

## Section 4.6 Exceptions to development standards: Written variation request – Floor space ratio

---

Construction of a new residential flat building containing thirty-nine (39) dwellings, basement car parking to Chapter 2, Part 2, Division 1 – In-Fill Affordable Housing of *State Environmental Planning Policy (Housing) 2021*

15-17 Lupin Avenue & 82 Belmore Street, Fairfield East  
Lot 185 in DP 15560, Lot 1 & 2 DP 1154467

Prepared for: BlueCHP

Project No: E867

Date: November 2024

Version: B

**Document Control**

Creative Planning Solutions works to a stringent Quality Assurance Program.

If this document has not been signed for review and approval then it is deemed a preliminary draft.



Prepared by:

Brendon Clendenning – Principal  
Planner

Reviewed by:



Daniel Govers – Director



Authorised by:

Daniel Govers – Director

**© Copyright CREATIVE PLANNING SOLUTIONS PTY LIMITED 2024**

This document is copyrighted; reproduction of this document or any part thereof is not permitted without prior written permission of Creative Planning Solutions Pty Limited.

**Disclaimer:**

In preparing this document, Creative Planning Solutions has relied upon information and documents provided by the Client or prepared by other Consultants within their various areas of expertise.

Creative Planning Solutions is unable to, and does not, accept responsibility for any errors or omissions in any of the material provided by other parties.

**Section 4.6 Written Request to Vary a Development Standard  
Fairfield Local Environment Plan 2013**

---

<b>Applicant's name</b>	BlueCHP
<b>Site address</b>	15-17 Lupin Avenue & 82 Belmore Street, Fairfield East (Lot 185 in DP 15560, Lot 1 & 2 DP 1154467)
<b>Proposal</b>	Construction of a new residential flat building containing thirty-nine (39) dwellings, basement car parking to Part 2, Division 1 – <i>In-Fill Affordable Housing of State Environmental Planning Policy (Housing) 2021</i> .
<b>Environmental Planning Instrument</b>	<i>Fairfield Local Environmental Plan 2013</i>
<b>Development standard to be varied</b>	Section 4.4(2) – Floor space ratio

---

Creative Planning Solutions (CPS) has prepared this report on the behalf of BlueCHP, as part of a Development Application to Fairfield Council (Council).

Contained within this report below is the written request relating to the proposed variation to Section 4.4 of *Fairfield Local Environmental Plan 2013* (FLEP 2013) in accordance with the provisions of Section 4.6 of FLEP 2013. This written request relates to plans prepared by Loucas Architects that are submitted to Council as part of an amended development application package.

### Details of development standard sought to be varied

Section 4.4 of FLEP 2013 prescribes the maximum floor space ratio for land to which the plan applies. The relevant provisions of section 4.4 are reproduced below:

#### **4.4 Floor space ratio**

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

- (a) *to provide an appropriate density of development consistent with the established centres hierarchy,*
- (b) *to ensure building density, bulk and scale make a positive contribution toward the desired built form as identified by the established centres hierarchy,*
- (c) *to control building density and bulk in relation to the site area and within building envelopes to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,*
- (d) *to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation,*
- (e) *to reduce the visual impact of development by limiting floor space to ensure that a building's bulk and scale are appropriate for the site,*
- (f) *to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,*
- (g) *to establish the maximum development density and intensity of land use, having regard to the availability of infrastructure and generation of vehicular and pedestrian traffic,*
- (h) *to facilitate design excellence by ensuring the extent of floor space in building envelopes leaves generous space for the articulation and modulation of design,*
- (i) *to provide an appropriate correlation between the size of a site and the extent of any development on that site.*

(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.*

**Note—**

*See Part 7 for exceptions to the maximum floor space ratio for buildings in the Cabramatta and Fairfield Town Centres.*

The Floor Space Ratio Map prescribes a maximum floor space ratio of 2:1 to the subject site. However, the floor space ratio that applies to the site is not determined by the Floor Space Ratio Map, but the provisions of section 4.4A, reproduced below.

