

Attachment C

Clause 4.6 Variation Request - Floor Space Ratio
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6.1.8 CLAUSE 4.6 VARIATION – FLOOR SPACE RATIO (FSR)

This request seeks a variation under Clause 4.6 of the Sydney Local Environmental Plan 2012 (Sydney LEP 2012) to permit a minor exceedance of the floor space ratio (FSR) development standard for a proposed addition at 553 Crown Street, Surry Hills. The site is a two-storey terrace within a Heritage Conservation Area (contributory item) and is subject to an FSR control of 1.5:1 under Clause 4.4 of Sydney LEP 2012.

The proposed works will result in an FSR of 1.65:1, representing a 10.2 m² (10.2%) increase over the permissible gross floor area (GFA). The proposal includes the infill of an existing ground-floor breezeway and external stairs, and a first-floor rear addition that aligns with the established rear building line of adjoining properties. Importantly, the proposal remains below the 9 m height limit and does not expand the building footprint toward Crown Street.

A Heritage Impact Statement accompanies the application, confirming that the contribution of the item to the conservation area will be preserved. Solar access analysis demonstrates that the additional floor area no overs does not result in adverse overshadowing of any adjoining residential private open space or habitable room windows, with new shadows cast only onto the roof of the commercial neighbour at 555 Crown Street. The rear of the site adjoins a decommissioned laneway, providing a buffer to the residential property further west. The locality is an inner-city mixed-use precinct, characterised by closely-built commercial terraces to the north and south and a mix of commercial and residential uses to the east and west. In this context, the proposal's modest intensification is in keeping with the established urban character and will not detract from neighbouring amenity or heritage values. The table below summarises the applicable FSR standard, the proposed development metrics, and the extent of variation sought:

TABLE 4

FLOOR SPACE RATIO (FSR) TABLE					
Control (FSR)	Site Area	Permissible GFA	Proposed GFA	Proposed FSR	Variation
FSR 1.5:1 (Clause 4.4)	66.8 m ²	100.2 m ²	110.4 m ²	1.65:1	+10.2 m ² (+0.15:1, 10.2%)

6.1.8.1 CLAUSE 4.6 STATUTORY FRAMEWORK AND RELEVANT CASE LAW

Clause 4.6 of Sydney LEP 2012 is an “exceptions to development standards” provision that empowers the consent authority to grant consent for a development that contravenes a numerical standard, provided certain tests are met. Under the current Clause 4.6(3), the written request must demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify the contravention. The consent authority must be satisfied that these matters are adequately addressed before it can consider granting the exception. This request also has regard to relevant planning principles established by the NSW Land and Environment Court in:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and [2015] NSWCA 248
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118

With respect to Clause 4.6(3)(b), the following sections address Clause 4.6(3)(a) and (3)(b) in turn. The justification draws on the objectives of the FSR standard in Clause 4.4 of Sydney LEP 2012, relevant planning considerations for the site, and the guidance from case law to establish a robust case for the variation.

6.1.8.2 CLAUSE 4.6(3)(A): COMPLIANCE IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES

Strict compliance with the 1.5:1 FSR development standard is considered unreasonable or unnecessary in the circumstances of this case, as the proposal can achieve the underlying objectives of the FSR control, with a 10.2% numerical exceedance. In effect, the proposal's outcomes align with what the FSR standard seeks to achieve, such that enforcing the precise numeric limit would serve no useful purpose.

The objectives of Clause 4.4 of Sydney LEP 2012 are:

- (1) *The objectives of this clause 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.*

The proposed development satisfies these objectives, as detailed below:

Objective (a) – “to provide sufficient floor space to meet anticipated development needs for the foreseeable future”: The proposal is consistent with this objective. By modestly increasing the available floor space within an existing commercial building, the development will better meet the functional needs of its intended use (a dental clinic) and contribute to the supply of commercial floor space in the local centre. Strict compliance with the 1.5:1 FSR standard would unreasonably limit the floor space available for the clinic, given the site's very small land area. In fact, requiring compliance would necessitate forgoing approximately 10 m² of usable floor area that is needed for the clinic's operations, restricting serviceability to the community. This would undermine Objective (a), rather than serve it, as it would frustrate the site's capacity to provide adequate floor space for a viable commercial use on this site. By allowing a slight exceedance, the development optimises the use of an existing building in a location where additional commercial floor space is beneficial to serve the local community's needs.

