

Request to Vary a Development Standard Clause 4.6



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22/03/2016

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22/03/2016

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1.0 Background

Development Application (DA873/2015) seeks consent to subdivide proposed Lot 4 into two lots; Lot 401 and Lot 402. Proposed Lot 4 is approved, but not yet registered, under DA571/2014 being the subdivision of Lot 7 in DP1077852 and part of Lot 8 in DP1077852.

Development Application 571/2014 was approved by the Joint Regional Planning Panel on 11 February 2015. Under this consent, approval was granted for:

- demolition of some existing structures;
- earthworks and remediation;
- infrastructure delivery, including roads, services and stormwater systems;
- landscaping;
- building envelopes; and
- subdivision of the site into five (5) development lots including Lot 4.

DA571/2014 was accompanied by a request to vary Development Standards under Clause 4.6 of the *Parramatta Local Environmental Plan 2011* (PLEP 2011). That request to vary the height and floor space across the site was supported by Council and approved by the JRPP at the time.

The application currently under assessment by Council does not propose any significant modification to the building envelopes or any change to the gross floor area approved under DA/571/2014.

As the approved and proposed building envelope exceeds the maximum building height and FSR allowed under the provisions of the PLEP 2011 a further request to again vary these Development Standards under Clause 4.6 is provided despite there being no change to the approved height or floor space.

2.0 Request to Vary a Development Standard

Clause 4.6 of the PLEP 2011 allows Parramatta City Council (PCC) to grant consent for development even though the development contravenes a development standard imposed by the PLEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- 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.

The consent authority's satisfaction as to those matters must be informed by the objective of providing flexibility in the application of the relevant control.

The Land and Environment Court has established questions to be addressed in variations to developments standards lodged under *State Environmental Planning Policy 1 – Development Standards* (SEPP 1) through the judgment of Justice Lloyd, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89.

The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 (Wehbe).

An additional principle was established in the decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (Four2Five) which was upheld by Pain J on appeal.

These tests and considerations can also be applied to the assessment of variations under clause 4.6 of the PLEP. This Clause 4.6 variation request is set out using the relevant principles established by the Court.

2.1 Development Standard to be Varied

Variance of two Development Standards is sought, these are:

- 4.3 Height of buildings; and
- 4.4 Floor space ratio.

2.1.1 Height of Buildings

Clause 4.3 Height of buildings specifies that,

‘The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.’

The permissible maximum height varies across the site from 31m (U1) to 40m (W) to 48m (X) as shown in **Figure 1** below.

