

8 January 2021

General Manager
Inner West Council
P.O. Box 14
PETERSHAM NSW 2049

73-75 Norton Street, Ashfield
Development Application No. DA/2020/0520
Clause 4.6 - Request for Variation from Floor Space Ratio Standard

1.0 INTRODUCTION

Development Application No. DA 2020/0520 was submitted to Council on 8 July 2020 to construct a 3/part 8-storey mixed-use building on this land containing new registered club premises for the Polish Club at the ground floor level and apartments at its upper levels.

Amended plans have been submitted which have resulted in:

- the number of apartments in the building being reduced from 91 to 88 apartments; and
- the number of car spaces associated with the apartments being reduced from 120 to 117 car spaces in Basement Levels 2 and 3.

Council has indicated that, as the 117 car spaces associated with the apartments exceeds the minimum number of 96 spaces recommended by the *Roads & Maritime Services' "Guide to Traffic Generating Developments"* and referred to in the design criteria contained in Section 3J-1 of the *Apartment Design Guide (ADG)* associated with *SEPP 65 - Design Quality of Residential Apartment Development*, the spaces in excess of the recommended minimum, i.e. 21 spaces, represent gross floor area and would result in the proposed development exceeding the floor space ratio (FSR) standard of 3:1 relating to the development on this land under the terms of Clause 4.4(2) of *Ashfield Local Environmental Plan 2013 (LEP)*.

Clause 30(1)(a) of *SEPP 65* provides that, if an application for the carrying out of development to which the *Policy* applies provides car parking equal to, or greater than, the recommended minimum amount of car parking specified in Part 3J of the *ADG*, the application must not be refused on the basis of car parking.

Given this, the design criteria in Part 3J-1 would not represent a development standard.



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In any event, if the 21 car spaces were to be included as gross floor area, they would have an area of 273m².

Part 8 - Parking in Council's *Comprehensive Inner West Development Control Plan 2016 DCP*) requires parking to be provided for residential flat buildings in the B2 Local Centre zone on the basis of:

- a minimum of 1 space/dwelling;
- 1 space/4 dwellings for visitors;
- 1 car wash bay.

On this basis, the development, which is to provide 88 apartments, is required to provide a minimum of 111 car parking spaces and the proposed 117 car spaces would exceed Council's minimum requirements by 6 spaces.

If the 6 car spaces were to be included as gross floor area, they would have an area of 78m².

"Gross floor area" is defined in the *LEP* as excluding "car parking to meet any requirements of the consent authority (including access to that car parking)".

A pragmatic approach would be for Council to consider that the 6 spaces met its minimum requirement.

This written request has been prepared in accordance with Clause 4.6 of the *LEP* to support the variation of the *FSR* standard contained in Clause 4.4(2) of the *Plan* should Council consider that the proposed residential car spaces are in excess of its requirements.

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

The *FSR* standard is not excluded from the operation of Clause 4.6 by Clause 4.6(8).

This request:

- has been prepared having regard to the Department of Planning & Environment's *Varying Development Standards: A Guide, August 2011*, and relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal; and
- demonstrates that exercising the flexibility afforded by Clause 4.6, in the particular circumstances of this application, is not only in the public interest because the proposal satisfies the relevant objectives of both the B4 Mixed Use zoning applying to the land and the *FSR* standard, but also it results in a better planning outcome for the development of the land.

2.0 FLOOR SPACE RATIO STANDARD

2.1 The Standard

Clause 4.4(2) provides that buildings on this land and in its vicinity in the Ashfield Town Centre should not exceed the maximum FSR shown on the *Floor Space Ratio Map*, which, in this area, is 3:1.

With a site area of 3,107.9m², this would permit a maximum gross floor area of 9,323.7m².

The proposal, excluding the parking and loading areas, complies with the 3:1 FSR.

2.2 Extent of Variation

Should the car parking be considered to be in excess of Council's requirements, i.e. 6 spaces, the gross floor area of the building would exceed the 3:1 FSR standard by 78m², or 0.8%.

