

Amended Clause 4.6 Variation Request
Nos. 180-186 Burwood Road, Burwood
Clause 4.4 – Floor space ratio

1. Floor space ratio control

Clause 4.4 (2) of Burwood Local Environmental Plan 2012 (BLEP 2012) relates to maximum permitted floor space ratio for a site and refers to the *Floor Space Ratio Map*. The relevant map identifies the floor space ratio controls that apply to the site as shown in the extract of the map in Figure 1 (with the subject site outlined in red). A maximum floor space ratio of 6:1 applies to the site.

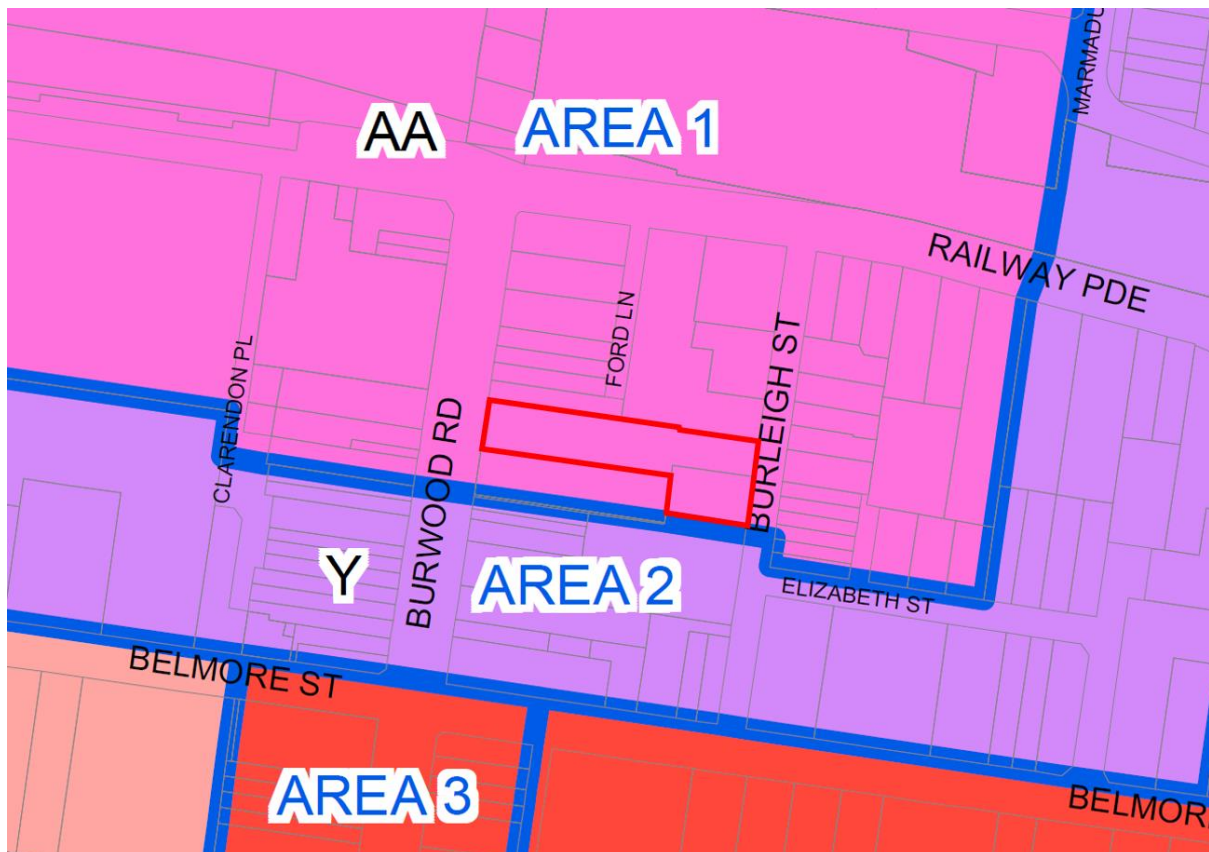


Figure 1: Extract from Floor Space Ratio Map to BLEP 2012 (AA = 6:1)

Floor space ratio is defined in BLEP 2012 as:

“(2) Definition of “floor space ratio”

The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area”

The floor space ratio control is a “development standard” to which exceptions can be granted pursuant to clause 4.6 of the LEP.

2. Proposed variation to height of building requirement

A survey plan of the site indicates that the site area is 1,632.60m². The proposed GFA is 10,770m² which equates to an FSR of 6.6:1 and is therefore non-compliant. The additional 0.6:1 FSR equates to a variation of 10%.

