

CLAUSE 4.6 VARIATION STATEMENT 5 RYNAN AVENUE EDMONSON PARK- FLOOR SPACE RATIO (CLAUSE 4.4)

Clause 4.4 of Liverpool Local Environmental Plan 2008 relates to maximum floor space ratio (FSR) requirement and refers to the *Floor Space Ratio Map*. The relevant map identifies the eastern portion of the subject site as having a maximum FSR of 1:1 as indicated at Figure 1.



Figure 1: Subject site on the LEP FSR Maps

As indicated in the submitted Statement of Environmental Effects, the proposal includes a 4 lot subdivision. Lot 4 will be subdivided to create a large parcel of land that will contain a riparian zone and open space. The remaining lots (Lots 1, 2 and 3) are located within the R1 – General Residential zoned portion of the site and constitute the “development site” for the purpose of calculating FSR pursuant to Clause 4.5 of the LEP. The configuration of Lots 1, 2 and 3 on the site is provided at Figure 2.

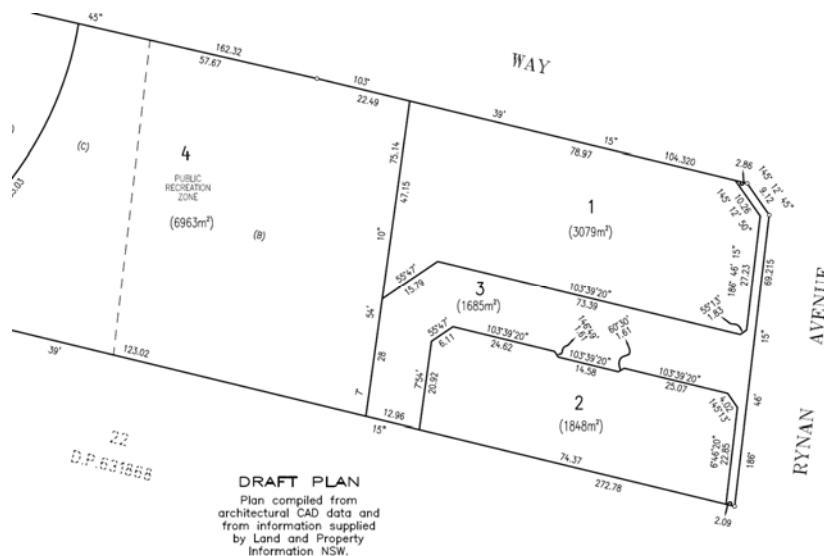


Figure 2: Configuration and areas of proposed Lots 1, 2 and 3

When calculated in accordance with the definition of gross floor area, the proposed development, comprising Buildings A, B and C will provide a total gross floor area of 6,316.02m². The total gross floor area relates to the development site (Lots 1, 2 and 3) with a resultant FSR of 0.96:1. Therefore, in the absence of subdivision, the proposed development provides the permitted gross floor area which is appropriately massed across the site.

However, the proposal includes the subdivision of the site into the 3 respective allotments to allow for the construction of the proposed residential flat buildings and the construction and dedication of the roadway that traverses the sites. The implications of the subdivision of the site is technical non-compliance in with the FSR control in relation to Lots 1 and 2. The post-subdivision FSR for each respective lot and the FSR for the whole development site is provided in Table 1 below.

TABLE 1: SITE AREA AND FSR FOR EACH RESPECTIVE LOT ON THE DEVELOPMENT SITE				
Lot	Lot 1	Lot 2	Lot 3	Total
Site Area	3,381m ²	2,077m ²	1,153m ²	6,611m ²
Buildings	Building A	Buildings B and C	Road	-
Gross Floor Area	3,757m ²	2,559.02m ²	0m ²	6,316.02m ²
FSR	1.11:1	1.23:1	0:1	0.96:1

In light of the above, the maximum permitted FSR has been provided across the site as a whole and the form of development and resultant yield across the development site is consistent with the intended density under the LEP. However, the proposal results in a technical non-compliance as each part of the site is to be subdivided to allow for the construction of the residential flat buildings and the construction and dedication of the proposed road.

