

## Clause 4.6 – Exceptions to Development Standards – FSR (CI4.4)

Address: 362-374 Oxford Street, Bondi Junction - Proposed Mixed Use Development

### 1.0 Introduction

This is a written request to seek an exception to a development standard under clause 4.6 – Exceptions to Development Standards of the Waverley Local Environmental Plan (WLEP) 2012.

The development standard for which the variation is sought is Clause 4.4 Floor Space Ratio under the WLEP 2012.

This application has been prepared in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline Varying Development Standards: A Guide, August 2011, and has incorporated as relevant principles identified in the following judgements:

- *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 1009 ('Four2Five No 1');
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 ('Four2Five No 2');
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3');
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7.

The following sections of this written request demonstrate that the proposed development addresses the principles identified in the above judgements.

### 2.0 Description of the planning instrument, development standard and proposed variation

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

The Waverley Local Environmental Plan (WLEP) 2012.

#### 2.2 What is the zoning of the land?

The zoning of the land is B4 Mixed Use.

#### 2.3 What are the objectives of the zone?

The objectives of the B4 Mixed Use zone are:

- “ To provide a mixture of compatible land uses;
- To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling; and
- To encourage commercial uses within existing heritage buildings and within other existing buildings surrounding the land zoned B3 Commercial Core.”

## 2.4 What is the development standard being varied?

The development standard being varied is the maximum floor space ratio (FSR) development standard.

## 2.5 Is the development standard a performance based control?

No. The floor space ratio development standard is a numerical control.

## 2.6 Under what Clause is the development standard listed in the environmental planning instrument?

The development standard is listed under clause 4.4 of WLEP 2012.

## 2.7 What are the objectives of the development standard?

The objectives of clause 4.4 are as follows:

- “ To ensure sufficient floor space can be accommodated within the Bondi Junction Centre to meet foreseeable future needs;
- To provide an appropriate correlation between maximum building heights and density controls;
- To ensure that buildings are compatible with the bulk, scale, streetscape and existing character of the locality; and
- To establish limitations on the overall scale of development to preserve the environmental amenity of neighbouring properties and minimise the adverse impacts on the amenity of the locality.”

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

Clause 4.4 establishes a maximum FSR of 5:1 for the site as illustrated on the extract of the Floor Space Ratio Map included in Figure 1 below.



Figure 1: Extract from Floor Space Ratio Map – WLEP 2012

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

The amended proposal has a gross floor area (GFA) of 5,168m<sup>2</sup> on a site area of 899.8m<sup>2</sup>. This equates to an FSR of 5.74:1.

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

The amended proposal exceeds the maximum FSR by 15%.

## **3.0 Assessment of the Proposed Variation**

### **3.1 Overview**

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.”*

This application has been prepared in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline Varying Development Standards: A Guide, August 2011, and has incorporated as relevant principles identified in the following judgements:

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

#### **3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?**

A development that strictly complies with the FSR standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The additional floor space, i.e. above the FSR control, is sited or designed on the site in a manner that is unlikely to result in significant adverse impacts upon adjacent properties or the public realm by way of overshadowing, visual massing, view loss or privacy impacts;
- There is minimal difference in the impacts between a building that strictly complies with FSR control including:
  - Visual and acoustic privacy impacts: The building will achieve appropriate building separation (noting the amended proposal is setback between 3.46m – 3.78m to the western side boundary and between 3.02m to 3.040m to the eastern side boundary at Levels 7–13), is arranged on the site in a manner with appropriate screening to mitigate privacy impacts to the neighbouring properties. The arrangement of the building on the site will not generate any significant privacy impacts;
  - Visual impacts: The building will sit within an urban context that is changing in character. The emerging character is of tall buildings and high density development. The development will be set against a back drop of tall buildings to the north of the site in Grafton Street where existing buildings are equal to or greater in height and density than the proposed development, along with relatively recent approvals within the locality for development of similar scale and density.  
  
The architectural design of the building is of a high merit. The street facades in particular demonstrate a high degree of articulation, differentiation in materials and textures and will result in a visually interesting addition to the streetscape and skyline. The design of the external presentation of the building responds to the existing and emerging character of the locality and the proposed building is unlikely to result in significant adverse visual impacts when compared to a complying building.
  - Overshadowing impacts: The difference in shadow impacts on adjacent sites between a compliant building compared to the proposed building are relatively minor due to the fact that the building is a relatively slender and tall building which results in thinner, faster moving shadows compared to wider more 'squat' style of development which results in wider and slower moving shadows. The building shadows fall predominantly on the rooftops of buildings to the south and move relatively quickly across those buildings. The resulting

shadows are of an impact that are considered acceptable within the context of the high density B4 zone and Bondi Junction Centre; and

- View loss impacts: The GFA above the development standard amount is arranged in a manner that is unlikely to result in view loss from adjacent residential properties.

