

**Item 8.****Development Application: 433-435 Kent Street, Sydney**

File No.: D/2019/216

**Summary****Date of Submission:** 7 March 2019

Additional Information received on 9 April 2019, 11 April and 16 April 2019.

**Applicant:** Vaughan Milligan Development Consulting Pty Ltd**Owner:** The Owner's Corporation (SP61376)  
Peter Gurtner (Owner of Unit 2701)**Cost of Works:** \$324,500.00**Zoning:** The site is zoned B8 Metropolitan Centre. The proposed extension to an existing serviced apartment unit is development that is permissible with consent in the B8 Metropolitan Centre zone.**Proposal Summary:** Approval is sought to carry out alterations and additions to an existing serviced apartment building by enclosing the existing roof terrace of Unit 2701 to provide for two new bedrooms, kitchen, dining and living area, and an outdoor seating and barbecue area.

The proposal exceeds the Sydney Local Environmental Plan 2012 (SLEP 2012) floor space ratio (FSR) development standard by 1417.114sqm or 26.8%. A written request has been submitted under Clause 4.6 of SLEP 2012 to vary the development standard. The proposed variation to the development standard is not adequate and is not supported in this instance.

The application was notified for a period of 14 days between 15 March 2019 and 1 April 2019. One submission was received on behalf of many owners of the subject Strata site raising concerns of what is being proposed. The issue raised in the submission has been further addressed in this report.

**Summary Recommendation:** This proposal is recommended for refusal.

**Development Controls:**

- (i) Environmental Planning and Assessment Act 1979
- (ii) Sydney Local Environmental Plan 2012 (Gazetted 8 March 2019, as amended)
- (iii) Sydney Development Control Plan 2012 (in force on 14 December 2012, as amended)
- (iv) City of Sydney Development Contributions Plan 2015
- (v) State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

**Attachments:**

- A. Selected Drawings
- B. Clause 4.6 Variation Request

## Recommendation

It is resolved that:

- (A) the variation requested to the floor space ratio development standard under Clause 4.4 and Clause 6.4 of the Sydney Local Environmental Plan 2012 in accordance with Clause 4.6 'Exceptions to development standards' of the Sydney Local Environmental Plan 2012 be overturned; and
- (B) pursuant to Section 4.16(1)(b) consent not be granted to Development Application No. D/2019/216 for the reasons set out in this subject report.

## Reasons for Recommendation

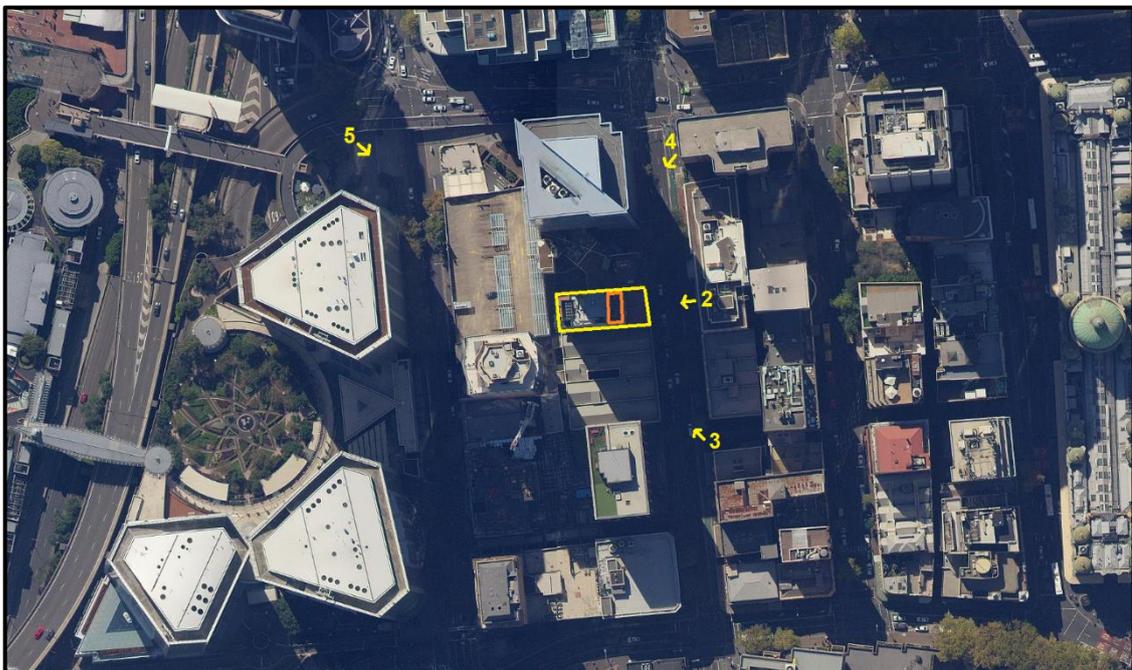
The application is recommended for refusal for the following reasons:

- (A) The proposed addition would result in a substantial 26.8% departure from the maximum allowable Floor Space Ratio (FSR) development standard of 11:1. The applicant's grounds for increasing the FSR is not in accordance with the objectives of the standard, in particular *'to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure'* and *'to ensure that new development reflects the desired character of the locality'*.
- (B) The proposal does not demonstrate a high standard of architectural design, materials and detailing appropriate to the building and thereby does not achieve design excellence, contrary to Clause 6.21 of the Sydney Local Environmental Plan 2012. The proposed addition would result in dark tinted glazing sitting flush with the masonry frame incongruent with the building's original design intent to have recessive upper levels set within a masonry parapet.
- (C) For the reasons outlined above, the proposed development would not be in the public interest, contrary to Clause 4.15(1)(e) of the Environmental Planning and Assessment Act, 1979.

## Background

### The Site and Surrounding Development

1. A site visit was carried out by Council staff on 2 April 2019.
2. The site is rectangular in shape with an approximate area of 480.6sqm. The site has a street frontage to Kent Street and is located within a street block bounded by Market Street to the north, Sussex Street to the west, Kent Street to the east and both Druitt Street and Druitt Place to the south. The site currently contains a 28-storey building used as the 'Mantra' serviced apartments with basement car parking, commercial uses on the first floor, and a plant room at the roof top terrace on Level 28.
3. Surrounding land uses are primarily commercial and residential. The 32-storey commercial British Telecom Tower is located approximately 25 metres to the north of the subject site. An eight-storey Wilson car parking station is located to the immediate west of the building, and a contemporary 30-storey building lies to the immediate south-west both with frontages onto Sussex Street.
4. The site is not a heritage item nor in a heritage conservation area, but is located within the vicinity of many local heritage items. This includes the 'former Edward Dunlop & Co warehouse' at 435A-441 Kent Street adjoining the subject site to its south which is currently a commercial building known as the Carla Zampatti Building (Heritage Item No. I1830), 414-418 Kent Street which consists of the 'Porters' Commercial Building (I1828), and the 'former church including [its] interior and front fence' at 420 Kent Street, currently the Genesis Theatre (I1829).
5. Photos of the site and surrounds are provided below:



**Figure 1:** Aerial image of subject site (in yellow), and surrounding area. The footprint of the whole serviced apartment Unit 2701 which is proposed for an external extension is outlined in orange.



