

Attachment C

Clause 4.6 Variation Request

Floor Space Ratio

Clause 4.6 – Exceptions to Development Standards

Request to vary Clause 4.4 – Floor Space Ratio in Sydney Local Environmental Plan 2012

Address: 378-380 Cleveland Street, Surry Hills (Lot 3 in DP618947)

Proposal: Alterations and additions including change of use

Amended Date: 19 August 2025

1. Introduction

This document is a written request submitted under Clause 4.6 of the Sydney Local Environmental Plan (SLEP) 2012 to vary the Clause 4.4 Floor Space Ratio (FSR) development standard applying to the proposed development at 380 Cleveland Street, Surry Hills.

The Development Application (DA) relates to both 378 and 380 Cleveland Street, Surry Hills. Both buildings are located on one, shared lot (Lot 3 in DP618947) as shown at Figure 1.



Figure 1: Aerial site photo (Source: SixMaps)

Site area

The site was previously located on two lots, which were amalgamated in 1981. However, the buildings are subject to separate development controls, including differing FSR.

As per the Deposited Plan (DP) DP618947, the site now has a total site area of 306.5m². Each building also has a separate site area for the purposes of calculating their differential FSR development standards. Based on information provided in the previous (now superseded) DP438837, the site area of 380 Cleveland Street is 170.7m². As such, the site area of 378 Cleveland Street is 135.8m².

The current and previous Deposited Plans are included at Attachment 1 for further detail.

2. Description of the environmental planning instrument, development standard and proposed variation

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

The Sydney Local Environmental Plan (SLEP) 2012.

2.2. What is the zoning of the land?

The land is zoned MU1 Mixed Use.

The objectives of the zone are:

- To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.
- To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To ensure land uses support the viability of nearby centres.
- To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.

2.3. What is the development standard being varied?

The development standard being varied is Floor Space Ratio (FSR).

2.4. Is the development standard a performance-based or numerical control?

The FSR development standard is a numerical control.

2.5. Under what Clause is the development standard listed in the environmental planning instrument?

Clause 4.4 of the SLEP 2012 establishes the maximum FSR for land within the Sydney LGA as identified on the FSR Map.

2.6. What are the objectives of the development standard?

The objectives of the development standard are:

- To provide sufficient floor space to meet anticipated development needs for the foreseeable future.

- To regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic.
- To provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure.
- To ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.

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

As demonstrated at Figure 1, the site comprises two buildings with separate FSR controls, despite being located on the same lot. The FSR controls are 1.5:1 for 378 Cleveland Street, and 1.25:1 for 380 Cleveland Street, as shown at Figure 2.

Averaged across the site, a maximum FSR of 1.36:1 is allowable.



Figure 2: Floor Space Ratio Map (Source: SLEP 2012)

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

At 380 Cleveland Street, an FSR of 1.47:1 is proposed. It is important to note that the existing building already exceeds the control for the site, with a current FSR of 1.29:1.

Across the whole site, an FSR of 1.38:1 is proposed, exceeding the allowable 1.36:1 by 0.02:1 or 1.47%. A breakdown of the FSR for each building, and the site as a whole, is provided at Table 1.

Property	Control	Existing	Proposed	Variation
378 Cleveland Street	1.5:1	1.15:1	1.26:1 (171m ²)	No
380 Cleveland Street	1.25:1	1.29:1	1.47:1 (251m ²)	Yes – 17.6%
Both properties (whole site)	1.36:1	1.23:1	1.38:1 (422m ²)	Yes – 1.47%

Table 1: Site area and FSR breakdown

Area of Proposed Variation

The proposed increase FSR at 380 Cleveland Street, and across the site as a whole, primarily results from the proposed first floor rear addition, which will function as the kitchen for the proposed restaurant, providing sufficient floorspace on the site for the use. The area of the proposed variation is shown at Figure 3.

Some minor internal alterations at 378 Cleveland Street also result in increased GFA (across the ground and first floors), but do not exceed the FSR control for that portion of the site. These minor increases contribute to the overall exceedance, across the whole site.

