

Clause 4.6 written request -
Variation to clause 4.4 (Floor
space ratio) of Ku-ring-gai
Local Environmental Plan 2015
7-9 Merriwa Street, Gordon

Prepared for
Giles Tribe Architects
November 2024



Mecone acknowledges the Traditional Custodians of the land on where this project is undertaken and across the Mecone offices that this report is prepared, paying respect to the Elders past and present. We recognise the ongoing connection of Aboriginal and Torres Strait Islander peoples to land, waters, and culture.

Project director

Chris Shannon

Contributors

Tyson Ek-Moller

Revision	Revision date	Status	Authorised: Name & Signature	
A	13 November 2024	Response to Council RFI	Chris Shannon	

* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

Contact

MECONE

Level 15, 6 Hassall Street,
Parramatta, New South Wales 2150

info@mecone.com.au

mecone.com.au

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1 Introduction

The Development Application (DA) for 7-9 Merriwa Street, Gordon (the site) seeks approval for a mixed-use building comprising of 27 residential apartments and three commercial tenancies, civil works (including basement car parking), landscaping and tree removal.

As a result of a design response to the unique conditions of the subject site, parts of the proposed car parking facilities are to be located on Levels 1, 2, and 3 of the development. Due to the slope of the site and prior works that have substantially altered the existing levels of the site, the car parking facilities on Levels 1, 2 and 3 are not 'basement' car parking facilities. As such, the proposed car parking facilities do not comply with all applicable controls within the Ku-ring-gai Development Control Plan (KDCP), relating to carpark design for mixed-use development, which (amongst other requirements) stipulates that such parking to be located within a basement and beneath the building footprint.

It is subsequently Ku-ring-gai Council's (Council) position that as the proposed car parking facilities do not satisfy all requirements regarding car parking, and as such, the proposed car parking facilities on Levels 1, 2 and 3 could be counted as Gross Floor Area (GFA) by the consent authority. If such car parking were included as GFA, then the Floor Space Ratio (FSR) of the proposed development would 2.59:1, which constitutes a 0.59:1 (i.e. a 29.5%) variation to the 2:1 FSR development standard pursuant to clause 4.4(2) (Floor space ratio) of the *Ku-ring-gai Local Environmental Plan 2015* (KLEP 2015).

This written variation request has been prepared in response to a request from Council to justify the potential contravention of clause 4.4(2) of the KLEP 2015, with regard to the specific circumstances of this proposal, if the Panel consider there to be a non-compliance. As demonstrated by this written request, it is submitted that permitting the proposed variation to clause 4.4(2) will allow for better development and planning outcomes in this particular instance.



2 Site description

The subject site comprises of a single allotment that is legally identified as Lot 2 in Deposited Plan 566663, and has an address of 7-9 Merriwa Street, Gordon. The site is located within the Ku-ring-gai Government Area (LGA) and is located within the MU1 Mixed Use zone on the northwest side of the Gordon local centre.

The subject site is a dual frontage 'parallel allotment' that it is located on the north-western side of Merriwa Street and the southern side of Fitzsimon Lane. It is an irregularly shaped allotment with an area of approximately 2,786.6m², which features a large rear-to-front downhill slope with elevational changes between the two road frontages approximately 10.1-11.1 metres. The construction of existing development (undertaken in the mid-1970s) has significantly modified the topography of the site by cutting into the slope to enable the construction of a part five- and-six-storey commercial building, with a five-storey semi-basement carpark between the commercial building and the Fitzsimons Lane frontage. Driveways run up both side setbacks from the Merriwa Street frontage to the aforementioned carpark.

The remainder of the site is landscaped, with numerous large (i.e. 20+ metre) trees within the Merriwa Street setback area.

There is a small separate parcel (Lot 1, DP 566663) that does not form part of the subject site but is encompassed by the subject site's Merriwa Street setback. Development on that site contains a small substation.

3 Proposed development

Pursuant to Section 4.16 of the *Environmental Planning and Assessment Act 1979* (EP&A Act), consent is sought for the demolition of all existing structures and the construction of an eight storey (plus basement and rooftop terrace) mixed use development comprising of residential apartments and commercial tenancies.

An overview of the works being proposed is as follows:

- demolition of all structures of the site
- the construction of a mixed-use development, which will comprise of a single building and is proposed to contain:
 - 27 residential apartments, including:
 - One x two-bedroom apartment
 - 13 x three-bedroom apartments
 - 13 x four-bedroom apartments
 - three commercial tenancies, which will address the Fitzsimons Lane frontage
 - a rooftop communal open space area
- civil works (including stormwater and services)
- landscape works (including the removal of 12 trees)
- the provision of new onsite utilities and connections
- Strata subdivision.

The use of the proposed commercial tenancies will be subject to separate proposals following approval of this development application.

