



Clause 4.6 – Exceptions to Development Standards – Maximum Floor Space Ratio (cl 4.4(2))

Address: 17-37 Wollongong Road, Arncliffe

Proposal: The proposal seeks development consent for the demolition of all existing structures and erection of a residential flat building containing 166 dwellings with basement car parking.

1.0 Introduction

This is a without prejudice Clause 4.6 submission prepared on behalf of the applicant in relation to Development Application DA2016/58 at 17-37 Wollongong Road Arncliffe (Development Proposal). We say that it is a without prejudice submission on the basis that it is the applicant's position that the Development Proposal does not require a submission on the basis set out below. The aim of this Clause 4.6 submission is to seek a variation to the maximum permissible GFA allowable under Clause 4.4 of the Rockdale Local Environmental Plan 2011 (RLEP 2011).

By way of background a Council meeting was held on 18 September 2015 relating to the above mentioned Development Proposal. A briefing note from Council Officers Contained in the Design Review Panel (DRP) minutes advised that on the basis of an initial assessment the Development Proposal did not comply with the maximum FSR standard under Clause 4.4 of the RLEP 2011. In particular, concern was raised regarding the suggestion that circulation corridors were not being included in GFA calculations.

In response, amended plans detailing the proposed GFA have been prepared by the applicant to indicate that open corridors and terrace style circulation spaces have not been included as GFA.

This assessment of GFA is consistent with the RLEP 2011 and the FSR definition as provided in Clause 4.4 and objectives as provided in Clause 4.5. The definition of GFA is a standard template definition and its interpretation has been confirmed in the decision of *Haralambis Management Pty Ltd v Council of the City of Sydney [2013] NSWLEC 2009*. We draw your attention to paragraphs 46-51 of the Judgement (copy attached) which confirms that as the circulation areas are not surrounded by an enclosure greater than 1400mm high, they are not by definition GFA and therefore do not contribute to the FSR calculation.

A legal opinion from Gadens Lawyers relating to the proposal confirms our assessment and is attached.

Following the receipt of legal advice from Gadens, the interpretation of the standard template definition of GFA was further clarified in the decision of *GGD Danks Street Pty Ltd and CR Danks Street Pty Ltd v Council of the City of Sydney [2015] NSWLEC*. We draw your attention to paragraph 31 of the Judgement (copy attached) which states

"The internal face of an external wall in the definition of GFA must refer to the interior surface of the wall that forms the façade or exterior of a dwelling, being the wall that weatherproofs the interior space, and cannot refer to the exterior surface of the outer wall. Therefore, the sum of the floor area of each floor of a building measured from the internal face of external walls requires the floor area that is included in the GFA calculation to be internal floor space."

In light of the above and given the open circulation areas will be exposed and the corridors open to the elements, they are not deemed to be included in calculations of internal floor space as they do not fit into the definition of gross floor area.

As such, it is the applicant's position that the Development Proposal complies with the maximum FSR of 1.99:1 (Noting maximum FSR control is 2:1). Nevertheless, for abundant certainty this "Without Prejudice" Clause 4.6 submission has been prepared for Council's consideration.

1.1 Clause 4.6 variation request

This is a written request on behalf of the applicant to seek an exception to a development standard under clause 4.6 – Exceptions to Development Standards of the Rockdale Local Environmental Plan 2011 (RLEP 2011).

The development standard for which the variation is sought is Clause 4.4 Floor Space Ratio under the RLEP 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 the latest authority on clause 4.6, contained 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 1009 ('Four2Five No 1')
4. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 ('Four2Five No 2')
5. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 248 ('Four2Five No 3')

The principles that stem from the relevant authorities may be summarised as follows:

- (a) *The relevant objectives are those stated in the controls not unidentified underlying objectives at [57] in Four2Five No.1;*
- (b) *That the sufficient environmental planning grounds have to be particular to the circumstances of the proposed development to the site at [60] in Four2Five No. 1; and*
- (c) *The five methods of establishing that compliance is unreasonable or unnecessary identified by Preston J in Wehbe remain relevant however you need something more than 1 in Wehbe to satisfy the unreasonable and unnecessary test in clause 4.6(3)(a) as that test is now encompassed in clause 4.6(4)(a)(ii) where consistency with the objectives of the standard is a mandatory precondition.*

