



Clause 4.6 – Exceptions to Development Standards – Maximum FSR (Cl. 4.4(2))

Address: 50 Honeysuckle Drive, Newcastle

Proposal: Mixed use commercial/residential development.

1.0 Introduction

This is a written request on behalf of the applicant to seek an exception to a development standard under Clause 4.6 – Exceptions to Development Standards of the Newcastle Local Environmental Plan (NLEP) 2012.

The development standard for which the variation is sought is Clause 4.4 Floor Space Ratio under NLEP 2012.

This application has been prepared in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline Varying Development Standards: A Guide, August 2011, and has incorporated as relevant the latest authority on Clause 4.6, contained in the following judgements:

- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 ('Four2Five No 1');
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 ('Four2Five No 2');
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3');
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7.

The following sections of this written request demonstrate that the proposed development addresses the principles identified in the above judgements.

2.0 Description of the Planning Instrument, Development Standard and Proposed Variation

2.1 What is the name of the environmental planning instrument that applies to the land?

The Newcastle Local Environmental Plan (NLEP) 2012.

2.2 What is the zoning of the land?

The land is zoned B4 Mixed Use.

2.3 What are the objectives of the zone?

The objectives of the zone are:

- To provide a mixture of compatible land uses;
- To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling; and
- To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.

2.4 What is the development standard being varied?

The development standard that is being varied is the maximum floor space ratio (FSR) development standard.

2.5 Is the development standard a performance based control? Give details.

No. The maximum FSR development standard is a numerical control.

2.6 Under what clause is the development standard listed in the environmental planning instrument?

The development standard is listed under Clause 4.4 of NLEP 2012.

2.7 What are the objectives of the development standard?

The objectives of the development standard are contained in Subclause 4.4(1)(a) to (c), and are reproduced below:

- “(a) To provide sufficient floor space to meet anticipated development needs for the foreseeable future,*
- (b) To regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,*
- (c) To provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,*
- (d) To ensure that the new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.”*

2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.4 establishes two (2) FSR controls for the site including:

- A maximum FSR of 2.1 running along the northern frontage of Worth Place Park West; and
- A maximum FSR of 2.5:1 running along the southern frontage and wrapping around the eastern side boundary to Worth Place (see Figure 1 below).