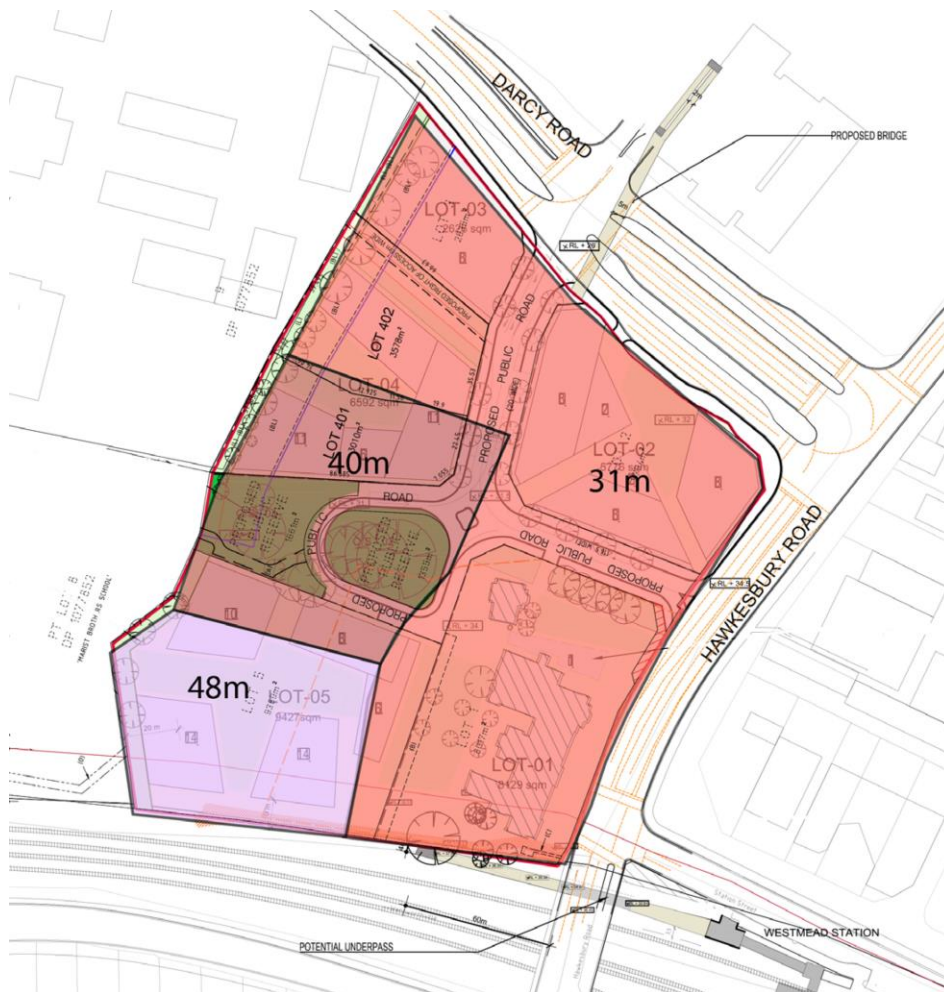


Figure 1 – HOB LEP Map

Source: Parramatta LEP, COX Richardson base plan and JBA overlay

The proposed development does not comply with the 31m maximum height standard in that the 12 storey north-south building envelope extends into the 31m height zone within proposed Lot 402. In addition, it is proposed that plant areas be allowed to project above the maximum permissible height. The variation is shown in **Figure 2** below.

Note that potential height exceedances that fall outside Proposed Lot 401 and Proposed Lot 402 have been previously approved (as has the height exceedance for proposed Lot 4). This Clause 4.6 request applies only to the potential height and FSR exceedances that could occur with the subdivision of Lot 4 into Lot 401 and proposed Lot 402.



Figure 2 – HOB Variation **UPDATE**

Source: Cox Richardson

2.1.2 Floor Space Ratio

Clause 4.4 Floor space ratio specifies that,

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

The permissible FSR varies across the site from 1.5:1 to 3:1 to 3.5:1 and 4:1 as shown in **Figure 3** below. The applicable FSR standards for consideration within this application are 3.5:1 and 4:1.

