

Clause 4.6 Variation Request – Floor Space Ratio

*Non Discretionary Standard – 108(2)
State Environmental Planning Policy (Housing) 2021*

16-20 Homestead Avenue, Collaroy



'Gura Bulga'

Liz Belanjee Cameron

'Gura Bulga' – translates to Warm Green Country. Representing New South Wales.

By using the green and blue colours to represent NSW, this painting unites the contrasting landscapes. The use of green symbolises tranquillity and health. The colour cyan, a greenish-blue, sparks feelings of calmness and reminds us of the importance of nature, while various shades of blue hues denote emotions of new beginnings and growth. The use of emerald green in this image speaks of place as a fluid moving topography of rhythmical connection, echoed by densely layered patterning and symbolic shapes which project the hypnotic vibrations of the earth, waterways and skies.

Ethos Urban acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture.

We acknowledge the Gadigal people, of the Eora Nation, the Traditional Custodians of the land where this document was prepared, and all peoples and nations from lands affected.

We pay our respects to their Elders past, present and emerging.

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1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Cornerstone Property Group. It is submitted to Northern beaches Council on behalf of Cornerstone Property Group (the Proponent) in support of a Development Application (DA) for the demolition and construction of six (6) Independent Living Units (ILUs) at 16-20 Homestead Avenue, Collaroy.

Specifically, the proposed scope of works in this DA includes:

- Demolition of the existing dwelling houses and removal/relocation of on-site trees;
- Excavation and in ground works, including stormwater works;
- Construction of six new ILU apartments within two residential flat buildings, with a combined below ground/basement car parking level; including:
 - Basement Level: 2 car spaces per residence, with each apartment allocated an accessible/bollard space, installed with electric vehicle charging port;
 - Ground Floor: Four, 3-bedroom ILU apartments, each with a spacious north facing living and dining room areas and south facing terraces. Each apartment will have three bathrooms (one being within the ensuite), with a landscaped courtyard provided on the edges of each dwelling;
 - Level 1: Two, 3-bedroom ILU apartments, each with a south facing balcony, as well as a 74m² north facing BBQ area/terrace and 206m² living and dining room area. Each apartment will also include a west facing study room, as well as a wine cellar room;
 - Roof: A 20-degree terracotta tile roof, with a chimney and steel roof sections providing on the protruding study, bedroom and BBQ room elements; and
- Relevant landscaping works.

Clause 4.6 of the *Warringah Local Environmental Plan 2011 (WLEP)* enables Council or the Consent Authority to grant consent for development even though the development contravenes a development standard (which uses the wording, by this (WLEP) or any other environmental planning instrument [Housing SEPP]). The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This clause 4.6 relates to a variation of clause 108(2)(c) of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP), which is noted as a non-discretionary development standard for independent living units, as opposed to 'Development Standards' as otherwise prescribed in the Housing SEPP at Division 3 of Part 5. Notwithstanding, this Clause 4.6 variation request is provided to accompany the application. It should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated 27 September 2023.

The intent of the non-discretionary standard is to set a 'base line' to prevent the application of a more onerous standard in relation to FSR. The lack of an FSR in the WLEP means that the 0.5:1 control does not otherwise control the bulk and scale and density of development, which is derived from other development controls and standards that apply to the development – primarily set out within the Warringah Development Control Plan 2011 (WDGP). The proposal has a 0.6:1 FSR which equates to an 20% variation to the non-discretionary standard.

This clause 4.6 request addresses a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*. In another case, *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) NSWLEC 118 it was confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard.

This clause 4.6 variation request demonstrates that compliance non-discretionary floor space ratio development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard. This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the non-discretionary standard, the proposed development:

- Achieves the objectives and intent clause 108(2) of the Housing SEPP and the Councils built form controls by:
 - Ensuring that the built form that results from the FSR of the development is in-keeping with the scale and character of neighbouring buildings and is of a form that will not result in any unreasonable environmental impacts.
 - Respecting the character, appearance and scale of the surrounding buildings, predominantly residential in scale.