**Figure 2:** Image of the site as viewed from Kent Street



**Figure 3:** Subject site and proposed rooftop terrace, viewed from Kent Street facing north.



**Figure 4:** Subject site and proposed rooftop terrace, viewed from Kent Street facing south.



**Figure 5:** Subject site and proposed rooftop terrace, viewed from Sussex Street facing south-east.

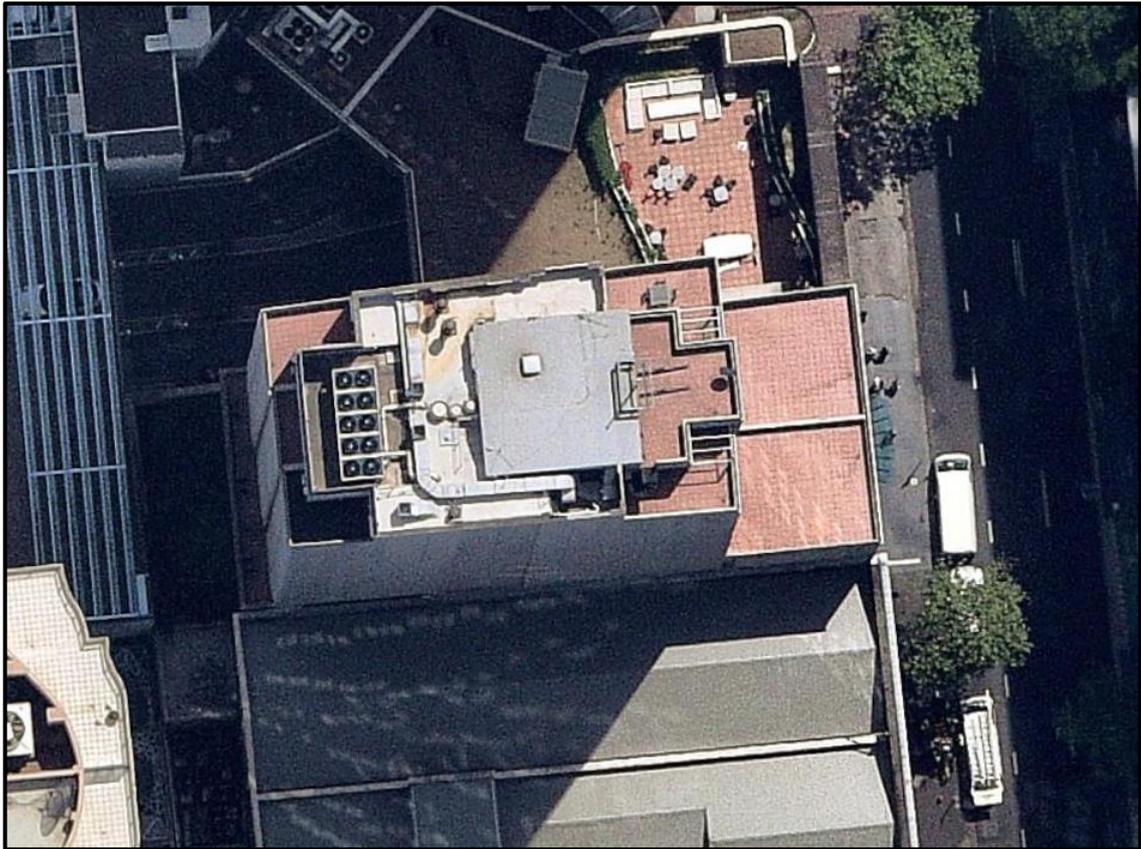


Figure 6: Aerial view of the site (Image Source: Nearmap).

