

4 Delmar Parade and 812 Pittwater Road, Dee Why

# Clause 4.6 – FSR Development Standard

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**4 DELMAR PARADE AND 812 PITTWATER ROAD,  
DEE WHY**

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## 1.0 CLAUSE 4.6 REQUEST – FSR

### 1.1 Introduction

This request for an exception to a development standard is submitted in respect of the FSR development standard contained within Clause 4.4 of the Warringah Local Environmental Plan 2011 (WLEP). The request relates to an application for demolition of existing structures and construction of a mixed use development containing 4 commercial tenancies and 219 apartments over 2 storey basement containing 334 car parking spaces, lot consolidation and subdivision at 4 Delmar Parade and 812 Pittwater Road, Dee Why.

### 1.2 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the WLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the WLEP, or any other environmental planning instrument.

However, clause 4.6(3) states that 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:

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

In accordance with clause 4.6(3) the applicant requests that the FSR development standard be varied.

### 1.3 Development Standard to be varied

Clause 4.4 states:

- (1) The objectives of this clause are as follows:
  - (a) to limit the intensity of development and associated traffic generation so that they are commensurate with the capacity of existing and planned infrastructure, including transport infrastructure,
  - (b) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,
  - (c) to ensure that buildings, by virtue of their bulk and scale, are consistent with the desired character of the locality,
  - (d) to manage the visual impact of development when viewed from public spaces,
  - (e) to maximise solar access and amenity for public areas.
- (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.

There are two FSR zones which apply to the site being a 3.2:1 FSR along the Pittwater Road frontage of the site, and a 2.4:1 FSR for the remainder of the site, as illustrated in Figure 1 below.

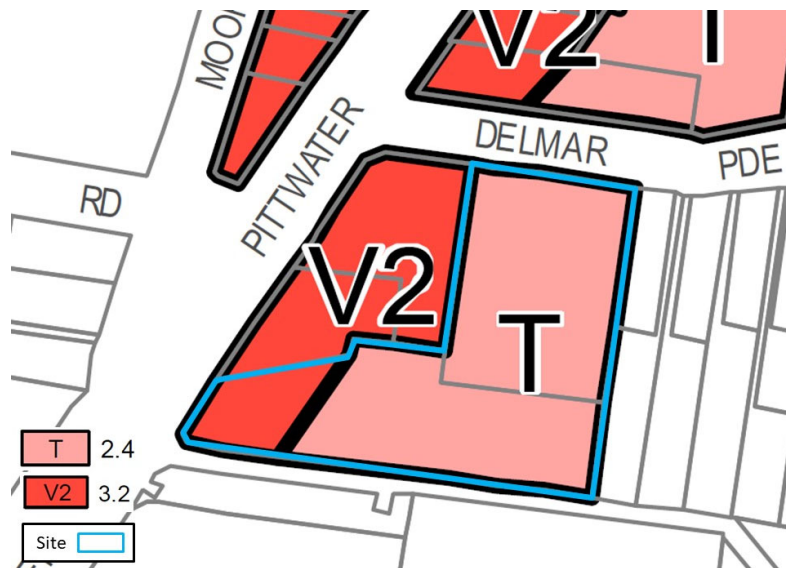


Figure 1:

Extract from the WLEP  
FSR Map

#### 1.4 Extent of Variation to the Development Standard

In relation to the calculation of FSR for the two FSR zones, in *Mulpha Norwest Pty Ltd v The Hills Shire Council (No 2)* [2020] NSWLEC 74, the Land and Environment Court has decided that the FSR must be evaluated separately in the two different FSR areas.

The table below provides a breakdown of the site area of each FSR zone, the compliant Gross Floor Area (GFA) within each FSR zone, the total available Gross Floor Area on a combined basis, and the variation to the FSR control in the 3.2:1 zone.

FSR zone	Site Area	Compliant GFA	Proposed GFA/FSR	FSR	FSR Variation
2.4:1	6,800 sqm	16,320 sqm	15,262.4 sqm	2.24:1	N/A
3.2:1	990 sqm	3,168 sqm	4,222.1 sqm	4.27:1	1,054.1 sqm or 33.2%
TOTAL	7,790sqm	19,488sqm	19,484.6 sqm	N/A	N/A

Whilst the total proposed Gross Floor Area is 4 square metres less than the total density that can be achieved across the entire site, the proposal exceeds the maximum gross floor area in the 3.2:1 area by 1,054.1 square metres or 33.2%

#### 1.5 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

**1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;**

The specific objectives of Clause 4.4 of the WLEP are identified below. A comment on the proposal’s consistency with each objective is also provided.

