



11-13 Solent Circuit, Baulkham Hills

## Clause 4.6 – FSR Development Standard

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## 11-13 SOLENT CIRCUIT, BAULKHAM HILLS

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## 1.0 CLAUSE 4.6 REQUEST - FSR DEVELOPMENT STANDARD

### 1.1 Introduction

The Site has been subject to of a recent Planning Proposal (LEP Amendment 29) which resulted in an increase in building height from RL 116m to RL 143.20m and a corresponding increase in the floor space ratio from 1.49:1 to 2.42:1. In support of the Planning Proposal, concept plans were submitted to Council demonstrating the form of development that could be achieved under the proposed amendments to the planning controls which previously governed the site. The proposed floor space ratio of 2.42:1 was directly informed by the concept plans rather than any other specifically identified limitation. The Planning Proposal also indicated that the site could accommodate approximately 240 apartments.

Development Application 1395/2016/JP for the demolition of existing structures and the construction of two mixed use buildings containing office and retail space as well as residential apartments at 11-13 Solent Circuit, Baulkham Hills was subsequently lodged with The Hills Shire Council in March 2016. The development application as lodged had a gross floor area of 31,941 square metres, a floor space ratio of 2.66:1 and comprised 267 residential apartments.

The proposal has subsequently been amended in response to various concerns raised by Council which has resulted in a reduction in gross floor area by 1,502 square metres to 30,439 square metres and a corresponding reduction to the proposed floor space ratio to 2.536:1. The amendments have also resulted in a reduction of 20 apartments to 247 apartments. The amended proposal is contained wholly within the concept plan envelopes which informed the Planning Proposal with significant areas well within the boundaries of the envelopes.

This request for an exception to a development standard is submitted in respect of the floor space ratio development standard contained within Clause 4.4(2) of the Hills Local Environmental Plan 2012 (HLEP 2012). The request relates to the amended application for the construction of a mixed use retail and residential development at 11-13 Solent Circuit, Baulkham Hills with a floor space ratio of 2.536:1 which represents a 4.8% variation to the standard.

The proposed development is wholly contained within the concept plan envelopes which informed the recent Planning Proposal, represents a particularly high quality architectural outcome with significant public benefits, and the minor variation to density does not result in any adverse impact. Accordingly, the site has the environmental capacity to accommodate the proposed density and strict compliance with the floor space ratio control would be unreasonable and unnecessary in this particular circumstance.

### 1.2 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the HLEP 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the HLEP 2012 or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant requests that the floor space ratio development standard be varied.

### 1.3 Development Standard to be varied

Clause 4.4 states:

- (1) The objectives of this clause are as follows:
  - (a) to ensure development is compatible with the bulk, scale and character of existing and future surrounding development,
  - (b) to provide for a built form that is compatible with the role of town and major centres,
- (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](#).

Floor space ratio is defined under Clause 4.5 of the HLEP as:

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

The maximum floor space ratio shown for the land on the Map for the site to which the proposed building relates is 2.42:1.

### 1.4 Extent of Variation to the Development Standard

The proposal has a floor space ratio of 2.536:1 which exceeds the standard of 2.42:1 by 4.8%. This request relates to provision of an additional 1,346 square metres above the permissible gross floor area of 29,093 square metres.

### 1.5 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council*. [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

The Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 has recently required additional ways of establishing that compliance is unreasonable or unnecessary beyond consistency with the standard and zone objectives to be established. For completeness, this request addresses the five part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The specific objectives of the floor space ratio development standard, as specified in clause 4.4(1) of the Hills Local Environmental Plan 2012 are identified below. A comment on the proposal's consistency with each objective is also provided.

- (a) to ensure development is compatible with the bulk, scale and character of existing and future surrounding development,

In considering the Planning Proposal for the site, Council identified that the likely built form (as represented in the concept plan drawings which accompanied the Planning Proposal) was considered to be an appropriate design response in this locality which is 260 metres from the future rail station, including view corridors to and from Bella Vista Farm. The contemplated built form was considered by Council to be consistent with State and Local strategic planning policies and directions on the basis that it is well-located to utilise planning and existing services and infrastructure given its central location in the Norwest Business Park and is within the 400m walking catchment of the future Norwest Rail Station. Furthermore, Council considered that the proposal would contribute significantly towards the provision of new dwellings and employment within the Norwest Precinct by 2036 as projected in the State Governments North West Rail Link Corridor Strategy.

