

26 April 2022

Mr Alistair Cook
SLS Canberra Residences Pty Ltd
304, Level 3
500 Pacific Highway
ST LEONARDS NSW 2065

By email: Alistair.Cook@newhopegroup.com

Mills Oakley
ABN: 51 493 069 734

Your ref:
Our ref: AJWS/CYCS/3575768

All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215

Contact
Clare Collett
Email: ccollett@millssoakley.com.au

Partner
Anthony Whealy +61 2 8035 7848
Email: awhealy@millssoakley.com.au

Dear Alistair

Advice on transfer of FSR between areas in St Leonards South precinct

We refer to previous correspondence and your request for legal advice in relation to the transfer of floor space between different areas of your Site, which is within the St Leonards South precinct. Your Site comprises of what are known as Areas 1, 2 and 4 in the St Leonards South Precinct. Under the incentive FSR map, Areas 2 and 4 have a floor space ratio (**FSR**) control of 3.55:1 whilst Area 1 has an FSR of 3.85:1. You have asked for advice on whether you can “share” FSR between areas 2 and 4 of your Site on the basis that they have the same FSR control. Lane Cove Council (**Council**) has informed you that, in their view, you cannot share FSR across Area 1 as Area 1 has a different FSR control to the other areas. You have therefore asked for confirmation that you can share FSR across Areas 2 and 4 in circumstances where your Site also includes Area 1, which is subject to a different FSR control.

Summary of Advice

In our view, it is clear that you can redistribute FSR or share FSR between Areas 2 and 4 of your Site. Areas 2 and 4 share a common boundary and have the same FSR controls. Case law has clearly established that FSR can be shared across lots with the same FSR. The fact that part of a site contains a different FSR control does not prevent you from sharing FSR across the areas of the site with the same FSR control.

Background

- The *Lane Cove Local Environmental Plan 2009* (**Lane Cove LEP**) and the *Lane Cove Development Control Plan 2009* (**DCP**) apply to the Site.
- Your Site falls within the ‘St Leonards South Precinct’, which is a precinct with discrete planning controls under the Lane Cove LEP and Part C of the DCP.
- Part 7 of the Lane Cove LEP relates to the St Leonards South Precinct and provides additional local provisions for the precinct. This includes a provision allowing for approval of a development relying upon the FSR and height incentive clauses and maps.
- The Incentive FSR map and the Incentive height map under the Lane Cove LEP divides the St Leonards South Precinct into ‘areas’. Your Site comprises of Areas 1, 2 and 4. An extract from the FSR Incentive map at Figure 1 below shows these areas. Each ‘area’ is made up of a number of lots.



Figure 1: Incentive Floor Space Ratio Map

- The FSR Incentive Map shows that Areas 2 and 4 of your Site have the same FSR (W1 control) whereas Area 1 has a different FSR incentive control (W5 control). Areas 2 and 4 have an FSR control of 3.55:1 whilst Area 1 has an FSR control of 3.85:1.
- We have been informed that you intend to rely upon the FSR controls in the FSR incentive map under the Lane Cove LEP and that your proposed development meets the requirements to rely upon the incentive controls.

Substantive Advice

- Can you transfer floor space between areas with different FSR controls?**
 - Council has informed you that, in their opinion, you cannot share floor space across parts of the Site that have different FSR controls. This essentially means that you cannot share floor space across Area 1 as this has a different FSR to the other parts of your Site.
 - We confirm that we agree with Council's view and that floor space cannot be shared across Area 1.
 - The NSW Land and Environment Court has considered the issue of floor space sharing on many occasions and has specifically considered the issue of floor space sharing between lots or parts of a site with different FSR controls.
 - The Court has confirmed that floor space cannot be shared across areas with different FSR controls.** Essentially, what the cases have found is that the definition of 'site area' in clause 4.5 of the LEP is a definitional clause but that the FSR control (in this case in clause 7.1(3) of the LEP) is an operative clause and that the term 'site area' must be read down when considering the FSR control. This means that, even though your Site includes areas 1, 2 and 4,

you cannot treat the site as one 'site' for the purposes of floor space sharing as this would be inconsistent with the FSR mapping (because the mapping provides for 2 different FSR controls within the Site).

- 1.5 In *Mulpha Norwest Pty Ltd v The Hills Shire Council (No 2)* NSWLEC 74 Justice Pain considered the situation where a site was mapped under two different FSR controls. Justice Pain found that FSR should be calculated for the two different mapped areas (ie essentially that floor space could not be shared). Her Honour held as follows (at [44]- [46]):

There is an ascending hierarchy revealed by the composite definition and operative provision, being that the Site is determined by the whole of the lots that make up the site area. But when the site area is used to calculate the FSR, the site area must be adjusted so as to comprise only so much of the Site as is contained within the land to which the FSR applies or for any other reason under cl 4.5(4) or (6). The land to which the FSR applies is fixed and determined by the FSR Map, which is thus the controlling provision and the site area must yield to the controlling map.