3. Clause 4.6 to BLEP 2012

The objectives and provisions of clause 4.6 to BLEP 2012 are as follows:

“4.6 Exceptions to development standards

(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,

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

(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. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(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.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*

- (a) a development standard for complying development,*
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which [State Environmental Planning Policy \(Building Sustainability Index: BASIX\) 2004](#) applies or for the land on which such a building is situated,*
- (c) clause 5.4,*
- (ca) clause 4.3A(2)."*

The development standards in clause 4.4 are not "expressly excluded" from the operation of clause 4.6.

Objective 1(a) of clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This request addresses the requirements of subclauses 4.6(3) and 4.6(4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in subclause 4.6(6).

Objective 1(b) of clause 4.6 is addressed later in this request.

The objectives of clause 4.4 floor space ratio are as follows, inter alia:

- "(a) to enable development density and intensity of land use to achieve an appropriate urban form,*
- (b) to focus higher development density and intensity of land use in the inner part of the Burwood Town Centre and to provide a transition in development density and intensity of land use towards the edge of the Burwood Town Centre."*

As previously noted, the *Floor Space Ratio Map* nominates a maximum floor space ratio of 6:1 on the site. It is hereby requested that an exception to this development standard be granted pursuant to clause 4.6 so as to permit a floor space ratio of 6.6:1, as described in Section 2.

In order to address the requirements of subclause 4.6(4)(a)(ii), the objectives of clause 4.4 are addressed in turn below.

Objective (a): "to enable development density and intensity of land use to achieve an appropriate urban form"

Despite non-compliance with the numeric standard, the additional density has been arranged and configured within the site to achieve an urban form that is appropriate to the emerging context, as described below:

- The numeric non-compliance is relatively minor in percentage terms and therefore the visual bulk of the proposal is not substantively different to a compliant development. Indeed, it is submitted that the difference in visual bulk between a compliant development and the building proposed would be largely imperceptible when viewed in the streetscape and context of the anticipated building form throughout the Burwood Commercial Centre.
- The streetscape analysis prepared by UrbanLink Architecture and submitted with the application considers the likely nature and configuration of future development on adjoining sites, taking into account applicable planning controls, lot sizes, ownerships patterns and the like. The analysis

demonstrates that the proposal will achieve a density and scale that is characteristic of the anticipated urban form, despite numeric non-compliance with the FSR control.

- An important factor that determines the apparent density of a development is the degree of façade articulation and the quality and arrangement of external treatments. Both the commercial tower and the residential tower incorporate recessed balconies at street facing elevations which serve to ameliorate the visual bulk of the development. Further façade articulation is achieved via appropriately proportioned window openings and by ‘framing’ portions of the façade to break up the verticality of the building. Solid to void ratios and the combination of external materials achieves a fine grained appearance applies to the slender towers to reduce the overall perception of bulk.
- The intensity of land use anticipated from the proposal will have no detrimental impacts to the function and form of the urban environment in which it is located. The proposal provides active frontages to both streets which are compatible with the level of streetscape activity in the Burwood Commercial Centre. Vehicle access and egress is confined to the Burleigh Street frontage to optimise pedestrian activity in the main street of Burwood Road. All necessary parking and servicing space as well as plant, equipment and storage required by the development can be accommodated within the basement without substantially adding to the bulk and scale of the building overall. Adequate common open space areas are provided for the future building occupants including a central courtyard space which creates opportunities for natural ventilation and solar access within the site as well as for future redevelopment projects on neighbouring sites.
- The overall form of the development as two slender towers creating a street wall to each street and a central space for natural ventilation and solar access sets a highly functional, practical and desirable precedent for the redevelopment of neighbouring sites and will fit within the existing and desired future streetscape and high density urban environment envisaged by planning controls for the commercial core.

In summary, the proposal is considered to represent a development density that will achieve an appropriate urban form for the site context within the commercial core of the evolving city centre, despite numeric non-compliance with the floor space ratio development standard. Accordingly, the proposal satisfies Objective (a) of the floor space ratio standard.

Objective (b): “to focus higher development density and intensity of land use in the inner part of the Burwood Town Centre and to provide a transition in development density and intensity of land use towards the edge of the Burwood Town Centre.”

Despite minor non-compliance with the numeric control, the proposal will achieve a development density and intensity that is appropriate within the Commercial Core Area of Burwood. The subject site is situated within the area identified in the Burwood Development Control Plan 2012 (DCP 2012) as the Burwood *Commercial Core Area*. To the south of the site is land identified as the *Middle Ring Area* and further south the land is identified as the *Perimeter Area*. The permitted FSR and building height within each of these areas differs to achieve a transition in height and scale that is progressively reduced moving outwards from the commercial core. Although marginally non-compliant with FSR, the proposal will contribute to this desired transitional arrangement as it will have a density appropriate to the commercial core and a higher density and scale than anticipated by future development to the south.