The proposed amended development is contained wholly within the concept plan envelopes, both in plan and elevation, which informed the Planning Proposal and provides an urban development which is highly appropriate for its central location within the B2 Local Centre zone. The proposed development is of a scale and density contemplated by the State Governments North West Rail Link Corridor Strategy and will be a gateway development to Norwest lakes and Norwest Marketown. Accordingly, the scale and density proposed is consistent and compatible with the future desired character of this precinct.

- (b) to provide for a built form that is compatible with the role of town and major centres,

The site is located within a B2 Local Centre zone which is also identified as a Strategic Centre within the State Government's A Plan for Growing Sydney. The Plan specifically identifies that the State Government will work in partnership with Councils to update planning controls to increase density, including changing floor space ratio allowances and building height controls to facilitate the expansion of markets in strategic centres including Norwest.

The proposed development provides a built form and density which is entirely consistent and compatible with the identified future strategic role for Norwest in providing strong economic growth, new housing and urban renewal around centres in Western Sydney.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objectives and purpose of the floor space ratio control are relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the proposed floor space ratio still results in a development which is compatible with the emerging scale of development within the visual catchment of the site and will sit comfortably with the future desired context of the site with no significant adverse impacts to adjacent properties.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objective of the floor space ratio control in this instance is to ensure that the development is compatible with the role of the site within a major centre and also that the bulk and scale of the development is compatible with the future desired context. Due to the design, location and configuration of the proposed development, the proposal successfully achieves these objectives and will provide a considered built form response given the sites location in a prominent position which signifies a gateway to the centre. However, strict compliance with the floor space ratio control would not result in any significant change to the perceived bulk and scale of the development given the minor nature of the proposed variation and would therefore only result in an unnecessary decrease in apartments in a location which is ideally suited for residential density. Strict compliance would therefore lead to a less satisfactory outcome as it would result a development which fails to fulfil the environmental capacity of the site. Accordingly, it is considered that strict compliance would in this instance diminish the achievement of the underlying objective of the floor space ratio control in this location which is specifically identified as a strategic centre which should accommodate increased density.

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;**

Council has adopted a flexible approach towards the amendment of floor space ratio controls via Planning Proposals in strategically significant locations which has resulted in the recent increase in the floor space ratio for the subject site from 1.49:1 to 2.42:1. However, the current floor space ratio of 2.42:1 was arrived at based on the gross floor area represented by the indicative or concept plan drawings submitted by the applicant in support of the Planning Proposal, rather than any other specific strategic reason. The proposed development remains true to the concept plan envelope (and in indeed is well within the envelope in some areas) however results in a slightly increased gross floor area as a result of an alternative and more efficient floor plan within the envelope when compared to the indicative scheme previously submitted. Given Council's historical adoption of a relatively flexible approach to the implementation of the floor space ratio development standard in appropriate circumstances where the objectives of the control are achieved, it is appropriate for this flexibility to be applied in this particular circumstance.

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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**

The proposed zoning of the land is considered to be reasonable and appropriate.

Strict compliance with the floor space ratio development standard is unreasonable and unnecessary in the circumstances of the case in that:

- The site is located within an important strategic centre as identified in A Plan for Growing Sydney and is a highly appropriate location for increased density, particularly having regard to its very close proximity to the forthcoming train station.
- The current floor space ratio of 2.42:1 was based on the gross floor area of the indicative plans within the envelope drawings which informed the Planning Proposal, which represented only one possible design for the site, rather than any other strategic basis. Having regard to this fact, where an alternative floor plan can be achieved but with a slightly higher gross floor area, strict compliance would be

unreasonable given that the proposed development is also contained wholly within the concept plan envelopes which informed the Planning Proposal and accordingly the bulk and scale of the development is consistent with the environmental capacity envisaged for the site by Council.