Where the site area falls partly on land to which one FSR applies and partly on land to which another FSR applies, it is necessary to read the word "site" to mean "part of the site" and to read "building" to mean, consistently with the EPA Act definition, part of a building. Accordingly, that part of the building that sits on one part of the Site being the land to which one standard on the FSR Map applies must be calculated separately to the part of the building on land to which a different FSR applies.

- 1.6 In the *Mulpha* case, part of the site was mapped in the FSR map but part of the site was not included on the FSR map at all (and so had no FSR control). The Court held that it was not possible to treat both parcels of land as the 'site' and to share floor space across the site. In coming to this conclusion, Justice Pain explicitly considered a situation where different FSR controls apply to one 'site' and found that the floor space can only be shared on land to which the same FSR control applies.
- 1.7 It is important to note that the FSR controls in clause 7.1(3) relates to **land** (and not a 'site'). The Courts have noted the distinction in terminology used and found this to be relevant in determining how FSR should be calculated across a site with different FSR controls.
- 1.8 What Her Honour found in *Mulpha* was that, even though 'site' is defined broadly in the LEP to include all of a site, in terms of FSR this must be read down so that each FSR control applies only to the mapped area/mapped 'land'. This means that a site which includes two different FSRs requires two different calculations of FSR for the relevant areas. **Justice Pain found that allowing different areas of FSR to merge would allow the definitional clause (i.e. site area) to govern the operative clause (the FSR control clause) and that this is not the correct approach.** In Her Honour's view, **the intent of the FSR provisions could not be circumvented by considering one large area which included different FSR controls and by "merging" these areas.**
- 1.9 This approach has been adopted and applied in later cases (see for example *Perpetual Corporate Trust Ltd v Randwick City Council* [2021] NSWLEC 1380 or *L&G Management Pty Ltd v Council of City of Sydney* [2021] NSWLEC 1084).
- 1.10 Whilst the reasoning above shows that floor space cannot be shared across Area 1, it also confirms that floor space can be shared across Areas 2 and 4 of your Site, and the fact that Area 1 is also part of the Site does not prevent or inhibit this in any way.

2. Can you transfer floor space between Areas 2 and 4?

- 2.1 We understand that you would like to transfer floor space between Areas 2 and 4 so that, when Areas 2 and 4 are viewed as a whole, there is compliance with the FSR incentive control. We have not been provided with details of the proposed development but presumably some part(s) of Area 2 or 4 would be non-compliant with the FSR control but when viewed as a whole, the proposed development in Areas 2 and 4 would be compliant with the FSR incentive control.

- 2.2 In our view, **it is clear that FSR can be shared across Areas 2 and 4 of your Site. The fact that Area 1 contains a different FSR incentive control does not change this.**
- 2.3 As you know, clause 4.5 of the Lane Cove LEP sets out how FSR and 'site area' are calculated. This is a standard clause which appears in all local environmental plans. Clause 4.5 reads as follows (relevantly):
- (2) **Definition of 'floor space ratio'.** *The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.*
- (3) **Site area.** *In determining the site area of proposed development for the purpose of applying a floor space ratio, the site area is taken to be –*
- (a) *if the proposed development is to be carried out on only one lot, the area of that lot, or*
- (b) *if the proposed development is to be carried out on 2 or more lots, the area of any lot on which the development is proposed to be carried out that has a least one common boundary with another lot on which the development is being carried out.*
- (our emphasis)
- 2.4 Importantly, clause 4.5 provides that FSR relates to site area and site area is defined as the area of the proposed development, which may be multiple lots with common boundaries (as per clause 4.5(3)(b)).
- 2.5 As the proposed development is within the St Leonards South Area, clause 7.1 also applies. Clause 7.1(3) reads as follows:
- (3) Despite clauses 4.3 or 4.4, the consent authority may consent to development **on land to which this clause applies** that will result in a building with either or both of the following –
- (a) *a building height that does not exceed the increased building height identified on the Incentive Height of Buildings Map, or*
- (b) *a floor space ratio that does not exceed the increased floor space ratio identified on the Incentive Floor Space Ratio Map.*
- 2.6 Clause 7.1(3) is an incentive clause which allows a greater FSR for some areas. Clause 7.1(3) should be read in conjunction with clause 4.4 and indeed clause 4.5.
- 2.7 The Lane Cove DCP contains some elements which should be met in order for a proposed development to be entitled to FSR/height incentives and we understand that these elements will be included in your proposed development.
- 2.8 **There is nothing in the Lane Cove LEP or the DCP which prevents you from sharing floor space across Areas 2 and 4 simply because Area 1 (which has a different FSR limit) is also part of your Site.**
- 2.9 The fact that the LEP and DCP refer to "areas" does not limit FSR calculations to being confined to those areas and prevent the sharing of floor space across areas. **The controls in the Lane Cove LEP relating to the calculation of FSR clearly outline how FSR should be calculated for the Site and should apply.**
- 2.10 As noted above, Justice Pain in *Mulpha Norwest Pty Ltd v The Hills Hire Council (No 2)* NSWLEC 74 considered the appropriate way to calculate FSR when there were multiple lots within a site with differing FSR controls. In *Mulpha*, the Court held that the FSR could not be spread across two lots (being the site) as one of the lots was not included in the FSR map. However, in considering FSR the Court also confirmed that:
- 'Site' for the purposes of calculating FSR does not necessarily mean the entire 'site';
 - The definition of 'site area' in clause 4.5 LEP should be read in a way which is consistent with the FSR controls. Put another way, the definition of 'site area' cannot be used to override FSR controls by allowing FSR sharing between parts of a site which have different FSR controls.

