CITY PLAN SERVICES

Clause 4.6 Variation Request

Floor Space Ratio Development Standard Ku-ring-gai Local Environmental Plan (Local Centres 2012

Roseville RSL Memorial Club, Part 62, 64-68 Pacific Highway Roseville NSW 2069

Submitted to Ku-ring-gai Council
on behalf of Hyecorp Property Group

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September 2019 P-18007

CERTIFICATION
This report has been authorised by City Plan Strategy & Development, with input from a number of other expert consultants, on behalf of Hyecorp Property Group . The accuracy of the information contained herein is to the best of our knowledge not false or misleading. The comments have been based upon information and facts that were correct at the time of writing this report.

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1. Introduction

This report seeks a variation to a development standard prescribed by the *Ku-ring-gai Local Environmental Plan (Local Centres) 2012* (KLEP). The report relates to a Development Application (DA) seeking consent for Shop Top Housing at **Nos. Part 62, 64-68 Pacific Highway, Roseville NSW 2069** (the subject site).

The variation is sought pursuant to Clause 4.6 under the KLEP in relation to the floor space ratio (FSR) of buildings development standards applicable to the subject development site, being 2:1, pursuant to Clause 4.4(2) under the KLEP. The subject site is also affected by a maximum FSR standard of 2.8:1 for a part of the site, however, the proposal does not exceed the standard. The variation is a result of a technicality of how to calculate the FSR of a building relative to the site area, in accordance with Clause 4.5 of the KLEP. Should these parts of the site be developed separately (i.e. different site areas), the overall permissible GFA would be greater than that proposed.

This request has been prepared in accordance with the Department of Planning & Environment (DP&E) Guideline Varying Development Standards: A Guide, August 2011, and has incorporated the relevant principles identified in the following judgements:

1. *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*
2. *Wehbe v Pittwater Council [2007] NSWLEC 827*
3. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No 1')*
4. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*
5. *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 ('Four2Five No 3')*
6. *Moskovich v Waverley Council [2016] NSWLEC 1015*
7. *Project Venture Developments v Pittwater Council [2005] NSWLEC 191*
8. *Ex Gratia P/L v Dungog Council (NSWLEC 148)*
9. *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC*

In this report, we have explained how flexibility is justified in this case in terms of the matters explicitly required by Clause 4.6 to be addressed in a written request from the Applicant. This report also addresses, where relevant and helpful, additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 and the assumed concurrence of the Secretary.

2. What is the environmental planning instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the *Ku-ring-gai Local Environmental Plan (Local Centres) 2012* (KLEP).

3. What is the zoning of the land?

In accordance with Clause 2.2 of the KLEP the site is zoned B2 - Local Centres.

4. What are the objectives of the zone?

The land use table under the KLEP provides the following objectives for the B2 zone:

> • *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 provide for residential housing close to public transport, services and employment opportunities.*
>
> • *To encourage mixed use buildings that effectively integrate suitable business, office, residential, retail and other development.*

5. What is the development standard being varied?

The development standard being varied is the maximum "floor space ratio" standard.

6. Under what clause is the development standard listed in the EPI?

The development standard being varied is prescribed under Clause 4.4(2) of the KLEP. An extract is below.

> *"4.4 Floor space ratio*
>
> *(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."*

7. What are the objectives of the development standard?

The objectives of the standard are set out below:

(a) to ensure that development density is appropriate for the scale of the different centres within Ku-ring-gai,

(b) to enable development with a built form and density compatible with the size of the land to be developed, its environmental constraints and its contextual relationship,

(c) to ensure that development density provides a balanced mix of uses in buildings in the business zones...

8. What is the numeric value of the development standard in the EPI?

The map referred to in "6" above demonstrates that the site is affected by two (2) maximum FSR standards. An extract of the map is shown in **Figure 1**. The map prescribes two (2) maximum FSR standards of 2:1 and 2.8:1 for the subject site.

