



215, 229-239 Pitt Street, Merrylands

Amended Clause 4.6 Variation to Floor Space Ratio

On behalf of Anglicare



1 Introduction

This Clause 4.6 variation has been prepared by Mecone on behalf of Anglicare in relation to a Development Application (DA) at 215, 229-239 Pitt Street, Merrylands.

The proposed development seeks consent for the following works:

- Demolition of existing structures; and
- Construction of a 24 storey mixed use building comprising:
 - 3 x levels of basement parking
 - Ground floor commercial and back of house;
 - Podium commercial space;
 - Tower comprising;
 - 88 x Residential Aged Care Facility (RACF) beds;
 - 98 x Independent Living Units (ILUs); and
 - Communal roof top open space.

This Clause 4.6 variation relates to the Floor Space Ratio (FSR) control in the Holroyd Local Environmental Plan (HLEP) 2013. Specifically, it relates to subclause (2B), which caps residential accommodation to an FSR of:

$(FSR_{max} - 1.7):1$

Where – **FSR_{max}** is the maximum floor space ratio in accordance with clause.

Based on a maximum base FSR of 8:1 and a design excellence bonus of 0.5:1, the site has a maximum FSR of 8.5:1.

Pursuant to clause 4.4.(2B) the maximum FSR for residential accommodation on the site is therefore capped at 6.8:1, which equates to a gross floor area (GFA) of 14,209.28m².

The proposed development provides a residential floor space component of 15,858m², which exceeds the maximum allowed by 1,648.72m² or by 11.6%.

2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the HLEP 2013 enables an exception to the FSR standard upon consideration of a written request from the applicant justifying the contravention in the terms stated below.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- 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.

The consent authority's satisfaction as to those matters must be informed by the objectives, which are:

1. to provide flexibility in the application of the relevant control; and
2. to achieve better outcomes for and from development.

The Land and Environment Court has established questions to be addressed in variations to developments standards lodged under *State Environmental Planning Policy 1 – Development Standards* (SEPP 1) through the judgment of Justice Lloyd, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89. The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 (Wehbe).

An additional principle was established in the decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (Four2Five) which was upheld by Pain J on appeal. A further recent judgement by Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 clarified the correct approach to Clause 4.6 variation requests, including that:

"The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard." [88]

How these tests and considerations are applied to the assessment of variations under Clause 4.6 of the LEP and other standard LEP instruments has most recently been confirmed in the judgement of Justice Preston, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSW LEC 118.

Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court.

Clause 4.6 of HLEP 2013 reads as follows:

4.6 Exceptions to development standards

(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.

(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.

(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.
- (4) Development consent must not be granted for development that contravenes a development standard unless—
 - (a) the consent authority is satisfied that—
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
 - (b) the concurrence of the Planning Secretary has been obtained.
- (5) In deciding whether to grant concurrence, the Planning 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 Planning Secretary before granting concurrence.
- (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 RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E3 Environmental Management or Zone E4 Environmental Living.

- (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).
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following—
 - (a) a development standard for complying development,
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
 - (c) clause 5.4.

3 The Development Standard to be varied

The development standard to be varied is Clause 4.4 Floor Space Ratio (FSR) in HLEP 2013. As identified on the HLEP 2013 FSR Map, the site has an FSR of 8:1 and is located in Area B.