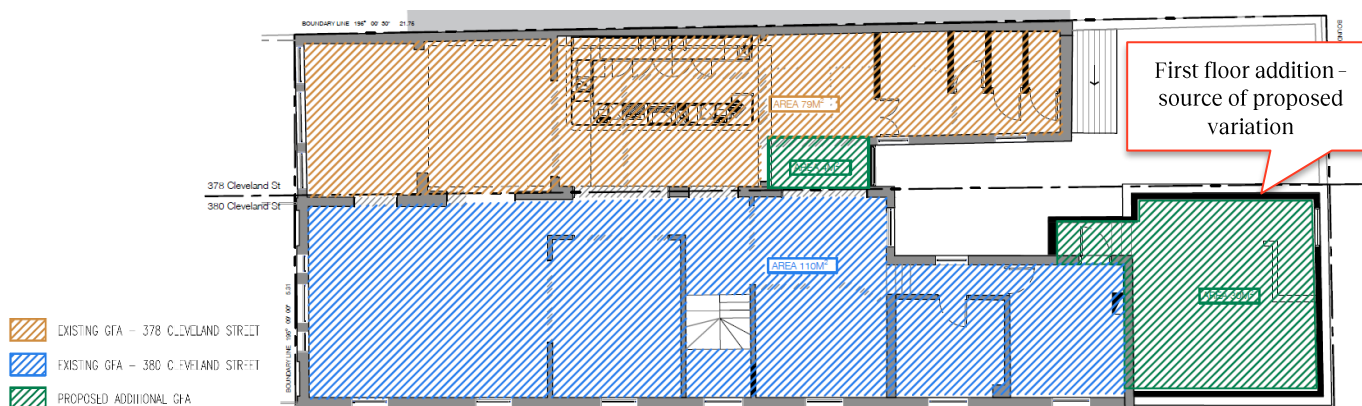


Figure 3: Existing and proposed gross floor area plan (first floor) (Source: Richards Stanisch, Drawing No. DA-0011)

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

Technically, the proposal exceeds the maximum FSR development standard at 380 Cleveland Street (1.25:1) by 0.22:1, which represents a variation of 17.6%.

However, the whole site exceeds the maximum FSR available (1.36:1) by 0.02:1, which represents a minor variation of 1.47%.

3. Justification of the Proposed Variation

3.1. Clause 4.6 Exceptions to Development Standards

Clause 4.6 establishes the framework for varying development standards in an environmental planning instrument.

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 that:

- "(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 standards."*

This written request has been prepared in accordance with the *Guide to Varying Development Standards* published by the NSW Department of Planning and Environment in November 2023, and has regard to the following judgements:

- *Winten Property v North Sydney Council* (2001) NSW LEC 46;
- *Wehbe v Pittwater Council* (2007) NSW LEC 827;
- *Four2Five Pty Ltd v Ashfield Council* (2015) NSW LEC 90;
- *Randwick City Council v Micaul Holdings Pty Ltd* (2016) NSW LEC 7;
- *Moskovich v Waverley Council* (2016) NSW LEC 1015;
- *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) NSW LEC 118;
- *Bringham v Canterbury-Bankstown Council* (2018) NSW LEC 1046;
- *Initial Action Ltd v Woollahra Municipal Council* (2019) NSW LEC 1097;
- *RebelMH Neutral Bay Pty Limited v North Sydney Council* (2019) NSWCA 130;
- *SJD DB2 Pty Ltd v Woollahra Municipal Council* (2020) NSW LEC 112;
- *WZSydney Pty v Ku-ring-gai Municipal Council* (2023) NSW LEC 1065;
- *Sioud v Canterbury-Bankstown Council* (2023) NSW LEC 1171;
- *Big Property Group Pty Ltd v Randwick City Council* (2021) NSW LEC 1161; and
- *Denny v Optus Mobile Pty Ltd* (2023) NSW LEC 27.

3.2. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The five common ways to establish whether compliance with the development standard is unreasonable or unnecessary have been summarised in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

This written request relies on the first test described in *Wehbe*, in that objectives of the development standard are achieved notwithstanding the non-compliance. An assessment of the proposal against the relevant objectives of the development standard contained at Clause 4.4(1) is provided below.

Given the circumstances of the case, the provision of a strict numerical compliance would be unreasonable on the basis that the proposed development achieves compliance with the objectives of the standard.

(1)(a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future

The proposal provides sufficient floor space to meet the development needs of the site. The proposed variation of the FSR control will allow the achievement of sufficient floor space to support the use of the site as a restaurant.

For this reason, the proposal is consistent with objective (1)(a).

(1)(b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic

- The proposed variation including the density, built form and intensity of land use of the whole proposal is appropriate for the site as it is consistent with the building envelopes controls set out by SLEP 2012 and the Sydney Development Control Plan (SDCP) 2012.
- The proposal will retain the two-storey form, which is compliant (and lower than) the three-storey height of building control for the site under SDCP 2012.
- The proposal is consistent with the envisioned intensity of land use for the site. The traffic and transport report lodged in support of the DA confirms that the proposal will not result in any adverse traffic impacts within the locality.
- The proposed addition is low-scale and subservient to the main building at 380 Cleveland Street, which is considered appropriate for the scale of built form on the site, the immediate locality and the Heritage Conservation Area (HCA), as outlined in the Heritage Impact Statement (HIS) submitted in support of the DA.