Objective (b) – “to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic”: The proposal will maintain a built form and density that is in harmony with the surrounding context, thereby upholding the intent of Objective (b). The minor increase in floor space (10.2 m²) equates to a negligible change in density and will not perceptibly alter the building's external bulk or scale. The building remains a two-storey terrace, comparable in scale to others along Crown Street. The first-floor addition simply squares off the rear of the building to match its neighbours, and the ground-floor infill occupies an existing external stairwell. Because there is no increase in the general footprint or height, the resultant density and built form remain well within the environmental capacity of the site and locality. In terms of traffic and pedestrian generation, the proposed variation has no material impact. The use of the building as a dental clinic is permissible and appropriate in the E1 zone and will not generate significant increases in traffic. Crucially, no on-site parking is proposed, which is consistent with the current situation, so the development will not encourage additional vehicle traffic. The site is well-served by public transport and pedestrian access, and the slight increase in floor space does not alter those dynamics in any meaningful way. Therefore, even with the FSR non-compliance, the intensity of development remains effectively regulated and in line with Council's planning parameters for this local centre.

Objective (c) – “to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure”: The proposed FSR variation will not exceed the capacity of the infrastructure available to the site. The subject site is located in an inner-city area with established infrastructure and services including water, sewer, energy, roads and public transport. The additional 10.2m² of floor space above the FSR standard will not place any discernible extra demand on utilities or infrastructure. Public transport capacity along Crown Street and nearby Cleveland Street, and the light rail and Central Station within walking distance, is more than sufficient to accommodate the negligible increase in patronage or employees associated with the expanded clinic floor area. Likewise, other utilities have existing capacity for the small increase in floor space and associated usage. As such, the development’s intensity remains commensurate with infrastructure capacity, satisfying Objective (c) notwithstanding the numerical FSR exceedance. Strict compliance is unnecessary in this regard, as it would not yield any tangible infrastructure benefit; it would simply remove floor area that could otherwise be utilised beneficially without impact.

Objective (d) – “to ensure that new development reflects the desired character of the locality ... and minimises adverse impacts on the amenity of that locality”: The proposal is carefully designed to respect the existing character of the South Surry Hills locality and to avoid adverse amenity impacts, thereby fulfilling Objective (d) despite the FSR non-compliance. The minor additions are located to the side and rear of the building and within an area already built-up to a two-storey form, so there is no change to the Crown Street streetscape or to the heritage character when viewed from public domains. The desired character of the area, which is a vibrant mixed-use inner-city village with heritage shopfronts and terrace buildings, is maintained; in fact, the infill and addition make the subject building more consistent with its neighbours. In terms of amenity impacts, detailed analysis confirms there will be no adverse overshadowing on key sensitive areas. The only adjacent residential property potentially affected is to the west (rear), but it is separated by a disused lane and oriented such that its main habitable rooms and open spaces will not receive any additional shadowing during mid-winter from the modest first-floor addition.

The proposed rear-facing windows are associated with the internal stairwell and are not associated with an area of congregation and will not cause privacy intrusion into neighbouring dwellings; the addition is enclosed and oriented in a manner consistent with the existing building. In summary, the character of the locality is upheld and amenity preserved. The objectives of the FSR standard in this regard are achieved notwithstanding the minor numerical non-compliance, so insisting on full compliance would not yield any appreciable benefit to character or amenity.

Based on the above assessment, the proposal satisfies the First Method in *Wehbe v Pittwater Council* [2007] NSWLEC 827; the objectives of the FSR development standard are achieved regardless of the non-compliance. The underlying planning intentions of the 1.5:1 FSR control are met in this case through a development that remains in character, causes no adverse impacts, and provides needed floor space for the site’s use. Moreover, as noted earlier, elements of the Fourth Method in *Wehbe* are also relevant: the numerical standard in this historic terrace context is somewhat arbitrary, given that many buildings were constructed prior to the imposition of current FSR limits. The minor nature of the non-compliance (10.2%) in a setting where a rigid application of the standard is not critical to achieving planning objectives further supports the conclusion that strict compliance is unreasonable and unnecessary.

For the reasons outlined above, it is demonstrated that compliance with the 1.5:1 FSR development standard is unreasonable and unnecessary in the circumstances of this case. In particular, the development achieves the aims and objectives of the standard notwithstanding the non-compliance, and nothing would be gained (in terms of planning outcomes) by enforcing strict compliance. The first limb of Clause 4.6(3) is therefore satisfied.

