

# Clause 4.6 Variation Request – Floor Space Ratio (Clause 4.4)

Development Application

**2 Tingwell Bvd, Eastgardens (Lot 3 DP 1272432)**

Lot C – Mixed-use Development

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# Contents

<b>1 Introduction .....</b>	<b>3</b>
1.1 Requirements of Clause 4.6 .....	4
<b>2 FSR Variation Assessment .....</b>	<b>5</b>
<b>3 Justification for Variation.....</b>	<b>7</b>
3.1 Compliance with the FSR Development Standard is unnecessary and unreasonable .....	7
3.2 Environmental Planning grounds to justify contravening the FSR Development Standard .....	8
3.2.1 Compliance with the Objectives of Clause 4.4.....	8
3.2.2 Consistency with the Objectives of the Zone .....	9
<b>4 Conclusion .....</b>	<b>10</b>

# 1 Introduction

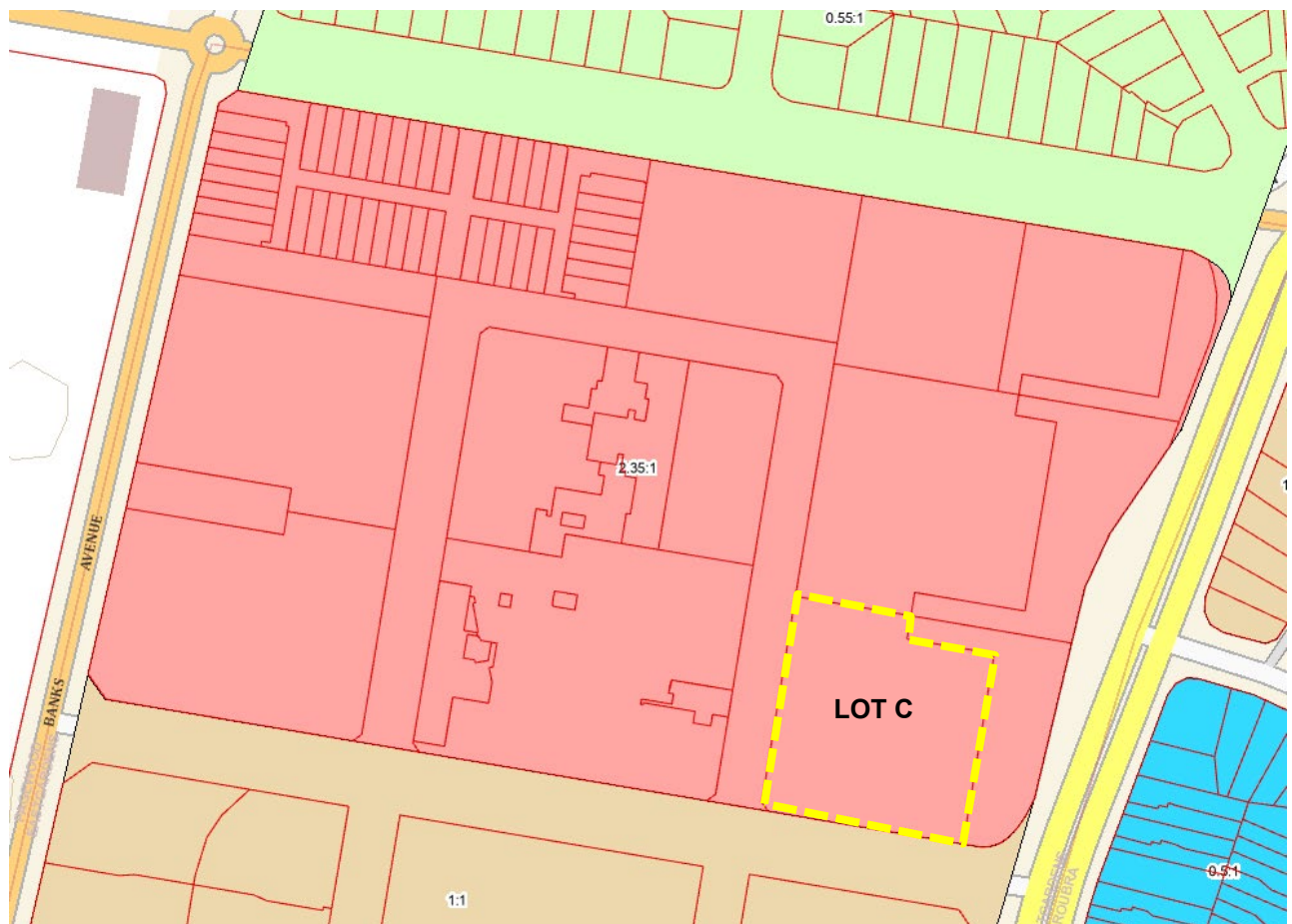
This Clause 4.6 Variation request supports a Development Application (DA-2024/172) at Lot C – 2 Tingwell Bvd, Eastgardens for a mixed-use development. Lot C is one of the various detailed applications for the Staged Concept Development of Meriton's Pagewood Green project. The Pagewood Green site formally comprised of two lots which were further subdivided into nine (9) development lots (identified as Lots A-J), public open spaces and roads.

