

Clause 4.6 Variation to Development Standard

Clause 4.4 Floor Space Ratio



152-200 and 206 Rocky Point Road, Kogarah

Proposed Residential Apartment Development

Submitted to Bayside Council

On Behalf of Rocky Point Road Development Pty Ltd

16 November 2017 ■ 16272

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1.0 Introduction

This clause 4.6 variation request has been prepared by JBA on behalf of Rocky Point Road Development Pty Ltd. It is submitted to Bayside Council (the Council) in support of a Staged Development Application (DA) for a residential apartment development and child care centre at 152-200 and 206 Rocky Point Road, Kogarah.

Clause 4.6 of the *Rockdale Local Environmental Plan 2011* (LEP 2011) enables the consent authority to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This clause 4.6 variation request:

- Relates to the development standard for Floor Space Ratio (FSR) under clause 4.4 of the LEP 2011;
- Should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by JBA dated December 2016 in relation to the Staged Development Application for the residential apartment development and child care centre at 152-200 and 206 Rocky Point Road, Kogarah.

This clause 4.6 variation request demonstrates that:

- compliance with the FSR development standard is unreasonable and unnecessary in the circumstances of the case;
 - given the objectives of the standard are achieved notwithstanding non-compliance with the standard;
- that there are sufficient environmental planning grounds to justify contravention of the standard, as:
 - consistent with the first objective of Clause 4.6 of the LEP, the degree of flexibility required by the consent authority to support the minor increase in floor space in this instance is considered both *appropriate*, and *particular* to the circumstances of the development;
 - the variation will result in a better overall outcome; and
 - no unacceptable adverse impacts will arise on neighbouring development and the character of the area;
- the variation is in the public interest because it is consistent with the objectives of the zone and the development standard; and
- the Secretary's concurrence can be obtained as contravention of the development standard does not raise any matter of significance for State and regional planning.

Therefore, the Staged DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.4 of the LEP 2011.

2.0 Request to Vary a Development Standard

Clause 4.6 of the LEP 2011 allows Council to grant consent for development even though the development contravenes a development standard imposed by the LEP. 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 of the LEP 2011 provides that (our emphasis **bold**):

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.*

.....

Consistency with Common Law Guidance

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSWLEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386;
4. *Moskovich v Waverley Council* [2016] NSWLEC 1015; and
5. *Zhang and anor v Council of the City of Ryde* [2016] NSWLEC 1179.

In accordance with the above requirements, this written clause 4.6 request;

- identifies the development standard to be varied (Section 5.1);
- identifies the variation sought (Section 5.2);
- establishes and justifies that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Section 5.3);
- demonstrates that there are sufficient environmental planning grounds to justify the contravention (Section 5.4);
- demonstrates that the consent authority can be satisfied that the proposal is in the public interest because it is consistent with the objectives of the standard and the objectives for development within the R4 High Density Residential Zone (Section 5.5); and
- provides an assessment of the matters the Secretary is required to consider before granting concurrence (Section 5.6), namely:
 - whether the contravention of the development standard raises any matter of significance for State or regional environmental planning; and
 - the public benefit of maintaining the development standard; and
 - any other matters required to be taken into consideration by the Secretary before granting concurrence.

Accordingly, development consent can be granted to the proposal despite the proposed contravention of the development standard because pursuant to clause 4.6(4)(a), the consent authority can be satisfied that:

- this written request has reasonably addressed the matters required to be demonstrated by clause 4.6(3); and
- the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone and will deliver a high level of public benefit.

2.1 Development Standard to be Varied

The development standard that is sought to be varied as part of this application is clause 4.4 of the Rockdale LEP 2011, relating to the maximum permissible Floor Space Ratio (FSR).

Clause 4.4 of the LEP 2011 is reproduced below in its entirety and an extract of the FSR Map, to which that clause applies, is reproduced in **Figure 1** (our emphasis **bold**).

(1) The objectives of this clause are as follows:

- (a) 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,
- (b) to minimise adverse environmental effects on the use or enjoyment of adjoining properties,
- (c) 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) 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 site is subject to a maximum FSR of 2:1 and is zoned R4 High Density Residential (**Figure 2**) under the LEP 2011.

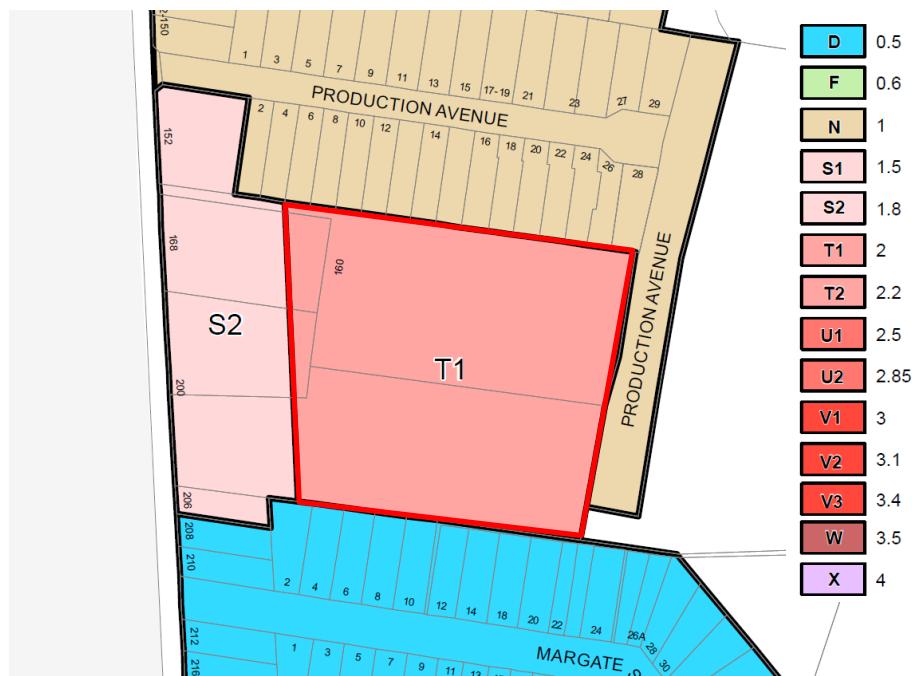


Figure 1 – Extract from the FSR Map (site outlined red)

