

Clause 4.6 – Exceptions to Development Standards – FSR (CI 4.4)

Address: 87-99 Oxford Street and 16-22 Spring Street, Bondi Junction

Prepared by BTG Planning Nov 2017 and subsequently amended June 2018

1.0 Introduction

This is a written request to seek a variation to a development standard under clause 4.6 – Exceptions to Development Standards of the Waverley Local Environmental Plan (WLEP) 2012. Council has before it DA 498/2017 which has now been amended but not in any material manner that affects its overall proposed building FSR.

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

This application has been prepared in the manner informed by the 2011 NSW Department of Planning and Infrastructure (DP&I) guideline Varying Development Standards: A Guide, and the relevant principles identified in a number of NSW Land and Environment Court cases.

The format, structure and some content of this variation request is based on a similar and very recent variation request prepared by SJB Planning for property known as 362-374 Oxford Street, Bondi Junction. That particular development also had a variation of 15% GFA and an extra two floors.

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

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

The Waverley Local Environmental Plan (WLEP) 2012.

2.2 What is the zoning of the land?

The zoning of the land is B4 Mixed Use.

2.3 What are the objectives of the zone?

The objectives of the B4 Mixed Use zone are:

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

2.4 What is the development standard being varied?

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

2.5 Is the development standard a performance based control?

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

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

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

2.7 What are the objectives of the development standard?

The objectives of clause 4.4 are as follows:

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

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

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



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

The amended proposal has a gross floor area (GFA) of 13,196m² on a site area of 2,295m². This equates to an FSR of 5.75:1. Or an additional 1,721m²

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

The amended proposal exceeds the maximum FSR by 15%.

3.0 Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to development standards, establishes the framework for varying development standards applying under a local environmental plan.

Objectives to clause 4.6 at 4.6(1) are as follows:

- “(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.”*

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- “(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.”*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a development that contravenes a development standard unless the:

- “(a) the consent authority is satisfied that:*
 - (i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (i) 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 FSR standard on this site would be unnecessary in this circumstance for the following reasons:

- The additional floor space (1,721m²), is intended to compensate for by an almost equivalent amount of void space (1,290m²) related to public domain outcomes;

- The additional FSR does not result in significant adverse impacts upon adjacent properties or the public domain by way of overshadowing, visual massing, view loss or privacy impacts. Indeed there is minimal difference in the impacts between a building that strictly complies with FSR control including:

Visual and acoustic privacy impacts: The building will achieve appropriate building separation with setbacks to the Waverley (west) of 7.4 m window to window on its northernmost section and 24m to the main east residential tower form. While the 7.4m does not quite meet the ADG recommended 9m Council officers appear to be satisfied with this relationship and if necessary the relevant box window forms of the proposal that face the Waverley can have screening devices installed. To the eastern side boundary the building replicates the zero set back of the Quest Apartments at podium level and 3 m above with a large internal atrium type space adjacent to the location of the Quest's west facing windows. The separation distances here are about 14-15m and comply with the ADG;

Visual impacts: The emerging character of this locality is one of tall buildings and high density development. The development will be positioned in the midst of other existing and approved tall buildings of similar height and density.

The building design exhibits a high degree of visual articulation, differentiation in materials and textures, responds to the existing and emerging character of the locality, will result in a visually pleasing addition to the streetscape, public domain and skyline. The proposed building will not result in adverse visual impacts when compared to a complying building.

Overshadowing impacts: The difference in shadow impacts on adjacent sites between a compliant building compared to the proposed building are relatively minor due to the fact that a large part of the building volume is positioned as far to the north on the site as possible and this also reflects the LEP height controls for the site which are aimed at achieving certain solar access outcomes for sites to its south. The resulting shadows are considered acceptable within the context of the high density B4 zone and the emerging character of the Bondi Junction Town Centre; and

View loss impacts: Theoretically the GFA above the development standard is contained throughout the proposed building envelope and not one particular facet of it. However, the proposal does have a clearly identified additional 2 floors above the LEP maximum height control and that is where most attention will be drawn. A view analysis has been included in the SEE accompanying the DA and it concludes that no significant views are affected by these two additional levels.

- The proposal and additional GFA will result in a better urban design outcome compared to a compliant development due to the substantial contribution it will make to the public domain. The building will provide a quality ground level pedestrian experience for members of the public and differentiate it from older style nearby buildings that are not compliant with the current planning controls;
- The level of non-compliance with the FSR control is consistent with the degree of variations contemplated and accepted by the consent authority with respect to development in similar situations within Bondi Junction;
- The development will result in significant public benefit through the inclusion of a VPA which will provide Council with the opportunity to deliver public infrastructure and affordable housing, in addition to the amount that would otherwise be provided for a development of this scale through the implementation of Council's S94A Contributions Plan. The VPA is consistent with Part 2 (a) of the Waverley Voluntary Planning Agreement Policy in that the additional FSR proposed is not more than 15% of the FSR allowable under Clause 4.4 of WLEP 2012; and
- The development satisfies the objectives of the zone and the development standard.

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

A development that strictly complied with the standard would likely result in a lesser urban design outcome. A development that strictly complied with the standard would likely result

in a building lower in height and density than adjacent development, resulting in a building that is inconsistent with the bulk and scale of buildings to the north and also of recently approved surrounding buildings, which does not reflect or respond to the site's urban context.

