



Clause 4.6 – Exceptions to Development Standards – FSR

Address: 801 - 807 New Canterbury Road, Dulwich Hill – Proposed Mixed Use Development

Proposal: The proposal seeks development consent for the demolition of all existing structures and a construction of a mixed use development containing 67 dwellings and 600m² of retail space and is four (4) storeys in height with basement car parking.

1. Introduction

This is a written request to seek an exception to a development standard under clause 4.6 – Exceptions to Development Standards of the Marrickville Local Environmental Plan 2011 (MLEP 2011). The development standard for which the variation is sought is Clause 4.4 Floor Space Ratio under the MLEP 2011.

This application has been prepared in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline *Varying development standards: A Guide*, August 2011, and has incorporated as relevant principles identified in the following judgements:

1. *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*
2. *Wehbe v Pittwater Council [2007] NSWLEC 827*
3. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*

2. Description of the planning instrument, development standard and proposed variation

2.1 What is the name of the environmental planning instrument that applies to the land?

The Marrickville Local Environmental Plan 2011 (MLEP2011).

2.2 What is the zoning of the land?

The zoning of the land is B2 Local Centre zone.

2.3 What are the Objectives of the zone?

The objectives of the B2 Local Centre zone are:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To provide housing attached to permissible non-residential uses which is of a type and scale commensurate with the accessibility and function of the centre or area.*
- *To provide for spaces, at street level, which are of a size and configuration suitable for land uses which generate active street-fronts.*
- *To constrain parking and reduce car use*

2.4 What is the development standard being varied?

The development standard being varied is the floor space ratio development standard.

2.5 Is the development standard a performance based control?

No. The building floor space ratio development standard is a numerical control.

2.6 Under what Clause is the development standard listed in the environmental planning instrument?

The development standard is listed under clause 4.4 of the MLEP2011.

2.7 What are the objectives of the development standard?

The objectives of clause 4.4 are as follows:

- (a) to establish the maximum floor space ratio,
- (b) to control building density and bulk in relation to the site area in order to achieve the desired future character for different areas,
- (c) to minimise adverse environmental impacts on adjoining properties and the public domain.

2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.4 establishes a maximum floor space ratio (FSR) of 1.75:1 for the site as illustrated on the extract of the Floor Space Ratio Map included in Figure 1.

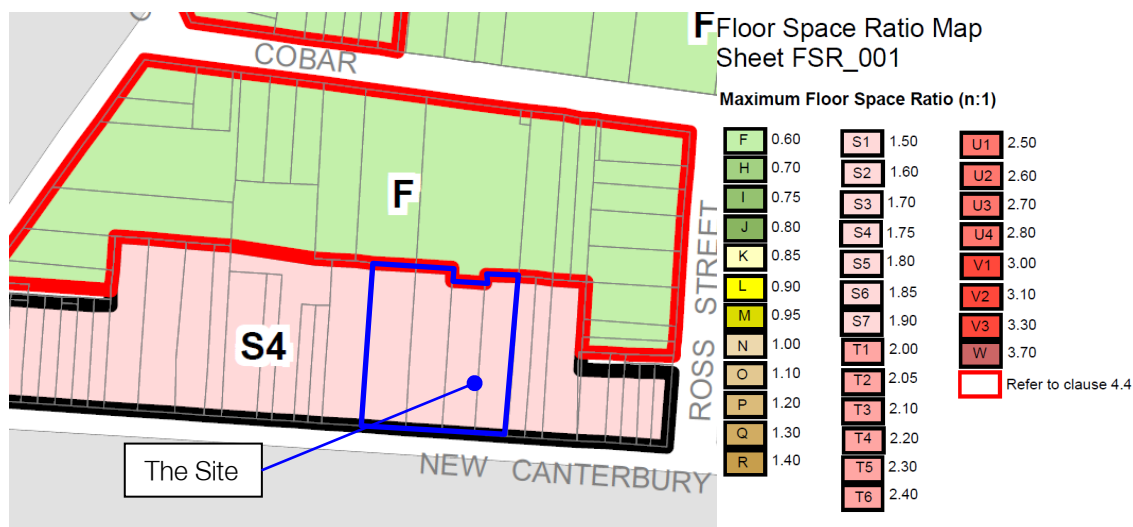


Figure 1: Extract from FSR Map – MLEP 2011

2.9 What is the proposed numeric value of the development standard in the development application?

The proposal has a gross floor area of 6,240m² on a site area of 3,070m². This equates to an FSR of 2.03:1.