Source: LEP 2011

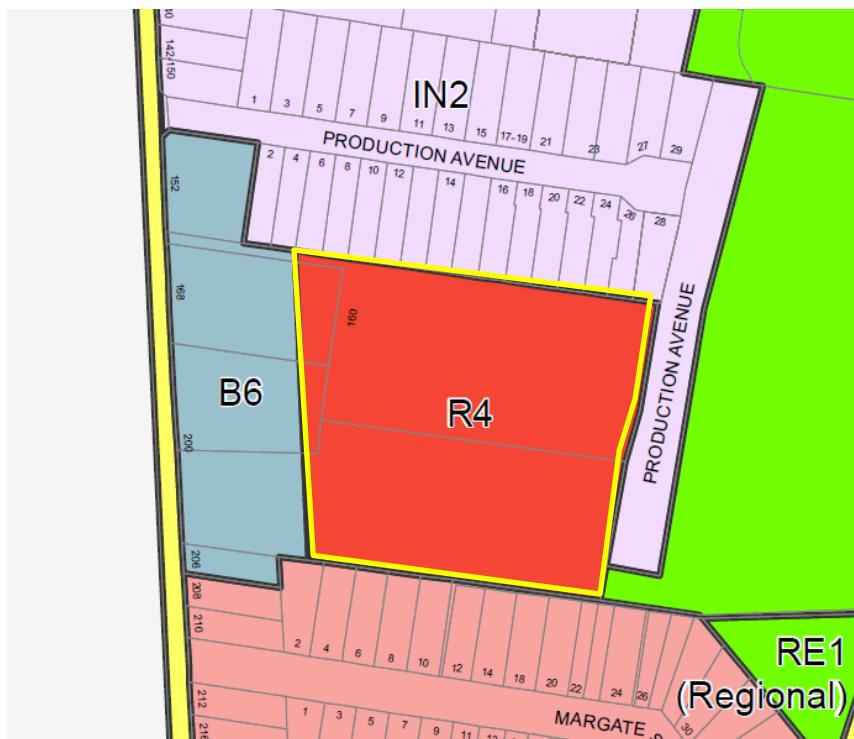


Figure 2 – Extract from the Land Zoning Map (site outlined yellow)

Source: LEP 2011

2.2 Extent of the Variation Sought

Land within the site (located entirely within the R4 High Density Residential Zone) and which is the subject of the proposed variation has an area of 22,374m².

Under the provisions of the LEP 2011, this would permit a maximum gross floor area (GFA) of 44,748m² to be developed on the site. This application proposes GFA of 45,591m², with a resultant FSR of 2.04:1. This represents an FSR variation of 0.04:1 (1.93%), or a GFA variation of 843m².

The additional floor space and resultant variation is the result of the following:

- additional child care centre floor space: 83.3m² GFA
- additional residential floor space (Level 12, Building B): 538m² GFA
- additional floor space associated with increased building lobby areas throughout the development: 221.7m² GFA

These variations are described in more detail below.

2.2.1 Child Care Centre Floor Space

This Clause 4.6 request in part seeks a variation to the FSR development standard for the additional floor space **required to deliver a state of art child care centre with greater capacity, in accordance with Council's preferred design, which is over and above the commitment required by the executed VPA for the site**. The minor increase in additional GFA is a result of the Council's preference for:

- A child care centre accommodating 65 children, providing more capacity than the 60 place child care centre that the developer is required to deliver under the executed VPA; and
- A two storey centre which provides greater capacity, design flexibility and a better urban outcome than a single storey centre (as required by the VPA).

The development of this option is discussed in further detail below.

Voluntary Planning Agreement Contributions

At the time of the site's rezoning from industrial uses, a Voluntary Planning Agreement (VPA) was executed for the site between the then landowner and Council which, amongst other development contributions, required the construction, fit out and dedication of a child care centre and its associated stratum lot or land parcel to Council. The VPA requires that the fit-out of the child care centre and its dedication to Council must occur "prior to the issue of an occupation certificate for the 350th residential dwelling on the Development Site".

The contribution value and specifications of the total contribution works associated with the child care centre are itemised in the VPA, and amount to:

- Child care centre works: \$1.5 million (fit-out value)
- Child care centre land dedication: \$1.35 million (estimated value of land/stratum)

The VPA defines the 'child care centre' as being a facility:

- with an approximate site area of 1,200m²;
- designed generally in accordance with the 'Child Care Centre Specification' included in the VPA; and
- which meets all the legislative requirements to cater for 60 children.

Child Care Centre Design Development

Rocky Point Road Development Pty Ltd has actively engaged with Bayside Council's asset team in preparing the preferred design solution for the child care centre, which will form part of a Stage 2 Detailed DA to Council.

The engagement process with Council has involved input on the preferred location and envelope of the child care centre from the St George Design Review Panel (DRP), who were commissioned to review the overall scheme as part of the DA process, and the appointment of a Council-selected child care centre design expert at the applicant's expense, to prepare design options for the child care centre for consideration by Council's executive committee.

The outcomes of this collaborative design process have been the following:

- Identification of the best location for the child care centre in the overall development, having regard to development siting, access and amenity considerations such as solar access and privacy, being the south-east corner of the overall site, as shown in **Figure 3**.



Figure 3 – Proposed child care centre location

- Agreement on the potential to achieve a flagship child care centre design, despite this not being an obligation under the VPA;
- Agreement that a two-storey scheme would provide a better interface with the remainder of the proposal and provide a better corner address for the development. This was a specific view raised by the Council's Design Review Panel;
- As identified in the options analysis prepared by the Council-appointed child care design expert:
 - A single storey child care centre designed over 1,200m² in this location which meets all legislative requirements, can only accommodate a maximum of 51 children;
 - A two-storey facility designed over 1,000m² in this location, which meets all legislative requirements, can accommodate up to 65 children;

Accordingly, two options for the design of the child care centre were presented to Council's asset team, one being a single storey option which could achieve a maximum of 51 children ('Option 1'), and a second option designed over two storeys which could achieve a maximum of 65 children ('Option 2'). Both options represented the maximum number of children which could be accommodated in either scenario whilst still complying with all legislative requirements.

