

Attachment E

Clause 4.6 Variation Request Floor Space Ratio

B Clause 4.6 Request to Vary Development Standard (Clause 4.4 Floor Space Ratio)

Date: 13 February 2018

Introduction

Purpose

This Clause 4.6 Exception to Development Standards Request is submitted to the City of Sydney Council to accompany a Development Application (DA) for the alterations and additions to an existing pub/hotel building to incorporate three storeys of residential accommodation at 106-108 Swanson Street, Erskineville (the site).

Written justification is provided to demonstrate that compliance with development standard Clause 4.4 Floor Space Ratio (FSR) is unreasonable or unnecessary in these circumstances.

This report specifies the grounds of the objection and has been prepared in accordance with:

- » Clause 4.6 of the Sydney Local Environmental Plan 2012 (SLEP).
- » Varying development standards: A Guide (August 2011) (the Guide).

Clause 4.6 Exceptions to Development Standards

Clause 4.6 Exceptions to development standards of SLEP states:

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

(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.

(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.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written requires 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.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(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, and

(b) the concurrence of the Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Secretary 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 Secretary before granting concurrence.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note: *When this plan was made it did not include land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.*

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(ca) clause 4.3 (Height of buildings), but only in relation to land shown as being in Area 1 or Area 2 on the Heights of Buildings Map,

(cab) clause 4.5A (Balconies on certain residential flat buildings),

(cb) clause 5.3A (Development below ground level in Zone RE1),

(cc) clause 6.10 (Heritage floor space),

(cd) clause 6.11 (Utilisation of certain additional floor space requires allocation of heritage floor space),

(cda) clause 6.11A (Temporary alternative heritage arrangements in relation to allocation of heritage floor space)

- (ce) clause 6.17 (Sun access planes),*
- (cf) clause 6.18 (Exceptions to sun access planes),*
- (cg) clause 6.19 (Overshadowing of certain public places), except in respect of Australia Square Plaza, Chifley Square, First Government House Place and Sydney Town Hall steps,*
- (cga) clause 6.26 (AMP Circular Quay precinct),*
- (cgb) clause 6.29 (58-60 Martin Place, Sydney),*
- (cgc) clause 6.33 (230-238 Sussex Street, Sydney),*
- (cgd) clause 6.35 (45 Murray Street, Pyrmont), but only if the development is an alteration or addition to an existing building),*
- (cge) clause 6.36 (12-20 Rosebery Avenue, 22-40 Rosebery Avenue and 108 Dalmeny Avenue, Rosebery),*
- (cgf) clause 6.37 (296-298 Botany Road and 284 Wyndham Street, Alexandria),*
- (ch) Division 1 of Part 7 (Car parking ancillary to other development).*

Land and Environment Court requirements

The Land and Environment Court (LEC) reiterated in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 per Preston CJ at [11] the four tests imposed by clause 4.6 as follows:

1. That compliance with the relevant development standard must be **unreasonable or unnecessary** in the circumstances of the case;
2. That there are **sufficient environmental planning grounds** to justify contravening the development standard;
3. That the applicant's written request has **adequately addressed the matters** required to be demonstrated by sub-clause 3;
4. That the proposed development would be in the public interest because it **is consistent with the objectives of the particular standard and the objectives for development within the relevant zone**

The test for "unreasonable or unnecessary" has also been settled by the LEC. In *Wehbe V Pittwater Council* [2007] NSW LEC 827, Preston CJ identified a five-part test that could be applied to demonstrate that an objection to a development standard is reasonable and will deliver an outcome consistent with the relevant policy framework. The five elements are identified below. For the most part, in this instance, only the first of the five elements are considered strictly applicable to this development and this has been addressed above. Nonetheless the test is as follows:

7. Objectives of the standard are achieved notwithstanding non-compliance with the standard
8. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is not necessary
9. The underlying objective of the purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable
10. The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the stand and hence compliance with the standard is unnecessary and unreasonable

11. 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.

Each of these considerations has been addressed as part of this request for variation to a development standard.

