

Clause 4.6 Contravention Request

[Clause 4.4 Ku-ring-gai Local
Environmental Plan (Local
Centres) 2012 Floor Space
Ratio]

**Roseville RSL Memorial Club, Part 62, 64-66 Pacific
Highway Roseville**

Submitted to Ku-ring-gai Council

On Behalf of Roseville Returned Servicemen's Memorial Club Ltd

May 2020

Disclaimer

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1. EXECUTIVE SUMMARY

This is a formal written request that has been prepared in accordance with Clause 4.6 of the Ku-ring-gai (Local Centres) Local Environmental Plan 2012 (KLEP) to support a mixed use development consisting of ground floor memorial club and shop-top housing at part 62, 64-66 Pacific Highway, Roseville (site).

The proposal is for the demolition of the existing club and the construction of a six (6) storey building consisting of ground floor new Memorial Club, thirty-three residential units above, basement parking and associated landscaping and infrastructure works.

The proposal also includes the subdivision and amalgamation of sites which currently have two different floor space ratio provisions and includes a small section of Council owned land. The design is such that the bulk of the building has been "pulled away" from the northern and north-western adjoining properties creating greater setbacks to those sites which have lower density and height provisions, so as to preserve the contextual character of the immediate area and also the heritage significance of the adjoining western building. This results in a re-allocation of floor space throughout the site, with a portion of the site providing greater FSR than what is permitted despite the overall FSR complying.

Compliance with the standard(s) would require a portion of the development to have a maximum FSR of 2:1, which would not result in a desirable and sensible built form. It would place building bulk in more sensitive areas, that is, along the western elevation abutting the laneway where currently there is none. The proposed setback is 6m from the laneway at ground level, stepping as the building increases in height; however, a compliant building can achieve 0m to a height of 14.5m along the western boundary (Larkin Lane).

This formal request demonstrates that compliance with the floor space ratio development standard(s) for part of the site would be unreasonable and unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds to justify the contravention. Further, the proposal is consistent with the objectives of the zone for the subject site and in is the public interest.

2. INTRODUCTION

This is a formal request that has been prepared in accordance with clause 4.6 of the Ku-ring-gai Local Environmental Plan (Local Centres) 2012 (KLEP) to justify a contravention to the floor space ratio development standard(s) proposed in a development application submitted to Ku-ring-gai Council for the mixed use development consisting of ground floor memorial club and shop-top housing at 62, 64-66 Pacific Highway, Roseville (site). The development is shown in architectural drawings and surveyor's drawings that form part of the development application. These drawings also form part of this clause 4.6 request.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)];
3. 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 [clause 4.6(4)]

This request also addresses the requirement for the concurrence of the Secretary as required by clause 4.6(4)(b).

3. STANDARD(S) TO BE CONTRAVENED

The standard that is proposed to be contravened is the "floor space ratio" development standard which is set out in clause 4.4 of the Ku-ring-gai *Local Environmental Plan (Local Centres) 2012 (KLEP)* as follows:

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*

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

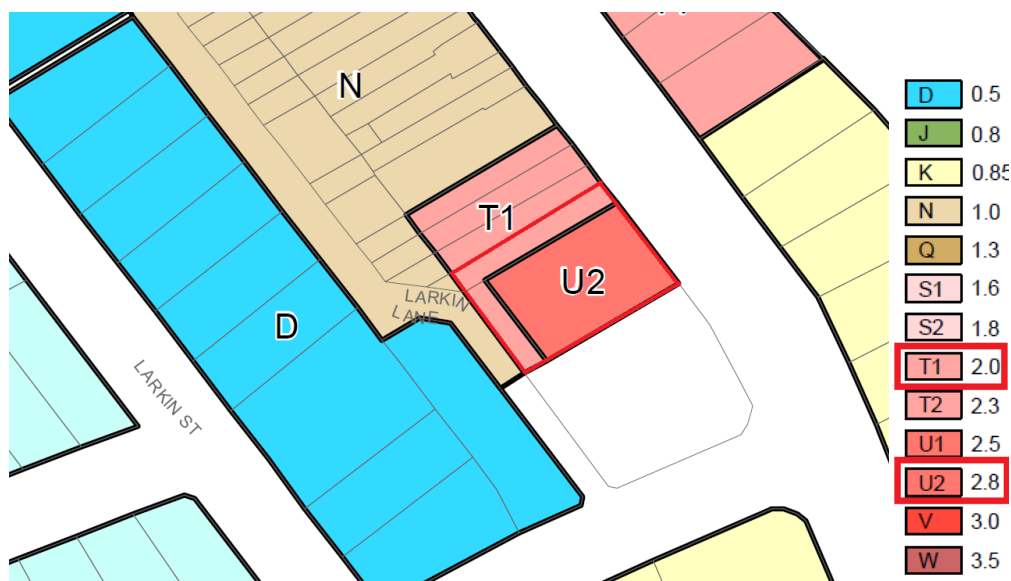


Figure 1: FSR map, site highlighted with red boundary (Source: NSW Legislation)

Whilst it may not be necessary to identify it separately, it is also proposed to contravene clause 4.5(7) of the KLEP.

4.5 Calculation of floor space ratio and site area

(7) **Certain public land to be separately considered** For the purpose of applying a floor space ratio to any proposed development on, above or below community land or a public place, the site area must only include an area that is on, above or below that community land or public place, and is occupied or physically affected by the proposed development, and may not include any other area on which the proposed development is to be carried out.

The development standard(s) to be contravened are not excluded from the operation of clause 4.6 of the KLEP.

4. 'SITE AREA' FOR THE PURPOSES OF FSR COMPLIANCE

All of the works for the purposes of the club and the mixed use development will take place on Lot 2 DP 505371 (Lot 2), Lot 1 DP 202148 (Lot 1) and a proposed new Lot 3. Lot 1 and Lot 2 are presently owned by the Applicant.

The proposed development includes the subdivision of Lot 2 DP 202148, presently Council-owned land.

The proposed subdivision will create two lots, Lot 3 and Lot 4 (see figure 2 below). Lot 4 will contain all of the existing Roseville Park. Lot 3 will be a strip of land south-west of the existing club building. While Lot 3 is presently owned by the Council it is, in fact, used (with Council acquiescence) by the Roseville Memorial Club for the purposes of parking.

