



Clause 4.6 – Exceptions to Development Standards – FSR (Cl.4.4)

Address: 62-82 Harrow Road, Bexley – Proposed Seniors Housing Development

Amended Proposal: The Development Application seeks the redevelopment of 62-82 Harrow Road, Bexley (“the site”) for a seniors housing development.

1.0 Introduction

This is a written request to seek an exception to a development standard under clause 4.6 – Exceptions to Development Standards of the Rockdale Local Environmental Plan 2011 (LEP 2011). The development standard for which the variation is sought is Clause 4.4 Floor Space Ratio under the LEP 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 principles 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’)
6. *Micaul Holdings Pty Limited v Randwick City Council (2015) NSWLEC 1386*
7. *Randwick City Council v Micaul Holdings Pty Ltd (2016) NSW LEC7*

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 (LEP 2011).

2.2 What is the zoning of the land?

The zoning of the land is R2 Low Density Residential zone.

2.3 What are the Objectives of the zone?

The objectives of the R2 Low Density Residential zone are:

- *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 ensure that land uses are carried out in a context and setting that minimises any impact on the character and amenity of the area*

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 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 (2E) of the LEP 2011.

2.7 What are the objectives of the development standard?

The objectives of clause 4.4 are as follows:

- *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,*
- *to minimise adverse environmental effects on the use or enjoyment of adjoining properties,*
- *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 (2E) establishes a maximum floor space ratio (FSR) of 1.25:1 for the site if the building subject of the development "is used only for the purpose of seniors housing".

The purpose of the proposed development is for seniors housing and therefore the 1.25:1 FSR applies to the development.

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

The site area is 8,307.5m² and the gross floor area, GFA of the amended development is 10,906m². This equates to an FSR of 1.31:1.

It is noted that the proposal includes an additional 41 car parking spaces within the basement levels which are provided above the minimum car parking requirement. The 41 car spaces represent 521m² of additional GFA and it is noted that when the 41 additional car parking spaces are excluded from the GFA calculations, the FSR is 1.25:1 and is compliant with the development standard.

Further, there is 322m² included in the FSR calculation which is comprised of the proposed 'men's shed', kitchen, workshop and laundry which are all elements below ground level within the basement levels. It is noted that the area of these facilities does not result in the development exceeding the FSR standard, rather it is the area of the additional 41 car spaces which results in the exceedance of the standard. In total, there is 843m² of GFA which is below ground level.

In summary, the GFA of the part of the proposed development which is above the ground level is 10,063m² which equates to a FSR of 1.21:1, which is less than the 1.25:1 development standard, while the numeric value of the overall development is 1.31:1.

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

The proposed amended development exceeds the maximum residential FSR by 0.06 which represents a variation of 4.8%.

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 that:

- (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 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*

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?

A development that strictly complies with the FSR standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The proposal would be fully compliant with the FSR standard but for the inclusion of the floor area of additional basement car parking spaces which are provided above the minimum car parking requirement of Council.
- The additional basement car spaces have no visual impacts on the external built form of the building and they do not result in any above ground floor space or impacts on the building.
- The deletion of the additional car spaces could occur in order to achieve numerical compliance with the FSR standard and there would be no change to the design of the building above basement level at all. The building form would remain unchanged for all intents and purposes.
- The additional car spaces are proposed to be provided in order to minimise adverse impacts to the on-street car parking availability in the vicinity of the site and wider locality and to adequately service the anticipated staff and visitor car parking needs of the seniors housing development.
- The additional car parking will not result in adverse traffic impacts to the local road network.
- Council have shown an appropriate degree of flexibility in the application of the FSR control in the LGA. The proposed FSR variation does not increase the intensity of the development in such a way that it will give rise to any additional environmental impacts such as bulk, scale or overshadowing.
- There is negligible difference in the impacts between a building that strictly complies with the FSR control including:
 - Visual and acoustic privacy impacts: The arrangement of the building on the site will not generate significant privacy impacts or impacts that would be reasonably expected within the residential context. The deletion of additional car spaces from the basement to comply with the FSR control would have no effect on the privacy impacts associated with the development.
 - Visual impacts: The deletion of the additional car spaces from the basement to comply with the FSR control would have no effect on the amount of above ground floor space, the visual massing, the scale or the setbacks of the proposal.
 - Overshadowing impacts: Due to the form and siting of the development and the location of adjacent residential dwellings, the building as it is proposed will have minimal overshadowing impacts and complies with Council's solar access controls. The deletion of the additional car spaces from the basement to comply with the FSR control would have no effect on the above ground built form and no effect on shadows cast by the development.
- The proposal satisfies the objectives of the development standard (refer to Section 3.4.1 below).
- The proposal, inclusive of the FSR variation, better satisfies the objectives of the zone and the development standard.