- Maintaining the principle of view sharing by not impacting key public vantage points or views from surrounding buildings, nor unreasonably impacting private views.
- Demonstrates there are sufficient environmental planning grounds to justify the variation of the FSR standard including the following:
 - The proposed development is commensurate with the height form and scale of surrounding buildings, reflect of the context and character of the existing and anticipated built form;
 - The proposed development demonstrates substantive compliance with other built form controls, which ensures that the proposed variation does not result in a building that is out of character with the built form capacity afforded to the site under the WDCP; and
 - The variation does not create additional or unreasonable adverse environmental impacts in terms of overshadowing, privacy and views from that of a complying development.
- The proposed development remains consistent with R2 zone as it:
 - The proposal provides for a diversity of housing needs for the community within a low density setting of Homestead Avenue and surrounds; and
 - The design carefully and consciously integrates landscaping and a contextually responsive form and materiality to reinforce the landscape setting on the site.
- The proposed development is in the public interest because it is consistent with the objectives of the zone and development standard.

In light of the above, Council can be satisfied that there is sufficient justification for the variation to the development standard, as proposed in accordance with the flexibility allowed under Clause 4.6 of the WLEP.

2.0 Development Standard to be Varied

This Clause 4.6 variation request seeks to justify contravention of the clause 108(2)(c) of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP) which states [our emphasis added]"

108 Non-discretionary development standards for independent living units—the Act, s 4.15

(1) The object of this section is to identify development standards for particular matters relating to development for the purposes of independent living units that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.

(2) The following are non-discretionary development standards in relation to development for the purposes of independent living units—

....

(c) the density and scale of the buildings when expressed as a floor space ratio is 0.5:1 or less,

...

For context, under the WLEP, the site does not otherwise maximum floor space ratio controls. Building density, built and scape is controlled by a combination of built form and effective site coverage and landscaped area control set out within WDCP.

Extent of Variation

The proposal has a 0.6:1 FSR which equates to an 20% variation to the non-discretionary standard. The definition of GFA that has been used to calculate this GFA is as per the revised definition introduced into the Housing SEPP on 18 August 2023.

The site area of the site is 1,789sqm, with the GFA proposed as 1,079sqm.

3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the WLEP provides that:

4.6 Exceptions to development standards

- (3) *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 circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

Further, clause 4.6(4)(a) of the WLEP provides that:

- (4) *Development consent must not be granted for 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*
 - (b) *the concurrence of the Secretary has been obtained.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action) A
4. *Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (Al Maha)
5. *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511 (Turland)
6. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386 (Micaul)
7. *Moskovich v Waverley Council* [2016] NSWLEC 1015 (Moskovich)
8. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552 (Baron Corporation)

The relevant matters contained in clause 4.6 of the WLEP with respect to the non discretionary FSR standard of the Housing SEPP, are each addressed below, including with regard to these decisions.

3.1 Role of the Consent Authority

The role of the consent authority in considering this written request for a Clause 4.6 variation has been explained by the NSW Court of Appeal in *Initial Action* and in *Al Maha* to require that the consent authority needs to be satisfied in relation to two matters:

- That the applicant's request has adequately addressed the matters in clause 4.6(4)(a)(i).
- That the proposed development will be in the public interest because of it consistent with the objectives of the development standard and the zone objectives.

The consent authority is required to form these two opinions first before it considers the merits of the DA, and it can only consider the merits of the DA if it forms the required satisfaction in relation to the matters. In particular, the consent authority needs to be satisfied that there proper planning grounds to grant consent and that the contravention of the standard is justified.

This report provides the basis for the consent authority to reach the required level of satisfaction. This Clause 4.6 variation request is proposed in context of the non-discretionary floor space ratio standard of Independent Living Units. Relevant matters contained in Clause 4.6 of the WLEP are each addressed below.

3.2 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the WLEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
- 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 (**Fourth Method**).
- 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 (**Fifth Method**).

This Clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances because the objectives of the HOB development standard are achieved notwithstanding the non-compliance with the standard (**First Method**).

3.2.1 The underlying objectives or purposes of the development standard

The development seeks to depart from the non-discretionary floor space ratio control within the Housing SEPP and there is no specific numeric control within the WLEP. Similarly, the SEPP does not set out objectives of the non-discretionary development standard. As such, a merit assessment of the objectives of the floor space ratio controls development standard contained in clause 4.4 of the WLEP are provided as a means to consider the intent of the controls.

4.4 Floor space ratio

(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.*

Notwithstanding the above, the Statement of Environmental Effects and this clause 4.6 demonstrate the proposal's compliance with the various built form controls that are used to manage the built form outcome within this part of Northern Beaches Council.