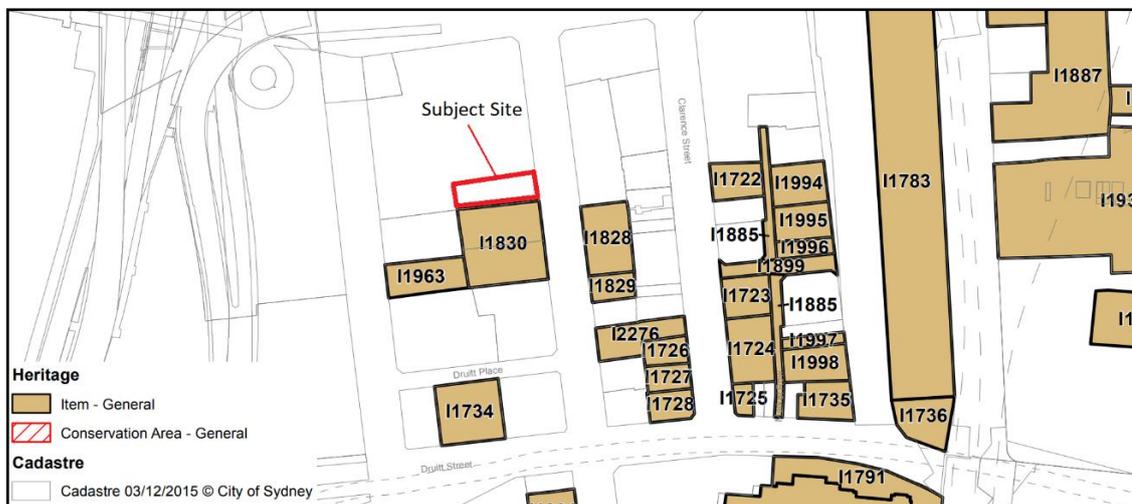


Figure 7: Sydney LEP Heritage Map showing the location of surrounding local heritage items (Image Source: NSW Legislation).

## Proposal

- Consent is sought to carry out alterations and additions to the uppermost two floors of a 28-storey serviced apartment building. The proposed works consist of:

**(a) On Level 27 (Serviced Apartment Unit 2701), to:**

- (i) enclose the existing terrace ancillary to serviced apartment Unit 2701;
- (ii) replace the bathroom within the existing internal footprint of the building with an open plan kitchen;
- (iii) on the footprint of the existing terrace, create two new bedrooms, a dining area and enclose the staircase leading up to the above floor, Level 28; and
- (iv) install a metal roof over the proposed room enclosures on Level 27.

**(b) On Level 28 (Rooftop Terrace floor in association with Unit 2701), to:**

- (i) activate the footprint of the existing rooftop terrace with outdoor seating, benches and a barbecue area;
- (ii) enclose the staircase area with a new habitable area; and
- (iii) install a glass roof to cover most of the proposed rooftop terrace.

7. The full set of drawings are provided in Attachment A.

**History Relevant to the Development Application**

Previous Development Applications:

- 8. On 27 August 1992, Development Application No. Z91-00635 (D/1991/635), the CSPC granted consent for the demolition of Cozmon House and erection of a 13-storey commercial building with an above street level height of 51.12m and an approved Floor Space Ratio of 11.25:1.
- 9. On 5 November 1996, Development Application No. Z96-00484 (D/1996/484) granted consent for the demolition of the Cozmon House, and the construction of a 28-storey building. It comprised of one basement level, a ground floor foyer level, a mezzanine restaurant and 27 storeys of serviced apartments. A total of 114 one-bedroom units were proposed. The building design consisted of a podium section 11-storeys high and a further 16-storeys above that which had an 8-metre setback from Kent Street.  
  
It initially had a proposed FSR of 16.5:1 but after requested changes by Council, design modifications were made to Levels 1, 2 and 8 of the proposed building to comply with the former 15.5:1 maximum permitted floor space. Design modifications to the conditions of consent reduced the FSR from 16.5:1 through changes to Levels 1, 2 and 8. The proposed building height of 78.65 metres was in compliance with the 80m (RL 90.85 metres) under the Draft Central Sydney Local Environmental Plan 1996.
- 10. Several other minor applications have been lodged to the Council of the City of Sydney but are not of any relevance to the subject application.

Current Development Applications:

- 11. There are no other active development applications on the site or any other applications that are relevant to the subject application.

**Economic/Social/Environmental Impacts**

12. The application has been assessed under Section 4.15 of the Environmental Planning and Assessment Act 1979, including consideration of the following matters:
  - (a) Environmental Planning Instruments and DCPs.

**Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (Deemed SEPP)**

13. The site is located within the designated hydrological catchment of Sydney Harbour and is subject to the provisions of the above SREP.
14. The Sydney Harbour Catchment Planning Principles must be considered in the carrying out of development within the catchment. The key relevant principles include to:
  - (a) protect and improve hydrological, ecological and geomorphologic processes;
  - (b) consider cumulative impacts of development within the catchment;
  - (c) improve water quality of urban runoff and reduce quantity and frequency of urban run-off; and
  - (d) protect and rehabilitate riparian corridors and remnant vegetation.
15. The site is within the Sydney Harbour Catchment and eventually drains into the Harbour. However, the site is not located in the Foreshores and Waterways Area or adjacent to a waterway and therefore, with the exception of the objective of improved water quality, the objectives of the SREP are not applicable to the proposed development.
16. The proposed development is consistent with the controls contained with the deemed SEPP.