As described above, the proposal will achieve a scale and density that is consistent with the desired density and intensity of development in the Burwood Commercial Core, despite minor non-compliance

with the floor space ratio standard. Accordingly, the proposal satisfies Objective (b) of the floor space ratio standard.

Clause 4.6(4) also requires consideration of the relevant zone objectives. The objectives of Zone B4 Mixed use are as follows:

- *“To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.”*

The proposed development is demonstrably consistent with the relevant zone objectives in that:

- The proposal replaces a large disused warehouse space and dated multi-storey function centre with a significant mixed-use development comprising high quality residential apartments and a large area of commercial floor space suitable for a range of office, business and retail uses and is therefore consistent with the zone objective to provide a mixture of compatible land uses.
- The site is well located in relation to public transport services being within 100m of Burwood Railway Station, less than 100m to high frequency bus stops and within the Commercial Core of the Burwood Commercial Centre. The site is therefore highly suitable for the proposed mixed-use development with access to public transport and walking opportunities potentially benefitting the commercial tenants and their customers as well as residents and their visitors.

For these reasons the development proposal meets the relevant objectives for development in Zone B4.

4. Sufficient environmental planning grounds

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, as discussed above it is considered that, despite non-compliance with the floor space ratio standard, the proposed density and subsequent urban form are compatible with the emerging character of the locality and also consistent with the desired transitional arrangement of development in the Burwood Town Centre. The intensity of development will be compatible with the capacity of established infrastructure and utilities and optimises efficient use of established services and facilities in the commercial centre.

On “planning grounds” and in order to satisfy that the proposal meets objective 1(b) of clause 4.6 in that allowing flexibility in the particular circumstances of this development will achieve “*a better outcome for and from development*”, it is considered that:

- The variation specifically relates to additional residential floor space (as explained in more detail in Annexure E). The proposed variation allows for additional residential floor space in a well-established Key Strategic Centre which is consistent with the strategic goals of *A Plan for Growing Sydney*. Additional housing, particularly housing that contributes to the quantity of affordable housing stock in key Strategic Centres, is a positive planning outcome and one that is consistent with the State Government’s strategic direction.
- The notion of concentrating residential accommodation (and thereby increasing population densities) around transport hubs and locations with access to places of employment, services and facilities, aligns with contemporary planning theory. The proposed floor space ratio variation allows for a greater number of dwellings to be provided in a well-connected location, thus encouraging patronage

of public transport, reducing travel times for occupants of those dwellings and subsequently enhancing quality of life. In this regard, the proposal is considered to be superior to a FSR compliant development in that a greater number of residents will enjoy the benefits of well-located accommodation.

- As previously noted the bulk and scale of the proposal is demonstrated to be compatible with, and sensitive to, both existing and likely future development in the streetscape. In this regard, it is submitted that the additional floor space proposed is a superior planning outcome with significant benefits associated with the provision of additional housing and no significant adverse impacts in terms of visual bulk, streetscape character, traffic and parking and the provision of ancillary plant and equipment for both residential and commercial uses.
- The additional floor space is proposed in conjunction with a voluntary planning agreement in accordance with the Council's Policy '*Carrying out bonus development in the public interest*' whereby additional residential floor space may be granted subject to a monetary contribution to the Council which is used for public infrastructure works. There is a clear and tangible public benefit associated with the monetary contribution proposed in conjunction with the development.

For the reasons listed above, it is considered that there are sufficient environmental planning grounds to support a variation to the floor space ratio standard, particularly when one considers that the bulk and scale of a strictly compliant development is not substantively different to that which is proposed and the benefits associated with the additional housing is consistent with the State Government's strategic direction for Burwood. In addition, there is a significant public benefit connected with the monetary contribution made through the proposed VPA.

5. Insistence on compliance is unreasonable and unnecessary

In regards to Clause 4.6(3)(a), in *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

" An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."

The judgement goes on to state that:

" The rationale is that 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)."

Preston CJ in the judgement then expressed the view that there are 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, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

3. *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *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;*
5. *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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Having regard to all of the above, it is our opinion that compliance with the floor space ratio development standard is unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone.

On environmental planning grounds and in addition to the relevant LEP objectives, the proposal will result in a high quality mixed use development with no adverse impacts on the amenity of nearby properties and demonstrating design excellence. The proposal will result in improvements to the streetscapes and function of both Burwood Road and Burleigh Street and provides an improved setting and layout for the potential redevelopment of adjoining sites through establishing a central courtyard space which enhances natural ventilation and solar access.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of clause 4.6(3) are satisfied and Council has the power to grant variation to the FSR development standard.