The subject site is zoned R4 High density residential. In accordance with Clause 4.4 of Bayside Local Environment Plan 2013 (BLEP) the maximum permissible Floor Space Ratio (FSR) on the subject site is **2.35:1**.

Lot C proposes an FSR of 0.24:1, which complies with the overall requirement for the Pagewood Green approved Concept Plan Development Application. However, subject to individual lot subdivision, Lot C proposes an FSR of 3.47:1. While this application seeks to maintain a gross floor area (GFA) that complies with the Concept DA (DA-2019/386), a variation request for the FSR is required due to the land subdivision of the Pagewood Green site.

The maximum FSR under Clause 4.4 of the BLEP is a "development standard" to which exceptions can be granted pursuant to Clause 4.6 of the BLEP.

**FIGURE 1: MAXIMUM FSR (SITE SHOWN WITH YELLOW OUTLINE)**



## 1.1 Requirements of Clause 4.6

This variation request has been prepared to demonstrate that the proposed departure from the applicable FSR can be recommended for approval by the Bayside City Council in accordance with the BLEP *Clause 4.6 - Exceptions to Development Standards*.

The objectives of **Clause 4.6(1)** of the BLEP 2021 are:

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

**Clause 4.6(2)** states as follows:

*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.*

It is noted that the FSR control is not expressly excluded from the operation of this clause.

**Clause 4.6(3)** of the BLEP states as follows:

*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.*

The judgements in *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170 [2018] NSWCA 24 recognise the need for the consent authority to form its own view on whether the requirements of Clause 4.6(3) have been achieved, in order to discharge its responsibility to determine whether it is satisfied that the written variation request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). Accordingly, the written Clause 4.6 variation request must 'demonstrate' that the requirements of Clause 4.6(3) have been 'adequately addressed'.

## 2 FSR Variation Assessment

The Concept DA (DA-2019/386) covers the entire Pagewood Green site, approved a maximum of 210,390 sqm of total GFA, including a minimum of 5,000 sqm of non-residential GFA resulting in a total FSR of 2.35:1. The proposed development at Lot C will comprise a GFA of 21,508sqm and FSR of 0.24:1, which complies with the overall requirement for the Pagewood Green site approved Concept Plan DA. **Table 1** below shows the compliance with the required FSR for the entire Pagewood Green Site.