2.10 What is the percentage variation (between the proposal and the environmental planning instrument)?

The proposal exceeds the maximum residential FSR by 0.28 which represents a variation of approximately 16% and an increase from the permitted gross floor area of 5,372.5m² by 867.5m². It is noted that 319m² (or 6%) of the GFA is within Basement Level 1.

3. Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan.

Objectives to clause 4.6 at 4.6(1) 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.*

Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the 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.*

In addition, 4.6(4)(a)(i) and (ii) requires that development consent must not be granted to a development that contravenes a development standard unless the:

- (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*

Where concurrence is required to be granted or assumed the following matters also need to be considered:

- (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 Director-General before granting concurrence.*

3.2 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A mixed use development resulting in a retail and residential development is an appropriate use for the site and reflects a land use mix envisaged by the zoning.

The proposal complies with the maximum height development standard contained in MLEP 2011 and the each building is consistent with the setback provisions envisaged in the MDCP 2011.

There is a disconnect between the building height and the FSR controls as they relate to mixed use development in the B2 Local Centre zone, such that the 14m building height control envisages 4 storey development while the FSR control effectively restricts development to less than 4 storeys.

The amended proposal is consistent with a four storey form of development envisaged for the locality and strict compliance is unreasonable and unnecessary in the circumstances of this case because:

- The immediate context of the site supports a range of built form typologies which support FSR greater than the FSR controls.
- A development that is compliant with the FSR would result in a three storey (or part 3 storey) scale development (i.e. a storey lower than the permitted height). There are mixed use buildings to the east and south which are four storeys (or more) in scale and there is residential development to the north which is four storeys in scale.
- Compliance with the FSR control would result in a smaller building on the site that does not reflect the urban context of the site. A development that complies with the FSR control would result in a poorer urban design outcome.
- The resulting scale relationship of a complying development reflecting a complying FSR would not be in keeping with the emerging or desired future character of the area.
- The scale relationship resulting from the allocation of FSR (and compliant height) as proposed is a better scale and land use relationship resulting in a development that is consistent with the character of the area.
- The proposal exceeds the allowable GFA by 867.5m² of which 319m² is within Basement Level 1 and consequently will not result in any bulk and scale impacts or visual impacts to the proposed development.

3.2.2 Would the underlying objective or purpose would be defeated or thwarted if compliance was required.

The objective of providing an appropriate correlation between FSR and height is thwarted if the FSR of 1.75:1 is maintained in that this would result in a predominantly 3 storey mixed use development over part or all of the site and would comprise the resultant built form outcome.

This is in an area where the provisions of the LEP and DCP envisage four storey development.

3.2.3 Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

There are examples of approved development that exceed the FSR development standard, however it development standard cannot be said to be abandoned.

3.2.4 Is the zoning of the land unreasonable or inappropriate?

The zoning is appropriate for the site.

3.3 Are there sufficient environmental planning grounds to justify contravening the development standard?

Yes. In the circumstances of the case, there are sufficient planning grounds to justify contravening the development standard being:

- The FSR of the proposed development is considered appropriate within the strategic planning context of the B2 Local Centre zone and is consistent with the zone objectives and the objectives of the FSR standard.
- There is a disconnect between the FSR development standard and the other fundamental built form controls applicable to the site. Specifically, the 14m building height development standard and the building separation and setback controls envisage a built form of four storeys at the site. An otherwise compliant four storey mixed use development at the site would invariably exceed the FSR standard.
- The additional floor space, (above the FSR control) is arranged on the site in a manner that is unlikely to result in significant adverse impacts upon adjacent properties or the public realm by way of overshadowing, visual massing or visual privacy.
- A significant portion of the additional floor space (i.e. 319m²) is in the form of twenty one (21) car spaces which are located within the basement levels and which will have no impacts upon the public domain or surrounding private properties in terms of bulk and scale, overshadowing or privacy;
- The proposed four storey development is consistent with the existing, the emerging and the desired future character of the locality as expressed through existing four (or more) storey buildings in the vicinity of the site, recent development approvals and the applicable building height control for the site within the LEP.
- It is understood that the west Dulwich Hill area did not undergo a detailed urban design, economic and strategic analysis when the provisions of the new LEP were formulated. Instead a transferring of the previous controls, with some relatively minor amendments, was undertaken in formulating the MLEP 2011 with respect to the west Dulwich Hill area.