Method 1 in *Wehbe* requires a demonstration that the objectives of the relevant development standard are achieved notwithstanding non-compliance with the numerical standard. As a result of *Four2Five*, it is now necessary to demonstrate something more than achieving the objective of the standard. For example a development that contravenes the development standard but as a result achieves the object of the development standard to a greater degree than a development that complied with the standard, would suffice.

2.0 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 Rockdale Local Environmental Plan 2011 (RLEP 2011).

2.2 What is the zoning of the land?

The land is zoned R4 High Density Residential.

2.3 What are the Objectives of the zone?

The objectives of the zone are:

Zone R4 High Density Residential

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

2.4 What is the development standard being varied?

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

2.5 Is the development standard a performance based control? Give details.

No. The maximum 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 RLEP 2011.

2.7 What are the objectives of the development standard?

The objectives of the development standard are contained in subclause 4.4(1)(a) to (c), and are reproduced below:

- (a) To establish the maximum development density and intensity of land use, accounting for the availability of infrastructure and generation of vehicular and pedestrian traffic, in order to achieve the desired future character of Rockdale,
- (b) To minimise adverse environmental effects on the use or enjoyment of adjoining properties,
- (c) To maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation.

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 of 2:1 for the site as illustrated in the extract of the Floor Space Ratio Map included in Figure 1.



Rockdale Local Environmental Plan 2011

Floor Space Ratio Map
- Sheet FSR_003

Maximum Floor Space Ratio (n:1)

D	0.5
F	0.6
N	1
S1	1.5
S2	1.8
T1	2
T2	2.2
U1	2.5
U2	2.85
V1	3
V2	3.1
V3	3.4
W	3.5
X	4
	Refer to Clause 4.4

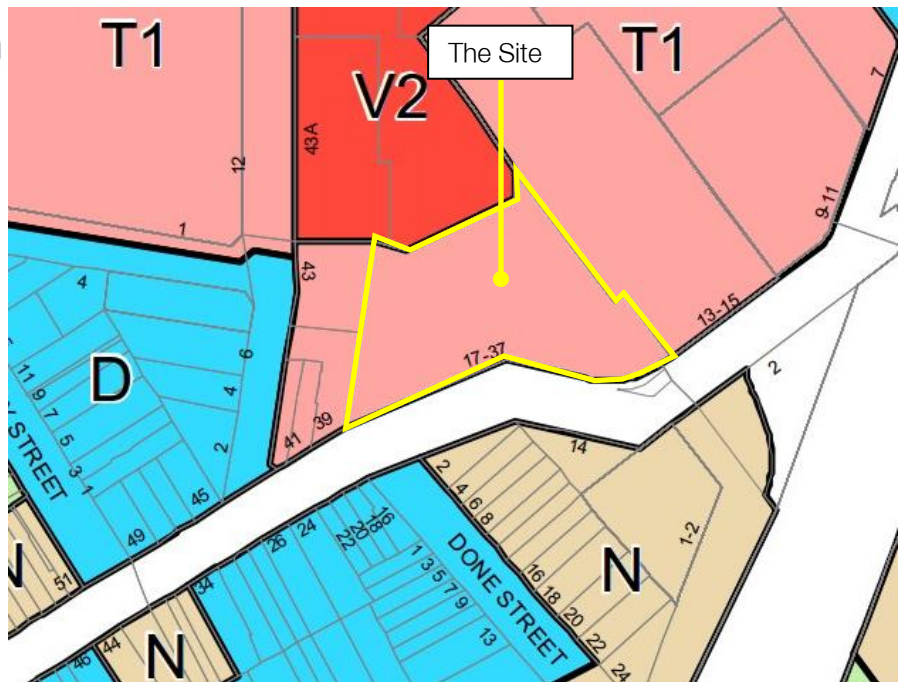


Figure1: Floor Space Ratio Map – RLEP 2011

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

The Development Proposal has a gross floor area of 11,548.4m² on a site area of 5,790m² which equates to a FSR of 1.99:1. As previously stated, it is our assessment that the open circulation areas for the building should not be included as GFA. However, it is understood that Council are of the opinion that open circulation areas should be included. Therefore for clarity a total GFA of 14,599.1m² is achieved if open circulation areas are included and this equates to a maximum FSR of 2.52:1 (see Drawing No. SK 3101/3).

