

Clause 4.6 Variation Requests

BUILDING HEIGHT AND FSR

25 MARCH 2020



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CLAUSE 4.6 VARIATION- BUILDING HEIGHT

Relevant Case Law

There are a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*, as well as *Zhang v Council of the City of Ryde*.

In addition a recent judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore this must be considered when evaluating the merit of the FSR departure.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* has adopted further consideration of this matter which requires that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

The approach in *Al Maha* was reinforced by *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130* where it was found that:

... in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).

Finally the decision in *Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61* confirmed that the consent authority must be directly satisfied that the matters are adequately addressed in the written Clause 4.6 variation request.

On that basis it is necessary that the following be satisfied.

- The consent authority must be satisfied the written request demonstrates the matters in Clause 4.6(3).
- The consent authority be satisfied the proposed development will be in the public interest because it is “*consistent with*” the objectives of the development standard and zone is not a requirement to “*achieve*” those objectives.

It is a requirement that the development be compatible with the objectives, rather than having to ‘achieve’ the objectives.

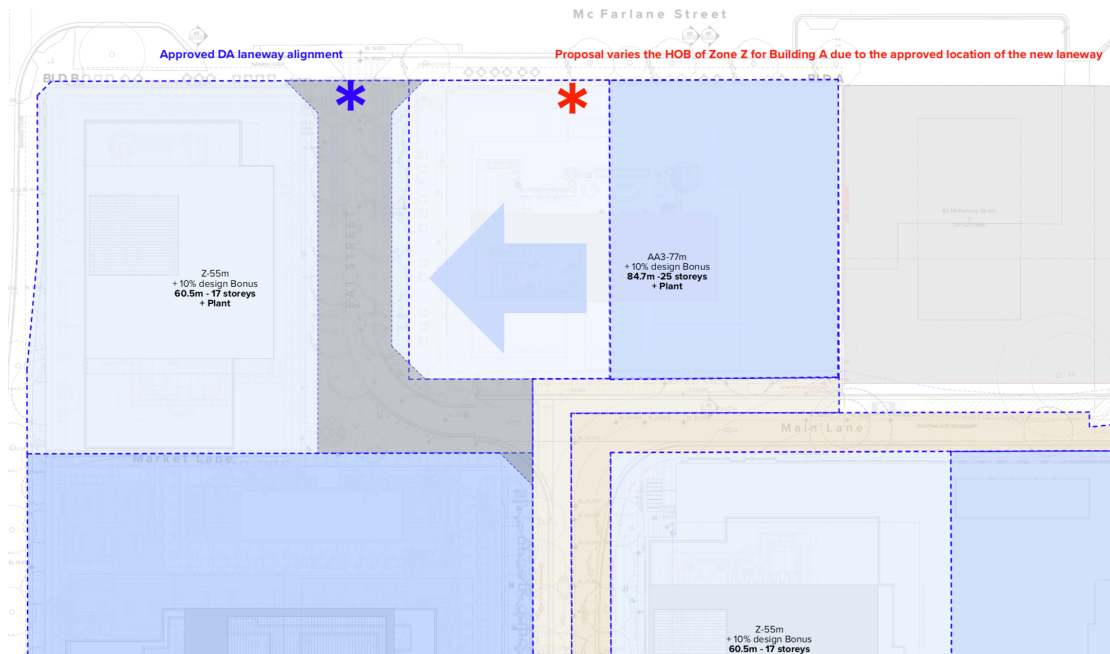
- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.
- The proposal is required to be in ‘the public interest’.



The Design Intent & The Height Departure

The development proposal has been influenced by a series of drivers, noting the building height and associated breach is driven by:

- The provision of a logical built form outcome, noting that Building A straddles an area of 2 building heights (77m/55m plus 10% height bonus) owing to the difference in the laneway location between the LEP (straight north/south) and as proposed which is irregular (and agreed with Council relating to culvert works). The intent of the height split was to follow the lane and provide a transition in height - which the proposal aligns and is consistent with and hence the outcome is reflective of the intent in the height split and transition. Diagrammatically this is reflected on Drawing DA-100-005 and reproduced below.