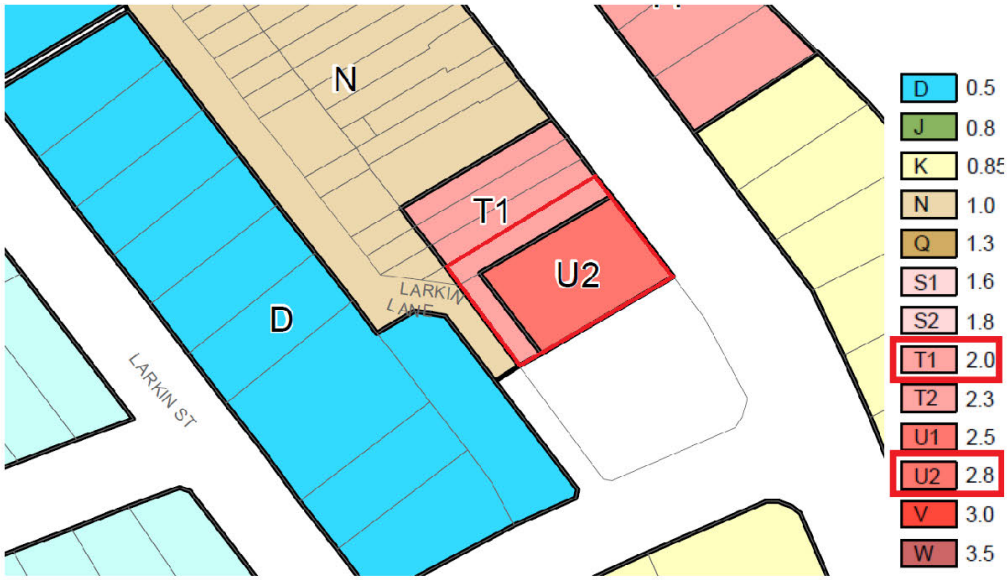

Figure 1: FSR map, site highlighted with red boundary (Source: NSW Legislation)

9. What is the proposed numeric value of the development standard in the DA and the variation proposed?

As noted above, the subject site is affected by two maximum FSR development standards. In accordance with Clause 4.5 of the KLEP, the site is 1,375m², and as the building on the site has a total Gross Floor Area (GFA) of 3,505m², the development has a FSR of 2.55:1. Therefore, the proposal breaches the FSR standard of 2:1 that applies to part of the site, with a variation of 755m² (i.e. 27.45% variation), however, is under the FSR standard of 2.8:1. Whilst the site has two separate FSR standards, the development only has one site area and the building only has one GFA/FSR measurement.

Important to understand is that if the parts of the site that are affected by different development standards were developed separately (i.e. separate sites), the combined GFA permitted on both sites would be 3,523.5m². Therefore, the proposed development does not exceed the maximum GFA permitted for the land. The variation of the standard is a consequence of the technical application of Clause 4.5 of the KLEP, and how site area and FSR of a development is calculated. To comply with the 2:1 standard would require the entire building/development to have a maximum FSR for the site of 2:1, which would be significantly under the maximum permitted on the 2.8:1 part of the site, and result in a building that does not represent the desired character of the site as a 'gateway' building.

10. Matters to be considered under Clause 4.6

The following table provides a summary of the key matters for consideration under Clause 4.6 of the KLEP and a response as to where each is addressed in this written request:

TABLE 1: MATTERS FOR CONSIDERATION UNDER CLAUSE 4.6.

Requirement/Subclause of Clause 4.6	Response/Comment
(1) The objectives of this clause 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.	It is key to note that the objectives of the clause are to provide flexibility in applying development standards in that in so doing better development outcomes ensue.
(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.	The FSR standard is not expressly excluded from operation of this clause.
(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.	This written request justifies the variation by demonstrating (a) is achieved in **Section 11**, and (b) is achieved in **Section 12.**
(4) Development consent must not be granted for development that contravenes a development standard unless: (a) the consent authority is satisfied that:	This written request addresses all requirements of subclause (3). As set out in **Section 13** of this written request, the proposed development will be in the public interest because it is consistent with the objectives of the

(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.	particular standard and the objectives for the zones. Concurrence is assumed. The application is required to be determined by the relevant independent planning panel.
(5) In deciding whether to grant concurrence, the Secretary 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.	Potential matters of significance for State or regional environmental planning is addressed in **Section 14.** Consideration of whether there is any public benefit in maintaining the development standard is considered in **Section 13.**
(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if: (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard. Note. When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU6 Transition, R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.	Does not apply.
(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).	This is a matter for the Consent Authority.

(8) This clause does not allow development consent to be granted for development that would contravene any of the following……..	Does not apply to the site/proposed variation.