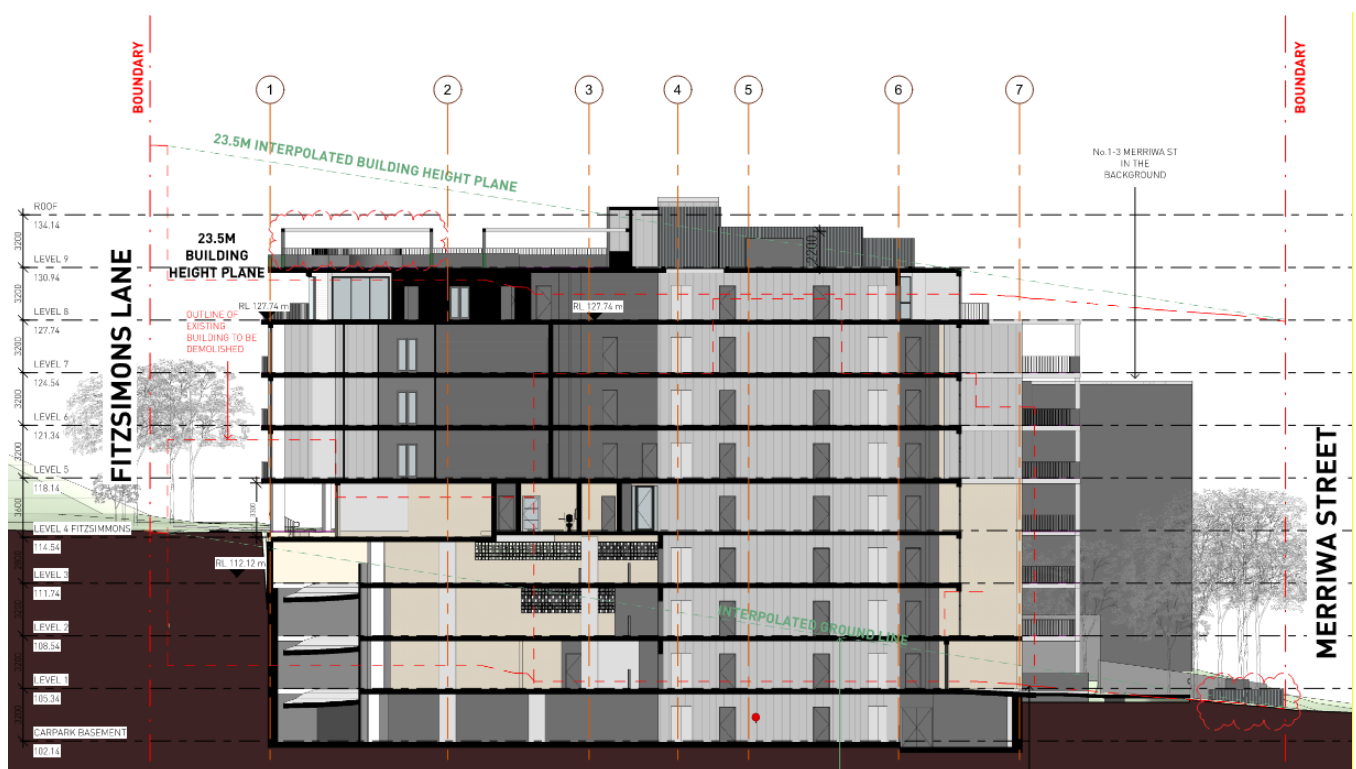


Figure 1: An extract of the proposed section plans, showing the proposed development's relation to the sloped topography (both existing and extrapolated) of the site.

Source: Giles Tribe, 2024



As demonstrated by **figure 1**, the site contains a significant slope, with falls of approximately 10.1-11.1 metres between the Fitzsimons Lane and Merriwa Street frontages. The construction of the existing commercial development and associated carpark on the site (undertaken in the mid-1970s) included significant excavation that cut into that slope. Such development significantly altered ground levels, with substantial lowering of existing ground levels. This is particularly evident towards the northern parts of the site where, as a result of the sloped topography, such excavation was at its greatest.

The design incorporates 'stepped' habitable areas (refer to **figure 1**) in order for the proposed development to:

- provide road frontages for habitable areas addressing both Fitzsimons Lane and Merriwa Street (which adjoin the northern and southern boundaries respectively)
- to provide sufficient solar access and amenity for habitable areas (particularly during mid-winter).

Some of the proposed car parking facilities have been placed beneath the upper five floors on the northern end of the building due to the existing excavation of the site. This avoids excavating deeper into the site to provide 'in-basement' parking.

4 Relevant planning instrument, development standard and proposed variations

4.1 Environmental Planning Instrument to be varied

The Environmental Planning Instrument (EPI) to be varied is the *Ku-ring-gai Local Environmental Plan 2015* (KLEP 2015).

4.2 Site zoning

The site is zoned MU1 Mixed Use. Refer to **figure 2** below for an extract of the LEP land zoning map.