- The provision of 3.16m floor to floor heights to allow set downs to balconies and improve amenity for residents;
- The provision of integrated architectural roof features that allow for fully integrated plant rooms and lift overruns servicing the roof levels to provide a well considered urban design response
- The provision of rooftop common open space areas;

The habitable parts of the building comply with the height limit when taking into account the 10% Design Excellence bonus which the proposal achieves and any reference to building height relates to the 'bonus' height as that is the maximum permitted height limit.

By way of summary the respective buildings are set out below and their compliance, noting this also relies on the realignment of the height for Building A

- Building A: Complies with the 84.7m height limit except for part of the balustrade and top floor roof slab and is 1.5m or 1.77% of the control. The portion above this is an architectural roof feature. When considering the nominated LEP height limit that straddles the site, being 60.5m/84.7m (including bonus) the numerical breach is 25.7m or 60.5% of the control. However this is a clear scenario where Clause 4.6 should be invoked as the proposal aligns fully with the intent of the control when considering the actual laneway alignment proposed and the intended step in the height control was to follow the laneway alignment envisaged- which is achieved.
- Building B: Complies with the 60.5m control noting that the portion above this satisfies Clause 5.6, being an architectural roof feature;
- Building C: Complies with the 84.7m control noting that the portion above this satisfies Clause 5.6, being an architectural roof feature;
- Building D: Complies with the 60.5m control noting that the portion above this satisfies Clause 5.6, being an architectural roof feature;
- Building E: Complies with the 84.7m height limit except for part of the balustrade and top floor roof slab and is 1m or 1.18% of the control. The portion above this is an architectural roof feature.

Clause 4.6 of the LEP

Clause 4.6 of the Holroyd LEP 2013 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular sub clause 3-5 which provide:

- 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 Secretary has been obtained.*
- 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.*

Each of these provisions are addressed in turn.

Clause 4.6(3)- Objectives of the Standard

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved.

The objectives of the building height development standard are stated as:

- 1) *The objectives of this clause are as follows:*
 - (a) *to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,*
 - (b) *to ensure development is consistent with the landform,*
 - (c) *to provide appropriate scales and intensities of development through height controls.*

The current development proposal seeks to depart from the height control for small portions of the upper storey of the building, and the 'shifting' of the height of Building A to align with the laneway location. Despite this, the proposal remaining consistent with the objectives of the clause because:

- The visual impact of the non-compliance is limited noting the departure is primarily to balustrade elements to most buildings and the realignment of Building A in terms of height- i.e. the height of the building being greater on the eastern side of the north/south laneway link- provides a suitable design response;
- The shadow diagrams show the adjoining properties received adequate solar access, noting the elements of non-compliance are limited with the exception of Building A which actually shifts the height further westwards which lessens the impact to adjoining properties to the east;
- The additional height has no bearing on the privacy of neighbouring properties;
- The development is designed to follow the landform, whilst acknowledging the impact of overland flow/flooding and a suitable design response;
- The development provides an appropriate scale and intensity, noting consistency with the intent of the Merrylands Town Centre DCP height massing and noting the FSR, across the entirety of the site (including laneway) is compliance;
- The non-compliance, other than Building A, is minor in nature with the majority of the building being compliant with the building height control and with the lift overruns recessed, their impact to the streetscape is negligible as it will be visually unnoticeable when viewed from the street level.

On that basis the underlying objectives are satisfied. Therefore the proposal satisfies the objectives of the control per Wehbe Test 1.

Clause 4.6(3)- Environmental Planning Grounds

In relation to environmental planning grounds the variation to the height standard is satisfactory on these grounds for the following reasons:

- The penetration of the height limit is a direct consequence of the design of the proposed development which incorporates a communal rooftop terrace that necessitates balustrading which protrudes beyond the permitted height plane. The proposal as designed seeks to maximise amenity for future occupants via the provision of this communal rooftop open space area. Proposed rooftop structures i.e. lift overrun, lobby, seating, bbq facilities are directly correlated to the design, function and intended use of the rooftop communal open space area which forms an integral part of the proposed development. The structures service the rooftop communal open space area which has been provided to benefit the future occupants of the site. The non-compliance relates to features of the property which will significantly improve the amenity of the occupants.
- The additional height proposed does not result in detrimental environmental planning outcomes, as it does not give rise to adverse solar access, view loss or visual or acoustic privacy impacts on site, or to neighbouring properties.
- The additional floor to floor height allows set down to balconies to maximise amenity for occupants;
- The departure to the height standard furthers the objects of the Environmental Planning and Assessment Act 1979 as set out below:
 - To promote the orderly and economic use and development of land
 - To promote good design and amenity of the built environment through the provision of the rooftop common open space area.
- The provision of a logical built form outcome, noting that Building A straddles an area of 2 building heights (77m/55m plus 10% height bonus) owing to the difference in the laneway location between the LEP (straight north/south) and as proposed which is irregular (and agreed with Council relating to culvert works). The intent of the height split was to follow the lane and provide a transition in height - which the proposal aligns and is consistent with and hence the outcome is reflective of the intent in the height split at the laneway interface and transition at the laneway interface. Diagrammatically this is reflected on Drawing DA-100-005

Given the above, and as a result of the agreed laneway alignment in proximity to Building A the flexible application of the Height standard is not inappropriate in this instance. The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances. The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control. This also satisfies Wehbe Test 1.

Clause 4.6(4)- Public Interest and Objectives of the Zone

The proposal is consistent with the objectives of the B4 zone, insofar as the development is not antipathetic to the zone objectives (per *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21).

Zone Objectives of the B4 Zone

The relevant objectives are prescribed as:

Zone B4 Mixed Use

1 Objectives of zone

- *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.*

The proposal is consistent with the objectives of the zone, providing a mixture of compatible uses and for redevelopment in an accessible location that will further the objective to maximise public transport patronage as well as encouraging walking and cycling.

The proposal provides for a vibrant mixed use development with active retail, commercial and other uses at the ground floor level.

The development proposal encourages the development and expansion of business activities that will strengthen the economic and employment role of the Merrylands Town Centre- noting the quantum of business floor space has been considered in detail by AEC Group as part of the Market Assessment which confirms the suitability of the quantum of floor space provided for commercial uses.

The proposal is consistent with the future desired character of the area as envisaged by the current planning controls. The proposal is consistent with the objectives of Clause 4.6 and the B4 Mixed Use Zone.

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the public interest as it remains consistent with the objectives of the building height control. In addition, the proposal is consistent with the objectives of the zone as addressed previously in this statement.

Clause 4.6(5)

It is understood that the concurrence of the Secretary can be assumed in the current circumstances.

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 points contained in Clause 4.6 (5) are a matter for consideration by the consent authority however the following points are made in relation to this clause:

- The contravention of the height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal
- There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the control is acceptable in the circumstances given the underlying objectives of the control are achieved and it will not set an undesirable precedent for future development within the locality as any future development on another site would require consideration of the relevant merits and circumstances of the individual application.

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose.

Conclusion

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its circumstances.

The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The proposal will not have any adverse effect on the surrounding locality, which will be characterised by residential development of comparable height and character. The proposal promotes the economic use and development of the land consistent with its zone and purpose.

The variation is well founded and demonstrates the relevant matters set out under Clause 4.6 having regard to the provisions of Clause 4.6 and recent case law and taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council and the planning panel support the development proposal.

CLAUSE 4.6 VARIATION- FLOOR SPACE RATIO SPLIT

Relevant Case Law

There are a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*, as well as *Zhang v Council of the City of Ryde*.

In addition a recent judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore this must be considered when evaluating the merit of the FSR departure.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* has adopted further consideration of this matter which requires that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

The approach in *Al Maha* was reinforced by *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130* where it was found that:

... in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).

Finally the decision in *Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61* confirmed that the consent authority must be directly satisfied that the matters are adequately addressed in the written Clause 4.6 variation request.

On that basis it is necessary that the following be satisfied.

- The consent authority must be satisfied the written request demonstrates the matters in Clause 4.6(3).
- The consent authority be satisfied the proposed development will be in the public interest because it is “*consistent with*” the objectives of the development standard and zone is not a requirement to “*achieve*” those objectives.

It is a requirement that the development be compatible with the objectives, rather than having to ‘achieve’ the objectives.

- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.
- The proposal is required to be in ‘the public interest’.

