

Clause 4.6 Objection to Clause 4.4 - Floor Space Ratio (FSR) of the Bankstown Local Environmental Plan 2015 (BLEP 2015)

February 2016

Introduction

This report is to be considered in conjunction with the Statement of Environmental Effects (SEE) for the application for the proposed demolition of 5 existing dwellings, removal of trees, proposed construction of two (2) three storey residential flat building comprising twenty two (22) units and six (6) two storey townhouses, fifteen (15) parking car spaces, associated landscaping and consolidation into a single lot

The report is a submission pursuant to the requirements of Clause 4.6 of the BLEP 2015 to seek approval from Council for consent to be granted to an application that contravenes a development standard.

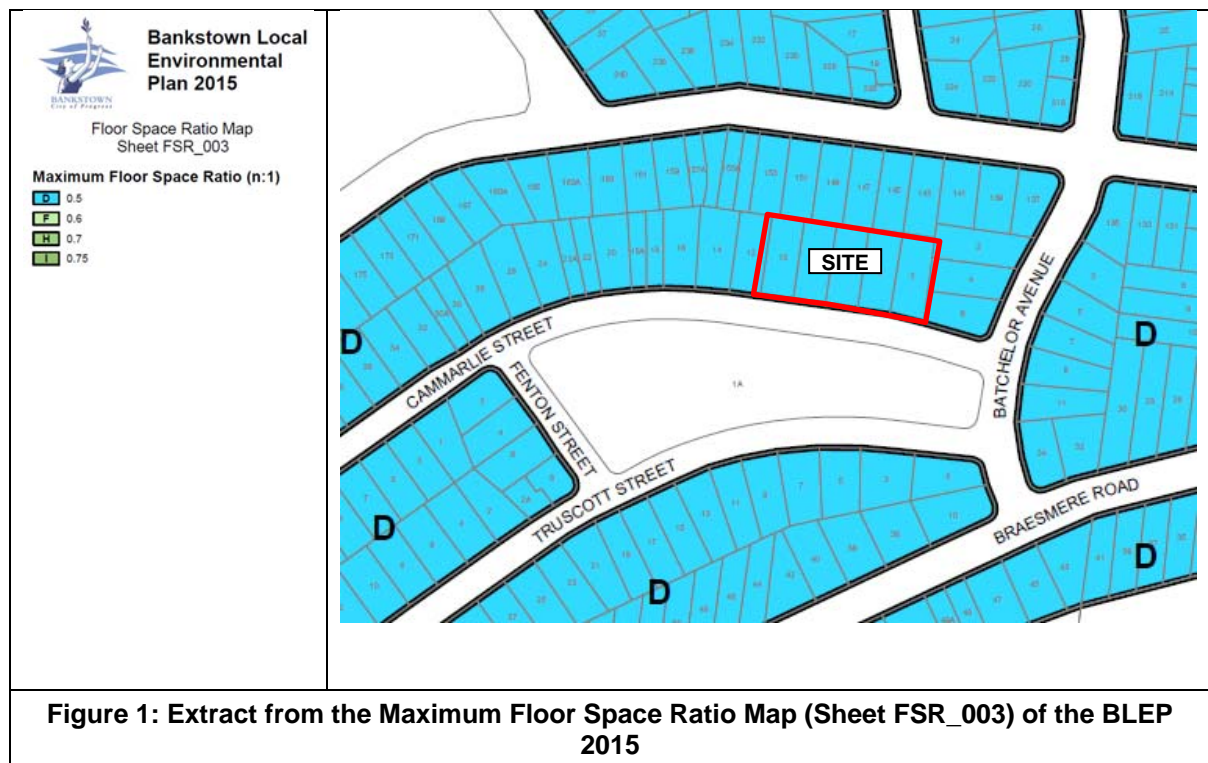
1. Clause 4.6 Objection

Development Standard

Pursuant to Clause 4.6 of the Bankstown LEP 2015 (BLEP 2015), this objection seeks to vary the FSR standard stipulated in Clause 4.4 that states:

(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

The relevant portion of the maximum Floor Space Ratio Map (Sheet FSR_003) of the BLEP 2015 is shown on Figure 1 below. The maximum FSR for the site is 0.5:1.



Proposed Variation

The table below is an extract from the development data on the Cover Page (Sheet 1 of 12 Rev C) of the submitted architectural plans and outlines the proposed variation.

FSR		
Required	Proposed	Variation
0.50:1	0.598:1	19.6%

2. Justification for the exception and matters for consideration

Compliance to Clause 4.6 BLEP 2105

The following provides the justification with regards to the objectives of 4.6 of the BLEP 2105.