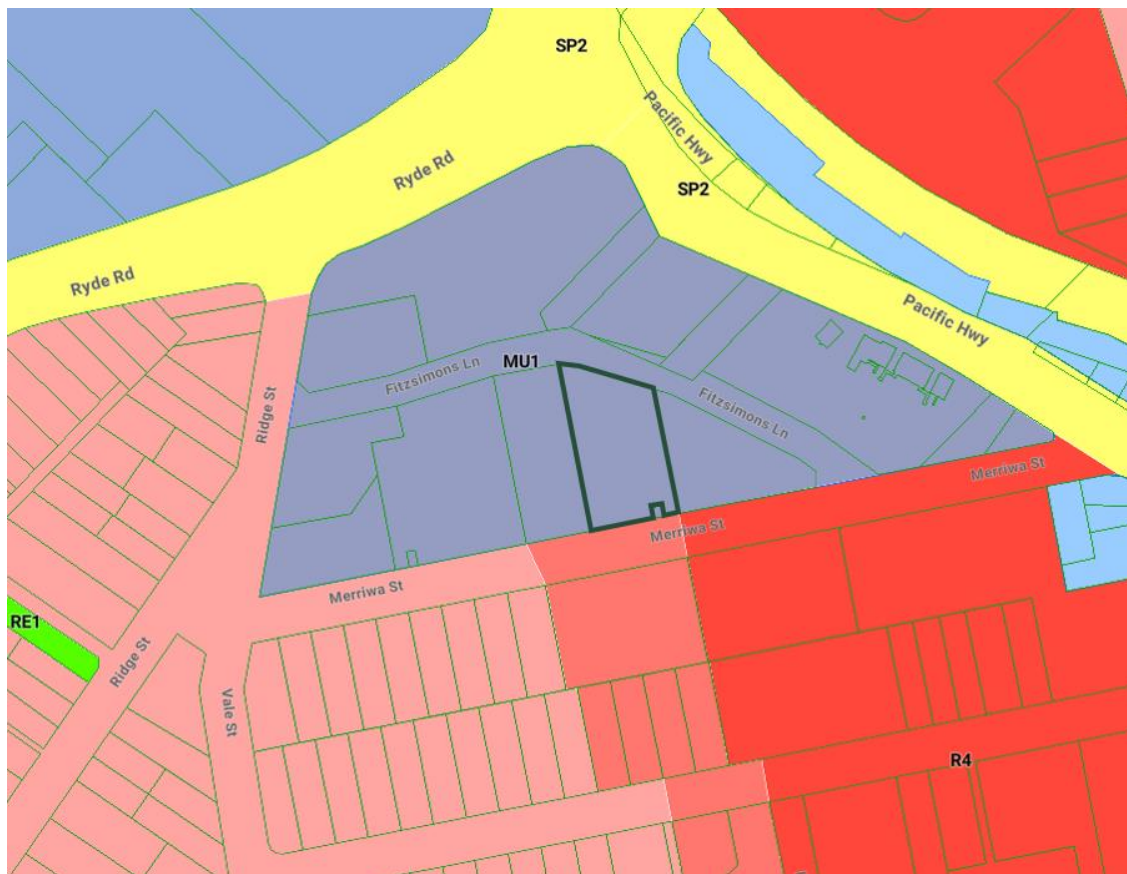


Figure 2: An extract of the KLEP 2015 land zoning map. The site is denoted by the dark green border.
Source: Mecone Mosaic, 2024

4.3 Development standard to be varied

The development standard to be varied is clause 4.4(2) (Floor space ratio) of the KLEP 2015.

For reference, the relevant sections of clause 4.4 are provided below. Clauses 4.4(2A)-(2F) have not been replicated and as such will not be discussed further within this written request as they are not relevant to this site or proposal.

4.4 Floor space ratio

- (1) *The objectives of this clause are as follows—*
 - (a) *to enable development with a built form and density that is compatible with the size of the land to be developed, its environmental constraints and its contextual relationship,*
 - (b) *to provide for floor space ratios compatible with a range of uses,*
 - (c) *to ensure that development density is appropriate for the scale of the different centres within Ku-ring-gai,*
 - (d) *to ensure that development density provides a balanced mix of uses in buildings in the employment and mixed use zones.*
- (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.*

The prescribed FSR development standard that applies to the site pursuant to clause 4.4(2) of the KLEP 2015 is 2:1 (refer to **figure 3** below). The development standard to be varied is therefore a numerical development standard. Further, clause 4.4 is not one that is subject to the application of clause 4.6(8) of the KLEP 2015.



Figure 3: An extract of the KLEP 2015 FSR map. The site is denoted by the dark green border.
Source: Mecone Mosaic, 2024



4.4 Details of proposed floor space ratio variation

Clause 4.4(2) of the KLEP 2015 prescribes a 2:1 FSR on the site.

