

Clause 4.6 Variation

FLOOR SPACE RATIO

691 VICTORIA ROAD, RYDE

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CLAUSE 4.6 DEPARTURE

BACKGROUND TO FSR STANDARD

This Clause 4.6 variation has been prepared in support of a development application for the construction of a mixed use development at 691 Victoria Road, Ryde.

The proposed development exceeds the maximum permitted FSR control of 2.5:1 that applies under the Ryde Local Environmental Plan 2014.

An extract of the relevant FSR map is provided below that identifies the site and the relevant FSR provisions noting that:

- The FSR base is 1.8:1 based on the mapping;
- Clause 4.4A Area I permits a further 0.7:1;
- This permits a maximum FSR of 2.5:1.



Figure 1: FSR Map Extract

VARIATION TO THE STANDARD ASSOCIATED WITH THE DEVELOPMENT

As set out above the site is subject the following FSR:

- The FSR base is 1.8:1 based on the mapping;
- Clause 4.4A Area I permits a further 0.7:1 as shown in the extract below.

4.4A Exceptions to floor space ratio

(1) The maximum floor space ratio for a building on land in an area shown in Column 1 of the table to this subclause that is permitted by clause 4.4 is increased by the amount of floor space ratio specified opposite the area in Column 2, if the land and the development meet the specifications shown opposite the area in Column 3.

Column 1 Area identified on Floor Space Ratio Map	Column 2 Additional floor space ratio	Column 3 Specifications relating to the Area
Area A	1.1:1	The lot on which the building is sited has an area of at least 800 square metres
Area B	0.8:1	The lot on which the building is sited has an area of at least 800 square metres
Area C	0.8:1	The lot on which the building is sited has an area of at least 2,000 square metres
Area D	0.7:1	The lot on which the building is sited has an area of at least 1,200 square metres
Area E	0.3:1	The lot on which the building is sited has an area of at least 1,200 square metres
Area F	1.1:1	The lot on which the building is sited has an area of at least 1,200 square metres
Area G	0.9:1	The lot on which the building is sited has an area of at least 1,200 square metres
Area H	0.5:1	The development is a mixed use development and provides laneway access that is not a private driveway or private laneway
Area H	1:1	The lot on which the building is sited has an area of at least 900 square metres and the development is a mixed use development and provides laneway access that is not a private driveway or private laneway
Area I	0.7:1	The lot on which the building is sited has an area of at least 900 square metres and the development is a mixed use development and provides laneway access that is not a private driveway or private laneway

- The proposal is a mixed use development and provides laneway access.
- This permits a maximum FSR of 2.5:1 for the development.

The table below summarises the permitted GFA and FSR as compared to the proposed GFA and FSR.

Address	Site Area	GFA Permitted	GFA Proposed	Exceedance
691 Victoria Road	6296.8m ²	2.5:1 15742 m ²	2.57:1 16208 m ²	466m ² or 2.96%

Therefore the proposal presents a breach of 2.96% to the standard.

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 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, requiring 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.

Accordingly, the key tests or requirements arising from the above judgements is that:

- 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*.
- There are planning grounds to warrant the departure, and these planning grounds are clearly articulated as reasons in arriving at a decision.
- The proposal is required to be in ‘the public interest’.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the maximum FSR control and on that basis that compliance is unreasonable or unnecessary;

- Establishing compliance is unreasonable and unnecessary;
- Demonstrating there are sufficient environmental planning grounds to justify varying the standard; and
- Satisfying the relevant provisions of Clause 4.6.

ADDRESS OF CLAUSE 4.6 PROVISIONS

Clause 4.6 of the Ryde Local Environmental Plan 2014 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 subclause 3-5 which provide:

4.6 Exceptions to development standards

(1) The objectives of this clause are as follows—

(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.

(2) 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.

(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

(a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

Note—

The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

(4) The consent authority must keep a record of its assessment carried out under subclause (3).

(5) (Repealed)

Clause 4.6 does not restrain the consent authority's discretion as to the numerical extent of the departure from the development standard. Each of the relevant provisions of Clause 4.6 are addressed in turn below.

CLAUSE 4.6(3)(A) - COMPLIANCE UNREASONABLE AND UNNECESSARY

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 satisfied, known as the first way in the decision of *Wehbe v Pittwater Council* (2007) 156 LGERA 446;

Underlying Objectives are Satisfied

The proposal, despite the numerical non-compliance identified, is consistent with the objectives of Cl. 4.4 – Floor Space Ratio of the Ryde LEP 2014.

The objectives of the 'FSR' development standard are stated as:

(1) The objectives of this clause are as follows:

(a) to provide effective control over the bulk of future development,

(b) to allow appropriate levels of development for specific areas,

(c) in relation to land identified as a Centre on the Centres Map—to consolidate development and encourage sustainable development patterns around key public transport infrastructure.

Each objective is considered below.

- Objective (a):
 - The proposed development exhibits a suitable bulk and scale on the site despite the numerical departure noting the extent of departure is minor to the extent that the bulk of a compliant built form as compared to this built form is indistinguishable and the built form response is suitable in terms of the bulk of the development.

- Objective (b):
- The extent of development across the sites is appropriate, notwithstanding the numerical departure. This is because the extent of the breach is minor and there are no discernible impacts arising from the breach to the standard.
- The intensity of the use arising from the proposed GFA must also be considered in relation to this objective and in that regard the traffic impacts are considered to be acceptable as set out in the traffic report. In addition the amenity impacts of noise and other privacy impacts are avoided given the design of the development.
- Objective (c):
- The development site is mapped on the Centres Map and the objective is relevant and the proposal aligns with this objective to consolidate development and encourage sustainable development patterns around key public infrastructure- being high frequency bus routes.

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.

CLAUSE 4.6(3)(B) - SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

Pain J held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 variation must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, being grounds that are specific to the site.

Pursuant to clause 4.6(3)(b) of the LEP, there are sufficient environmental planning grounds to justify the variation to the FSR development standard.

The below points demonstrate suitable environmental planning grounds exist to justify contravening the FSR development standard and further demonstrates that the FSR departure does not give rise to any environmental impacts, and therefore the proposal is an appropriate design response for the subject site:

- At the outset the variation is minor to the extent that a compliant built form is not discernibly different to a non-compliant built form;
- The breach facilitates additional housing in proximity to Ryde Town Centre and public transport.

- This design approach and breach of the FSR enables a suitable design outcome on the site and is consistent with the following Objects of the Environmental Planning and Assessment Act 1979:

*(c) to promote the orderly and economic use and development of land,
(g) to promote good design and amenity of the built environment,*

- The departure to the FSR standard also does not generate any adverse amenity impacts to adjoining properties with regard to visual privacy or overshadowing given the lot orientation and careful design of the development.

Therefore, the current proposal is a suitable outcome from an environmental planning perspective and demonstrates that there is merit in varying the FSR control to achieve a suitable design response on the site which demonstrates sufficient environmental planning grounds to support the departure to the FSR standard.

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control. To require strict compliance would result in an underdevelopment of the land that would be a poor outcome having regard to the location and context of the site.

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

CONCLUSION

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

The proposed development is in the public interest because it is consistent with the objectives of the FSR development standard (CI 4.4).

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.