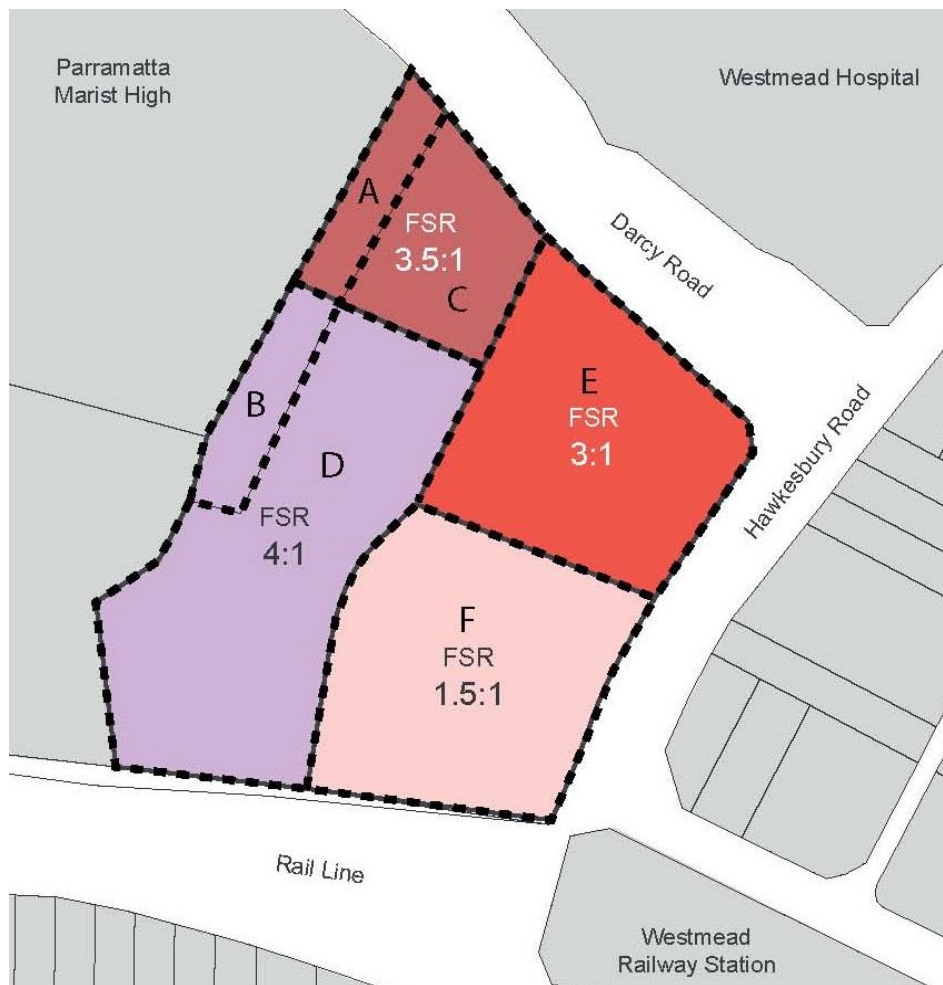


Figure 3 – FSR LEP Map
Source: PLEP

The FSR across the site complies with the maximum FSR for the precinct (see **Table 1**). The amount of floor space proposed to be provided within each of the four floor space zones however varies with zone F not achieving the maximum floor space but with the unused floor space being reallocated to the other three zones. The relative amounts of floor space for each of the zones is set out in **Table 1**.

The areas of the parcels identified in the FSR LEP Map have been calculated by overlaying the map on the Cox Richardson Master Plan. Accordingly, the areas are not based on any technical survey information, and it is therefore considered that the resulting FSRs are approximate only.

Table 1 – FSR Variation

Parcel	Area (m ²)	Previously Approved GFA (m ²)	Compliance	Proposed GFA (m ²)	Compliance
A + C	5,935	24,520	LEP FSR 3.5:1 4.1:1 proposed Over (0.6:1) – non-compliant		
B + D	14,396	57,280	LEP FSR 4:1 4:1 proposed Equal – complies		
E	9,677	31,270	LEP FSR 3:1 3.2:1 proposed Just over (0.2:1) – non-compliant	No Change	No Change
F	10,405	8,600	LEP FSR 1.5:1 0.83:1 proposed Well under - complies	No Change	No Change
Total / Average	40,413m²	121,670 m² (permissible maximum GFA = 122,995m²)	Average FSR site wide as proposed = 3:1 LEP FSR average 3:1		Average FSR site wide as proposed = 3:1 LEP FSR average 3:1

The 5 lots approved under Consent 571/2014 were allocated the following floor space:

Table 2 – Approved Land Use, GFA and FSR

Indicative Land Use	Indicative GFA (m ²)					Total
	Lot 1	Lot 2	Lot 3	Lot 4	Lot 5	
Lot Area	7,682	5,753	2,635	6,588	9,560	
Education	5,000					5,000
Commercial		12,900	16,000			28,900
Retail		7,600				7,600
Health		2,400				2,400
Serviced Apartments		7,800				7,800
Residential (housing)				28,825	42,470	71,295
Total	5,000	30,700	16,000	28,825	42,470	122,995
FSR	0.65:1	5.34:1	6.07:1	4.38:1	6.45:1	

Proposed Lot 401 has an area of 3,010m² and proposed Lot 402 has an area of 3,578m². The maximum floor space ratio for each lot, and the floor space proposed is set out in **Table 3** below.