The calculated FSR is based upon the total GFA as a proportion to site area. The calculation of GFA is based upon on the definition of 'gross floor area' within the KLEP 2015, which for reference is as follows:

gross floor area means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—

- (a) the area of a mezzanine, and
- (b) habitable rooms in a basement or an attic, and
- (c) any shop, auditorium, cinema, and the like, in a basement or attic, but excludes—
- (d) any area for common vertical circulation, such as lifts and stairs, and
- (e) any basement—
 - (i) storage, and
 - (ii) vehicular access, loading areas, garbage and services, and
- (f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and
- (g) car parking to meet any requirements of the consent authority (including access to that car parking), and
- (h) any space used for the loading or unloading of goods (including access to it), and
- (i) terraces and balconies with outer walls less than 1.4 metres high, and
- (j) voids above a floor at the level of a storey or storey above.

If car parking is excluded from GFA calculations, then the FSR for the proposal would be 1.97:1, which would be compliant with the 2:1 FSR standard.

Based on the above definition, car parking would ordinarily be excluded from GFA calculations (noting that the parking rates provided by this application are consistent with the KDCP). Council has advised that the proposed parking on Levels 1, 2 and 3 may be considered by the consent authority as GFA.

A summary of the need to include such areas as GFA is as follows:

- part (g) of the 'gross floor area' definition (see above) excludes "...car parking to meet **any requirements of the consent authority**..." [emphasis added]
- controls 1 and 2 within Part 7B.1 (Car parking provision) of the KDCP provides the following:
 1. All residential flat developments are to provide on-site car parking within basements.
 2. Basement car park areas are to be consolidated under building footprints.

- As car parking on proposed building levels 1, 2 and 3 are not within a ‘basement’¹ (primarily as a result of previous excavation for the existing development that substantially altered the existing ground levels of the site), it is Council’s position that the proposed car parking facilities may not be considered by the consent authority as fully compliant with all requirements relating to car parking (i.e. the aforementioned DCP controls requiring that all car parking be situated both within a basement and below the building footprint).
- The proposed car parking facilities on Levels 1, 2, and 3 will only be included as GFA, and therefore FSR calculations, if the consent authority considers that ‘any requirements’ includes the DCP control for basement parking. This clause 4.6 variation request has been submitted if the consent authority forms this view. If the consent authority does not require compliance with the DCP control, then this clause 4.6 variation request is not required.

Refer to **figure 4** for a visual representation of GFA calculations for Levels 1, 2 and 3.

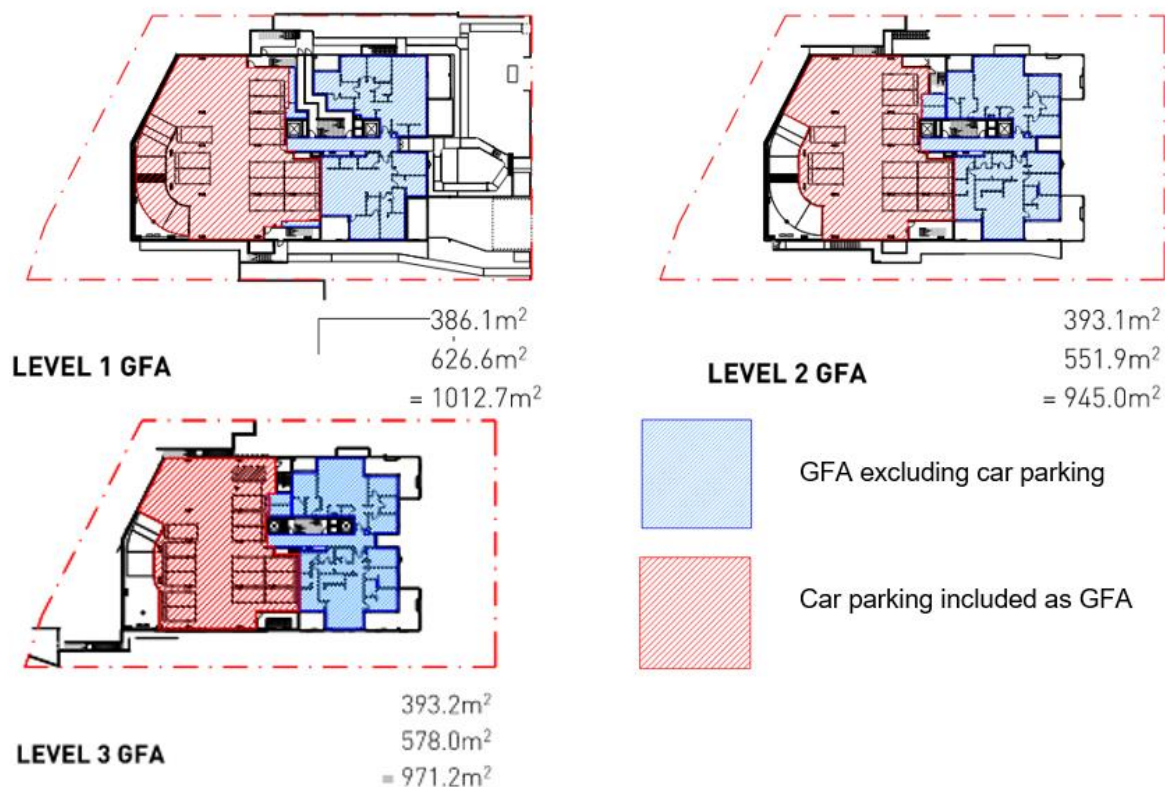


Figure 4: Extract of the FSR calculation plans (amended November 2024), showing GFA on Levels 1, 2 and 3.
Source: Giles Tribe, 2024

¹ For reference, a ‘basement’ is defined by the KLEP 2015 as “...the space of a building where the floor level of that space is predominantly below ground level (existing) and where the floor level of the storey immediately above is less than 1 metre above ground level (existing).”