Views in the locality are predominantly in a northern direction towards Sydney Harbour and Double Bay.

The site to the immediate north of the subject site (at 81 Grafton Street) accommodates an 18 storey scale building that is wider and taller than the proposed building. A similar 18 storey scale building also exists at 79 Grafton Street to the north west of the site. Such that the existing development in Grafton Street is likely to inhibit views towards Sydney Harbour from buildings to the south, south east and south west of the subject site, and not the subject development.

Notwithstanding the above, the increased setbacks and corresponding narrowing of the building at Levels 7-13 has the consequential benefit of increasing view corridors across the site relative to the original proposal. In particular, the view corridors obtained from buildings located on the southern side of Oxford Street (looking northward) will be enhanced relative to the original submission.

- The amended proposal will result in a better urban design outcome compared to a compliant development. The building will be better differentiated from adjacent buildings and will provide a well-considered visually interesting addition to the Bondi Junction Centre;
- The level of non-compliance with the FSR control is consistent with the degree of variations contemplated and accepted by the consent authority with respect to development in similar situations within Bondi Junction;
- The development will result in significant public benefit through the inclusion of a VPA which will provide Council with the opportunity to deliver public infrastructure and affordable housing, in addition to the amount that would otherwise be provided for a development of this scale through the implementation of Council's S94A Contributions Plan. The VPA is consistent with Part 2 (a) of the Waverley Voluntary Planning Agreement Policy in that the additional FSR proposed is not more than 15% of the FSR allowable under Clause 4.4 of WLEP 2012; and
- The development satisfies the objectives of the zone and the development standard.

### **3.2.2 Would the underlying objective or purpose be defeated or thwarted if compliance was required?**

A development that strictly complied with the standard would likely result in a lesser urban design outcome. A development that strictly complied with the standard would likely result in a building lower in height and density than adjacent development, resulting in a building that is inconsistent with the bulk and scale of buildings to the north and also of recently approved surrounding buildings, which does not reflect or respond to the site's urban context.

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

It cannot be said that the FSR development standard has been abandoned, however there are numerous examples of approved development that exceed the FSR development standard within the vicinity of the site and elsewhere in the suburb and LGA.

### **3.2.4 Is the zoning of the land unreasonable or inappropriate?**

The zoning of the land is appropriate for the site.

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

The particular circumstance of this site that distinguishes it from others is its relatively large, consolidated site area on a primary street of the Bondi Junction Centre. This is combined with the fact that the site accommodates a heritage item and is also located adjacent to (and to the south of) a set of existing 18 storey towers (including podiums).

Any redevelopment at the site will be affected by the bulk and scale impacts, visual massing and overshadowing of the two (2) tall developments to the north (and north west) in Grafton Street.

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

- The proposed non-compliance with the FSR control will result in a better urban design outcome at the site.

The site is located on a primary (main) street of the Bondi Junction Centre. The proposed scale of the building will visually differentiate it from the approved building immediately to the west of the site at 356-360 Oxford Street and the two (2) taller towers at 79 and 81 Grafton Street to the north.

The visual catchment of Oxford Street and Grafton Streets contain a number of buildings which have been approved that will present a scale that will set the character. The proposed development will not be determinative in respect of the character of the locality, rather it will be complementary to the character of the precinct.

The site is capable of accommodating the proposed density and the development is of an intensity and scale commensurate with the evolving character and the prevailing urban conditions and capacity of the locality. Overall, the increased FSR of the development will result in a better urban design outcome for the site and the wider Bondi Junction Centre compared to a compliant development;

- The proposed variation to the FSR is in part a function of compliance with the ADG requirements for solar access, such that due to overshadowing from approved taller buildings to the north, the height of the development has been arranged so that direct sunlight can be achieved to 70% of the proposed residential apartments;
- The development will provide additional residential accommodation in an area with excellent access to public transport services, an aim of the strategic planning vision for this locality;
- The proposal will not set a precedent in terms of density or height for development in the vicinity;
- The proposal satisfies the objectives of the B4 Mixed Use zone and the objectives of the FSR standard, and the proposed FSR is considered appropriate within the strategic planning context of the B4 Mixed Use zone in the Bondi Junction Centre.
- The non-compliance with the standard does not contribute to significant adverse environmental impacts in terms of overshadowing, visual impacts or view loss;
- The development will result in significant public benefit through the inclusion of a VPA which will provide Council with the opportunity to deliver public infrastructure and affordable housing, in addition to the amount that would otherwise be provided for a development of this scale through the implementation of Council's S94A Contributions Plan; and
- The development as proposed is consistent with the provisions of orderly and economic development.

