



46-50 Kent Road, Mascot

Clause 4.6 – Floor Space Ratio Development Standard

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46-50 KENT ROAD, MASCOT

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Prepared under instructions from
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1.0 CLAUSE 4.6 REQUEST – FSR

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the floor space ratio development standard contained within Clause 4.4(2) of the Botany Bay Local Environmental Plan 2013 (BBLEP 2013).

The request relates to an application for demolition and construction of a commercial development at 46-50 Kent Road, Mascot.

Tipalea's vision is for the proposed building to become Mascot's Healthiest and Most Productive office building and accordingly the building will be "WELL" Certified.

The WELL Building Standard was launched in October 2014 after six years of research and development by the International WELL Building Institute™ (IWBI™) which is leading the global movement to transform our buildings and communities in ways that help people thrive.

WELL Building Standard is the premier standard for buildings, interior spaces and communities seeking to implement, validate and measure features that support and advance human health and wellness. The Standard was developed by integrating scientific and medical research and literature on environmental health, behavioral factors, health outcomes and demographic risk factors that affect health with leading practices in building design, construction and management.

The WELL Certification is about creating an environment focused on the health and wellbeing of the users which results in increased productivity, employee retention and satisfaction.

WELL Certification takes into account the following 10 elements and factors of the development:

- Air
- Water
- Thermal Comfort
- Sound
- Nourishment
- Light
- Materials
- Mind
- Movement
- Community

In order to be able to achieve the Well Certification, the development includes a number of facilities and areas for the exclusive use of the future occupants of the building including:

- Very generous end of trip facilities that will comprise 112 bike racks, showers and lockers;
- a dedicated "Wellness Centre" which is likely to be occupied by a dedicated yoga studio and gym or the like;
- a café with healthier options in the lobby;
- extensive and generous landscaping and public seating inside and outside the lobby;
- public art commitment of \$300,000

The Wellness areas at the ground floor could ordinarily be used as Net Lettable Area in the building, however, these spaces will be dedicated specifically as communal components within the building in order to achieve the WELL Certification.

1.2 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the BBLEP 2013 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the BBLEP 2013 or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant requests that the floor space ratio development standard be varied.

1.3 Development Standard to be varied

Clause 4.4 states:

- (1) The objectives of this clause are as follows:
 - (a) to establish standards for the maximum development density and intensity of land use,
 - (b) to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,
 - (c) to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation,
 - (d) to ensure that 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,
 - (e) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,
 - (f) to provide an appropriate correlation between the size of a site and the extent of any development on that site,
 - (g) to facilitate development that contributes to the economic growth of Botany Bay.
- (2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

Floor space ratio is defined under Clause 4.5 of the BBLEP as:

“the ratio of the gross floor area of all buildings within the site to the site area.”

The Floor Space Ratio Map shows a floor space ratio of 3:1 applying to the site.

1.4 Extent of Variation to the Development Standard

A gross floor area of 19,056 square metres is proposed which equates to a floor space ratio of 3.77:1. The proposal therefore seeks to vary the floor space ratio development standard by 3,879 square metres or 25.6%.

1.5 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

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

The specific objectives of the floor space ratio development standard, as specified in clause 4.4(1) of the Botany Bay Local Environmental Plan 2013 are identified below. A comment on the proposal’s consistency with each objective is also provided.

(a) to establish standards for the maximum development density and intensity of land use,

Whilst a floor space ratio standard is adopted for the site, Council has consistently varied this standard within the suburb of Mascot where a considered site analysis and careful spatial arrangement of built and landscape elements has demonstrated that an alternative floor space ratio is appropriate. Council has consistently accepted that there are certain circumstances where the established standard does not properly reflect the environmental capacity of a particular site and in these instances it has been appropriate to support an alternative FSR.

The proposed FSR is consistent with the pattern of variation to the FSR development standard and is therefore considered satisfactory with respect to objective (a) of the standard.

