

CLAUSE 4.6 VARIATION

REQUEST – FLOOR SPACE RATIO

496-520 PACIFIC HIGHWAY, ST LEONARDS

1. INTRODUCTION

A development application has been lodged in respect of land known as 496-520 Pacific Highway St Leonards. The development proposes the construction of a mixed use development comprising retail, commercial and residential uses on 500-520 Pacific Highway, basement car parking below 496-498 and 500-520 Pacific Highway and upgrading of publicly accessible Friedlander Place (496-498 Pacific Highway).

The proposed development is located over three development lots with two different maximum floor space ratios (FSRs) allocated under the Lane Cove LEP 2009 (the LEP). The lot details, FSRs, site areas and equivalent GFAs are shown at Table 1 below.

Table 1 – Assessment of Consistency with Development Standard Objectives

Site	Site Area	FSR under Lane Cove LEP 2009	Equivalent GFA
496-498 Pacific Highway St Leonards	1,475m ²	12:1	17,700m ²
500-520 Pacific Highway St Leonards	2,277m ²	17:1	38,709m ²

Total Available GFA and proposed Floor Space Ratio

Combining the site areas and FSRs in Table 1, the total GFA available to the whole of the site comprising the three lots is 56,509m². This is equivalent to a total FSR of 15.06:1.

The proposed development seeks a maximum GFA of 47,868m², being equivalent to a total FSR across the whole of the site of 12.758:1.

Calculation of Floor Space Ratio

The "floor space ratio" for the land on the FSR map cannot be exceeded under clause 4.4(2).

The definition of 'floor space ratio' under Lane Cove LEP 2009 (in clause 4.5(2) of the LEP) is the "ratio of the gross floor area of all buildings within the site to the site area" (emphasis added). In other words, FSR = GFA / site area.



Clause 4.5(3) of Lane Cove LEP (Calculation of Floor Space Ratio and Site Area) provides that:

(3) Site area

In determining the site area of proposed development for the purpose of applying a floor space ratio, the site area is taken to be:

(a) if the proposed development is to be carried out on only one lot, the area of that lot, or

(b) if the proposed development is to be carried out on 2 or more lots, the area of any lot on which the development is proposed to be carried out that has at least one common boundary with another lot on which the development is being carried out. (emphasis added).

The effect of clause 4.5(3)(b) is that where two or more adjoining lots are being developed, all lots are to be included in the calculation of site area.

As noted in Table 1 above, the site area comprises both 496-498 Pacific Highway and 500-520 Pacific Highway, with a total area of 3,752m². The FSR applicable to 500-520 Pacific Highway is 17:1, equivalent to 38,709m² GFA. The FSR applicable to 496-498 Pacific Highway is 12:1, equivalent to 17,700m² GFA.

Applying the LEP definition of "floor space ratio" and having regard to the "site area" as a whole consistently with clauses 4.5(2) and (3)(b) of the LEP, the total GFA applicable to the development site is 56,409m², is equivalent to a total FSR of 15.06:1. The total GFA proposed in the development is 47,868m².

The total GFA available on these lots is therefore distributed over the site, and would result in a total proposed FSR of 12.758:1.

The "floor space ratio" in clause 4.5(2) is defined by reference to the "site" which is a combination of "lots" under clause 4.5(3)(b). Accordingly, the floor space ratio identified on the FSR Map should also be calculated as a whole "site" rather than separate and individual pieces of "land" or "lots" as though they were being separately developed.

This position is entirely consistent with Clause 4.5(9) which provides that a condition of development consent can be imposed requiring registration of a covenant that prevents the creation of floor area on a lot if the consent authority is satisfied that an equivalent quantity of floor area will be created on another lot only because the site included the restricted lot.

In this light, the proponent is of the opinion that the overall maximum FSR for the site is not exceeded as the total proposed GFA (47,868m²) is less than the total GFA allowable on the whole of the site (56,509m²).

Despite this position, and for abundant caution, a proposed variation to the FSR development standard under clause 4.4(2) of the LEP is sought pursuant to Clause 4.6 of the LEP in the event that the consent authority is of the opinion that the proposed FSR for the whole of the site exceeds the maximum FSR and that the proposed development therefore contravenes the development standard in clause 4.4(2) of the Lane Cove LEP.

2. PROPOSED VARIATION

To the extent that this clause 4.6 variation request is required, this request seeks flexibility in the application of the development standard contained within clause 4.4 of the LEP as it applies to only part of the site, being the 12:1 maximum FSR allocated to 496-498 Pacific Highway, St Leonards.

This variation request seeks that the total floor area (being a GFA of 47,868m²) equivalent to a total FSR across the site of 12.758:1 be supported by the consent authority in this instance. Overall, the extent of the variation is an FSR of 0.758:1 as it applies to 496-498 Pacific Highway, St Leonards. It is noted that the proposed FSR does not exceed the development standard as it relates to land known as 500 and 504-520 Pacific Highway St Leonards.

This variation request should be read in conjunction with the Amended Statement of Environmental Effects dated 25 October 2017.