- 2.11 **This means that, site area in clause 4.5 of the LEP should be read as referring to parts of the site with the same FSR control. This is supported by the use of ‘land’ rather than ‘site’ in clause 7.1, which is the FSR incentive clause.**
- 2.12 Case law has established that it is the FSR control or FSR mapping which is important. Parts of a site which have the same FSR control can therefore benefit from floor space sharing but parts of a site which have different FSR controls cannot benefit from floor space sharing.
- 2.13 A review of case law also shows that it is not necessary to consider the ‘Site’ as a whole (i.e. Areas 1, 2 and 4) for the purposes of calculating FSR. The flipside of this is that the different FSR control in Area 1 does not prevent you from sharing FSR across two other parts of the site, namely Areas 2 and 4.
- 2.14 For completeness, we note that the fact that the FSR incentive map shows ‘areas’ does not mean that the FSR must be calculated by ‘area’ only. Although the ‘areas’ have been used in the FSR and height incentive maps, the areas refer to areas to be amalgamated under the DCP. As the DCP is a lower order instrument than the LEP, any amalgamation standards under the DCP are not determinative of FSR controls.
- 2.15 **This is affirmed by the wording in clause 7.1(3) (the FSR incentive clause) which refers to ‘development on land’ and ‘a floor space ratio that does not exceed the floor space ratio identified on the Incentive Floor Space Ratio Map’. Clause 7.1 does not state that the FSR must be applied to a particular ‘area’ and in our view there is no reason to interpret the clause this way. If there had been an intention that clause 7.1(3)(b) required that the incentive FSR be applied to each individual ‘area’, in our view this would have been explicitly stated in clause 7.1.**
- 2.16 We note that clause 4.5 does refer to ‘the area of any lot on which the development is proposed to be carried out that has at least one common boundary with another lot on which the development is being carried out’. We confirm that Areas 2 and 4 of your Site have a common boundary.
- 2.17 **In our opinion it is clear that floor space can be shared across Areas 2 and 4 of your Site. Case law has clearly established that the entire ‘site’ of the proposed development should not be used when different FSR controls apply. As the broader Site is being broken down into sections with the same FSR, there is no reason why Area 1 prevents Areas 2 and 4 sharing floor space.**
- 2.18 **We note that we have been provided with an email from Council which seems to confirm that they agree with the above approach.** The email of 18 March 2022 is from Mr Christopher Shortt, Senior Planner, to Ms Clare Swan of Ethos Urban and responds to a query from Ms Swan in relation to the transferring of floor space between all areas of your Site. The email reads as follows:
- The legal advice effectively confirms that if the 2 adjoining sites have the same FSR (Areas 2 and 4) they can average it out. However if one site has a different FSR (Area 1) to the others – it cannot shift FSR.*
- Despite this, you are still subject to their own individual LEP height controls which cannot be averaged.*
- 2.19 **Also for completeness, we note that clause 4.5 of the Lane Cove LEP explicitly contemplates a situation such as this (where floor space is redistributed between lots within a Site) and provides for the inclusion of a covenant to prevent double dipping of FSR in the future. Clause 4.5 reads as follows:**
- ‘When development consent is granted to development on a site comprised of 2 or more lots, a condition of the consent may require a covenant to be registered that prevents the creation of floor area on a lot (the restricted lot) if the consent authority is satisfied that an equivalent quantity of floor area will be created on another lot only because the site included the restricted lot’.*

Conclusion

In our opinion, it is clear that you can redistribute floor space between Areas 2 and 4 of your Site. The fact that Area 1 has a different FSR does not prevent you from sharing FSR between Areas 2 and 4 and we see no legal basis for arguing this at all. Whilst the FSR for Area 1 will need to be calculated separately, floor space can be shared between Areas 2 and 4 of your Site.

Our reading of Council's email of 18 March 2022 is consistent with our interpretation outlined above and, as such, we anticipate that Council would agree to floor space sharing between Areas 2 and 4 as long as the FSR for Area 1 is calculated separately.

If you have any questions or require further information in relation to this advice please do not hesitate to contact Anthony Whealy on +61 2 8035 7848 or Clare Collett on ccollett@millsoakley.com.au.

Yours sincerely



Anthony Whealy
Partner

Accredited Specialist — Local Government and Planning