- The proposed addition is of a built form scale considered appropriate for a rear lane addition, as shown at Figure 4. The addition is smaller and lower in height than other nearby rear lane additions, for example the recently completed addition along Goodlet Lane, shown at Figure 5.

For these reasons, the proposal is consistent with objective (1)(b).



Figure 4: Photomontage of the proposed addition (Source: DA-0701 of the Amended Architectural Plans)



Figure 5: Recently completed rear addition along Goodlet Lane, near the site (Photo taken: April 2025)

(1)(c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure

- The proposal provides an intensity of development appropriate for the site as it is generally consistent with the locality statement in SDCP 2012, and compliant with the other applicable development standards of SLEP 2012.
- The proposal will not result in increased strain on existing or planned infrastructure, as demonstrated in the traffic and transport report lodged in support of the DA.

For these reasons, the proposal is consistent with objective (1)(c).

(1)(d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality

- The proposed development is appropriate for the desired character of the Cleveland Street area as outlined in the Locality Statement because:
 - The proposal is responsive to, and complements, the heritage status of the site by reinvigorating the façade, retaining significant heritage fabric (the pharmacy shopfront and fit out) and proposing a contemporary addition to the rear lane which is low-scale and subservient to the original building.
 - The proposal retains and restores the corner building, introducing a new commercial use which will activate and enliven the streetscape.
 - The proposed restaurant use will activate to the street front.
 - The proposed addition will contribute to the mix of building types, reflecting diversity of form and massing throughout the locality.
 - The proposal will strengthen the existing ‘activity cluster’ at the intersection of Marlborough and Young Streets with Cleveland Street, which contributes to the linking of activity and retail offerings between Redfern and Surry Hills.

For these reasons, the proposal is consistent with objective (1)(d).

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

As outlined below, it is considered that there are sufficient environmental planning grounds to justify contravening the development standard, because:

- The proposed variation facilitates the orderly and economic redevelopment of the land.
- The proposed variation provides opportunity for the adaptive reuse and revitalisation for use of the site as a restaurant.
- The proposed variation will not have adverse heritage impact, as concluded in the HIS submitted in support of the DA, for the following reasons:
 - The HIS concludes that the proposed addition “is very modest and is sympathetic, with a skillion form and materials. The roof of the addition is set below the parapet to Marlborough Street and the addition is subservient to the primary form”.
 - The addition is set 1.84m below the parapet. The walls of the new addition are also setback behind the existing terrace walls, which assists in the addition being read as low-scale and subservient.
 - The HIS concludes that the proposal is a well-considered response to the heritage significance of the place, its current poor condition and the level of intactness. The proposed variations will not result in adverse heritage impact to the fabric of the buildings, or to the HCA.
- The proposed variation results in a built form that is contextually compatible with the Cleveland Street Locality and the HCA, with varying heights and contemporary, sympathetic rear lane additions.

- The proposed variation results in a built form which is consistent with the desired scale of the surrounding development and streetscape, below the maximum 3 storey height limit under SDCP 2012.
- The proposed variation results in a built form which is consistent with the desired built form envelope as set by SLEP 2012 and SDCP 2012.
- Non-compliance with the development standard does not contribute to adverse environmental impacts in terms of solar access, acoustic or traffic impacts, outlined below.
 - Solar Access - There are two residential tenancies at 382 Cleveland Street, directly opposite the site, which have windows fronting Marlborough Street. The shadow elevations demonstrate that the proposed addition will not overshadow any windows on the Marlborough Street façade. As such, the proposal will not have any solar access impact to these units.
 - Refer to the solar access diagrams and elevations within the architectural drawings for further detail.
 - Acoustic Impact- The acoustic report demonstrates that the proposal will have no adverse impact to the acoustic privacy of nearby residential properties, subject to recommended operational and design requirements.
 - Traffic Impact - In summary, the proposal will not result in any adverse traffic impacts. Deliveries and servicing of the site will occur during the day and utilise the loading area in the existing garage. Swept path analysis demonstrates that a standard B99 vehicle can easily manoeuvre in and out of the garage and will not cause and traffic impacts on Marlborough Street.

4. Conclusion

Development standards are a means of implementing planning purposes for a development or area.

A development strictly complying with the numerical standard would not have any positive social, environmental or economic impacts. As demonstrated in this submission, it would be unreasonable for strict compliance with the FSR control to be enforced.

It is concluded that the variation the development standard is well founded as compliance with the standard is both unnecessary and unreasonable in the circumstances of this case.