### 3.4 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?

#### 3.4.1 Objectives of the FSR standard

The proposal remains consistent with the objectives of the FSR standard outlined in Subclause 4.4(1) despite the non-compliance demonstrated below:

*“(a) to ensure sufficient floor space can be accommodated within the Bondi Junction Centre to meet foreseeable future needs,”*

The proposed development seeks to create a mixed use building which will incorporate high quality retail tenancies, serviced apartments, and residential apartments with good to excellent amenity. Each of the proposed uses will assist in meeting the varied current and future needs of the Bondi Junction Centre.

*“(b) to provide an appropriate correlation between maximum building heights and density controls,”*

The proposal seeks a variation to the building height control and the circumstances that are relevant to the proposed variation to the density control (maximum FSR) are pertinent to the proposed variation in height. In that respect the correlation between the two (2) controls will remain, however in the circumstances of this development there is merit in allowing both controls to be varied.

The control will continue to prescribe the maximum FSR and the proposal will not alter that. Council will be able to continue to consider applications and variations based on merit and in accordance with the provisions of Clause 4.6.

*“(c) to ensure that buildings are compatible with the bulk, scale, streetscape and existing character of the locality,”*

The bulk and scale of existing and approved developments in the locality ranges considerably. The scale of the proposed development is commensurate with the scale of existing development in the vicinity of the site as well as recently approved (but yet to be constructed) developments within the vicinity of the site. This includes developments along Oxford Street and Grafton Street.

The building will achieve appropriate separation to buildings on adjacent sites (current and potential future development) and the building does not represent a development that is out of scale or comparatively bulky when considered against the existing and desired future character for the locality.

*“(d) to establish limitations on the overall scale of development to preserve the environmental amenity of neighbouring properties and minimise the adverse impacts on the amenity of the locality.”*

The design of the building represents a thoughtful response to the location of the site within one of the main streets of the Bondi Junction Centre and will provide visual differentiation to adjacent development.

The building is of a design so that the floor space which represents the variation in FSR control is positioned in a manner that is unlikely to significantly compromise the amenity of surrounding properties.

Although relatively tall, the building is well articulated and is relatively slender. The building will achieve adequate separation between existing and future buildings on adjacent sites.

Consequently the building is unlikely to result in significant adverse visual massing and bulk and scale impacts above the impacts that could be reasonably expected from a compliant development.

The building is of a similar height to (or in some instances lower than) approved and existing development in the vicinity and is generally consistent with the desired future character of locality. The design of the

building, in particular the elevation character and façade treatment, is of a high quality and the proposal will improve the streetscape and provide a new aesthetically pleasing element to the evolving skyline when viewed from adjoining roads and public places.

The SEE submitted with the DA demonstrates that the proposal is unlikely to result in significant adverse impacts by way of overshadowing, visual and acoustic privacy, view loss and visual massing to adjoining properties and the public domain.

The design of the building responds to the constraints of the site and its urban context. The height and density of the building responds to the sites relatively prominent location within one of the main roads of the Bondi Junction Centre and the size and orientation of the site and this is reflected by the lack of adverse impacts that will result from the development and the fact that appropriate building separation will be achieved.

Additionally, the development includes a VPA which will provide Council with the opportunity to enhance aspects of the public domain in the locality that would otherwise not be possible in the absence of the proposed VPA.

### 3.4.2 Objectives of the zone

The proposal remains consistent with the objectives of the B4 Mixed Use zone, despite the non-compliance with the FSR standard as demonstrated in the assessment of the objectives below:

- “*To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
- *To encourage commercial uses within existing heritage buildings and within other existing buildings surrounding the land zoned B3 Commercial Core.”*

The proposal includes retail premises, serviced apartments and residential apartments which are all forms of land uses envisaged for the zone. The combination of the proposed uses is arranged in a configuration where all three uses can coexist, and in a location that is already characterised by mixed use development.

The site has excellent access to public transport and is in a highly accessible location. It is close proximity to a train station and bus routes.

The site is highly accessible to high frequency public transport in the form of trains and buses. A large range of services and amenities are within easy walking distance. The development includes bicycle storage facilities in locations and of a capacity that is consistent with Council's requirements.

