

CLAUSE 4.6 VARIATION - FLOOR SPACE RATIO

**101 WATERLOO ROAD,
MACQUARIE PARK**

4 NOVEMBER 2016
FINAL

URBIS

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1. OVERVIEW

This report is a variation request to the applicable floor space ratio (FSR) development standard within the *Ryde Local Environmental Plan 2014* (RLEP2014). It has been prepared with regard to the following considerations:

- Clause 4.6 of RLEP2014;
- The objectives of clause 4.4 Floor Space Ratio, being the development standard of which a variation is sought.
- Relevant case law specifically the considerations for assessing development standards including *Wehbe v. Pittwater Council* [2007] NSWLEC 827 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LEC.
- “*Varying Development Standards: A Guide*” published by the Department of Planning and Infrastructure (August 2011).

This variation request provides an overview of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with clause 4.6 of RLEP2014 and the relevant principles of the court judgements detailed above.

A variation to the strict application of the FSR development standard is considered appropriate for the proposed development as:

- The objectives of the RLEP2014 FSR control are achieved notwithstanding the technical non-compliance;
- The objectives of the RLEP2014 B4 Mixed Use zone are achieved notwithstanding the technical non-compliance;
- There are sufficient environmental planning grounds to support the proposed variation;
- The design of the proposal overcomes potential impacts which could be associated with the additional floor area proposed; and
- The public benefit of maintaining the development standard is not eroded by the proposal.

2. PROPOSED VARIATION TO DEVELOPMENT STANDARD

Clause 4.4(2) of RLEP 2014 specifies the following:

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 relevant FSR Map nominates a FSR of 3:1 for the site and the site survey (provided within the **Volume of Plans**) identifies that the site has a total area of 17,161sqm. When measured in accordance with the RLEP2014 definition¹, the original proposal included 56,579.8sqm of gross floor area (GFA).

Following detailed design and preparation of the response to submissions, 33 balconies have been identified that may require additional partial screening to deflect noise generated by the existing Macquarie Centre. Given the potential extent of the enclosure of these balconies as 'wintergardens', the total GFA of the proposal has been increased by 566,6sqm, resulting in a total GFA of 57,146.4sqm.

Development consent is sought for a total FSR² of 3.33 (3.297:1 without the above-mentioned balconies) across the site, this variation request relates to the total FSR.

The variation equates to a non-compliance with the development standard prescribed by clause 4.4(2) of the RLEP2014 by 11%.

Clause 4.6 of RLEP 2014 provides flexibility to vary the development standards specified within the LEP where it can be demonstrated that the compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and where there are sufficient environmental planning grounds to justify the departure.

Accordingly, justification is set out in the following sections for the departure from the FSR control applicable to the development and the site under the RLEP2014.

¹ **gross floor area** means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes:

- (a) the area of a mezzanine, and
- (b) habitable rooms in a basement or an attic, and
- (c) any shop, auditorium, cinema, and the like, in a basement or attic, but excludes:
 - (d) any area for common vertical circulation, such as lifts and stairs, and
 - (e) any basement:
 - (i) storage, and
 - (ii) vehicular access, loading areas, garbage and services, and
 - (f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and
 - (g) car parking to meet any requirements of the consent authority (including access to that car parking), and
 - (h) any space used for the loading or unloading of goods (including access to it), and
 - (i) terraces and balconies with outer walls less than 1.4 metres high, and
 - (j) voids above a floor at the level of a storey or storey above.

² **floor space ratio** of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area

3. CLAUSE 4.6 ASSESSMENT

This section assesses the proposed variation to consider whether compliance with the FSR standard can be considered unreasonable or unnecessary in this particular case, and whether there are sufficient environmental planning grounds to justify contravening the development standard.

