

## CLAUSE 4.6 EXCEPTION TO FSR STANDARD

### INTRODUCTION

This written request replaced the Clause 4.6 Request submitted with the Development Application to accommodate the amended development application. This request has been prepared in accordance with the provisions of clause 4.6 "Exceptions to Development Standards". The request seeks a variation to the Floor Space Ratio (FSR) development standard at clause 4.3 of the *Ryde Local Environmental Plan 2014* (RLEP 2014).

The proposed development includes a total of 180 retail car parking spaces, which exceeds the maximum permitted number of retail car spaces under the North Ryde Station Precinct DCP 2013 by 101 spaces. Additional retail car parking is located on Lot 104 to serve the proposed retail uses including a full line supermarket. A detailed justification for the proposed non-compliance with the maximum car parking rates for the retail uses is provided in Statement of Environmental Effects, submitted with the Development Application, and in formal response to the *Peer Review of Traffic & Parking impact Assessment Report*, prepared by Urbis dated 21 March 2017.

Careful consideration has been given to the type and size of retail land uses proposed at Lot 104 and Lot 105 Lachlan's Line, North Ryde. It is important to note that Lot 104 and Lot 105 is the only mixed-use development site within the wider Lachlan's Line Precinct and therefore it must meet the future needs of the wider population.

The planned retail centre is proposed to be anchored by a major full-line supermarket, which will support and attract smaller high quality retail tenancies, some of which may include:

- Service retail (medical centre, pharmacy, optometrist, child care);
- Lifestyle retail (gymnasium, hair salon, day spa);
- Fresh Food (providore, butcher, seafood, delicatessen); and
- Eateries (restaurants, cafes).

The proposed development also incorporates other land uses to meet the needs of the wider Precinct, including the community facility, child care, and public open spaces.

The success of the activation of the Lachlan's Line mixed-use precinct is hinged heavily on having a major full-line supermarket to anchor and attract residents, workers and visitors. The full-line supermarket provides not only an economic benefit to the adjoining retailers, but also provides a significant benefit to the utilisation of the community facility, child care centre, and public open space to be provided by Greenland and operated by Council.

Without a full-line supermarket, it will be difficult to secure A grade tenants and the mixed-use precinct has a greater of chance of being underutilised. This outcome would be inconsistent with the vision and objectives of the North Ryde Station Precinct for a vibrant mixed use precinct.

A major full-line supermarket cannot operate in the context of the Macquarie Park environment with only 79 retail car parking spaces. It is unrealistic to expect that the majority of patrons will travel by train to and from the supermarket (and cross the pedestrian bridge into Lachlan's Line) to undertake their grocery shopping.



Without a major full-line supermarket, there is the possibility that the precinct would be diverting the ~5,000 residents away from Lachlan's Line toward an existing supermarket location (e.g. Macquarie Shopping Centre), consequently adding further traffic to the network.

Despite the numerical exceedance of the car parking rates the proposal retail uses and ancillary car parking has been assessed to be consistent with the vision and objectives of the North Ryde Station Precinct DCP, as follows:

- **2.1 Vision for North Ryde Station Precinct**
  - *Represent 'place-making' through activation of the space, creation of a destination and creation of identifiable landmarks, including an appropriate mix of uses and community facilities*

Comment: The vision for North Ryde Mixed Use Precinct as to create a destination with an appropriate mix of uses and community facilities, which anticipates that people will visit the site from outside of the Precinct. The range of uses are suitable to meet the vision for North Ryde Station Precinct outlined in the DCP.

- **2.2 Design Principles**
  - *North Ryde Station Precinct is Active – many of the new community's needs will be available on site. The precinct is also to be a destination that can serve the wider community.*

Comment: The North Ryde Station Precinct has been designed and incorporates uses that cater to the occupants within the Precinct as well as serve the wider community. The retail uses include a full line supermarket within the Lachlan's Line, which will draw in the wider community for their daily and weekly shopping needs.

- **5.4 Mixed Use Buildings- Objectives**
  - *Creative lively streets and public spaces in the Precinct*
  - *Increase the diversity and range of shopping and recreational activities for workers and residents*

Comment: The proposed mixed use development includes suitable retail uses fronting streets that create a destination that can draw in the wider community to provide vibrancy and activation throughout the day and at night. Having the proposed retail will drive the activation of the public domain and is critical to the successful mixed used precinct at North Ryde.