**TABLE 1: CONCEPT DA FSR CALCULATION**

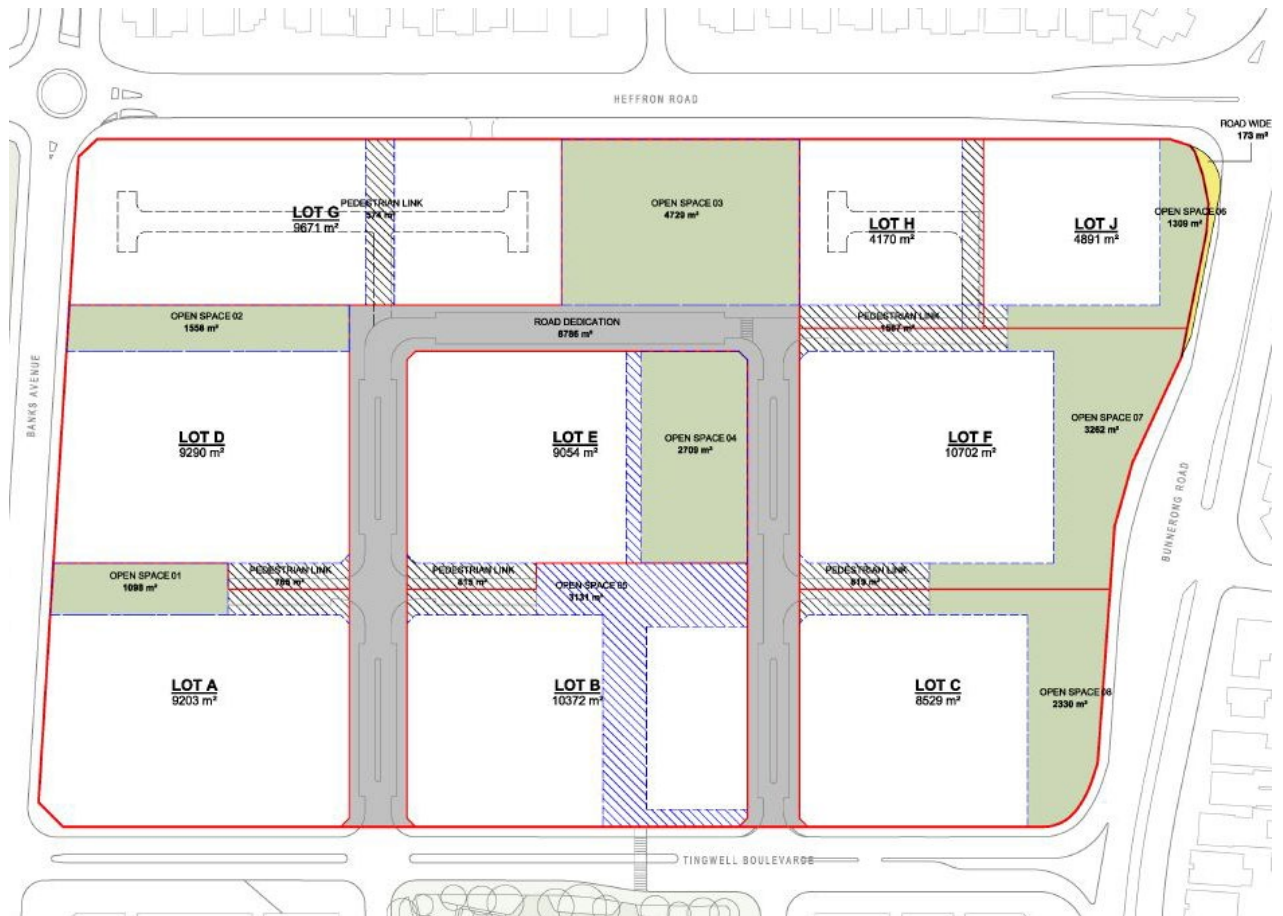
Approved Concept DA total area <b>89,570 sqm</b> Floor Space Ratio for – <b>2.35:1</b>				
LOT	SITE AREA (subject to future DAs)	Concept DA Indicative GFA Allowance	DAs as lodged / approved GFA	Concept DA FSR
A (approved)	9,203sqm	38,900sqm	38,966 sqm	0.43:1
B (approved)	10,372sqm	38,700sqm	39,085sqm	0.44:1
<b>C</b>	<b>8,529sqm</b>	<b>21,900sqm</b>	<b>21,508sqm</b>	<b>0.24:1</b>
<b>D</b>	<b>9,290sqm</b>	<b>38,500sqm</b>	<b>38,570sqm</b>	<b>0.43:1</b>
E (approved)	9,054sqm	28,600sqm	32,315sqm	0.38:1
<b>F</b>	<b>10,702sqm</b>	<b>24,010sqm</b>	<b>22,500sqm</b>	<b>0.25:1</b>
G (approved)	9,671sqm	6,300sqm	5,635 sqm	0.06:1
H (approved)	3,778sqm	2,480sqm	2,246 sqm	0.02:1
<b>J</b>	<b>5,282sqm</b>	<b>11,000sqm</b>	<b>9,533sqm</b>	<b>0.10:1</b>
Land dedication	13,688sqm	0	0	
<b>TOTAL</b>	<b>89,570sqm</b>	<b>210,390sqm</b>	<b>210,358 sqm</b>	<b>2.35:1</b>
<b>Potential GFA remaining for future stages</b>			<b>32sqm</b>	