3. **CLAUSe 4.6**

Clause 4.6 of the Lane Cove LEP 20019 states:

4.6 Exceptions to development standards

...

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

...

At the time of writing, the case law relevant to the preparation of this Clause 4.6 variation request are as follows:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2five No 3')
- *Winten Property Group Ltd v North Sydney Council* [2001] NSWLEC 46
- *Zhang and Anor v Council of the City of Ryde* [2016] NSWLEC 1179
- *Micaul Holdings Pty Ltd v Randwick City Council* [2016] NSWLEC 7
- *Moskovich v Waverley Council* [2016] NSWLEC 1015

The findings and principles set out in these cases have been considered in the preparation of this Clause 4.6 variation request.

In accordance with clause 4.6, and as guided by the above case law, this clause 4.6 variation request:

1. identifies the development standard to be varied (Section 1 above);
2. identifies the extent of the variation sought (Section 2 above);
3. establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances because the objective of the FSR development standard is achieved notwithstanding non-compliance with the standard (Section 4 below);
4. demonstrates that there are sufficient environmental planning grounds to justify the variation (Section 4 below);
5. demonstrates that the consent authority can be satisfied that the proposal is in the public interest because it is consistent with the objectives of the standard and the objectives for development within the B4 Mixed Use zone (Section 4 below);
6. demonstrates that the variation of the maximum FSR development standard does not raise any matter of significance for State or regional planning (Section 4 below); and
7. demonstrates that there is no public benefit in maintaining the numerical FSR development standard in this instance (Section 4 below).

4. ASSESSMENT OF CLAUSE 4.6 VARIATION

4.1. Consistency with Objectives of Floor Space Ratio Control

Clause 4.4 of the Lane Cove LEP 2009 outlines one objective for the floor space ratio development standard.

The objective is:

- *To ensure that the bulk and scale of development is compatible with the character of the locality*

The proposal is consistent with this objective as:

- The proposed building complies with the maximum building height development standard contained under clause 4.3 of the LEP.
- The proposed development has resulted from a site specific land rezoning which saw the introduction of the B4 Mixed Use zone on the subject and adjoining site (at 472&486 Pacific

Highway, St Leonards). This rezoning envisaged the construction of two mixed use developments with residential towers above podium retail uses and the delivery of a rejuvenated public plaza on Friedlander Place.

- The allocation of GFA across the site allows for the delivery of a mixed use tower and the provision of public open space in the form of a rejuvenated Friedlander Place.
- The proposed building form is compatible with the character of the St Leonards locality generally. It comprises a tall, mixed use building form that has been designed to respond to the immediate site context of mixed use sites to the south and east, and commercial sites to the west, north and south.
- The proposal responds to the site specific provisions in the Lane Cove LEP 2009 and DCP 2010, and is consistent with the Design Principles and Objectives contained in SEPP 65 and the accompanying Apartment Design Guide.

4.2. Consistency with Objectives of the B4 Mixed Use Zone

The Lane Cove LEP 2009 includes objectives for the B4 Mixed Use Zone. These objectives are identified in Table 2. This table demonstrates that the variation is consistent with the objectives of the zone.

Table 2 – Assessment of Consistency with Zone Objectives

Objective	Comment
<i>To provide a mixture of compatible land uses.</i>	The proposal provides a mix of retail, commercial, residential and public open space land uses on the site, consistent with this objective. It specifically delivers much needed publicly accessible open space through the redevelopment and improvement of Friedlander Place at 496-498 Pacific Highway St Leonards. The proposed variation will result in the delivery of non-residential and residential floorspace to optimise the development opportunity on this site, as envisaged by the Planning Proposal and site specific Lane Cove LEP Amendment 18.
<i>To integrate suitable business, office, residential and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.</i>	The proposal provides a mix of retail, commercial and residential development close to St Leonards Railway station and the future Crows Nest Metro Station location, as well as bus services along the Pacific Highway. It is therefore consistent with this objective.
<i>To encourage urban design maximising attractive public domain and adequate circulation space for current and future users.</i>	The proposal specifically delivers on this objective, facilitating the redevelopment and improvement of Friedlander Place at 496-498 Pacific Highway St Leonards. This will be reinstated as a publicly accessible plaza following completion of the development.

Objective	Comment
	The proposed variation will allow maximisation of the public domain area available on Friedlander Place and available for public use in perpetuity.
<i>To maximise sunlight for surrounding properties and public domain.</i>	The proposal ensures that adequate levels of solar access are provided to surrounding properties and public domain. Shadow diagrams accompanying the development application demonstrate that solar access to surrounding sites will not be unreasonably reduced as a result of the proposal.

4.3. Unreasonable or Unnecessary

Strict compliance with the FSR development standard on this site is considered to be unreasonable and unnecessary given the method by which clause 4.5 of the LEP informs the calculation of Floor Space Ratio and Site Area.

Clause 4.5 (2) defines floor space ratio as

“the ratio of the gross floor area of all buildings within the site to the site area”.

Clause 4.5(3) defines site area as

“if the proposed development is to be carried out on 2 or more lots, the area of any lot on which the development is proposed to be carried out that has at least one common boundary with another lot on which the development is being carried out.”