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

In accordance with our assessment the development does not exceed the FSR development standard. However, when including open circulation areas in the GFA calculations, the Development Proposal exceeds the maximum FSR control by approximately 26%. However, development consent may be granted if a variation to the FSR control is approved under clause 4.6 of the LEP. The objectives of clause 4.6 are set out below.

3.0 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.

Clause 4.6(3)(a) and 4.6(3)(b) require 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.

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a 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

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained and clause 4.6(5) requires the Secretary in deciding whether to grant concurrence 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.

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?

The applicant's interpretation is that the proposal complies with the standard. However, when applying Council's interpretation of the GFA definition, a non-compliance with the development standard would arise. A development that strictly complies with the 2:1 FSR standard (as interpreted by Council) is unreasonable or unnecessary in this circumstance for the following reasons:

- The form and scale of the development responds to and is consistent with the broader context of the site and the high density residential form that has emerged as the locality has transitioned from an industrial precinct to a residential precinct and bulk and scale of the Development Proposal is consistent with this transition;
- A strictly compliant development would fail to maximise the housing contribution of the site. This is particularly important given the location of the site within an area in a locality that has been specifically planned to accommodate high density housing and is also well served by existing passenger rail services in an easy walkable distance of the site;
- A strictly compliant development would result in a loss of apartments in the Development Proposal and would undermine the objectives of the zone to provide for a variety of housing types within a high density residential environment;
- The variation to the residential FSR control does not increase the intensity of the development in such a way that will give rise to adverse environmental impacts such as increased traffic, bulk and scale, overshadowing or loss of views;

- Overall, it is unreasonable to deny a variation that would promote a more efficient use of transport infrastructure whilst also promoting housing choice, particularly in circumstances where the variation to the FSR control can be approved without resulting in significant adverse impacts; and
- The site is in a well-served locality that has been specifically zoned to accommodate the scale of developed proposed by this application.

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

It is the applicant's belief that the objectives are being met and numerical compliance is achieved. However, notwithstanding this position, applying Council's interpretation of the GFA calculation, compliance with the underlying objectives of the 2:1 maximum floor space ratio would be thwarted if strict compliance with the standard was required. Strict compliance would result in a building that would not be in harmony with the bulk and scale of surrounding buildings within the Bonar Street Precinct.

As demonstrated in the Statement of Environmental Effects, there is sufficient infrastructure, including infrastructure for vehicular and pedestrian traffic, to accommodate the development as proposed. In this respect, the objective at 1(a) of Clause 4.4 Floor Space Ratio, namely to establish maximum development densities accounting for infrastructure capacity, would be thwarted if compliance is required.

Additionally, the development and surrounding properties are located within the Arncliffe Priority Precinct. This Precinct is currently being investigated for increased density and to transform the area surrounding the train station and therefore the Development Proposal will be consistent with this proposed future direction of the area.

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

The development standard cannot be said to be abandoned. Rather, it is noted that the site is located immediately southward of No. 45 Bonar Street (approved and constructed) which has a maximum FSR of 3:1 under Clause 4.4 of the RLEP 2011 and has a height approximately two (2) storeys above the building in the Development Proposal. As such, the proposed density for the site is a direct response to the higher density to the north (within the Bonar Street Precinct), whilst maintaining a desire to provide high levels of amenity for future occupants of the site.

