

AMENDED REQUEST FOR CLAUSE 4.6 VARIATION

**74-80 Restwell & 1-9 Leonard Streets, Bankstown
(Lots 10-13 DP11718, Lot 81 DP8448, Lots 1-3 DP306558 & Lot 40 DP1128927)**



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INTRODUCTION

Jensen Bowers Group Consultants Pty Ltd (Jensen Bowers) have been engaged by Le Chateau Developments Pty Ltd to make a written request of Bankstown City Council (BCC), in accordance with clause 4.6 of the Bankstown Local Environmental Plan 2015 (BLEP), to vary the Floor Space Ratio (FSR) development standard applying to land described as 74-80 Restwell & 1-9 Leonard Streets, Bankstown (Lots 10-13 DP11718, Lot 81 DP8448, Lots 1-3 DP306558 & Lot 40 DP1128927).

Le Chateau Developments Pty Ltd is proposing to develop the subject site for the purposes of a residential flat building, as defined in the BLEP. Plans accompanying the response to BCC's Information Request detail the nature and scale of the proposed development. The development appears to satisfy many of the other development standards from the BLEP, as well as SEPP65 considerations, provisions of the Bankstown Development Control Plan 2014 (BDCP) and the 'rules of thumb' from the Residential Flat Design Code. So it is merely the FSR development standard that BCC is hereby requested to vary.

We understand the FSR mapping from the BLEP prescribes a maximum FSR for the subject site of 2:1 but, being a development standard not expressly excluded from the operation of clause 4.6, Jensen Bowers believes the proposed development is worthy of the benefit of the flexibility afforded to BCC in applying this development standard. In this context we provide the following assessment of the proposal against:

- the matters outlined in subclause (3) of clause 4.6;
- the objectives of the FSR development standard;
- the objectives for development within the R4 High Density Residential Zone; and
- '*Varying development standards: A Guide*' (August 2011), published by the New South Wales Department of Planning and Infrastructure ('the guide').

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CLAUSE 4.6(3)(a) – UNREASONABLE OR UNNECESSARY

The decision of Preston CJ in *Wehbe V Pittwater Council* [2007] NSW LEC 827 is legal authority for satisfying the test of whether a development standard is unreasonable or unnecessary. In *Wehbe*, the Chief Justice set out five ways in which an objection may be well founded, these include:

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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.¹

In the circumstances of the present case, the proposed FSR will achieve the objectives of the standard notwithstanding non-compliance with that standard (see section 4 below for detailed justification on this point) and so a requirement to strictly comply with FSR would probably be unreasonable and/or unnecessary.

¹ Taken from Hurstville City Council website, accessed 3.23pm on 23 March 2015 (<http://www.hurstville.nsw.gov.au/Objections-to-Development-Standards.html>)

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CLAUSE 4.6(3)(b) – SUFFICIENT ENVIRONMENTAL GROUNDS

Notwithstanding the non-compliance with the 2:1 FSR development standard, the proposed FSR of 2.14:1 will achieve the objectives of that development standard as well as the objectives of the zone, and this alone constitutes sufficient environmental grounds to warrant BCC approval of the variation request made under clause 4.6 of the BLEP.

See the pages that follow for assessments against the objectives of the FSR development standard and the objectives of Zone R4 – High Density Residential.

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OBJECTIVES OF THE FSR DEVELOPMENT STANDARD

In the present case, clause 4.6(4)(a)(ii) of the BLEP operates to the effect that BCC must be satisfied that 'the proposed development will be in the public interest because it is consistent with the objectives of the FSR development standard.'