**TABLE 2: LOT C FSR VARIATION ASSESSMENT**

Site Area	Permissible GFA	Proposed GFA
Lot C – 6,199sqm	14,567sqm	21,508sqm
	FSR – 2.35:1	FSR – 3.47:1
Pagewood Green Site - 89,570sqm	210,390sqm	21,900sqm
	FSR – 2.35:1	<b>FSR – 0.24:1</b>

This variation arises from the new subdivision of each development lot, which separates public open spaces, roads, and residential super lots. (See **Figure 2** below, which shows the subdivided Pagewood Precinct.) When Lot C is considered in isolation for the calculation of the FSR, the figure is 3.47:1. For this reason alone, a Clause 4.6 variation is required due to the recent subdivision of the Pagewood Green site into super lots.

FIGURE 2: APPROVED SUBDIVISION PLAN



### 3 Justification for Variation

As held by the court in *Wehbe v Pittwater Council* [2007] NSW LEC 827, development standards are not an end in themselves but a means of achieving environmental and planning objectives. Where the objectives of the development standard are achieved, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).

#### 3.1 Compliance with the FSR Development Standard is unnecessary and unreasonable

Compliance with the FSR standard is unnecessary in this instance because the proposed development aligns with the approved Concept DA (DA-2019/386). The development meets the objectives of the FSR standard and the zoning requirements under the LEP. Therefore, the intent of the FSR standard is achieved, despite the non-compliance.

The Concept DA approved a maximum total GFA of 210,390 sqm, including a minimum of 5,000 sqm of non-residential GFA, resulting in an overall FSR of 2.35:1 for the entire Pagewood Green site. The site, previously under single ownership and used for industrial purposes, is now being transformed into a residential hub featuring supermarkets, specialty stores, restaurants, cafes, childcare centres, public roads and public open spaces.

The Concept Plan allocated 21,900 sqm of GFA to Lot C, equating to an FSR of 0.24:1 across the entire Pagewood Green site, as required by the Concept Plan DA approval, which is outlined in **Table 3** below. In accordance with *Condition 15* of the Concept DA approval, the GFA of a lot can be transferred elsewhere within the Pagewood Green precinct. As such, 390sqm of underutilised floor space from Lot C can be used at other parts of the precinct, reducing its total allocated GFA from 21,900sqm to 21,508 sqm.

This floor space remains consistent with the Concept Plan's allocation requirements. The FSR for Lot C has reduced slightly from 3.53:1 to 3.47:1, while the FSR for the broader Pagewood Green site remains same 0.24:1—both of which comply with the approved Concept DA.

**Table 3** below shows the compliance with the required FSR for the entire Pagewood Green Site.

TABLE 3: CONCEPT DA FSR CALCULATION

Approved Concept DA total area <b>89,570 sqm</b> Floor Space Ratio for – <b>2.35:1</b>				
LOT	SITE AREA (subject to future DAs)	Concept DA Indicative GFA Allowance	DAs as lodged / approved GFA	Concept DA FSR
A (approved)	9,203sqm	38,900sqm	38,966 sqm	0.44:1
B (approved)	10,372sqm	38,700sqm	39,085sqm	0.44:1
<b>C</b>	<b>8,529sqm</b>	<b>21,900sqm</b>	<b>21,508sqm</b>	<b>0.24:1</b>
<b>D</b>	<b>9,290sqm</b>	<b>38,500sqm</b>	<b>38,570sqm</b>	<b>0.43:1</b>
E (approved)	9,054sqm	28,600sqm	32,315sqm	0.38:1
<b>F</b>	<b>10,702sqm</b>	<b>24,010sqm</b>	<b>22,500sqm</b>	<b>0.25:1</b>
G (approved)	9,671sqm	6,300sqm	5,635 sqm	0.06:1
H (approved)	4,170sqm (3,778sqm)	2,480sqm	2,246 sqm	0.02:1
<b>J</b>	<b>4,891sqm (5,282sqm)</b>	<b>11,000sqm</b>	<b>9,533sqm</b>	<b>0.10:1</b>
Land dedication	13,688sqm	0	0	
<b>TOTAL</b>	<b>89,570sqm</b>	<b>210,390sqm</b>	<b>210,358 sqm</b>	<b>2.35:1</b>
	<b>Potential GFA remaining for future stages</b>		<b>32sqm</b>	

### 3.2 Environmental Planning grounds to justify contravening the FSR Development Standard

This section of the report demonstrates that there are sufficient environmental planning grounds to justify contravening the maximum FSR development standard as required by Clause 4.4 of the BLEP.