#### **4.4A Exceptions to maximum floor space ratio in Zone R4**

(1) *This clause applies to land in Zone R4 High Density Residential (excluding any land in Bonnyrigg, Cabramatta, Canley Vale and Fairfield Heights).*

(2) *Despite clause 4.4, the maximum floor space ratio for a building on land to which this clause applies is as follows—*

- (a) *if the building has a street frontage of less than 30 metres—0.8:1,*
- (b) *if the building has a street frontage of at least 30 metres, but less than 45 metres—*
  - (i) *1.25:1 if the site has a depth of less than 40 metres, or*
  - (ii) *1.5:1 if the site has a depth of at least 40 metres,*
- (c) *if the building has a street frontage of at least 45 metres—*
  - (i) *1.5:1 if the site has a depth of less than 40 metres, or*
  - (ii) *2:1 if the site has a depth of at least 40 metres.*

In addition, the development is affected by section Chapter 2, Part 2, Division 1 of *State Environmental Planning Policy (Housing) 2021* (“the Housing SEPP”). This policy has been amended since the lodgement of the development application; however, the savings provision under clause 8 of schedule 7A of the Housing SEPP, indicate that the amendments made by the amending instrument, *State Environmental Planning Policy Amendment (Housing) 2023*, do not apply to development applications that were already made but not finally determined.

As the entirety of the gross floor area of the development is to be used for affordable housing, pursuant to section 17 of the Housing SEPP, an FSR bonus of 0.5:1 applies to the development. This provides a total permissible FSR equal to that permitted by section 4.4A of FLEP 2013 plus 0.5:1. The subject site has a depth of at least 40 metres; however, does not contain a single street frontage that exceeds 45m but instead contains two street frontages that exceed 40m and, combined, exceed 45m. The development application was accompanied by legal advice from Bartier Perry (“the Legal Advice”), indicating that the combined street frontage could be used to determine that a floor space ratio of 2:1 applies under section 2(c)(ii) of FLEP 2013 (with the bonus under the Housing SEPP increasing this to 2.5:1).

Council correspondence, dated 23 December 2023, states that the position of Bartier Perry is not accepted and that the development application seeks a floor space ratio non-compliance. Although not stated within the Council correspondence, it is understood that the position of Council is that a floor space ratio of 1.5:1 applies under section 2(b)(ii) of FLEP 2013 (with the bonus under the Housing SEPP increasing this to 2:1).

While this position is not accepted by the applicant, for abundant caution, this variation request is provided to fulfil a statutory requirement for a written variation, which would apply in the event that the advice of Bartier Perry is not correct (or at least, not accepted in the determination of the application). Therefore, the language of this variation request (for instance, reference to a “non-compliance”) should not be interpreted as a surrender to Council’s position.

The proposed development has a floor space ratio of 2.07:1, which would exceed the floor space ratio permitted by section 2(b)(ii) of FLEP 2013 and section 17 of the Housing SEPP. This non-compliance would result in a 3.5% variation to the development standard.

#### **Section 4.6 Exceptions to Development Standards – *Fairfield Local Environment Plan 2013***

Section 4.6 of the FLEP 2013 is the mechanism by which the consent authority is able to grant consent to a development despite a non-compliance(s) with a prescribed development standard. On 1 November 2023, after the lodgement of the development application, DA 294.1/2023, section 4.6 was amended by *Standard Instrument (Local Environmental Plans) Amendment (Exceptions to Development Standards) Order 2023*.

The section is reproduced below:

- (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)*
  - (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—*
    - (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
    - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

(7) *(Repealed)*

(8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*

- (a) a development standard for complying development,*
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
- (c) clause 5.4,*
- (caa) clause 5.5.*

**Note:** The development application does not propose a variation to any of the provisions referred to within section 4.6(8).

**Section 4.6(3) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the development standard**

Compliance with the maximum floor space ratio development standard has been determined to be unreasonable and unnecessary in the circumstances of the case, and the following outlines the environmental planning grounds for the proposed variation:

1. Compliant on the basis of a “sliding scale” FSR

There are no objectives associated section 4.4A of FLEP 2013. However, it is evident that the provision is aimed at delivering a higher floor space ratio on land that is well dimensioned. Within section 4.4A, the FSR increases with both the length of the frontage and the depth of the site. The section can be interpreted as acknowledging that there are environmental planning grounds for the higher FSR on sites with longer dimensions. However, there is no “sliding scale” associated with either the frontage length or the site depth. Instead, as a site increases in either dimension, FSR only increases once a certain threshold is exceeded, and it then increases sharply at those thresholds.

It is understood that it is accepted that the site has a depth of greater than 40m. Therefore, the FSR is dependent on the length of the frontage. For a frontage from 30m – 45m, the FSR is 1.5:1, and it then increases sharply to 2:1, once the threshold of 45m is exceeded. Therefore, a site with a frontage of 45.01m would have an FSR of 2:1, which is 33.3% higher than the FSR that would apply to a site with a 44.99m frontage, despite it having a frontage which is only 0.02m (0.04%) longer. In these hypothetical circumstances, the FSR increase is 825 times higher than the frontage increase.