Table 3 – FSR for Each Proposed Allotment

Proposed Lot	Permitted FSR	Area (m ²)	Proposed GFA (m ²)	Proposed FSR
401	4:1	3,010	17,500	5.8:1
402	Part: ■ 3.5:1 ■ 4:1	Part: ■ 3143 ■ 435	11,325	3.17:1
Total		6,588	28,825	4.38:1

The different FSR's as they apply to Lots 401 and 402 is shown in **Figure 4** below.

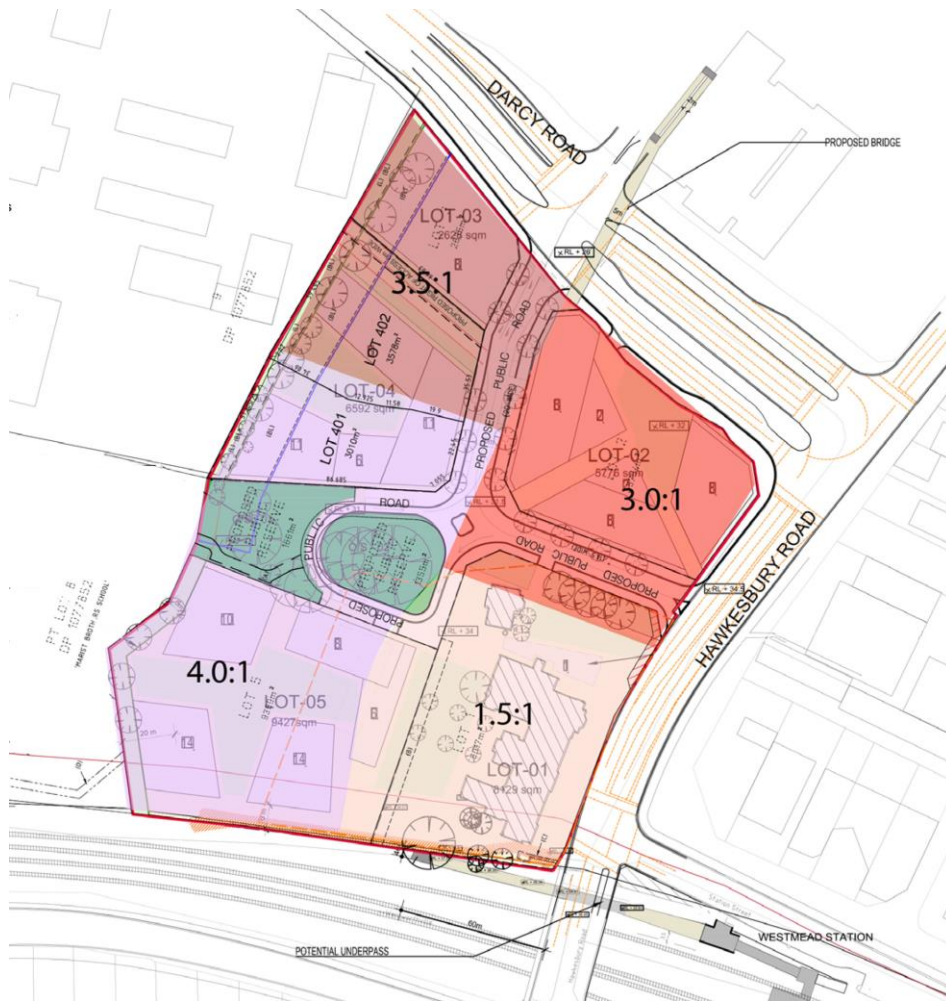


Figure 4 – FSR LEP Map and Proposed Subdivision Layout
 Source: Parramatta LEP, COX Richardson base plan and JBA overlay

3.0 Justification for Contravention of the Development Standard

3.1 Site Context

The approved redevelopment of the site will allow for the provision of a premier transit orientated development which will bring added value to the broader community through the creation of new jobs and housing opportunities and a new retail focus for the Westmead Precinct, as well as enhancing access to public transport and services.