The assessment is structured in accordance with the relevant matters for consideration identified in the *Wehbe v Pittwater* [2007] NSW LEC 827 (Wehbe) Land and Environment Court judgment:

1. *"The applicant must satisfy the consent authority that "the objection is well founded," and compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;*
2. *The consent authority must be of the opinion that granting consent to the development application would be consistent with the policy's aim of providing flexibility in the application of planning controls where strict compliance with those controls would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the Environmental Planning & Assessment Act 1979; and*
3. *It is also important to consider:*
 - a. *Whether non-compliance with the development standard raises any matter of significance for State or regional planning; and*
 - b. *The public benefit of maintain the planning controls adopted by the environmental planning instrument."*

Consideration has also been given to the findings of *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LEC, initially heard by Commissioner Pearson and upheld on appeal by Justice Pain. This case found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of the Wehbe judgement and demonstrate the following:

- o *Compliance with the particular requirements of clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;*
- o *That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity); and*
- o *That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone which applies to site.*

An assessment of the proposed variation to the FSR standard against the provisions of Clause 4.6 and the relevant case law is therefore provided in the following sections.

3.1. COMPLIANCE IS UNREASONABLE OR UNNECESSARY

In the Wehbe judgement Preston CJ set out five ways in which a variation to a development standard can be supported as follows:

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*

In applying the tests of the Wehbe judgement above, **only one of the above rationales is required to be established.** The proposed development is consistent with both the underlying objectives of the standard for FSR and the B4 Mixed Use zone of RLEP 2014 as particularly demonstrated within the Statement of Environmental Effects accompanying this development application.

The objectives of Clause 4.4 are as follows:

- As enhanced throughout the multiple Urban Design Review Panel meetings held in relation to the proposed development, the 'bulk' of the proposal has been revised to include a stepped building podium with low level building breaks, compliant building separation, a significant ground level public domain offering, and communal open space. Further, the proposed tower form includes varied floor plate geometries to offer a dynamic perspective of the development when viewed from key public corridors including the approached on Waterloo Road. The angled tower forms reduce the perception of scale and 'bulk' of the towers.

The Council requested enclosure of 33 of the balconies that may be affected by noise generated by the existing Macquarie Centre will have little contribution to the perception of bulk and scale of the development, especially as viewed from the public domain.

The site is located within the Macquarie Park Corridor 'Centre' identified on the Centres Map. The proposal represents an appropriate level of development for the area given the proposal represents a transition of building heights and FSR between that is achievable on the adjacent Macquarie Shopping Centre site and properties to the south east located within the 'Macquarie Park Corridor' Precinct Incentive area. This is a particular consideration for the site which is somewhat uniquely positioned between the Macquarie Centre and the future priority growth area immediately to the east of the site.

- Providing additional dwellings in close proximity to employment and high frequency public transport;
- Providing incentives for active transport encouraging a reduction in certain movements in private transport;
- Exceeding the Apartment Design Guide requirements for areas of deep soil landscaping and communal open space; and
- Achieves all required sustainability targets as mandated within SEPP BASIX and Section J of the BCA.

Further, it is considered that the proposal will remain consistent with the objectives of the B4 zone, being:

- 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 ensure employment and educational activities within the Macquarie University campus are integrated with other businesses and activities.
- To promote strong links between Macquarie University and research institutions and businesses within the Macquarie Park corridor.

The proposed development is consistent with these objectives because:

- The proposed development provides a mixture of compatible land uses that leverage from surrounding developments to provide an increased number of dwellings in close proximity to employment and services.
- Public transport patronage, walking and cycling will be encouraged through the provision of housing adjacent Macquarie University Railway Station and bus interchange and through improved connections throughout the precinct.
- The scheme includes a significant amount of retail frontage and active uses across the ground level of the proposal which not only provides non-residential tenancies within the precinct, but also provides an active retail connection between Waterloo Road, the site, and the Macquarie Shopping Centre.

3.2. ADEQUATE GROUNDS FOR CONTRAVENING THE STANDARD

Clause 4.6 requires the applicant to demonstrate that there are sufficient environmental planning grounds to contravene the development standard. This section demonstrates that the impacts of the variation will be consistent with the external site impacts that may be reasonably expected by a complying development with regard to the following:

- The current and desired future character of the locality;
- The preservation of the residential amenity of the site and surrounding developments, with particular regard to overshadowing impact;
- Achieving a high level of policy compliance with other relevant Planning Provisions; and
- The applicant has included the offer of a draft VPA concurrently with the DA that will provide significant material public benefits in the immediate vicinity of the site in addition to Section 94 contributions beyond what would be offered in a fully compliant scheme.