- **7.2 Car Parking - Objectives**
  - *Minimise traffic congestion in the Precinct*
  - *Provide adequate car parking for building users and visitors, depending on building use and proximity to public transport*

Comment: The proposed car parking arrangements will successfully achieve the objectives of the DCP car parking controls. As noted above the traffic generation for the proposed development will be similar to the traffic generation anticipated in the TMAP Review. The proposal provides adequate car parking for the retail uses that are catering for the residents on the site and the wider community, as patrons will travel to the site to do their weekly shop.

It is our assessment that the proposed retail car parking spaces is appropriate in the specific circumstances of the site and the development proposed. Specifically:

- The proposed full-line supermarket is required to support and attract high quality smaller retail tenancies and ensure the mixed-use precinct, including the community facility, child care centre, and public open space is active and vibrant. This is consistent with the overall vision for the North Ryde Station Precinct.
- The objectives and controls contained within the Development Control Plan for retail car parking do not anticipate the provision of a full-line supermarket that will serve the wider Lachlan's Line precinct and surrounding local catchment. This has resulted in a numerical non-compliance with the DCP.
- Justification has been provided by the applicant (and has been confirmed by Council's independent peer review) demonstrating that despite the numerical non-compliance with the retail car parking controls, the proposed development will have no net impact on the surrounding road network.
- The provision of retail car parking spaces is not inconsistent with the key principles for Transit Oriented Development, as listed in the DCP at Section 2.1. Specifically:
  - The proposed development provides a mix of compatible uses, including residential, retail, community, and public open space, within 500m of North Ryde Station.
  - The mix of uses proposed will stimulate activity around the station.
  - The proposed development applies a reduced rate of private residential car parking thereby encouraging use of alternative transport options.
  - The proposed development provides liveable and active public domain spaces that will attract and service the wider Lachlan's Line precinct and surrounding catchment.
  - The proposed development provides high quality open space consistent with the DCP.

Clause 1.7 of the North Ryde Station DCP 2013 relates to Compliance with Objectives and Controls of the DCP and states *"...in some circumstances, strict compliance with the controls may not be necessary, or may be difficult to achieve because of the particular characteristics of a development site"*. Further, Clause 1.7 allows Council to *"...grant consent to a proposal that does not comply with the Controls in this plan, providing the intent (i.e. the Objective/s) of the Controls is achieved"*.

It is our opinion that the proposed development is consistent with the objectives of Clause 7.2 Car Parking. Specifically:

- The proposed development will limit private vehicle usage by providing residential car parking in accordance with the DCP rates.
- The proposed development will have no net impact on the surrounding road network and access restrictions, as compared to the most recent assessment of the road network undertaken for the precinct.
- The proposed development will reduce car dependency and promote alternative means of transport by limiting the number of residential car parking spaces provided.
- The provision of car parking spaces is considered necessary to meet the needs of the building users and visitors and ensure the precinct is vibrant and active.
- The provision of retail car parking spaces is required to ensure retail patrons are not queuing in surrounding streets or diverted to other retail centres, consequently adding further traffic to an already congested network.

## CLAUSE 4.6, RYDE LOCAL ENVIRONMENTAL PLAN 2014 (RLEP 2014)

Clause 4.6 of the RLEP 2014 provides flexibility in the application of planning controls by allowing Council to approve a development application that does not comply with a development standard where it can be demonstrated that flexibility in the particular circumstances achieve a better outcome for and from development. Subclauses (3), (4), (5) and (8) from clause 4.6 of RLEP 2014 are extracted below:

- (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 Director-General has been obtained.*
- (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.*
- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
  - (a) *a development standard for complying development,*
  - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*

- (c) clause 5.4,
- (ca) clause 4.3, to the extent it applies to Precinct 2 (Town Core) shown on the Ryde Town Centre Precincts Map.

**NSW Land and Environment Court: case Law (tests)**

Several key Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached. The key findings and directions of each of these matters is outlined in the following discussion.

*Winten v North Sydney Council*

The decision of Justice Lloyd in *Winten v North Sydney Council* established the basis on which the former Department of Planning and Infrastructure's Guidelines for varying development standards was formulated. Initially this applied to State Environmental Planning Policy – Development Standards (SEPP 1) and was subsequently updated to address clause 4.6 of the *Standard Instrument templates*.

These principles for assessment and determination of applications to vary development standards are relevant and include:

- Is the planning control in question a development standard;
- What is the underlying object or purpose of the standard;
- Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act;
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;
- Is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case; and
- Is the objection well founded.

*Wehbe V Pittwater [2007] NSW LEC 827*

The decision of Justice Preston in *Wehbe V Pittwater [2007] NSW LEC 827* expanded on the findings in *Winten v North Sydney Council* and established the five (5) part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions:

- Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;
- Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;
- Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;



- Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
- Is the “*zoning of particular land*” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently compliance with that development standard is unnecessary and unreasonable.

*Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*

More recently in the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

- Compliance with the particular requirements of clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP; and
- 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);
- 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 in which the site occurs.

The following section addresses the local provisions of Clause 4.6 of RLEP 2014 together with principles of *Winten v North Sydney Council* as expanded by the five (5) part test established by *Wehbe V Pittwater [2007] NSW LEC 827* and refined by the judgement of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*.

***Is the Planning Control in question a development standard?***

The planning control in question is clause 4.4 of the RLEP 2014. Clause 4.4 nominates a maximum FSR of 3.3:1 FSR. The planning control as a numerical control is a development standard capable of being varied under the provisions of clause 4.6 of the RLEP 2014.

The definition of “floor space ratio” at Clause 4.5(2) of the RLEP 2014 provides that the 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.

Gross Floor Area is defined to mean:

***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.

Our emphasis added.

As provided at (g) above, car parking to meet the requirements of the consent authority (including access to that car parking) is excluded from the calculation of Gross Floor Area, under the RLEP 2014 definition. It follows that car parking that exceeds the requirements of Council, is included in the calculation of GFA, for the purposes of calculating the FSR of the development.

Clause 7.2(6) of the NRSP DCP provides maximum car parking rate for retail and supermarket uses, as follows:

- Retail: 1 space per 100m<sup>2</sup> GFA
- Supermarket: 1 space per 60m<sup>2</sup> GFA

Applying the current rates for the proposed uses, will equate to the follow retail parking spaces:

**Table 1 – Retail car parking required**

use	m <sup>2</sup>	rate (maximum)	car parking spaces
Retail	3077	1 / 100 m <sup>2</sup>	31
Supermarket	2889	1 / 60 m <sup>2</sup>	48
<b>TOTAL</b>	<b>5966</b>		<b>79</b>

The development exceeds the permissible GFA under Consent SSD\_5093 and the FSR standard by 1944m<sup>2</sup> equal to a variation of 2.6 per cent of the approved GFA and adopted development standard.

***What is the underlying objective of the Standard?***

The objectives for FSR development standard provided at subclause 4.4(1) of RLEP 2014 state the following:

- To provide effective control over the bulk of future development,



- *To allow appropriate levels of development for specific areas,*
- *In relation to land identified as a Centre on the Centres Map—to consolidate development and encourage sustainable development patterns around key public transport infrastructure.*

The general underlying intent of the clause is to control the bulk of development and to ensure appropriate density of development for specific areas.

The proposed development, as proposed is considered consistent with the relevant objectives of the control for the following reasons:

- The proposal will be compatible with the bulk and scale of adjacent development and is in proportion to the width of the Retail Street, Spine Road and Central Park.
- The proposed development and in particular the additional GFA does not contribute unreasonably to any building bulk impacts in term of loss of privacy, overshadowing or loss of views or diminish the amenity of adjacent land as the additional car parking is proposed below ground level.
- Additional car parking has been assessed in terms of traffic generation impacts on the local and regional road network and found to be within the assumptions of the original traffic modelling undertaken at the site of the site's rezoning for mixed use development.
- The additional parking will serve a full line supermarket and retail tenancies, which is an appropriate use for the site, and will provide a convenience for existing and future residential within the precinct. The retail precinct will be a destination attracting people to shop.
- The proposed car parking for the retail is consistent with the car parking rate for retail development under the Ryde DCP 2014 (1 space per 25m<sup>2</sup> of retail GFA).

The development despite the minor non-compliance with the development standard is consistent with the planning and environmental objectives of the control.

## **IS COMPLIANCE WITH THE DEVELOPMENT STANDARD CONSISTENT WITH THE AIMS OF THE POLICY, AND IN PARTICULAR DOES COMPLIANCE WITH THE DEVELOPMENT STANDARD TEND TO HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN SECTION 5(A)(I) AND (II) OF THE EP&A ACT**

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

- "(a) 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 co-ordination of the orderly and economic use and development of land..."*



The development is generally consistent with the objects of the Act, in respect to the following:

- The site is located within an urban environment undergoing significant transformation for high density and mixed use development. The redevelopment of the site for mixed use development contributes to urban consolidation and may contribute to reducing demand to develop more environmentally sensitive lands.
- Adequate car parking for a full line supermarket and speciality retail tenancies will promote the orderly and economic use and development of the land for a neighbourhood retail centre.
- The FSR variation, as a result of the additional retail parking requested, will enable the provision of a full-line supermarket and retail uses well patronised so the mixed-use precinct is activated throughout the day and at night.

