

**Clause 4.6 variation request – Floor Space Ratio
Residential flat building development
Lot 1, DP 973520, 17 Shirley Road, Roseville
Lot 1, DP 972422, 19 Shirley Road, Roseville
Lot 1, DP 972554, 21 Shirley Road, Roseville
Applicant: Lindfield Estate Pty Limited**

1.0 Introduction

This updated clause 4.6 variation request has regard to the following amended Architectural plans prepared by MX Architects:

DRAWING NO.	DRAWING TITLE	DATE ISSUED	REVISION NO.
AR 001	Cover Page	12/09/2025	3
AR 002	Site Plan	29/07/2025	2
AR 003	Demolition Plan	29/07/2025	2
AR 005	Location Plan	29/07/2025	2
AR 006	Site Analysis	12/09/2025	3
AR 006A	Site Analysis	29/07/2025	1
AR 007B	Basement 1m Height Above NGL	08/08/2024	1
AR 008	LEP Height Compliance	01/09/2025	5
AR 008A	LEP Height Compliance	12/09/2025	1
AR 009	Landscape Compliance	29/07/2025	2
AR 010	Deep Soil & C.O.S Compliance	12/09/2025	3
AR 011	Excavation Plan	10/04/2025	1
AR 012	Environmental Site Management Plan	10/04/2025	1
AR 014	Site Coverage	29/07/2025	1
AR 021	Shadow Diagrams - Winter (0900-1200)	29/07/2025	2
AR 022	Shadow Diagrams - Winter (1300-1500)	29/07/2025	2
AR 024	Shadow Comparison Diagrams - 21 June, 1pm	29/07/2025	1
AR 025	Sun Path Diagrams - Winter (0900-1200)	29/07/2025	2
AR 026	Sun Path Diagrams - Winter (1300-1500)	29/07/2025	2
AR 028	Site Photos	10/04/2025	1
AR 100	Basement 3 GA Plan	12/09/2025	10
AR 101	Basement 2 GA Plan	12/09/2025	10
AR 102	Basement 1 GA Plan	12/09/2025	11
AR 103	Ground Floor GA Plan	12/09/2025	10
AR 104	Level 1-3 (Typical) GA Plan	12/09/2025	8
AR 105	Level 4 GA Plan	12/09/2025	8
AR 106	Level 5-6 (Typical) GA Plan	12/09/2025	8
AR 107	Roof Terrace GA Plan	12/09/2025	8
AR 108	Roof Plan	09/09/2025	2
AR 400	Building Elevations - North & East	12/09/2025	3
AR 401	Building Elevations - South & West	12/09/2025	3
AR 410	Schedule of Finishes & Sample Board	10/04/2025	1
AR 420	Photo Montage 1	10/04/2025	1
AR 421	Photo Montage 2	10/04/2025	1
AR 601	Building Section	11/09/2025	3
AR 610	Loading Dock & Parking Entry	05/08/2025	2
AR 900	Glazing Type Schedule	09/09/2025	2
AR 950	Storage Schedule	12/09/2025	1
AR 990	Notification Plan - Site Plan	10/04/2025	1
AR 991	Notification Plan - Elevations	10/04/2025	1
AR 992	Notification Plan - Elevations	10/04/2025	1

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 State Environmental Plan Policy (Housing) 2021 (SEPP Housing)

2.1 Chapter 5, clause 155(4)(a) – Maximum floor space ratio

Pursuant to clause 155(4)(a) of SEPP Housing the maximum floor space ratio (FSR) for a residential flat building in a Transport Oriented Development (TOD) Area is 2.5:1. The subject site is located within a mapped TOD Area.

It has been determined that the proposal has a total GFA, as defined, of 8636.06m² representing an FSR of 2.58:1 and a non-compliance of 286.06m² or 3.4%. The GFA calculation includes 292m² of floor space occupied by 19 carparking spaces located within Basement 3 on the basis that these spaces are in excess of the maximum number allowed to be excluded from the calculation of GFA pursuant to clause 7B.1 of Ku-ring-gai Development Control Plan (KDCP) an extract of which is over page.

Car parking rates

- 9 The following parking ranges apply to residential flat developments on sites within 800m walking distance of a railway station entry:

Apartment Size	Minimum number of parking spaces per dwelling	Maximum number of parking spaces per dwelling
Studio	0 spaces	0.5 spaces
One bedroom	0.6 spaces	1 space
Two bedrooms	1.0 space	1.25 spaces
Three or more bedrooms	1.4 spaces	2 spaces

Car parking exceeding the requirements of the parking controls in the above table will not be excluded from the Gross Floor Area as defined in the KLEP.