Should the RMS recommended minimum parking be considered to be Council's requirement, the gross floor area of the building would exceed the 3:1 FSR standard by 273m², or 2.9%.

3.0 CLAUSE 4.6(3) CONSIDERATIONS

3.1 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

On the basis of Council's DCP, the residential component of the development, which is to provide 88 apartments, is required to provide a minimum of 111 car parking spaces, representing 1 space/apartment, 22 visitor spaces and a car wash bay.

The residential car park involves the provision of 117 car spaces and would exceed Council's minimum requirement by 6 spaces.

The residential car park is located at the 2 lowest basement levels of the building, Levels B2 and B3, which are located totally underground and which are not visible from the public domain in Norton Street or from surrounding properties.

The elimination of 6 car parking spaces would not result in any physical change to the structure of the proposed building or the design of its basement parking levels nor will it have any effect on the height, bulk or scale of the development.

There is a scarcity of on-street car parking opportunities in Norton Street in this area, with:

- "No Stopping" restrictions applying to its southern side; and
- "No Parking" restrictions applying to its northern side, west of 55 Norton Street.

The parking to be provided will increase on-site parking opportunities in an area where on-street parking is at a premium.

The gross floor area of any parking spaces in excess of requirements does not result in any increase in the extent or density of the proposed development.

In this context, the *FSR* standard, insofar as it relates to the provision of the car parking as proposed, is both unreasonable and unnecessary.

Additionally, Clause 4.3A of the *LEP* permits a building height incentive, the objective of which is to increase the supply of affordable rental housing in the Town Centre, and Council has issued the following consents for developments which have taken advantage of this incentive:

- Development Consent No. 2014/91, issued on 18 June 2014 by the Sydney East Joint Regional Planning Panel, for the redevelopment of 270 Liverpool Road for a building with a *FSR* of 3.5:1;
- Development Consent No. 2016/127, issued on 24 January 2017 by the Inner West Planning Panel, for the redevelopment of 8-12 Murrell Street for a building with a *FSR* of 3.47:1; and
- Development Consent No. DA 2017/172, issued on 10 July 2018 by the Inner West Planning Panel, for the redevelopment of 2-4 Murrell Street for a building with a *FSR* of 3.7:1.

The proposed building will be consistent with the prevailing *FSR* of contemporary mixed-use buildings in this locality and represents an appropriate and satisfactory response to the opportunities and constraints offered by the site and its setting.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Chief Justice Preston identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and held that it was sufficient for only one of these ways to be established.

Ways identified in the *Wehbe* judgement to establish that compliance with a standard was unreasonable or unnecessary included establishing that:

- the standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard; and
- the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

It would suffice to say that the proposal achieves the objectives of the standard notwithstanding its variation from its numerical value. See Section 4.0.

Consistent with the *Wehbe* judgement, compliance with the *FSR* standard is unreasonable and unnecessary as:

- the standard has been virtually abandoned or destroyed by Council's own actions in granting consents departing from the standard to achieve the objective of increasing the supply of affordable housing in the Town Centre; and
- the proposal achieves the objectives of the standard despite varying from its numerical value.

In conclusion, compliance with the *FSR* standard is both unreasonable and unnecessary in the circumstances of the case.

3.2 Are there sufficient environmental planning grounds to justify contravening the development standard?

The environmental planning benefit of providing the parking proposed in this application in terms of the scarcity of on-street parking available in this locality is addressed in Section 3.1.

This benefit is achieved without affecting:

- the height, bulk or scale of the proposed building; or
- the amenity enjoyed by residents or occupiers of surrounding properties.

The inclusion of any parking in excess of requirements in the building as proposed to meet the parking demand created by its residential component will not result in the building being inconsistent with:

- the *FSR* of other contemporary mixed-use developments in the Town Centre in this locality which have taken advantage of the building height incentive to provide affordable housing; or
- the built form of existing development in this area or the desired future character of development in the Town Centre.

The proposal will facilitate the the orderly and economic use and development of the land in accordance with Section 1.3(c) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.