The requirement for consideration and justification of a Clause 4.6 variation necessitates an assessment of a number of criteria. It is recognised that it is not merely sufficient to demonstrate a minimisation of environmental harm to justify a Clause 4.6 variation, although in the circumstance of this case, the absence of any environmental impact is of considerable merit.

The proposed variation from the development standard is assessed below against the accepted "5 Part Test" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council [2007] NSWLEC 827* and the principles outlined in *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46.* Whilst the principle applied to SEPP 1, we believe that it is useful to apply in the consideration of a request under Clause 4.6 of the KLEP, as confirmed in *Four2Five*.

11. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council [2007] NSW LEC 827*. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the variation. Under *Four2Five*, whilst this can still be considered under this heading, it is also necessary to consider it under Clause 4.6(3)(a) (see below).

Under *Micaul Holdings Pty Limited v Randwick City Council (2015)*, it was stated that the consent authority needs to be satisfied that the written request adequately demonstrates that the strict compliance with the standard is unreasonable or unnecessary in the circumstances of the case. The consent authority also needs to be satisfied that the development will be 'consistent' with the objectives of the zone and development standard.

The five ways described in *Wehbe* are therefore appropriately considered in this context, as follows:

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

The objectives of the standard are set out in **Section 7** of this report. A response to each of the objectives is provided below:

(a) to ensure that development density is appropriate for the scale of the different centres within Ku-ring-gai,

As discussed above, the variation to the standard is a consequence of how site area and FSR is calculated for a development pursuant to Clause 4.5 of the KLEP. If the areas of the site that are affected by different FSR standards were developed separately (i.e. two site areas), the maximum permitted GFA across the two sites would be 3,523.5m². The proposed development has a total GFA of 3,505m², therefore, provides a density and scale anticipated by the KLEP.

Further, the development has incorporated setbacks from both the western and northern boundaries of the site, where the lower FSR standard (i.e. 2:1) applies. Thus, the proposal has re-distributed floor space away from the part of the site that anticipates a lower FSR, to reduce its bulk and scale on this part of the site which adjoins and is adjacent to land that will have lower scale development.

The proposed variation does not affect consistency or achievement of this objective.

(b) to enable development with a built form and density compatible with the size of the land to be developed, its environmental constraints and its contextual relationship,

As noted under objective (a), the proposed development provides a built form and density that is consistent with the desired future character of the land. The majority of the FSR is situated on the part of the site affected by the development standard of 2.8:1, with the building including setbacks in excess of that required by Council's controls on the parts of the site affected by the lower FSR standard of 2:1. This is indicatively shown in **Figure 2** below.

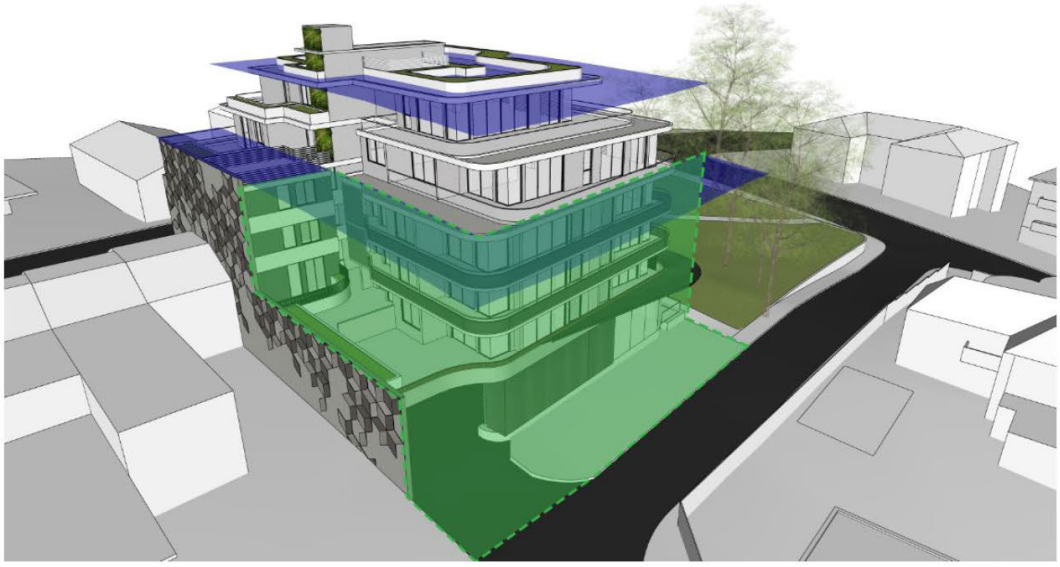

Figure 2: 3D perspective indicating where GFA has been re-distributed away from the part of the site affected by the 2:1 standard (re-distributed GFA outlined by green box) (Source: PBD Architects)