(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.*

Comment

The non-complying element of the proposed development is a 19.6% excess over the maximum FSR standard of 0.5:1. This numerical breach is considered acceptable as it is the outcome of a well balanced urban design solution to achieve maximum site yield without adversely impacting on the local character of the area.

(b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances*

Comment

Strict compliance to the 0.5:1 FSR requirement means the loss of 309m² of gross floor (GFA), equivalent of at least 3 affordable housing dwelling units. It will also result in an unsettling building form and under utilize a well located site in terms of accessibility to public transport, parks, shops, community facilities and services.

(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.*

Comment

The maximum FSR standard is not excluded from the clause.

(3) *Written request required 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*

Comment

This report outlines the justification for the case that strict compliance with the 0.5:1 maximum FSR standard in BLEP 2015 is unreasonable and unnecessary.

(b) *that there are sufficient environmental planning grounds to justify contravening the development standard*

Comment

The following outlines are various environmental planning instruments that support contravening the development standard.

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 Environmental Planning and Assessment Act 1979 (the Act).

Division 5 of the ARH SEPP applies to those areas where residential flat buildings are not normally permissible and non-compliances with key controls including FSR are considered justified. One aim of the SEPP is to *“facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards.”*

Clause 4.6 of the BLEP 2015 allows a proponent to seek approval from Council for consent to be granted to an application that contravenes a development standard, in this case the maximum floor space ratio. As outlined in the SEE, the proposed development complies with other standards of BLEP 2015 and BDCP 2014 and will create a minimal impact on the locality and its surrounds;

The SEE has demonstrated that there is no disruption to existing views, loss of privacy, overshadowing or visual intrusion despite numerical excess in the maximum FSR. The design meets the SEPP 65 amenity requirements demonstrating suitability of the site for the density proposed using careful planning and design strategies to reduce the environmental impact of the development. The impact to the current amenity will be insignificant.

Flexibility in the maximum FSR standard is in this particular instance, justified and strict compliance is unreasonable and unnecessary as it will result in the loss of at least 3 RFB's for affordable rental housing. It will be tantamount to under utilization of existing site potentials and public infrastructure as well as disregard to the objective of Division 5 of the ARHSEPP in the provision of new affordable rental housing.

Based on the above, there is sufficient environmental planning ground to justify contravening the development standard.

(4) Development consent must not be granted unless:

(a) the consent authority is satisfied that:

(i) the written request has addressed sub clause (3)

Comment

Sub Clause 3 has been adequately addressed above and in the SEE (Section 3.2.2- Bankstown Development Control Plan 2014 (BDCP 2014) B1: Residential Development - Section 9: Residential Flat Buildings.

(ii) the proposed development is in the public interest (consistent with the objectives of the standard and the zone)

Comment

The objectives of Zone R2 Low Density Residential in the BLEP 2015 include the following:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To allow for certain non-residential development that is compatible with residential uses and does not adversely affect the living environment or amenity of the area.*
- *To allow for the development of low density housing that has regard to local amenity.*
- *To require landscape as a key characteristic in the low density residential environment.*

The above objectives of the zone are met by the proposal for the following reasons:

- The proposed development provides community needs for affordable housing. It provides opportunity for a mix of and diversity of housing types close.
- The proposal takes advantage of local amenities including proximity to Panania station, retail, commercial and other town centre facilities and services without exceeding their capacities. The site is well placed across Cammarlie reserve and will enhance its use and add to its Crime Prevention through Environmental Design CPTED features.
- The development sits comfortably with the existing and future low density character of the street and surrounding area.
- Landscaping is used throughout the site to enhance the overall development by softening the hard surfaces including the carparking bays, driveways and pedestrian pathways.

(b) the concurrence of the Director-General has been obtained.

Comment

A Site Compatibility Certificate under Division 5, Part 2 of the ARHSEPP was issued on 21 May 2014 by the Acting Secretary of the Department of Planning and Environment. which states that the development of the site as described in Schedule 1 and 2 of the Certificate:

- *is compatible with the surrounding land uses, having regard to the matters specified in clause 37(6)(b) of the ARH SEPP; and*
- *is not likely to have an adverse effect on the environment and does not cause any unacceptable environmental risks to the land.*

Schedule 1 is a description of the development and Schedule 2 the concept plan that shows the 3 storey residential flat buildings to the front and the 2 storey multi dwelling structures to the rear of the site.

A summary of the concept plan was outlined in the accompanying development table that indicated an FSR of 0.66:1. This was reiterated in the SCC application form (Floor Space Ratio and Setbacks, page 21). In its current form, the proposal is a reduction from the approved SCC of 0.66:1 FSR to 0.598:1.