Council strategic planners, within a report to Council regarding the then Draft LEP, have acknowledged at that time there is merit in increasing the density for the locality and have stated in a Council report that an uplift in FSR and height is *“supported in general terms, particularly as lots along this section of New Canterbury Road are deep and are located on the northern side of the road, so increased heights can be managed so as not to adversely affect neighbouring or nearby properties through overlooking or overshadowing.”*

Since the adoption of MLEP 2011, public transport access for the locality has improved through the construction and operation of the light rail network which is within walking distance of the site.

Approvals have been granted for taller buildings to be constructed on the southern side of New Canterbury Road and several mixed use developments have been approved for the northern side of New Canterbury Road.

The strategic planning justification for higher density in the B2 zone has therefore increased since Council recognised the merits of such increases in 2010.

It is considered that on a strategic planning level, the proposed development represents a well-considered urban design response. The development will result in a density, building height and general built form (i.e. buildings located with long axis running in an east west manner – with maximum exposure to the north) that is a more appropriate urban design response to the prevailing and emerging urban context.

The development will result in the more orderly and appropriate use of the B2 zoned properties along the western end of New Canterbury Road in Dulwich Hill than would be the case with absolute compliance with the current FSR control.

- The visual catchment of New Canterbury Road contains a number of new buildings which have been approved that will present a similar or greater bulk and scale and which will set the character to a large degree. Importantly, built form controls allowing considerably greater scale and density of development have been established for the B2 zoned properties opposite the site, on the southern side of New Canterbury Road.
- The proposal will provide a transition in scale between taller buildings (and future taller buildings) on the southern side of New Canterbury Road and the four (4) storey RFBs to the north of the site.
- Consequently, the non-compliance with the standard does not result in a scale of building that is out of character with the surrounding development and the emerging character.
- The proposal will achieve a positive urban design outcome and will improve the streetscape through contemporary architecture styling, appropriate articulation and use of interesting and varying materials and finishes.
- Within this context the site is capable of accommodating the FSR proposed and the development is of an intensity and scale commensurate with the evolving character and the prevailing urban conditions and capacity of the locality.
- Council would not be setting a precedent by varying the FSR control as proposed. It is understood that Council has varied the FSR controls to similar degrees on similar developments and it is noted that the immediately adjacent mixed use development at 799 New Canterbury Road is significantly larger in terms of the approved FSR (and top storey height) than the proposed development.
- The non-compliance with the standard does not contribute to adverse environmental impacts in terms of overshadowing, visual impacts or view loss.
- The development will result in significant public benefit through:
 - the positive urban design outcomes and revitalisation of a significant site at the western end of New Canterbury Road,
 - the increase in accessible, flexible and well-appointed retail floor space;
 - the provision of 67 residential units which achieve a high amenity, considerably above the minimum standards called for in the RFDC and Marrickville DCP;

- the provision of a mixed use building of high architectural merit which achieves design excellence and will deliver a level of aesthetic interest to the western end of New Canterbury Road which is currently lacking; and
 - the inclusion of a VPA which will provide Council with the opportunity to deliver significant public infrastructure, in addition to the amount that would otherwise be provided for a development of this scale through the implementation of Council's S94 Contributions plan.
- The development is a large and important site which can deliver excellent northern orientation and amenity, with 90% of apartments orientated in whole or part away from New Canterbury Road towards extensive landscaped gardens to create a vibrant and well designed in fill development proximate to rail, commercial businesses, schools and recreational facilities.
 - The development is a large and prominent site at the western end of Dulwich Hill that is well serviced by rail transport (three (3) rail stations within walking distance), schools, parks, with significant north frontage and depth that will allow the creation of an urban infill development of high architectural merit that will assist the rejuvenation of the western precinct of New Canterbury Road, Dulwich Hill;
 - Removing the non-compliance would not significantly alter the perceived scale and density of the proposed development when viewed from the public domain or surrounding development;
 - The development as proposed is consistent with the provisions of orderly and economic development.

The recognition of the policy framework adopted for the site as a B2 Local Centre zone with 14m height limit is achieved through a variation in the FSR.

A better planning outcome is achieved through a building that properly responds to the surrounding built form and land use context. A mixed use building complying with the FSR control would leave a significant portion of the site undeveloped or principally three storeys in height. While the character of the area supports a variety of building density, the predominant recent forms are over the FSR of 1.75:1.

3.4 Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?

