

Exception to Development Standards Submission

This amended Exception to Development Standards Submission accompanies Development Application (662/2016) proposing the demolition of all existing structures and the construction of a residential apartment building at 1A Hill Street, Dulwich Hill (the **site**).

Calculations in this amended submission are based on plans and information provided by Squillace Architects. Following negotiations with Council's officers, the proposal's Floor Space Ratio (**FSR**) has been technically increased through the additional provision of 10 car parking spaces in response to objections received. The amended FSR calculation also includes the slightly enlarged green bin room at the ground floor level.

As required pursuant to Clause 4.6(3) of Marrickville Local Environmental Plan 2011, this submission provides a written request to Council that justifies the proposal's departure from the FSR development standard at Clause 4.4(2) is acceptable from an environmental planning point of view and that compliance with the standard is both unreasonable and unnecessary given the circumstances of the case.

Purpose of Clause 4.6

The Standard Instrument LEP contains its own variations clause (Clause 4.6) to allow the variation of development standards. Clause 4.6 of the Standard Instrument is similar in tenor to the former State Environmental Planning Policy No. 1 (**SEPP 1**), however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 variation should be assessed. The following cases are taken into consideration in this request for variation.

- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46
- *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90; and
- *Moskovich v Waverley Council* [2016] NSWLEC 1015.

Description of the planning instrument, development standard and proposed variation

What is the name of the environmental planning instrument that applies to the land?

Marrickville Local Environmental Plan 2011 (**LEP 2011**).

What is the zoning of the land?

The land is zoned R1 General Residential.

What are the objectives of the zone?

The objectives of the R1 General Residential zone are:

- *to provide for the housing needs of the community.*
- *to provide for a variety of housing types and densities.*
- *to enable other land uses that provide facilities or services to meet the day to day needs of residents.*

- to provide for retail premises in existing buildings designed and constructed for commercial purposes.
- to provide for office premises in existing buildings designed and constructed for commercial purposes or as part of the conversion of existing industrial or warehouse buildings.

What is the development standard being varied?

Development Standards' are defined under Section 4(1) of the Environmental Planning and Assessment Act, 1979 (the **Act**) as follows:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...

- (a) *the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) *the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) ***the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,***
- (d) ***the cubic content or floor space of a building,***
- (e) *the intensity or **density of the use of any land, building or work,***
- (f) *the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) *the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) *the volume, nature and type of traffic generated by the development,*
- (i) *road patterns,*
- (j) *drainage,*
- (k) *the carrying out of earthworks,*
- (l) *the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) *the provision of services, facilities and amenities demanded by development,*
- (n) *the emission of pollution and means for its prevention or control or mitigation, and*
- (o) *such other matters as may be prescribed. (**my emphasis**)*

The FSR control at Clause 4.4 of LEP 2011 is clearly a development standard.

Is the development standard a performance based control? Give details.

No.

Under what clause is the development standard listed in the environmental planning instrument?

The development standard is listed under Clause 4.4 of LEP 2011.

What are the objectives of the development standard?

The objectives of the development standard are expressly stated at Clause 4.4(1) of LEP 2011 and are:

- (a) to establish the maximum floor space ratio,*
- (b) to control building density and bulk in relation to the site area in order to achieve the desired future character for different areas,*
- (c) to minimise adverse environmental impacts on adjoining properties and the public domain.*

What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.4(2) of LEP 2011 establishes a maximum FSR of 1.75:1 for the site.

What is the proposed numeric value of the development standard in the development application?

The proposed residential apartment building results in a gross floor area (GFA) of 5,693m² which equates to an FSR of 1.97:1.

The proposed FSR (above ground) is the same (1.91:1) as that previously approved for the site under DA 2015/246.

What is the percentage variation (between the proposal and the environmental planning instrument)?

The percentage variation is 13%.

Assessment of the proposed variation

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan.