Overall, by this calculation, the total maximum FSR = $56,509\text{m}^2 / 3,752\text{m}^2 = 15.06:1$

The “*floor space ratio*” in clause 4.5(2) is defined by reference to the “*site*” which is a combination of “*lots*” under clause 4.5(3)(b). Accordingly, the floor space ratio identified on the FSR Map should also be calculated as a combined “*site*” rather than individual pieces of “*land*” or “*lots*”. Otherwise the total combined FSR for the whole of a site comprising more than one lot would always have to be less than the smaller FSR development standard applying to one of the lots (and hence there would be no need to combine the site areas of the lots comprising the site because FSR would always have to be below the lowest maximum FSR identified on the FSR map for the lots comprising the site).

Given the provisions of LEP Clause 4.5, it is unreasonable to strictly apply the development standard contained within Clause 4.4 of the LEP (as shown on the Floor Space Ratio Map) as it applies to 496-498 Pacific Highway, being 12:1.

The development proposal will result in the delivery of a significant quantum of future public open space within Friedlander Place, which is of public benefit to the wider community.

4.4. Consideration of *Wehbe v Pittwater Council* [2007] NSWLEC 827

The Chief Judge of the NSW Land and Environment Court (NSWLEC) delivered this influential judgment in relation to variations under SEPP 1, which held that variations to development standards may be well founded in a variety of ways.

At [42], it was noted that the most common way to establish that compliance with a development standard is unreasonable or unnecessary is because the objectives of the development standard are achieved despite non-compliance with the control.

The Court elaborated on the rationale of this approach, noting at [43]:

Development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).

The question that this raises is as follows:

1. Would the proposal, despite a numerical non-compliance, be consistent with the relevant environmental or planning objectives?

Section 4.1 and 4.2 above demonstrate that, despite the numerical non-compliance, the proposal is consistent with the objectives of the Floor Space Ratio standard and B4 Mixed Use zone.

The Court outlined four other methods for establishing that compliance with a development standard is unreasonable or unnecessary:

2. Establish that the underlying objective or purpose [of the development standard] is not relevant to the development, with the consequence that compliance is unnecessary.

The underlying objectives of the FSR standard and B4 zone are relevant to this proposal and as such this consideration is not relevant in this case.

3. Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required, with the consequence that compliance with the development standard is unreasonable.

Strict compliance with the development standard for part of the site contradicts the provisions of Clause 4.5 of the LEP as demonstrated at 4.3 above.

4. Establish that the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the development standard, and hence compliance with the standard is unnecessary and unreasonable.

Lane Cove Council has not abandoned the development standard. This consideration is not relevant.

5. Establish that *the zoning of particular land was unreasonable or inappropriate* so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary."

The zoning of the land is not unreasonable or inappropriate and as such this consideration is not relevant.

The proposal is a considered and planned development, that responds to the context of the site and overall objectives of the Planning Proposal which rezoned the land in 2015, which aimed to realise mixed use development and redevelopment of public open space at Friedlander Place.

4.5. Sufficient Environmental Planning Grounds

It is considered that there are sufficient environmental planning grounds to support the variation as follows:

- The overall GFA proposed in the development is less than the total GFA allocated to the total site under Lane Cove LEP 2009.
- The total building height proposed does not exceed the Height of Buildings standard under clause 4.3 of Lane Cove LEP 2009.
- The pooling of the available GFA and its realisation as a mixed-use building on part of the site and delivery of a significant area of public open space over another part of the site (Friedlander Place) provides a development outcome that is consistent with the objectives of the B4 zone and the intent of the original Planning Proposal which resulted in Amendment 18 to LEP 2009. It also delivers a significant community benefit in the upgrading of public open space prior to its ownership being transferred back to Lane Cove Council in stratum.
- The resulting built form responds well to the current planning context for the site and the impacts of the built form and overall development are supportable.

4.6. Any Matter of Significance

The non-compliance does not raise any matter of significance for state or regional environmental planning.

4.7. Public Benefit

Overall it is considered that the strict maintenance of the standard in this instance is not in the public interest as the proposal will result in significant public benefit by the delivery of high quality public open space, and the strict application of the standard is contradictory with the application of Clause 4.5 of the LEP.

5. CONCLUSION

Strict compliance with the floor space ratio development standard in Clause 4.4 of Lane Cove LEP as it relates to this site is unreasonable and/or unnecessary in the circumstances of the case for the following reasons:

- When 'site area' and 'floor space ratio' is calculated in accordance with Clause 4.5 of the LEP, the proposal falls well below the allowable FSR for the total site.
- The proposal is consistent with the objectives of both Clause 4.4 of the LEP and the B4 Mixed Use zone.
- The proposal will result in the realisation of non-residential and residential floor space well below the maximum allocated to this total site, in a form that provides for the redevelopment and improvement of a significant area of public open space that will be dedicated back to Council in stratum at the completion of the development.
- The specific circumstances of this site, being an amalgamation of 3 lots, supports the proposed variation to the strict interpretation of the FSR standard as it applies to 496-498 Pacific Highway.