3.4.1 Objectives of the FSR standard

An assessment of the development against the objectives of the FSR standard are as follows.

(a) to establish the maximum floor space ratio,

The control will continue to prescribe maximum floor space ratio and the proposal will not alter that. Council is able to continue to consider applications and variations based on merit and in accordance with the provisions of Clause 4.6.

(b) to control building density and bulk in relation to the site area in order to achieve the desired future character for different areas,

The intensity and bulk and scale of the development are consistent with the scale of recently approved developments within the vicinity of the site, which have been completed or are under construction. This includes developments along New Canterbury Road.

Address	Distance from Proposal	Approved / Built Height	Height Control	LGA	Approved / Built FSR
799 New Canterbury Road	Immediately adjacent proposal to east	To roof parapet 13 metres and to lift overrun / level 5 roof top terraces 16 m	14m	Marrickville	2.2:1
610 – 618 New Canterbury Road	350 m east of site	Part 5 and 6 levels	18m to roof and 19.5m to loft overrun / roof top structures	Canterbury	No FSR control under Canterbury LEP but inferred at 2.8:1 to 3:1

Table 1: Comparison with recent development

Additionally, the entire southern part on New Canterbury Road, opposite the site has a maximum building height control of 18m and is not subject to a FSR control, but an inferred FSR for the permitted height and permitted building envelope are in the range of 2.7:1 to 2.9:1 for a six (6) storey building.

This has been generally confirmed by the recent approvals and completed projects as described in Table 1. Recent approvals provide for development of a greater scale and density than that which is proposed. Recent approvals have been granted based on these parameters and those developments are underway. In addition the adjoining recently completed project at 799 New Canterbury Road achieves an FSR of 2.2:1

Notwithstanding that the southern portion of New Canterbury Road is within the City of Canterbury LGA, the development activity and built form and land use outcomes along that section of the road will have a significant and demonstrable influence on shaping the urban character of the locality overall. The urban context for development on the northern side of New Canterbury Road cannot be viewed or considered in isolation from the built form that exists, and which is emerging, on the southern side of the road.

In this respect, the proposed FSR is significantly less than the approved FSR of 2.2:1 at the adjoining site at 799 New Canterbury Road and less than the approved FSR for the developments opposite the site.

The proposal will act as an appropriate transition in scale and density between the B2 zoned land to the south of the site and the R1 zoned land to the north of the site.

The proposed density, although numerically greater than the development standard, is nonetheless consistent with Council's strategic vision and desired future character for the West Dulwich Hill locality in that it will assist in delivering a vibrant and rejuvenated mixed use precinct with new retail and commercial opportunities and increased residential dwellings with good amenity and access to public transport.

(c) to minimise adverse environmental impacts on adjoining properties and the public domain.

The building is of a design such that the floor space which represents the variation in FSR control is positioned within the site in a manner that is unlikely to significantly adversely compromise the amenity of surrounding properties.

The amended DA includes side setbacks which respond to the mixed use development to the east of the site. The proposed setting back of higher elements will minimise overshadowing impacts and privacy impacts.

Through the provision of a well-designed and visually interesting new building the streetscape and therefore public domain will be improved.

Additionally, the development includes a VPA which will provide Council with the opportunity to enhance aspects of the public domain in the locality that would otherwise not be possible in the absence of the proposed VPA.

3.4.2 Objectives of the zone

The objectives of the B2 Local Centre zone are addressed as follows:

- (a) *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*

The proposal will incorporate three (3) new retail tenancies (600m² in total floor space) at ground level which will activate the street frontage at the site and which will provide opportunities for new business to establish themselves and to better service the needs of the local and wider community.

The retail floor space has been designed so that it is flexible in its layout, will address the street and also a landscaped open space within the centre of the site. The retail space can be tailored to suit a wide variety of retail and commercial businesses.

- (b) *To encourage appropriate employment opportunities in accessible locations.*

The proposal will provide additional retail, office, business and community employment opportunities at a location that is highly accessible by walking, cycling and public transport.

It is considered that the development will display design excellence and through its construction and operation is likely to assist in rejuvenating and drawing new commercial activity to the western end of the New Canterbury Road commercial locality.

The proposed non-compliance with the FSR control in no way discourages the delivery of new retail floor space within the zone, rather it is likely to encourage additional interest in employment opportunities in the locality.

The site is accessible and the proposal seeks to establish commercial floor space within a contemporary building that will increase employment opportunities. Non-compliance with the FSR control in this instance is not inconsistent with objective (b).

