

Attachment C

<p>Clause 4.6 Variation Request</p>
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Exception to Development Standards Submission

This Exception to Development Standards Submission accompanies Development Application (DA) 2018/210 proposing internal alterations and additions at 4/111-117 McEvoy Street, Alexandria (the **site**).

Calculations within this submission are based on that provided by the City of Sydney Council (the **Council**) in an email to Tribe Studio (the project architectural practice) on 27 April 2018.

As required pursuant to Clause 4.6(3) of Sydney Local Environmental Plan 2012, this submission provides a written request to Council that justifies the proposal's departure from the **Floor Space Ratio (FSR)** development standard is acceptable from an environmental planning point of view and that compliance with the standard is both unreasonable and unnecessary given the circumstances of the case.

There is judicial guidance on how variations under Clause 4.6 variation should be assessed. The following cases are taken into consideration in this request for variation.

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90; and*
- *Moskovich v Waverley Council [2016] NSWLEC 1015.*

Description of the planning instrument, development standard and proposed variation

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

Sydney Local Environmental Plan 2012 (**LEP 2012**).

What is the zoning of the land?

The land is zoned B4 Mixed Use.

What are the objectives of the zone?

The objectives of the B4 Mixed Use zone are:

- *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.*

What is the development standard being varied?

Development Standards' are defined under Section 1.4 of the Environmental Planning and Assessment Act, 1979 (the **Act**) as follows:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...

- (a) *the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*

- (b) *the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) ***the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,***
- (d) ***the cubic content or floor space of a building,***
- (e) ***the intensity or density of the use of any land, building or work,***
- (f) *the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) *the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) *the volume, nature and type of traffic generated by the development,*
- (i) *road patterns,*
- (j) *drainage,*
- (k) *the carrying out of earthworks,*
- (l) *the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) *the provision of services, facilities and amenities demanded by development,*
- (n) *the emission of pollution and means for its prevention or control or mitigation, and*
- (o) *such other matters as may be prescribed. (my emphasis)*

The FSR control at Clause 4.4 of LEP 2012 is clearly a development standard as it relates to:

- the bulk, shape, size and density of a building or work specified in subclause (c);
- the cubic content of floorspace of a building specified in subclause (d); and
- the density of the use of any building specified in subclause (e).

Is the development standard a performance based control? Give details.

No.

Under what clause is the development standard listed in the environmental planning instrument?

The FSR development standard is listed under Clause 4.4 of LEP 2012.

What are the objectives of the development standard?

The objectives of the FSR development standard are stated at Clause 4.4(1) of LEP 2012 and are:

- (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.*

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

A maximum FSR of 1:1 applies to the site pursuant to Clause 4.4 of LEP 2012. In addition, Council has advised that a bonus FSR of 0.5:1 applies to the site pursuant to Clause 6.12 of LEP 2012. Based on a site area of 2,456m², the maximum (with bonus) FSR of 1.5:1 equates to a gross floor area (GFA) of 3,684m².

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

As advised by Council, the site's existing built form as approved under U00/00619 has a GFA of 5,997m² which equates to an FSR of 2.44:1.

The proposed alterations and additions will increase the site's overall GFA by 53.58m² to 6,050.58m² which equates to an FSR of 2.46:1. All works are proposed within Tenancy 4.

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

The existing variation is 2,313m² or 63%.

The proposed variation is 2,366.58m² or 64%.

Assessment of the proposed variation

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Samadi v Council of the City of Sydney [2014] NSWLEC 1199*.

Paragraph 27 of the judgement states:

Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i))

Is the proposed development in the public interest because it is consistent with the objectives for development in the zone and the objectives of the particular standard?**Objectives of the zone**

As stated at Clause 2.3 of LEP 2012, the objectives of the B4 Mixed Use zone are:

- 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 may be developed with the stated variations to overall FSR without being inconsistent with the zone objectives. This is because in considering the question of consistency, the adopted approach of the former Chief Judge, Justice Pearlman in *Schaffer Corporation v Hawkesbury City Council (1992) LGRA 21* where, is as follows at Paragraph [27]:

The guiding principle, then, is that a development will be generally consistent with the objectives, if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible.

Consistency is not readily quantifiable in absolute numerical terms. The proposed development despite its departure from the FSR development standard is consistent with the objectives of the B4 Mixed Use zone and is therefore a suitable and appropriate redevelopment of the site as it:

- does not alter the external building envelope;
- maintains the existing external impacts (and therefore amenity to adjacent properties) through the retention of the existing built form;
- maintains a mixed land use that is specifically permissible and consistent with the adjacent land use context;
- has no identifiable planning impact on the viability of centres, including the Green Square town centre; and
- maintains an existing business in an accessible location with excellent access to services, amenities and facilities.