As previously indicated, legal precedents and legal advice have informed the applicant's position that the development proposal complies with the maximum FSR of 2:1. However, over the years both Council and the JRPP have shown an appropriate degree of flexibility in the application of the floor space ratio standard in the Wolli Creek and Arncliffe urban renewal areas as shown in the following table. Furthermore, these variations have been approved in circumstances where there has been no doubt regarding the correct method for calculating the gross floor area.

Application No.	Address	Approved Variation	Determining Body	Date of Determination
2014/122/A	13-21 Arncliffe Street, Wolli Creek	20 per cent	Council	1 April 2015
2015/279	15-21 Willis Street, Wolli Creek	5.3 per cent	JRPP	16 September 2015
2015/69	25-29 Gertrude Street and 28-32 Innesdale Road, Wolli Creek	9.4 per cent	JRPP	9 April 2015

Application No.	Address	Approved Variation	Determining Body	Date of Determination
2014/194	1-5 Gertrude Street and 10-16 Princes Highway, Wolli Creek	1.6 per cent	JRPP	10 September 2014

This list is not exhaustive, nevertheless, these decisions have demonstrated that provided the other matters required to be considered under clause 4.6 are answered satisfactorily, strict compliance with the floor space ratio standard is unreasonable and unnecessary.

3.2.4 Is the zoning of the land unreasonable or inappropriate?

The zoning of the land is reasonable and appropriate given the site's location in the Bonar Street Precinct which is undergoing transition from an industrial area to a high density residential area. Additionally, the site and surrounding properties are located within the Arncliffe Priority Precinct, which is being investigated to be rezoned to accommodate higher density residential forms in the vicinity of the Arncliffe Railway Station.

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

We are of the view that the development standard is not being contravened. However, for argument's sake, we would suggest that there are sufficient planning grounds to justify contravening the development standard being:

- The proposal satisfies the objectives of the R4 High Density Residential zone and the objectives of the standard as described in Section 3.2 above;
- Non-compliance with the standard does not contribute to adverse environmental, social or economic impacts;
- As outlined in Section 3.2 and 3.3 a theoretical variation to the standard is required to support a viable development on the site. The proposal provides a high density apartment building that is appropriate for the sites location in both the current and future setting within a high density zone in the Bonar Street Precinct;
- The proposed variation enables a more appropriate transition from the scale of the adjacent development site to the north (45 Bonar Street) to the Wollongong Road frontage that is particular to this site because of its context;
- The Development Proposal does not give rise to unacceptable impacts associated with an increased maximum FSR, including greater intensity of development, traffic generation or bulk and scale; and
- The proposed development is generally compliant with the controls, or the intent of the controls, contained in the Rockdale Development Control Plan 2011.

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 Floor Space Ratio standard

We are of the view that the Development Proposal is compliant. However, in the circumstances of the case, the provision of strict numerical compliance in accordance with Council's interpretation would be unreasonable due to the following.

The proposal remains consistent with the objectives of the R4 High Density Residential zone, despite the non-compliance with the 2:1 FSR control as demonstrated in the assessment of the objectives below:

To establish the maximum development density and intensity of land use, accounting for the availability of infrastructure and generation of vehicular and pedestrian traffic, in order to achieve the desired future character of Rockdale.

- The proposal provides for a high quality residential development that will be served by the capacity of the existing road infrastructure. The site is well located in terms of access to public transport and services being located 250m from Arncliffe Station and surrounding shops. The proposal as submitted has been reviewed for traffic impacts in accordance with Council's requirements and will not result in unacceptable traffic impacts.

To minimise adverse environmental effects on the use or enjoyment of adjoining properties.

- The proposal will not result in significant adverse impacts upon the locality or adjacent residential properties by way of overshadowing, privacy, or bulk and scale.

To maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation.

- The area to the immediate south is located within an area known as the Arncliffe Priority Precinct, which is currently being investigated by the Department of Planning to be rezoned to accommodate higher density residential forms in the vicinity of Arncliffe train station. The proposed density is consistent with the applicable development standard and will provide an appropriate visual relationship between recent development in the Bonar Street Precinct, specifically the 10 storey building immediately to the north and the existing character of Wollongong Road to the south. Given the potential outcome of the Priority precinct investigations, density controls to the south of the site could be substantially increased. Regardless, the proposed design provide an appropriate transition from development to the south up to the Bonar Street Precinct.