Bayside Council's Executive Committee Endorsement

Following consideration by Council's Executive Committee at their meeting on Tuesday 28 March 2017, the Committee resolved to endorse 'Option 2', being the two-storey scheme which could achieve a total of 65 children and exceed the requirements of the VPA.

As identified by PTW Architects and based on the layouts within the two design options presented to the Executive Committee, the required GFA to deliver Option 2 over and above Option 1 is 83.3m² (to a total of 486m² in the illustrative scheme presented to Council). Accordingly, this Clause 4.6 request seeks a variation to the FSR control for the additional amount of GFA required to deliver the two-storey child care centre option, as this GFA was not contemplated within the scheme identified in the VPA.

2.2.2 Residential Floor Space

A portion of the FSR variation relates to the wider development, being additional residential floor space, accommodated within the footprint of the proposed western residential apartment building ('Building B'). The additional floor space constitutes 538m² of residential GFA, representing a 1.2% variation to the FSR standard, and is attributed to the floor plate of Level 12 of Building B.

Figures 4 to 6 demonstrate the extent of the additional floor space proposed on Level 12 of Building B.



Figure 4 – Street elevation (new proposed road), looking north (extent of variation shown circled green)

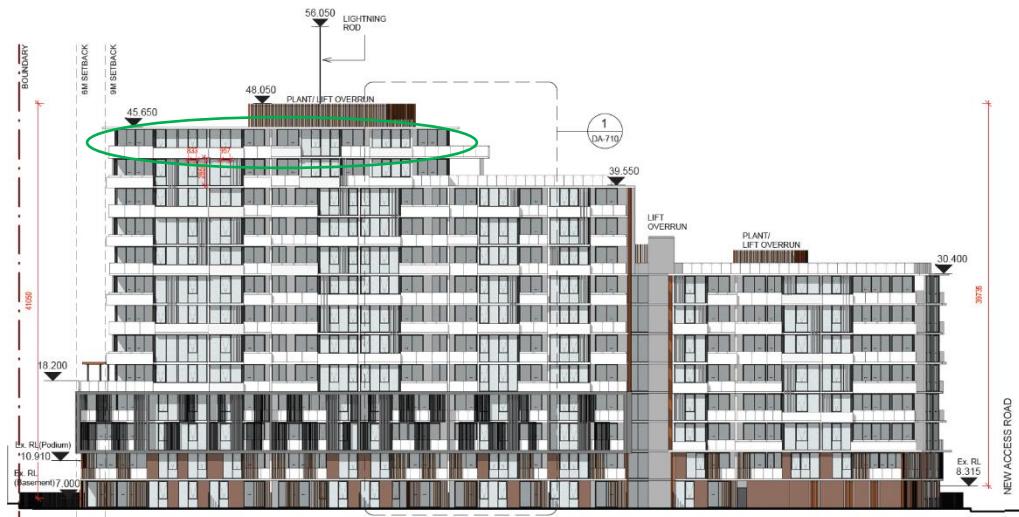


Figure 5 – Building B Western Elevation (extent of variation shown circled green)

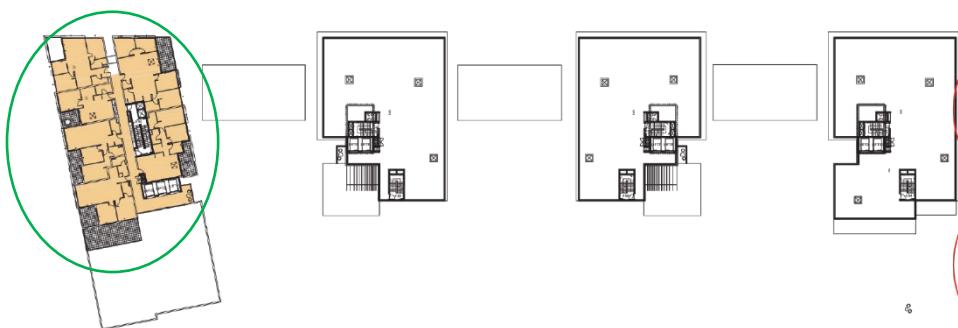


Figure 6 – GFA Plan, Level 12 (GFA shown orange)

This additional floor space is minor in the context of the overall development and is achievable due to the opportunity provided by the site-specific maximum building height plane that allows for additional height and mass to be achieved

on site, whilst continuing to comply with the other site-specific planning controls including the objectives of the FSR standard. **This airspace 'differential', whilst applicable to all buildings, is most prevalent with Building B, which can accommodate an additional floor between the height limit and the height plane.**

Site-Specific Building Height Plane

LEP Height of Buildings Map (Clause 4.3)

Under the LEP 2011, a range of height zones which increase from south to north apply to the subject site, permitting a maximum building height of 33 metres at the north end of the site and a maximum of 17.5 metres to the south. **Figure 4** is an extract from the Height of Buildings Map applicable to the site.

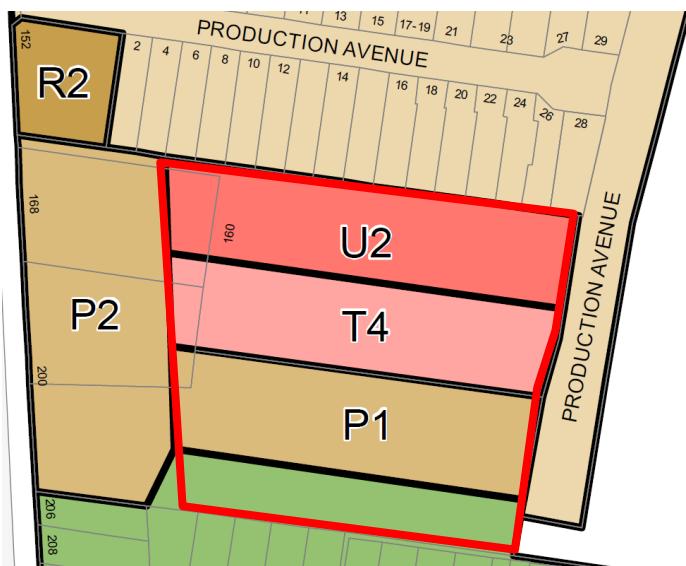


Figure 7 – LEP Height of Buildings Map extract (site outlined red)

Building Height Plane (Clause 4.3A)

In addition to the statutory building heights control is a maximum building height plane control (Clause 4.3A) which sits above but works in conjunction with the LEP height limits. This Clause operates to allow the development on the site to exceed the maximum building heights outlined under Clause 4.3 (and the Height of Buildings map), subject to compliance with the prescribed building height plane.