In *Initial Action Pty Ltd v Woollahra Municipal 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 *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LEC 1009, 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.

There are sufficient environmental planning grounds to justify a flexible approach to the application of the FSR control as it applies to the site, and are demonstrated below:

#### 3.2.1 Compliance with the Objectives of Clause 4.4

The proposal has been assessed against the relevant objectives under Clause 4.4 of the BLEP to demonstrate how these objectives are met notwithstanding non-compliance with the maximum FSR standard.

- a) To establish standards for the maximum development density and intensity of land use*
- b) To ensure the bulk and scale of new development is compatible with the desired future character of the area*
- c) To minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain*
- d) To maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation*
- e) To ensure buildings do not adversely affect the streetscape, skyline or landscape when viewed from adjoining roads and other public places such as parks and community facilities*

#### **Compliance Assessment**

Despite non-compliance, the proposal will deliver a mixed-use development which will be consistent with the desired future character of the Pagewood Green Site. The proposed development will deliver a built form and character in accordance with the Concept DA.

In addition, the proposed development will not be out of context with the built form anticipated by the approved Concept Plan DA for the site. In this regard, the proposed development will:

- Deliver an FSR which complies with the maximum permitted by the BLEP and Concept Plan DA approval for the overall Pagewood Green Site;
- Provide generous landscaping throughout the site;
- Deliver a building envelope which is compliant with that approved under the Concept DA; and
- Maximises compliance with ADG criteria

The proposed development will not result in any excessive undue environmental impacts upon the adjoining properties and the public domain. The proposed development being entirely compliant with the Concept DA, is therefore compliant with the objectives of Clause 4.4 of the BLEP.



### 3.2.2 Consistency with the Objectives of the Zone

The subject site is zoned R4 High density residential, and the proposed development remains consistent with the objectives of the zone which are assessed in **Table 4** below

**TABLE 4: CONSISTENCY WITH ZONE OBJECTIVES**

OBJECTIVE	CONSISTENCY	PROPOSED DEVELOPMENT
<ul style="list-style-type: none"> <li>To provide for the housing needs of the community within a high-density residential environment.</li> </ul>	Yes	The new high quality mixed-use development will accommodate 232 new dwellings in close proximity to major transport routes, employment and services.
<ul style="list-style-type: none"> <li>To provide a variety of housing types within a high density residential environment.</li> </ul>	Yes	The development proposed for Lot C is a high-density residential complex featuring a mix of unit types, expansive landscaped communal open spaces with an outdoor swimming pool, barbecues, seating areas, an indoor gym, and a spa. It also incorporates environmentally sustainable features such as solar panels and electric vehicle charging points for each parking space. The development meets community housing needs and is located in close proximity to public transport, new and existing public open spaces, a local shopping precinct, and the large Westfield Shopping Centre.
<ul style="list-style-type: none"> <li>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</li> </ul>	Yes	Lot C proposes retail uses on the ground level to meet the day-to-day needs of the residents.
<ul style="list-style-type: none"> <li>To ensure land uses are carried out in a context and setting to minimise impact on the character and amenity of the area.</li> </ul>	Yes	The proposed development for Lot C is a mixed-use development in context and setting with the character and future amenity anticipated by the approved Concept Plan DA and permissible with the zoning.
<ul style="list-style-type: none"> <li>To encourage development that promotes walking and cycling.</li> </ul>	Yes	The site provides pedestrian and bicycle pathways that connects the wider Pagewood Green site and adjoining localities.

## **4 Conclusion**

This Clause 4.6 variation has been required based on a technicality due to the land subdivision of the wider Pagewood Green site into development lots that are consistent with the approved Concept DA and the BLEP 2013. The technicality being Lot C complies with the GFA/FSR under the Concept DA before the land subdivision took place. Only because of the land subdivision, that the numerical compliance changed.

Having regard to all of the above, compliance with the maximum FSR development standard is considered unreasonable and unnecessary in the circumstances of this case as the development is compliant with the approved Concept DA (DA-2019/386) and meets the objectives of the FSR standard and the zoning under the BLEP. The proposal has also demonstrated sufficient environmental planning grounds to support the breach. Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied, and the variation is worthy of support.