



## Clause 4.6 – Exceptions to Development Standards – Floor Space Ratio (Cl4.4) (Built Form)

Address: 160 -178 Stoney Creek Road, Beverly Hills (“the site”)

### 1. Introduction

This is a written request to seek an exception to a development standard under clause 4.6 – Exceptions to Development Standards of the Hurstville Local Environmental Plan 2012 (HLEP 2012). The development standard for which the variation is sought is Clause 4.4 Floor Space Ratio (FSR) under the HLEP 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 1’); and
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 (‘Four2Five No 3’).
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386
- *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. 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 Hurstville Local Environmental Plan 2012 (HLEP 2012).

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

The land is zoned B2 Local Centre.

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

The objectives of the B2 zone are:

- *To provide a range of retail, business, entertainment, and community uses that serve the needs of people who live in, work in, and visit the local area*

- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To maintain a commercial and retail focus for larger scale commercial precincts*

#### **2.4 What is the development standard being varied?**

The development standard being varied is the FSR development standard.

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

No. The FSR 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 the HLEP 2012.

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

The objectives of clause 4.4 are as follows:

- (a) to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,*
- (b) to establish the maximum development density and intensity of land use, accounting for the availability of infrastructure and generation of vehicular and pedestrian traffic to achieve the desired future character of the locality,*
- (c) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,*
- (d) to facilitate an appropriate transition between the existing character of areas or localities that are not undergoing and are not likely to undergo a substantial transformation,*
- (e) to minimise the adverse impact of the development on heritage items,*
- (f) to establish maximum floor space ratios that ensure the bulk and scale of development is compatible with the major centre status of the Hurstville City Centre*

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

Clause 4.4(2) establishes a FSR control for the site. The site has two maximum FSR controls, one relating to the western end of the site and one relating to the eastern end of the site.

Specifically, the western end is identified on the FSR Map as being in Area T1 having a maximum FSR of 2:1 and the eastern end is identified as being in Area S having a maximum FSR of 1.5:1 (refer to Figure 1).

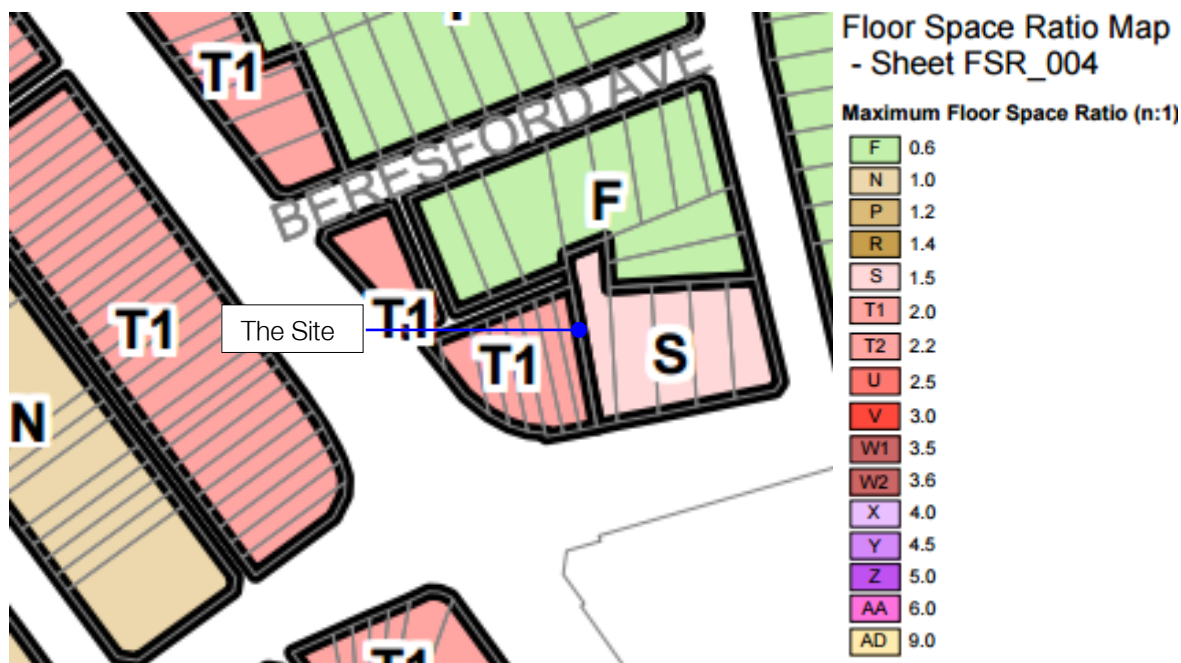


Figure 1: Extract from the Heights of Buildings Map – HLEP 2012

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

The proposed development achieves an FSR of 2.10:1 over Area T1 and FSR of 1.47:1 over area S of the site.