Despite the above, the basement level of the building satisfies the KLEP 2015's definition of a 'basement' (see below). Car parking within the proposed basement level can therefore be excluded from GFA, and will not be discussed further by this written request.

If car parking on Levels 1, 2 and 3 is included as GFA, the proposed development would provide 7,224.25m² of GFA, which equates to FSR of 2.59:1. Such an FSR constitutes a 0.59:1, or a 29.5% variation to the FSR development standard pursuant to clause 4.4(2) of the KLEP 2015.



5 Assessment

5.1 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

In *Wehbe V Pittwater Council (2007)* 156 LGERA 446 (Wehbe), Preston CJ set out the following 5 different ways in which an objection (variation) may be well founded and under which a proponent could demonstrate that compliance with a development standard is unreasonable or unnecessary as per clause 4.6(3)(a)).

For reference, the five ways in which a variation may be well founded are listed as follows:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable*
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*
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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

It is generally understood that Clause 4.6(3) can be satisfied if it is established that a development satisfies one or more of the above scenarios. In this instance, the first point has been investigated and is considered to be well founded for the proposed development.

(a) *to enable development with a built form and density that is compatible with the size of the land to be developed, its environmental constraints and its contextual relationship.*

Mecone comment:

The built form, scale and density of the proposed development is compatible with the size of the subject site and the form of surrounding development, with regard to the following:

- the development is otherwise mostly consistent with applicable development standards and controls (such as floor space ratio, setbacks and building separation)
- the development is highly responsive to the environmental constraints of the site (in particular its slope and earlier site modifications that substantially altered existing levels), in that it seeks to:
 - maximise residential amenity (noting constraints that would otherwise affect residential development at/close to ground level on Levels 1, 2 and 3)
 - avoiding additional site excavation where avoidable, thereby minimising associated environmental impacts
- once excavated ground levels around the periphery of the site are restored to approximate former levels, the development will present as a structure that:



- is integrated with onsite topography
- has sought to both maximise setbacks from the Merriwa Street frontage while limiting massing and scale along the active Fitzsimons Lane frontage
- has incorporated large deep soil areas that will enable retention and growth of significant trees and vegetation, which is consistent with outcomes sought by Council
- the perceived scale of the development will be consistent with the existing and likely future built character of the local area and once constructed, will not present a built form that would present incongruent bulk and/or scale when compared to existing development on surrounding sites, in particular more contemporary mixed-use site redevelopments to the east, north and west of the subject site
- the development will not give rise to significant, adverse and unreasonable impacts on surrounding sites
- the development will provide a variety of land use activities that includes active street uses on the Fitzsimons Lane frontage and high-quality and high-amenity housing and associated facilities, as envisioned by centre-specific development controls.

Given that the development will not present inconsistently with the surrounding area and that its form, scale and density will not give rise to adverse and unreasonable impacts, it is submitted that the development's form and scale is compatible with the size of the subject site. The proposal is therefore consistent with this objective.

(b) to provide for floor space ratios compatible with a range of uses.

Mecone comment:

The proposed development is to provide for a range of uses that includes:

- three commercial tenancies of varying sizes that will be capable of accommodating a range of smaller-scale commercial land use activities on the Fitzsimons Lane frontage, and
- 27 residential apartments of varying sizes.

The proposed FSR of the development is sufficient for the undertaking of various land uses and associated facilities (such as car parking, loading facilities, waste storage areas, etc.), as envisioned by the MU1 zone on the site and the applicable development standards and controls governing the placement and operation of certain elements (such as the commercial tenancies). Further, the total amount of floor space to be provided within the development would be the same as that provided within a compliant scheme. The FSR is a consequence of where certain car parking areas are to be located and how they are subsequently calculated as GFA (i.e. if the same amount of floor space were provided, albeit with all car parking located within basement levels, the proposal would otherwise comply with the FSR development standard).

For such reasons, we believe that the proposed floor space ratio is compatible with the range of uses envisioned for the site, and as such this objective will be satisfied.



- (c) *to ensure that development density is appropriate for the scale of the different centres within Kuring-gai.*

Mecone comment:

The KLEP 2015 provides that development within the Gordon Local Centre will comprise of higher density development within areas:

- along the Pacific Highway to the west of Gordon railway station
- within MU1 zoned areas at the north/northeast end of this centre, noting that clause 4.4(2) of the KLEP 2015 prescribes:
 - a 2:1 FSR for sites in this area that do not address the Pacific Highway
 - a 2.3:1 FSR for sites in this area with frontages to the Pacific Highway.