As demonstrated above in the green shaded area, the proposed development has been designed to respond to the surrounding built form and has purposefully located GFA away from the part of the site affected by a lower FSR standard. This ensures that amenity will be maintained by the adjoining and adjacent properties, so that a compatible relationship is achieved. The proposed variation does not affect consistency or achievement of this objective.

(c) to ensure that development density provides a balanced mix of uses in buildings in the business zones.

The proposed variation of the standard does not affect achievement or consistency with this objective.

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

We do not rely on this reason. The underlying objective or purpose of the standard is relevant to the development and is achieved.

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

We do not rely on this reason.

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;

We do not rely on this reason.

5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

We do not rely on this reason.

12. Sufficient environmental planning grounds to justify the contravention

The SEE prepared for this DA provides a holistic environmental planning assessment of the proposed development and concludes that subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the development. There is robust justification throughout the SEE and accompanying documentation to support the overall development and contend that the outcome is appropriate on environmental planning grounds.

Specifically, there are sufficient environmental grounds to justify the breach of the standard which are summarised as follows:

- The proposed variation is a consequence of the strict interpretation of how FSR of a building is measured relative to a development's site area. However, the proposed development has a total GFA that would not exceed the permissible GFA of the land should it be developed separately as two sites, as opposed to one site as proposed.
- The proposed development has re-distributed GFA away from the northern and western boundaries of the site where the lower FSR standard (2:1) applies. This has been done to respond to the adjoining/adjacent properties which permit lower density development, and to provide an appropriate built form relationship to these properties and maintain amenity between the properties.
- Compliance with the standard would require the entire development to have a maximum FSR of 2:1, which would be significantly under the 2.8:1 standard for the remainder of the site. This would reduce the size of the building on the site, and it would not achieve the desired character for the land of a 'gateway' building.
- The breach of the standard does not result in any adverse environmental impacts to adjoining properties, and the building has been designed to respond to the existing and future built form character of the area.
- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development as it is consistent with the objectives of the development standard and the objectives of the B2 zone, notwithstanding the variation.

The above points are environmental planning grounds that warrant the exceedance, which are not "generic", but rather, specific to the site and circumstances of the development.

13. Is the variation in the public interest?

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

The objectives of the standard have been addressed in **Section 11** and are demonstrated to be satisfied.

The objectives of the zone are addressed below in **Table 2**.

TABLE 2: RESPONSE TO OBJECTIVES OF B2 ZONE

Objectives of R4 Zone	Response/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 the re-development of the existing club that is currently operating on the site. Thus, the proposal will provide ground floor retail premises that will provide for the needs of people who live and work in the area. The variation to the standard does not affect consistency with this objective.
To encourage employment opportunities in accessible locations	The proposed development includes ground floor retail premises, that will create/maintain ongoing employment for the area. The variation to the standard does not affect consistency with this objective.
To maximise public transport patronage and encourage walking and cycling.	The variation to the standard does not affect consistency with this objective.
To provide for residential housing close to public transport, services and employment opportunities	The proposal provides for additional housing, in close proximity (i.e. 150m) of the Roseville train station. The variation to the standard does not affect consistency with this objective.
To encourage mixed use buildings that effectively integrate suitable business, office, residential, retail and other development	The proposal is consistent with and achieves this objective.

The objectives of the zones, as demonstrated above, as well as the objectives for the standard have been adequately satisfied, where relevant. Therefore, the variation to the height of buildings standard is in the public interest.

14. Matters of state or regional significance (cl. 4.6(5)(a))

There is no prejudice to planning matters of State or Regional significance resulting from varying the development standard as proposed by this application.

15. The public benefit of maintaining the standard (cl. 4.6(5)(b))

Pursuant to *Ex Gratia P/L v Dungog Council (NSWLEC 148)*, the question that needs to be answered is "whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development".

There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the Height of Buildings standard and hence there are minor public disadvantages.

We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will have an overall public benefit.