Objectives of the FSR standard

Each objective of the FSR standard is considered similar. A combined assessment of the proposal against all the standard's objectives follows.

The proposal despite the departure from the FSR standard is nonetheless consistent with each objective and therefore provides an appropriate planning outcome for the following reasons:

- does not alter the external building envelope;
- it provides additional meeting space for existing employees (additional employees are not proposed);
- maintains the existing external impacts (and therefore amenity to adjacent properties) through the retention of the existing built form;
- works are not proposed to any other tenancy within the building. There is no additional demand on existing or future planned infrastructure;
- essentially, the objective of an FSR control is to ensure that the intensity of development respects and reflects the overall built form of a locality and does not detrimentally affect the amenity of the area. The maximum FSR that a site can achieve is determined by its environmental constraints, specifically overshadowing, privacy, streetscape, parking, landscaping, visual impact and views and the capacity of the community infrastructure. The proposal clearly meets or surpasses these criteria. It has a negligible planning impact;
- the resultant external building envelope is no different to that existing;

- as the bulk and scale (building envelope) is retained:
 - there is no additional overshadowing impact to adjacent properties and the surrounding public domain;
 - existing levels of natural daylight and ventilation to adjacent properties are retained;
 - existing limited views and vistas from adjacent properties and the surrounding public domain are retained;
 - through appropriate design measures, aural and visual privacy is maintained;
- despite the departure from the FSR standard, it is inconsequential from a planning perspective as all new floorspace (i.e. the proposed mezzanine level) is contained internally within the existing tenancy. Therefore, the external impacts remain unaltered;
- the existing site coverage is not altered;
- the site is well located to provide additional floorspace above that technically permitted. It is within walking distance of existing infrastructure. The proposal will not result in any adverse traffic or pedestrian generation impact that would lead to the unacceptable performance of the surrounding road network; and
- it maintains a built form that is appropriate to its locational context as a basis for innovative and imaginative design and one which has environmental initiatives.

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

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

A development that strictly complies with the 1.5:1 FSR standard is unreasonable or unnecessary given the following presented circumstances:

- the existing built form departs from the standard;
- the internal works do not adversely affect the site's heritage significance;
- the resultant external building envelope is no different to that existing;
- the site's constraints (size, location of built form, existing site coverage etc) preclude any redevelopment of the site being able to comply with the standard;
- compliance would require demolition of a large part of the existing heritage listed built form which is economically impractical and ludicrous;
- the departure from the standard is inconsequential from a planning perspective as it does not perceptibly add to the built form's impacts as all works are internal. The external envelope remains unaltered;
- the building envelope remains unaltered;
- the existing site coverage is not altered;
- approval of the FSR as proposed on the site for a building envelope that has an acceptable environmental performance but which at the same time exceeds that prescribed for the locality in LEP 2012 will not set a precedent for other non-conforming applications;

- it has been demonstrated that the proposal will not result in any material environmental impacts to adjacent properties and the surrounding public domain; and
- the proposed FSR does not preclude the redevelopment of adjacent properties.

Would the underlying objective or purpose of the standard be defeated or thwarted if compliance was required?

Compliance with the underlying objective of the 1.5:1 (including bonus) FSR standard would be thwarted if strict compliance with the standard was required in the circumstances as the quality of the outcome would be compromised for no sound planning reason and it would require demolition of the existing built form.

The resultant building envelope is essentially no different to that existing and as the bulk and scale is retained, its environmental impacts are known and not materially altered or improved relative to GFA/FSR. The internal works exhibit a quality design.

Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

The development standard cannot said to be abandoned.

Notwithstanding and following a review of Council's Development Standard Variations Register there are numerous examples of built form that is within the B4 Mixed Use zone that depart from the FSR standard and others within LEP 2012.

Is the zoning of the land unreasonable or inappropriate?

The zoning of the land is reasonable and appropriate given the site's location and built form character. The site's existing built form reflects its former historical industrial land use.

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

The primary issue in this DA is whether there are sufficient environmental planning grounds to allow the variation to the standard. The environmental planning grounds which are deemed to be sufficient to justify a variation are discussed previously and further in detail below.

In the 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined in her judgement that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not 'satisfied' because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does **not** mean that Clause 4.6 variations can only ever be allowed where there is some special or feature of the site that justifies the non-compliance. Whether there are sufficient environmental planning grounds to justify contravening the development standard is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* is to be considered. In this case, the Council appealed against the original decision, raising very technical legal arguments about whether each item of clause 4.6 of the LEP had been meticulously considered and complied with (both in

terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February 2017, the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ... and that there are sufficient environmental planning grounds to justify contravening the development standard. He held that this means:

the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary.