Therefore, should the subject application not include subdivision, the proposal would be entirely consistent with the permitted FSR controls and there would be no such need for a justification pursuant to Clause 4.6 in relation to the FSR.

It is a reasonable expectation and widely accepted practice that density can be extracted out of land which is dedicated as part of either a development application process or voluntary planning agreement. In the case of the subject site, the density that is afforded to the site collectively is allocated to proposed buildings A, B and C and the technical non-compliance with the FSR control results from the necessary land subdivision.

Maximum FSR is a "development standard" to which exceptions can be granted pursuant to clause 4.6 of the LEP. The objectives and provisions of clause 4.6 are as follows:

- " **4.6 Exceptions to development standards**
- (1) *The objectives of this clause are as follows:*
- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:
 - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
 - (b) that there are sufficient environmental planning grounds to justify contravening the development standard.
 - (4) Development consent must not be granted for development that contravenes a development standard unless:
 - (a) the consent authority is satisfied that:
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
 - (b) the concurrence of the Secretary has been obtained.
 - (5) In deciding whether to grant concurrence, the Secretary must consider:
 - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
 - (b) the public benefit of maintaining the development standard, and
 - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.
 - (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:
 - (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.
- Note.** When this Plan was made it did not include all of these zones.
- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).
 - (8) This clause does not allow development consent to be granted for development that would contravene any of the following:
 - (a) a development standard for complying development,
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
 - (c) clause 5.4,
 - (ca) clause 6.4, 6.5, 6.6, 7.22, 7.23, 7.24, 7.25, 7.26, 7.26A, 7.27, 7.28, 7.29 or 7.30.

The development standard in clause 4.4 is not expressly excluded from the operation of clause 4.6.

Objective 1(a) of clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of subclauses 4.6(3) & (4) in order to demonstrate that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, it is noted that the extent of the discretion afforded by subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, for example, subclause 4.6(6).

Objective 1(b) of clause 4.6 is addressed later in this request.

The objectives of clause 4.4 are as follows:

- "
- (1) *The objectives of this clause are as follows:*
 - (a) *to establish standards for the maximum development density and intensity of land use, taking into account the availability of infrastructure and the generation of vehicle and pedestrian traffic,*
 - (b) *to control building density and bulk in relation to the site area in order to achieve the desired future character for different locations,*
 - (c) *to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,*
 - (d) *to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation,*
 - (e) *to provide an appropriate correlation between the size of a site and the extent of any development on that site,*
 - (f) *to facilitate design excellence in the Liverpool city centre by ensuring the extent of floor space in building envelopes leaves generous space for the articulation and modulation of design."*

As previously noted, the *Floor Space Ratio Map*, nominates a maximum FSR of 1:1 at the site and the proposal results in a technical non-compliance by virtue of subdividing the development site to create lots 1, 2 and 3. Specifically, the proposal seeks to provide an FSR of 1.15:1 in relation to the proposed Lot 2 and an FSR of 1.27:1 in relation to proposed Lot 3. It is hereby requested that an exception to this development standard be granted pursuant to clause 4.6 so as to permit the proposed FSR on each of the proposed lots.

In order to address the requirements of subclause 4.6(4)(a)(ii), each of the relevant objectives of clause 4.4 are addressed in turn below.

Objective (a):

Objective (a) seeks to establish standards for the maximum permitted density to manage impacts on the availability of infrastructure and the generation of vehicle and pedestrian traffic. The subject site is a large residentially zoned parcel of land that is identified as having a maximum FSR of 1:1. The site as a whole, has been designed to provide less than the maximum permitted gross floor area that has been afforded to the site. The density that was applied to the site was done so in light of the strategic context of the area and the ability of the local infrastructure, roads and services to accommodate that density. As the proposal relates to a technical non-compliance arising from subdivision of the site into smaller parcels of land, the level of density provided across the development site as a whole, is commensurate with the level of activity that was expected as part of drafting the FSR controls.