The carparking calculations are as follows:

Number of 2 bedroom units (including 2B+TV without windows) – 37

- Maximum rate $1.25 \times 37 = \underline{46.25 \text{ spaces}}$

Number of 3 bedroom units (including 2B+TV with windows) - 23

- Maximum rate $2.0 \times 23 = 46$ spaces

Total maximum car spaces = 92 spaces (92.25 rounded down)

As the proposal provides for a total of 111 car parking spaces the GFA calculation includes the area of 19 carparking spaces located within Basement 3 as depicted on the plan extract over page.

In the event that these basement level carparking spaces were converted to storage or plant rooms, which are not GFA as defined, the proposal would have a total GFA as defined of 8344.38 representing a compliant FSR of 2.49:1.

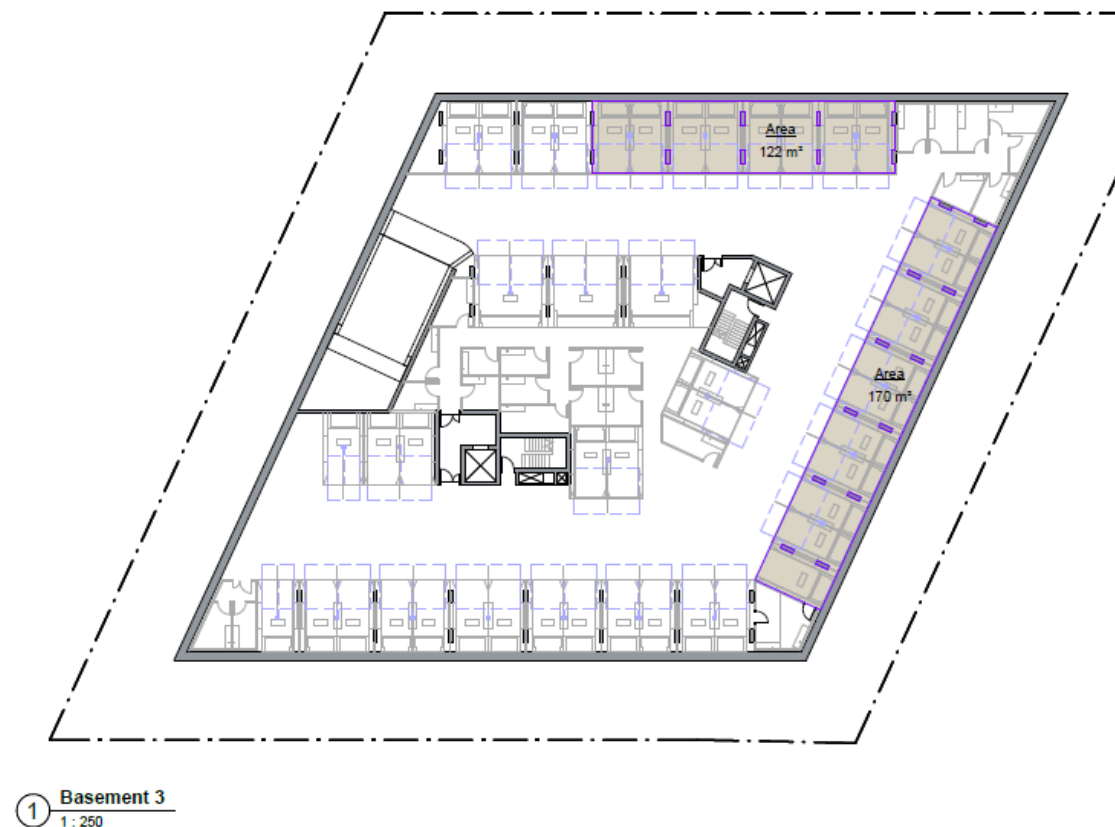


Figure 1 – Basement 3 plan extract showing the location of the floor space associated with the non-compliant carparking.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of KLEP provides:

- (1) *The objectives of this clause are:*
- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of KLEP provides:

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.

This clause applies to the clause 155(4)(a) of SEPP Housing maximum FSR development standard.