3.4.2 Objectives of the zone

The proposal remains consistent with the relevant objectives of the FSR standard, despite Council's interpretation of a non-compliance with the FSR limit applying to the site as demonstrated below:

To provide for the housing needs of the community within a high density residential environment.

- The Development Proposal provides a residential apartment development in the Bonar Street Precinct that has been specifically rezoned and planned within the RLEP 2011 and RDCP 2011 to accommodate higher density residential development. The theoretical variation (on Council's calculation of GFA) to the FSR development standard facilitates the delivery of high quality and high amenity accommodation. This is consistent with the intended density of the locality as envisaged by the objectives of the Bonar Street Precinct to be an area that is well served by public transport options and also is in an area being investigated under the Priority Precinct program.

To provide a variety of housing types within a high density residential environment

- The Development Proposal provides for a range of dwelling types that are specifically targeted to the market demand for the locality. The dwelling mix reflects the market demand and the sites proximity in an easy walk to Arncliffe Station. The proposal includes the provision of 10% of the dwellings as adaptable consistent with Council's policy requirements. The Development Proposal reflects the changing character of the area that is well supported by public transport and in close proximity to jobs and services. This environment is supported by the precincts planning objectives.

To enable other land uses that provide facilities or services to meet the day to day needs of residents.

- The development proposes only residential accommodation in this instance and does not seek to provide other land uses also permitted in the zone.

Given the circumstances of the case, the provision of a strict numerical compliance in accordance with Council's interpretation would be unreasonable on the basis that the proposed development achieves compliance with the objectives of the standard.

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

Council's interpretation of a 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, and 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.*
- (ii) The promotion and coordination of the orderly and economic use and development of land..."*

A development strictly complying with Council's interpretation of the controls would result in a poorer urban design response to the overall site and the area generally and in that sense it may be said that compliance with the standard would hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act.

The development as proposed is consistent with the provisions of orderly and economic development and would not hinder the objects of the Act in Section 5(a)(i) and (ii).

3.7 Is there public benefit in maintaining the development standard?

Generally speaking, there is public benefit in maintaining development standards. However, there is also public interest in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with Council's interpretation of the FSR control would preclude the delivery of high amenity accommodation in a well-served location and maximising the public investment in transport services.

Such a rigid and inflexible approach to the development standards forgoes the opportunity to provide additional residential amenity to the future residents in a manner that has no substantial adverse environmental impacts.

On balance the theoretical variation to provide improved residential outcomes in an urban context is considered to be an appropriate use of the provisions of Clause 4.6.

Accordingly in the specific circumstances of this case, there is no public benefit in strictly maintaining the development standard as interpreted by Council.

3.8 Is the objection well founded?

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

The development does not hinder the attainment of the objects specified within clause 5(a)(i) and (ii) of the Act.

4.0 Conclusion

It is our assessment that the proposal as submitted complies with the maximum FSR standard of 2:1. Additionally, legal advice has been sought that confirms this interpretation. Notwithstanding, this assessment and accompanying legal advice, for caution and "without prejudice" a Clause 4.6 variation has been submitted. The variation in accordance with Council's GFA interpretation 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 and would not result in an appropriate urban design response to the site. In the context of the locality within the Bonar Street Precinct and adjoining residential properties both in existing circumstances and if transformed through the priority precinct process it would be unreasonable for strict compliance to be enforced.

Additionally, strict enforcement of the standard would result in the development not satisfying the objectives of the control, specifically land use accounting for infrastructure, achieving the desired future character of Rockdale, maintaining an appropriate relationship between new development and the existing character whilst minimising the adverse effects on adjoining properties. The strict application of the control would result in a building that provides poorer amenity for future residents.

The theoretical non-compliance will not result in any precedents for future development within the LGA given the particular site circumstances and surrounding pattern of development near the site.

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