

Attachment B

Clause 4.6 Variation Request – Floor Space Ratio
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32 Moore Park Road, Paddington

REQUEST FOR VARIATION TO FLOOR SPACE RATIO OF BUILDINGS DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.6(3) OF Sydney LEP 2012

This Clause 4.6 variation relates to a proposal to carry out alterations and additions to the existing residential component of a mixed-use building. The proposal seeks to add an additional storey comprising of two new residential units (1 x studio and 1 x one-bedroom unit) above the existing building.

The proposal includes changes to the entry foyer and common vertical circulation to ensure compliance with BCA specifications.

Specifically, the following construction works are proposed:

- **Demolition**
 - Demolition of the existing rooftop storeroom, common laundry and roof terrace
- **Ground Floor level**
 - New bin storage area to the Josephson Street frontage (GFA of the ground floor shop is reduced)
 - Ventilating roller shutter to screen the new bin storage area
- **New second-storey level**
 - The additional storey will comprise of two new units consisting of a studio and a one-bedroom unit with common stairs for vertical circulation and access:
 - Unit 6 – studio with bathroom, kitchenette, living room, bedroom and deck
 - Unit 7 – one bedroom unit with bathroom, open kitchen, living room, media room, bedroom and deck
 - The units have operable skylights to the bathroom for ventilation and natural lighting
 - New windows to the eastern side elevation are aligned with windows at the lower floor levels
 - Existing roof to be adjusted to metal deck with 1.5 degree fall

Please refer to the architectural plans for more details.



3D Rendering prepared by Architects Ink

The proposal results in a non-compliance with clause 4.4 of the Sydney Local Environmental Plan 2012 (**SLEP**) which relates to floor space ratio (**FSR**). As such, this Clause 4.6 request has been prepared in accordance with Clause 4.6 of the Sydney Local Environmental Plan 2012, which applies to the subject site.

The request demonstrates that compliance with the development standard relating to FSR is unreasonable or unnecessary in the circumstances of the case and establishes that there are sufficient environmental planning grounds to justify contravening the development standard, satisfying clause 4.6(3) of the SLEP.

Based on this Clause 4.6 request, the consent authority can be satisfied that the written request has adequately addressed the matters required to be demonstrated by subclause (3), and that the proposed development will be consistent with the objectives of the FSR development standard.

The nature of the exceedance to the development standard relating to FSR is set out below, followed by consideration of the relevant matters in clause 4.6 of the SLEP.

The NSW Department of Planning, Industry and Environment (DPI&E) provides guidance on how to prepare Clause 4.6 variations; 'Varying development standards: A Guide' (August 2011). This written request to vary the standards is based on the Guide.

Zoning of the site

The zoning of the land is R1 – General Residential. The objectives of the R1 zone are:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To maintain the existing land use pattern of predominantly residential uses.*

Clause 4.4 – Floor Space Ratio

The Standard

The site has an area of 220.6m².

Clause 4.4 of the SLEP and the associated map prescribe a maximum floor space ratio (FSR) of 1.75:1 (386m²) for this site.

The existing mixed use building has an FSR of 1.66:1 (365.8m²).

The proposal seeks to provide a maximum FSR of 2.01:1 (443.9m²) that is a percentage variation of 15% (57.9m²), providing a non-compliance with this control.

Floor Space Ratio calculations from the architect are provided as follows:

	Existing	Proposed
Ground Floor	172.4m ²	169.5m ²
First Floor	173.4m ²	173.4m ²
Second Floor (new)	-	101m ²
Total GFA/ FSR	365.8m ² (1.66:1)	443.9m ² (2.01:1)

The objectives of Clause 4.4

The objectives of Clause 4.4 are as follows:

- (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 new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.*

Clause 4.6 – Exceptions to Development Standards

Clause 4.6 of the SLEP allows for exceptions of Development Standards. The objectives of this 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.*

Clause 4.6(2) provides the power for development consent to be granted even though the development would contravene a development standard,

subject to that clause:

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

Clause 4.6(3) sets out what a clause 4.6 written request seeking to justify a contravention of a development standard must demonstrate in order for consent to be granted for development that contravenes a development standard:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:*
- (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) *there are sufficient environmental planning grounds to justify contravening the development standard.*

The matters required to be demonstrated under clause 4.6(3) are set out below as Points 1 and 2.

Clause 4.6(4) requires that Council keep a record of its assessment carried out under Clause 4.6(3).

1. Clause 4.6(3)(a) - Compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case:

In order to assess whether strict compliance with the development standard is unreasonable or unnecessary, a proposal is considered against the following five ways¹:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;

¹ see *Wehbe v Pittwater Council* [2007] NSWLEC 827

3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that 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; or
5. The zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to the land.

These five ways were re-emphasised by the Court². Each 'test' offers a potential way of demonstrating that compliance is unnecessary or unreasonable in a particular circumstance³. All tests are separate and not all tests may not be applicable in each case. Therefore, not all tests need to be met.

This objection relies on the first method set out above, that compliance with a standard is unreasonable and unnecessary given that the objectives of the standard are met even though the standard is not complied with⁴.

Objective (a)

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

Comment: The proposal includes the addition of a studio and one-bedroom residential unit which provides sufficient floor space to meet the development needs for the foreseeable future. The site is well located in terms of public transport and social infrastructure and suitable for additional housing.