Clause 4.6(3) of KLEP provides:

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 that:

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed development does not comply with the FSR provision at clause 155(4)(a) of SEPP Housing which specifies a maximum FSR however strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

- 17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
- 18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
- 19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*

20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 155(4)(a) of SEPP Housing a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard

4.0 Request for variation

4.1 Is clause 155(4)(a) of SEPP Housing a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 155(4)(a) of SEPP Housing prescribes a density standard that seeks to control the bulk and scale of certain development. Accordingly, clause 155(4)(a) of SEPP Housing is a development standard.

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

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first way, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

First way - Consistency with objectives of the standard

There are no stated objectives associated with the clause 155(4)(a) FSR standard although the aims of Chapter 5 of SEPP Housing are as follows:

- (a) to increase housing density within 400m of existing and planned public transport,*
- (b) to deliver mid-rise residential flat buildings, seniors housing in the form of independent living units and shop top housing around rail and metro stations that—*
 - (i) are well designed, and*
 - (ii) are of appropriate bulk and scale, and*
 - (iii) provide amenity and liveability,*

- (c) to encourage the development of affordable housing to meet the needs of essential workers and vulnerable members of the community.*

The non-compliant FSR is located within Basement 3 which is subterranean in nature and accordingly the non-compliance does not contribute to the bulk and scale of the development in any discernible manner. Accordingly, the FSR non-compliance does not compromise the development's ability to achieve the aims of the Chapter noting that the additional car parking will contribute to the amenity of the apartments benefiting from the car parking spaces.

Notwithstanding the FSR non-compliance the aims of the Chapter are achieved.

I also consider it appropriate to assess the proposed FSR non-compliance against the objectives of the FSR standard contained at clause 4.4 KLEP to the extent that they do not derogate from Chapter 5 provisions of SEPP Housing.

An assessment as to the consistency of the proposal when assessed against the objectives of clause 4.4 KLEP 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,*

Response: The non-compliant FSR is located within Basement 3 which is subterranean in nature and accordingly the non-compliance does not contribute to the bulk and scale of the development in any discernible manner. That is, the conversion of the excess car spaces to storage or plant rooms which are not included in the GFA calculation would bring FSR into compliance without any change to the proposed building form or footprint.

Accordingly, the non-compliant FSR does not prevent the proposed built form and density from being compatible with the size of the land to be developed, its environmental constraints and its contextual relationship. This objective is achieved notwithstanding the non-compliant FSR proposed.

- (b) to provide for floor space ratios compatible with a range of uses,*

Response: For the reasons previously outlined this objective is achieved notwithstanding the non-compliant FSR proposed.

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

Response: For the reasons previously outlined this objective is achieved notwithstanding the non-compliant FSR proposed.

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

Response: N/A

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as a development compliant with the standard. Given the developments consistency with the objectives of the FSR standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

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.

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.

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].

Sufficient environmental planning grounds

Ground 1 - Minor nature of breach and absence of impact

The FSR non-compliance is appropriately described both quantitatively and qualitatively as minor. I am satisfied that the FSR breaching floor space does not contribute to building height, bulk or scale. The above ground floor space is compliant with the FSR standard and accordingly the building will be compatible with the desired future character of the precinct as anticipated by the Chapter 5 TOD provisions of SEPP Housing.

I am also satisfied that the building height breaching elements will not give rise to any streetscape or residential amenity impacts. Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSWLEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [2021] NSW LEC 1242, the particularly small departure from the actual numerical standard and absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.

Ground 2 – Aims of Chapter 5 SEPP Housing

The non-compliant FSR is located within Basement 3 which is subterranean in nature and accordingly the non-compliance does not contribute to the bulk and scale of the development in any discernible manner. Accordingly, the FSR non-compliance does not compromise the development's ability to achieve the aims of the Chapter noting that the additional car parking will contribute to the amenity of the apartments benefiting from the car parking spaces.

Notwithstanding the FSR non-compliance the aims of the Chapter are achieved.

Ground 3 - Objectives of the Environmental Planning and Assessment Act 1979

Approval of the variation to the FSR standard will enable the development to achieve the habitable FSR anticipated by the TOD provisions and in doing so promote the orderly and economic use and development of the land consistent with objective 1.3(c) of the Act.

Approval of the FSR variation will promote the delivery of affordable housing consistent with objective 1.3(d) of the Act.

There are sufficient environmental planning grounds to justify contravening the development standard.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of an FSR variation in this instance.

Boston Blyth Fleming Pty Limited



Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

15.9.25