

SUTHERLAND & ASSOCIATES PLANNING

**REQUEST TO VARY FLOOR SPACE RATIO
DEVELOPMENT STANDARD**

Sutherland & Associates Planning Pty Ltd

REQUEST FOR AN EXCEPTION TO THE FLOOR SPACE RATIO DEVELOPMENT STANDARD

Introduction

This request for an exception to a development standard is submitted in respect of the floor space ratio development standard contained within Clause 4.4 of Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006. The request relates to an application for the following development at 60 Cudgegong Road and 99 and 107 Rouse Roads, Rouse Hill:

- construction of a part 6, part 7 and part 8 storey residential flat development (Building D1 and Building D2) containing 215 apartments above three levels of car park containing 299 car parking spaces; and
- construction of an extension of both Roland Street and Torrelli Street along the boundaries of the site.

Clause 4.6 Exceptions to development standards

Clause 4.6(2) of Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 provides that development consent may be granted for development even though the development would contravene a development standard imposed by Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006, or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

Clause 4.6 requires a qualitative merit assessment based on evaluative questions that are specific to each particular development application, and which must be assessed against the context of that particular site. It advocates an entirely performance-based approach to the assessment of each application, based upon the “the circumstances of the case”, and whether compliance is subjectively considered by the consent authority to be “unreasonable or unnecessary” in the particular circumstances.

Clause 4.6 does not provide any quantitative or numerical limitation to cap the extent of non-compliance that may be approved. This conclusion has been confirmed by the Courts on a number of occasions such as the Court upheld decision of North Sydney Council to approve a building where the applicable FSR control was 3.5:1 and the approved FSR was 15:1 and the applicable height control was five storeys whereas the approved height was 17 storeys: *Legal and General Life v North Sydney MC*. (1989) 68 LGRA 192. Similarly, in another matter the Court approved an FSR of 5:1 on a site where the allowable FSR was 1:1: *Hosking Munro Pty Limited v City of Sydney Council* [2008] NSWLEC 1485.

In accordance with clause 4.6(3) the applicant requests that the floor space ratio development standard be varied.

Development Standard to be varied

Clause 4.4 states:

(1) The objective of this clause is to control the bulk and scale of buildings within the Area 20 Precinct by setting maximum floor space ratios for development.

(2) 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.

Floor space ratio is defined under Clause 4.5 of Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 as:

"the ratio of the gross floor area of all buildings within the site to the site area."

The maximum floor space ratio shown for the land on the Map for the site to which the proposed development relates is 1.75:1 in area 'S'.

Extent of Variation to the Development Standard

The approval of the Stage 1 Concept Plan recognised that the density proposed across the overall site was consistent with the density permitted pursuant to State Environmental Planning Policy (Sydney Region Growth Centres) 2006 despite the individual allotments exceeding the permissible floor space ratio. The indicative gross floor area under the approved Stage 1 Concept Plan was 22,385 square metres for Stage 4, and 76,608.9 square metres for the overall site.

The proposal provides a gross floor area of 22,174 square metres which is less than the indicative gross floor area allocated to this stage.

However, when calculated against the notional site area to which the subject application relates, this results in a floor space ratio of 2.11:1 which exceeds the floor space ratio development standard of 1.75:1 which applies to the site.

Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council*. [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

The Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 has recently required additional ways of establishing that compliance is unreasonable or unnecessary beyond consistency with the standard and zone objectives to be established. For completeness, this request addresses the five part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The specific objective of the floor space ratio development standard, as specified in clause 4.4 of Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 is identified below. A comment on the proposal's consistency with the objective is also provided.

(1) The objective of this clause is to control the bulk and scale of buildings within the Area 20 Precinct by setting maximum floor space ratios for development.

The approval of the Stage 1 Concept Plan recognised that the density proposed across the overall site was consistent with the density permitted pursuant to State Environmental Planning Policy (Sydney Region Growth Centres) 2006 despite some of the individual allotments exceeding the permissible FSR. The density proposed on subject lot is consistent with the density approved under the Stage 1 Concept Plan.

The proposed distribution of built form and massing of the buildings across the site is the result of a considered analysis of the context of the site and the desire to deliver a positive urban design outcome. The cornerstone of this approach to the site is to provide a diversity of housing product across the concept plan area and a collection of various residential building typologies and scale. This serves to generate a high level of visual interest with modulation to the skyline and meets the various housing needs of the community with housing to suit families through to single occupants.