(a) to limit the intensity of development and associated traffic generation so that they are commensurate with the capacity of existing and planned infrastructure, including transport infrastructure,

The overall density across the site does not exceed the maximum density which is achievable with the application of the two FSR controls, and in fact is 4 square metres the maximum floor area, and the variation arises as a result of a minor increase to the density on the western part of the site which is compensated by a reduction in density on the eastern part of the site. Furthermore, the density is more appropriately placed adjacent to Pittwater Road rather at the interface with the lower density zoning to the east. Accordingly, the intensity of land use is exactly as anticipated by the FSR controls which apply to the site notwithstanding the variation to FSR in the 3.2:1 zone which means that the density is acceptable having regard to the availability of infrastructure and also likely traffic generation arising from the development of the site.

(b) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,

The overall proposed floor space is as anticipated by the planning controls and will meet the anticipated needs for the future.

(c) to ensure that buildings, by virtue of their bulk and scale, are consistent with the desired character of the locality,

The overall density across the site does not exceed the maximum density which is achievable with the application of the two FSR controls and the variation arises as a result of a minor increase to the density on the western part of the site which is compensated by a reduction in density on the eastern part of the site. The variation to the 3.2:1 FSR zone does not manifest itself in any difference in bulk and scale of development compared to that which is envisaged for the site under the planning controls for the site, and therefore the proposal is consistent with the desired character of the locality.

(d) to manage the visual impact of development when viewed from public spaces,

The overall density across the site does not exceed the maximum density which is achievable with the application of the two FSR controls and the variation arises as a result of a minor increase to the density on the western part of the site which is compensated by a reduction in density on the eastern part of the

site. The proposed bulk and scale of the buildings is as anticipated by the planning controls and so there is no change to the visual impact of the proposal when viewed from public spaces.

(e) to maximise solar access and amenity for public areas,

The variation to the 3.2:1 FSR zone does not manifest itself in any difference in scale of development compared to that which is envisaged for the site under the planning controls for the site, and therefore there is no adverse impact in relation to solar access and amenity for public areas around the site, noting that the proposal is height compliant.

**2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;**

The underlying objectives and purpose of the FSR control are relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the overall density on the site is as anticipated by the application of the two FSR zones.

**3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;**

The underlying objectives and purpose of the standard relates to density and intensity of use as well and to control bulk and scale. The underlying objective and purpose would be diminished by a compliant proposal in the 3.2:1 FSR zone as the development would fail to realise the identified environmental capacity of the site.

**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;**

The development standard has not been virtually abandoned.

**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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**

Key facts that support the above reasons why strict compliance with the floor space ratio development standard is unreasonable and unnecessary in the circumstances of the case are as follows:

- Whilst there is a minor exceedance in the 3.2:1 zone, this is balanced by the equivalent minor reduction in the 2.4:1 zone, such that the overall density of the proposed development is exactly as anticipated for the site when the two FSR zones are combined. Accordingly, the variation arises from the distribution of Gross Floor Area across the site and not as a result of any proposed increase in overall density for the site beyond that which is intended by the FSR controls and will not be perceivable beyond a numerical assessment.
- Notwithstanding that the distribution of Gross Floor Area across the site is not precisely as intended by the boundary between the two FSR zones, the proposed development nonetheless provides a distribution of mass and scale across the site generally as anticipated by the WLEP and WDCP.
- Despite the proposed FSR variation, the Applicant's proposed approach towards the distribution of density on the site is entirely aligned with the objective of the split FSR zones with a higher density and

scale along the Pittwater Road frontage of the site and lower density and scale for the remaining majority of the site.

- The proposed variation to the 3.2:1 FSR control is minor and does not result in any unreasonable impacts, noting that this does not compromise the achievement of all of the necessary metrics in relation to setbacks, number of storeys, and common open space for the overall development.
- If the variation is not permitted, the overall site will not achieve its planned level of density.

#### 1.6 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The Land & Environment Court matter of Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

The variation to the development standard in this instance is for FSR and unlike a variation to a height control for example, where there is a specific area of encroachment, there is not necessarily one specific area responsible for the FSR control.

The environmental planning grounds that justify the component of the development which results in the FSR variation are:

- The proposed development is predominantly compliant in relation to height, setbacks and arrangement of buildings as anticipated by the WLEP and WDCP. The removal of floor space to simply achieve numerical compliance in the 3.2:1 zone would result in a built form which is less than that which was anticipated for the site and would be inconsistent with the built form outcome which is intended by the planning controls. Furthermore, strict compliance in the 3.2:1 FSR zone would force this area to be redeployed into Building A in the 2.4:1 zone, which could result in an anomalous outcome which would be inconsistent with the intention of the DCP to reduce scale at the eastern edge of the site. The proposed development in the 3.2:1 FSR zone has a scale and proportions as anticipated by the planning controls such that the proposed variation does not result in any perceptible or detrimental impact or a built form outcome which differs from that which is expected on the site. Therefore, the appropriate contextual fit of the proposed development provides an environmental planning ground to support the proposed variation.
- It is noted that Preston J provides that the development is not required to demonstrate a beneficial effect relative to a compliant development, however, in this instance it is considered that strict compliance would not achieve any improved outcome for the development and would in fact result in a diminished outcome as a result of needing to redeploy the floor space into the 2.4:1 FSR zone, or simply result in less housing and employment floor space than that which is capable of being provided within the demonstrated environmental capacity of the site.