In this context, there are adequate and appropriate environmental planning grounds to justify the proposed building contravening the *FSR* standard and approving the development.

4.0 OBJECTIVES OF STANDARD

An assessment of the proposal in terms of the objectives of the *FSR* standard contained in Clause 4.4(1) of the *LEP* is as follows.

Objective of Standard	Proposal's Response	Consistency
To establish standards for development density and intensity of land use	Any parking in excess Council's requirement proposed does not result in any increase in planned development density or intensity of land use	✓
To provide consistency in the bulk and scale of new development with existing development	Any parking in excess Council's requirement proposed does not result in any increase in the bulk or scale of the building	✓
To minimise adverse environmental impacts on heritage conservation areas and heritage items	Any parking in excess Council's requirement proposed does not have any effect on any heritage items in the vicinity of the site	✓
To protect the use or enjoyment of adjoining properties and the public domain	Any parking in excess Council's requirement proposed does not have any adverse effect on the use or enjoyment of adjoining properties or the public domain	✓
To maintain an appropriate visual relationship between new development and the existing character of areas that are not undergoing, and are not likely to undergo, a substantial transformation	Any parking in excess Council's requirement proposed does not have any adverse visual relationship with the existing development in this area	✓

The proposal is consistent with the objectives of the standard specified in Clause 4.4(1) of the *LEP*.

5.0 OBJECTIVES OF ZONE

An assessment of the proposal in terms of the objectives for development in the B4 Mixed Use zone is as follows.

Zone Objective	Proposal's Response	Consistency
To provide a mixture of compatible land uses	The proposal will contribute to the wide range of compatible land uses in this part of the Town Centre	✓
To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling	The proposal integrates residential development with renewed and revitalised Club premises on this land and will foster and promote the use of public transport, walking and cycling as the primary form of private transport	✓
To enhance the viability, vitality and amenity of Ashfield town centre as the primary business activity, employment and civic centre of Ashfield	The proposal will enhance the viability, vitality and amenity of Town Centre by: <ul style="list-style-type: none"> continuing the vital community, social, leisure and recreation facilities in a new modern facility which meets contemporary community demands and standards; and increasing the potential customers and clients for retail and commercial services available in the Town Centre by the establishment of the proposed apartments 	✓
To encourage the orderly and efficient development of land through the consolidation of lots	The proposal will not prejudice the orderly and efficient development of surrounding properties	✓

The proposal is consistent with the objectives of the B4 Mixed Use zone.

6.0 OTHER MATTERS

6.1 Concurrence of the Secretary of the Department of Planning & Environment

The Secretary's concurrence to a variation of a standard by up to 10% may be assumed in accordance with the Department's Circular PS 18-003, issued on 21 February 2018.

6.2 Does the contravention of the development standard raise any matter of significance for State or regional environmental planning?

The variation from the FSR standard for the development does not raise any matter of State or regional environmental planning significance.

6.3 The public benefit of maintaining the development standard

There is no identifiable public benefit in maintaining the standard in the context of the prevailing FSR of established adjoining and nearby buildings and the proposal's consistency with the existing and desired future character of development in this locality.

6.4 Any other matters required to be taken into consideration by the Secretary before granting concurrence

There are no other relevant matters required to be taken into consideration relating to the Secretary's concurrence.

7.0 CONCLUSION

The *FSR* standard is both unreasonable and unnecessary in the circumstances of this case and there are sufficient environmental planning grounds to justify variations from it.

The proposal is in the public interest because it is consistent with:

- the objectives of the standard; and
- the objectives for development in the B4 Mixed Use zone.

The development, with the variation from the standard as proposed:

- will not result in any adverse environmental impacts;
- will not have any significant effect on the amenity enjoyed by residents of surrounding properties in terms of privacy, solar access, visual impact or view loss; and
- will promote the orderly and economic use and development of the land in accordance with Section 1.3(c) the *EP&A Act*.

The proposal is, therefore, suitable for approval under the terms of Clause 4.6(2) of the *LEP*, despite its variation from the numerical value of the *FSR* standard contained in Clause 4.4(2) of the *Plan*.

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