Variation to the controls relating to floor space ratio

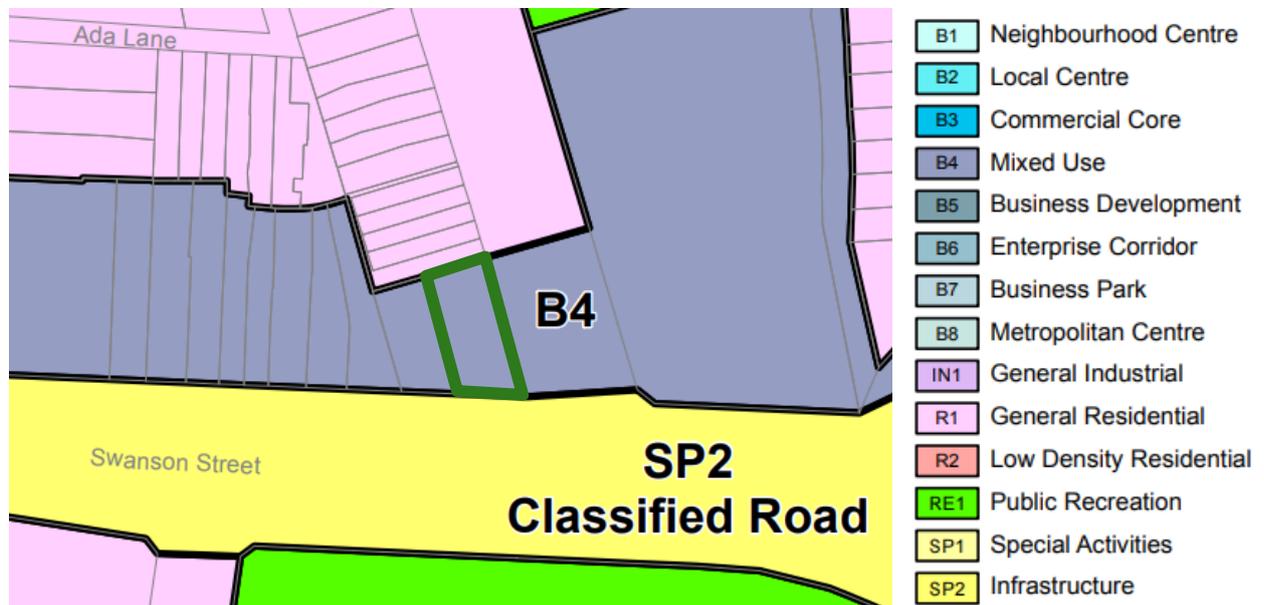
Background

According to the Zoning Map, the site is located within Zone B4 Mixed Use Zone, with the zone objectives being:

- » *To provide a mixture of compatible land uses*
- » *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling*
- » *To ensure uses support the viability of centres.*

The site is identified in Figure 1 below.

Figure 13 Land zoning map

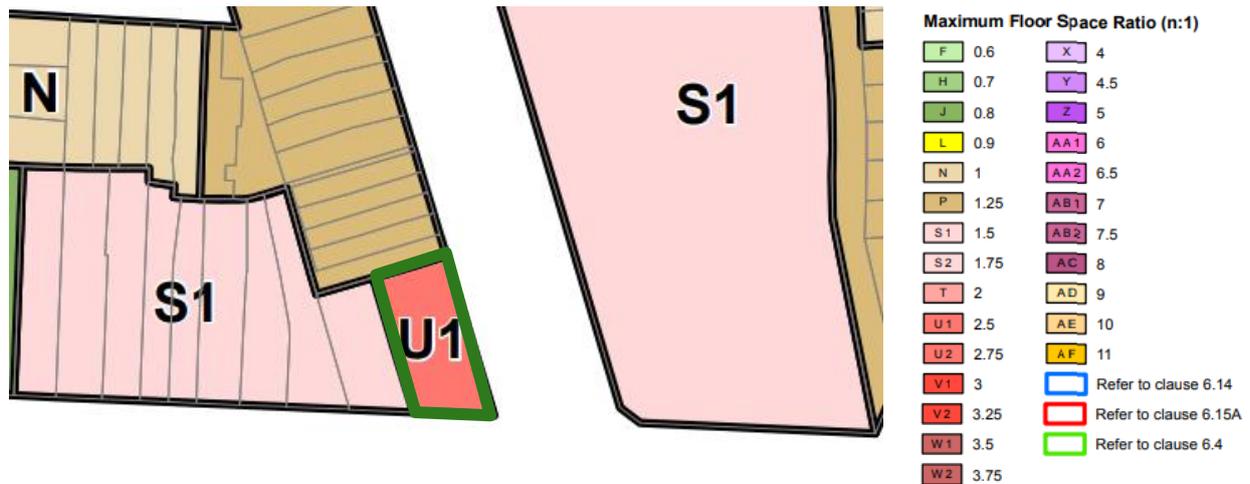


Source: SLEP 2012 Land Zoning Map 10

Explanation of development standard variation

This application seeks to vary the controls relating to clause 4.4 of SLEP. Clause 4.4 requires the FSR on any land not to exceed that shown on the FSR Map (excerpt provided in Figure 2), which is 2.5:1. This Clause 4.6 request seeks a maximum FSR of 2.59:1, which is 27.75sqm or 3.6% exceedance of Council's controls.

Figure 14 Maximum floor space ratio



Source: SLEP 2012 FSR Map 10

Relevant clauses and definitions

The development standard to which this clause 4.6 request relates is clause 4.4 FSR of SLEP. Clause 4.4 states:

(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.*

(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

SLEP defines FSR as being "the floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area."

The objectives of Clause 4.4 FSR and how the proposed development responds to these objectives is discussed in Table 1 below.

