

Request to vary development standard Floor space ratio



1-17 Delhi Road

North Ryde

Submitted to Ryde City Council

On Behalf of Australand North Ryde Development P/L

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1.0 Introduction

This report is submitted to Ryde City Council in support of a development application for mixed use development at 1 – 17 Delhi Road, North Ryde.

This report requests and justifies a technical minor variation to the floor space ratio in Ryde Local Environmental Plan 2014 (LEP 2014), as permitted under clause 4.6 of that LEP. It has been prepared by JBA on behalf of Australand North Ryde Development P/L.

Clause 4.6 of LEP 2014 allows Council to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This request to vary the development standard should be read in conjunction with the Statement of Environmental Effects (SEE) dated October 2014. It relates to the 'Floor space ratio' (clause 4.4 of LEP 2014) development standard.

The site was initially rezoned by the (then) minister for Planning in September 2013 as part of the Urban Activation Precinct program. A maximum FSR of 2.3:1 was gazetted as part of that rezoning. The Statement of Environmental effects and accompanying design were prepared in accordance with this FSR.

Subsequent to the rezoning, Ryde LEP 2014 (being a conversion LEP) was gazetted. It has now come to our attention that an error appears to have occurred in the conversion process as the mapped FSR for the site is now shown as 2.2:1. Accordingly we have prepared this Clause 4.6 variation request.

2.0 Request to vary a development standard

Clause 4.6 of LEP 2014 allows Council to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 states:

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.*

.....

2.1 Development standard to be varied

Clause 4.4 of LEP 2014 stipulates that the maximum FSR for a building is not to exceed the FSR shown on the Floor Space Ratio Map, which shows a maximum FSR of 2.2:1 for the site.

The site has an area of 13,010m², providing for an allowable GFA of 28,622m². This application proposes a Gross Floor Area (GFA) of 29,739m², with a resultant FSR of 2.285:1. This represents a minor FSR variation of 0.058:1 (3.9%), or a minor GFA variation of 507m².

3.0 Justification for contravention of the development standard

3.1 Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston stated that there are five different ways in which a variation to a development standard might be shown as unreasonable or unnecessary in the circumstances of the case. These five ways are:

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 or 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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

In this instance the objectives of the standard are achieved notwithstanding the minor non-compliance with the standard ('WAY 1').

3.1.1 The objectives of the FSR standard

The objectives as set out by clause 4.4(1) of the LEP 2014 are as follows (our emphasis):

- a) *to provide effective control over the bulk of future development,*
- b) *to allow appropriate levels of development for specific areas,*
- c) *in relation to land identified as a Centre on the Centres Map—to consolidate development and encourage sustainable development patterns around key public transport infrastructure.*

The following sections demonstrate that the proposed variation to the floor space ratio development standard will still result in a development that achieves the relevant objectives of the clause.

a) to provide effective control over the bulk of future development,

The proposed development was designed to be 'compliant' with Council's FSR control, acknowledging that the FSR control provided an effective control over bulk across the subject site. In this regard, the proposal has an FSR below 2.3:1 – which was the FSR control applying to the site during the design phase and prior to the gazettal of Ryde LEP 2014.

b) to allow appropriate levels of development for specific areas,

The development testing and threshold across the subject site was determined by the State Government in 2013 as appropriate to accommodate mixed use development in the order of 29,923m² (equating to an FSR of 2.3:1).

Nothing has changed in the circumstances of the subject site since 2013, when the site was rezoned for mixed use and high density development at an FSR of 2.3:1, to today. What was considered appropriate in 2013 for the site in terms of the level of development, should remain appropriate in 2015. The FSR now applying to the site under Ryde LEP 2014 (being 2.2:1) does not support/allow an appropriate level of development.

3.2 There are sufficient environmental planning grounds to justify contravening the development standard

The Ryde LEP 2014 currently identifies the subject site as having an FSR of 2.2:1 (refer to **Figure 1**).

It has become evident that this FSR allocated to the site is in fact an error/ misdescription. The error/ misdescription has come about from the translation of the Ryde LEP 2010 across to the comprehensive Ryde LEP 2014.

Under Ryde LEP 2010 the subject site had an FSR of 2.3:1 (refer to **Figure 2**). This FSR was established following gazettal of the North Ryde Urban Activation Precinct rezoning by the Minister in September 2013.