The building height plane control is unique to the site and is not applicable to any other site in the entire LGA. The outcome of these overlapping controls is that some parts of the site are able to achieve building heights above the heights identified in the LEP height maps.

By virtue of this clause all four proposed apartment buildings include floor space above the statutory height limits, but below the building height plane, as illustrated in **Figures 8 and 9** below. This outcome was encouraged by the DRP, as a site-specific response to concentrating mass to the northern portion of the overall site.

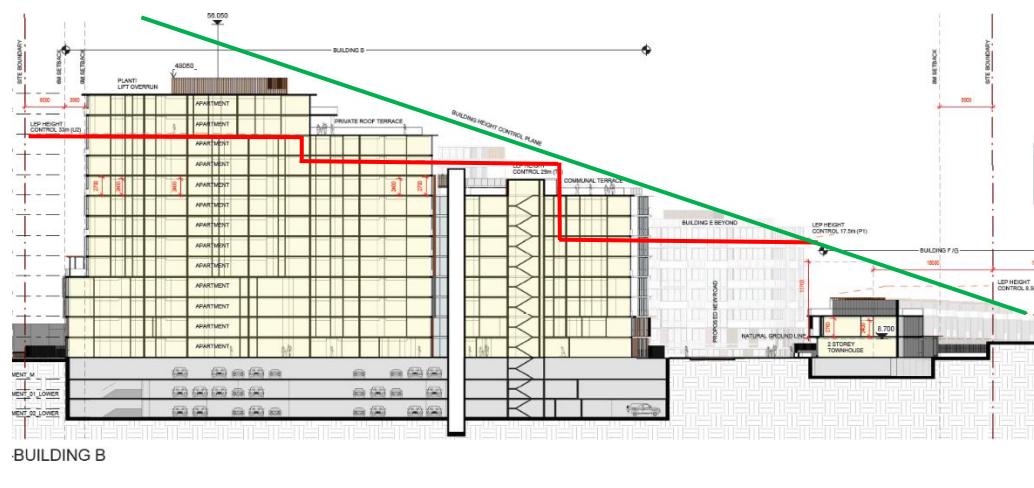


Figure 8 – Building B section illustrating relationship of proposed development and applicable height controls

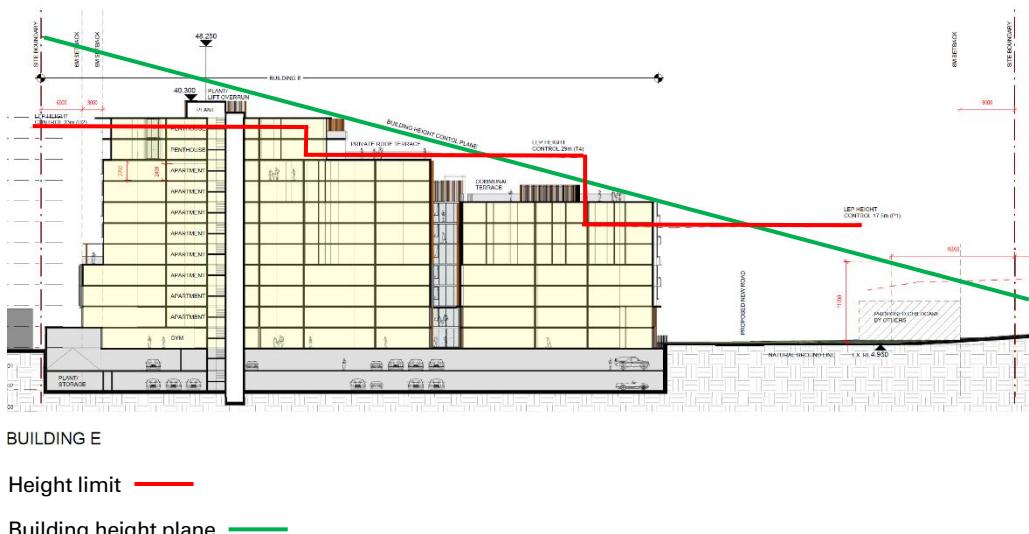


Figure 9 – Building E section illustrating the relationship of the proposed development and applicable height controls

As can be seen above, the unique set of controls which govern the height of the site provide the opportunity to locate building mass to the north of the site between the two governing height standards with each of the buildings.

Allocation of floor space in this manner results in the following benefits:

1. the concentration of building mass to the north of the site within the proposed building footprints, minimising impacts to the nearest low density residential catchments located to the south of the site;
2. Improvements to the amount of solar access received to the central communal open space area and the townhouses to the south, reducing the height of building wings at the nearest points to the space;
3. Ensuring more apartments benefit from the amenity afforded at greater heights, including natural ventilation, solar access and district views; and

4. A reduction of site coverage and increase of deep soil and landscaped areas, consistent with the ADG Objectives, as a result of concentrating building mass within the building footprints shown.

Development of the Height Plane Control

The height plane was established through the rezoning of the site, where it was identified that the renewal of large sites such as this should achieve a compatible built form with surrounding development while optimising urban renewal opportunities.

The purpose of the height plane is therefore to ensure that building heights within the site step down to achieve an appropriate height transition from north to south, thus ensuring an effective built form interface with the lower density residential development on Margate Street to the south, and concentrating development within the site and adjoining the industrial development to the north.

Figure 5 is an extract from the section diagram which formed the proposed building height plane within the Council resolution of 19 February 2014, which illustrated its operation in relation to the residential properties along Margate Street. The proposed built form strategy and allocation of floor space within the proposal is consistent with the intent of the control's development.

