

ATTACHMENT A

SEPP No. 1 OBJECTION

FLOOR SPACE RATIO

INTRODUCTION

State Environmental Planning Policy (SEPP) No. 1 - Development Standards, is the legislative mechanism available to Applicants submitting a Development Application (DA) that involves a variation to a statutory development standard.

The aims and objectives of the Policy are expressed in Clause 3 as follows:

3. This policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Act.

The relevant objects of the Environmental Planning and Assessment Act 1979 are expressed as follows:

5(a) to encourage:

- (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, 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 co-ordination of the orderly and economic use and development of land.

Clause 6 of the Policy provides the mechanism for the making of a SEPP No. 1 Objection and specifies that:

6. Where development could, but for any development standard, be carried out under the Act (either with or without necessity for consent under the Act being obtained therefor) the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case, and specifying the grounds of that objection.

Clause 7 of the Policy provides the discretion and power to a consent authority to support a SEPP No. 1 Objection and grant development consent as follows:

7. Where the consent authority is satisfied that the objection is well founded and is also of the opinion that granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3, it may, with the concurrence of the Director, grant consent to that development application notwithstanding the development standard the subject of the objection referred to in clause 6.

In accordance with Clause 12 of Circular B1, Council can assume the Director's concurrence to a SEPP No. 1 Objection.

PROPOSED DEVELOPMENT

The proposed development comprises the demolition of the existing improvements, and the construction of a retail, commercial and residential development accommodating approximately 2,053.6m² of retail/commercial floor space, 188 residential apartments, and 14 townhouses.

Off-street car parking is proposed for a total of 345 vehicles at various at-grade and basement locations throughout the site. Vehicular access to the 14 townhouses is proposed via a new entry/exit driveway along Hillcrest Avenue. Vehicular access for the remainder of the development is proposed via a new entry/exit driveway along Northcote Avenue.

The proposed development has generally been designed to provide five (5) separate buildings accommodating the retail floor space, commercial floor space and residential apartments. Buildings 1 and 2 address the Hume Highway frontage, and Buildings 3 - 5 occupy the central portion of the site.

The retail/commercial floor space is accommodated at the ground floor level along the Hume Highway frontage (Buildings 1 and 2), and at the first floor level within Building 2.

The residential apartments are accommodated above the ground floor level of Building 1, and within Buildings 3 - 5. The 14 townhouses generally extend along the southern and eastern boundaries.

The proposed development includes extensive new landscaping beyond the footprints of the proposed buildings, including a hierarchy of canopy trees, lower level trees, shrubs and groundcovers.

VARIATION TO THE STANDARD

Clause 30 of the Bankstown Local Environmental Plan (LEP) 2001 specifies a maximum floor space ratio (FSR) of 0.98:1 (based on 18,012.9m² for the main portion of the site and 371.55m² for the portion of the site fronting Hillcrest Avenue).

The definition of "*gross floor area*" incorporated in the Bankstown LEP 2001 (now repealed) is based on "*the area within the outer face of the external enclosing walls*" [emphasis added].

Based on that definition, the proposed development provides a gross floor area of 19,319.1m², representing an FSR of 1:03:1, with the "excess" gross floor area represented by 934.65m² (19,319.1m² – 18,384.45m²) or less than 5.1% of the allowable gross floor space.

The Bankstown LEP 2015 came into force on 5 March 2015, however the "*savings provision*" incorporated in Clause 1.8A remains relevant to the proposed development.

Irrespective, the definition of "*gross floor area*" incorporated in the Bankstown LEP 2015 is consistent with the "*standard instrument*" and is based on the area "*measured from the internal face of external walls*" [emphasis added].

Further, the FSR control of 0.98:1 (based on 18,012.9m² for the main portion of the site and 371.55m² for the portion of the site fronting Hillcrest Avenue) remains unchanged.

In the circumstances, based on definition of "*gross floor area*" incorporated in the Bankstown LEP 2015 (and the "*standard instrument*"), the proposed development provides an FSR of 0.99:1, with the "excess"

gross floor area represented by 237.85m^2 ($18,622.3\text{m}^2 - 18,384.45\text{m}^2$) or less than 1.3% of the allowable gross floor space.

1. IS THE REQUIREMENT A DEVELOPMENT STANDARD?

The environmental planning instrument to which this Objection relates is the Bankstown LEP 2001. The development standard to which this Objection relates is Clause 30 of the LEP.

The provisions of SEPP No. 1 are applicable to development standards prescribed under an environmental planning instrument pursuant to the provisions of the Environmental Planning and Assessment Act 1979, and the FSR control incorporated in Clause 31 of the LEP is a development standard amenable to the provisions of SEPP No. 1.

2. WHAT IS THE UNDERLYING OBJECT OR PURPOSE OF THE STANDARD?

The relevant objectives of the FSR control are expressed as follows:

- (a) to generally regulate the scale and bulk of development consistently with the capacity and character of the area of the development site,
- (c) to regulate the intensity of development in business zones consistently with the role and function of the particular business centre, the capacity of the road network to accommodate business-related traffic, and the availability of public transport.

3. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ expressed the view that there are five (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:

- (a) *The proposal meets the objectives of the development standard notwithstanding its non-compliance with the standard. In this instance one must determine the objectives of the standard and*

if not expressly stated in the LEP what are the inferred objectives?

In terms of objective (a), the overall scale and bulk of the proposed development, and the manner in which the building bulk has been distributed on the site, is consistent with the capacity and character of the area, and its desired future character.

In terms of objective (c), the proposed development is consistent with the intended role and function of the site, and will not have any unacceptable traffic implications in terms of road network capacity, and no road improvements or intersection upgrades will be required as a consequence of the proposed development.

(b) The underlying objective or purpose of the standard is not relevant to the development;

The underlying objectives and purpose of the FSR control remain relevant to the proposed development, and the proposed development is generally consistent with the relevant objectives of the FSR control as set out above.

(c) The underlying object or purpose would be defeated or thwarted if compliance was required with the standard;

The proposed development is generally consistent with the aims and objectives of SEPP No. 1 to the extent that compliance with the FSR control would hinder the attainment of the objects of the Environmental Planning and Assessment Act 1979.

(d) 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;

The FSR control has not been abandoned or destroyed by Council's own actions, however the Council has adopted a flexible approach to the implementation of the FSR control in circumstances where a variation is considered reasonable and appropriate.

Further, the *"North East Local Area - Issues Paper"* recommends increasing the FSR control on the subject site from 1:1 to 1.5:1 *"to match the 4 storey limit"* provided that, inter alia, *"The properties at Nos. 225-241 Hume Highway and No. 112 Northcote Road consolidate into a single site. Otherwise a 1:1 FSR will apply"*.

4. IS THE OBJECTION WELL FOUNDED?

The objection to the development standard is well founded on the basis that strict compliance with the FSR control is unreasonable and unnecessary in the particular circumstances because:

- the extent of non-compliance is very minor, with the "excess" gross floor area represented by less than 5.1% of the allowable gross floor space;
- the FSR of the proposed development is reduced under the definition of *"gross floor area"* incorporated in the Bankstown LEP 2015 (and the *"standard instrument"*) to the extent that the variation is less than 1.3% of the allowable gross floor area;
- the nature and scale of the proposed development are such that it would be virtually impossible to identify any material physical difference between the proposed development, and an alternate development that achieved strict compliance with the FSR control;
- the variation to the FSR control is so small as to ensure that the "excess" floor space does not contribute to any new or additional impacts on the amenity of any surrounding land;
- the *"North East Local Area - Issues Paper"* recommends increasing the FSR control on the subject site from 1:1 to 1.5:1, and the proposed development remains substantially below the recommended FSR control for the site;
- strict compliance with the FSR control is considered unnecessary and unreasonable given the physical characteristics of the site, the scale of the proposed development, and the very minor nature of the non-compliance;
- the proposed development will make efficient use of well serviced land in close proximity to existing infrastructure and services; and
- the objectives of the FSR control are generally satisfied despite the minor non-compliance.

5. IS THE GRANTING OF CONSENT CONSISTENT WITH THE AIMS OF THE SEPP 1 POLICY?

- (a) *To provide flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance in any particular case would be unreasonable or unnecessary;*

The proposed development is consistent with providing flexibility in the application of the FSR control, and strict compliance with the FSR control would be unreasonable and unnecessary for the reasons set out in Section 4 above.

- (b) *Will strict compliance with the development standard tend to hinder the objects of the Act, namely:*
- (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purposes of promoting the social and economic welfare of the community and a better environment; and*
 - (ii) *the promotion and co-ordination of the orderly and economic use and development of land.*

The proposed development is consistent with the aims and objectives of SEPP No. 1, the objectives of the FSR control, and the relevant objectives of the zone.

In the circumstances, strict compliance with the development standard would hinder the attainment of the objects of the Environmental Planning and Assessment Act 1979.

6(a). WHETHER OR NOT NON-COMPLIANCE WITH THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING?

The variation to the development standard does not raise any matter of significance with State or Regional environmental planning for the reasons set out in Sections 3, 4 and 5 above.

6(b). THE PUBLIC BENEFIT OF MAINTAINING THE PLANNING CONTROLS ADOPTED BY THE ENVIRONMENTAL PLANNING INSTRUMENT.

The proposed development is generally consistent with the aims and objectives of SEPP No. 1, the objectives of the FSR control, and the relevant objectives of the zone as set out in Sections 3, 4 and 5 above.

In the circumstances, the proposed development does not affect the public benefit of maintaining the planning controls adopted by the relevant environmental planning instruments.

CONCLUSION

In the circumstances of the proposed development, the objection to the development standard is well founded and strict compliance with the FSR control would be unreasonable and unnecessary.

Further, the proposed development is generally consistent with the aims and objectives of SEPP No. 1 to the extent that compliance with the FSR control would hinder the attainment of the objects of the Environmental Planning and Assessment Act 1979.