As a State Government initiated rezoning process, it is clear that there would be no reason or rationale for the FSR applying to the site to have been reduced within Ryde LEP 2014.

We understand that in liaising with the Department of Planning and Environment and Council that the subject site is not alone in terms of being affected by translation errors.

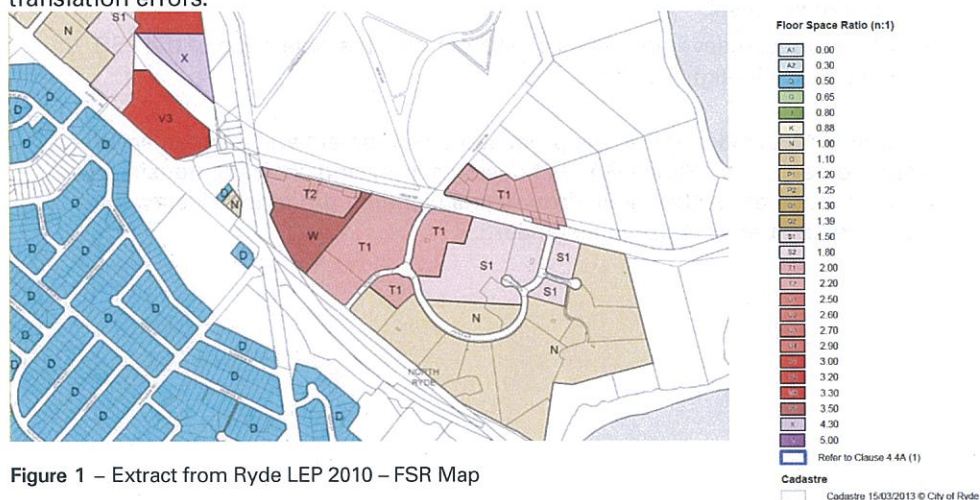


Figure 1 – Extract from Ryde LEP 2010 – FSR Map

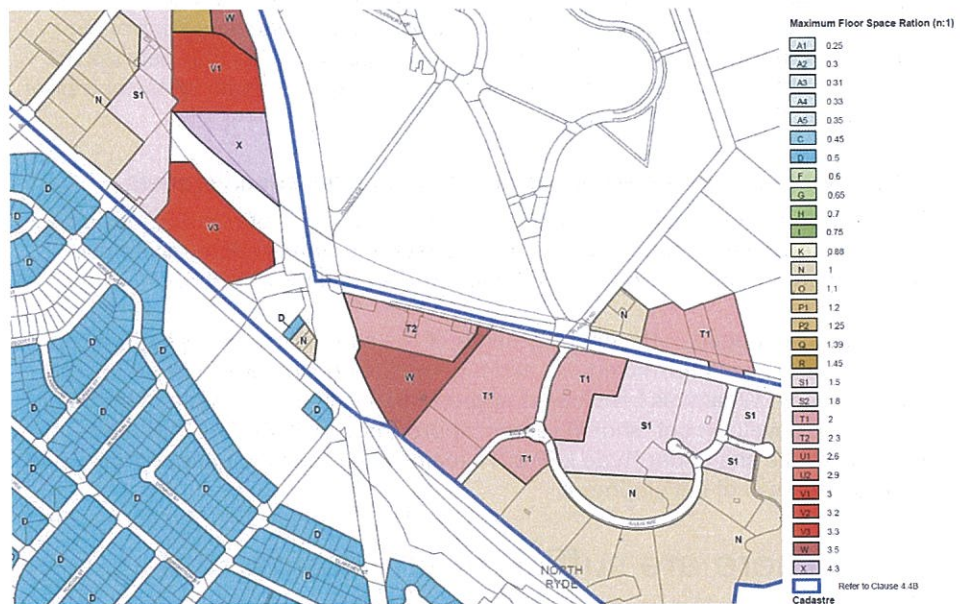


Figure 2 – Extract from Ryde LEP 2014 – FSR Map

In summary, there are sufficient environmental planning grounds to justify contravening the development standard as the proposal is fully compliant with the 'correct' FSR control that would have applied to the site should the documentation/data error not have occurred.