Objectives to clause 4.6 at 4.6(1) 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.*

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- (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.*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a development that contravenes a development standard unless the:

- (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*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained and Clause 4.6(5) requires the Secretary in deciding whether to grant concurrence 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.*

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the 1.75:1 FSR standard is unreasonable or unnecessary in the circumstances of 1A Hill Street, Dulwich Hill for the following reasons:

- the above ground level FSR is the same as that already approved on the site under DA 2015/246;
- a proportion of the additional FSR directly relates to additional car parking spaces within the three level basement car park;
- the proposed built form is not dissimilar to other buildings in the surrounding locality;
- the overall design sits comfortably within the established and likely future built form context;
- the density proposed produces a building of similar scale and appearance of adjacent development;
- the height, bulk and scale of the apartment building will not set an undue precedent;
- it has been demonstrated that the proposal will not result in any material environmental impacts to the adjoining and adjacent properties, particularly in terms of overshadowing, aural and visual privacy, solar access and natural ventilation, and views and vistas;
- it will permit the redevelopment of the site to facilitate a use which is predominantly in accordance with the adopted planning controls for the site and consistent with community expectations for the area; and
- approval of the FSR as proposed on the site for a building envelope that has a more than acceptable environmental performance but which at the same time exceeds that prescribed for the locality in LEP 2011 will not set a precedent for other non-conforming applications.

Would the underlying objective or purpose of the standard be defeated or thwarted if compliance was required?

Compliance with the underlying objective of the 1.75:1 FSR standard would be thwarted if strict compliance with the standard was required in the circumstances as the quality of the residential outcome would be compromised for no sound planning reason and particularly following the approval of DA 2015/246.

Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

The development standard cannot said to be abandoned, although it is known that a number of built form (existing and approved and under construction) in the surrounding locality already depart from the FSR standard.

Approved DA 2015/246 departed from the LEP 2011 FSR standard. A similar departure is proposed as that previously approved. The above ground FSR is the same as that previously approved.

Is the zoning of the land unreasonable or inappropriate?

The zoning of the land is reasonable and appropriate given the site's location and its excellent access to services, amenities, and facilities, including public transport.

Are there sufficient environmental planning grounds to justify contravening the development standard?

In the circumstances of the case, there are sufficient environmental planning grounds to justify contravening the development standard being:

- the above ground level FSR is the same as that already approved on the site under DA 2015/246. Therefore, the environmental impacts of a built form with this density have already been assessed as being acceptable;
- the proposal satisfies the objectives of the R1 General Residential zone;
- the proposal satisfies the objectives of the FSR development standard;
- less building form is proposed adjacent to the southern boundary than that approved under DA 2015/246;
- significant environmental initiatives are proposed, including:
 - BASIX compliance;
 - all apartments have been designed to maximise access to natural light and ventilation to minimise use of artificial light, heating and cooling;
 - all apartments are naturally cross ventilated;
 - 84% of apartments receive more than 2 hours of direct solar access between 9am and 3pm during the winter solstice;
 - apartments have living areas and outdoor terraces facing north to achieve maximum access to natural light;
 - all outdoor private spaces are designed as extension of the living room to enhance and encourage outdoor and indoor living, while at same time acting as a transition space to modulate temperature in the apartment;
 - openings to balconies have an awning, louvers, eave or terrace above to minimise solar gain in summer;
 - rainwater tanks and bio retention areas which are capable of being reused for irrigation purposes and grey water;
 - the use of 3-star rating plumbing fixtures and water systems will be used;