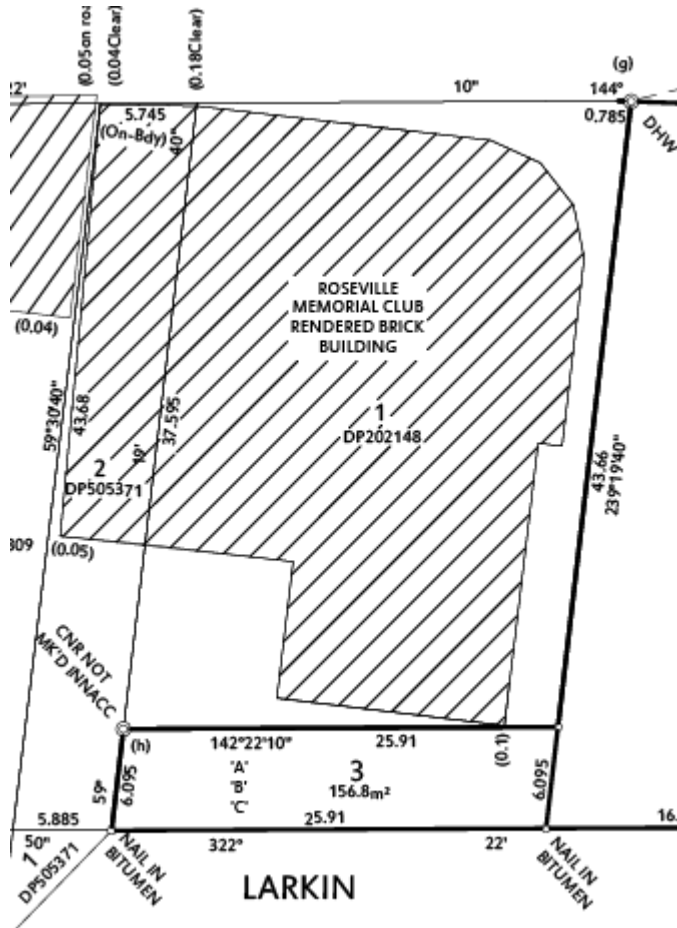


Figure 2: An extract of the draft plan of subdivision. (Source: DSP Surveyors & Engineers)

The development application also proposes the consolidation of Lot 1, Lot 2 and Lot 3 into Lot 100 (see figure 3 below). No works on Lot 4 (the park) are proposed (which will not be consolidated with any other lot).

All of the proposed gross floor area within the development is to be contained within Lot 1 and Lot 2.

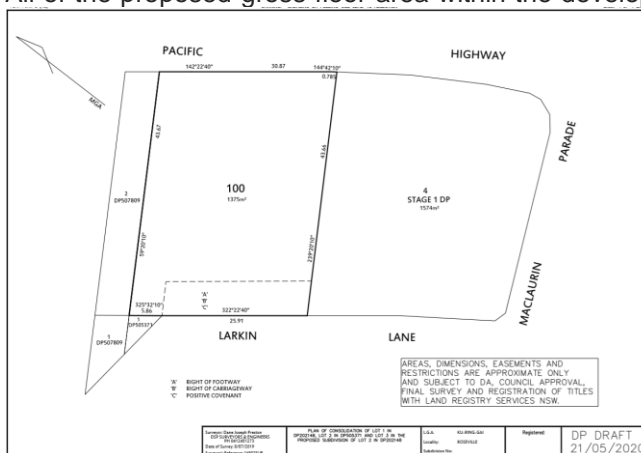


Figure 3: An extract of the Plan of consolidation (Source: DSP Surveyors & Engineers)

The proposed Lot 3 and Lot 4 are presently both a public place.

This means that, under clause 4.5(7) of KELP, for the purpose of applying a floor space ratio (to any proposed development on, above or below Lot 3) the 'site area':

- must only include an area of Lot 3 and Lot 4 that is occupied or physically affected by the proposed development; and
- may not include any other area on which the proposed development is to be carried out.

All of the proposed Lot 3 is to be occupied or physically affected by the proposed development. None of Lot 4 is to be so occupied or affected.

This means, if this clause 4.6 request is not upheld, neither Lot 3 or Lot 4 may contribute to the balance of the development's site area calculations for FSR purposes.

If Lot 3 and Lot 4 were **not** public places:

- Lot 2 and Lot 3 would be evaluated for FSR compliance together (as they are the subject of the same FSR maximum); and
- Lot 1 would be evaluated for FSR compliance by itself; and
- Lot 4 would not be considered for the purposes of FSR compliance at all.

However, Lot 3 is a public space, so this clause 4.6 request assumes the following site areas and FSR maximums for a 'strictly compliant' approach and a 'Lot 100 approach'.

Strictly compliant:

Lot	Area (m ²)	Max FSR x:1	Max GFA (m ²)
1	966.9	2.8	2,707.3
2	251.6	2	503.2
3	156.8	2	313.6

Table 1: Strictly compliant site area, max FSR, max GFA

Lot 100 approach ('Lot 100' is the proposed designation for the lot that will be created by the consolidation of Lot 1, Lot 2 and Lot 3, see figure 3 above):

Lot	Area (m ²)	Max FSR x:1	Max GFA (m ²)	Blended Max GFA across Lot 100 (m ²)
1	966.9	2.8	2,707.3	3,524.1
2 & 3	408.4	2	816.8	

Table 2: Lot 100 area, max FSR and GFA for component parts, max blended GFA across all of Lot 100

5. EXTENT OF VARIATION

Under the KLEP the subject site is affected by two maximum FSR development standards and, for a strictly compliant development, compliance with these standards would be (conservatively) measured in three distinct site areas. These are Lot 1, Lot 2 and Lot 3 as shown in the table below.

The table also includes Lot 100 (the proposed consolidation of Lot 1, Lot 2 and Lot 3).

In accordance with Clause 4.5 of the KLEP, the site has a total area of 1,375.3m², and as the building on the site has a total Gross Floor Area (GFA) of 3,523m², the development as a whole has a FSR of 2.56:1.

Parcel	Proposed GFA (m ²)	Max GFA (m ²)	GFA above the Max (m ²)	Variation (%)
Lot 1	3,263.0	2,707.3	555.7	20.5
Lot 2	260.0	503.2	-243.2	-48.5
Lot 3	0.0	313.6	-313.6	-100
Lot 100	3,523.0	3,524.1	-1.1	0

Table 3: Variations on the maximum FSR (noting that Lot 100 is presented for the purposes of making a merit-based case for evaluation under this clause 4.6 request).

The proposal exceeds the FSR on Lot 1 (2.8:1) by 20.5%. The proposal is **under** the FSR on Lot 2 (2.0:1) by 48.5%. The proposal is **under** the FSR on Lot 3 (2.0:1) by 100%.

In terms of GFA, Lot 1 includes an extra 555.7m² above that anticipated by a strict application of the controls, while Lot 2 and Lot 3, together, have 556.8m² **less** GFA than what is anticipated by the controls.