3.2.1. Current and Desired Future Character of the Locality

The proposal is consistent with the desired future character of the area for the following reasons:

- As articulated within the Macquarie Park Corridor site specific controls of the RDCP 2014 the vision for the locality includes:

"The Corridor will be characterised by a high-quality, well-designed, safe and livable environment that reflects the natural setting, with three accessible and vibrant railway station areas providing focal points.

Residential and business areas will be better integrated and an improved lifestyle will be forged for all those who live, work and study in the area."

- The proposal includes a development that represents a high-quality architectural and landscape design that not only improves the interface of the site to Waterloo Road, but also improves the permeability of the site for both vehicles and pedestrians. The development includes significant landscape areas both for the benefit of the future residents of the development and the general public.
- The proposal specifically assists in providing a better integration between the public domain, residential units, and businesses by providing ground level retail tenancies around a new public plaza, direct connections between the public plaza and the residential component of the development, and a new direct pedestrian link between the public domain, residential component of the development and the adjacent Macquarie Centre. This is a particularly opportunity afforded to this specific site.

- The proposal is consistent with the anticipated building form within the Macquarie Park Corridor, which includes podium and tower forms. Importantly to note the proposal complies with the maximum height limit applicable to the site, and provides compliant building setbacks and building separation.
- Therefore the proposed additional FSR will not create any discernible change to the anticipated building form and scale.

3.2.2. Residential Amenity

Despite the contravention to the FSR development standard, the proposal achieves a high level of amenity for the residents of the development as:

- The proposed towers are orientated and positioned to achieve greater percentage north-east and north-west facing apartments;
- 15% (102 out of 680) of apartments achieve no direct sunlight;
- The proposal achieves the required building separation for tall towers, and further provides appropriate screening to ensure acoustic and visual privacy is maintained between dwellings;
- The proposal meets the Apartment Design Guide requirements for naturally cross ventilated apartments and apartments that achieve solar access for more than 2 hours in mid-winter; and
- The proposal exceeds the Apartment Design Guide requirements for total areas of deep soil landscaping, communal open space, and private open space to the clear majority of apartments.

Further, the proposal results in appropriate environmental impacts to surrounding development sites as:

- The proposal provides two hours of solar access to at least 50% of the property immediately to the south east of the site on 21 June to enable the future redevelopment of that site for potentially residential purposes;
- The geometry of Tower B results in a narrow and quick moving shadow across properties immediately to the east of the site;
- The proposal achieves the building setbacks required by the RDCP 2014 and therefore results in appropriate separation between the development and surrounding sites, proposed and existing streets; and
- The proposed development includes a significant new public plaza and new road that will directly benefit the future residents and current occupants of surrounding sites by providing additional public infrastructure.

3.2.3. Consistency with other Relevant Planning Provisions

A detailed assessment of the proposal has been carried out against the applicable RLEP2014 and RDCP 2014 planning provisions and is included within the Statement of Environmental Effects supporting this development application.

As outlined within the pre-lodgement meetings held with Council, the site is capable of accommodating additional floor space above the control, whilst maintaining compliance with other key building form controls. Council staff indicated that minor exceedances (~10%) to the FSR control may therefore be considered as part of a Clause 4.6 variation request. Importantly, the proposal maintains compliance with the other key statutory built form control being building height.

As demonstrated in that assessment, the proposal substantially complies with the range of planning objectives and controls beyond those discussed in this Clause 4.6 variation to manifest into a design that achieves design excellence and a quality of building form and public domain amenity desired by the planning controls.

3.2.4. Draft Voluntary Planning Agreement Delivers Public Benefit

As outlined in the SEE report, the application includes a draft VPA which according to Section 79C(1)(a)(iia) is a relevant matter for consideration in determining a development application. The draft VPA will deliver substantial public benefits including:

- Public domain works in kind including:

- Construction of portions of a new road which lies within the boundaries of the site.
 - Construction of the civil works required to deliver the new road including but not limited to footpaths, landscape islands, kerb and gutter, asphalt roads, line markings, and road and street signage.
 - Provision of services within the boundaries of the site including cut and demolition of existing hard stand area, excavation, concrete pipework, backfill, connection to existing main, surcharge inlet pits, street lighting to be connected into existing grid in consultation with the City of Ryde Council.
 - Provision of temporary road works including retaining walls between the site and the adjacent land concurrent with the construction of the new road.
 - The delivery of Public Domain Works within Waterloo Road in accordance with the Council Public Domain Manual.
- Remediation of the site where required in accordance with the recommendations of the relevant contamination assessment. All land to be dedicated to Council will be remediated where required prior to the dedication.
 - Excision of 2,482sqm of land area from the site and dedication to the City of Ryde Council for the purposes of a new road, footpath and public domain works.
 - Construction of 21 residential apartments, representing 3.1% of the total residential units to be delivered as part of the development, to be dedicated to Council for use as KWH. The location of the nominated dwellings is illustrated on the concept architectural plans prepared by PTW Architects (**Volume of Plans**). This KWH will be dedicated to Council progressively, to be managed on Council's behalf by a Community Housing Provider.
 - The construction of a pedestrian link through the site from Waterloo Road to the adjacent Macquarie Centre. The location of the link and artist's impression of the link is shown on the Architectural Plans (**Volume of Plans**) and has been prepared in consultation with AMP the owner of the Macquarie Centre.

The offer of a draft VPA provides substantial delivery of public benefits that would be carried out as part of the development and therefore implemented immediately to benefit the community. The offer of a draft VPA should therefore constitute a matter for consideration in terms of the development serving the public interest.

3.3. IS THE OBJECTION WELL FOUNDED

Compliance in this circumstance would not improve the outcome. Rather it would unreasonably impact on the public benefit provided for the project effectively undermining the objectives of the proposal. It is our view that to force compliance in the circumstance would be antipathetic to the inherent flexibility provided by clause 4.6, thereby hindering the attainment of its objectives.

3.4. SIGNIFICANCE FOR STATE OR REGIONAL PLANNING

The non-compliance will not raise any matter of State or Regional Significance.

3.5. THE PUBLIC INTEREST

Clause 4.6 requires that the consent authority consider the public interest in determining whether to support the variation. The proposed variation to the FSR development standard will result in a better outcome for the public as:

- The variation to the development standard facilitates the potential dedication of 21 KWH units that are currently not required by the planning controls, without adversely affecting the other public benefits offered by the development such as the dedication of a new public road, and significant new public plaza.
- The variation will result in a podium that can deliver retail tenancies with appropriate depth to achieve a variety of retail uses activating Waterloo Road and the proposed new public plaza.
- The proposed additional residential units facilitated by the variation will increase the supply of dwellings in close proximity to employment and high frequency public transport contributing to the NSW Government objective to increase the number of dwellings within 30minutes from employment.

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4. CONCLUSION

In view of the development context, strict compliance with Clause 4.4 of the RLEP2014 is considered to be unnecessary in this case and the proposed development is justified on the following environmental planning grounds as follows:

- The proposed development is consistent with the underlying objective or purpose of the development standard as demonstrated throughout this report.
- The proposed development positively contributes to the desired future character of the area as outlined within the Macquarie Park Corridor precinct specific controls contained within the RDCP.
- The floor space proposed above the control will have no demonstrable adverse impact on the amenity of adjoining occupiers beyond a fully compliant FSR scheme because the buildings comply with the maximum height and maintain the desired visual and physical through site corridors envisaged by the RDCP controls. The increase in FSR resulting from the requested enclosure of 33 balconies will rather have an improved amenity impact on the units.
- The proposed development will not result in any unreasonable privacy intrusion or loss of significant daylight access to adjacent properties, beyond that reasonably expected from future envelopes.
- The proposed development complies with other key standards of the RLEP2014 and will create a minimal impact on the locality and its surrounds.
- The design meets the objectives of the SEPP65 amenity requirements demonstrating the suitability of the site for the density proposed.
- The proposed variation to the standard does not raise any matter of significance for State or regional planning.
- There is no public benefit in maintaining strict compliance with the standard. Thus strict application of the standard is therefore unreasonable and unnecessary in the circumstances of the case.
- The proposed development, contributes to achieving the objects of the EP&A Act which includes the promotion and co-ordination of the orderly and economic use and development of land.

For these reasons, the proposed variation to the FSR standard should be supported as part of the assessment of this DA.

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