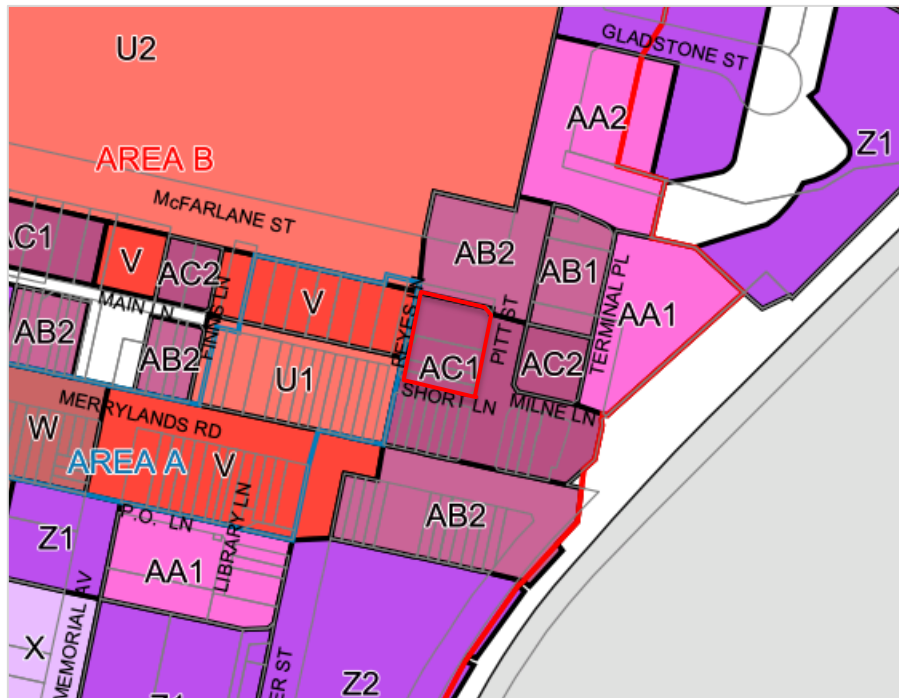


Figure 1: Floor Space Ratio Map Extract

Source: HLEP 2013

The site is also subject to design excellence provisions outlined in clause 6.11. Subject to going through the design excellence process the site is capable of being awarded an FSR bonus of 0.5:1 and height bonus of 10%.

A separate process has been undertaken with Cumberland Design Excellence Panel (CDEP) to seek the bonuses in accordance with clause 6.11. With conditional endorsement granted from CDEP, the site has a maximum FSR of 8.5:1.*

*At the time of preparing this amended report, the development has since received design excellence consistent with clause 6.11.

4 Extent of Variation to the Development Standard

Clause 4.4(2B) of HLEP 2013 reads as follows:

(2B) Despite subclauses (2) and (2A), if a building on a site area on land identified as "Area B" on the Floor Space Ratio Map is used for the purposes of residential accommodation or tourist and visitor accommodation, or a combination of such uses, the maximum floor space ratio for that part of the building that is used for such purposes is—

$$(FSR_{max} - 1.7):1$$

where—

FSR_{max} is the maximum floor space ratio in accordance with this clause.

Based on a maximum base FSR of 8:1 and a design excellence bonus of 0.5:1, the site has a maximum FSR of 8.5:1.

The maximum FSR for residential accommodation on the site is therefore capped at 6.8:1, which equates to a gross floor area (GFA) of 14,209.28m².

The proposed development provides a residential floor space component of 15,858m², which exceeds the maximum allowed by 1,648.72m² or by 11.6%.

5 Objectives of the Standard

The objectives of the Clause 4.4 Floor Space Ratio are as follows:

(1) The objectives of this clause are as follows—

- (a) to support the viability of commercial centres and provide opportunities for economic development within those centres,*
- (b) to facilitate the development of a variety of housing types,*
- (c) to ensure that development is compatible with the existing and desired future built form and character of the locality,*
- (d) to provide a high level of amenity for residential areas and ensure adequate provision for vehicle and pedestrian access, private open space and landscaping.*

6 Objectives of the zone

The objectives of the B4 Mixed Use zone are as follows:

- 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 facilitate a vibrant, mixed-use centre with active retail, commercial and other non-residential uses at street level.
- To encourage the development and expansion of business activities that will strengthen the economic and employment role of the Merrylands town centre.