Lot 100 is included in the table 3 for the purposes of making a merit-based case for evaluation under this clause 4.6 request. If Lot 100 were evaluated holistically, on the basis of a blended FSR, there is no variation (and the maximum FSR and GFA would not be exceeded).

It is important to understand that if the parts of the site that are affected by different development standards (and land tenure) were developed separately (i.e. separate sites), the combined GFA permitted on the sites would be 3,524.1m². Similarly, if a single building was built on all three 'site areas', it could be massed in accordance with the floor space ratio control and include 3,524.1m² in GFA.

Therefore, the proposed development does not exceed the overall planned GFA for the land.


The Applicant has made this clause 4.6 request because it considers that the separate development of the three site areas, or the massing of a proposed building in strict compliance with the GFA maximums for each site area, would be an inferior planning outcome to what is proposed.

The contravention of the standard(s) is a consequence of the technical application of Clause 4.4 and Clause 4.5 of the KLEP, and how site area and FSR of a development is calculated. While those technical rules generally play an important role in securing appropriate outcomes, technical compliance would lead to a suboptimal outcome in the circumstances of this case.

The FSR calculation for the whole site is shown in the diagram below, with each of the 3 x lots represented separately. Because the bulk of the building is shifted to the south-eastern corner, where the Ku-ring-gai DCP identifies the site as a Landmark Building and away from the neighbouring lower-density development, it results in more FSR on Lot 1, very little FSR on Lot 2 and none on the Council Land (along Larkin Lane).

FSR CALCULATION			
Gross Floor Area (m ²)			
	Lot 1	Lot 2	Council
Ground Floor :	647	26	0
Level 1 :	595	78	0
Level 2 :	595	78	0
Level 3 :	595	78	0
Level 4 :	503	0	0
Level 5 :	324	0	0
Level 6 (Roof Terrace):	4	0	0
Total Proposed GFA :	3,263	260	0
Proposed FSR :	3.37 : 1	1.03 : 1	0 : 1
Permissible FSR :	2.8 : 1	2.0 : 1	2.0 : 1

LEGEND

 Gross Floor Area

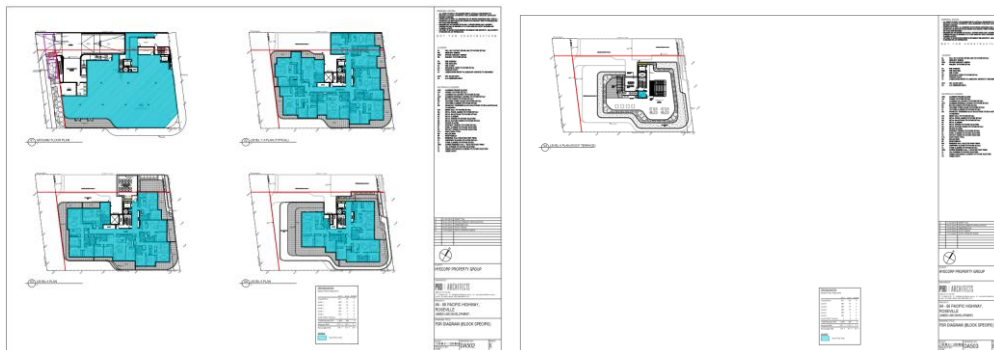


Figure 4: FSR Diagrams and calculation as distributed over the 3 existing lots. (Source: PBD Architects)

6. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard(s) is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the KLEP.

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The five ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated, thwarted or undermined (*Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]) if compliance was required with the consequence that compliance is unreasonable;
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 the standard is unreasonable and unnecessary; and
5. The zoning of the land is unreasonable or inappropriate

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

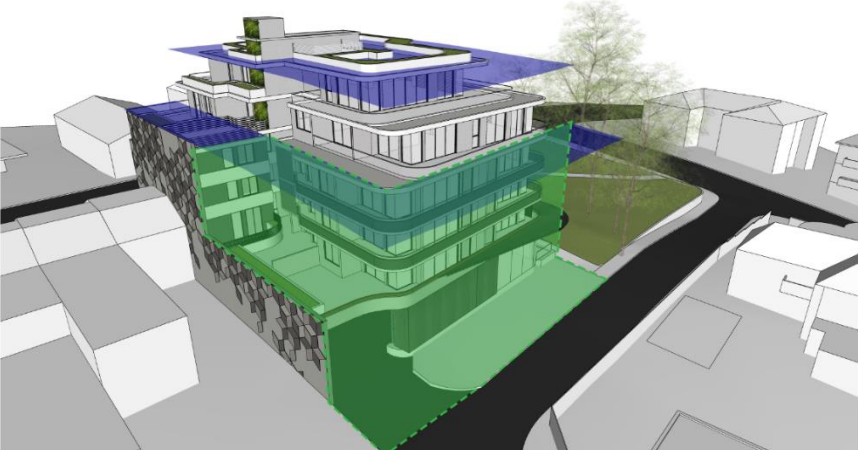
In this case, it is demonstrated below that Test 1 and 3 has been satisfied.

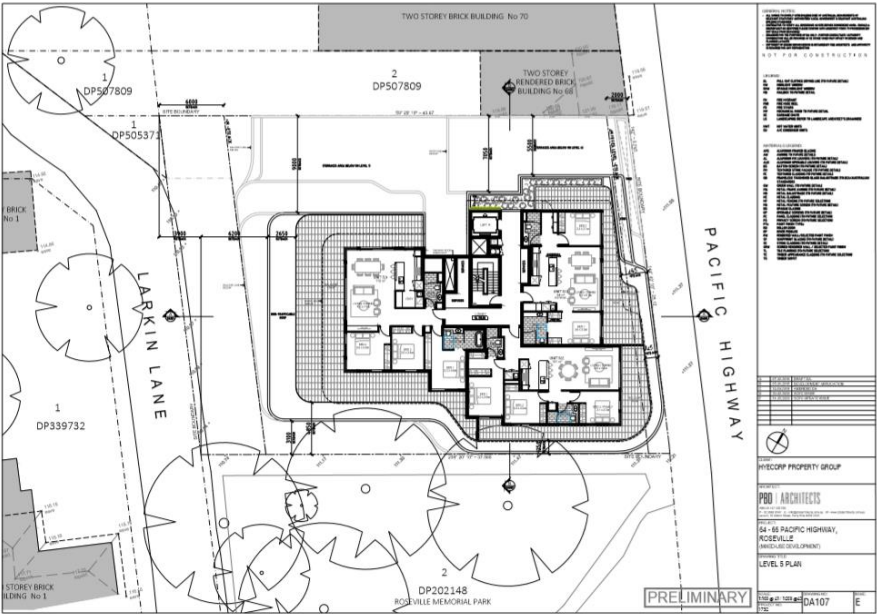
6.1. The objectives of the development standard(s) are achieved notwithstanding non-compliance with the standard(s).