The Departure: Maximum Residential Accommodation

Clause 4.4(2B) outlines that for Land Identified in Area B the maximum residential FSR is equivalent to (FSR_{max}-1.7):1 for that component. On that basis the maximum FSR for various uses is as follows:

- Residential Accommodation: 45,271m²
- Other Uses: 19241m²

The proposal adopts the following GFA:

- Residential Accommodation: 61,239m²
- Other Uses: 9163m²

The FSR departure is 15,968m² or 35.2%, however this primarily relates to the 'split' of the residential to non-residential uses on the land.

The rationale of this approach has been informed by an Economic Impact Assessment prepared by AEC Group to determine the most appropriate quantum of commercial floor space in the context of the Merrylands Town Centre.

That report confirms the economic merit of the proposal which will contribute significantly to the Cumberland local economy by adding \$204.6 million in output, \$116.5 million in contribution to GRP, \$56.8 million in incomes and 646 Full Time Equivalent Jobs.

On that basis adjustment to the 'split' of residential and non-residential GFA is appropriate for a development of this size and scale and in the context of the modelled economic impacts associated with the Merrylands Town Centre. Further requiring strict compliance with the 'split' would either see:

- The provision of substantially vacant parts of the development and building and potential impacts on financing and actual completion of the project; and
- An underdevelopment of the site as compared to the planned intensity of development on the land.

Further to the above when considering the entirety of the site area, inclusive of the laneway, the development complies with the overall maximum FSR control. When excluding the laneway, which has arisen through the change to the LEP mapping compared to the former mapping associated with the site, the proposal presents a minor departure of 9.13%.

Purpose of the Control

It is understood that the control seeks to provide for sufficient streetscape activation and the delivery of sufficient commercial space on the site.

The proposal provides 9163m² of floor space other than residential, and specifically 3,735m² of commercial space and 4659m² of retail space, across the site at the ground and first floor levels that aligns with the intent of the control. The location of commercial space at predominantly the ground floor ensures that the intention for activation and a positive contribution at the street level to the town centre is achieved. Clearly the intent of the control is satisfied by the proposal.

Clause 4.6 of the LEP

Clause 4.6 of the Holroyd LEP 2013 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular sub clause 3-5 which provide:

- 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 Secretary has been obtained.*
- 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.*

Each of these provisions are addressed in turn.

Clause 4.6(3)- Objectives of the Standard

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved.

The objectives of the FSR development standard are stated as:

(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.*

The current development proposal is entirely consistent with the above objectives and is considered to be appropriate on environmental planning grounds based on the following:

- The proposed building exhibits a bulk and scale that is consistent with the desired future character of the locality. Following discussions with Council staff and urban designers it is agreed that the proposal represents a suitable and preferable density, bulk and scale that is consistent with the desired future character of the Merrylands Town Centre.
- The variation is a function of the desire to achieve a built form outcome that appropriately arranges floor space across the large site, to achieve superior amenity and urban design outcomes to an alternative compliant floor space allocation. The allocation of floor space across the site has been undertaken in consultation with Council to provide more residential floor space where there is less desire for commercial uses and noting the design scheme provides streetscape activation to the ground floor areas and a full commercial level at the first floor

- The proposed departure to the FSR 'split' control has no additional adverse impact as it simply allocates a different, and more suitable, mix of residential to non-residential
- The proposed additional floor space results in a high quality development that is an improved Urban Design outcome with the series of towers. The removal of the residential floor space would result in its redistribution to other parts of the site and a poorer urban design outcome.
- The proposed development will permit the site to develop to its full zoning potential whilst complementing the future vision envisioned for the site by providing a landmark development that provides high quality address and activation to the street frontage and meeting the intent of the key planning controls applying to the proposal.
- The development proposal provides a sympathetic, activated street frontage that addresses the context, streetscape and future character of the Town Centre and adjoining developments. The development provides a mix of dwellings that will contribute towards increasing housing choice, diversity and stock of Holroyd LGA.
- The proposal provides for a variety of housing type with a mix of 1, 2, and 3 bedroom units and provides for a higher number of studio and 1 bedroom units to respond to the identified market demand set out in the AEC Group report. This directly satisfies objective b).
- The proposal provides for high levels of amenity given the manipulation of the DCP envelopes to ensure a suitable laneway response and through site movements.
- The development proposal provides for a suitable amount of commercial space on the site in those areas which are most amenable to the delivery of this space- i.e. along the most active frontages. Further the AEC Group Economic Impact Assessment report sets out the quantum of residential to non-residential floor space is suitable and the most appropriate mix given Merrylands Town Centre context noting the proposal provides a greater proportion of GFA for commercial and retail space than would typically be associated with a development of this scale and it further notes that retail space is at a slightly oversupply at this time. This directly satisfies objective a).