(5) The Director-General must consider:

(a) whether contravention raises any matter of significance for State or regional environmental planning.

Comment

As mentioned above, an SCC from the the Acting Secretary of the Department of Planning and Environment has been obtained.

3. Wehbe v Pittwater Council [2007] NSW LEC 827

In his decision in *Wehbe v Pittwater Council [2007] NSW LEC 827*, Chief Justice Preston expressed the view that there are five 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.

The five tests are considered in the table below.

<p><i>(i) The objectives of the standard are achieved notwithstanding non-compliance with the standard</i></p>	<p>The BLEP 2015 Clause 4.4 Floor space ratio and corresponding responses are as follows:</p> <p>(1) <i>The objectives of this clause are as follows:</i> (a) <i>to establish the bulk and maximum density of development consistent with the capacity and character of the locality of a development site,</i></p> <p>Comment</p> <p>The non-complying element of the proposed development is a 19.6% excess over the maximum FSR standard of 0.5:1. This numerical breach is the result of maximizing site yield.</p> <p>Notwithstanding, the building scale, height and form are adequately addressed in the design. A delicate balance between increased density and compatibility to existing surrounding development has been achieved by reduction of bulk, use of appropriate colours, landscaping and other architectural treatment. No intrusion to privacy, blocking of solar access and overshadowing of adjacent properties is expected as a result. The impact to the local character is not any different to any existing or future development in the area.</p> <p>The consistency with the objectives of Cl. 4.4 Floor Space Ratio as outlined above satisfies the <i>Wehbe</i> test (i) and the absence of any environmental impacts, demonstrates that strict compliance with FSR standard is both unreasonable and unnecessary in this instance.</p>
<p><i>(ii) the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary</i></p>	<p>Not applicable. The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in (i) above.</p>
<p><i>(iii) the underlying object of</i></p>	<p>Not applicable. The underlying object or purpose of the</p>

<i>purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable</i>	standard would not be defeated or thwarted if compliance was required.
<i>(iv) 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; and</i>	This exception to development standards request does not rely on this reason.
<i>(v) 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.</i>	This exception to development standards request does not rely on this reason

4. Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46

The exception to development standards request is assessed below against the accepted test for the assessment of development standard variation established by Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46.

A Is the planning control in question a development standard?	Yes, Cl. 4.4 of Bankstown LEP 2015 is a development standard.
B What is the underlying object or purpose of the standard?	The underlying objectives of the standard are assessed in Section 3.
C Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?	Sections 2 & 3 demonstrates that compliance is unnecessary and unreasonable.
D. Is compliance with the development standard consistent with the aims of the Policy (to provide flexibility in the application of	The arguments contained in this Clause 4.6 variation support the case to allow flexibility in the application of the standard. The non-compliance with the development standard

<p>development standards); and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act, 1979?</p>	<p>allows for an orderly use of the land and has been designed with consideration to the desired future character of the area.</p> <p>Additionally, the Objects of the Act are satisfied as:</p> <ul style="list-style-type: none"> • The departure from the maximum FSR standard in the BLEP 2015 will have no negative consequences in terms of 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; and • The departure from the maximum FSR standard in BLEP 2015 allows for the orderly and economic use of the site in a manner which otherwise achieves the outcomes and objectives of the relevant planning controls.
<p>E. Is the objection well founded?</p>	<p>As the Clause 4.6 exception to development standards request appropriately addresses <i>Wehbe v Pittwater Council</i> [2007] NSW LEC 827, the proposed variation is well founded.</p>

5. **Public interest and matters of State or regional significance**

5.1 Is the proposal in the public interest?

Clause. 4.6 exception to development standards request and the accompanying plans and technical reports contained within the SEE demonstrate the public advantages of developing the site. In summary:

- Strict compliance to the maximum FSR will result in the loss of at least 3 affordable rental housing units. In the context of the current debate on homelessness and housing affordability for those members of society that are unable to meet their own housing needs. The proposed development in its entirety clearly delivers a better social outcome
- The proposed development will allow the Land and Housing Corporation to modernize its housing stock, assist it in trying to meet constantly increasing demands for public housing, and allow a site that is well located within Panania to be utilized to its maximum potential.
- The proposed development is of contemporary architectural design and new materials that will interest and enhance the existing character of the street and immediate area.
- The project will generate employment during the construction
- No unreasonable public disadvantage have been identified. It has been demonstrated that any environmental or other impacts associated with the development are minimal and/or can be adequately managed.

5.2 Matters of State or Regional Significance

The non-compliance with Clause 4.4 Floor Space Ratio standard does not raise matters of significance for State or regional planning. The proposed development is consistent with the objectives of the ARHSEPP in providing affordable rental housing. It will likewise allow for much needed affordable housing in the Bankstown Local

Government Area and would in turn assist the Council in achieving its dwelling targets under the Metropolitan Plan.