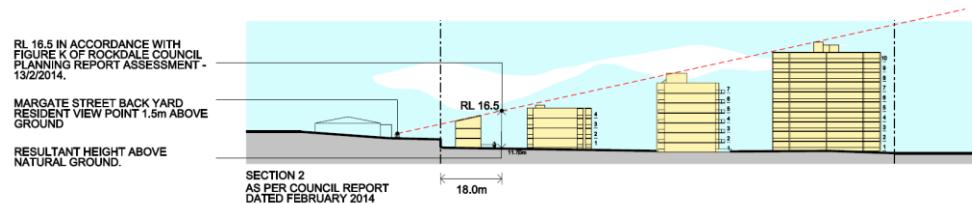


Figure 10 – Extract from section of Council's Business Paper dated 19 February 2014

Opportunity for minor floor space increase

A described earlier in this section, the residential floor space the subject of this Clause 4.6 variation relates primarily to a minor portion of floor space which is attributed to Level 12 of Building B.

This proposed floor level is the recognition of an opportunity to provide a very minor increase in floor space in the form of apartments which achieve high levels of amenity and take advantage of airspace between the two statutory height controls. **This airspace 'differential' is most prevalent with Building B, which can accommodate an additional floor between the height limit and the height plane.**

Accordingly, the proposed additional residential floor space above the maximum permissible:

- constitutes 538m², or a 1.2% FSR variation, which is extremely minor;
- is located completely below the building height plane (Clause 4.3A);
- results in the construction of an additional six (6) high amenity apartments over a 3ha site;
- results in a development which does not appear materially different from compliant development when viewed from surrounding areas; and
- results in an additional level that can be accommodated within the environmental capacity of the site.

2.2.3 Increased Lobby Sizes

The balance of the GFA variation relates to additional floor space associated with increased building lobby areas throughout the development, following discussions with Council officers during the DA assessment process, in order to provide generous circulation spaces and common lobbies with high levels of amenity throughout the development. In consultation with Council officers, the lobby areas were increased, providing increased internal common areas, which encourage social interaction and recognition in accordance with ADG guidance. The amended lobby areas resulted in a minor increase in GFA across the development of 221.7m² GFA.

The figures below provide examples of the increased lobby areas, with changes circled in red.



Figure 11 – Increased lobby on ground floor, Building B

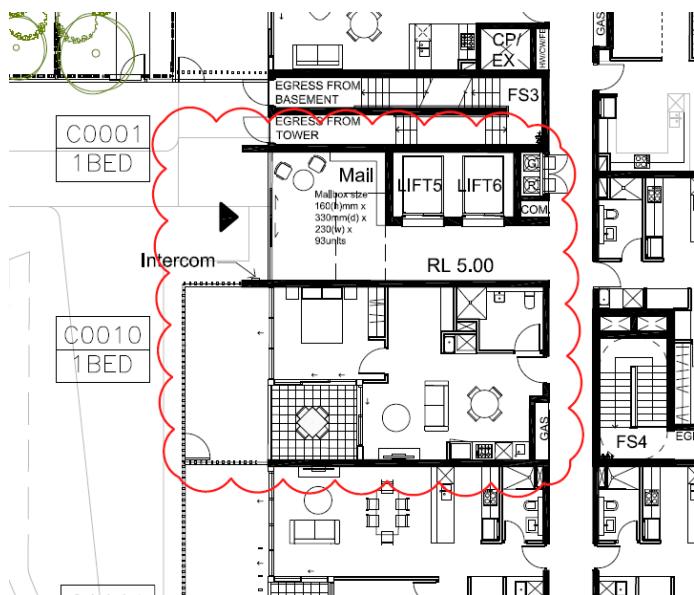


Figure 12 – Increased lobby on ground floor, Building C

The following sections address the relevant matters under Clause 4.6 of the LEP in order to ensure the consent authority can issue development consent for the proposal despite the proposed minor variation to the FSR development standard.

3.0 Justification for Contravention of the Development Standard

3.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In the decision of *Wehbe v Pittwater Council [2007] NSW LEC 827*, Chief Justice Preston stated that there are five different ways in which a variation to a development standard might be shown as unreasonable or unnecessary in the circumstances of the case. These five ways are:

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 or 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.

This clause 4.6 variation request establishes that compliance with the maximum floor space ratio development standard is unreasonable or unnecessary in the circumstances of the proposed development and accordingly justifies the variation to the control pursuant to the following 'ways' outlined in *Wehbe*:

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

In the recent judgment in *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* the Chief Judge upheld the Commissioner's approval of large variations to height and FSR controls on appeal. He noted that under Clause 4.6, the consent authority (in that case, the Court) did not have to be directly satisfied that compliance with the development standard was unreasonable or unnecessary but that the applicant's written request adequately addresses (our emphasis) the matters in clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary.

Sections 3.1.1 to 3.1.3 address the matters in clause 4.6(3)(a), in particular, how the objectives of the maximum floor space ratio development standard are achieved notwithstanding the non-compliance with the numerical control.

3.1.1 The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way)

The objectives as set out by clause 4.4(1) are as follows:

- a) *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,*
- b) *to minimise adverse environmental effects on the use or enjoyment of adjoining properties,*
- c) *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 following sections demonstrate that the proposed variation to the floor space ratio development standard will still result in a development that achieves the objectives of the clause.