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

No, a development that strictly complied with the standard would compromise the outcome of the development without discernible benefit given the non-compliance does not have significant adverse amenity or environmental impacts and the proposal remains consistent with the objectives of the standard.

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

It cannot be said that the FSR development standard has been abandoned, however Council has previously displayed an appropriate degree of flexibility in the application of the LEP 2011 FSR control.

The proposed FSR variation does not increase the intensity of the development in such a way that it will give rise to any additional environmental impacts such as bulk, scale or overshadowing. It can therefore be said that the proposed development is consistent with previous variations to the FSR standard.

3.2.4 Is the zoning of the land unreasonable or inappropriate?

The zoning of the land 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.

Compliance with the FSR control would not alter the above ground form of the proposed building.

The site area is 8,307.5m² and the gross floor area, GFA of the amended development is 10,906m². This equates to an FSR of 1.31:1.

As stated above, the proposal would be fully compliant with the FSR standard but for the inclusion of the floor area of the proposed additional basement car parking spaces which are provided above the minimum car parking requirement of Council.

Specifically, the proposal includes 120 car spaces within the basement of which 41 spaces are provided above the minimum 79 car spaces required by Council for the development.

The GFA associated with the additional 41 car spaces is 521m². The deletion of the 41 spaces would reduce the GFA of the proposed development to 10,385m², and reduce the FSR to 1.25:1 which would be compliant with the allowable FSR under Clause 4.4(2E).

Further, there is 322m² included in the FSR calculation which is comprised of the proposed 'men's shed', kitchen, workshop and laundry which are all elements below ground level within the basement levels. In total, there is 843m² of GFA which is below ground level, such that the numeric value of the FSR of the part of the proposed development which is above the ground level is 1.21:1 and is less than the 1.25:1 development standard.

The deletion of the basement car spaces (and the other below ground level facilities included in FSR) would have no effect upon the external appearance of the building or the buildings' contribution and or relationship with the streetscape.

The deletion of the car spaces would not alter the impacts of the proposal with respect to overshadowing, visual massing, bulk and scale, visual privacy or view loss.

Importantly the additional car spaces are expected to result in a considerable positive public benefit and positive impact upon the local on-street parking arrangements. Specifically, the proposed additional car spaces are aimed at ensuring that there will be adequate on-site car parking to service the facility during the expected peak visitation times and staff change over periods.

The non-compliance is unlikely to result in adverse amenity impacts to the neighbouring properties and the proposed development complies with the objectives of the R2 zone and Clause 4.4 of the LEP.

In summary, complying with the FSR control will provide no additional benefit and would result in a poorer planning outcome for the site, particularly with respect to the impacts upon on-street parking capacity within the vicinity of the site.

Council would not be setting a precedent by varying the FSR control as proposed and the development as proposed is consistent with the provisions of orderly and economic development.

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

The proposal remains consistent with the objectives of the FSR standard outlined in subclause 4.4(1) despite the non-compliance demonstrated 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 above ground floor area of the proposed development complies with the FSR standard applicable to seniors housing development at the site and the proposed built form is of a scale, density, building footprint and density that is reasonable envisaged by the applicable statutory controls and relevant policies.

The non-compliant GFA element is manifest in the additional 41 basement car spaces proposed. The effect of additional car spaces to service the development has been assessed within an Assessment of Traffic and Parking Implications report and found to be consistent with the expected parking requirements of the proposed facility and was also found not to result in adverse impacts upon the operation of the local road network.

The additional GFA will have a positive impact in that it will minimise the development's impact upon the capacity and availability of on-street parking in the vicinity of the site to the benefit of local residents while having negligible impacts upon the functioning of intersections and the road network within the vicinity of the site.

In this respect the proposed seniors housing facility represents a land use that is of an intensity that is consistent with the intensity envisaged for the site by the relevant strategic planning documents and is consistent with the desired future character for Rockdale as envisaged in the relevant planning provisions.

The proposal is consistent with this objective.

- *to minimise adverse environmental effects on the use or enjoyment of adjoining properties,*

The proposed non-compliant GFA is accommodated as car parking spaces within the basement of the proposed development and as such will have no adverse impacts upon the adjoining properties in terms of bulk and scale, visual massing, view loss, overshadowing and visual privacy.

Additionally the traffic generation associated with the proposed parking arrangements at the site has been assessed and it is unlikely to result in significant adverse impacts upon the operation of the local road network.

The proposal is consistent with this objective.

- *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 design of the seniors housing development generally accords with the key built form controls applicable to the site with respect to scale, setbacks and landscaping. The development, though greater

in scale than some adjacent residential development, is consistent with the scale and type of development envisaged for the site within the site specific provisions of the recently amended RLEP.