When development of the site is complete, the precinct will:

- create a vibrant centre with a mix of jobs, retail and housing;
- support the wider precinct's role as a specialist medical, research and education hub;
- take advantage of the site's strategic location;
- provide links to the adjoining Westmead Hospital, schools and key uses; and
- facilitate access to public transport nodes including Westmead Railway Station and the T-Way.

As noted above, a Stage 1 development application has previously been approved to facilitate the redevelopment of the site. The application currently under assessment seeks to modify the approved development, but not to seek any additional height or floor space.

3.2 Public Benefit

Clause 4.6(4)(a)(ii) of the PLEP requires 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.

The proposed development has been assessed against the objectives for the *B4 – Mixed Use* zone below. Despite the proposed non-compliance with the maximum building height and FSR Development Standards, the proposal is considered to be in the public interest as it nevertheless satisfies the objectives of the zone and the objectives of the development standards.

3.3 Consistency with *B4 Mixed Use* Zone

The objectives of the *B4 – Mixed Use* zone are:

- 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.
- To encourage development that contributes to an active, vibrant and sustainable neighbourhood.
- To create opportunities to improve the public domain and pedestrian links.
- To support the higher order Zone B3 Commercial Core while providing for the daily commercial needs of the locality.

- To protect and enhance the unique qualities and character of special areas within the Parramatta City Centre.

The proposed development seeks to modify a previously approved development, within which the Height of Buildings and FSR Development Standards were varied under Clause 4.6. No change in land uses is proposed as part of this application. The development satisfies the objectives of the zone.

3.4 Justification for Variance

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, which provides case law relating to SEPP 1 Objections (similar to a clause 4.6 request to vary a standard), Chief Justice Preston expressed the view that there are five different ways in which a variation to a development standard might be shown as unreasonable or unnecessary. Of particular relevance in this instance is:

- 'way 1', that a development standard might be shown as unreasonable or unnecessary if 'the objectives of the standard are achieved notwithstanding non-compliance with the standard'; and
- 'way 3' that 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.

3.4.1 Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

Height of Buildings

Table 4 below demonstrates that the proposed variation to the height control will still result in a development that achieves the objectives of the PLEP development standard.

Table 4 – HOB Assessment Against Relevant LEP Objectives

Objective	Proposal
(a) to nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan	The proposed development maintains the approved building height and maintains the transition in built form within the area previously approved. The variation of the Development Standard will not affect compliance with this objective.
(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development	The proposed development maintains the building mass that was previously approved and does not disrupt views, result in a loss of privacy or solar access to existing development.
(c) to require the height of future buildings to have regard to heritage sites and their settings	There is suitable separation between new development and the heritage buildings of Lot 1. The variation of the Development Standard will not affect compliance with this objective.
d) to ensure the preservation of historic views,	The preservation of historic views will not be impacted by the proposed exceedance of the height controls. The proposed development does not change the building mass that was previously approved. The variation of the Development Standard will not affect compliance with this objective.
(e) to reinforce and respect the existing character and scale of low density residential areas	It is noted that the closest low density residential area is some distance to the south of the site across the rail corridor. Accordingly, the proposed development will have no impact on the character of this area.

Floor Space Ratio

Table 5 below demonstrates that the proposed variation to the FSR control will still result in a development that achieves the objectives of the PLEP development standard.