- the engagement with the outdoors, the natural ventilation, the increase in natural light and the passive solar controls will reduce energy consumption;
 - the site's landscape solution has been specifically designed for adaptable living or recreation that is suitable for vegetation and able to sustain vegetation growth;
 - the provision of a wire planter vertical green garden façade system;
 - the site's landscape quality is significantly improved from that existing. The landscaping enhances the vegetated and landscape and townscape character of the Hoskins Park redevelopment precinct; and
 - the proposed landscaping (and built form location) does not result in the loss of any mature vegetation. In addition appropriate new plantings are proposed which will positively contribute to the landscape and scenic quality of the immediate locality.
- the visual catchment contains several buildings that will present a similar or greater bulk and scale and which will set the character to a large degree. Consequently, the non-compliance with the standard does not result in a scale of building that is out of character with the surrounding development and the emerging character;
 - the proposal will achieve a positive urban design outcome and will improve the streetscape through contemporary architecture styling as opposed to the numerous large non-descript built forms that contain little or no aesthetic significance;
 - within this context, the site can accommodate the FSR proposed and the development is of an intensity and scale commensurate with the evolving character and the prevailing urban conditions and capacity of the locality.
 - Council would not be setting a precedent by varying the FSR control as proposed;
 - removing the non-compliance would not significantly alter the perceived scale and density of the proposed development when viewed from the public domain or surrounding development; and
 - the development as proposed is consistent with the provisions of orderly and economic development.

Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?

Objectives of the FSR standard

The objectives of the FSR standard are expressly stated at Clause 4.4(1) of LEP 2011 and are as follows:

- (a) to establish the maximum floor space ratio,*
- (b) to control building density and bulk in relation to the site area in order to achieve the desired future character for different areas,*
- (c) to minimise adverse environmental impacts on adjoining properties and the public domain.*

As each FSR objective is similar, a complete and combined analysis of the proposal's compliance follows below. The proposal despite the departure from the FSR standard is nonetheless consistent with the FSR objectives for the following reasons:

- the above ground level FSR is the same as that already approved on the site under DA 2015/246. Therefore, the environmental impacts of a built form with this density have already been assessed as being acceptable and is nonetheless consistent with the objectives of the FSR standard;
- less building form is proposed adjacent to the southern boundary than that approved under DA 2015/246;
- the visual catchment contains several buildings that will present a similar or greater bulk and scale and which will set the character to a large degree. Consequently, the non-compliance with the standard does not result in a scale of building that is out of character with the surrounding development and the emerging character as expected within the Hoskins Park Precinct Masterplan;
- essentially, the objective of an FSR control is to ensure that the intensity of development respects and reflects the overall built form of a locality and does not detrimentally affect the amenity of the area. The maximum FSR that a site can achieve is determined by its environmental constraints, including overshadowing, privacy, streetscape, parking, landscaping, visual impact and views and the capacity of the community infrastructure. In terms of these performance criteria, the proposal clearly meets or surpasses these criteria as detailed previously. The proposal has been designed to minimise impacts and has had regard to site users and neighbours in terms of visual appearance, overshadowing, traffic generation, parking and streetscape;
- the proposed density of development is regulated to an acceptable level within the context of the site's locational characteristics and proximity to public transport. It will not generate an unacceptable level of pedestrian or vehicular traffic that cannot be accommodated within existing infrastructure;
- the site is well located to provide additional floorspace above that technically permitted. It is within walking distance of existing infrastructure (public transport, shops, parks, amenities and facilities) which will be able to cope with the increased demand. Specifically, the Traffic and Parking Assessment Report (submitted separately) clearly demonstrates that the proposal will not result in any adverse traffic generation impact that would lead to the unacceptable performance of the surrounding road network. In response to Council and community concerns, an additional 10 car parking spaces are proposed (above that already provided) within the three level basement car park;
- resulting from its high quality urban and architectural design solution, the apartment building will improve the locality's existing visual character and be consistent with that desired under the Hoskins Park Precinct Masterplan. The site is in an area within an existing urban environment that contains a history of varied land uses, building envelopes, heights, types, densities, and architectural merit. The development fits within the desired form, scale and character of the locality as anticipated by the Hoskins Park Precinct Masterplan and the ongoing redevelopment of properties within;
- the resulting built form and FSR is less than that approved on the property to the site's south which is currently under construction;
- the proposed built form provides a consistent vertical and horizontal modulation that has been established within the Hoskins Park precinct. The proposed height, bulk and scale of the site's built form sits comfortably within its immediate established (Waratah Flour Mills) and approved (the site under DA 2015/246) and that under construction (to the south) built form context;