The proposed development will provide new ground floor retail floor space behind retained and restored heritage building facades.

The proposed non-compliance with the FSR control in no way affects the developments compliance and satisfaction of the zone objectives.

Given the circumstances of the case, the provision of a strict numerical compliance would be unreasonable on the basis that the proposed development achieves compliance with the objectives of the standard and the zone, and is compatible with adjoining development.



### **3.5 Whether contravention of the development stand 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 a 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.

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

The objects set down in Section 5(a)(i) and (ii) are as follows:

*“to encourage*

- (i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- (ii) The promotion and coordination 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.

Strict compliance with the development standard would not result in discernible benefits to the amenity of adjoining sites or the public. Further, the proposal satisfies the zone and development standard objectives, and principally maintains the scale and density of recently approved buildings.

The development as proposed is consistent with the provisions of orderly and economic development and strict compliance with the standard is not required in order to achieve compliance with the objectives.

### **3.7 Is there public benefit in maintaining the development standard?**

Generally speaking, there is public benefit in maintaining standards. However, there is public benefit in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the FSR would result in a poorer urban design outcome in respect to the presentation of the building to, and its relationship with, other recently approved buildings within the Bondi Junction Centre that are of a similar density and height as the proposed development.

There is, in the specific circumstances of this case, no public benefit in maintaining the development standard, as the proposed development results in a better planning outcome for the site.

Additionally, the proposed VPA will result in significant public benefit through the provision of additional public infrastructure and affordable housing in the locality.

Therefore, in the specific circumstances of this case, no public benefit in maintaining the development standard, as the proposed development results in a better planning outcome for the site.

### **3.8 Is the objection well founded?**

Yes. For reasons outlined in the preceding sections of this submission, the variation to the FSR control is well founded as compliance with the standard is unreasonable as the development does not contravene the objects specified within 5(a)(i) and (ii) of the Act nor the objectives of the B4 Mixed Use zone of WLEP 2012.

A development that strictly complies with the standard is unnecessary in this circumstance as no appreciable benefits would result by restricting the building to absolute numerical compliance.

Clause 4.6(5) states:

*“(5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.”*

The requested variation to the FSR Standard does not raise any matter of significance for State or regional environmental planning. The consideration of the variation is a purely local matter relating to the distribution and accommodation of building volume on the site in a manner that skilfully integrates the building into the streetscape.

There is no discernible public benefit in maintaining a strict application of the numerical FSR limit in this instance. Despite the variation to the FSR development standard, the proposal generally complies with the SEPP 65 design principles, setback controls and amenity controls applicable to the development.

The variation to the FSR control delivers a public benefit in facilitating a mixed use development of design excellence which responds to the existing and emerging urban context of the locality and the site's relatively prominent position while providing contemporary retail floor space, high quality serviced apartments (i.e. tourist accommodation) and increasing the housing stock within an area identified for higher density mixed used development.

Additionally, the proposed VPA will result in significant public benefit through the provision of public infrastructure and affordable housing.

## **4.0 Conclusion**

Development standards are a means of implementing planning purposes for a development or area.

The proposed FSR is considered appropriate to the context and circumstances of the site, and does not result in a scale of development that is out of character with the surrounding development and emerging character of the locality.

Contextually, the amended proposal will provide a development of a scale, form and density that appropriately responds to the sites' prominent location within the Bondi Junction Centre. On an urban design basis, the outcome will be entirely appropriate to the locality and will result in a building that will display architectural excellence.

The proposal does not represent an overdevelopment of the site and the height and proposed intensity (density) is consistent with the locality's desired future character and its evolving urban context.

The site is within a locality that is of a geographical position and which has appropriate service capacity to readily accommodate development of the density and scale proposed. The site is within a location that has excellent access to a range of services and facilities, including a high level of public transport.

It is suitable to maximise the development opportunities for higher density and higher scale development. The proposed variation to the density control is consistent with the identified strategic outcomes for the locality and the sites physical constraints.

The amended proposal will result in considerable public benefit through the provision of new retail floor space, 14 serviced apartments, 70 residential dwellings and the inclusion of a VPA which will result in additional public infrastructure and affordable housing for the locality.

This submission satisfies the provisions of 4.6(3)(a), 4.6(3)(b), 4.6(4)(a)(i) and 4.6(4)(a)(ii) of WLEP 2012 as it has been demonstrated that compliance with the FSR development standard is both unnecessary and unreasonable in the circumstances of this case, there is sufficient planning grounds to justify contravening the standard, the development will be in the public interest and it is consistent with the objectives of the standard and the objectives for development within the B4 Mixed Use zone.