Furthermore, it is noted that:

- The development will provide a number of significant benefits to the local and future community in terms of more housing and greater accommodation choice.
- The development will not result in any significant adverse impacts in terms of visual impact, overshadowing, acoustic or visual privacy or any other built form-related impacts.
- The proposed minor FSR variation will not result in a building form that is out of character with the existing/future surrounding area and does not result in any non-compliance with other development standards.
- Full compliance with the development standard will neither be noticeable nor deliver any material public benefit or improved amenity outcome over the current proposal.
- The proposed development is consistent with the objectives of the FSR control as highlighted above.

Overall, it is considered that the proposed development will result in an overall improvement to the Ryde LGA, its housing supply and choice of housing type and that there are sufficient environmental planning grounds to justify contravening the development standard.

4.0 The public interest

Clause 4.6 (4)(a) (ii) requires that consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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*” .

The development is consistent with the objectives of the particular standard for the reasons set out in **Section 3.1** above, and therefore satisfies this component of the public benefit test in clause 4.6(4)(a)(i).

Regarding the zone objectives, the subject site is split across two zones, being the B4 Mixed Use zone in SLEP 2012 and the R3 Medium Density Residential zone.

The B4 zone objectives are:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling*

The proposed development will meet the relevant objectives across both zones satisfactorily. Specifically, the following is noted:

- The proposal provides a mixture of compatible land uses that are appropriate to the site’s highly accessible location above a train station;
- The proposal will facilitate the future integration of sustainable business, residential and retail uses in a highly accessible location with excellent access to public transport, walking and cycling facilities and services; and
- result in the orderly and efficient development of land through the redevelopment of a vacant and underutilised site.

4.1 Director-General’s concurrence

It is understood that the Director-General’s concurrence under clause 4.6(5) of SLEP 2012 has been delegated to Council. The following section provides a response to those matters sets out in clause 4.6(5) which must be considered by Council under its delegated authority:

4.1.1 Whether contravention of the development standard raises any matter of significance for State or regional environmental planning.

The proposed departure from the development standard does not give rise to any matter of State or regional significance, other than contributing towards the goals and directions established under the Plan for Growing Sydney, such as:

- accelerating housing supply;
- creating great places to live; and
- improving housing choice to suit different needs and lifestyles.

Beyond this positive contribution, the proposed minor variation will not have any effects outside the site’s immediate area. The proposed development will not result in any negative consequences for State or regional environmental planning.

4.1.2 The public benefit of maintaining the development standard.

Given that the proposed development is consistent with the objectives of the development standard, the B4 zone, the relevant provisions of the Metropolitan strategies for the Sydney Region and would not result in any unacceptable environmental impacts, there would be no public benefit of maintaining the FSR development standard in this instance.

The orderly and economic use of the site would be realised with approval of this development, whereas compliance with the FSR development standard would unduly impact the economic viability of the project by reducing the number of dwellings on the land, even though this additional density is demonstrably acceptable in this context (and otherwise 'compliant' with the correct FSR development standard that should apply should the LEP drafting error not have occurred).

It is therefore important to assess the merits of the proposal and form a balanced view on whether the application should be approved or not. The considerable merits of this development far outweigh the singular technical minor non-compliance with the FSR control (which as established is a control that has been adopted in error), particularly as there are no significant adverse environmental impacts arising.

4.1.3 Any other matters required to be taken into consideration by the Director-General before granting concurrence.

A mistake has clearly occurred in bringing across the Ryde LEP 2010 planning controls into the Ryde LEP 2014 planning controls. The subject site was offered for sale by the State and purchased by Australand (now Frasers Property Australia) with an FSR of 2.3:1. The vehicle and mechanism for dealing with this error is available through Clause 4.6, and there are not considered to be any reasonable grounds for the consent authority to not utilise its powers under Clause 4.6 and support the proposed minor variation to the FSR standard.

5.0 Conclusion

This variation request supports a proposal for the redevelopment of land at 1 – 17 Delhi Road, North Ryde into mixed use development.

Clearly, there has not been an intentional back zoning of the subject site by either Council or the Department of Planning and Environment. Such a move would contradict common sense and strategic planning policy.

Clause 4.6 recognises that in some instances it may be unreasonable or unnecessary to comply with a development standard. It is fundamentally evident that in these circumstances it is unreasonable to comply with a development standard that has been adopted in error.

It is therefore requested that Council recommend approval for the proposed development even though it technically contravenes the FSR development standard imposed by Ryde LEP 2014. Importantly, the development (inclusive of that additional floor space over and above the incorrect FSR) does not result in any adverse impacts on the surrounding area.