- (c) *To maximise public transport patronage and encourage walking and cycling.*

The site is highly accessible by public transport and benefits from a high level of pedestrian and cyclist traffic. This has been enhanced with the provision of the light rail within walking distance of the site, in addition to the heavy rail line.

The site is within 690m of the Hurlstone Park railway station (i.e. within walking distance) and is also within walking distance (approximately 800m or less) of the recently completed Dulwich Grove and Arlington light rail stations. It is noted that at the time that the MLEP 2011 controls were contemplated and came into operation, the light rail extension had not been confirmed or commenced.

The site is also located close to established bus routes.

The FSR and intensity of development as proposed within a business centre that has good accessibility to public transport is likely to encourage greater patronage of the public transport.

The provision of a mixed use development of the scale and intensity of the proposed development is consistent with State and local government strategic aims of locating medium density residential development and commercial development in proximity to public transport infrastructure.

- (d) *To provide housing attached to permissible non-residential uses which is of a type and scale commensurate with the accessibility and function of the centre or area.*

The proposal seeks to provide housing attached to retail uses. The scale and intensity of the mixed use development is commensurate with the overarching strategic aims of the locality, its geographical position and its recognised position as a local business centre within the business and employment generating centre hierarchy of the Marrickville LGA.

- (e) *To provide for spaces, at street level, which are of a size and configuration suitable for land uses which generate active street-fronts.*

The proposal includes retail floor space, divided into three (3) tenancies each of which addresses the street frontage. The spaces are of appropriate size and will be provided with appropriate services that are suitable for them to operate as new vibrant retail businesses, which will enable the activation of the street in this location.

The retail floor space has been designed so that it is flexible in its layout, includes front and rear glazing lines so that it will address both the street and also a landscaped open space within the centre of the site. The retail space has been designed so that it can be tailored to suit a wide variety of retail and commercial businesses.

- (f) *To constrain parking and reduce car use*

The proposal seeks to provide off-street car parking which satisfies Council's requirement to service the development. The proposal also includes twenty one (21) car spaces above the Council requirement and although the area of these spaces is counted as GFA they do not add to the height or the bulk and scale of the development.

The site is within walking distance to several forms of public transport including heavy rail, light rail and bus routes.

The development and range of uses proposed provide opportunity to provide an enhanced activity at this corner.

3.5 Whether contravention of the development stand raises any matter of significance for the State or regional Environmental Planning?

The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the broad brush nature of a control applied across an area that supports a variety of built forms, that are reflective of different zones, are a function of their use.

3.6 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?

The objects set down in Section 5(a)(i) and (ii) are as follows:

"to encourage

- (i) *The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the*

purpose of promoting the social and economic welfare of the community and a better environment.

(iii) *The promotion and coordination of the orderly and economic use and development of land...*

Compliance with the standard would not hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act, which are to encourage development that promotes the social and economic welfare of the community and a better environment, and to promote and coordinate orderly and economic use and development of land.

Notwithstanding the development as proposed is consistent with the provisions of orderly and economic development.

A strictly complying development would result in a poorer urban design response to the overall site and the area generally.

3.7 Is there public benefit in maintaining the development standard?

Generally speaking, there is public benefit in maintaining standards. However, there is public interest in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the FSR standard would result in a development that would not be compatible with the existing, emerging and desired future urban form and character of the area.

3.8 Is the objection well founded?

For the reasons outlined in previous sections, it is considered that the objection is well founded in this instance and granting an exception to the development can be supported in the circumstances of the case.

The particular circumstance will mean that the proposed development will be consistent with the built form outcomes envisaged in the zoning and policy framework.

A development that strictly complied would result in a lesser development form that would not be compatible with the context and scale of surrounding development.

The development does not contravene the objects specified with 5(a)(i) and (ii) of the Act.

4. Conclusion

The proposed variation is based on the reasons contained within this formal request for an exception to the standard.

The development will not result in unacceptable impacts with regard to the amenity of adjoining properties.

A development strictly complying with the numerical standard would not significantly improve the amenity of surrounding land uses. In the context of the locality it would be unreasonable for strict compliance to be enforced.

The non-compliance is not considered to result in any precedents for future development within the LGA given the site considerations and surrounding pattern of development, and the combination of zoning and differentiated controls applying to the whole of the site.

It is concluded that the objection is well founded as compliance with the standard is both unnecessary and unreasonable.