(b) to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,

The envisaged scale of development within the area is established by the 44 metre height under the BBLEP 2013. The proposal is fully compliant with this height and so presents an appropriate scale of development.

The bulk of the development is mitigated through careful design which involves the setbacks being consistent with the established pattern of development to the east and the north.

It has been demonstrated that the proposal provides an appropriate bulk and scale which is compatible with the emerging context of development within Mascot. Accordingly, the proposal satisfies objective (b) of the standard in that it provides an appropriate bulk and also scale and will be consistent with the desired future character of the locality.

- (c) to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation,

Land surrounding the subject site to the south and west generally contains older style industrial development and has been zoned to allow for substantial transformation through increased densities and building height. However, there are recent approvals for similar scaled development on nearby sites at 1-5 Chalmers Crescent, 253 Coward Street and also 7-9, 14-18, and 19-21 Chalmers Crescent. The proposal will provide an appropriate visual relationship for existing development, but also provides an appropriate response to the emerging character of the area.

Accordingly, the proposal satisfies objective (c) of the standard.

- (d) to ensure that 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,

The proposal is fully compliant with the maximum 44 metre height control. The proposed development provides an appropriate bulk and scale which is commensurate with other new and approved buildings within the area. The proposed development will represent a high quality architectural outcome for the site that will positively contribute to the character of the Mascot West Business Park Precinct. A varied palette and materiality are used to provide a clear identity for the development as well as to define the differing components of the building. The varied architectural language generates a high level of visual interest and will positively influence the ground floor plane to Coward Street and Kent Road by introducing an active frontage and maintaining the existing landscaped character of the site. Accordingly, the proposal satisfies objective (d) of the standard.

- (e) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,

The increased floor space beyond the control does not result in any additional adverse impact on the adjoining properties or the public domain given that the proposal complies with the height control and satisfies objective (e) of the standard.

- (f) to provide an appropriate correlation between the size of a site and the extent of any development on that site,

The subject site is a large land holding which is demonstrated to have the environmental capacity to accommodate the proposed gross floor area without generating adverse impact. The density is similar to that of nearby approved development including 40 Ricketty Street, 1-5 Chalmers Crescent, and 253 Coward Street. It has been demonstrated on many sites within Mascot that with a height of 44 metres it is possible to comfortably accommodate an FSR of up to 4:1 whilst meeting the various design criteria in Council's DCP to achieve a high level of internal amenity. Accordingly, it has been demonstrated that the subject site has the environmental capacity to absorb the proposed density, objective (f) of the standard is satisfied.

(g) to facilitate development that contributes to the economic growth of Botany Bay

The proposal will provide for an increased employment density on the site. The increased floor space beyond the control will be used as office premises and will directly contribute to the economic growth of the area and satisfies objective (g) of the standard.

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

The underlying objectives and purpose of the floor space ratio control is relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the proposed floor space ratio still results in a development which is consistent with the desired future character for the subject site and the Mascot precinct generally and sits comfortably within the context of the site with no significant adverse impacts to adjacent properties.

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

The underlying objective of the floor space ratio control is to achieve an appropriate density on the site which is compatible with the context of the site. Due to the design, location and configuration of the proposed development, the proposal successfully achieves these objectives and will provide a considered built form response that will deliver a positive urban design outcome. However, strict compliance with the floor space ratio control would likely lead to a less satisfactory outcome as it would result a development which fails to fulfil the environmental capacity of the site and would result in an inferior built form that would be contextually inappropriate because it would result in inconsistent setbacks with the established pattern of development surrounding the site. Accordingly, it is considered that strict compliance would likely defeat the underlying objective or purpose of the floor space ratio control because it would encourage a less desirable outcome for the site.

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

Council has historically consistently varied the floor space ratio development standard in circumstances where the objectives of the control are achieved and in doing so has consistently accepted that there are certain circumstances where the established standard does not properly reflect the environmental capacity of a particular site and in these instances it has been appropriate to support an alternative FSR.

5. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

The proposed zoning of the land is considered to be reasonable and appropriate.

Strict compliance with the floor space ratio development standard is unreasonable and unnecessary in the circumstances of the case in that:

- The proposal has been designed to respond properly to opportunities and constraints of the site and is considered to provide an appropriate outcome having regard to the context of the site. In particular, the

proposed street setbacks respond to the pattern of setbacks already established to the east, north and south of the site. A reduction in the floor space ratio of the development would not result in any meaningful difference or improvement in relation to the impact of the proposal however would diminish its fit within the context of the site. Furthermore, a reduction in floor space would unnecessarily reduce employment opportunities on an ideally located site, to the detriment of achieving the vision for the Mascot West Business Park Precinct.

- The height of the development fully complies with the 44 metre height limit under the BBLEP 2013 and so any reduction in density would not require a reduction to the overall height and scale of the development.
- The proposed development provides both retail and office uses which will support the viability of the centre and provide much needed employment floor space in a location which is close Sydney Airport and various transport nodes.
- The availability and capacity of local infrastructure and public transport supports the additional floor space proposed. The site is located in close proximity to Mascot Train Station and a range of bus services.
- The density proposed does not give rise to any unreasonable impacts on the adjoining properties in terms of overshadowing, loss of privacy or visual impact.
- The location of the subject site and restriction on car parking for the building is such that the proposed additional floor space does not generate any additional traffic beyond that which would be generated by a complying development on the site which would involve the same car parking provision.
- A high level of amenity is provided for occupants of the development.
- Where a considered site analysis and careful spatial arrangement of built and landscape elements has demonstrated that an alternative floor space ratio is appropriate, as is the case for the proposed development, Council have been willing to consider an FSR on a site by site basis. It is considered that the subject proposal demonstrates a careful and appropriate spatial arrangement of built and landscape elements, such that the FSR variation can be supported in this instance.
- Having regard to the planning principle established in the matter of Project Venture Developments v Pittwater Council [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.
- Finally, it is noted that there are a number of additional facilities proposed within the project for the significant benefit of the occupants which increase the Gross Floor Area but are not Net Leasable Area or profit producing components of the proposal. These facilities include end of trip facilities and wellness facilities, which are not mandatory requirements for the project and could potentially be removed to lower the FSR. However, it is considered that this would simply be to the detriment of the project and the future occupants with no public benefit achieved as a result of the removal of these components. The proposed FSR variation facilitates the implementation of these additional facilities. Strict compliance, or any required reduction in the gross floor area, for the proposal would undermine the ability to provide these additional communal facilities for the benefit of the future occupants.

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

The Land & Environment Court matter of *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

The variation to the development standard in this instance is for FSR and unlike a variation to a height control for example, where there is a specific area of encroachment, there is not necessarily one specific area responsible for the FSR control. Notwithstanding, the proposed variation to the FSR control of 3,656 square metres could correlate with GFA on the top floors.

The environmental planning grounds that justify the component of the development which results in the FSR variation are:

- The above identification of areas within the building which are equivalent to the additional 3,656 square metres is particularly useful in considering the environmental planning grounds associated with the proposed variation. The office tower is fully compliant in relation to height and the street setbacks match the established pattern of setbacks to the east and north of the site. The removal of floor space by taking the top floors from the top of the building to simply achieve numerical compliance would not result in any improved outcome for the development and the adjacent properties. (In any event, even if several levels were removed from the top of the building, the floor to ceiling heights of the remaining levels could in theory be increased to compensate, resulting in an identical height for the building). The proposed tower has a scale and proportions as anticipated by the planning controls such that the proposed variation does not result in any detrimental impact or a built form outcome which differs from that which is expected on the site. Therefore, the appropriate contextual fit of the tower provides an environmental planning ground to support the proposed variation.
- It is noted that Preston J provides that the development is not required to demonstrate a beneficial effect relative to a compliant development, however, in this instance it is considered that strict compliance would not achieve any improved outcome for the development and would in fact simply result in less employment floor space than that which is capable of being provided on the site within the environmental capacity of the site. Furthermore, strict compliance, or indeed any required reduction to the floor space of the building, could be achieved by removing the 'wellness' areas from the development which would only serve to significantly diminish the amenity within the development with no offset positive outcome.
- The proposed variation to the FSR control does not result in any adverse impacts to adjacent properties when compared to a compliant FSR.
- The proposed variation to the FSR control does not result in any increased traffic impact when compared to a compliant FSR because the car parking provision is reduced on the site and the development in fact provides less car parking, and therefore less traffic, than that which could be provided under a compliant

scheme. Specifically, the proposal provides 234 car parking spaces whereas an FSR compliant proposal could provide 380 car spaces.

- The proposed FSR variation will provide for additional employment floor space which is an environmental benefit particularly in this location where Council is trying to encourage employment floor space to balance the significant delivery of residential floor space over recent years in the area. The additional employment floor space will support the viability of the centre and provide much needed employment floor space in a location which is close Sydney Airport and various transport nodes.

The objects specified in section 5(a)(i) and (ii) of the EP&A Act are:

‘to encourage:

i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

ii) the promotion and co-ordination of the orderly and economic use and development of land..’

The proposed development is consistent with the aims of the Policy and the objects of the EP&A Act in that:

- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Strict compliance with the FSR standard in this particular instance would represent a departure from the manner in which the issue of FSR has been considered in recent times in Mascot to the significant detriment of the employment floor space on the site and with no measurable benefit for the public or surrounding properties. Accordingly, strict compliance would simply prevent the attainment of employment floor space which is within the demonstrated environmental capacity of the site.
- The proposed variation allows for the most efficient and economic use of the land.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed FSR non-compliance in this instance.

1.7 [Clause 4.6\(4\)\(a\)\(i\) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6\(3\)](#)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

1.8 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

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

Objective of the Development Standard

The proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B7 Business Park zone which has the following objectives:

- To provide a range of office and light industrial uses.
- To encourage employment opportunities.
- To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.
- To encourage uses in the arts, technology, production and design sectors.

The proposal will provide for a commercial use, being predominantly office, which will result in increased employment density on the site compared to the maximum capacity available within the existing building. The proposed development includes a café which will meet the day to day needs of workers in the area. The office is capable of being used for the arts, technology, production and design sectors.

For the reasons the proposal is considered to be consistent with the objective of the B7 zone.

1.9 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(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,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are significant environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the

development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

1.10 Objectives of Clause 4.6

The specific objectives of Clause 4.6 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.

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives of Clause 4.4 notwithstanding the proposed variation to the maximum FSR development standard.

Requiring strict compliance with the FSR development standard on the subject site would result in an outcome that would contextually be essentially no different from the proposed development and would not result in any meaningful benefit to the streetscape or the amenity of adjoining properties. Strict compliance would simply result in a loss of employment floor space below the demonstrated environmental capacity of the site.

Allowing the flexible application of the floor space ratio development standard in this instance is not only reasonable but also desirable given the context of the site and that the site has the environmental capacity to absorb the proposed density.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the floor space ratio development standard will achieve a better urban design outcome in this instance in accordance with objective 1(b).

1.11 Conclusion

Strict compliance with the floor space ratio development standard contained within clause 4.4(2) of the Botany Bay Local Environmental Plan 2013 has been found to be unreasonable and unnecessary in the circumstances of the case. In addition, there are sufficient environmental planning grounds to justify the variation. Finally, the proposed development and FSR variation is in the public interest because it is consistent with the objectives of the standard and the zone. In this regard it is reasonable and appropriate to vary the floor space ratio development standard to the extent proposed.