The following table considers whether the objectives of the development standard are achieved notwithstanding the proposed contravention (Test 1 under *Wehbe*).

Table 4: Achievement of Objectives of Clause 4.4 & 4.5 of LEP

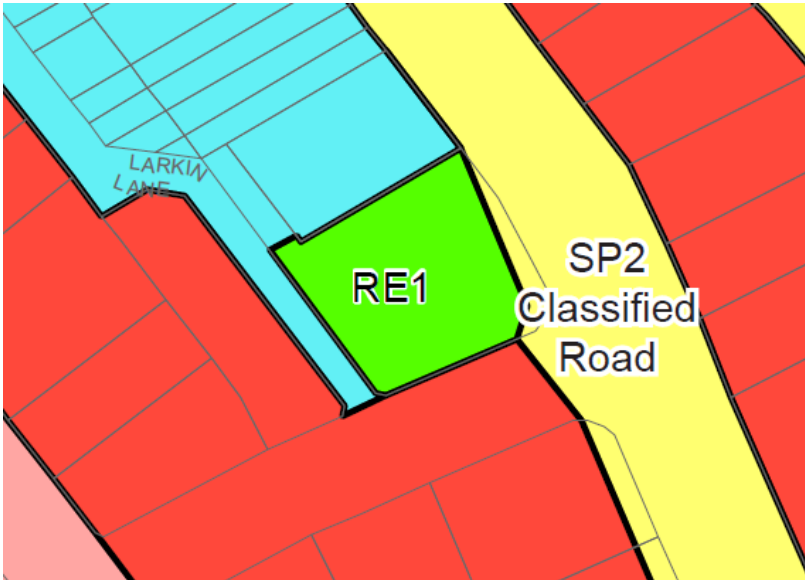
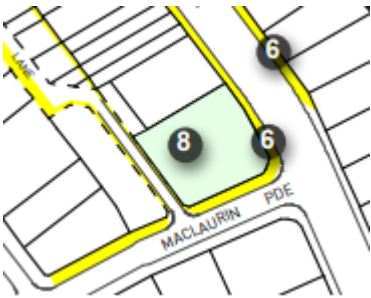
Objective	Discussion
Clause 4.4(1)	
(a) to ensure that development density is appropriate for the scale of the different centres within Ku-ring-gai	<p>The contravention to the standard is a consequence of how site area and FSR is calculated and because the site is affected by two (2) different FSR provisions. If the areas of the site that are affected by different FSR standards were developed separately, the combined maximum permitted GFA across the three site areas would be greater than the proposal and would allow built form closer to the lane situated on the west of the site. Refer to Figure 9 in Section 6.3 below showing the massing that could be achieved on this site if each site area was developed separately to its full potential.</p> <p>The allowable floor space on the 3 x site areas combined is 3,524.1m². The three site areas are:</p> <ul style="list-style-type: none"> ▪ Lot 1 - 2.8:1 - 966.9m², maximum GFA 2,707.3m²; ▪ Lot 2 - 2:1 - 251.6m², maximum GFA 503.2m²; and ▪ Lot 3 - 2:1 - 156.8m², maximum GFA 313.6m²

Objective	Discussion
	<p>The total floor space proposed on the 3 x sites combined, albeit reallocated to have less impact on the neighbours, is 3,523m² comprising of:</p> <ul style="list-style-type: none"> ▪ Lot 1 - 3,263m², ▪ Lot 2 - 260m², and ▪ Lot 3 - 0m². <p>Thus, the quantum of density proposed on the actual development site is appropriate for the scale of the centre, as it complies with the overall permissible density allowed when the three notional 'site areas' are considered in their entirety.</p> <p>The distribution of the density within the overall site is appropriate for the scale of the local centre. This is because the development has incorporated setbacks from both the western and northern boundaries of the site, where the lower FSR standard applies. Thus, the proposal has re-distributed floor space away from the part of the site that anticipates a lower FSR. This is to reduce its bulk and scale on this part of the site which adjoins and is adjacent to land that will have a lower scale development.</p> <p>(Refer to Figure 5 below)</p> <p>The objective is achieved as the proposal provides a density appropriate for the scale of the centre.</p>
<p>(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</p>	<p>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 providing 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 5 below.</p>  <p><i>Figure 5: 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)</i></p> <p>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. The green shaded area shows the portion of the site affected by the 2:1 FSR and lower height limit of 14.5m.</p> <p>Lot 3, located along the western boundary abutting Larkin Lane, has a 0m setback permissible with a height of 14.5m. Same to, the northern portion of the site, known as Lot 2.</p>

Objective	Discussion
	<p>By pulling the mass of the built form away from these areas and providing additional setbacks than what is currently permissible, the design ensures that amenity will be improved to the adjoining and adjacent properties, however does result in a variation to the north-eastern corner of the site and Lot 1. Visual bulk of the building is reduced and the separation is increased, allowing for less shadows on those immediate properties to the west and the park to the south. (Figure 12 in Section 6.3 shows shadows of a complying mass building compared to shadows of the proposed scheme)</p> <p>The reduced impacts demonstrate that a compatible relationship is achieved despite the proposed variation to FSR for part of the site, and it does not affect consistency or achievement of this objective.</p> <p>Contextually, the site is recognised as a landmark corner site having regard to the southern adjoining Memorial Park and lower density sites to the west whilst promoting active street frontages along Pacific Highway. To achieve this, the floor space has been moved away from the western adjoining lower scale and heritage sites, with no building proposed on the Council land adjoining the laneway. Thus, creating greater setbacks and separation between the lower density buildings. The bulk of the building has been "shifted" to the centre of the site and towards the south-eastern corner, creating a focal point, consistent with the provisions of the Ku-ring-gai Local Centres Development Control Plan Roseville Local Centre Section 14F.9 Built Form.</p> <p>This creates a technical variation for FSR for a portion of the site, however, demonstrates that the development's built form and density is compatible with the environmental and contextual relationship. (Refer to Figure 6 below showing the bulk of building located in the south-eastern "landmark" corner, stepping of the building away from the north and western boundaries)</p>  <p><i>Figure 6: Level 5 plan showing the bulk of the building situated in the south-eastern corner, having "shifted" the allowable floor space away from the western and northern boundaries and stepping at each level, ensuring compatible built form and density. (Source: PBD Architects)</i></p>
(c) to ensure that development density provides a balanced mix of uses in	The proposed is for a mixture of commercial club on ground floor and residential units above. The proposed contravention does not affect achievement or consistency with this objective as it still allows a