Table 1 – Assessment against the objectives of the FSR development standard

Objective	Proposal
1) <i>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.</i>	<p>The proposed 1.93% variation to the FSR development standard is minor in nature, and will not impact on the achievement of this objective. Specifically, it is noted that:</p> <ul style="list-style-type: none"> ▪ The proposed variation does not result in a substantive increase in the density and intensity of the proposal, given the increase is very minor. The proposal will still provide a density and intensity of land use that can be adequately serviced by infrastructure, including the substantial infrastructure upgrades provided as part of the development (and as required by the executed VPA). ▪ The proposal, despite the minor variation, will still achieve the desired future character and built form envisaged for the site, as the additional floor space will remain beneath the building height plane, thereby not increasing the bulk and scale of the buildings beyond the controls that have been established for the site. ▪ The Traffic Impact Assessment provided with the DA includes a detailed review of the potential traffic impacts and concludes that, subject to the upgrades that will be delivered as part of the proposal, the existing road network has sufficient capacity to accommodate the vehicular and pedestrian traffic it will generate. The minor increase in floor space does not alter this, in that the road network will continue to operate at acceptable levels, even with the additional floor space.
2) <i>to minimise adverse environmental effects on the use or enjoyment of adjoining properties.</i>	<p>The overall proposal has been designed to minimise any adverse environmental effects on the use or enjoyment of adjoining properties. The opportunity to locate a minor increase in additional floor space within Building B, the child care centre and through more expansive building lobbies does not materially alter the proposal's achievement of this objective.</p> <p>The proposal is compliant with the maximum building height, the complimentary development standard for regulating land use intensity, which has been specifically drafted for this site having regard to its specific characteristics. The design of the proposal has considered all potential impacts on adjoining land uses, in particular the potential for overshadowing, the perception of the proposed buildings when viewed from low density residential areas to the south, and traffic impacts. The minor increase in additional floor space does not result in additional impacts beyond a compliant scheme, but rather, results in a better overall outcome, as discussed further in Section 3.3.2.</p> <p>The increase in floor space is accommodated within the site's allowable height limit. It is therefore a reasonably scaled development within the environmental capacity of the site, and achieves substantive compliance with other required DCP and ADG built form and amenity controls. The proposal's density can be</p>

Objective	Proposal
	<p>accommodated within an elegant and complementary built form that will positively contribute to the surrounding area and the Bayside Council LGA as a whole. Furthermore, the proposal has been designed to comply with the height plane, which was drafted expressly to ensure the achievement of an appropriate interface and built form relationship with the residential buildings along Margate Street. The significant distance away from the properties along Margate Street to the south ensures that the proposal will not result in additional overshadowing, overlooking or amenity impacts. Accordingly, the proposal will not compromise the use or enjoyment of adjoining properties.</p>
<p><i>3) 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.</i></p>	<p>The height and mass of the proposal has been designed to respond to the building height plane that applies to the site under Clause 4.3A of the Rockdale LEP 2011. This height plane was specifically drafted to protect surrounding existing development from any adverse overshadowing, visual and privacy impacts. The height plane was drafted:</p> <ul style="list-style-type: none"> ▪ to commence at a height along Margate Street of 1.5 metres above ground level (representing eye height when looking north); and; ▪ project north at an angle which corresponds to meeting the height of the southern elevation of the closest factory building of the former Darrell Lea factory. <p>The minor increase in floor space does not result in any breach of the building height plane and therefore still ensures a built form outcome that achieves an appropriate relationship with its surrounds as envisaged by the site-specific controls.</p> <p>The proposal therefore maintains an appropriate visual relationship between new development and the existing character of its surrounding areas, some of which (particularly low density residential areas to the south) are neither undergoing nor likely to undergo a substantial transformation.</p>

3.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

There are sufficient environmental planning grounds to justify a flexible approach to the application of the floor space ratio development standard as it applies to the site.

Clause 4.6(3)(b) of the LEP requires the departure from the development standard to be justified by demonstrating:

“...that there are sufficient environmental planning grounds to justify contravening the development standard”.

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site.

There are particular circumstances that affect the subject site and for the variation proposed which warrant variation from strict compliance with the FSR standard. These are detailed below.

3.2.1 Ground 1: Particular circumstances of the development

The first objective of Clause 4.6 of the Rockdale LEP 2011 is to **“provide an appropriate degree of flexibility in applying certain development standards to particular development”**. The degree of flexibility required by the consent authority to support the minor increase in floor space in this instance is considered both *appropriate* and *particular* to the circumstances of the development, for the following reasons:

Additional Child Care Centre Floor Space

- The proposed Child Care Centre design (two storeys, over a 1,000m² lot in accordance with the Option 2 Design) reflects the preference of the Executive Committee of Council. The preferred option has been the subject of a feasibility analysis, which confirmed that it is more operationally and financially feasible compared with a single storey option over a 1,200m² allotment. This was confirmed by the independent child care expert engaged by Council. The endorsed option can accommodate 65 children compared with a maximum of 51 children under a single storey facility over a 1,200m² site, which has been identified as unfeasible;
- The delivery of the preferred child care centre design requires an additional amount of GFA not contemplated within the scheme identified in the executed VPA for the site;
- The proposed scheme can accommodate more children (65) than required in the VPA (60), providing an additional public benefit;
- The proposed two storey scheme will be a state of the art facility with the most up to date infrastructure and facilities designed by PTW, the additional cost of which in achieving design excellence will be borne by the applicant. A two storey option provides the opportunity for a better design response and the potential for a flagship childcare centre for Bayside Council;

- A two storey scheme is the preference of the Design Review Panel, noting it would allow for a better architectural design and for a development which sits more appropriately in its future urban context.

Additional Residential Floor Space

- The relationship of the LEP 2011 height limits and building height plane control across the site result in an opportunity to accommodate a minor increase in floor space and distribute this floor space between the statutory height controls as an additional level in Building B, in a manner which does not alter the future character of the site as envisaged by the planning controls. This character has been expressly determined by the graduation of heights from south to north associated with the site-specific building height plane;
- The additional floor space, by virtue of its location between the statutory height limits and height plane, does not increase the perceived building bulk compared with a compliant scheme. This floor space can be accommodated within the proposed building footprints which provide good levels of internal and external amenity for the site and its surrounds as developed with input from the numerous Design Review Panel briefings, taking into consideration a number of amenity considerations;
- The potential for additional floor space in this instance is within the environmental capacity of the site as a result of the substantial upgrades proposed, including the proposed internal road and traffic signalisation of its connection to Rocky Point Road, the widening of Rocky Point Road and the upgrade of Production Lane.

Accordingly, the degree of flexibility required by the consent authority to support the proposed minor increase in floor space in this instance is considered both *appropriate* and *particular* to the circumstances of the development, consistent with the first objective of Clause 4.6 of the Rockdale LEP 2011, which contributes to the finding that there are sufficient environmental planning grounds to justify the minor contravention of the development standard in this instance.