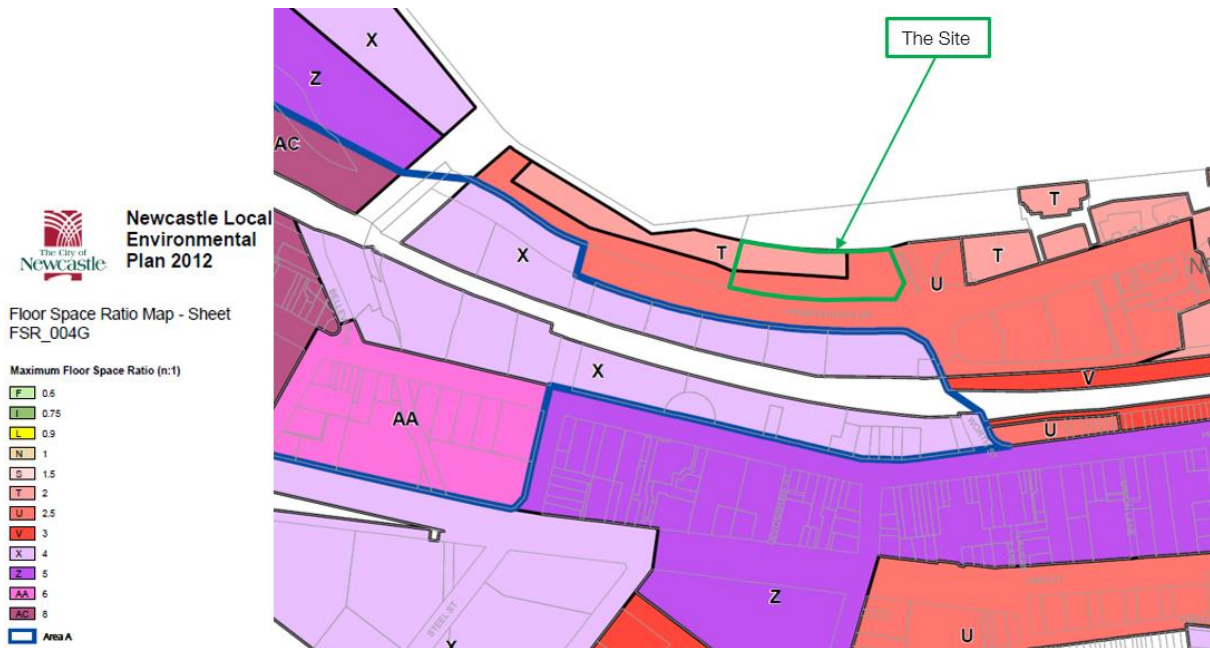


Figure1: Floor Space Ratio Map – NLEP 2012

2.9 What is the proposed numeric value of the development standard in the development application?

The development proposes a maximum gross floor area (GFA) of 16,801m² and therefore will comply with the maximum GFA of 16,820m² permitted across the entire site aggregate (FSR of 2.3:1) (see Figure 2). However, it is noted that the distribution of FSR will result in a numerical non-compliance to the southern and eastern portion of the site by 857m² where the 2.5:1 FSR standard applies. As such the proposed density to the southern and eastern portion of the site results in an FSR of 2.7:1 (see Figure 3).



Total Allowable GFA = 16820sqm

Figure 2: Maximum GFA as specified by FSR Development Standard

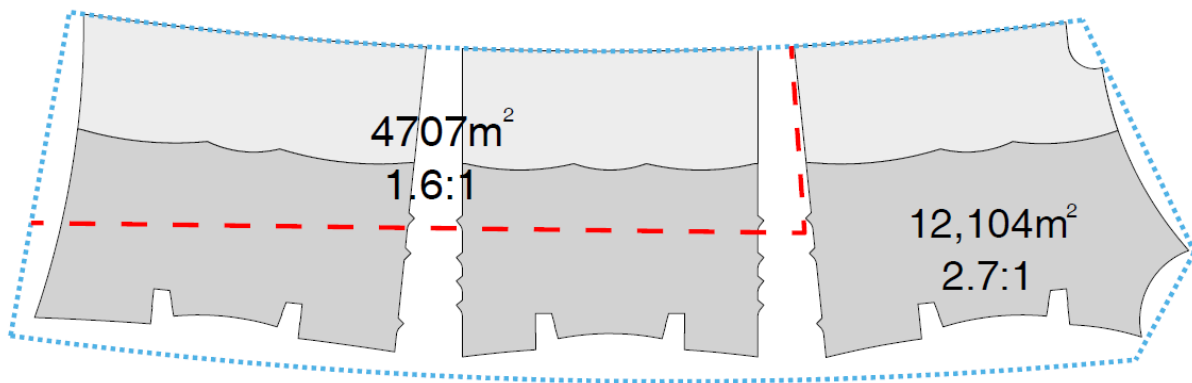


Figure 3: Proposed GFA/FSR

2.10 What is the percentage variation (between the proposal and the environmental planning instrument)?

In accordance with our assessment, the development does not exceed the aggregate FSR development standard applicable over the entire site. However, the proposed development exceeds the maximum FSR of 2.5:1 applicable to the southern and eastern portion of site by 7.6%.

3.0 Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan.

Objectives to Clause 4.6 at 4.6(1) 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."*

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating:

- "(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."*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a development that contravenes a development standard unless:

- "(a) the consent authority is satisfied that:*
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and"*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained and Clause 4.6(5) requires the Secretary in deciding whether to grant concurrence must consider:

- “(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.”*

This application has been prepared in accordance with the DP&I guideline, Varying Development Standards: A Guide, August 2011, and has incorporated as relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 ('Four2Five No 1');
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3.2 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the 2.5:1 FSR standard to the southern and eastern portion of the site is unreasonable or unnecessary in this circumstance for the following reasons:

- The proposed development is compliant with the maximum FSR permitted across the entire site. The numerical non-compliance is therefore restricted to the rear, southern and eastern portion of the site where the 2.5:1 FSR standard applies;
- As identified within the Built Form Analysis in Section 5.4 of the Environmental Impact Statement (EIS) and the architectural drawing package prepared by SJB Architects the proposal underutilises the maximum FSR applicable to the northern portion of the site and has subsequently redistributed that FSR to the southern and eastern portion of the site. The proposed redistribution of FSR within the site is considered to result in a better built form transition from Honeysuckle Drive to the foreshore relative to a compliant scheme;
- Strict compliance with the control would be unreasonable and unnecessary as the proposal does not seek a greater yield than what is currently permitted on site, rather it delivers a better planning and urban design outcome through superior distribution of the permitted FSR;
- The form and scale of the development responds to and is consistent with the broader context of the site and the high density built form that has emerged as the locality has transitioned from an industrial precinct to a residential precinct and the bulk and scale of the proposal is consistent with this transition;
- A strictly compliant development would fail to maximise the housing contribution of the site. This is particularly important given the location of the site within an area in a locality that has been specifically planned to accommodate high density housing in a mixed use zone and is also well served by public transport services including future light rail infrastructure in an easy walkable distance of the site;