Objective	Discussion
buildings in the business zones.	
Clause 4.5(1)	
(a) to define floor space ratio,	<p>The proposed development does not affect the terms of the KLEP.</p> <p>The analysis in this clause 4.6 request uses the same definition of floor space ratio as in the controls, that is: 'the floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area'.</p> <p>The only difference in approach relates to what is counted as the 'site area'. This request proposes a variation in the way that the site area is determined, so as to take a whole-of-site approach in the circumstances of this case. This approach remains consistent with the intent to define FSR in the KLEP.</p>
<p>(b) to set out rules for the calculation of the site area of development for the purpose of applying permitted floor space ratios, including rules to—</p> <p>(i) prevent the inclusion in the site area of an area that has no significant development being carried out on it, and.</p>	<p>In calculating the actual floor space ratio of the proposed development, the proposal does not rely on any land, in that would not be the subject of 'significant development'.</p> <p>'Development' is defined to include the 'subdivision of land' (as per section 1.5(a) of the EP&A Act).</p> <p>All of Lot 3 is included in — and are part of — the subdivision that forms part of the development. Indeed, Lot 3 would not exist in its defined form, but for this fact. The subdivision is significant (given that has importance and is of consequence).</p> <p>Additionally, works proposed within Lot 3 include:</p> <ul style="list-style-type: none"> - the excavation for, and installation/connection of, an underground rain water tank (6 metres x 2.8 metres); - the erection of an awning to serve the new club premises; - the construction of a footpath; and - landscaping. <p>Other 'development' proposed in relation to Lot 3 is as follows:</p> <ul style="list-style-type: none"> - the subdivision of the existing Lot 2 DP 202148 to create Lot 3 (as mentioned above); and - the use of Lot 3 for the purposes of a road (a road includes a path; the path will be made available for public use under easements and maintained under a positive covenant and the 'use of land' is a form of development under the EP&A Act). <p>The proposal may be seen to have separate components: the subdivision of land, the construction/use of the mixed use building and the construction/use of the public footway. However, this does not prevent these components from being included in a single development application (<i>TK Commercial Property Holdings</i> at [83]).</p> <p>Similarly, different components are still regarded as being part of the same proposed development for the purposes of calculating FSR (<i>TK Commercial Property Holdings</i> at [96]).</p> <p>It is not necessary for works themselves to create new 'gross floor area' in order for them to constitute 'significant development' under clause 4.5(6). In <i>TK Commercial Property Holdings</i>:</p> <p>(a) substantial excavation;</p>

Objective	Discussion
	<p>(b) the construction of a masonry stairway;</p> <p>(c) the creation of new pathways and ramps; and</p> <p>(d) the construction of a new sewer main and new drainage infrastructure,</p> <p>was sufficient to constitute 'significant development' and therefore justify the inclusion of the lot in site area (at [96]).</p> <p>Similarly, in <i>Bouchard v Waverley Council</i> [2019] NSWLEC 1449 the use of land as an access was sufficient to constitute 'significant development' (at [8] and [27]-[28]).</p> <p>The proposed development, including the subdivision itself, is sufficient to establish that there is 'significant development' across the three relevant lots (proposed Lot 3 and existing Lot 1 and Lot 2).</p>
(ii) prevent the inclusion in the site area of an area that has already been included as part of a site area to maximise floor space area in another building, and	<p>No part of the proposed site area has already been included as part of a site area to maximise floor space area in another building. (Other than the existing club premises — which is to be completely demolished under the development consent sought.)</p>
(iii) require community land and public places to be dealt with separately.	<p>The intent of this provision is to ensure that developments on private land cannot inappropriately secure floor space that is only available because of adjacent public land. It would be inappropriate for the developers of private land to extract GFA benefits from public land in circumstances where the public, as the owner of the land, does not receive any benefit.</p> <p>This objective anticipates that, generally speaking, when private land is developed, GFA made available by the inclusion of public land should be located on that public land. This ensures the value of any GFA made available by that public land is enjoyed by the public owner of that land.</p> <p>Lot 3 is technically a 'public place' because it is 'public land'. It is 'public land' because it is vested in or under the control of the Council. However, it is not 'typical' public land of the kind that this objective is generally focused on.</p> <p>Firstly, the dominant use of Lot 3 does not serve any public purpose. Lot 3 is a strip of land being used as a car park for private premises. It is covered with asphalt. In its current state is obviously not practicable or safe for it to be used for recreation.</p> <p>Secondly, Lot 3 is to be created by the existing registered lot, known as Lot 2 DP 202148. This lot identified in part 2 of schedule 4 of the KLEP as 'operational land'. This means that it is not 'community land' under the <i>Local Government Act 1993</i>.</p> <p>There is no requirement for the Council to:</p> <ul style="list-style-type: none"> ▪ manage operational land under a plan of management; or ▪ retain operational land in public ownership. <p>This distinguishes it from community land. Local councils are obliged to retain community land in public ownership.</p>

Objective	Discussion
	<p>Thirdly, Lot 3 is not zoned in contemplation of any public purpose. An extract of KERP zoning map appears below:</p>  <p><i>Figure 7: Extract of the zoning map from the KERP (Source: NSW Legislation)</i></p> <p>The light blue shading over almost all of Lot 3 identifies that land as 'B2 Local Centre' (B2). The balance of Lot 2 DP 202148 (Lot 4) is zoned 'RE1 Public Recreation' (RE1). (Lot 4 is not included in site area for the purposes of the clause 4.6 request or any calculation of floor space ratio for the proposed development.)</p> <p>Fourthly, the Ku-ring-gai Local Centres Development Control Plan (the DCP) applies. This is an extract from figure 14F.3-1 in the DCP showing the Council strip of land:</p>  <p><i>Figure 8: Extract from figure 14F.3-1 in the DCP (Source: Ku-ring-gai Council Local Centres DCP)</i></p> <p>The legend for this figure identifies the green shaded area as a 'New or existing park'. It should be noted that all of Lot 4 is identified as a 'new or existing park'. None of Lot 3 is identified in this way.</p> <p>Fifthly, the DCP identifies locations for future 'key community infrastructure' (in the control set out in section 14F.3 of the DCP). An extract from figure 14F.3-1 is reproduced above as figure 8. The absence of a yellow strip on Lot 3 indicates that it is not a site intended for future 'key community infrastructure' under the DCP.</p>