3.2.2 Ground 2: The variation will result in a better overall outcome

The second objective of Clause 4.6 of the Rockdale LEP 2011 is to “**achieve better outcomes for and from development by allowing flexibility in particular circumstances**”. Allowing the flexibility in the application of the FSR development standard in this instance will achieve *better outcomes* for and from the proposed development, which are particular in the circumstances (established in **Section 3.2.1** above), for the following reasons:

- The additional floor space required for the child care centre Council-preferred design will allow for a better designed, better functioning and feasible child care centre, which can accommodate additional children over and above the amount envisaged under the executed VPA for the site providing additional public benefit. The two-storey option, as preferred by Council’s executive committee, provides the opportunity for a better design response and the potential for a flagship childcare centre for Bayside Council which achieves design excellence;
- The additional residential floor space will:
 - take advantage of the significant investment in infrastructure upgrades associated with the proposal, such as road and intersection upgrades, through the provision of well designed, high quality housing with significant solar, ventilation and outlook amenity, in a development site with a diverse range of housing typologies;

- Take advantage of a location with good access to services and amenities and substantial open space to the east;
- Provides increased building lobby areas throughout the development, following discussions with Council officers during the DA assessment process, in order to provide generous circulation spaces and common lobbies with high levels of amenity throughout the development. The increase provides increased internal common areas, which encourage social interaction and recognition in accordance with ADG guidance;
- Provides additional housing, of which it is recognised is in demand in the LGA and subregion. This is consistent with the applicable regional strategy, *A Plan for Growing Sydney*, and *Draft Subregional Strategy* for the Central Subregion, which seek to accommodate housing in locations which take advantage of available infrastructure;
- The increase in floor space will contribute to the diversity and quantum in housing stock in the LGA which is within the environmental capacity of the site, as identified in the SEE and its supporting studies and can be accommodated without altering the established future character of the area given the unique set of controls which permit the flexible distribution of that floor space; and
- The additional floor space will help with subsidising the additional costs of the larger, state of the art child care centre, which is outside the requirements of the executed VPA and therefore the developer's obligations. The costs of a larger and state of the art child care centre design, per m², are much greater than the acquisition cost of the site per m², the benefits of which will be realised by a catchment wider than the overall development.

Accordingly, *better outcomes* are achieved for and from the development as a result of the proposed variation, consistent with the second objective of Clause 4.6 of the Rockdale LEP 2011, which contribute to the finding that there are sufficient environmental planning grounds to justify the minor contravention of the development standard in this instance.

3.2.3 Ground 3: No unacceptable adverse impacts on neighbouring development and the character of the area

The additional floor space associated with the two storey child care centre and the additional Level 12 in Building B does not result in any unacceptable impacts on neighbouring development, having particular regard to overshadowing, overlooking and privacy, and will not detract from the character of the area having regard to the established planning controls, as follows:

- **Traffic:** The traffic impact analysis and SIDRA modelling prepared and included with the DA, which contemplates the proposal's traffic generation factoring in the minor additional increase in floor space, has identified that all intersections in the vicinity of the proposal operate satisfactorily, with generally minor or moderate changes to average delays and degree of saturation; and with no change to existing levels of service during either peak period;
- **Solar access:** The additional shadow cast does not materially reduce the amount of solar access to the proposed southern townhouses, which achieve compliant levels of solar access in midwinter, or impact on solar access to the central communal open space area. No additional shadow is cast to properties fronting Margate Street as a result of the additional floor space;

- **Privacy:** The additional floor space proposed does not result in any overlooking and privacy issues, as the separation of proposed buildings to neighbouring development is considered adequate; and
- **Character / built form:** The additional floor space does not alter the character of the proposed development compared to a compliant scheme, given the additional floor space is minor and results in a form of development which is consistent with the site-specific height controls for the site. Notwithstanding the minor variation to the FSR development standard, the proposal provides an appropriate built form transition to:
 - the low density residential environment to the south through the graduation of heights and the concentrating of massing to the north;
 - the site's northern boundary which abuts industrial zoned land fronting onto Production Avenue;
 - the B6 Enterprise Corridor and Rocky Point Road to the west; and
 - The parkland to the east.

Accordingly, no unacceptable impacts are considered to arise from the minor additional floor space proposed, and no material difference in impacts or character of the area is anticipated from the proposal as a result of the additional floor space when compared to a compliant scheme.

3.3 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

Clause 4.6 (4)(a) (ii) requires that 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*". These matters are addressed in the following sections.

3.3.1 Consistency with the objectives of the development standard

The proposal is consistent with the objectives of the FSR development standard, for the reasons discussed earlier in this report.

The proposal will provide a density and intensity of land use that can be adequately serviced by infrastructure, that can be accommodated by the existing road network, and which will deliver a built form outcome that is consistent with the desired future character for the site and Bayside more broadly. Additionally, the proposal will not result in unacceptable impacts on surrounding existing development nor will it compromise future development opportunities surrounding the site. The proposal therefore complies with the objectives of the development standard in this regard.

3.3.2 Consistency with the objectives of the zone

The site is located within the R4 High Density Residential zone under the Rockdale LEP 2011. The zone objectives are:

- *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.*

The proposal will meet all the relevant zone objectives satisfactorily as:

- it seeks to provide for the housing needs of the community in a high density residential environment by taking advantage of the proposed investment in infrastructure upgrades, through the provision of well-designed, high quality housing with significant solar, ventilation and outlook amenity;
- it will provide a mix of housing typologies and sizes that respond to the local community's housing needs and which support the creation of a high quality residential environment consistent with the site's zoning; and
- it seeks to integrate a new child care centre within the design of the scheme and will therefore provide a new local facility that services and meets the needs of residents within the local area.

Despite the proposed variation to the development standard, it has been demonstrated that the proposal is consistent with the objectives of the R4 High Density Residential Zone under the Rockdale LEP 2011.