The proposed development's 2.59:1 FSR exceeds the prescribed 2:1 FSR development standard that applies to the site. We note however that this standard has been broadly applied to sites within the locality and does not appear to consider highly variable (and in some cases, highly modified) topography and how it constrains some sites within this part of the Gordon Local Centre. The subject site is one such example, with earlier excavation into a significant slope resulting in existing levels that created a significant environmental constraint.

While we acknowledge that the proposed FSR of the development may technically breach the standard, it is a consequence of responding to highly localised and site-specific environmental constraints. Despite such a noncompliance, the skilful design of the proposed development provides for an appearance that is reflective of development scale and density (which despite the technical FSR non-compliance) is consistent with surrounding sites, particularly those within the MU1 zone on the northern side of Merriwa Street. Such consistency with envisioned density is also supported by the development's demonstrated lack of significant and unreasonable impacts on surrounding sites.

The proposal is therefore consistent with this objective.

- (d) *to ensure that development density provides a balanced mix of uses in buildings in the employment and mixed use zones.*

Mecone comment:

The proposed development will provide for a balanced mix of uses within the MU1 Mixed Use zone. Such uses will comprise of:

- three commercial tenancies of varying sizes (in addition to supporting building services and utilities) to support an active primary frontage addressing Fitzsimons Lane in accordance with locality-specific development controls
- 27 residential apartments of varying sizes.

The MU1 zone on the site and the applicable 2:1 FSR development standard generally envisions such development densities. But for any requirements to consider Levels 1, 2 and 3 as GFA, the proposed development would otherwise comply with the FSR development standard while still providing for a balanced mix of uses within the MU1 zone. As such, the proposal is consistent with this zone objective.



5.2 Clause 4.6(3)(b) –Environmental planning grounds to justify contravention of the development standard

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 the Court found at [23]-[25] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*
25. *The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

In this regard, we submit that there are numerous and substantive environmental planning grounds to justify the proposed contravention of the FSR development standard, which are detailed below.

Unique site conditions

As detailed within Section 4.4 of this document, the proposed technical variation to the FSR development standard is a consequence of variations to two particular controls within the KDCP, which to summarise require that:

- all parking be provided within a basement
- all parking be provided below the proposed building footprint.

Both the application of the FSR standard to this area and controls for residential flat building/mixed-use development within the Ku-ring-gai LGA (in particular those relating to parking):

- are broadly applied to zones, localities and specific forms of development
- generally do not apply such controls to particular properties afflicted with site-specific constraints.

With regard to the above, we submit that for development on a more regular (i.e. flatter) and less developed site:



- compliance with those aforementioned DCP controls would ordinarily be more readily attainable
- as a consequence (and assuming that parking rates are in accordance with relevant requirements), proposed parking would therefore be unlikely to be included as GFA. An FSR noncompliance (based on inclusion of parking as GFA) would therefore be unlikely to occur.

The subject site is not however considered to be a 'regular' site, with unique constraints created as a result of both its steeply sloped topography and prior development that has significantly lowered existing ground levels across a large portion of the site. We therefore submit that non-compliances with controls relating to basement parking (which subsequently necessitates the inclusion of non-basement parking as GFA and creates the proposed variation to the FSR development standard) are warranted in order to facilitate a building design that:

- is more responsive to existing site conditions
- provides for improved planning outcomes
- enables a feasible redevelopment of the subject site.

To require compliance with the aforementioned DCP parking controls to avoid the inclusion of parking as GFA would result in suboptimal residential amenity and environmental outcomes (refer to other environmental planning grounds below). Conversely, to locate parking above ground level and comply with the FSR development standard would require removing significant portions of habitable floorspace, which would affect the feasibility of redeveloping the site and the provision of high-density housing within a suitable location.

In summary, if all car parking facilities were located within the basement, then the proposed development would likely comply with the FSR development standard, even with similar total floorspace areas being proposed. Given the constraints of the site however, such a design was not adopted, as we believe that:

- a full in-basement carpark design would result in adverse environmental impacts and suboptimal residential amenity outcomes
- better planning outcomes are achievable with a design that incorporates parking above ground level.

While it is not compliant with the DCP, the proposed design provides better planning outcomes in the specific circumstances of this particular proposal. As such, we submit that it is unreasonable and unnecessary to require compliance with the DCP control and FSR development standard with regard to the specific circumstances of this proposal.

Responsiveness to site conditions and minimisation of additional earthworks

As detailed elsewhere within this written request and the Statement of Environmental Effects (SEE) that was submitted to Council for this application, the subject site:

- is within an area that features steeply sloped topography with a large north-to-south downhill slope
- has been highly modified by earlier development that significantly excavated into that slope to provide relatively level footprints for the existing commercial building and multi-level carpark.