The amended design of the building refines the relationship that it has with adjacent low density residential development and provides a suitable transition from the 3 and 4 storey elements to the adjacent 1 and 2 storey dwellings and 3 and 4 storey residential flat buildings.

The development site is relatively large and the proposed design incorporates setbacks to each boundary so that appropriate building separation distances are achieved on all sides of the development.

Finally, and as previously detailed, the non-compliant GFA element is manifest in the additional basement car spaces proposed. The deletion of the car spaces would have no impact on the visual relationship of the building and the existing character of the locality.

The proposal is consistent with this objective.

3.4.2 Objectives of the zone

The subject site is zoned R2. The objectives of the zone are:

- *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 ensure that land uses are carried out in a context and setting that minimises any impact on the character and amenity of the area*

The proposal is consistent with the objectives for the following reasons:

- Seniors housing is a critical component of the housing needs of the community. The proposal seeks to provide a significant contribution and increase in the supply of seniors housing accommodation within the local community and the wider LGA.
- The proposal is generally compliant with the applicable built form controls, and where it is not, only relatively minor variations are proposed. The minor variations will allow for the realisation of a high amenity facility without any associated adverse impacts.
- The locality is comprised of a mixture of building forms and building scales, and while the development may be higher than some adjacent single dwellings, the development is nonetheless consistent with the scale of the development envisaged by the relevant height controls for the site and is responsive to the varied scale of one to four storey development in the locality. The amended proposal provides an appropriate transition to development to the east, north and south of the site.
- The proposal for seniors housing represents an important land use which will make an important contribution to the residential accommodation needs of the community. Additionally, the associated ancillary facilities proposed at the site will provide the future residents with services and facilities which will assist in meeting their day to day needs.
- The amended development has been designed to respond to the mixed scale residential nature of the locality. The design responds to the busy nature of Harrow Road and the higher scale of development along that road. The proposed building transitions down in scale at the rear towards the east and residential development in Frederick Street. The proposal provides considerable architectural articulation to the southern and northern facades and appropriate building separation to the one and two storey scale dwellings in Goyen Avenue and Bowlers Avenue. Finally, the proposal has been arranged to avoid significant adverse impacts upon adjacent residential properties in terms of visual massing, overshadowing, view loss and privacy impacts.

The proposal as amended is consistent with the objectives of the R2 Low Density Residential zone.

3.5 Whether contravention of the development standard 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 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 strictly complying development would result in a poorer planning response and development outcome 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.

Strict compliance with the development standard would not result in discernible benefits to the amenity of adjoining sites or the public. Further, the proposal satisfies the zone and development standard objectives, and principally maintains the scale and density envisaged for seniors housing development at the site.

The development as proposed is consistent with the provisions of orderly and economic development and strict compliance with the standard is not required in order to achieve compliance with the objectives.

3.7 Is there public benefit in maintaining the development standard?

Generally speaking, there is public benefit in maintaining standards. However, there is also a public benefit in maintaining a degree of flexibility in specific circumstances.

In the current case, strict compliance with the FSR would result in a poorer planning outcome.

Strict compliance with the FSR standard would result in a development that would likely result in additional adverse impacts (particularly with respect to on-street parking availability within the vicinity) compared to the proposed development.

There is, in the specific circumstances of this case, no public benefit in maintaining the development standard, as the proposed development results in a better planning outcome for the site and the locality.

3.8 Is the objection well founded?

For the reasons outlined in the previous sections, it is considered that the objection is well founded in this instance and that granting 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

The proposed FSR variation is considered appropriate to the context and circumstances of the site, and does not result in a scale or type of development that is inconsistent with the scale and character of development envisaged for the site within the applicable statutory provisions and strategic planning documents.

Contextually, the proposal will provide a development of a scale, form and density that appropriately responds to the site's location and the purpose of the seniors housing development. On an urban design basis, the outcome will be appropriate to the locality.

The proposal does not represent an overdevelopment of the site and the height and proposed intensity (density) is generally consistent with the site's desired future character.

The proposal could be made to numerically comply with the FSR standard by deleting additional car parking spaces without making any change at all to the design or form of the above ground building.

This submission satisfies the provisions of 4.6(3)(a), 4.6(3)(b), 4.6(4)(a)(i) and 4.6(a)(ii) of the LEP 2011 as it has been demonstrated that compliance with the FSR development standard is both unnecessary and unreasonable in the circumstances of this case, there is sufficient planning grounds to justify contravening the standard, the development will be in the public interest and it is consistent with the objectives of the standard and the objectives for development within the R2 Low Density Residential zone.