3.2.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard

Objective 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 proposal incorporated a total of 6 independent living units across a two storey pitched roof development – presented with the visual appearance of 2 x two storey dwelling houses on the site. The size, and scale of the proposal has a minor/negligible impact in terms of traffic generation and intersection performance, (refer to traffic and Parking Report accompanying the SEE). The proposal is commensurate with the capacity of the existing and planned infrastructure for the site and surrounds.

Objective B - to provide sufficient floor space to meet anticipated development needs for the foreseeable future,

The floor space provided in this scheme is sufficient to cater for the independent living units proposed, whilst also ensuring that the proposal complies with the broad spectrum of the Council WDCP building envelope controls and the explicit and detailed design requirements of the Housing SEPP.

Objective C - to ensure that buildings, by virtue of their bulk and scale, are consistent with the desired character of the locality,

As demonstrated in the architectural form and landscape design, along with the compliance assessment contained within the Statement of Environmental Effects demonstrates that the proposal complies with the external built form controls. As such, and when considering the architectural design and materiality, the bulk and scale of the proposal is considered to be consistent with the desired character of the locality.

Objective D - to manage the visual impact of development when viewed from public spaces,

When viewed from Homestead Avenue and any areas of surrounding public land, the proposal sits in context and harmony with the surrounding built form. The variation to the non-discretionary standard does not drive any non-compliance or expansion of a building envelope that complies with the WDCP.

Objective E - to maximise solar access and amenity for public areas.

The proposed FSR does not drive any non-compliance with maximum building height or setback controls of the WDCP (external envelope) that exacerbates or create additional overshadowing. The proposal does not overshadow any areas of public land (such as parks reserves).

3.3 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the WLEP requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

The proposed FSR (and exceedance to the non-discretionary standard) is a function of achieving high quality and high amenity design outcome on the site that demonstrates sufficient environmental planning grounds to support the variation as it aligns with the Objects of the Act

Objects of the Act

- a) *to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- b) *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- c) *to promote the orderly and economic use and development of land, (d) to promote the delivery and maintenance of affordable housing,*
- d) *to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- e) *to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- f) *to promote good design and amenity of the built environment,*
- g) *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- h) *to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- i) *to provide increased opportunity for community participation in environmental planning and assessment.*

The development promotes good design and amenity of the built environment, noting that the development will not contribute to any unreasonable impact on amenity considerations (i.e. solar access, privacy and view loss) to neighbouring properties.

The proposed independent living units (dwellings) have been sized to maximise amenity, whilst remaining within the building envelope controls and managing privacy and impacts. This provides the opportunity for an alternate housing product (for seniors only) to be provided within the Collaroy area, whilst still remaining within the desired future character – offering residents a chance to age in place.

As outlined in a recent Council assessment report the extent of FSR proposed is comparable to recent approvals in the broader Northern Beaches LGA for Seniors Housing developments in the past two years.

- DA2022/1431 – 633-635 Warringah Road, Forestville: 0.58:1
- DA2021/1901- 21 Mona Street, Mona Vale: 0.56:1
- DA2021/1841- 7 Coronation Street, Mona Vale: 0.63:1
- DA2021/1766 - 18 Alexander Street, Collaroy: 0.54:1
- DA2021/1805- 4 Alexander Street, Collaroy: 0.65:1
- DA2020/1320- 681 Warringah Road, Forestville: 0.59:1
- DA2020/1172- 54 Bardo Road, Newport: 0.569:1

As outlined in this clause 4.6 and the SEE, the development presents a suitable density and bulk and scale demonstrated by consistency with other planning controls applying to the development.

3.4 Clause 4.6(4)(a)(i): the applicant's written request has adequately addressed the matters required to be demonstrate by subclause (3)

As detailed above, this written request adequately and comprehensively addresses the matters required to be demonstrated by subclause (3).

3.5 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

In *Initial Action* at [27], it was held that it is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. The proposal is therefore in the public interest as it is consistent with the objectives of the development standard and the objectives of the zone.

Consistency Caselaw

Consistency has been defined throughout caselaw including the following Land and Environment Court cases:

- Addenbrooke v Woollahra Municipal Council [2008] NSWLEC 190.
- Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21.
- Raissis v Randwick City Council [2019] NSWLEC 1040.
- Abrams v Council of City of Sydney [2018] NSWLEC 1648.
- Kingsland Developments v Parramatta Council [2018] NSWLEC 1241.
- Dem Gillespies v Warringah Council (2002) 124 LGERA 147.