Such modifications to site topography resulted in significant lowering of 'existing ground levels' within the northern half of the site. Significantly greater excavation of the site will result from a requirement to provide all car parking facilities within basement levels and below the proposed building footprint, noting that:

- the number of car parking spaces that are to be provided on the site
- that basements are defined by the KLEP 2015 as being both:
 - predominantly below ground level (existing)
 - where the floor level of the storey immediately above is less than one metre above existing ground level.

The placement of car parking on Levels 1, 2 and 3 will, in this specific instance, deliver better design and environmental outcomes, despite the proposed DCP parking variations resulting in additional GFA inclusions and the subsequent FSR variation. The reasons for this are as follows:

- due to poor residential amenity at/near ground level around the northern sides of the proposed building, providing parking at the northern end of Levels 1, 2 and 3 will both:
 - enable better utilisation of that part of the site that is already used for parking, without the need for significant and additional excavation
 - enable placement of habitable areas towards the northern of the building at higher elevations, which as discussed below, will provide for enhanced residential amenity
- compared to a development scheme with full in-basement parking, a building layout like that proposed will significantly reduce excavation depths and associated spoil generation, with improved environmental outcomes, through:
 - reductions of construction traffic volumes that would otherwise be required to remove excavated spoil from the site
 - reduced potential for adverse impacts on surrounding sites
 - reduced likelihood of groundwater interception, which if encountered as a result of deeper excavation², would necessitate construction and/or ongoing dewatering.

Improved residential amenity and building utilisation

The subject site contains a substantial north-to-south downhill slope, resulting in significant elevational differences between the northern and southern boundaries of approximately 10.1-11.1 metres. This is detailed elsewhere within this written request and the Statement of Environmental Effects (SEE) that was submitted to Council for this application.

² Reference is made to the geotechnical investigation report (prepared by Stantec) that was submitted as part of the subject Development Application.



Lower levels of the building (particularly at its northern end) will be significantly overshadowed in mid-winter. This is a result of:

- higher ground levels at the site's northern end
- existing/approved large-scale development on adjoining and surrounding sites to the east, west and north of the site
- proposed landscaping.

Such considerations would be further compounded by the orientation of the site, which would limit any residential accommodation on lower levels to single-aspect apartments oriented to the east and west of the site.

As a result of the above, any apartments located at the northern end of Levels 1, 2 and 3 would be subject to limited natural light access and therefore very poor amenity.

The placement of car parking on Levels 1, 2 and 3 will enable better residential amenity outcomes, as a result of the following:

- the proposed above-ground parking enables the creation of a building podium that will facilitate the placement of residences and commercial tenancies at both higher elevations and/or towards the southern parts of the site (i.e. away from slopes contributing to internal overshadowing), thereby improving natural light access and residential amenity
- noting that the part of the site proposed to be used as above-ground parking is already being used for parking, the proposed design of such facilities will:
 - provide for a minimum six-metre setbacks (compared to the zero-setbacks of the existing carpark)
 - provide for substantial landscaped areas within those side setback, in addition to high-quality design incorporating and external materials.

It is therefore submitted that the proposed design, whilst not compliant with the DCP (and subsequently the FSR development standard) will enable improved amenity outcomes. For such reasons, compliance with the FSR development standard is therefore considered to be unreasonable and unnecessary in the circumstances of this proposal.

Lack of significant or unreasonable impacts on surrounding sites and the public domain

The submitted architectural plans and modelling (both as submitted and subsequently amended) and the SEE submitted as part of this application, demonstrate that the proposed variation to the FSR development standard will not significantly, nor adversely affect, surrounding sites and the public domain. The justification is that the proposal will:

- not give rise to adverse visual privacy impacts (particularly from the Fitzsimons Lane frontage)
- not excessively or unreasonably overshadow adjoining sites
- provide sufficient space around the periphery of the site for suitably sized deep soil areas that includes the retention of numerous large canopy trees.



Compliance with the FSR development standard (which would substantially reduce the size of the development without providing significantly improved amenity outcomes) is therefore unreasonable and unnecessary in the specific circumstances of this particular proposal.

Lack of visual impact from surrounding sites and the public domain

As indicated within the previous environmental planning ground above, the proposed design was selected over one with a more compliant building height as it responds better to the constraints of the site.

Despite the variation to the FSR development standard, the proposed development's design is responsive to the site's conditions, and will support built form outcomes including bulk and scale that are likely to be perceived from the public domain (i.e. the Merriwa Street and Fitzsimons Lane road reserves) as being consistent with surrounding high-density development.