**State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004**

17. An approved BASIX Certificate has been submitted with the development application.
18. The BASIX Certificate lists measures to satisfy BASIX requirements which have been incorporated in the proposal.

**Sydney LEP 2012**

19. The site is located within the B8 Metropolitan Centre zone. The proposed use is defined as serviced apartments, a type of tourist and visitor accommodation and is permissible.
20. The relevant matters to be considered under the Sydney Local Environmental Plan 2012 for the proposed development are outlined below.

## Compliance Tables

Development Control	Compliance	Comment
4.3 Height of Buildings	Yes	<p>A maximum height of 80m is permitted.</p> <p>A height of 77.49m is proposed.</p>
4.4 Floor Space Ratio; and 6.4 Accommodation Floor Space	No	<p>A maximum FSR of 11:1 is permitted which includes 3:1 of eligible accommodation FSR as permitted for serviced apartment purposes in 'Area 3' under Clause 6.4 of the Sydney LEP 2012.</p> <p>The current submitted FSR is 13.949:1 and a GFA of 6703.714 sqm. This is non-compliant with the maximum permitted FSR of the site that is 11:1 or 5286.6sqm. This is 26.8% or 1417.114sqm in excess of the permissible GFA.</p> <p>The application is subject to a Clause 4.6 Variation request which has been provided.</p> <p>See further discussion under the Issues section.</p>
4.6 Exceptions to development standards	No	<p>The proposal seeks to vary the floor space development standard prescribed under Clause 4.4 and Clause 6.4 of the SLEP 2012. A written request to contravene this development standard has been submitted with the application, however, is not considered well founded.</p> <p>See further discussion under the Issues section.</p>

Part 6 Local Provisions - Height and Floor Space	Compliance	Comment
Division 1 Additional floor space in Central Sydney  6.4 Accommodation Floor Space	Yes	As discussed above, the development is eligible for additional accommodation floor space in accordance with Clause 6.4. Notwithstanding this, it still does not comply with the maximum permitted FSR of 11:1.  See further discussion under the Issues section.
Division 4 Design Excellence  6.21 Design excellence	No	The proposal does not demonstrate a high standard of architectural design, materials and detailing appropriate to the building.  The existing building is notable for its tri-part facade with windows set within a masonry frame.  The proposed addition would result in glazing sitting flush with the masonry frame, incongruent with the remainder of the building.  The pergola structure proposed to sit above the addition is also non-symmetrical with the existing building, which would create a visual outcome of poor quality.

Part 7 Local Provisions - General	Compliance	Comment
7.14 Acid Sulfate Soils	Yes	The site is identified as being partly in a Class 2 and Class 5 risk level of Acid Sulfate Soils. As no excavation works are proposed, this provision would not be affected by the proposal.
7.15 Flood planning	Yes	The site is identified as being flood prone and located within the Darling Harbour Catchment area. As no modifications to the ground or lower floors of the building are proposed, flooding is not expected to be an issue under this application.

Part 7 Local Provisions - General	Compliance	Comment
7.24 Development near Cross City Tunnel ventilation stack	Yes	<p>The development is near the Cross City Tunnel ventilation stack affected area.</p> <p>Under Clause 3.13.2 and Table 3.6 of the Sydney DCP 2012, the proposal due to its height in AHD and its distance from the road tunnel's ventilation stack, is unlikely to be affected by the effects of reduced air quality. It therefore does not require an Air Quality Impact Assessment Report.</p>

### Sydney DCP 2012

21. The relevant matters to be considered under Sydney Development Control Plan 2012 for the proposed development are outlined below.