It is understood that the dimension of 45m is relatively arbitrary and is not based upon any specific characteristic of floor space that exists on sites with frontages above 45m. Although clause 4.4A does not provide a “sliding scale”, adapting an incremental sliding scale to land with frontages

between 30m and 45m, provides an understanding of the reasonableness of the proposed floor space ratio on the site.

The length of the western (Lupin Street) frontage is 41.55m and the length of the eastern (Belmore Street) frontage is 41.29m and the table below depicts the FSR that would be permitted with a sliding scale.

Street Frontage	Depth	FSR increase (LEP)	FSR (sliding scale)
30m	40m	1.50	1.50
31m	40m	1.50	1.53
32m	40m	1.50	1.57
33m	40m	1.50	1.60
34m	40m	1.50	1.63
35m	40m	1.50	1.67
36m	40m	1.50	1.70
37m	40m	1.50	1.73
38m	40m	1.50	1.77
39m	40m	1.50	1.80
40m	40m	1.50	1.83
41m	40m	1.50	1.87
<b>41.29m (Belmore Ave frontage)</b>	<b>40m</b>	<b>1.50</b>	<b>1.88</b>
<b>41.55m (Lupin St frontage)</b>	<b>40m</b>	<b>1.50</b>	<b>1.89</b>
42m	40m	1.50	1.90
43m	40m	1.50	1.93
44m	40m	1.50	1.97
45m	40m	2.00	2.00

The table above shows that the application of a sliding scale to the two site frontages would provide an FSR of 1.88:1 based upon the Belmore Street frontage (2.38:1 with the bonus available under the Housing SEPP) and an FSR of 1.89:1 based upon the Lupin Avenue frontage (2.39:1 with the bonus available under the Housing SEPP). In the understanding that there are environmental planning grounds for a higher FSR on sites with longer frontages, and that the dimension of 45m is relatively arbitrary, the application of an FSR of up to 2.39:1 is justified on this basis alone.

## 2. Underlying purpose of section 4.4A

Section 4.4A was considered in depth within *Sun Life Dior Pty Ltd ATF Sun Life Dior Unit Trust v Fairfield Council* [2020] NSWLEC 1087. This appeal related to a six-storey residential flat building containing two basement levels of parking at 7-11 Weston Street, Fairfield. In her findings, Dixon SC notes that:

*“The underlying purpose of the FSR standard in cl 4.4A is to ensure that development provides suitable bulk and scale commensurate with the area of the site. The planners agree that as the widths and depths of a site increase, so too does the maximum FSR that may be achieved”.*



The development site featured an irregular rear boundary, with parts of the site being deeper than 40m, and other parts of the site being less than 40m in depth, as shown in the image below:

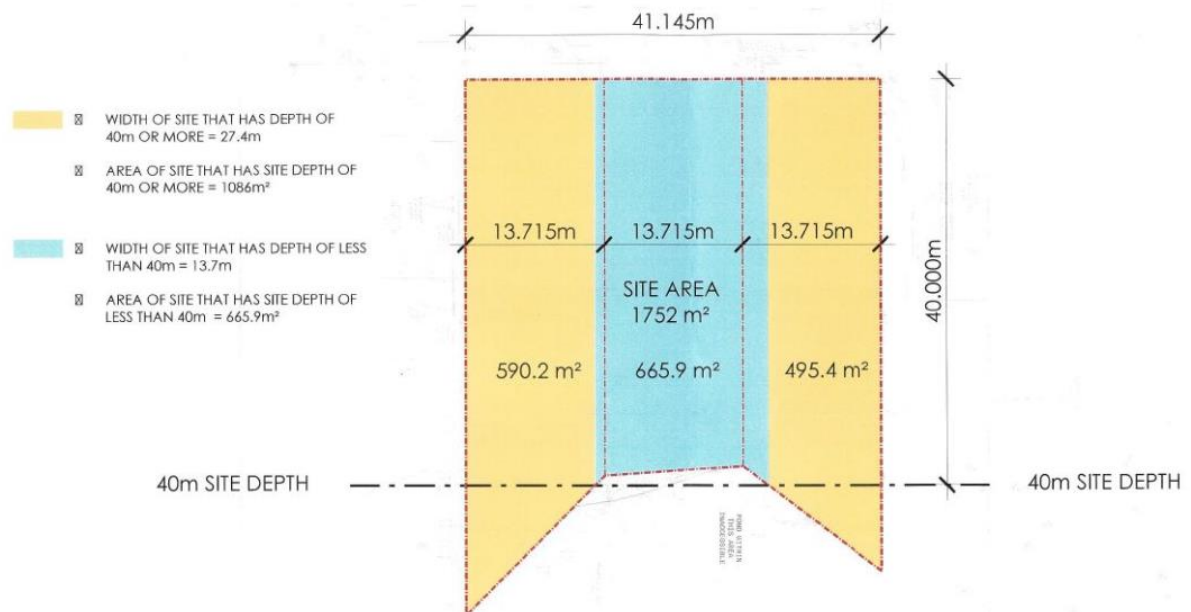


Figure 1 Site depth at 7-11 Weston Street, Fairfield

Council had argued that the depth did not exceed 40m as part of the site was not provided with the threshold depth. The Senior Commissioner disagreed as follows:

*“The applicant’s construction is perfectly consistent with underlying purpose of the clause agreed by the experts and with the implementation of the aims and objectives of the LEP with respect to the land use identified as permissible with consent. In those circumstances I would regard another construction as being irrational in the relevant sense”.*

The comments demonstrate that the purpose of section 4.4A is to provide higher FSR to well-dimensioned sites, and that a relatively liberal interpretation of the provision is appropriate. This is consistent with the notion that – irrespective of the legal interpretation – there is sound logic in the provision of an FSR under FLEP 2013 of between 1.5:1 and 2:1 (therefore up to 2.5:1 under the Housing SEPP).

### 3. Opportunities associated with two frontages

The Legal Advice had provided reasons that the combined street frontage could be used to determine that a floor space ratio of 2:1 applies under subsection 4.4A(2)(c)(ii) of FLEP 2013 (with the bonus under the Housing SEPP increasing this to 2.5:1) and the Council correspondence, dated 23 December 2023, states that the position of Bartier Perry is not accepted. The Council correspondence states that this is because both frontages have a clear and distinct presentation and identity, therefore it is considered that the term ‘street frontage’ referred to in the subject clause is in the singular, rather than a combined basis.

However, there is no basis within clause 4.4A for which a consideration of presentation and identity can be made. If the minimum numerical threshold is met, the higher FSR is applicable, if it is not met, then the higher FSR is not applicable. That aside, in the understanding that there are environmental planning grounds for a higher FSR on sites with longer frontages, and that the dimension of 45m is relatively arbitrary, the application of a higher FSR for sites with two frontages that fall marginally short of the 45m dimensions, is provided with a sound environmental planning, and possibly also, legal, basis.

It stands to reason that if a site were provided with two frontages which both exceeded 45m, that the environmentally planning grounds for a higher FSR (such as 2:1, or perhaps higher still) should also be stronger. It therefore also stands to reason that, in the circumstances of the subject site, the presence of two frontages which are closer in length to 45m, than they are to 30m, provides stronger environmental planning grounds for the proposed FSR of 2.19:1

In essence, a site with two relatively long frontages, is generally either provided on a corner or fronting two parallel roads, and the corner location is a more favourable location for higher densities, than a site fronting two parallel roads, and both are more favourable than a midblock lot. There are a number of reasons for this, and some are listed below, along with commentary on how they are applied to the proposed development.

- Unlike midblock sites (i.e., those with a single frontage), corner sites and parallel road sites, provide an opportunity for a frontage that is free from utility or servicing space, such as that associated with vehicular circulation and bin storage, and which are ordinarily excluded from gross floor area. In this instance, the bin store and driveway are each located on the Lupin Avenue frontage, leaving the Belmore Street frontage to be provided solely with dwelling floor space. The overall size of the building is therefore lower relative to an alternative arrangement.
- Corner buildings provide an opportunity to give visual prominence to a corner, through the concentration of building mass to that corner. This is encouraged by FDCP 2013, with each of the above provisions effectively encouraging higher densities at corner locations.
  - Section 7.4.3(c) states that buildings may be provided with narrower secondary street setbacks if it provides a feature to the corner and results in a good (sic) urban design outcome and enhances the streetscape.
  - Section 7.4.4(f) states that *“building facades should express important corners by giving visual prominence to parts of the facade, for example, a change in building articulation, material or colour, roof expression or increased height”*.
- Rooftop communal open spaces are preferred per objective 4N-2 of the *Apartment Design Guide* and corner allotments are ideal locations for rooftop communal open spaces, particularly in instances where a northern aspect is available. The rooftop communal open space provides excellent amenity given the generous aspects and solar access available. The rooftop area also enables the provision of deep soil and landscaped areas within side setback areas, which minimises the apparent building bulk when viewed from the sites which adjoin to the south and east.