While reference is also made to the assessment of the objectives pursuant clause 4.4(1) of the KLEP 2015 (refer to Section 5.1 of this written request), potential visual impacts created by the placement of parking on Levels 1, 2 and 3 (and the subsequent FSR variation) will be mitigated by the following:

- the high levels of building articulation on the buildings southern end (which will include progressively increased setbacks within higher parts of the building)
- reducing the perceived height of the northern end of the building, by utilising the higher ground levels in/adjacent to the Fitzsimons Lane road reserve
- to provide a building form that will present as a five-storey building when viewed from Fitzsimons Lane (refer to **figure 5** below)
- substantially increasing existing side setbacks, combined with the restoration of ground levels outside of the proposed building envelope:
 - once works are complete, the built form of the development will appear to be excavated into an existing slope, which will reduce the apparent bulk and scale of the northern end of the development, particularly as viewed from the Fitzsimons Lane road reserve.



Figure 5: An extract of the photomontage for the proposed development, as viewed from the Fitzsimons Lane frontage (i.e. the public domain area closest to the proposed parking on Levels 1, 2 and 3).

Source: Luda Studios, 2024

As such, the perceived height, bulk and scale of the proposed development will appear to be consistent with that of surrounding mixed use and high-density residential sites that address Fitzsimons Lane and the northern side of Merriwa Street.

Compliance with the FSR development standard in this particular instance is therefore unreasonable and unnecessary, given that the proposed FSR variation will not give rise to adverse visual impacts.

Provision of suitably sized and designed housing

The proposed development seeks to provide for a larger proportion of family sized apartments, in particular three- and four-bedroom homes, with the intent of providing housing that:

- comprises of larger, accessible, high-quality and high-amenity apartments in relatively close proximity to public transport, retail premises and services within the Gordon Local Centre
- is located within a high amenity setting
- can cater for changing local demographics.

Council's Local Strategic Planning Statement (LSPS) recognises such changing demographics, noting that:

- 55% of households are family households with children
- the Ku-ring-gai LGA is home to an increasingly large proportion of Culturally And Linguistically Diverse (CALD) households
- the Ku-ring-gai LGA's population of persons aged 65 and above is projected to increase by 49% by 2036.



Further, the LSPS has also found that families from CALD backgrounds have differing family structures that often comprise of numerous generations living within the same household.

Both the proposed number of apartments and their diversity (in terms of number of bedrooms, floor areas, layouts and variable configurations) have been designed in response to such demographic changes (in particular multi-generational living). It is therefore submitted that the proposed gross floor space is both required and suitable for the area, to reduce gross floor space to comply with the development standard will subsequently reduce:

- the number of proposed apartments
- the size and diversity of such apartments, noting that their variable sizes and designs seek to cater for anticipated demographic changes within the Ku-ring-gai LGA.

Noting the technical nature of the proposed variation to the FSR development standard and its relative lack of impact, to require compliance with that development standard would require:

- significant reductions to the amount of floor space (thereby substantially reducing the number of apartments that have been designed to cater for an identified residential demand within the local area)
- design changes that would significantly reduce the amenity of the proposed apartments.

We submit that either of these outcomes would reduce the social benefits presented by this proposal, and to reduce the amount of floor space to comply with the development standard (particularly given the lack of adverse impacts associated with the variation) is therefore considered to be unnecessary and unreasonable in the circumstances of this particular proposal.

To summarise, the design of the proposed development responds well to the unique constraints of the site and, despite the proposed variation to the FSR standard, will not give rise to significant, adverse and/or unreasonable impacts. To require compliance with the building FSR would require either:

- relocating all car parking to basement areas, and/or
- a very substantial reduction in habitable floor area.

As demonstrated above, to undertake one or both of these changes would likely result in:

- worsened environmental impacts
- worsened residential amenity, and/or
- a substantial reduction in the number of proposed dwellings, which would reduce the social benefits to be delivered by this proposal.

For the reasons outlined above, it is evident that there are sufficient and substantive environmental planning grounds to justify contravention of the FSR development standard, and why compliance with that standard would be unreasonable and unnecessary in the specific circumstances of this particular proposal.



6 Conclusion

Having regard to the provisions within both clauses 4.4(2) and 4.6 of the KLEP 2015, we have formed the considered opinion that:

- the development is consistent with the objectives of the FSR development standard pursuant to clause 4.4(1) of the KLEP 2015
- the application does not propose a variation to a clause that is subject to the application of clause 4.6(8) of the KLEP 2015
- there are sufficient environmental planning grounds to justify contravening the FSR development standard prescribed by clause 4.4(2) of the KLEP 2015
- that having regard to a) and b), compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of the case.

Pursuant to clause 4.6(3) of the KLEP 2015, the consent authority can therefore be satisfied that the applicant's written request has adequately 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.*

In conclusion, we believe that the variation is an outcome of a design that is responsive to the unique conditions of the site and that has sought to both maximise residential amenity and minimise environmental impacts. We believe that such a design and the associated FSR contravention present better planning and design outcomes when compared to an alternative and more compliant option. Further, we have formed the considered opinion that there is no statutory or environmental planning impediment to the approval of the mixed-use development and any deemed FSR contravention in this particular instance.

As this written request has satisfied statutory requirements pursuant to clause 4.6 of the KLEP 2015, the proposed variation to the FSR development standard can be approved.



mecone.com.au
info@mecone.com.au
02 8667 8668