Objective	Discussion
	<p>Sixthly, the development, once development consent granted, will not be able to be carried out without the subsequent co-operation and agreement of the owners of Lot 1, Lot 2 and Lot 3 (as a matter of real estate law, rather than planning law: <i>Rothwell Boys Pty Ltd v Coffs Harbour City Council</i> (2012) 186 LGERA 366 at [5]; <i>Sydney City Council v Ipoh Pty Ltd</i> [2006] NSWCA 300 at [84]).</p> <p>The works required in Lot 3 are sufficiently important that it would not be appropriate for any occupation certificate to be issued before they are completed. A condition to this effect should be imposed.</p> <p>As a result, in the present case, there is no risk of a private developer extracting a financial benefit from GFA made possible via Lot 3, other than by reaching a commercial agreement with its public owner, that is, the Council.</p> <p>Finally, the development application proposes the construction and maintenance of a public footpath on Lot 3. Public access would be ensured by easements in gross benefiting the Council. The owner of the adjacent mixed use development will be legally responsible for the maintenance and repair of the footpath. Accordingly, the consent authority can be confident that the proposed development will deliver a public benefit commensurate with the inclusion of Lot 3 in a single site area for the purpose of the calculation of FSR.</p> <p>This objective requires public places to be dealt with separately. The objective, in itself, does not require a particular mathematical approach to be followed. Achievement of (and consistency with) the objective can come about by separate consideration of Lot 3, whilst still allowing Lot 3 to be included in a larger site area as part of floor space ratio calculations.</p> <p>The clause 4.6 does separately consider Lot 3 and puts forward the result of that consideration as follows:</p> <ul style="list-style-type: none"> ▪ Lot 3 is to be the site of a public footpath and landscaping, which is to be the subject of easements in gross favouring the Council and ensuring public access in perpetuity. ▪ Legal and financial responsibility for the maintenance and repair of the public footpath should rest with the owners of the mixed use building, and this arrangement is to be in place in perpetuity under a positive covenant benefiting the Council. ▪ No GFA is to be created on Lot 3. ▪ The existing (visually unattractive) car parking on Lot 3 will be removed. ▪ No occupation certificate is to be issued for the mixed use development unless and until the works on Lot 3 have been completed (and the easements in gross and the positive covenant are in place). <p>In short, this objective is achieved through the consideration (and upholding) of this clause 4.6 request. The proposed development, that includes the measures that arise from that separate consideration, is consistent with this objective.</p>

As demonstrated in Table 4 above, the objectives of the Floor Space Ratio development standard(s) (in clause 4.4 and clause 4.5 of the KELP) are achieved notwithstanding the proposed contravention

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112

at [31], therefore, compliance with the development standard(s) is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

6.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

If compliance was required with regards to the allowable FSR on each lot, it is considered the objective (b) would be defeated, thwarted or undermined. Objective (b) states:

(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.

Below is a comparison of building massing based on the allowable FSR for each lot as compared with the current design. Two building mass diagrams have been provided, the first with no articulation and the second with some articulation. (Both of these comply with the relevant FSR and height provisions of each lot individually.)



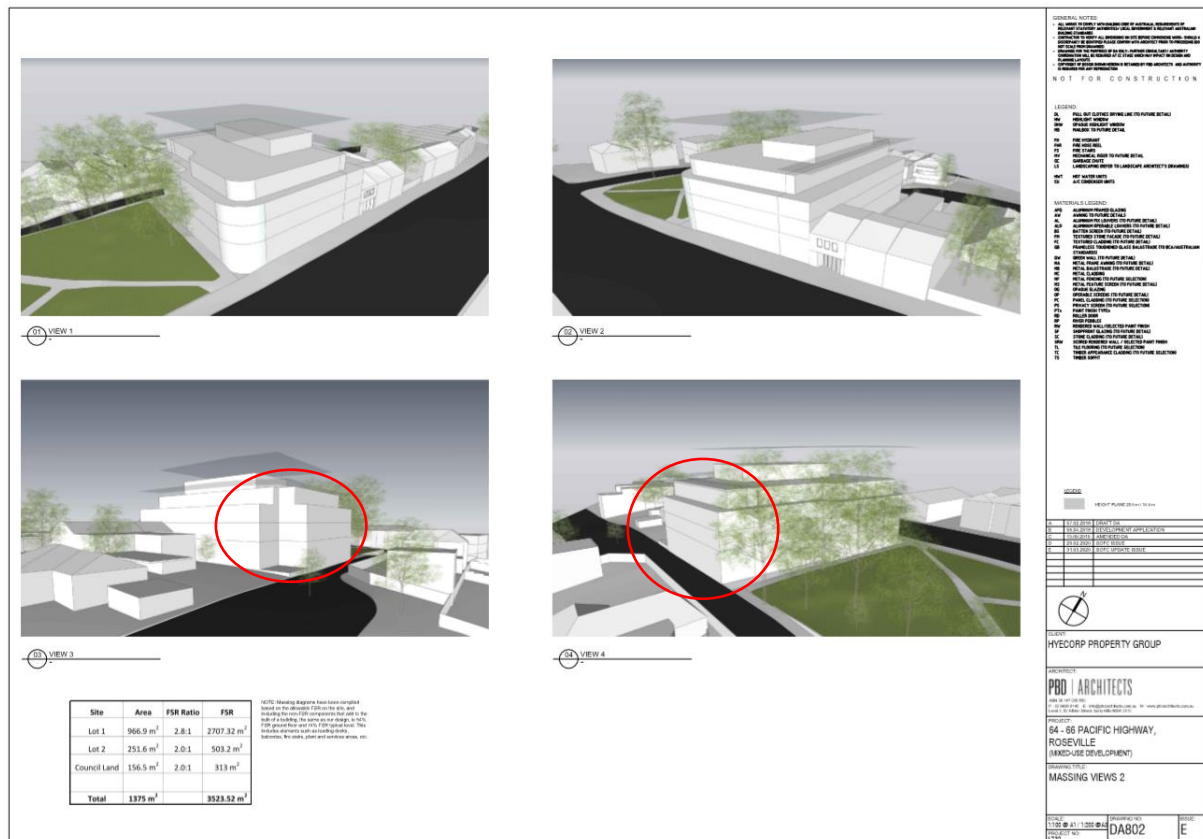


Figure 9: Building Mass diagrams demonstrating compliant FSR and height buildings allowable on the site. (Source: PBD Architects)

What is evident from these diagrams is that in both scenarios, Views 3 and 4 show that the extent of building mass that could occur abutting the laneway (western elevation) and along the north-western boundary with a complying development is greater than that proposed by this current development. (As depicted in the red circles).

The properties to the west and north-west of the subject site are of a lower density and scale, with a heritage item situated at No. 1 MacLauren Pde directly to the west. Thus, any development on the subject site must have regard to these environmental constraints and the contextual relationship, under this objective.