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

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

3.2.4 Is the zoning of the land unreasonable or inappropriate?

The zoning of the land is appropriate for the site.

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

The particular circumstances of this site that distinguish it from others is its relatively large consolidated site area with two primary street frontages and three different site height controls aimed at achieving certain solar access outcomes to an adjacent heritage site.

Development of this site must be considered in the context not only of the current urban built form but also several recent approvals for major redevelopment of nearby sites.

In these circumstances, there are sufficient planning grounds particularly relevant to the site to justify contravening the development standard being:

- The proposed non-compliance with the FSR control will result in a better urban design outcome at the site.
- The visual catchment of Oxford Street and Spring Streets contain a number of buildings which have been approved that will present a scale that will set the future character of the locality. The proposed development will not be determinative in respect of the character of the locality, rather it will be complementary to the intended character of the precinct.
- The site is capable of accommodating the proposed density and the development is of an intensity and scale commensurate with the evolving character and the prevailing urban conditions and capacity of the locality. Overall, the increased FSR of the development will result in a better urban design outcome for the site compared to a compliant development;
- The proposed variation to the FSR is in part a function of compliance with the ADG requirements for solar access, such that due to overshadowing from approved taller buildings to the north, the height of the development has been arranged so that direct sunlight can be achieved to 70% of the proposed residential apartments;
- The development will provide additional residential accommodation in an area with excellent access to public transport services, an aim of the strategic planning vision for this locality;
- The proposal will not set a precedent in terms of density or height for development in the vicinity;
- The proposal satisfies the objectives of the B4 Mixed Use zone and the objectives of the FSR standard, and the proposed FSR is considered appropriate within the strategic planning context of the B4 Mixed Use zone in the Bondi Junction Centre.
- The non-compliance with the standard does not contribute to significant adverse environmental impacts in terms of overshadowing, visual impacts or view loss;

- The development will result in significant public benefit through the inclusion of a VPA which will provide Council with the opportunity to deliver public infrastructure and affordable housing, in addition to the amount that would otherwise be provided for a development of this scale through the implementation of Council's S94A Contributions Plan; and
- The development as proposed is consistent with the provisions of orderly and economic development.

3.4 Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?

3.4.1 Objectives of the FSR standard

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

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

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

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

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

The control will continue to prescribe the maximum FSR and the proposal will not alter that primarily due to the fact that the variation is consistent with the Council VPA policy which is aimed at achieving good planning outcomes. Council will be able to continue to consider applications and variations based on merit and in accordance with the provisions of Clause 4.6.

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

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

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

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

The design of the building represents a thoughtful response to the location of the site within one of the main streets of the Bondi Junction Town Centre and the various planning controls. It is considered the proposal will not have any adverse amenity impacts on neighboring properties beyond those to be anticipated by the planning controls themselves.

The building is well articulated and will achieve adequate separation between existing and future buildings on adjacent sites.

3.4.2 Objectives of the zone

The proposal remains consistent with the objectives of the B4 Mixed Use zone, despite the non-compliance with the FSR standard. The objectives are:

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

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

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

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

3.5 Whether contravention of the development standard 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

- 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.*
- The promotion and coordination of the orderly and economic use and development of land..."*

A strictly complying development would result in a poorer urban design response to the overall site and the area generally and in that sense it may be said that compliance with the standard would hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act.

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

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

3.7 Is there public benefit in maintaining the development standard?

Generally speaking, there is public benefit in maintaining standards. However, there is public benefit in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the FSR would result in a poorer urban design and public domain outcome and to its relationship with other recently approved buildings within the Bondi Junction Town Centre that are of a similar density and height as the proposed development. There is therefore no public benefit in maintaining the development standard, as the proposed development results in a better planning outcome for the site. The proposed VPA will give effect to the proposed public domain benefits and additional public infrastructure and affordable housing in the locality.

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

3.8 Is the objection well founded?

Yes. For reasons outlined in the preceding sections of this submission, the variation to the FSR control is well founded as compliance with the standard is unreasonable as the development does not contravene the objects specified within 5(a)(i) and (ii) of the Act nor the objectives of the B4 Mixed Use zone of WLEP 2012. A development that strictly complies with the standard is unnecessary in this circumstance as no appreciable benefits would result by restricting the building to absolute numerical compliance.

Clause 4.6(5) states:

“(5) In deciding whether to grant concurrence, the Director-General must consider:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Director-General before granting concurrence.”*

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

4.0 Conclusion

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

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

The site is within a locality that is of a geographical position and which has appropriate service capacity to readily accommodate development of the density and scale proposed. The site is within a location that has excellent access to a range of services and facilities, including a high level of public transport. It is a legitimate planning outcome to maximise the development opportunities for higher density and higher scale development in these major town centre locations throughout the Metropolitan area of Sydney as this is a finite resource.

The proposed variation to the density 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(4)(a)(ii) of WLEP 2012. It has been demonstrated that compliance with the FSR development standard is both unnecessary and unreasonable in the circumstances of this case as there are sufficient planning grounds to justify contravening the standard. The development will be in the public interest, is consistent with the objectives of the standard and the objectives for development within the B4 Mixed Use zone of the Bondi Junction Town Centre.

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