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

The percentage variation to the 2:1 FSR control is 5%.

**3. 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 development,*
- (b) *to achieve better outcomes for and from development by allowing flexibility 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.*

### **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 2:1 FSR standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The additional density, (above the density allowed over the western end of the site under the control) is positioned 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 and privacy impacts.
- There is minimal difference in the impacts between a building that strictly complies with the maximum FSR control and the proposed development in that:
  - Visual and acoustic privacy impacts: The 5th storey at the western end of the site numerically represents the component of the building which is non-compliant. The arrangement of the 5th storey, including its setback to the northern boundary, is such that the additional density will not generate any significant privacy impacts.
  - Visual impacts: Due to the setback arrangements and the reasonable expectation that the properties to the west will be redeveloped in a similar manner in the future, there is a nominal difference in visual impacts between the proposed building and a complying building.
  - Overshadowing impacts: The difference in shadow impacts on adjacent sites of a compliant building compared to the proposed building are minimal. This is due to the fact that the building has been arranged so that the higher portion is centred and setback from adjacent residential properties. The shadow from the development will predominantly fall over Stoney Creek Road.
- The proposed development will result in a better urban design outcome compared to a compliant development and one which better responds to the site's constraints and prominent location compared to a compliant development (refer to discussion under section 3.3). The building tapers down toward the eastern and northern sides, where it is adjacent to lower density residential development. As such, the eastern portion of the proposed building has a density that is less than the 1.5:1 FSR control applicable to the eastern portion of the site.
- 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.

- The development satisfies the objectives of the zone and the development standard.
- It is noted that when the FSR is treated on a 'pro-rata' basis over the entire site, the applicable FSR would be 1.66:1 with a maximum GFA of 6,290m<sup>2</sup>. This is based upon the component identified as S having a site area of 2602m<sup>2</sup> (representing 69% of the total site area) and the component of the site identified as T1 having a site area of 1,178m<sup>2</sup> (representing 31% of the total site area).  
  
The proposal involves a total GFA of 6,285m<sup>2</sup>, which is less than the maximum GFA permitted over the entire site on a pro rata basis.

### **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 marginally lower in density at the western end and marginally higher in density at the eastern of the site (where it is closer to the low density residential properties).

Such an outcome would be a lesser urban design response to the site's prominent position at the southern entry to the Beverly Hills commercial centre and would not provide as good a transition in scale to the lower forms of development in Lee Avenue and Beresford Avenue.

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

In this instance, it cannot be said that the development standard has been abandoned

Notwithstanding, there are numerous examples of approved development that exceed the FSR development standard within the vicinity of the site and wider 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 circumstances of this site that distinguishes it from others is its position at the southern entry to the Beverly Hills commercial centre at the intersection of two major roads (being Stoney Creek Road and King Georges Road).

Additionally, and although the entire site is zoned B2 Local Centre, the site is affected by 'split' height and FSR controls, such that there are different height and FSR controls applicable to the western end of the site compared to the eastern end of the site.

The variation to the FSR will result in a better planning outcome for the site compared to a compliant development.

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 control will result in a better urban design outcome at the site.  
  
The site is located at the main southern entry to the Beverly Hills commercial centre. Height differentiation is a recognised urban design element used to emphasize a location or a place and also to provide variation and visual separation between buildings.

The proposed concentration of GFA at the western end presents itself as additional height at the western end of the building. The additional height will visually differentiate it from buildings further east and north. The proposed height will also provide a visual focus and visual recognition of the entry into the Beverly Hills commercial centre and will provide a better visual focus to this important location than the current lower commercial development at the site and the existing pedestrian footbridge over Stoney Creek Road.

The additional height, will visually accentuate the subject building (even if only incrementally) and will present a well-considered building of high architectural merit to people entering the centre.

The visual catchments of Stoney Creek Road and King Georges Road 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 delineate the main southern entry point into the Beverly Hills commercial centre and will be complementary to the character of that centre.

The site is capable of accommodating the proposed FSR and height 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 density of the development will result in a better urban design outcome for the site and the wider centre compared to a compliant development.

- Notwithstanding the sites B2 zoning, the site is constrained by lower forms of residential development to the north and east, and as such the development better responds to these forms of development by centralising height and bulk and tapering the built form and massing down to the northern and eastern sides of the site.
- The development will provide additional residential accommodation in an area with good access to public transport services, an aim of the strategic planning vision for this locality.
- The proposal will not set an undesirable precedent in terms of density or height for development in the vicinity, particularly given the site's 'split' height and density controls.
- The proposal satisfies the objectives of the B2 zone and the objectives of the FSR standard and the proposed density is considered appropriate within the strategic planning context of the B2 Local Centre zone in the Beverly Hills 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 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 building height standard outlined in subclause 4.3(1) despite the non-compliance demonstrated below:

*(a) to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,*

On balance the variation, which is only 5% above the 2:1 FSR standard, is relatively minor and it relates to the western end of the proposed building only.