### 3A. Expansion of issues identified in points 1, 2, accounting for amendments to the Housing SEPP.

Following further discussions with Council and the Regional Panel, and setting aside the disagreement as to the appropriate FSR (2:1 according to Council, and 2.5:1 according to the Legal Advice, each accounting for the 0.5:1 affordable housing bonus), further comments are provided to further expand upon point 1, 2 above:

- (a) The intent of section 4.4A of *Fairfield Local Environmental Plan 2013* (FLEP 2013) appears to be to provide higher permitted FSR as the frontage and width of properties increase.
- (b) If either frontage were increased from ~41m to 45m, it is understood that Council would accept that the FSR is 2.5:1, even if the lot size were unchanged.
- (c) Conversely, if either of the frontages were reduced to 30m, and the maximum depth reduced to 40m, the FSR would not change, and Council would maintain that the FSR is 2:1 (which is agreed to by the applicant). This would also apply to a midblock property that is not located at a corner.
- (d) Given the apparent intent of the control, there must be an acceptance that an FSR of somewhere between 2:1 to 2.5:1 is reasonable for the subject site, especially when:
  - i. the proposed FSR is much closer to 2:1 than it is to 2.5:1,
  - ii. the site is provided with two frontages, each that are very close to meeting the 45m threshold which would increase the FSR to 2.5:1,
  - iii. the overall area required for setbacks is less than that which would be required for a midblock lot, and
  - iv. the proposal provides 100% affordable housing, with 50% affordable housing being sufficient to receive the FSR bonus.

In relation to the final point above, it is important to note that the changes to the Housing SEPP are also relevant to this discussion, and strengthen the rationale for the variation. The amended version of the SEPP, which does not apply to this development application, provides a proportionately higher FSR bonus for a proportionately lesser provision of affordable housing. An affordable housing component of only 15% would give a bonus of 30%, and this is the maximum bonus that can be applied.

If a 2:1 baseline FSR applied, then under the new SEPP, the bonus would increase to 0.6:1, giving a total FSR of 2.6:1, which is higher than the 2.5:1 put forward in the Legal Advice. In fact, the FSR bonus would be higher than 0.5:1 for any baseline FSR that was over 1.67:1. However, adopting the position of Council, the baseline FSR would be 1.5:1, which would provide a reduced FSR of 1.95:1.

Under the current version of the SEPP, points (a), (b), and (d)(iv) above could be rewritten as follows:

- If either frontage were increased from ~41m to 45m, it is understood that Council would accept that the FSR under the amended Housing SEPP is 2.6:1, even if the lot size were unchanged.
- Conversely, if either of the frontages were reduced to 30m, and the maximum depth reduced to 40m, the FSR would not change, and Council would maintain that the FSR under the

amended Housing SEPP is 1.95:1 (which would be agreed to by the applicant). This would also apply to a midblock property that is not located at a corner.

- The proposal provides 100% affordable housing, with 15% affordable housing being sufficient to receive the 30% FSR bonus.

Therefore, the starkness of the impact of variations in the site frontage and width is exacerbated when accounting for the amended Housing SEPP, and the anomalies created by section 4.4A are not explained by any town planning rationale.

Setting aside all of the above, it is possible that there is an alternative underlying intent to section 4.4A; for instance, its purpose may be to encourage lot amalgamation. The development seeks to consolidate three lots, and is therefore also consistent with this objective.

Under the current version of the SEPP, points (a), (b), and (d)(iv) above could be rewritten as follows:

- If either frontage were increased from ~41m to 45m, it is understood that Council would accept that the FSR under the amended Housing SEPP is 2.6:1, even if the lot size were unchanged.
- Conversely, if either of the frontages were reduced to 30m, and the maximum depth reduced to 40m, the FSR would not change, and Council would maintain that the FSR under the amended Housing SEPP is 1.95:1 (which would be agreed to by the applicant). This would also apply to a midblock property that is not located at a corner.
- The proposal provides 100% affordable housing, with 15% affordable housing being sufficient to receive the 30% FSR bonus.