- The proposed minor variation to the floor space ratio control and the proposed density does not prevent achievement of the 9 principles of SEPP 65. Apartments within the development are provided with a high level of amenity as the proposal provides for cross ventilation, solar access, open space, deep soil and landscaping in accordance with the relevant requirements therefore strict compliance with the floor space ratio control is considered to be unnecessary and unreasonable to achieve an appropriate level of amenity within the development.
- There are no adverse impacts in terms of shadow, view, visual and acoustic privacy impacts to adjacent sites resulting from the proposed variation to the floor space ratio development standard which would warrant strict compliance.
- The development provides the required provision of car parking and will have an acceptable impact on local traffic conditions.
- The proposed variation allows for the most efficient and economic use of the land.
- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- The variation with the floor space ratio control does not prevent the achievement of a compatible relationship with the future surrounding context.
- Having regard to the planning principle established in the matter of Project Venture Developments v Pittwater Council [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

As the proposal is consistent with the objectives of the floor space control, compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

#### 1.6 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The following environmental planning grounds are sufficient to justify contravention of the development standard:

- The recently adopted uplift in height and floor space ratio for the site was directly informed by the concept plan which accompanied the Planning Proposal for the site which was intended to provide certainty for the consent authority in relation to the likely built form which would result from the uplift in height and floor space ratio. However, , it is understood that the gross floor area and resulting floor space ratio of 2.42:1 was specifically derived from a literal measurement of the indicative floor plans which accompanied the Planning Proposal which were only intended to demonstrate one possible option within the concept plan envelopes. Accordingly, there is no other strategic basis or other reason for the specific floor space ratio of 2.42:1 other than a measurement of one indicative option within the concept plan envelopes.
- Whilst the proposed development differs from the indicative scheme which accompanied the concept plan envelopes which informed the Planning Proposal, it is noted that the proposed development is nonetheless contained wholly within the concept plan building envelopes with some significant articulation also provided within the envelope. Accordingly, notwithstanding the minor variation to the



floor space ratio control, the proposed development is consistent with the bulk and scale anticipated for the site by Council when it increased the height and floor space ratio.

- The proposed variation to the floor space ratio control results in 247 apartments which is only 7 more apartments or 2.9% increase in yield, when compared to the indicative number of 240 which informed the Planning Proposal and subsequent floor space ratio figure. This increase in yield is insignificant in terms of impact and does not result in any meaningful change to the perceived density of the proposal.
- The proposed minor variation to the floor space ratio control and the proposed density does not prevent achievement of the 9 principles of SEPP 65. Apartments within the development are provided with a high level of amenity as the proposal provides for cross ventilation, solar access, open space, deep soil and landscaping in accordance with the relevant requirements therefore strict compliance with the floor space ratio control is considered to be unnecessary and unreasonable to achieve an appropriate level of amenity within the development.
- There are no adverse impacts in terms of shadow, view, visual and acoustic privacy impacts to adjacent sites resulting from the proposed variation to the floor space ratio development standard which would warrant strict compliance.
- The development provides the required provision of car parking and the proposed variation to the floor space ratio control will not result in any acceptable impact on local traffic conditions.
- The proposed variation to the floor space ratio control will provide an improved diversity and quantum of housing within a strategically identified site which will assist in meeting demand generated by changing demographics and housing needs in an existing urban area with excellent access to transport and services.

Having regard to the fact that the proposed development is contained wholly within the concept plan building envelopes for the site, provides for an appropriate level of amenity for future occupants and does not result in adverse impacts to adjacent properties or the locality, the subject site is demonstrated to have the environmental capacity to absorb the proposed density and there are sufficient environmental planning grounds to justify contravening the development standard.

#### 1.7 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

#### 1.8 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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.

Whilst the objectives of the development standard have already been addressed previously in this written request, for the purpose of completeness these objectives are again considered below in specific reference to Clause 4.6(4)(a)(ii).

### Objective of the Development Standard

The specific objectives of the floor space ratio development standard, as specified in clause 4.4(1) of the Hills Local Environmental Plan 2012 are identified below. A comment on the proposal's consistency with each objective is also provided.