- The overall density of the proposal does not exceed the total density which could be achieved across the site. Furthermore, the proposed distribution of density across the site, where more floor space is located in the western part of the site rather than the more sensitive eastern part, is entirely consistent with the core objective of the split FSR zones which instead aims to shift the majority of built form to the western part of the site and away from the sensitive interface to the east of the site. The Applicant's proposed approach towards the distribution of density on the site is entirely aligned with the objective of the split FSR zones by moving density towards the western part of the site.
- The proposed variation to the 3.2:1 FSR control does not result in any unreasonable impacts.
- If the variation is not permitted, the overall site will not achieve its planned level of density.
- The proposed FSR variation will provide for additional housing and employment floor space which is an environmental benefit particularly in this location where Council is trying to encourage additional housing and employment closer to centres due to the better access to public transport and the various facilities and amenities offered by the centres.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed FSR non-compliance in this instance

**1.7 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)**

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

**1.8 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives**

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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.

**Objective of the Development Standard**

The proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

**Objectives of the Zone**

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B4 Mixed Use zone.

The objectives of the B4 Mixed Use 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.
- To reinforce the role of Dee Why as the major centre in the sub-region by the treatment of public spaces, the scale and intensity of development, the focus of civic activity and the arrangement of land uses.
- To promote building design that creates active building fronts, contributes to the life of streets and public spaces and creates environments that are appropriate to human scale as well as being comfortable, interesting and safe.
- To promote a land use pattern that is characterised by shops, restaurants and business premises on the ground floor and housing and offices on the upper floors of buildings.
- To encourage site amalgamations to facilitate new development and to facilitate the provision of car parking below ground

The proposed development is considered to be consistent with the zone objectives for the following reasons:

- The proposed development is located at the southern edge of the Dee Why town centre and provides for an appropriate mix of residential accommodation and commercial use which is compatible with the emerging character of the southern end of the town centre. In this location, there is limited demand for commercial activity beyond the activation of the street edges and so the proposal provides a compatible arrangement of uses for this location.
- The proposal provides additional residential accommodation in an ideal location at the southern end of the Dee Why town centre and future residents will be able to walk and cycle to all of the services, employment and recreational facilities within the central area of the town centre, including Dee Why beach. The site is also very well located immediately to the north of the Stony Range Botanic Garden.
- The proposal successfully promotes active building fronts by providing active retail edges to both the Delmar Parade and Pittwater Road frontages which will contribute positively to the life of streets and creating environments that are appropriate to human scale as well as being comfortable, interesting and safe.
- The proposal provides an appropriate mix of residential and commercial uses having regard to its location at the southern edge of the town centre.
- The proposal amalgamates several large sites at the southern end of the town centre and provides for an integrated underground car parking arrangement with a consolidated vehicular entry and exit point.

The above discussion demonstrates that the proposal development will be in the public interest notwithstanding the proposed variation to the FSR development standard, 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. Furthermore, there is no material public benefit in maintaining the standard generally or in relation to the site specifically as a variation as proposed has been demonstrated to be based on sufficient environmental planning grounds in this instance. Accordingly, there is no material impact or public benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard for this particular component.

### 1.9 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(5) In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

### 1.10 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

(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.

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives of Clause 4.4 notwithstanding the proposed variation to the FSR development standard.

Requiring strict compliance with the FSR development standard in the 3.2:1 zone on the subject site would result in an inferior built form that would contextually be essentially no different from the proposed development and would not result in any meaningful benefit to the streetscape or the amenity of adjoining properties. Strict compliance would force this floor space to be redeployed to the 2.4:1 zone which is a less desirable outcome due to the objective to reduce density in that part of the site.

Allowing the flexible application of the FSR development standard in this instance is not only reasonable but also desirable given the objective to increase density in the western part of the site.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the 3.2:1 FSR standard, and where the overall site density is not exceeded, will achieve a better urban design outcome in this instance in accordance with objective 1(b).

### 1.11 Conclusion

Strict compliance with the FSR development standard contained within clause 4.4 of Warringah Local Environmental Plan 2011 has been found to be unreasonable and unnecessary in the circumstances of the case. In addition there are sufficient environmental planning grounds to justify the variation. Finally, the proposed development and overall site density is in the public interest because it is consistent with the objectives of the standard and the zone. In this regard it is reasonable and appropriate to vary the FSR development standard to the extent proposed.