Therefore, the starkness of the impact of variations in the site frontage and width is exacerbated when accounting for the amended Housing SEPP, and the anomalies created by section 4.4A are not explained by any town planning rationale.

Finally, in addition, it should be noted that the current version of the Housing SEPP would also provide a 30% height bonus to the development, such that a variation to the height of buildings standard would not be required.

#### 4. Social benefits and dwelling yield

The Fairfield Local Housing Strategy 2022 ('FLHS') has found that *'the waiting list for social housing within the City is in excess of 15 years, with homelessness experienced by humanitarian entrants hidden and not easily quantifiable. In addition, the lack of affordable housing also results in overcrowding and negative impact of mental health and wellbeing.'*

As the proposed development is to be occupied by affordable housing, dwelling yield is critical to maximising the social benefit to be gained by such a project. This is in line with Planning Priority 2 of the FLHS which requires Council to *'Deliver greater housing diversity and affordability to meet the changing needs of the community'*.

Given the need for affordable housing within the Fairfield LGA, as referenced in the FLHS (specifically Planning Priority 2 and its associated actions), it is submitted that compliance with the development standard in this instance would be unreasonable and unnecessary. Given that the relatively minor breaches would have minimal adverse impact on the surrounding area, in particular the adjoining southern and eastern properties, for the consent authority not to support the minor non-compliance with floor space ratio standard, it would:

- Reduce the amount of housing available for the vulnerable members of the community and key workers; and/or
- Likely reduce the amenity (i.e., communal amenities) that could otherwise be afforded to the proposed apartments.

The additional 0.5:1 of FSR permitted by the Housing SEPP is providing in order to achieve identified town planning objectives. Section 3(b) of the Housing SEPP identifies one of the 8 principles of the policy as seeking to encourage *“the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability”*.

Similarly, section 1.3(b) of the *Environmental Planning and Assessment Act 1979* (“the Act”) identifies one of the 10 objects of the Act as seeking *“to promote the delivery and maintenance of affordable housing”*.

Residential flat buildings typically only contain affordable housing for either of two reasons: if the building is owned and operated by an affordable housing provider, or if a commercially-minded developer seeks to maximise yield through the provision of affordable housing (albeit for a temporary period). In the former instance, the provision of affordable housing is greater than the additional FSR allowed by the Housing SEPP, whereas in the latter instance, the provision of affordable housing is often no more than the minimum required to benefit from the additional FSR. It is evident that the former instance provides a greater contribution to the overall affordable housing stock than the latter, and therefore better meets the above identified town planning goals.

## 5. Acceptance of similar variations

Putting aside that the position of the applicant remains that there is no proposed FSR non-compliances, examples of similar FSR variations within the Fairfield LGA are described within Table 1 below.

**Table 1 – Examples of similar floor space ratio variations within the Fairfield LGA**

Application Details	Details of variation
DA 406.1/2019 34-36 Vine Street, Fairfield Approved on 14 December 2020	<i>A maximum FSR of 0.8:1 is permitted for this site based on the site frontage. However the Applicant has sought a variation to Clause 4.4A, seeking an FSR of 1.286:1 equal to a variation of Clause 4.4 of the Fairfield LEP 2013, allows for a maximum FS the development is consistent with other relevant planning instruments and it is</i>

	<p><i>considered that the Application provides an appropriate response to the characteristics of the site.</i></p> <p><i>It is considered that the variation sought will not result in an unacceptable environmental planning outcome. It is also considered that the development will be in the public interest because it is consistent with the objectives of the FSR standard and the objectives of the R4 High Density Residential zone and is therefore able to be supported in these circumstances.</i></p> <p>Source: Fairfield Council Variations Register Oct-Dec 2020</p>
<p>DA 43.1/2023 24-32 Hughes Street, Cabramatta Approved on 15 June 2023</p>	<p><i>The maximum floor space ratio for a building on any land is not to exceed the floor space ratio as specified on the Floor Space Ratio Map, which is 2:1. The proposed development will increase the floor area by 24m<sup>2</sup>, by infilling the floor area around the new lift, resulting in an increase to the total floor space ratio from 2.54:1 to 2.55:1.</i></p> <p>(Note that the permitted FSR in this location is 2:1).</p> <p>Source: Agenda of Fairfield Local Planning Panel - 15 June 2023.</p>

## 6. Minimal impacts on the surrounding area

The non-compliance does not create adverse and unreasonable impacts on the amenity of surrounding sites and the public domain in terms of privacy impacts, excessive solar access reduction, view loss and adverse streetscape impact.