6.1.8.3 CLAUSE 4.6(3)(B): THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

Clause 4.6(3)(b) of the Sydney LEP 2012 requires that the applicant’s written request demonstrate “sufficient environmental planning grounds” to justify the contravention of the development standard. The focus of this assessment is on the specific

aspect of the development that contravenes the standard, rather than the merits of the development as a whole. In other words, the justification under limb (b) must show why allowing an FSR in excess of 1.5:1 (in the amount proposed) is warranted in this particular case, beyond just the general benefits of the project as clarified in *Initial Action Pty Ltd v Woollahra Municipal Council* at [24] and *Turland v Wingecarribee Shire Council* at [42]. Furthermore, the environmental planning grounds advanced must be specific to the circumstances of the proposed development on this site, not simply broad or generic reasons. The Court in *Four2Five* emphasised that the rationale for the variation should stem from features unique to the site and proposal, demonstrating why this departure from the standard produces a better outcome in planning terms.

Having regard to the above principles, the following environmental planning grounds are put forward to justify the contravention of the FSR standard in this case:

- The numerical extent of the variation is minor and inconsequential in planning terms.** The exceedance is only 0.15:1 (10.2 m²), or 10.2%, which is minor in magnitude. This small amount of extra floor space is virtually indiscernible externally and does not manifest in any appreciable difference in building bulk, scale or height. In practical terms, the streetscape presentation and urban form outcome of a compliant scheme (FSR 1.5:1) versus the proposed scheme (FSR 1.65:1) would be effectively identical. This indicates that the objectives and impacts tied to the FSR control are not compromised by the small variation. The minor nature of the non-compliance is an environmental planning ground in itself, as it demonstrates that the purpose of the standard is not defeated by the proposal – the standard’s aims are met and any theoretical benefit of strict compliance would be negligible.
- The variation facilitates a superior design and planning outcome by making better use of existing built form.** The ground-floor breezeway and external staircase currently represent under-utilised space in the building. By enclosing the breezeway and internalising the stair, the development recovers floor area within the existing footprint, enhancing the functionality and usability of the premises without extending beyond the overall building’s envelope. This is a positive planning outcome because it promotes the orderly and economic use of land, which is a key objective of the Environmental Planning and Assessment Act 1979 and aligns with sustainability principles by avoiding the need for outward expansion. If the FSR standard were strictly enforced, that ground-floor void would remain unusable and the building would operate less efficiently. Allowing the infill and associated FSR exceedance is therefore justified as it leads to a more rational and beneficial use of the space on environmental planning grounds. Similarly, by extending the first floor to the rear boundary, the proposal achieves a unified rear building line with adjoining properties, which are already built to the rear. The contravention of the FSR standard is thus partly driven by a response to the existing built form context. Aligning the addition with the neighbours not only respects the pattern of development but also maximises the site’s constrained area. This results in a more coherent and integrated built form, thereby enhancing the overall urban design outcome. The additional floor space enables a contextually appropriate design solution. The FSR variation is justified by the site-specific context, yielding a better design that aligns with their surroundings. These design improvements are possible only with the FSR flexibility and constitute sound planning grounds for the variation.
- The contravention enables development that better respects the site’s context (heritage and urban form) than a strictly compliant alternative.** In this heritage conservation area context, the preferable approach to adding floor space is to utilise and extend the existing building in a sympathetic manner, rather than to contemplate more intensive redevelopment. The 10.2 m² of extra space is achieved through minor additions that preserve the heritage fabric and aesthetic of the contributory item. A strictly compliant scheme might require awkward design compromises which could actually appear incongruous or less sympathetic to the historic terrace form. By contrast, the proposed infill and addition follow the form of the neighbouring terraces, resulting in a more cohesive row of buildings. This respectful approach is an environmental planning ground supporting the variation: the heritage and urban design outcomes are improved by allowing the small exceedance, whereas adhering literally to the FSR limit could hinder achieving the best heritage outcome. The submitted Heritage Impact Statement confirms that the additions have no adverse heritage

impact, and indeed, ensuring the building's ongoing viable use helps secure its long-term conservation, and is in the public's interest.