Therefore the proposal satisfies the objectives of the control.

Clause 4.6(3)- Environmental Planning Grounds

In relation to environmental planning grounds the variation to the FSR standard is satisfactory on these grounds for the following reasons:

- The proposal provides a suitable and sustainable quantum of non-residential floor space and then replaces the excess non-residential floor space, beyond that which the market can handle, as demonstrated by the Economic Impact Assessment report, with residential floor space;
- To require strict compliance with the technical application of the FSR split development standard would lead to a development of a density below that planned by the nominated and mapped FSR standard noting that the proponent would not deliver greater non-residential floor space that currently proposed owing to the lack of demand and viability;
- The technical departure to the FSR standard furthers the objects of the Environmental Planning and Assessment Act 1979 as set out below:
 - To promote the orderly and economic use and development of land-whereby strict compliance would hinder achievement of this and would present and underdevelopment of the land and below the planned and mapped maximum FSR for the land;
 - To promote the delivery of affordable housing through increased housing supply and a larger proportion of studio and 1 bedroom apartments to align with the market analysis by AEC Group;
 - To promote good design and amenity of the built environment;

Given the above, the technical departure to the FSR standard has planning merit and sufficient environmental planning grounds exist for the departure.

Clause 4.6(4)- Public Interest and Objectives of the Zone

The proposal is consistent with the objectives of the B4 zone, insofar as the development is not antipathetic to the zone objectives (per *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21).

Zone Objectives of the B4 Zone

The relevant objectives are prescribed as:

Zone B4 Mixed Use

1 Objectives of zone

- *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.*

The proposal is consistent with the objectives of the zone, providing a mixture of compatible uses and for redevelopment in an accessible location that will further the objective to maximise public transport patronage as well as encouraging walking and cycling.

The proposal provides for a vibrant mixed use development with active retail, commercial and other uses at the ground floor level and a suitable quantum of non-residential floor space as set out in the AEC Group Report noting that the proposal provides a greater proportion of GFA for commercial and retail space than would typically be associated with a development of this scale and it further notes that retail space is at a slightly oversupply at this time. This directly satisfies objective a).

The development proposal encourages the development and expansion of business activities that will strengthen the economic and employment role of the Merrylands Town Centre- noting the quantum of business floor space has been considered in detail by AEC Group as part of the Market Assessment which confirms the suitability of the quantum of floor space provided for commercial uses.

The proposal is consistent with the future desired character of the area as envisaged by the current planning controls. The proposal is consistent with the objectives of Clause 4.6 and the B4 Mixed Use Zone.

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the public interest as it remains consistent with the objectives of the FSR control. In addition, the proposal is consistent with the objectives of the zone as addressed previously in this statement.

Clause 4.6(5)

It is understood that the concurrence of the Secretary can be assumed in the current circumstances.

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 points contained in Clause 4.6 (5) are a matter for consideration by the consent authority however the following points are made in relation to this clause:

- The contravention of the FSR control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal
- There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the control is acceptable in the circumstances given the underlying objectives of the control are achieved and it will not set an undesirable precedent for future development within the locality as any future development on another site would require consideration of the relevant merits and circumstances of the individual application.

Strict compliance with the prescriptive FSR ‘split’ requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose.

Conclusion

Strict compliance with the prescriptive FSR split requirement is unreasonable and unnecessary in the context of the proposal and its circumstances.

The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The proposal will not have any adverse effect on the surrounding locality, which will be characterised by mixed use development of comparable height and character. The proposal promotes the economic use and development of the land consistent with its zone and purpose.