The visual bulk of the development is focused towards the street corner, providing a strong presence to that corner as encouraged by FDCP 2013, and complemented by the alignment of the façades. This assists in minimising impacts associated with the additional floor space.

The most likely impact is that associated with overshadowing to dwellings located on land to the south, noting the variable setbacks to the southern boundary. The proposed development demonstrates that the east-west dimension of the site (40.255m at the southern boundary) is suitable to accommodate a building with predominantly east and west facing apartments, around a north-south oriented core. Therefore, solar access will generally be available from the primary aspect either to the east or the west, with neighbouring development to the south unlikely to feature a high number of dwellings with a single aspect to the north, irrespective of the floor space and proposed southern setback of the subject development.

On each level, the proposed development also contains a single aspect apartment oriented towards the north. If a similar arrangement were proposed on the development to the south, the sun eye view diagrams, provided with the amended application, demonstrate that the majority of these hypothetical central north-facing apartments would receive solar access between 9am and 11am

(the lowest two floors would be overshadowed at 11am), and would therefore be counted amongst the apartments with compliant solar access.

Furthermore, the highly articulated design of the building, and landscaped setting within which it is to be located, serve to minimise the visual impact of the additional floor space ratio. It is noted that substantial deep soil area, in excess of minimum requirements, is proposed within all boundary setback areas, largely due to the presence of communal open space on the rooftop, and these landscaped spaces are proposed to accommodate large trees that would filter and screen the development.

#### Consistency with objectives of the development standard

The objectives of the floor space ratio development standard (section 4.4), and a response to each demonstrating that such objectives would be satisfied are as follows (note there are no objectives to section 4.4A):

*(a) to provide an appropriate density of development consistent with the established centres hierarchy,*

**CPS response:** The subject site is not located within a local centre per Part 7 of FLEP 2013, nor is Fairfield East identified in the *Fairfield City Centres Policy 2015*, noting that the latter policy applies to non-residential areas. The proposed variation is not incompatible with this objective.

*(b) to ensure building density, bulk and scale make a positive contribution toward the desired built form as identified by the established centres hierarchy,*

**CPS response:** As indicated above, the site is not directly affected by an established centres hierarchy and the proposed variation is not incompatible with this objective.

*(c) to control building density and bulk in relation to the site area and within building envelopes to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,*

**CPS response:** As FSR represents a ratio of floor space to site area, the development standard, by inference, has a direct relationship with site area, with larger sites provided with a higher permitted gross floor area. This objective is somewhat superseded by the provisions of section 4.4A of FLEP 2013, as section 4.4A provides for a direct relationship between the *dimensions* of the site – rather than the area of the site – and the extent of development on that site. The proposed FSR is consistent with the intent of section 4.4A and the bulk and scale of the development is consistent with the desired future character of the locality, noting the relatively recent rezoning in 2020.

*(d) to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation,*

**CPS response:** The surrounding locality was rezoned on 17 December 2020. The gradual, but substantial transformation of the character of the locality is likely to commence in the near future, and the development does not impact upon areas that are not undergoing, or are not likely to undergo, a substantial transformation.

*(e) to reduce the visual impact of development by limiting floor space to ensure that a building's bulk and scale are appropriate for the site,*

**CPS response:** The scale of the development is typically controlled by the height of the development, and whilst a height non-compliance is also proposed, taller elements are centralised within the building to reduce their apparent scale. The visual bulk of the development is focused towards the street corner, providing a strong presence to that corner, completed by the alignment of the façades, and in these respects, the building's bulk is appropriate for the site.

*(f) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,*

**CPS response:** The non-compliance does not create adverse and unreasonable impacts on the amenity of the surrounding sites and the public domain in terms of privacy impacts, excessive solar access reduction, view loss and adverse streetscape impact. The additional floor space is partially tied to the strong emphasis of the street corner.

*(g) to establish the maximum development density and intensity of land use, having regard to the availability of infrastructure and generation of vehicular and pedestrian traffic,*

**CPS response:** As the development is subject to parking concessions available under the Housing SEPP, it is likely to introduce less vehicular traffic than a comparable market development with parking required by the local planning controls. The generation of pedestrian traffic deriving from the proposed variation is negligible.