The proposal, by reallocating the FSR throughout the site and moving the bulk of the building away from the western and northern elevations; achieves compliance with this objective by creating a built form and density that is compatible with the size of land to be developed, its environmental constraints and particularly its contextual relationship. This is despite the technical contravention over the whole site. It allows a greater setback to the western (6m in lieu of 0m) and north-western boundaries and provides a building form compatible with the surrounding buildings whilst still achieving a density less than permitted over the site as a whole. (Refer to Figure 9 above and Figures 10 and 11 below)



Figure 10: Extract of 3D Perspective showing current proposal adjoining the northern development to the 11.5m height limit. The red circle shows the greater setback to the north-western and western (laneway) boundaries which the "re-allocation" of the FSR on the site achieves. Thus, improving the relationship to the lower-density neighbours and heritage site at No. 1 MacLauren Pde than what a permissible development would achieve. (Source: PBD Architects)



Figure 11: Level 1 with red lines showing the 6m setback to Larkin Lane and staggered setback to the north-western corner; improving the separation between lower-density buildings. (Source: PBD Architects)

Also, the diagrams below show that the extent of shadow generated by the proposal has less impact than the extent of shadow which would be generated by a complying development, because the bulk has been relocated away from the western boundary. As can be seen, because the proposal has "shifted" the floor space to the east and south-eastern corner, the extent of shadow cast on the western low-density neighbours and also over the Memorial Park is reduced.

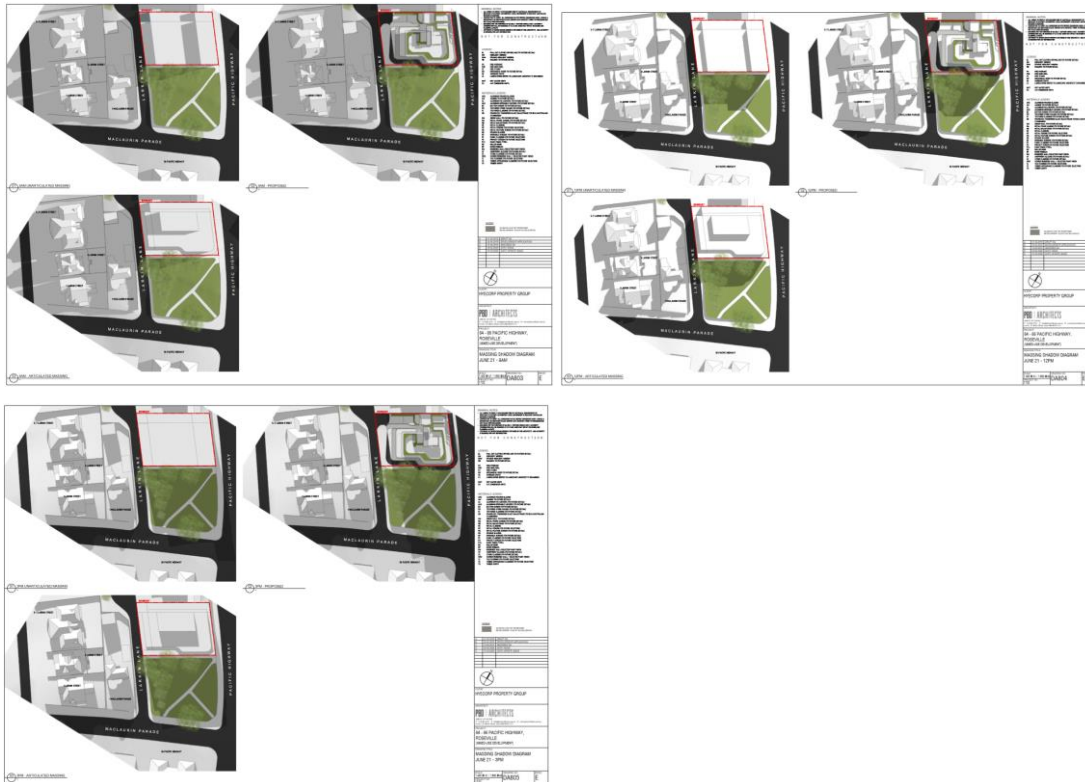


Figure 12: Extent of shadows cast from two x FSR complying developments compared with the proposed development. (Source: PBD Architects)

Therefore, it is demonstrated that strict compliance with the KELP's numerical allocation of FSR over the site, would defeat, thwart or undermine this objective.

6.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or

The standard has not been abandoned by Council actions in this case and so this reason is not relied upon.

6.5. The zoning of the land is unreasonable or inappropriate.

The zoning of the land is reasonable and appropriate and therefore is not relied upon.

6.6. Other grounds.

For completeness, this request also seeks to demonstrate that the "unreasonable and unnecessary" requirement is met because the burden placed on the community by not permitting the contravention (and allowing for the building mass to be distributed differently than anticipated under the strict numerical controls) would be disproportionate to the adverse consequences attributable to the proposed non-compliant development.

This disproportion is, in itself, sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

In this regard, all of the earlier discussion is adopted and advanced.

Compliance with the development standard(s) is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

7. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *FourFive Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning grounds to justify the departure of the named standard(s) are as set out in the preceding sections 5 and 6 in detail. They can be summarised as follows:

- The proposed contravention 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 three sites, as opposed to one site as proposed.
- It would also be possible, but less desirable in planning terms (when compared to the proposed development) to develop a single building over the three 'site areas' that complies with GFA maximums for each of those site areas. The proposed distribution of building mass is superior to the one that would be necessitated by a complying development.
- 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. This promotes the orderly and economic use and development of the land.
- Compliance with the standard(s) would require a portion of the development to have a maximum FSR of 2:1, which would not result in a desirable and sensible built form. It would place building bulk in more sensitive areas, that is, along the western elevation abutting the laneway where currently there is none. The proposed setback is 6m from the laneway at ground level, stepping as the building increases in height; however, a compliant building can achieve 0m to a height of 14.5m
- The breach of the standard(s) do not result in any material 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.
- It promotes good design and amenity of the built environment, resulting in improved urban design and amenity considerations for both the local community and the future occupants of the building. It provides greater separation to the adjoining properties to the north and west, and reduces the impacts of bulk and shadows on the properties to the west and the Memorial Park.
- Compliance with the development standard(s) would be unreasonable and unnecessary in the circumstances of this development as it is consistent with the objectives of the development standard(s) and the objectives of the B2 zone, notwithstanding the contravention.