- (a) to ensure development is compatible with the bulk, scale and character of existing and future surrounding development,

In considering the Planning Proposal for the site, Council identified that the likely built form (as represented in the concept plan which accompanied the Planning Proposal) was considered to be an appropriate design response in this locality which is 260 metres from the future rail station, including view corridors to and from Bella Vista Farm. The contemplated built form was considered by Council to be consistent with State and Local strategic planning policies and directions on the basis that it is well-located to utilise planning and existing services and infrastructure given its central location in the Norwest Business Park and is within the 400m walking catchment of the future Norwest Rail Station. Furthermore, Council considered that the proposal would contribute significantly towards the provision of new dwellings and employment within the Norwest Precinct by 2036 as projected in the State Governments North West Rail Link Corridor Strategy.

The proposed amended development is contained wholly within the concept plan envelopes, both in plan and elevation, which informed the Planning Proposal and provides an urban development which is highly appropriate for its central location within the B2 Local Centre zone. The proposed development is of a scale and density contemplated by the State Governments North West Rail Link Corridor Strategy and will be a gateway development to Norwest lakes and Norwest Marketown. Accordingly, the scale and density proposed is consistent and compatible with the future desired character of this precinct.

- (b) to provide for a built form that is compatible with the role of town and major centres,

The site is located within a B2 Local Centre zone which is also identified as a Strategic Centre within the State Government's A Plan for Growing Sydney. The Plan specifically identifies that the State Government will work in partnership with Councils to update planning controls to increase density, including changing floor space ratio allowances and building height controls to facilitate the expansion of markets in strategic centres including Norwest.

The proposed development provides a built form and density which is entirely consistent and compatible with the identified future strategic role for Norwest in providing strong economic growth, new housing and urban renewal around centres in Western Sydney.

### Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B2 Local Centre and SP2 Infrastructure under The Hills Local Environmental Plan (LEP) 2012.

The B2 Local Centre zone objectives are:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.

The proposed development provides for a genuine mixed use development comprising a significant provision of retail, business and entertainment uses with 6,000 square metre of non-residential space which will be used for a variety of restaurants, retail and office uses. These uses will serve the needs of people who live, work and visit the area. This quantum of non-residential floor space will also serve to significantly increase employment opportunities on the site which is in an ideal location adjacent in the centre of the Norwest business park and very close proximity to the forthcoming train station. This central location of the development will maximise public transport patronage and will strongly encourage walking and cycling.

The amended proposal has been demonstrated to be consistent with both the objectives of the floor space ratio development standard as well as the objectives of the zone and therefore the consent authority can be satisfied that the amended proposal is in the public interest. Furthermore, the public interest is appropriately served by maximising the provision of jobs and housing provided by the development, within the identified environmental capacity of the site, to ensure that it optimises the value of the public investment in transport infrastructure within this strategically important location.

### 1.9 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

- (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.

The floor space ratio control which applies to the site was based on some indicative floor plans within building envelopes which supported the Planning Proposal for the site. The proposed development is also contained wholly within those building envelopes, however, due to a more efficient design has been able to achieve a slightly increased density. Therefore, the proposed floor space ratio is within the environmental capacity of the site and requiring strict compliance with the floor space ratio standard in this instance would only serve to reduce housing supply within a specifically identified strategic centre without any reasonable basis. The public interest is served by ensuring that the public investment in transport infrastructure such as the new train station is maximised within the environmental capacity of the land.

Accordingly, this is a circumstance where flexibility in the application of the floor space ratio standard is appropriate as it will achieve a better outcome by virtue of a more efficient development of the site which is within an identified Strategic Centre. The more efficient development of the site is consistent with the specific Object 5(a)(ii) of the Environmental Planning & Assessment Act 1979 being the promotion and co-ordination of the orderly and economic use and development of land and will facilitate an increase in housing supply in close

proximity to a range of services, employment and transport infrastructure as identified by Action 2.1.1 of A Plan for Growing Sydney.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the floor space ratio development standard will achieve a better outcome in this instance in accordance with objective 1(b).

#### 1.10 Conclusion

Strict compliance with the floor space ratio development standard contained within clause 4.4(2) of the Hills Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. In addition there are sufficient environmental planning grounds to justify the variation. In this regard it is reasonable and appropriate to support the proposed minor variation to the floor space ratio development standard in this circumstance.