The variation is well founded and demonstrates the relevant matters set out under Clause 4.6 having regard to the provisions of Clause 4.6 and recent case law and taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council and the planning panel support the development proposal.

CLAUSE 4.6 VARIATION- FLOOR SPACE RATIO MAXIMUM

Relevant Case Law

There are a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*, as well as *Zhang v Council of the City of Ryde*.

In addition a recent judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore this must be considered when evaluating the merit of the FSR departure.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* has adopted further consideration of this matter which requires that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

The approach in *Al Maha* was reinforced by *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130* where it was found that:

... in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).

Finally the decision in *Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61* confirmed that the consent authority must be directly satisfied that the matters are adequately addressed in the written Clause 4.6 variation request.

On that basis it is necessary that the following be satisfied.

- The consent authority must be satisfied the written request demonstrates the matters in Clause 4.6(3).
- The consent authority be satisfied the proposed development will be in the public interest because it is “*consistent with*” the objectives of the development standard and zone is not a requirement to “*achieve*” those objectives.

It is a requirement that the development be compatible with the objectives, rather than having to ‘achieve’ the objectives.

- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.
- The proposal is required to be in ‘the public interest’.

The Departure & Background: Maximum FSR

Clause 4.4(2) outlines a maximum FSR for the development site, that is also subject to a 10% design excellence bonus.

The mapped FSR varies, however a detailed breakdown on the calculations is provided by Turner.

In numerical terms:

- The maximum GFA permitted by the LEP when excluding the laneway land (which is zoned SP2 and reserved for acquisition) is 64,511m²
- The maximum GFA permitted by the LEP when including the laneway land (which is zoned SP2 and reserved for acquisition) is 70,918m² however Councils legal advice is that the laneway cannot be used for the purposes of GFA.
- The GFA proposed by the development is 70,402m²

On that basis it can be seen that across the entire area of the site, the development would be compliant. However owing to the legal definition of 'site area' per Clause 4.5 Council is of the view that the proposal cannot rely on the laneway.

However it is noted that historically (before LEP amendment):

- The entire site was B4;
- The mapped FSR covered the entire site.

On that basis historically the FSR was calculated on the gross site area with no distinction of the SP2 land and this was the basis of the prior DA consent. This was not the intent of the changes to the LEP- which were only proposed to revise heights and introduce the Design Competition bonuses. Therefore these changes were unintended and will be rectified in due course such that the FSR will again be calculated across the whole site- noting that the proposal is compliant when this occurs.

As such given the circumstances there is a departure to the maximum FSR control across the site of 9.13%. It is reinforced that when considering the entirety of the site area, inclusive of the laneway, the development complies with the overall maximum FSR control. Further this is due to a change in the LEP mapping and it is understood this was not the intent of the LEP amendments and this will be rectified through a separate process with Council.

However as there is a technical departure to the standard a Clause 4.6 variation has been prepared accordingly.

Clause 4.6 of the LEP

Clause 4.6 of the Holroyd LEP 2013 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular sub clause 3-5 which provide:

- 6) *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.*
- 7) *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 Secretary has been obtained.*
- 8) *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.*

Each of these provisions are addressed in turn.

Clause 4.6(3)- Objectives of the Standard

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved.

The objectives of the FSR development standard are stated as:

(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.*

The current development proposal is entirely consistent with the above objectives and is considered to be appropriate on environmental planning grounds based on the following:

- The proposed building exhibits a bulk and scale that is consistent with the desired future character of the locality. Following discussions with Council staff and urban designers it is agreed that the proposal represents a suitable and preferable density, bulk and scale that is consistent with the desired future character of the Merrylands Town Centre.
- The extent and quantum of GFA proposed complies across the entirety of the site area to ensure that the proposal supports the viability of the Merrylands Town Centre and associated economic development noting the significant scale of development and significant economic benefits as set out in the AEC Group Economic Impact Assessment. This directly satisfies objective a).
- The proposal provides for a variety of housing type with a mix of 1, 2, and 3 bedroom units and provides for a higher number of studio and 1 bedroom units to respond to the identified market demand set out in the AEC Group report. This directly satisfies objective b).
- The proposed additional floor space results in a high quality development that is an improved Urban Design outcome with the series of towers across the site and reflects the desired future built form and character of the locality noting the design response aligns with the DCP provisions with regard to the varied tower heights, connection points and through connections. The development proposal, and the GFA proposed, satisfies objective c) again reinforcing on the basis of the entirety of the site area the proposal would be compliant.