5.3 The public benefit of maintaining the standard

There is no public benefit in maintaining strict compliance with the development standard in this instance.

6. Summary justification

A summary of the matters set out in this cl. 4.6 exceptions to development standards request to vary the maximum FAR standards are follows:

Relevance of the FSR standard

- The non-complying element of the proposed development is a 19.6% excess over the maximum FSR standard of 05:1. This numerical breach is considered acceptable as it is the outcome of a well balanced urban design solution to achieve maximum site yield without adversely impacting on the local character of the area.
- Strict compliance to the FSR standard of 0.5:1 will result in the loss of 309m² of gross floor (GFA) or the equivalent of at least 3 affordable dwelling units.

Urban design and streetscape

- The building scale, height and form are adequately addressed in the design. A delicate balance between increased density and compatibility to existing surrounding development has been achieved by reduction of bulk, use of appropriate colours, landscaping and other architectural treatment. No intrusion to privacy, blocking of solar access and overshadowing of adjacent properties is expected as a result.
- The front elevation demonstrates that the proposal sits comfortably within the existing streetscape and surrounding area. The minor breach will not be incompatible with any future development. The impact to the local character is not any different to any existing or future development in the area.

FSR standard objectives

The proposal satisfies the relevant objectives of BLEP 2015 Clause 4.4 Floor space ratio standard as follows:

(1)(a) *to establish the bulk and maximum density of development consistent with the capacity and character of the locality of a development site.*

- The building scale, height and form are adequately addressed in the design. A delicate balance between increased density and compatibility to existing surrounding development has been achieved by reduction of bulk, use of appropriate colours, landscaping and other architectural treatment. No intrusion to privacy, blocking of solar access and overshadowing of adjacent properties is expected as a result. The impact to the local character is not any different to any existing or future development in the area.
- There is consistency with the objectives of the standard, and the absence of any environmental impacts, would demonstrate that strict compliance with the maximum FSR standard is both unreasonable and unnecessary in this instance.

Impacts

- The Traffic and Parking Assessment Report dated 10 September 2015 by Varga Traffic Planning) (page 10) concludes that the proposed development will clearly not have any unacceptable traffic implications in terms of road network capacity.
- The proposal does not give rise to any unreasonable or unexpected adverse amenity impacts on surrounding properties (in terms of overshadowing, views/outlook and privacy impacts) as addressed in the SEE, Section 3.2.2 - Bankstown Development Control Plan 2014 (BDCP 2014) B1:Residential Development - Section 9: Residential Flat Buildings, Section 3.3 Visual Impact, 3.4 Solar Access, 3.5 Privacy among others.

Zone objectives

The proposal satisfies the objectives of Zone R2 – Low Density Residential as follows:

- The objectives of the zone are met by the proposal as it provides affordable housing to people in need. The objectives of the zone would be defeated and if compliance with the maximum FSR standard was required as it would preclude the construction of much needed affordable housing on the site
- The development sits comfortably with the existing and the future character of the street and surrounding area.
- The proposal takes advantage of the local amenity including proximity to Panania railway station, town centre facilities and services as well as Cammarlie reserve located right across the site.
- Landscaping is used throughout the site to enhance the overall development by softening the hard surfaces including the carparking bays, driveways and pedestrian pathways.

Objects of the Act

The Objects of the Act are satisfied as follows:

- The departure from the maximum FSR standard in the BLEP 2015 will have no negative consequences in terms of 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.
- The departure from the maximum FSR standard in the BLEP 2015 allows for the orderly and economic use of the site in a manner which otherwise achieves the outcomes and objectives of the relevant planning controls.

Public interest

- Strict compliance to the maximum FSR standard will result in the loss of at least 3 affordable rental housing dwellings. In the context of the current debate on homelessness and housing affordability for those members of society that are unable to meet their own housing needs, the proposed development in its entirety is clearly a better social outcome
- No unreasonable public disadvantages have been identified as it has been demonstrated that any environmental or other impacts associated with the development are minimal and/or can be adequately managed.

Other tests

- The proposed variations satisfy the tests and considerations established in *Wehbe v Pittwater Council* [2007] NSW LEC 82 and *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46.

Conclusion

In summary, compliance with the development standard restricting the maximum FSR is unreasonable and unnecessary. This is because the objectives of the development standard can still be achieved notwithstanding non-compliance. The development standard is not an end in itself but rather a means of achieving desired outcomes.

Council is therefore urged to support this Clause 4.6 objection.