- A strictly compliant development would result in a loss of apartments in the proposed development, and would undermine the objectives of the zone to provide for a variety of compatible uses within a mixed use development;
- The variation to the residential FSR control does not increase the intensity of the development in such a way that will give rise to adverse environmental impacts such as increased traffic, bulk and scale, overshadowing or loss of views;
- The site is in a well served locality that has been specifically zoned to accommodate the scale of developed proposed by this application, noting that the proposal complies with the overall GFA permitted on the site; and
- Overall, it is unreasonable to deny a variation that would promote a more efficient use of transport infrastructure whilst also promoting housing choice, particularly in circumstances where the variation to the 2.5:1 FSR control applying to the site can be approved without resulting in significant adverse impacts.

3.2.2 *Would the underlying objective or purpose be defeated or thwarted if compliance was required?*

Compliance with the underlying objectives of the 2.5:1 FSR standard to the southern and eastern portion of the site would be thwarted if strict compliance with the standard was required. Strict compliance would result in a building that would not be in harmony with the bulk and scale of surrounding buildings and public open space within the Honeysuckle Precinct.

As demonstrated in the EIS, there is sufficient infrastructure, including that for vehicular and pedestrian traffic, to accommodate the development as proposed. In this respect, the objective at 1(b) of Clause 4.4 Floor Space Ratio, namely to regulate density of development relative to the generation of vehicle and pedestrian traffic.

Strict compliance with the 2.5:1 FSR standard would not thwart the intention to regulate the density of development and land use intensity and to control the corresponding generation of vehicle and pedestrian traffic has been satisfied. However, strict compliance would lead to circumstance where the development capacity planned for the area would not be achieved.

3.2.3 *Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?*

The development standard cannot be said to be abandoned. Rather, it is noted that the site is located to the north of 18, 22, and 24 Honeysuckle Drive which have a maximum FSR of 4:1 under Clause 4.4 of NLEP 2012, and a maximum building height of 30m under Clause 4.3 of NLEP 2012. As such, the proposed density for the site is a direct response to the higher density to the south, whilst maintaining a desire to provide high levels of amenity for future occupants of the site. Visually, the stepped building form provides for a more interesting façade and composition that reduces building height to Worth Place Park whilst providing articulation and site through links.

3.2.4 *Is the zoning of the land unreasonable or inappropriate?*

The zoning of the land is reasonable and appropriate given the sites location in the Honeysuckle Precinct which is undergoing transition from an industrial area to a high density mixed use area.

3.3 Are there sufficient environmental planning grounds to justify contravening the development standard?

It is considered that there are sufficient planning grounds to justify contravening the development standard being:

- The proposal satisfies the objectives of the B4 Mixed Use Development zone and the objectives of the standard as described in Section 3.2 above;
- Non-compliance with the standard does not contribute to adverse environmental, social or economic impacts or additional intensity of development on the site;
- As outlined in Section 3.2 and 3.3, a numerical variation to the standard is required to support a viable development on the site. The proposal provides a high density mixed use development that is appropriate for the sites location in both the current and future setting within a high density zone in the Honeysuckle Precinct;
- The proposed variation enables a more appropriate transition from the scale of the neighbouring development site to the south (18, 22, and 24 Honeysuckle Drive) that is particular to this site because of its context;
- The Proposed development does not give rise to unacceptable impacts associated with an increased maximum FSR, including greater intensity of development, traffic generation, bulk and scale or adverse view loss as the total yield across the site is consistent with the underlying planned density; and
- The proposed development is generally compliant with the controls, or the intent of the controls, contained in the Newcastle Development Control Plan (NDCP) 2012.

3.4 Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?

3.4.1 Objectives of the Floor Space Ratio standard

The proposal remains consistent with the objectives of the B4 Mixed Use zone, despite the non-compliance with the FSR control, as demonstrated in the assessment of the objectives below:

“to provide an appropriate density of development consistent with the established centres hierarchy,”

- The proposed density is consistent with the combined FSR standard over the entire site and will provide an appropriate visual relationship between the seven (7) to nine (9) storey buildings at 18, 22-24 Honeysuckle Drive to the south, the existing character of Worth Place Park West, and the wider city centre.

“to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.”

- The proposed building density across the site including the provision of public spaces and through-site links is consistent with the scale and massing permitted in the city centre. Visually, the stepped building form provides for a more interesting façade and composition that reduces building height to Worth Place Park whilst providing articulation and through-site links.