*(h) to facilitate design excellence by ensuring the extent of floor space in building envelopes leaves generous space for the articulation and modulation of design,*

**CPS response:** The proposed design is exceptionally well modulated, with articulated facades, both in terms of materiality and form.

*(i) to provide an appropriate correlation between the size of a site and the extent of any development on that site.*

**CPS response:** As with objective (c), this objective is somewhat superseded by the provisions of section 4.4A of FLEP 2013, as section 4.4A provides for a direct relationship between the *dimensions* of the site – rather than the “size” of the site – and the extent of development on that site. As indicated in earlier commentary, the proposed FSR is consistent with the intent of section 4.4A.

**Consistency with objectives of the zone:**



The objectives of the R4 High Density Residential zone, and a response to each demonstrating that such objectives would be satisfied are as follows:

- *To provide for the housing needs of the community within a high density residential environment.*

**CPS response:** The proposal will deliver 39 dwellings as designated to affordable housing, high density residential development within an accessible area that provides for the housing needs of a diverse community including those with a lower-income and/or those experiencing financial and social disadvantage. The scale and nature of the development is consistent with that anticipated to be found within the future surrounding high-density residential environment.

- *To provide a variety of housing types within a high density residential environment.*

**CPS response:** The proposal will deliver a range of dwelling sizes in the form of one, two, and three-bedroom apartments within a high-density residential development, which is envisaged for the surrounding R4 zone. Furthermore, 100% of the dwellings are to be affordable housing. This supports the needs of the community in providing tangible benefits for residents, such as secure housing, and improved employment, educational and health outcomes.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

**CPS response:** The proposed development will not affect the capacity of surrounding allotments to provide services and/or facilities that would serve the daily needs of local residents.

- *To maximise opportunities for increased development on all land by encouraging site amalgamations.*

**CPS response:** The proposed development includes the amalgamation of three (3) separate allotments in order to provide sufficient area to accommodate the form of development envisaged for the R4-zoned land. Whilst, on one interpretation of section 4.4A, the amalgamation of the subject lots is not sufficient for consideration under subsection 4.4A(2)(c)(ii), the amalgamation to create two frontages of over 40m, with an FSR between 2:1 and 2.5:1, is consistent with the intent of this objective.

In summary, irrespective of the floor space ratio variation, the consent authority can be satisfied that the proposed development will satisfy the objectives of both the floor space ratio standard and R4 High Density Residential zone. The proposed development is therefore in the public interest.

## **Conclusion**

In summary, the proposal seeks to utilise the development potential afforded by the applicable development standards, including that given by the Housing SEPP. There are some areas of disagreement on the FSR that is permitted by FLEP 2013 and this variation request is provided for the purposes of abundant caution, in the event it is deemed a necessary prerequisite to the approval of the application.

Irrespective of the correct legal interpretation of the provision, it is evident that the provision is aimed at delivering a higher floor space ratio on land that is well dimensioned. The dimension of 45m is relatively arbitrary and is not based upon any specific characteristic of floor space that exists on sites with frontages above 45m. Viewed in this manner, it is appropriate that some flexibility be applied to the development standard and as noted in *Sun Life*, the provision supports the notion that “*as the widths and depths of a site increase, so too does the maximum FSR that may be achieved*”.

The corner location of the site not only provides for a legal interpretation of the standard that supports compliance, but in the event of a non-compliance, also provides sound town planning reasoning for the additional floor space, as supported by the provisions of FDCP 2013. This rationale is strengthened further when accounting for recent amendments made by *State Environmental Planning Policy Amendment (Housing) 2023*.

To enforce compliance with the floor space ratio standard will reduce dwelling yields and associated affordable housing provision. Further, the proposed variation to the floor space ratio standard will have minimal adverse impact on the surrounding sites and the locality more broadly, and would not present to surrounding areas in a manner that would be inconsistent with the future character of the area.

This variation request confirms that the proposal will positively contribute towards the existing and desired character of an area that permits six (6) storey buildings. The non-compliance will provide affordable housing options within the Fairfield LGA, without causing significant and unreasonable impacts on surrounding sites and the public domain in terms of visual privacy, solar access and/or visual amenity.

As a result, compliance with the floor space ratio development standard is found to be unreasonable and unnecessary in the specific circumstances of this proposal, and there are sufficient environmental planning grounds to justify contravention of the floor space ratio development standard. Given the above, the applicant’s statutory requirements pursuant to section 4.6 of FLEP 2013 are satisfied, and the variation to the floor space ratio development standard can be approved by Council.