- the apartment building has been designed to physically and architecturally each frontage boundary. The resultant built form provides a positive visual interest;
- a proportion of the departure is contained within the three level basement car parking area. Additional car parking spaces are proposed. The Traffic and Parking Assessment Report (submitted separately) clearly demonstrates that the proposal will not result in any adverse traffic generation impact that would lead to the unacceptable performance of the surrounding road network. The basement level GFA/FSR does not in any way add to the bulk and scale of the above ground level built form which is again consistent with that approved under DA 2015/246;
- the numerical departure is inconsequential from a planning perspective as it does not materially add to the bulk and scale of the site's built form. The built form sits comfortably within its established, approved and likely future locational context. The proposed FSR is comparable to (or less than) other properties which have undergone redevelopment or are in the process of redevelopment;
- additional (high quality) landscaped area (more than that approved under DA 2015/246) is provided than technically required. This further reduces any perception of built form dominance;
- a complying site coverage is proposed (less than that approved under DA 2015/246);
- approval of an FSR on the site that is less than the character of the area (or the same as that previously approved on the site), but exceeds the LEP 2011 standard, will not set a precedent for other non-complying applications;
- the proposal provides high quality modern, contemporary and architecturally designed apartment building on the site which is consistent with the R1 General residential built form character of the area;
- it develops a built form that defines and addresses the street character and positively contributes to the quality (enhancement) of the public domain;
- it provides a built form that is appropriate to its locational context as a basis for innovative and imaginative design notwithstanding the site's natural constraints;
- the site is proportioned to allow the efficient realisation and internalisation of the impacts of the additional floorspace without an adverse visual impact or perceived built form dominance;
- the proposal supports the principles of ecological sustainable development;
- consideration has been given in the design to minimising environmental impacts to adjoining and surrounding properties particularly in relation to aural and visual privacy, overshadowing, visual, solar access, access to natural daylight and ventilation, traffic generation/capacity; views and streetscape (including bulk and scale);
- the expression of the built form is adjusted to respond to:
 - the site's locational context;
 - the site's topography and flooding constraints (minimum habitable floor levels required);
 - the design and built form character of the adjacent development;
 - solar access and the site's orientation; and
 - internal and external amenity for the future occupants;

- the proposed density of development is regulated to an acceptable level within the context of the site's locational characteristics. It will not generate an unacceptable level of pedestrian or vehicular traffic that cannot be accommodated within existing infrastructure.

Objectives of the zone

The site is zoned R1 General Residential. The objectives of this zone are:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide for retail premises in existing buildings designed and constructed for commercial - purposes.*
- *To provide for office premises in existing buildings designed and constructed for commercial purposes or as part of the conversion of existing industrial or warehouse buildings.*

The proposed development despite its departure from the FSR development standard is nevertheless consistent with the stated objectives of the R1 General Residential zone and is therefore considered to be a suitable and appropriate redevelopment of the site for the following reasons:

- provides for high density residential development on a high density residential allotment of land;
- provides an appropriate mix of housing choice for the community within an identified high density environment;
- does not preclude the co-existence or establishment of other land uses that provide facilities or services to meet the day to day needs of surrounding residents;
- provides a well-designed high density residential development close to services and facilities, including public transport;
- does not propose any non-residential land uses;
- provides the opportunity to work from home; and
- maintains the amenity of adjacent residential and non-residential properties.

Whether contravention of the development standard raises any matter of significance for the State or regional Environmental Planning?

The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the broad brush nature of the control applied across an area that supports a variety of built forms that are reflective of different zones and are a function of their use.

The proposed FSR is similar to that approved under DA 2015/246. It is the same as that approved above ground. It is less than that of similar type development within the Hoskins Park Masterplan precinct. The proposed development supports state government policies of urban consolidation and centres policy. It is also consistent with the Metro Strategy by increasing residential densities and thereby improving the viability and vibrancy of local government areas. The site is in a built form precinct which is greater than that permitted by the planning controls and has excellent access to services, facilities and amenities.

