

6.3 Clause 4.6 Request - Floor Space Ratio Control

The FSR Standard and the Variation Sought

Pursuant to Clause 4.4 of the LEP there is a 0.6:1 FSR control for the site.

The existing and proposed floor space of the building is illustrated in the below table.

Table 2 - Floor Space (Existing and Proposed)				
		FSR	Non- Compliance	%
Site Area	410.6m ²			
Proposed/ Existing GFA	429m ²	1.05	183m ²	74%
FSR Control	0.6:1	<i>Notes: see Dickson Rothschild plans and Sydney Surveyor's Survey</i>		
Control GFA	246m ²			

This document is the Applicant's written request under Clause 4.6 (4) of the LEP for this control to be varied in this instance.

The Clause 4.6 Tests

The relevant matters to consider under Clause 4.6 of the LEP are addressed below.

Clause 4.6 3 (a): that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,

The objectives of the floor space ratio at Clause 4.4 of the LEP are:

"4.4 Floor space ratio

(1) The objectives of this clause are as follows:

- (a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*
- (b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*
- (c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*
- (d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*
- (e) to provide for the viability of business zones and encourage the development"*

The site has a nominal FSR control of 0.6:1– see LEP map extract below.



Figure 8 – FSR Map, the LEP

The proposal provides for 182.64m² or 74% non-compliance with the site's floor space control via conversion of the existing commercial building to a residential dwelling house and secondary dwelling. There is no additional floor space proposed. The proposal is tested against the objectives of the floor space control below.

In terms of objective (a), the proposal has no impact on the bulk or scale of the existing building.

In terms of objective (b), the proposal provides for a deintensification of use of the building from its current approved use as an educational centre for 70 students and associated staff (see DA 244/2000) to a single dwelling house and secondary dwelling. The proposed use is more in line with the density and land use expectations of the zoning than the current approved use.

In terms of objective (c), the proposal provides for no significant change in the character of the building and its surrounds. A dwelling house and secondary dwelling use are more in keeping with the adjoining character of this locality than an educational centre.

In terms of objective (d), again the proposal provides for no change to the bulk and scale of the existing building.

Objective (e) is not relevant.

The proposal is consistent with the objectives of the floor space control and the variation sought has a proper planning justification, that is:

- no actual GFA is proposed; and
- a more appropriate land use is facilitated by the request.

Clause 4.6 (4) (a) (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,

The proposed development is in the public interest as it successfully implements the objectives of its zoning, the floor space control and provides for a deintensification of use of a site located in a residential area. The secondary dwelling provides for more housing choice in the locality.

If this application was refused based on floor space compliance, the applicant would be forced to seek a tenant under the current educational centre approval. That use would have greater impacts in terms of potential overflow parking, noise and general congestion.

The proposal provides for a low intensity use of an existing commercial building that is isolated in a residential area.

The proposal is in the public interest.

Clause 4.6 (4) (b): the concurrence of the Director-General has been obtained.

It is assumed the concurrence of the Director-General is delegated to the relevant consent authority in this instance City of Sydney Council. Nevertheless, the relevant matters to be considered by the Director are briefly considered below.

Clause 4.6 (5): In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

There is no public benefit in maintaining this standard. In this instance maintaining the standard would deny a more appropriate use on the site (residential) compared to the existing educational centre use.

There are no other matters relevant to the Director's concurrence in this instance.

The 'Five Part Test'

In addition to the above requirements, Councils may elect to not only use the principles of Clause 4.6 but also the 'five-part test' established by the Land and Environment Court.

Court cases dealing with applications to vary development standards resulted in the Land and Environment Court setting out a five-part test for consent authorities to consider when assessing an application to vary a standard to determine whether the objection to the development standards is well founded. The 'five-part test' is outlined as follows:

- "1. the objectives of the standard are achieved notwithstanding noncompliance with the standard;*
- 2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- 3. the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

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;*
5. *the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone."*

In relation to point (1):

The proposal meets the relevant objectives of the floor space ratio development standard, as detailed previously.

In relation to point (2):

We would argue that this part of the test contradicts the first point in the test. We have outlined that the objectives of the standard are still met despite the non-compliance with the standard. It would be unusual to find a situation where the underlying objective is not relevant to a development.

In relation to point (3):

If strict compliance was required with the floor space ratio, then the site would have to be maintained for its commercial use as the significant reduction in site GFA required to meet the standard would not constitute a viable option.

In relation to point (4):

We do not have access to Council's records to know how Clause 4.6 has been determined since it was introduced. However previous uses have been allowed on the site which represent a more intense use of the land compared to what is proposed.

In relation to point (5):

The Applicant does not rely on this point.

Four2Five Pty Ltd v Ashfield Council decision

This clause 4.6 request is prepared cognisant and in accordance with recent Court decisions on the proper consideration of such requests as outlined in the Four2Five Pty Ltd v Ashfield Council decision and its recent judicial review (see [2015] NSWLEC 90). In this case the Court considered that the justification under clause 4.6(3) (b) requires '*particular reference to the circumstances of the proposed development*'. In practice, this means a request needs a site-specific justification.

In this instance, the site-specific justification for this breach of the floor space standard is the form and character of the existing building. No new floor space is sought, and this variation does not undermine the control or set a precedent as the circumstances of this variation are unique to the existing building.

Conclusion

The objectives of Clause 4.6 of the LEP 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.”*

The proposal is consistent with the objectives of Clause 4.6, the height control, its zoning and the specific policy requirements for this site.

There is an absence of environmental harm associated with the non-compliance with the development standard.

Having regard to the above, it can be concluded that compliance with the floor space ratio standard is unreasonable and unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify the non-compliance and that the proposal is in the public interest because it is consistent with the objectives both of the FSR standard and those of the R1 zone. Therefore, the non-compliance is inherently reasonable.