- **No public disbenefit or adverse environmental impact will result from the FSR variation.** It is a fundamental planning consideration that a development standard can be flexibly applied where doing so does not compromise environmental or amenity outcomes. In this case, detailed analysis has shown that the extra floor area will not cause any negative environmental impacts: there is no material change in shadowing, privacy, traffic, or demand on infrastructure attributable to the additional 10 m². The site remains compliant with all other applicable controls, including height, setbacks, heritage considerations, and land use. The proposal will have a positive impact on the community by receiving better-utilised local service with improved facilities. The absence of adverse impacts is an important site-specific circumstance here, demonstrating that the objectives of the zone and the development standards are upheld despite the variation. This aligns with the intent of Clause 4.6 to allow flexibility where strict adherence to a numerical standard is unwarranted in light of the proposal's planning merits. In view of the above points, it is clear that there are sufficient environmental planning grounds to justify the FSR contravention in this instance. Each ground is particular to the site and the proposed development: the extremely small and controlled nature of the exceedance, the design efficiencies gained within the existing building form, the heritage-sensitive outcome, and the neutral or positive environmental impacts all combine to form a compelling justification. Enforcing the 1.5:1 standard in this case would serve no useful town planning purpose, whereas allowing the variation enables a better planning outcome overall. This satisfies the second limb of Clause 4.6(3).

In light of the above, it is evident that compelling environmental planning grounds exist to justify the proposed contravention of the FSR development standard. Conversely, there are no overriding planning grounds that would necessitate strict compliance with the 1.5:1 standard in this case – enforcing the standard would be an unnecessary impediment to an otherwise acceptable development. The written request has therefore demonstrated full satisfaction of Clause 4.6(3)(b). The contravention is justified by site-specific circumstances and results in a development outcome that aligns with the objectives of the standard and the zone, consistent with the intent of Clause 4.6 of the LEP.

6.1.8.4 CONCLUSION

The assessment above demonstrates that compliance with the maximum FSR development standard implemented under Clause 4.4 of Sydney LEP 2012 is unreasonable and unnecessary in the circumstances of this proposal, and that there are sufficient environmental planning grounds to justify the contravention. The justification for the FSR variation is well-founded and supported by both the particulars of the development and relevant planning principles. Allowing the proposed FSR 1.65:1 in lieu of 1.5:1 will facilitate the orderly and economic use of the land in an appropriate manner and enable a better design and heritage outcome than a strictly compliant scheme. Importantly, the resultant development remains entirely in character with its surroundings and does not cause adverse impacts, fulfilling the core purposes behind the development standard.

This Clause 4.6 variation request has demonstrated that, notwithstanding the minor non-compliance with the FSR standard, the proposed development is acceptable and in the public interest as:

- The built form will largely remain consistent with the existing building's bulk and scale, as well as the established pattern of development along Crown Street. The additions are minor and sympathetic, ensuring the visual appearance and scale of the building continue to complement the streetscape and locality.
- Compliance with the FSR development standard is unreasonable and unnecessary in this case because the objectives of the standard are achieved notwithstanding the non-compliance. The proposal meets all the objectives of Clause 4.4 including appropriate floor space provision, controlled density, infrastructure alignment, and maintained local character/amenity even though it slightly exceeds the numeric limit.

- There are sufficient environmental planning grounds to justify the contravention of the standard, as detailed in this request, given that:
 - *Consistency with Clause 4.6's first objective:* The variation is consistent with the first objective of Clause 4.6 of the LEP, which is to provide an appropriate degree of flexibility in the application of development standards. In this instance, flexibility in applying the FSR control is appropriate and warranted to accommodate the minor additions that lead to a superior outcome.
 - *Consistency with Clause 4.6's second objective:* The variation is consistent with the second objective of Clause 4.6, in that it enables the achievement of a better planning outcome for this development. The additional floor space allows a functional and improved design (including internal circulation improvements and enhanced amenity for the building's users) and supports the adaptive re-use of a heritage building, which together represent a better outcome than strict compliance would produce.
 - *Contextual merit:* The proposal is in harmony with the built form and land use intensity of its context in Surry Hills. It optimises the use of a small inner-city site located in a designated local centre, maximising commercial floor space in close proximity to public transport and services. The variation does not push the development beyond what the locality can comfortably sustain; rather, it fits neatly within the envelope of existing development in the area.

Therefore, Council can be satisfied that there is sufficient planning justification to support the proposed variation to the FSR development standard. The DA may be approved with the FSR as proposed (1.65:1) under the flexibility afforded by Clause 4.6 of the Sydney LEP 2012, confident that the objectives of the standard and the broader planning objectives for the site will be met.