How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?

The objects of the Act as specified in Section 5(a) (i) and (ii), are in our opinion, achieved by the proposed development in that:

- it constitutes *“proper management, development and conservation of natural and man-made resources”*;
- it promotes *“the social and economic welfare of the community and a better environment”* by better utilising the existing resources and infrastructure of the community; and
- it would result in *“the promotion and co-ordination of the orderly and economic use and development of land”*.

A strictly complying development would result in a poorer urban design response to the overall site and the area generally and in that sense it may be said that compliance with the standard would hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act.

The development as proposed is consistent with the provisions of orderly and economic development and would not hinder the objects of the Act in Section 5(a)(i) and (ii).

In addition to the above, compliance with the FSR development standard would hinder the attainment of the objects of the Act as:

- the above ground level FSR is the same as that already approved on the site under DA 2015/246. Therefore, the environmental impacts of a built form with this density have already been assessed as being acceptable and is nonetheless consistent with the objectives of the FSR standard;
- less building form is proposed adjacent to the southern boundary than that approved under DA 2015/246. Therefore, the curtilage to these properties is increased and impacts relative to overshadowing reduced;
- the proposed FSR across the site supports high quality residential apartment building development that responds to demand for high quality residential accommodation in locations with excellent access to public transport, services, amenities, and other facilities;
- it would preclude redevelopment of the site in the manner proposed and which would not offer the level of amenity expected;
- it would preclude the design and siting of the proposal from being consistent with and becoming a positive contribution to the evolving and future desired character of the Hoskins Park Masterplan precinct;
- it doesn't constitute the orderly, economic, and sympathetic redevelopment of land; and
- the departure from the standard does not result in any adverse impacts to the adjoining and adjacent properties and the surrounding public domain.

Is there public benefit in maintaining the development standard?

Generally, there is public benefit in maintaining standards. However, there is public interest in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the FSR standard would serve no other purpose than to impose numerical inflexibility that would achieve no planning purpose, particularly following the approval of DA 2015/246.

Following of review of other DA's, it can be demonstrated that Council (and alternative consent authorities) has considered applications favourably which depart from the FSR standard (and others) subject to a satisfactory environmental performance and an appropriate planning outcome. The proposal is consistent with this principle. There are no reasons as to why the proposal is not in the public interest and refusal of the proposal based on the departure from the FSR standard is not warranted. Therefore, it is argued that there is no public benefit in maintaining the adopted FSR planning control, and even more so following the approval of DA 2015/246.

On balance the variation to the FSR standard is an appropriate use of the provisions of Clause 4.6. Accordingly there is in the specific circumstances of the case, no public benefit in strictly maintaining the development standard.

Is the objection well founded?

For the reasons outlined in previous sections, the objection is well founded in this instance and granting an exception to the development can be supported in the circumstances of the case.

The circumstance will mean that the proposed development will be consistent with the built form outcomes envisaged in the zoning and policy framework and provide a built form like that already considered acceptable under DA 2015/246.

A development that strictly complied would result in a lesser development form that would not be compatible with the context and scale of surrounding development.

The development does not contravene the objects specified with 5(a)(i) and (ii) of the Act.

Conclusion

The proposed variation is based on the reasons contained within this formal request for an exception to the standard. The proposal will not result in unacceptable impacts regarding the amenity of adjoining properties.

A development strictly complying with the numerical standard would not significantly improve the amenity of surrounding land uses. In the context of the locality it would be unreasonable for strict compliance to be enforced.

The non-compliance is not considered to result in any precedents for future development within the LGA given the site considerations and surrounding pattern of development, and the combination of zoning and differentiated controls applying to the whole of the site.

It is concluded that the objection is well founded as compliance with the standard is both unnecessary and unreasonable, particularly following the approval of DA 2015/246.