The objectives of the FSR development standard are defined in the BLEP as follows:

- *To establish the bulk and maximum density of development consistent with the capacity and character of the locality of a development site;*
- *To ensure the bulk of non-residential development in or adjoining a residential zone is compatible with the prevailing suburban character and amenity of the residential zone; and*
- *To encourage lot consolidations in commercial centres to facilitate higher quality built form and urban design outcomes.*

Being a purely residential development, it is only the first of the three objectives which directly applies to the proposed FSR. In relation to that objective, Jensen Bowers provide the following:

1. The density that would result from approval of the proposed development is much less than is achievable on the site if development was proposed to the maximum building height and maximised in other respects. The resulting density would undoubtedly be viewed as being consistent with the capacity and character of the locality;
2. With the inclusion of significant areas of ground-floor private open space, the building bulk is necessarily less than could arguably be achieved from the site. The building bulk would undoubtedly be consistent with the capacity and character of the locality;
3. The proposal, as demonstrated by the accompanying shadow studies provided, there would be no adverse impacts on adjoining and nearby properties to the south in their current form. It should also be noted that the land to the south of the site has been rezoned to enable residential flat development to be constructed to a height of 19m. It has been determined that this proposal would subsequently have no adverse impacts on the amenity of any future development of this adjoining land; and
4. The proposed built form, apart from being below the maximum height permitted, also provides substantial side boundary setbacks and complies with the building separation controls within SEPP 65.

Accordingly, Jensen Bowers anticipates that BCC will be satisfied that 'the proposed development will be in the public interest because it is consistent with the objectives of the FSR development standard.'

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OBJECTIVES OF ZONE R4

In the present case, clause 4.6(4)(a)(ii) of the BLEP operates to the effect that BCC must be satisfied that 'the proposed development will be in the public interest because it is consistent with the objectives for development within Zone R4 – High Density Residential'.

The objectives of 'Zone R4 – High Density Residential' are stated in the BLEP as follows:

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Being a purely residential development, it is only the first two zoning objectives which directly apply to the proposed development and, notwithstanding the proposed FSR, the proposed development is clearly consistent with these stated objectives. In fact, it could be said that the greater the FSR the more the project contributes to satisfying housing needs of the community within this high density residential environment.

Irrespective of the additional 7% FSR (above the 2:1 development standard), the proposed development is delivering one particular housing type to the locality, a housing type already prevalent throughout the local area and in high demand given both affordability and limited stock issues.

Accordingly, Jensen Bowers anticipates that BCC will be satisfied that 'the proposed development will be in the public interest because it is consistent with the objectives for development within Zone R4 – High Density Residential'.

6 THE GUIDE

'Varying development standards: A Guide' sets out 14 questions in providing grounds to vary a development standard. These questions, and the applicant's answers, are as follows:

Question	Answer
What is the name of the environmental planning instrument that applies to the land?	Bankstown Local Environmental Plan 2015 (BLEP)
What is the zoning of the land?	Zone R4 – High Density Residential
What are the objectives of the zone?	See section 5 herein (above)
What is the development standard being varied?	Floor Space Ratio (FSR)
Under what clause is the development standard listed in the environmental planning instruments?	Clause 4.4 of the BLEP
What are the objectives of the development standard?	See section 4 herein (above)
What is the numeric value of the development standard in the environmental planning instrument?	2:1
What is the proposed numeric value of the development standard in your development application?	2.14:1
What is the percentage variation (between your proposal and the environmental planning instrument)?	7%
How is strict compliance with the development standard unreasonable or unnecessary in this particular case?	See section 2 herein (above)
How would strict compliance hinder the attainment of the objectives specified in Section 5(a)(i) and (ii) of the Act.	Strict compliance is not necessary in order to achieve the relevant stated objectives of the FSR development standard and the zoning and therefore BCC's inflexible approach to the FSR development standard would be contrary to the objects of the Environmental Planning and Assessment Act 1979

Is the development standard a performance based control? Give details.	Yes, refer to section 4 herein (above) for details
Would strict compliance with the standard, in your particular case, be unreasonable or unnecessary? Why?	Yes, refer to section 2 herein (above) for explanation
Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.	Yes, refer to section 3 herein (above)

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CONCLUSION

Whilst the proposal is not compliant with the maximum FSR development standard of 2:1 in clause 4.4 of BLEP, it satisfies the requirements of clause 4.6 of that planning instrument relating to varying a development standard, and so Jensen Bowers concludes that the requested variation is well founded and refusal of the forthcoming DA on account of FSR would not be warranted.