Accordingly, and regarding the proposed development, there are sufficient environmental planning grounds to justify contravening the FSR standard being:

- the proposal satisfies the objectives of the B4 Mixed Use zone;
- the proposal satisfies the objectives of the FSR development standard;
- the internal works do not adversely affect the site's heritage significance;
- the resultant external building envelope is no different to that existing;
- the site's constraints (size, location of built form, existing site coverage etc) preclude any redevelopment of the site being able to comply with the standard;
- the existing site coverage is not altered and the curtilage to adjacent properties remains unaltered;
- there is no additional demand (no increase in employees) on existing or planned infrastructure;
- the quantum of GFA / FSR is arranged on the site in a manner that is unlikely to result in significant adverse impacts upon adjacent properties or the public realm by way of overshadowing, visual massing, view and vista impacts, visual and acoustic privacy, traffic and parking and natural drainage patterns;
- appropriate environmental initiatives are proposed, including:
 - retention of the predominant building envelope including materials. In this regard works are not proposed to any other any other tenancy. Other than signage, proposed works are internal to tenancy 4;
 - the proposal provides significant natural light penetration through an open plan floor plan and a mezzanine;
- curtilage to adjacent properties remains unaltered; and
- the nature of such an urban environment is that all future development will seek to maximise levels of residential amenity and density through design. In this regard, the proposal represents an appropriate planning outcome with any adverse environmental impacts.

Whether contravention of the development standard raises any matter of significance for the State or regional Environmental Planning?

The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and site specific contextual conditions. The continued use of the warehouse built form as a dual occupancy (attached) with associated amenities assists in meeting housing and locational context demand.

How would strict compliance hinder the attainment of the objects specified in Section 1.3 of the Act?

The relevant objects of the Act as specified in Section 1.3, are in our opinion, achieved by the proposed development in that it:

- promotes the social and economic welfare of the community;
- facilitates ESD;
- promotes the orderly and economic use and development of land;
- promotes the sustainable management of built and cultural heritage;
- promotes good design and amenity of the built environment; and
- promotes the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.

A strictly complying development would result in a poorer urban design response to the overall site and the area generally and in that sense it may be said that compliance with the standard would hinder the attainment of the objects of section 1.3 of the Act, particularly given the predominant retention of the existing building envelope.

The site's redevelopment and subsequent departure from the FSR standard does not preclude or isolate an adjacent property(s) from being appropriately redeveloped. The development as proposed is consistent with the provisions of orderly and economic development and would not hinder the objects of the Act in Section 1.3.

Is there public benefit in maintaining the development standard?

Generally, there is a public benefit in maintaining standards. However, there is public interest in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the FSR standard would serve no purpose other than to impose numerical inflexibility that would achieve no planning purpose. A rigid and inflexible compliance based approach to the development standard forgoes the opportunity to improve the occupant's amenity whilst maintaining the amenity of adjacent landowners. This is a desirable outcome.

Following of review of other DA's, it can be demonstrated that Council has considered applications favourably which depart from the FSR standard (and others) subject to a satisfactory environmental performance. The proposal is consistent with this principle. There are no other reasons as to why it is not in the public interest and its refusal based on the standard's departure is not warranted. Therefore, it is argued that there is no public benefit in maintaining the adopted FSR planning control.

On balance, the variation to the FSR standard is an appropriate use of the provisions of Clause 4.6. Accordingly, there is in the specific circumstances of the case, no public benefit in strictly maintaining the development standard.

Is the objection well founded?

For the reasons outlined (and answers provided to posed questions) in previous sections and based on the requirements of the four NSW LEC judgements, it is considered the objection is well founded in this instance and granting an exception to the development can be supported given the presented circumstances of the case. The development does not contravene the objects specified at 1.3 of the Act.

Conclusion

The proposed variation to the **FSR development standard** is based on the reasons contained within this formal request for an exception to the standard. A development strictly complying with the numerical FSR standard would not significantly alter the development's environmental impacts and therefore impacts to adjacent properties and the surrounding public domain as:

- the proposal satisfies the objectives of the B4 Mixed Use zone;
- the proposal satisfies the objectives of the FSR standard;
- the internal works do not adversely affect the site's heritage significance;
- works are only proposed within Tenancy 4;
- the resultant external building envelope is no different to that existing;
- the site's constraints (size, location of built form, existing site coverage etc) preclude any redevelopment of the site being able to comply with the standard; and
- there is no additional demand (no increase in employees) on existing or planned infrastructure;

It is concluded that the objection:

- is well founded;
- demonstrates that compliance with the standard is both unnecessary and unreasonable; and
- demonstrates that there are sufficient environmental planning grounds in which to support the proposal.