Some examples that illustrate the wide range of commonplace numerical variations to development standards under clause 4.6 (as it appears in the Standard Instrument) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003 the Land and Environment Court granted a development consent for a three storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187 per cent.
- In *Auswin TWT Development Pty Ltd v Council of the City of Sydney* [2015] NSWLEC 1273 the Land and Environment Court granted development consent for a mixed use development on the basis of a clause 4.6 request that sought a 28 per cent height exceedance over a 22-metre building height standard.
- In *Season Group Pty Ltd v Council of the City of Sydney* [2016] NSWLEC 1354 the Land and Environment Court granted development consent for a mixed use development on the basis of a

clause 4.6 request that sought a 21 per cent height exceedance over a 18-metre building height standard.

- In *Amarino Pty Ltd v Liverpool City Council* [2017] NSWLEC 1035 the Land and Environment Court granted development consent to a mixed-use development on the basis of a clause 4.6 request that sought a 38 per cent height exceedance over a 15-metre building height standard.
- In *Landco (NSW) Pty Ltd v Camden Council* [2018] NSWLEC 1252 the Land and Environment Court granted development consent for a land subdivision with clause 4.6 variations of between 47-51 per cent on the minimum 450m² lot size (allowing lots sizes ranging from 220 to 240m²).
- In *Stellar Hurstville Pty Ltd v Georges River Council* [2019] NSWLEC 1143 the Land and Environment Court granted development consent for 12-storey residential tower, on the basis of a clause 4.6 request, with a floor space ratio exceedance of 8.3 per cent.
- In *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555 the Court granted development consent for a three storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27 per cent (1.27:1 compared to the permitted 1.0:1)
- In *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583 the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75 per cent (2.63:1 compared to the permitted 1.5:1)
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 the Court granted development consent to a six-storey shop top housing development with a floor space ratio exceedance of 42 per cent (3.54:1 compared to the permitted 2.5:1).
- In short, clause 4.6 is a performance-based control so it is possible (and not uncommon) for large variations to be approved in the right circumstances.

8. PUBLIC INTEREST

In this section it is explained how 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. This is required by clause 4.6(4)(a)(ii) of the KLEP.

In section 6 it was demonstrated that the proposed development overall achieves the objectives of the development standard(s) notwithstanding the contravention of the development standard.

The table below considers whether the proposal is also consistent with the objectives of the zone.

Table 5: Consistency with Zone Objectives.

Objectives of Zone B2 Local Centre	Discussion
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.	<p>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.</p> <p>The contravention to the standard(s) does not affect consistency with this objective.</p>
To encourage employment opportunities in accessible locations	<p>The proposed development includes ground floor retail premises, that will create/maintain ongoing employment for the area.</p> <p>The contravention to the standard(s) does not affect consistency with this objective.</p>
To maximise public transport patronage and encourage walking and cycling.	<p>The contravention to the standard(s) does not affect consistency with this objective.</p>
To provide for residential housing close to public transport, services and employment opportunities	<p>The proposal provides for additional housing, in close proximity (i.e. 150m) of the Roseville train station.</p> <p>The contravention to the standard(s) does not affect consistency with this objective.</p>
To encourage mixed use buildings that effectively integrate suitable business, office, residential, retail and other development	<p>The proposal is consistent with and achieves this objective.</p>

Objectives of Zone RE1 Public Recreation	Discussion
To enable land to be used for public open space or recreational purposes.	<p>The letter of advice from Mills Oakley dated 16 September 2019 (which is included in the development application documents) forms part of this request.</p> <p>The development proposes the subdivision of Lot 2 DP 202148, so that operational land owned by the Council is separated from parkland that is zoned RE1 and is maintained by the Council as a park.</p>

	<p>To be clear, the strip of Council land to be separated from the parkland is not a park— nor functionally part of a park in any legal or substantive sense. It makes sense that it be subdivided from land that is such land.</p> <p>Additionally, this strip of Council land is not, in reality or in law, presently set aside for public use. It is, in fact, signposted (with Council's acquiesce) as parking for the registered club. The proposed subdivision, together with the proposed easements, will make this strip of land available for public use as a landscaped and -maintained footpath.</p>
To provide a range of recreational settings and activities and compatible land uses.	<p>The proposed development does not adversely impact on the use or nature of the park. In fact, it positive contributes to the park by providing an additional means for pedestrians to comfortably access the park (via the new landscaped footpath to be constructed on the strip of Council land).</p> <p>Additionally, the mixed use development adjacent to the park will complement and reinforce the park use in the following ways:</p> <p>The club entry is oriented to the park (south-east corner) and opens onto the parkland,</p> <p>This main entry links with the existing path from Pacific Highway to the centre of the park,</p> <p>The club incorporates a terrace which overlooks the park, and</p> <p>The park is a Memorial Park with plaques and services which is an integral part of the Returned Servicemen's Memorial Club.</p>
To protect and enhance the natural environment for recreational purposes	<p>The proposed development will have no material adverse impact on the natural environment.</p> <p>The proposed landscaped footpath will improve access arrangements to the park environment, which will contribute positively to this objective.</p>
To protect, manage and restore areas of high ecological, scientific, cultural or aesthetic value.	<p>The park is of aesthetic and cultural value, being a Memorial Park; and the proposed development respects and complements its qualities. The design of the development integrates the RSL Club with the park, providing outdoor terrace, main entry and glass frontage ensuring the club is oriented to the Memorial Park. It enhances the south-eastern corner of the site, which is identified as suitable for a landmark building within Section 14F.9 Built Form of the Roseville Local Centre provisions of the Ku-ring-gai Local Centres Development Control Plan; specifically due to the cultural and aesthetic value of the park.</p>

	The design compliments the existing trees within the park and adds to the aesthetic value along the Larkin Lane, with the provision of the landscaped pedestrian path.
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As demonstrated in Table 5, the proposal is consistent with the objectives of the zone and in Section 6 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

9. STATE OR REGIONAL ENVIRONMENTAL PLANNING

This section considers whether contravention of the development standard(s) raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of contravening the development standard(s) as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 18-003 'Variations to development standards', dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The circular provides for assumed concurrence.

The Secretary can be assumed to have given concurrence to the variation, provided that the determination is not made by a delegate of the Council. (It should be noted that a panel and the Court are not delegates of the Council.)

10. CONCLUSION

This submission requests a contravention, under clause 4.6 of the Ku-ring-gai (Local Centres) *Local Environmental Plan 2012*, to the Floor Space Ratio development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case;
- The development achieves the objectives of the development standard and is consistent with the objectives of the B2 Local Centre zone.
- There are sufficient environmental planning grounds to justify the contravention;

The consent authority can be satisfied to the above and that the development achieves the objectives of the development standard and is consistent with the objectives of Zone B2 Local Centre and RE1 Public Recreation notwithstanding non-compliance with the Floor Space Ratio standard(s) and is therefore in the public interest.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 18-003.

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.