7 Assessment

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

Compliance with the floor space ratio standard is unreasonable and unnecessary given the following circumstances of this case:

- The proposal includes 88 residential age care facility (RACF) beds that equate to a GFA of 6,249m²;
- While RACF are defined as residential accommodation, the RACF component of the building is anticipated to generate up to 45 total staff, with a rostered maximum of 33 staff on any shift. The use is still employment generating and is not strictly residential in nature or operation;
- The proposal includes 98 independent living units (ILU's) that equate to a GFA of 9,609m². This use is anticipated to generate up to 4 – 5 total staff including

sales, village manager, assistant village manager and a maintenance manager;

- Overall, the uses within the residential accommodation component are also employment generating and will provide up to 50 staff within the development;
- While these are considered to be a form of residential accommodation under the LEP, they also run commercial operations and will facilitate jobs and flow on services that would similarly be realised by meeting the shortfall of non-residential floor space;
- Notwithstanding, the variation the proposal is consistent with the objectives of the FSR standard;
- The contravention of the FSR standard does not raise any matter of State or regional planning significance; and
- There is no public benefit in maintaining the standard in the circumstances of the case as explained below.

Strict compliance with the FSR standard is considered unreasonable and unnecessary as explained in the cases above. There is no public benefit in maintaining strict compliance with the standard in this circumstance.

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

As discussed above, Pain J held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a Clause 4.6 variation must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, preferably being grounds that are specific to the site.

Pain J also held that in order for a clause 4.6 variation to be accepted, seeking to justify the contravention is insufficient - the consent authority must be satisfied that clause 4.6(3)(a) and (b) have been properly addressed. On appeal, Leeming JA in *Four2Five vs Ashfield Council* [2015] NSWCA 248 acknowledged Pain J's approach, but did not necessarily endorse it, instead re-stating Pain J and saying:

"matters of consistency with objectives of development standards remain relevant, but not exclusively so."

Further recent findings by Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 also found that:

"The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard." [88]

There are sufficient environmental planning grounds to justify contravening the development standard in the following ways:

- The variation only results in a redistribution in the quantum of allocated FSR permitted on the site and as such, does not increase the bulk or scale of the building;
- The redistribution of FSR does not give rise to any additional overshadowing or amenity impacts;

- The de facto commercial nature of the RACF component in the podium provides for an improved design response of the building and its relationship to the public domain including improved private outdoor and landscaping areas that would unlikely be realised through strict commercial uses;
- The proposal has undergone a rigorous design excellence process and has demonstrated an optimal built form outcome in relation to the varying street conditions and impacts to adjoining properties;
- The proposal does not undermine the objectives of the B4 zone and maintains both ground and podium commercial uses in addition to the employment generating in the residential components;
- The proposal delivers important social outcomes for Merrylands by not only delivering housing choice, but housing tailored to seniors or people with a disability so they can age in place; and
- The development complies with the objectives of the B4 Mixed Use zone, the objectives of clause 4.4 and the desired future character of the area.

Given the above, strict compliance with the FSR controls would hinder the attainment of the objects of the Act, and would not result in the orderly and economic use and development of land.

Clause 4.6(4)(a)(ii) - Is the proposed development 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

In the court case *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Commissioner Pearson stipulates that the consent authority is to be satisfied the proposed development will be in the public interest because it is consistent with:

- a) the objectives of the particular standard, and*
- b) the objectives for development within the zone in which the development is proposed to be carried out.*

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, the Chief Judge observed in his judgement at [39] that 4.6(4) of the Standard Instrument does not require the consent authority to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly be satisfied that the applicant's written request has adequately addressed those matters.

The objectives of the development standard and the zone are addressed below under the relevant headings.

a) the objectives of the particular standard

The particular development standard is Clause 4.4 Floor Space Ratio of HLEP 2013 and the relevant objectives are addressed below:

- (a) to support the viability of commercial centres and provide opportunities for economic development within those centres,*

The proposal will provide a genuine mixed use development with ground floor and podium commercial uses along with seniors living in the tower forms.

The proposal will be one of the first redevelopments in Merrylands town centre following the finalisation of the Merrylands and MacFarlane Station Precinct Planning Proposal and provides seniors living uses that will support the economic activity and demand for services in the centre.