- The proposed development will permit the site to develop to its full zoning potential whilst complementing the future vision envisioned for the site by providing a landmark development that provides high quality address and activation to the street frontage and meeting the intent of the key planning controls applying to the proposal.
- The development proposal provides a sympathetic, activated street frontage that addresses the context, streetscape and future character of the Town Centre and adjoining developments. The development provides a mix of dwellings that will contribute towards increasing housing choice, diversity and stock of Holroyd LGA.
- The proposal provides for high levels of amenity given the manipulation of the DCP envelopes to ensure a suitable laneway response and through site movements both pedestrian and vehicular and then a series of quality spaces for residents with regard to private open space, landscaping and common areas. This satisfies objective d).

Therefore the proposal satisfies the objectives of the control.

Clause 4.6(3)- Environmental Planning Grounds

In relation to environmental planning grounds the variation to the FSR standard is satisfactory on these grounds for the following reasons:

- The proposal provides a suitable and sustainable quantum of non-residential floor space and complies across the entirety of the site area and enables a suitable development outcome on the site.
- The technical departure to the FSR standard furthers the objects of the Environmental Planning and Assessment Act 1979 as set out below:
 - To promote the orderly and economic use and development of land-whereby strict compliance would hinder achievement of this and would present and underdevelopment of the land and below the planned development density for the site;
 - To promote the delivery of affordable housing through increased housing supply and a larger proportion of studio and 1 bedroom apartments to align with the market analysis by AEC Group;
 - To promote good design and amenity of the built environment;

Given the above, the technical departure to the FSR standard has planning merit and sufficient environmental planning grounds exist for the departure.

Clause 4.6(4)- Public Interest and Objectives of the Zone

The proposal is consistent with the objectives of the B4 zone, insofar as the development is not antipathetic to the zone objectives (per *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21).

Zone Objectives of the B4 Zone

The relevant objectives are prescribed as:

Zone B4 Mixed Use

1 Objectives of zone

- *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.*

The proposal is consistent with the objectives of the zone, providing a mixture of compatible uses and for redevelopment in an accessible location that will further the objective to maximise public transport patronage as well as encouraging walking and cycling.

The proposal provides for a vibrant mixed use development with active retail, commercial and other uses at the ground floor level and a suitable quantum of non-residential floor space as set out in the AEC Group Report.

The development proposal encourages the development and expansion of business activities that will strengthen the economic and employment role of the Merrylands Town Centre- noting the quantum of business floor space has been considered in detail by AEC Group as part of the Market Assessment which confirms the suitability of the quantum of floor space provided for commercial uses.

The proposal is consistent with the future desired character of the area as envisaged by the current planning controls. The proposal is consistent with the objectives of Clause 4.6 and the B4 Mixed Use Zone.

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the public interest as it remains consistent with the objectives of the FSR control. In addition, the proposal is consistent with the objectives of the zone as addressed previously in this statement.

Clause 4.6(5)

It is understood that the concurrence of the Secretary can be assumed in the current circumstances.

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 points contained in Clause 4.6 (5) are a matter for consideration by the consent authority however the following points are made in relation to this clause:

- The contravention of the FSR control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal
- There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the control is acceptable in the circumstances given the underlying objectives of the control are achieved and it will not set an undesirable precedent for future development within the locality as any future development on another site would require consideration of the relevant merits and circumstances of the individual application.

Strict compliance with the prescriptive FSR requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose.

Conclusion

Strict compliance with the prescriptive FSR requirement is unreasonable and unnecessary in the context of the proposal and its circumstances.

The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The proposal will not have any adverse effect on the surrounding locality, which will be characterised by mixed use development of comparable height and character. The proposal promotes the economic use and development of the land consistent with its zone and purpose.

The variation is well founded and demonstrates the relevant matters set out under Clause 4.6 having regard to the provisions of Clause 4.6 and recent case law and taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council and the planning panel support the development proposal.