The development has been designed to respond to the existing urban context physically and architecturally, while also responding to the emerging context that has been set by the strategic vision for the locality. On this point, it can be reasonably expected that the adjacent site to the west will be redeveloped in the future to a similar scale and density as that proposed in the current DA. In this respect

the proposal responds to the desired and emerging character of the B2 Local Centre zone and the Beverly Hills commercial centre.

Approval of the development will not set a precedent and will not represent development uncoordinated, ill-considered, or ad-hoc development.

*(b) to establish the maximum development density and intensity of land use, accounting for the availability of infrastructure and generation of vehicular and pedestrian traffic to achieve the desired future character of the locality,*

The proposal is compliant with the amount of GFA that would be applicable to the site in the circumstances that the split FSR standards were to be applied on a 'pro-rata' basis over the entire site.

This indicates that the proposal does not represent an overdevelopment and the proposed GFA for the site is consistent with the GFA and density that could be reasonably be expected under the relevant strategic planning controls envisaged for the locality.

*(c) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,*

The building is designed so that the bulk and scale is well setback from properties to the north and east, where lower density residential is located. The building is arranged and articulated in a manner that is unlikely to adversely affect the amenity of surrounding properties such that it will achieve good separation between existing and provide appropriate response to potential future mixed use development to the west.

Consequently, the building is unlikely to result in significant adverse visual massing and bulk and scale impacts, disruption of views, loss of privacy and overshadowing impacts above the impacts that could be reasonably expected from a compliant development.

*(d) to facilitate an appropriate transition between the existing character of areas or localities that are not undergoing and are not likely to undergo a substantial transformation,*

The B2 zone is undergoing, and is likely to under further, substantial transformation given its proximity to the nearby train station. Notwithstanding, the proposal nonetheless responds to the lower density residential development to the north (in Beresford Avenue) and to the north east and east (in Lee Avenue) by tapering the development down in these directions, and setting the building back from the northern boundary.

The proposal provides an appropriate transition to land use intensity.

*(e) to minimise the adverse impact of the development on heritage items,*

The development will have no adverse impacts on any heritage items.

*(f) to establish maximum floor space ratios that ensure the bulk and scale of development is compatible with the major centre status of the Hurstville City Centre.*

Not applicable.

### **3.4.2 Objectives of the zone**

The proposal is consistent with the objectives of the 'B2 Local Centre' Zone as detailed in the following table.

Objective	Comment
To provide a range of retail, business, entertainment, and community uses that serve the needs of people who live in, work in, and visit the local area.	The proposal includes commercial premises, which could include business and or retail premises as well as a large floor area specifically for a supermarket and residential dwellings. All of these forms of land uses are envisaged for the zone.
To encourage employment opportunities in accessible locations.	The proposed retail floor space will provide employment opportunities. Because of the sites proximity to a range of public transport, it can be considered to be an accessible location.
To maximise public transport patronage and encourage walking and cycling.	The site has good access to public transport and is an accessible location. It is approximately 400m from Beverly Hills Train Station. The site is also well serviced by bus routes that provide transport to a range of other nearby centres.
To maintain a commercial and retail focus for larger scale commercial precincts.	In the hierarchy of commercial centres within the Council area, Beverly Hills is a secondary centre. It is a well-known entertainment precinct with a high proportion of restaurants and cafes. The proposed supermarket in particular will broaden the retail offer available. Additionally, the proposal seeks to significantly improved the access to the site from the adjacent lane to the north. This will improve the pedestrian connectivity of the site with the northern part of the B2 zone. The improvements include a footpath widening, landscaping to the end of the lane way and the creation of a wide 'mouthed' pedestrian entry to a retail courtyard into the site.

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 envisaged for the locality.

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 building height standard would result in a poorer urban design outcome in respect to the presentation of the building to the southern entry into the Beverly Hills commercial centre and its relationship to the emerging and envisaged height of development within the centre. The development is of a density, height and architectural articulation that is consistent with the site's prominent and visually important position.

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.

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

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

The development does not hinder the attainment of the objects specified within clause 5(a)(i) and (ii) of the Act.

## **4. Conclusion**

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

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

Contextually, the proposal will provide a development of a height, form and density that appropriately responds to the sites' prominent location at the southern entry point to the Beverly Hills commercial 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 height and density proposed. The proposed variation to the maximum FSR control is consistent with the identified strategic outcomes for the locality and the sites physical constraints.

This submission satisfies the provisions of 4.6(3)(a), 4.6(3)(b), 4.6(4)(a)(i) and 4.6(a)(ii) of the HLEP as it has been demonstrated that compliance with the maximum building height 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 B2 Local Centre zone.