The scale of the proposed development will have no impact upon views from Rouse Hill House and Farm to the subject site because these views are completely obstructed by protected trees within Rouse Hill Regional Park. Even in the absence of these trees, due to the considerable distance of the subject site and Rouse Hill House and Farm and the fact that a building height of 8.5 metres and 12 metres is permitted on sites to the north, and a building height of 26 metres is permitted on sites to the south and west of the subject site, it would not be possible to distinguish any difference in scale between that provided on the subject site and the northern adjacent site.

The approval of the Stage 1 Concept Plan recognised the environmental capacity of the overall site having regard to its favourable location in proximity to public transport. The proposed development is consistent with the density of development approved under the Stage 1 Concept Plan as well as the desired future character for the subject site and the Area 20 (Cudgegong Road Station) Precinct generally, and will sit comfortably within the context of the site with no significant adverse impacts to adjacent properties or the public domain.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objectives and purpose of the floor space ratio control is relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the proposed floor space ratio still results in a development which is consistent with the desired future character for the subject site and the Area 20 (Cudgegong Road Station) Precinct generally, and will sit comfortably within the context of the site with no significant adverse impacts to adjacent properties or the public domain.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objective of the floor space ratio control is to achieve an appropriate density on the site which is compatible with the context of the site. Due to the design, location and configuration of the proposed development, the proposal successfully achieves these objectives and will provide a considered built form response that will deliver a positive urban design outcome. However, strict compliance with the floor space ratio control would likely lead to a less satisfactory outcome as it would result a development which fails to fulfil the environmental capacity of the site and would result in an inferior built form that would be contextually inappropriate. Accordingly, it is considered that strict compliance would likely defeat the underlying objective or purpose of the floor space ratio control because it would encourage a less desirable outcome for the site.

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;**

Council has historically consistently applied the maximum floor space ratio control. Whilst this individual development application exceeds the floor space ratio control due to the notional site area, the Stage 1 DA provided a total floor space ratio of 1.27:1 which is considerably less than the maximum control of 1.75:1. As the proposed provides a gross floor area consistent with that which was provided for the site under the Stage 1 DA, the proposed variation does not result in the abandonment of the floor space ratio control by Council.

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 compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**

The proposed zoning of the land is considered to be reasonable and appropriate.

The proposed variation to the floor space ratio development standard is reasonable and necessary in the circumstances of the case in that:

- The approval of the Stage 1 Concept Plan recognised that the density proposed across the overall site was consistent with the density permitted pursuant to State Environmental Planning Policy (Sydney Region Growth Centres) 2006 despite the individual allotments exceeding the permissible floor space ratio. The density proposed on the subject lot is consistent with the density approved under the Stage 1 Concept Plan.
- The proposed distribution of built form and massing of the buildings across the site is the result of a considered analysis of the context of the site and the desire to deliver a positive urban design outcome that will deliver a diversity of housing product across the concept plan area and a collection of various residential building typologies and scale.
- The proposal will deliver a high quality development in close proximity to public transport that will increase the vibrancy of the precinct.
- The proposal is consistent with the desired future character outlined within Blacktown City Council Growth Centres Precinct Development Control Plan 2010 for the subject site and the Area 20 Precinct (Cudgegong Road Station) generally.
- The density proposed does not prevent achievement of the 9 principles of SEPP 65.
- There are no unacceptable adverse impacts in terms of shadow, view, visual and acoustic privacy impacts resulting from the proposed variation to the floor space ratio development standard which would warrant strict compliance.

- The proposed density will not result in an acceptable impact on local traffic conditions.
- The proposed variation allows for the most efficient and economic use of the land.
- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Having regard to the planning principle established in the matter of Project Venture Developments v Pittwater Council [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

As the proposal is consistent with the objectives of the floor space control, compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The following environmental planning grounds are sufficient to justify contravention of the development standard:

- The proposed gross floor area complies with the allocated gross floor area under the Stage 1 development consent.
- The proposal will deliver a high quality development that will increase the vibrancy of the precinct whilst delivering a diversity of housing product across the concept plan area and a collection of various residential building typologies and scale.
- The proposed distribution of built form and massing of the buildings across the overall site is the result of a considered analysis of the context of the site and the desire to deliver a positive urban design outcome.
- Apartments within the development are provided with a high level of amenity.
- The development provides the required provision of car parking and will have an acceptable impact on local traffic conditions.
- There are no adverse impacts in terms of shadow, view, visual and acoustic privacy impacts resulting from the proposed variation to the floor space ratio development standard which would warrant strict compliance.

Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public and in this particular circumstance there are sufficient environmental planning grounds to warrant the proposed variation to the floor space ratio controls as the proposal will achieve a superior outcome with a higher level of residential amenity within the site and without any significant adverse impact to adjacent sites.

Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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.

Whilst the objectives of the development standard have already been addressed previously in this written request, for the purpose of completeness these objectives are again considered below in specific reference to Clause 4.6(4)(a)(ii).

Objective of the Development Standard

The specific objective of the floor space ratio development standard, as specified in clause 4.4 of Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 is identified below. A comment on the proposal's consistency with the objective is also provided.

(1) The objective of this clause is to control the bulk and scale of buildings within the Area 20 Precinct by setting maximum floor space ratios for development.

The approval of the Stage 1 Concept Plan recognised that the density proposed across the overall site was consistent with the density permitted pursuant to State Environmental Planning Policy (Sydney Region Growth Centres) 2006 despite some of the individual allotments exceeding the permissible FSR. The density proposed on subject lot is consistent with the density approved under the Stage 1 Concept Plan.

The proposed distribution of built form and massing of the buildings across the site is the result of a considered analysis of the context of the site and the desire to deliver a positive urban design outcome. The cornerstone of this approach to the site is to provide a diversity of housing product across the concept plan area and a collection of various residential building typologies and scale. This serves to generate a high level of visual interest with modulation to the skyline and meets the various housing needs of the community with housing to suit families through to single occupants.

The scale of the proposed development will have no impact upon views from Rouse Hill House and Farm to the subject site because these views are completely obstructed by protected trees within Rouse Hill Regional Park. Even in the absence of these trees, due to the considerable distance of the subject site and Rouse Hill House and Farm and the fact that a building height of 8.5 metres and 12 metres is permitted on sites to the north, and a building height of 26 metres is permitted on sites to the south and west of the subject site, it would not be possible to distinguish any difference in scale between that provided on the subject site and the northern adjacent site.

The approval of the Stage 1 Concept Plan recognised the environmental capacity of the overall site having regard to its favourable location in proximity to public transport. The proposed development is consistent with the density of development approved under the Stage 1 Concept Plan as well as the desired future character for the subject site and the Area 20 (Cudgegong Road Station) Precinct generally, and will sit comfortably within the context of the site with no significant adverse impacts to adjacent properties or the public domain.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the R3 Medium Density Residential zone which has the following objectives:

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To support the well-being of the community by enabling educational, recreational, community, religious and other activities where compatible with the amenity of a medium density residential environment

The proposed development provides for residential accommodation in the form of a residential flat development which will provide for the housing needs of the community within a medium density residential environment. A variety of housing types are provided within the development including adaptable housing that will meet the changing needs of the resident population. The overall development includes a comprehensive landscape scheme that will enhance the amenity and liveability for residents and visitors and support the well being of the community. For the reasons given the proposal is considered to be consistent with the objectives of the R3 Medium Density Residential zone.

Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

- (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.

The architectural package prepared by Turner Architects which accompanies the subject application illustrates the relationship of the proposed development within the context of the site. It demonstrates a high quality outcome for the site which will result in the delivery of an integrated community of buildings with significant separation set around a central open space area which collectively will contribute significantly to the amenity afforded to the general public and future occupants alike. This approach is only possible with a variation to the floor space ratio control for the residential flat development component of the development on the subject site which is offset by the design of the townhouses and community title park that were approved under Stages 1 and 2 that are well below the floor space ratio control.

Allowing the flexible application of the floor space ratio development standard in this instance is not only reasonable but also desirable given the context of the site and that the site has the environmental capacity to absorb the proposed density.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the floor space ratio development standard will achieve a better urban design outcome in this instance in accordance with objective 1(b).

Conclusion

The proposed variation to the floor space ratio development standard contained within clause 4.4 of Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 has been found to be consistent with the allocation of gross floor area under the Stage 1 DA and strict compliance would be unreasonable and unnecessary in the circumstances of the case. In addition there are sufficient environmental planning grounds to justify the variation. In this regard it is reasonable and appropriate to vary the floor space ratio development standard to the extent proposed.