Attachment C

Clause 4.6 Variation Request – Floor Space Ratio

Clause 4.6 variation request – Floor space ratio (clause 4.4 SLEP 2012)

1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney [2019]* NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 Sydney Local Environmental Plan 2012 ("SLEP")

2.1 Clause 4.4 – Floor space ratio

Pursuant to Clause 4.4 of Sydney Local Environmental Plan 2012 (SLEP) the maximum floor space ratio for a building on the land is not to exceed 1.5:1. The objectives of this control 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 proposal results in a total GFA of 827m^2 representing an FSR of 2.11:1 and a non-compliance of 241.4m^2 or 41.2%.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of SLEP provides:

(1) The objectives of this clause are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The decision of Chief Justice Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal *in RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

> *"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of SLEP provides:

(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.

This clause applies to the clause 4.4 FSR Development Standard.

Clause 4.6(3) of SLEP provides:

(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.*

The proposed development does not comply with the FSR provision at 4.4 of SLEP which specifies a maximum FSR however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.4 of SLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

    (a) compliance is unreasonable or unnecessary; and

(b) there are sufficient environmental planning grounds to justify contravening the development standard

4.0 Request for variation

4.1 Is clause 4.3 of SLEP a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes:

> *(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 4.4 SLEP prescribes a density that relates to certain development. Accordingly, clause 4.4 SLEP is a development standard.

4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in Wehbe v Pittwater Council [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

<u>Consistency with objectives of the floor space ratio standard</u>

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

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

Response: The non-compliant floor space is associated with the proposed residential accommodation. The non-compliant portion of the proposed floor space will increase the stock of housing within the City of Sydney Local Government Area. The proposal achieves this objective notwithstanding the non-compliant floor space proposed.

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

Response: The subject property is located within accessible areas such that will not generate unmanageable vehicle or pedestrian traffic. Notwithstanding the non-compliant floor space proposed the development provides appropriately for off-street carparking.

This objective is achieved notwithstanding the non-compliant floor space proposed.

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

Response: The non-compliant floor space will not exceed the capacity of existing and planned infrastructure. This objective is achieved notwithstanding the non-compliant floor space proposed.

(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.*

Response: As detailed within the accompanying Statement of Environmental Effects the proposed development is consistent with the principles and desired future character identified for the Pyrmont locality. The alterations and additions do not adversely impact on the Pyrmont HCA nor the adjoining heritage item and heritage items in the vicinity, as outlined. It provides for a mixed-use building while maintaining its contribution to the heritage value of the area.

The height, scale and density of the proposal are consistent within the streetscape and will maintain a complimentary and compatible streetscape. The floor space has been appropriately distributed across the site having regard to the properties immediate built form context and the height established by the existing building.

The additional floor space and associated height facilitates the adaptive reuse of the building in a manner which promotes the orderly and economic use and development of land for a purpose which will increase the stock of housing within the City of Sydney Local Government Area.

The additional floor space and associated height will not give rise to unacceptable amenity impacts in terms of views, solar access or visual privacy.

This objective is achieved notwithstanding the non-compliant FSR proposed.

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the FSR standard. Given the developments consistency with the objectives of the FSR standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*

24. *The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient environmental planning grounds

The aspect or element of the development that contravenes the FSR standard is generally that located above the 9m height standard. Sufficient environmental planning grounds exist to justify the variation to the height of buildings standard. Those grounds are as follows:

Ground 1

Objective 1.3(b) of the Environmental Planning and Assessment Act 1979 is:

> *"to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,"*

Consistent with objective 1.3(b) of the EP&A Act, SLEP includes the following aim at clause 1.2(2)(c):

> *(c) to promote ecologically sustainable development,*

The retention, expansion and adaptive reuse of the non-complying element of the building facilitates ecologically sustainable development. It reuses the structure of an existing building and avoids the environmental impacts of demolition and unnecessary waste. It reduces resource consumption and reduces waste materials. It also maintains the economic viability of the development whilst management impacts on the environment.

The non-compliant floor space provides sufficient economic incentive to undertake an adaptive reuse of the existing building for the purpose of affordable rental housing with such outcome achieving the aim of SLEP at clause 1.2(2)(e) of that EPI. The proposed development achieves objective 1.3(b) of the EP&A Act and the relevant aims in clause 1.2(2) of SLEP.

A development that demolished and did not replace the non-complying element of the development would be inconsistent with (and would tend to hinder the achievement of) Objective 1.3(b) of the EP&A Act and clause 1.2(2)(c) of SLEP.

Ground 2

Objective 1.3(c) of the EP& Act is:

> *"to promote the orderly and economic use and development of land,"*

The proposal seeks to adaptively reused the existing building and to augment floor space through the provision of an additional level of accommodation which will increase the stock of housing within the City of Sydney Local Government. Approval of the FSR variation will facilitate the adaptive reuse of the existing building in a mixed-use form and in doing so promote the orderly and economic use and development of land consistent with this objective.

Ground 3

The proposed adaptive re-use of the existing building which proposes floor space above the FSR and height standards does not result in any additional environmental impacts beyond what exists but results in an improvement in the design and visual appearance of the building.

For the above reasons there are sufficient environmental planning grounds to justify contravening the development standard.

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

There are sufficient environmental planning grounds to justify contravening the development standard.

5.0 Conclusion

T consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

(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.

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of an FSR variation in this instance.

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Director

25.6.25