Furthermore, requiring strict compliance with the FSR development standard in this instance would result in an outcome that unreasonably constrains the site from delivering additional, high amenity housing stock and additional child care centre floor space which is within the environmental capacity of the site.

Accordingly, the consent authority can reasonably be satisfied that this written request has adequately addressed the matters in clause 4.6(3) and that the proposed development would 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.

3.4 Secretary's Concurrence

Under clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

- (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.*

These matters are addressed in detail below.

3.4.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

FSR is largely based on controlling the bulk and scale of buildings in order to minimise adverse environmental impacts. The proposed variation is minor and is not contrary to any State or regional environmental planning objectives and indeed reinforces the ability of the Council to deliver housing and other uses to meet local needs. The variation constitutes a minor 1.93% variation. The proposed variation to the development standard will not result in any negative consequences for State or regional environmental planning in particular given the circumstances are particular to the site.

3.4.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

There would be no public benefit in maintaining the development standard in this instance. Maintaining the development standard would result in a less desirable public outcome as it would:

- a) unnecessarily hinder the site's ability to deliver additional high amenity housing stock, which can be accommodated within the environmental capacity of the site; and
- b) would hinder the proposal's ability to deliver a child care centre with a better overall design and greater functionality.

3.4.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Secretary before granting concurrence

No further matters have been identified that might be required to be taken into consideration by the Secretary before granting concurrence.

The proposal will result in positive outcomes for the Bayside Council in terms of housing supply and the delivery of new public domain upgrades, through site links and a new child care centre. It is noted that the extent of the public domain works, as a result of the Council's preference in terms of the location of the child care centre, has resulted in the requirement for significant road works at the cost of the proponent which are outside the scope of works of the executed VPA.

The proposal is within the environmental constraints and capacity of the site as evidenced throughout the environmental assessment. Overall, the quality of the proposed design is likely to create a positive image for the local area that will

engender a stronger sense of community pride and encourage further investment.

3.5 Summary

This clause 4.6 variation request demonstrates, notwithstanding the proposed variation to the development standard, that:

- the objectives of the maximum FSR standard and Clause 4.4 of the LEP are achieved notwithstanding the variation to the numerical control as the proposal results in a development:
 - with an appropriate density accounting for the availability of infrastructure and the generation of vehicular and pedestrian traffic, in order to achieve the desired future character;
 - which minimises adverse environmental effects on the use and enjoyment of adjoining properties; and
- consistent with the first objective of Clause 4.6 of the LEP, the degree of flexibility required by the consent authority to support the minor increase in floor space in this instance is considered both *appropriate*, and *particular* to the circumstances of the development, as:
 - The proposed child care centre design reflects the preference of the Executive Committee of Council and can accommodate more children (65) than required in the VPA (60), providing an additional public benefit; and
 - The relationship of the LEP 2011 height limits and building height plane control across the site result in an opportunity to accommodate a minor increase in floor space and distribute this floor space between the statutory height controls as an additional level in Building B, in a manner which does not alter the future character of the site as envisaged by the planning controls;
- the flexible application of the FSR control will facilitate the achievement of a better planning outcome than would be achievable by strict adherence to the controls across the development site as the additional floor space:
 - allows the delivery of a flagship child care centre with additional places for children; and;
 - additional well-designed residential floor space which will take advantage of the significant investment in infrastructure upgrades associated with the proposal;
 - results in increased building lobby areas throughout the development, providing generous circulation spaces and common lobbies with high levels of amenity and providing increased internal common areas, which encourage social interaction and recognition in accordance with ADG guidance;
- the proposal is in the public interest as it remains consistent with the applicable strategic planning documents, land use zones and development standards;
- the proposal is compatible with the intended future scale and character of the area and will not have adverse amenity impacts on surrounding land;
- the non-compliance with the development standard does not raise any matters of State and regional planning significance;
- there is no public benefit in maintaining the floor space ratio development standard adopted by the environmental planning instrument for this site; and

- legal precedent has been taken into account and addressed as part of this clause 4.6 variation request.

This clause 4.6 request demonstrates that the proposed development will deliver a superior planning outcome than could be achieved by strict adherence to the development standard for the existing and future community of Kogarah and Rockdale. Overall, the proposal results in the opportunity to establish a high quality development that positively contributes to the precinct. For the reasons set out in this written request the development should be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of Rockdale LEP 2011.

4.0 Conclusion

This clause 4.6 variation request has been prepared by JBA on behalf of Rocky Point Road Development Pty Ltd. It is submitted to Council in support of a Staged DA for a residential apartment development and child care centre at 152-200 and 206 Rocky Point Road, Kogarah.

The SEE and supporting documentation provided with the DA demonstrates that the proposed development will not give rise to any significant adverse environmental effects which cannot be managed or mitigated. The proposed development will make a positive contribution to the local area, through the provision of public domain and traffic improvements, improved residential choice and living opportunities, and the delivery of a new, high quality 65 place child care centre.

Compliance with the maximum FSR development standard contained in clause 4.4 of Rockdale LEP 2011 is unreasonable and unnecessary in the circumstances of the case, and the justification is well founded. It is considered that the variation allows for a better planning outcome for the site that is aligned with the needs of the local community and the clear intent to achieve a high quality development and design outcome.

The consent authority can be satisfied that this clause 4.6 variation request demonstrates, notwithstanding the proposed variation to the development standard, that:

- compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, given:
 - the objectives of the standard are achieved notwithstanding non-compliance with the standard;
- there are sufficient environmental planning grounds to justify contravening the development standard given, as:
 - The degree of flexibility required by the consent authority to support the minor increase in floor space in this instance is considered both *appropriate*, and *particular* to the circumstances of the development;
 - The variation will result in a better overall outcome; and
 - No unacceptable adverse impacts will arise on neighbouring development;
- the variation is in the public interest because it is consistent with the objectives of the zone and the development standard; and
- the Secretary's concurrence can be obtained as contravention of the development standard does not raise any matter of significance for State and regional planning, there would be no public benefit in maintaining the development standard in this instance and no further matters have been identified that might be required to be taken into consideration by the Secretary before granting concurrence.

It is therefore requested that development consent be granted for the proposed development despite its contravention of the FSR development standard in the LEP 2011.