3.4.2 Objectives of the zone

The proposal remains consistent with the relevant objectives of the FSR standard, despite a numerical non-compliance with the 2.5:1 FSR standard applying to the southern and eastern portion of the site as demonstrated below:

“To provide a mixture of compatible land uses.”

- The proposed development will feature commercial / retail units at ground floor level accessed directly from Honeysuckle Drive and Worth Place. In addition, the proposal increases the supply of residential accommodation in an area of mixed uses that affords the diverse range of opportunities for business, entertainment and community uses within the Honeysuckle Precinct.

“To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.”

- The development proposed is for commercial/retail units and residential development in a highly accessible location noting the site’s proximity to existing pedestrian and cycle links, bus stops and the future light rail infrastructure within Newcastle City Centre.

“To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.”

- The development site is located within easy walking distance of established and emerging business development within the Honeysuckle Precinct and the wider Newcastle City Centre. The proposed mixed use development is considered to support the viability of the commercial centre given the inclusion of a significant residential component.

Given the circumstances of the case, the provision of a strict numerical compliance to the FSR control applying to the southern and eastern portion of the site would be unreasonable on the basis that the proposed development achieves compliance with the objectives of the standard whilst delivering a better planning and urban design outcome through superior distribution of the permitted FSR. Furthermore, the proposal complies with the maximum FSR applicable to the entire site.

3.5 Whether contravention of the development stand raises any matter of significance for the State or regional Environmental Planning?

The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the broad brush nature of a control applied across an area that supports a variety of built forms that are reflective of different zones, and are a function of their use.

3.6 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?

The objectives set down in Section 5(a)(i) and (ii) are as follows:

“to encourage:

- (i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- (ii) The promotion and coordination of the orderly and economic use and development of land...”*

A development strictly complying the 2.5:1 FSR control on that part of the site would result in a poorer urban design response to the overall site and the area generally. It has been demonstrated that the alternate distribution of the permitted FSR achieves a superior outcome assessed against the provisions of SEPP65 and associated Apartment Design Guide (ADG). In that sense, it may be said that compliance with the standard would hinder the attainment of the objects of Section 5(a)(i) and (ii) of the Act.

The development as proposed is consistent with the provisions of orderly and economic development and would not hinder the objects of the Act in Section 5(a)(i) and (ii).

3.7 Is there public benefit in maintaining the development standard?

Generally speaking, there is public benefit in maintaining development standards. However, there is also public interest in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the FSR control to the southern and eastern portion of the site would preclude the delivery of high amenity accommodation in a well served location, and maximising the public investment in transport services.

Such a rigid and inflexible approach to the development standards forgoes the opportunity to provide superior residential amenity to the future residents in a manner that has no substantial adverse environmental impacts.

On balance the numerical variation to provide improved residential outcomes in an urban context is considered to be an appropriate use of the provisions of Clause 4.6.

Accordingly in the specific circumstances of this case, there is no public benefit in strictly maintaining the development standard, noting that the proposal complies the maximum GFA permitted over the entire site.

3.8 Is the objection well founded?

For the reasons outlined in previous sections, it is considered that the objection to the FSR Development Standard is well founded in this instance and that granting of an exception to the development can be supported in the circumstances of the case.

4.0 Conclusion

The proposed variation is based on the reasons contained within this formal request for an exception to the standard.

The development will not result in unacceptable impacts with regard to the amenity of adjoining properties. The overall aesthetic appearance and scale of the development is that of a mixed use form that is compatible with the typologies in the surrounding area.

A development strictly complying with the numerical standard of 2.5:1 to the southern and eastern portion of the site would not significantly improve the amenity of surrounding land uses and would not result in a superior urban design response to the site compared to that proposed. In the context of the locality within the mixed use setting of the Honeysuckle Precinct it would be unreasonable for strict compliance to be enforced noting that the proposal does not seek a greater yield than what is currently permitted on the site, rather it delivers a better planning and urban design outcome through the superior distribution of the permitted FSR.

Additionally, strict enforcement of the standard would result in the development not satisfying the objectives of the control, specifically to provide an appropriate density of development consistent with the established area and ensuring the built form makes a positive contribution to the city centre. The strict application of the control would result in a building that provides poorer amenity for future residents whilst

failing to respond the surrounding physical context including the Hunter River foreshore to the north, the Honeysuckle Precinct and wider Newcastle City Centre.

The non-compliance will not result in any precedents for future development within the local government area given the particular site circumstances and surrounding pattern of development near the site.

It is concluded that the objection is well founded as compliance with the standard is both unnecessary and unreasonable.