Table 5 – FSR Assessment Against Relevant LEP Objectives

Objective	Proposal
(a) to regulate density of development and generation of vehicular and pedestrian traffic	The proposed development complies with the maximum permissible site-wide GFA and does not proposed to change the GFA approved under consent 571/2015. Whilst the FSR of individual development lots exceeds the permissible maximum, the density of development is compliant and there is no additional generation of vehicular or pedestrian traffic. The variation of the Development Standard will not affect compliance with this objective.
(b) to provide a transition in built form and land use intensity within the area covered by this Plan	While the FSR of individual development lots exceeds the permissible maximum, the density of development provides a transition in built form and land use intensity for the area covered by the plan. The variation of the Development Standard will not affect compliance with this objective.
(c) to require the bulk and scale of future buildings to have regard to heritage sites and their settings	The bulk and scale of building has had regard to the heritage items and remains as previously approved. The variation of the Development Standard will not affect compliance with this objective.
(d) to reinforce and respect the existing character and scale of low density residential areas	It is noted that the closest low density residential area is some distance to the south of the site across the rail corridor. Accordingly, the proposed development will have no impact on the character of this area.

3.4.2 The Development Standard Has Been Virtually Abandoned or Destroyed by the Council's Own Actions

The development application to which this Request to Vary Development Standards under Clause 4.6 of the PLEP applies seeks no additional height or FSR when compared to the application which was approved as DA-517/2014.

In this regard it is argued that, insofar as its relevance applies to the application in question, the Development Standards for height of buildings and FSR have been abandoned given the particular circumstances of the approved Concept Plan for the site.

3.5 There are sufficient environmental planning grounds to justify contravening the development standard

3.5.1 Height of Buildings

Strict compliance with the height controls would result in less articulation of building height on Lots 401 and 402 and also likely result in floor space being relocated to other lots, particularly Lot 1. This would result in a less than optimal urban design outcome and new building form in closer proximity to the heritage items in the precinct. Exceeding the maximum permissible height control within the PLEP allows the previously approved FSR to be maintained within the previously approved building envelope. With the exception of plant areas no part of the building envelopes will exceed the 40m height limit that exists on the southern part of Proposed Lot 4.

3.5.2 Floor Space Ratio

When the various FSRs are applied to their respective site areas the permissible maximum site-wide GFA equates to 122,995m². While the proposed development complies with the permissible maximum site-wide GFA, the FSR for the individual development lots exceeds the PLEP standards. This results from a redistribution of floor space (from Lot 1 which contains the heritage items) and the creation of roads and open space within the precinct.

The FSR proposed for Lots 401 and 402 maintains the existing maximum floor space approved under Consent 571/2014 for proposed Lot 4 and the site overall.

4.0 Secretary's Concurrence

It is understood that the Director General's concurrence under clause 4.6(5) of the PLEP has been delegated to PCC. The following section provides a response to those matters set out in clause 4.6(5) which must be considered by PCC under its delegated authority:

Whether contravention of the development standard raises any matter of significance for State or regional environmental planning.

Contravention of the development standard does not raise any matter of significance for State or regional environmental planning given the proposed development would result in an improved built form and urban outcome consistent with the current approval.

The public benefit of maintaining the development standard.

There would be no public benefit in maintaining the development standard given the proposed development would result the same built form and urban outcome.

Any other matters required to be taken into consideration by the Director-General before granting concurrence.

There are no other matters to be taken into consideration by the Director-General before granting concurrence.

5.0 Summary

This section demonstrates Council can be satisfied that:

- That compliance with each development standard is unreasonable or unnecessary in the circumstances of the case because the proposed development will result in built form and urban outcome consistent with the current approval; and
- That there are sufficient environmental planning grounds to justify contravening the development standard as the proposed building heights consider northern aspect, solar access, steepness of the internal road network, and proximity to heritage items; and the proposed FSRs consider the provision of roads, public open space and heritage curtilage.

It is therefore requested that PCC grant development consent for the proposed development even though it varies the permissible maximum height and permissible FSR development standards in the PLEP.