Table 5 Clause 4.4 Objectives

Assessment of compliance against Clause 4.4 Objectives
<i>(a) To provide sufficient floor space to meet anticipated development needs for the foreseeable future</i>
The site is in an appropriate location for the proposed development as it:
» Is zoned for mixed use development, which includes food and drink premises and multi-unit dwellings
» Is well serviced by existing infrastructure, including electricity, water, gas and telecommunications

Assessment of compliance against Clause 4.4 Objectives

- » Is well located to access public transport, recreational amenities, educational and employment opportunities, retail outlets and services
- » Will enable a more efficient use of an existing building, in an area which features mixed use developments, residential dwellings and areas of open space.

There is a need for additional residential development and more choice in terms of housing variety. The proposed development will assist in meeting the future residential floor space needs of the community, as well as maintaining the existing pub/hotel.

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

The exceedance of the FSR control equates to an additional 27.75sqm. This is minimal, and the reduction of the development by this amount of floor space will have negligible impact on the bulk and scale of the development, as proposed.

Consequently, there will be no additional visual impacts, loss of privacy or a reduction in solar access to the proposed development as a result of the FSR breach.

Given the minor exceedance of the FSR control and the fact that no detrimental environmental impacts will occur as a result, the proposed development is considered to be acceptable.

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

The site is currently well serviced by existing infrastructure, including electricity, water, gas and telecommunications

(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 reflective of the future desired character of the locality and the B4 zone in which the site is located.

Overall, it is considered that the proposed development is in the public interest by complying with the relevant objectives of Clause 4.4.

Justification for variation to development standard

Clause 4.6(3) and (4) of SLEP 2012 allows the consent authority to consider a contravention to a development standard as stated below.

(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.

4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(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, and

(b) the concurrence of the Secretary has been obtained.

The following section provides a justification for the proposed exceedance of FSR, based on the above-mentioned matters.

Assessment

Clause 4.6(3)(a) – Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Strict compliance with the FSR standard is considered both unreasonable and unnecessary in this instance.

The exceedance of the FSR control is minimal and would result in no increase in the overall bulk and scale of the overall development. No detrimental environmental impacts due to the minimal nature of the exceedance as well as the sites location in a B4 Mixed Use zone, adjacent to two roads; Park Street and Swanson Street (classified road).

Clause 4.6(3)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

The site is located in the B4 Mixed Use zone, which aims to provide a mixture of compatible land uses, to integrate suitable businesses, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling and to ensure uses support the vitality of centres.

The proposed development aims to expand the mix of uses on the site from a pub/hotel to a pub/hotel with residential apartments, thereby providing increased housing and a greater variety of housing within Erskineville. The site is also located in an extremely accessible location, being within 350m of Erskineville train station approximately 100m from the nearest bus stop. Therefore, it can be determined that the proposed development is achieving the aims of the B4 zone.

The additional area of floorspace, which equates to 27.75sqm, is minimal in terms of the overall development and will result in no increase in the bulk and scale of the overall development. The exceedance of the 2.5:1 FSR control by 0.09:1 is an exceedingly minimal non-compliance and will not result in any detrimental impacts to the surrounding environment or adjacent development and is therefore considered to be acceptable.

Clause 4.6(4)(a)(ii) – Is the proposed development in the public interest?

The proposed development is considered to be in the public interest as:

- » The zone allows for mixed use development
- » The proposal is consistent with the Locality Statement and the Kingsclear Road Conservation Area
- » The proposal provides an opportunity for a different type of housing product within Erskineville

The proposal provides additional residential accommodation in an accessible location, near to employment, educational, social and recreational facilities.

LEC 'five part test'

The following table sets out a response to the questions in the five part test.

Table 2 LEC Five Part Test

LEC five part test	Response
Objectives of the standard are achieved notwithstanding non-compliance with the standard	Yes, refer to discussion above.
The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is not necessary	The exceedance of the development control is minimal and would result in an improved use of the land, providing additional residential accommodation within Erskineville.
The underlying objective of the purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable	Yes, refer to discussion above.
The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the stand and hence compliance with the standard is not unnecessary and unreasonable	N/A
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	N/A

Conclusion

This request for a Clause 4.6 variation demonstrates that compliance with the FSR development standard contained in the Clause 4.4 of the SLEP is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. The proposed development presents an orderly and economic use of the land in providing additional residential accommodation in an area identified for renewal.

The requested variation shows that the proposed development:

- » Facilitates a high-quality development that is responsive to the local context, topography and landscape setting
- » Seeks an exceedance to Council's FSR control to a maximum of 2.59:1
- » Ensures a development outcome that is generally compatible with, and reflective of, the scale of development envisaged for the future of the site and the surrounding area
- » Will not adversely impact any significant views or have any significant visual, privacy or overshadowing impacts
- » Is consistent with the aims of the SLEP 2012 and the underlying B4 Mixed Use zone objectives
- » Ensures an appropriate built form outcome is achieved by generally complying with ADG.

As such, it is requested that the development application be approved, with the proposed minor variation, in accordance with the flexibility allowed under Clause 4.6 of the SLEP 2012.