Objective (b):

Objective (b) seeks to achieve the desired future character for different locations through massing and the density of development. As previously discussed, the proposed FSR non-compliance is technical and would not arise if it was not for the subdivision of the land. Notably, the development could be configured to provide a road that consisted of a right of way across two separate lots, rather than the creation of a lot that was to be dedicated as a road. In this instance there would be no numerical non-compliance. That being said, there is no difference between the resultant density and form of development as proposed, to that which does not include subdivision. As such, the proposal represents a form of development across the site that is consistent with the level of density afforded to the site. The proposal is therefore consistent with Objective (b).

Objective (c):

Objective (c) seeks to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain. The development has been designed and sited to ensure that no significant or adverse environmental impacts result on the adjoining properties. This has been considered in detail in the submitted Statement of Environmental Effects which details with impact arising from overshadowing, view loss and aural and visual privacy. Despite the technical non-compliance proposed, in relation to Lots 1 and 2 there are no adverse environmental impacts on adjoining properties, future adjoining properties or the public domain.

Objective (d)

Objective (d) intends on maintaining an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation. As discussed, the proposal complies with the applicable FSR across the site which is located in an area that is undergoing significant change. The permitted density is comfortably accommodated across the site and despite the technical non-compliance, the proposal will result in a development that will sit comfortably within the desired future built form context.

Objective (e)

Objective (e) seeks to provide an appropriate correlation between the size of a site and the extent of any development on that site. This objective is satisfied by the imposition of the FSR control, of which the proposal complies with across the entirety of the site. Redevelopment of the subject site in the form proposed is therefore consistent with objective (e)

Objective (f)

Objective (f) applies to the Liverpool Centre and is therefore not relevant to the site.

The proposed development is therefore consistent with the relevant objectives for FSR, despite the technical numeric non-compliance that arises from the subdivision of the land into the three separate lots.

Clause 4.6 (4) also requires consideration of the relevant zone objectives. The objectives of the *R1 – General Residential* zone are as follows:

- "
- *To provide for the housing needs of the community.*
 - *To provide for a variety of housing types and densities.*
 - *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
 - *To ensure that housing densities are broadly concentrated in locations accessible to public transport, employment, services and facilities.*
 - *To facilitate development of social and community infrastructure to meet the needs of future residents."*

The proposal is consistent with the objectives as it provides housing that is compatible with the needs of the community and adds to the variety of housing types by proposing a suitable range of residential apartment types in an area that is currently dominated by detached dwellings. The density of housing is compatible with the future provision of public transport to the Edmondson Park Urban Release Area and the proposal will not hinder the development of social and community infrastructure.

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, as discussed above it is considered

that there is an absence of significant impacts of the proposed non-compliance on the amenity of future building occupants, on area character and on neighbouring properties.

On “planning grounds” and in order to satisfy that the proposal meets objective 1(b) of clause 4.6 in that allowing flexibility in the particular circumstances of this development will achieve “a better outcome for and from development”, it is considered that applying flexibility to the FSR controls in this instance will allow for the permitted density to be provided across the development site and the associated subdivision will assist with realising the intended development form in the area. Specifically, the subdivision proposed will allow for the construction of the proposed apartments and the dedication of a local road to Council that will ultimately assist with access and redeveloping the adjoining property to realise the intended development outcome at the site and the area.

Insistence on strict compliance with the FSR control would require the withdrawal of the subdivision aspect of the proposal and would result in a less desirable urban outcome.

Returning to Clause 4.6(3)(a), in *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

“ An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”

The judgement goes on to state that:

“ The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Having regard to all of the above, it is our opinion that compliance with the FSR development standard is unnecessary in the circumstances of this case as the development meets the relevant objectives of that standard and the zone objectives.

The non-compliance proposed is technical in nature and would result in the same development form at the site without the subdivision aspect of the proposal. The subdivision is reasonably necessary and appropriate as part of this application and as such the outcome achieved by this proposal is superior to that of a scheme that has been designed to comply on each lot, with resultant implications on the ability to provide the intended residential density.

Therefore, insistence upon strict compliance with the standard would be unreasonable. On this basis, the requirements of clause 4.6(3) are satisfied.