In these cases, consistency is considered to be different to that of 'achievement'. The term 'consistent' has been considered in judgements of the Court in relation to zone objectives and has been interpreted to mean "compatible" or "capable of existing together in harmony" (*Dem Gillespies v Warringah Council* (2002) 124 LGERA 147; *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190) or "not being antipathetic" (*Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21). Whichever interpretation is adopted, the test of "consistency" is less onerous than that of "achievement".

3.5.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the non-discretionary FSR development standard, for the reasons discussed in **Section 3.2.2** of this report.

3.5.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the R2 Low Density Residential zone, as demonstrated below. The exceedance of the non-discretionary development standard for FSR does not result in any inconsistencies with the objective of the zone.

Objective (a): To provide for the housing needs of the community within a low density residential environment.

The proposal provides for a diversity of housing needs for the community within a low density setting of Homestead Avenue and surrounds.

Objective (b): To enable other land uses that provide facilities or services to meet the day to day needs of residents.

Not applicable to the proposal as it provides sole residential use.

Objective (c): To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.

The design carefully and consciously integrates landscaping and a contextually responsive form and materiality to reinforce the landscape setting on the site.

3.6 Other Matters for Consideration

Under clause 4.6(5), in deciding whether to grant concurrence, the Director-General must consider the following matters:

- (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, 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.*

These matters are addressed in detail below.

3.6.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the FSR development standard does not raise any matter of significance for State or regional planning. We do note, however, that the proposal is consistent with the most recent metropolitan plan and the governments priorities for housing, including housing for seniors.

3.6.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

As outline in **Section 3.3** above, there are sufficient environmental planning grounds to warrant variation of the non-discretionary development standard and it is considered to be in the public interest for the variation to be supported in this case. It is also considered that there is no public benefit in maintaining the numerical development standard in this instance.

In fact, strictly adhering to the non-dictionary standard may result in an undesirable outcome for the site, given it may unnecessarily result in a development outcome for seniors housing that would be less than a private residential dwelling (non-seniors).

Strict compliance with the prescriptive floorspace requirements is unreasonable and unnecessary in the context of the proposal and the circumstances of this particular site – particularly given the context of no FSR development standard within the WLEP and the proposal broad compliance with the WDCP built form controls.

The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The proposal will not have any adverse effect on the surrounding locality and is consistent with the future characterised envisioned for the subject area.

3.6.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence.

There are no other matters required to be taken into consideration.

4.0 Conclusion

The assessment above demonstrates that compliance with the non-discretionary standard for floor space ratio controls contained Section 2013 clause 108(2)(c) the Housing SEPP is unreasonable and unnecessary in the circumstances of the case (the site and proposal) and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, consistent with the other built form envelope development controls for the site under the WDCP, whilst also allows for a better outcome in planning terms.

This clause 4.6 variation request demonstrates that compliance non-discretionary floor space ratio development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard. This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the non-discretionary standard, the proposed development:

- Achieves the objectives and intent clause 108(2) of the Housing SEPP and the Councils built form controls by:
 - Ensuring that the built form that results from the FSR of the development is in-keeping with the scale and character of neighbouring buildings and is of a form that will not result in any unreasonable environmental impacts.
 - Respecting the character, appearance and scale of the surrounding buildings, predominantly residential in scale.
 - Maintaining the principle of view sharing by not impacting key public vantage points or views from surrounding buildings, nor unreasonably impacting private views.
- Demonstrates there are sufficient environmental planning grounds to justify the contravention of FSR development standard including the following:
 - The proposed development is commensurate with the height form and scale of surrounding buildings, reflect of the context and character of the existing and anticipated built form;
 - The proposed development demonstrates substantive compliance with other built form controls, which ensures that the proposed variation does not result in a building that is out of character with the built form capacity afforded to the site under the WDCP; and
 - The variation does not create additional or unreasonable adverse environmental impacts in terms of overshadowing, privacy and views from that of a complying development.
- The proposed development remains consistent with R2 zone as it:
 - The proposal provides for a diversity of housing needs for the community within a low density setting of Homestead Avenue and surrounds; and
 - The design carefully and consciously integrates landscaping and a contextually responsive form and materiality to reinforce the landscape setting on the site.
- The proposed development is in the public interest because it is consistent with the objectives of the zone and development standard.

The variation is well founded and taking into account the absence of any adverse environmental, social or economic impacts. It is therefore requested that the consent authority support the proposal.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the WLEP.