(b) to facilitate a variety of housing types

The proposal achieves a mix of apartment types within the ILU component including 20.4% 1 x bedroom, 61.2% x 2 bedroom and 18.4 x 3 bedroom apartments. These apartments are located within a development that exhibits design excellence through the provision of private open space and community facilities within the development, as well as activation of the ground plane.

(c) to ensure that development is compatible with the existing and desired future built form and character of the locality,

The proposal has been designed in consideration of the future character of Merrylands town centre. Detailed urban design and master planning has been undertaken by Turner Architects through the course of the design excellence process to ensure the scale of built form responds not only to its context, but presents opportunities to minimise impacts of built form on adjoining development.

(d) to provide a high amenity for residential areas and ensure adequate provision for vehicle and pedestrian access, private open space and landscaping.

The proposal includes a careful consideration of the integration of landscape and private open space areas to enhance residential amenity. Vertical greening is embedded within the design of the development, presenting diverse open space areas for social interaction. The site achieves 37.5% of communal open space on an infill site, as well as additional landscaped areas for the ILU and RACF components.

A high level of pedestrian access has been considered within the design including two entries at the ground level from Reyes Lane and Pitt Street.

The proposed design also ensures key ADG criteria are not only met but are substantially exceeded including solar access, private open space and and cross flow.

b) the objectives for development within the zone in which the development is proposed to be carried out.

The site falls within the B4 Mixed Use zone, and the relevant objectives are addressed below.

a) to provide a mix of compatible land uses,

The proposal achieves a genuine mixed use building with a combination of commercial and residential uses that are allocated appropriately within the development. The commercial uses will be capable of providing a mix of activated retail at street level as well as office uses within the podium.

b) 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,

The proposal co-locates complementary land uses in excellent proximity to transport infrastructure, shops and services. The site is located in Merrylands town centre and is within 200m walking distance to Merrylands Train Station and Interchange, and Stockland Shopping Centre.

c) to facilitate a vibrant, mixed-use centre with active retail, commercial and other non-residential uses at street level

The proposal has undergone a rigorous design excellence process to demonstrate a high level of architectural design. The design, which has been

informed by the proposed uses and their location within the building, serve to activate and respond to the public domain including ground level retail, podium commercial and RACF within the upper levels.

Three activated frontages are proposed including Pitt Street, MacFarlane Street and Reyes Lane, which have been designed to respond to the unique streetscape conditions and activate the ground plane.

- d) *to encourage the development and expansion of business activities that will strengthen the economic and employment role of Merrylands town centre.*

The proposal serves to enhance the role of Merrylands town centre by providing sufficient commercial uses within the development. Despite the minor breach of residential accommodation FSR, the RACF component will require 45 staff to support residents, as well as an additional 5 staff for the ILU component.

In turn, the employment generation created from these uses alone would arguably be similar to what would be realised if the shortfall of non-residential GFA was provided on the site.

The proposed seniors living component will support additional economic activity in Merrylands town centre through flow on effects and consumer demand for goods and services for nearby businesses, which will improve local retail trade.

As discussed above the proposal is considered in the public interest as it is consistent with the objectives of the development standard and the B4 Mixed Use zone.

8 Any matters of significance for State or regional environmental planning

The contravention of the FSR standard does not raise any matter of State or regional planning significance.

9 Conclusion to variation to floor space ratio standard

This written request is for an exception to the FSR standard under clause 4.4 of HLEP 2013. It justifies the contravention to the FSR standard in the terms required under clause 4.4 of the LEP and in particular demonstrates that the proposal provides a significantly better planning outcome with no significant adverse environmental impacts.

Therefore, in the circumstances of the case:

- Compliance with the FSR standard is unreasonable and unnecessary;
- There are sufficient environmental planning grounds for the contravention;
- It is in the public interest in being consistent with the objectives of the FSR standard and zone; and
- There are no matters of State or regional planning significance and no public benefits in maintaining the FSR standard in this case.



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