## **IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?**

Compliance with the development standard is considered unreasonable and unnecessary in the circumstance of the application based on the following:

- The development, as proposed be modified, is consistent with the objectives of the development standard as provided in clause 4.4 of the RLEP 2014.
- The variation to the FSR standard does not:
  - Result in external bulk and scale impacts or cause a non-compliance with the HOB Standard;
  - Contribute unreasonably to amenity impacts, including privacy loss or overshadowing; or
  - Alter the built form character or design quality of the Lachlan's Line development or surrounding North Ryde Station Precinct.
- Strict compliance would not result in a significantly reduced level of retail development. The retail centre is a viable scale to support the objectives for a vibrant mixed use centre consistent with the zone objectives and the vision for the North Ryde Station Precinct expressed in the NRSP DCP 2013. An appropriate amount of retail car parking is required to meet parking demand.
- The potential environmental impacts of the variation have been documented and detailed in this Statement of Environmental Effects. It is the opinion of the author of the report that the non-compliance in this instance would not contravene the environment planning objectives of the FSR control.

Taking into account the above, the particular circumstances of this application warrant a variation of the development standard to facilitate an appropriate mixed use retail centre. A reduction in retail car parking, would result in a development that is inconsistent with the Ryde DCP 2014 car parking provision for retail uses. Strict compliance would not improve the development but rather would result in a diminished management of car parking demand, as it would likely result in car parking spilling into local residential streets.



In this instance, numerical compliance would not contribute to an improved outcome. As such it is considered that a complying development is neither, reasonable or necessary in circumstances of the case.

***Is the development standard a performance based control?***

No. The development standard is not a performance based control.

**ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?**

Yes, there are sufficient environmental planning grounds to justify the contravening development. These include:

- There are no reasonable alternatives to achieve compliance with the standard without adversely affecting the residential amenity of existing and future residential streets;
- The variation does not result in unreasonable adverse amenity impacts on adjacent land;
- The variation does not diminish the development potential of adjacent land;
- The variation in the FSR as a result of counting the non-compliant car parking spaces does not cause a non-compliance with the HOB development standard; and
- The development provides necessary parking provision to meeting parking demand for a full line supermarket and specialist retailers, which is consistent with the car parking rate that applies throughout Ryde, with the exception of North Ryde Station Precinct.

**IS THE OBJECTION WELL FOUNDED?**

The proposed exception to the FSR development standard will, in part, support a neighbourhood retail centre, which will draw patronage from beyond the site, given the distance to other retail centres.

The development does not result in any unreasonable or significant adverse environmental (social, economic or biophysical) impacts. In particular the variation does not diminish the redevelopment potential or amenity of any adjoining land.

Compliance in this circumstance would not improve the outcome. Rather it would unreasonably impact on the building quality of the development. It is the opinion of the author of this report 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.

***Would non-compliance raise any matter of significance for State or Regional Planning?***

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

***Is there a public benefit of maintaining the planning control standard?***

The additional car parking provided is not contrary to the public interest as it will provide patrons with sufficient parking opportunities conveniently located in the basement of the development accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

## CONCLUSION

The development exceeds the permissible GFA under Consent SSD\_5093 and the FSR standard by 1944m<sup>2</sup> equal to a variation of 2.6 per cent of the approved GFA and adopted development standard. Taking into account the particular circumstances of this development, strict compliance with the numerical standard in this instance be both unreasonable and unnecessary owing to the following:

- A numerically complying development would not result in an improved amenity outcome for adjacent land. It would result in the opposite occurring and would likely result in adverse impacts on the wider street network, whereby residents and visitors would seek the convenience of other retail centres within the local precinct thereby contributing traffic to the wider Macquarie Park road network; and
- A numerically compliant development with the maximum DCP car parking rates for the retail uses , and resultant FSR would ne inconsistent with the vision for the North Ryde Station Precinct as a vibrant mixed use precinct, a place where people visit for a high quality and convenient shopping experience.

Except for the additional car parking proposed, in basement levels below ground floor level the proposed GFA is consistent with the approved GFA allocation for Lots 104 and 105 under Condition A8 of Consent\_SSD\_5093. Accordingly, once constructed the development will be compatible with the bulk and scale of development envisaged for the site, as well as the surrounding North Ryde Station Precinct and is consistent with the objectives of the FSR standard.

Based on the reasons outlined above, it is concluded that the request is well founded and that the particular circumstances of the case warrant flexibility in the application of the development standard.