Objective (b)

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

Comment: The proposal provides a building with a built form that is consistent with other residential development in the surrounding area and suitable in its heritage context.

² *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386

³ *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312

⁴ *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245

The proposed density and land use intensity is considered to be appropriate in its context and traffic generation is considered to be acceptable.

Objective (c)

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

Comment: The addition of two residential units is acceptable and is not an over intensification of the development. The capacity of existing and planned infrastructure is capable of absorbing the additional units.

Objective (d)

- (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.*

Comment: The proposed development is fitting within the Selwyn Street locality which consists of a diverse mix of terraces, modest dwellings, and larger institutional and commercial buildings. The proposal meets the desired character of the locality and does not create adverse impacts on the amenity of the locality.

Compliance with the development standard is unreasonable and unnecessary as the proposed building height and bulk is of an appropriate form and scale and is compatible with surrounding development and the desired future character for the locality and meets the objectives of the development standard.

2. Clause 4.6(3)(b) - There are sufficient environmental planning grounds to justify contravening the development standard:

The components proposed above the FSR control are:

- 57.9m² of GFA

In addition to the the consistency of the proposal against the FSR objectives (see **Point 2 above**), in my opinion there are sufficient environmental planning grounds to justify contravening the development standard⁵.

⁵ see *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [90]

The proposal has been designed with a suitable density and built form that is compatible with the local context whilst not creating any adverse impacts on the amenity of the locality.

There are sufficient environmental planning grounds which demonstrate that the proposed FSR can be achieved without adverse impacts for the following reasons:

- Overall, the proposed building height and bulk is of an appropriate form and scale and is compatible with surrounding development and the desired future character for the locality.
- Exceedance of the FSR control will not create additional building bulk that results in unreasonable environmental amenity impacts as follows:
 - The proposal will not result in the loss of views from surrounding development;
 - The proposal will not result in unreasonable overshadowing of adjoining properties. The neighbouring development will receive 3 hours of unimpeded solar access from 12pm to 3pm on 21 June.
 - The proposal will provide a development, which has been designed to ensure that the visual and acoustic privacy of adjoining properties is maintained. Windows have been suitably located to ensure there is no overlooking to the neighbouring residential property; and
 - The proposal will provide a development, which is consistent with the scale of the adjoining developments and is of an appropriate visual bulk for the locality.
- The front and rear alignment of the proposed storey matches alignment of the adjoining terrace at 30 Moore Park Road.
- The proposed new storey incorporates articulated facades to avoid a bulky appearance and has proportions consistent with the existing building and streetscape.
- The building on the site is not identified as a heritage item, however, it is located within the Paddington Urban Heritage Conservation Area. A Heritage Impact Statement (HIS) prepared by John Oultram accompanies this application which considers the development a relatively modest and well-considered addition to a contributory item of limited significance. Original fabric and significant elements of the building such as the chimneys, are retained. The HIS recommends the proposal for approval.

- All existing and proposed units will receive sunlight between 9am and 3pm in mid-winter to the living areas, with adequate solar access to the private open space of Apartment 7 in mid winter. This meets the 15% requirement of the ADG.
- The proposal improves the existing common areas including the common vertical circulation by ensuring BCA and fire safety compliance, as well as the provision of a new waste bin storage area for the residential units that is located to the Josephson Street frontage at the ground floor level.
- The proposal adds a suitable mix of apartment sizes and housing choices for the housing needs of the area. The building will provide two additional residential units including a studio (Unit 6) and a one-bedroom unit (Unit 7).
- The proposed residential units include a private open space each, that meets the size requirements of the ADG. The studio will have an external rooftop deck of 8.8m² and the one-bedroom unit will have an external rooftop deck of 11m². The private open spaces provide passive recreational space for the residents, and enhances the amenity and indoor/outdoor lifestyle of residents.

The proposal will provide a suitable design and be of suitable amenity in terms of the built environment and represents the orderly and economic use and development of land, which are identified as objects of the Act (Section 1.3 of the EP&A Act, 1979). The building envelope and design of the proposal responds appropriately to the unique opportunities and constraints of the site.

The aspect of the development that breaches the FSR control can be justified as the proposal provides a consistent scale with neighbouring development. This can be described as an environmental planning ground because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome⁶.

The lack of impact on adjoining properties in terms of solar access, privacy, view loss and visual bulk establishes sufficient planning grounds⁷.

⁶ *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 1097 at [42]

⁷ *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [94(c)] and *Randwick City Council v Micaul Holdings Pty Ltd* at [34]

3. Clause 4.6(5)

In the context of the requirements of Clause 4.6(5), it is considered that no matters of State or regional planning significance are raised by the proposed development. Moreover, it is considered that there would be no public benefit in maintaining the particular planning control in question, in the case of this specific development.

Conclusion

The proposal is consistent with the objects of Section 1.3 of the EP& A Act, 1979, which are to encourage development that promotes the social and economic welfare of the community and a better environment, to promote and coordinate orderly and economic use and development of land, to promote good design and amenity of the built environment and to protect the heritage of the built environment.

This submission is considered to adequately address the matters required by Clause 4.6 and demonstrates that compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case and that there are sufficient environmental planning grounds to support the variation.

Based on this Clause 4.6 request, the consent authority can be satisfied that the written request has adequately addressed the matters required to be demonstrated by subclause (3), and that the proposed development is consistent with the objectives of the FSR development standard under the SLEP, in which the development is proposed to be carried out.

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26 August 2025