<p><b>2. Locality Statements –</b></p> <p><b>2.1.1 York Street Special Character Area including Clarence Street and Kent Street</b></p>
<p>The subject site is located in the York Street Special Character Area including Clarence Street and Kent Street. The proposed external additions and alterations to the building are not considered to be in keeping with the unique character of the building and area.</p>

3. General Provisions	Compliance	Comment
3.5 Urban Ecology	Yes	The proposed development does not involve the removal of any trees. New non-existing potted plants are proposed on the rooftop and are not expected to impact adversely on the local urban ecology.
3.6 Ecologically Sustainable Development	Yes	The proposal complies with the relevant BASIX provisions and a BASIX Certificate has been submitted with the application.
3.12 Accessible Design	Yes	The proposed development does not significantly impact upon accessibility. The Level 28 rooftop terrace will continue to have access with the floor's own dedicated lifts and ingress door.

<b>3. General Provisions</b>	<b>Compliance</b>	<b>Comment</b>
3.14 Waste	Yes	The proposed development does not significantly impact upon waste collection or waste management. The whole serviced apartment unit would continue to use the same waste facilities that are currently available.

<b>4. Development Types</b>	<b>Compliance</b>	<b>Comment</b>
<b>4.2 Residential flat, commercial and mixed use developments</b>		
4.2.1 Building height	Yes	The maximum permitted building height of the site is 80m. The proposal does not intend to modify this.
4.2.2 Building setbacks	Yes	The proposal will not overhang or extend out of the existing building envelope as viewed from directly above. The proposal is therefore compliant with this Clause's building setback provisions.
4.2.6 Waste minimisation	Yes	The proposed development would not have any implications on the waste collection or waste management of the building. There is no proposed change to the number of serviced apartment dwellings as part of this application.

<b>4. Development Types</b>	<b>Compliance</b>	<b>Comment</b>
<b>4.4 Other development types and uses</b>		
4.4.8 Visitor accommodation	Yes	The proposed development is expected to maintain the health, amenity and safety of the occupants as well as the security and safety of the surrounding locality.
4.4.8.5 Additional provisions for serviced apartments.	Yes	The proposal will have a reasonably equivalent level of amenity as the other serviced apartments on the site.

5. Specific Areas	Compliance	Comment
5.1.2 Building Setbacks	Yes	The building from Level 11 and above is already setback from Kent Street by 8m, as per the requirements of this Clause. The proposed development will align with the existing external building setback of Levels 11 to 26.
5.1.6 Building exteriors	No	The top levels of the building would detract from the design of the building rather than integrate with it.

## Issues

### Floor Space Ratio and Clause 4.6 request to vary a development standard

22. The site is subject to a maximum permissible floor space ratio control of 11:1 under Clauses 4.4 and 6.4 of the Sydney LEP 2012. The proposed development has a floor space ratio of 13.95:1. This represents a 26.8% variation to the permissible gross floor area.
23. A written request has been submitted to Council in accordance with Clause 4.6(3)(a) and (b) of the Sydney LEP 2012 seeking 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 standard.
24. A copy of the applicant's written request is provided at Attachment B.

#### Applicants Written Request - Clause 4.6(3)(a) and (b)

25. The applicant seeks to justify the contravention of the floor space ratio development standard on the following basis:
- (a) That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case:
    - (i) The proposal provides for additions and alterations to an existing serviced apartment development, which is permissible in a B8 Metropolitan Centre zone.
    - (ii) The proposal does not exceed the existing building height, and the facade of the building as viewed from the public domain remains largely unchanged. Therefore, it would not result in unreasonable bulk and scale or have a detrimental impact on the streetscape.

- (iii) The proposal remains compatible with the existing development that surrounds the property which is predominantly commercial offices, retail and residential apartment development.
  - (b) That there are sufficient environmental planning grounds to justify contravening the standard:
    - (i) The proposal will only see a minor increase to the gross floor area of the development being 38.6sqm to a total building gross floor area of 6703.714sqm and an FSR of 13.95:1.
    - (ii) The existing development already exceeds the FSR control.
    - (iii) The proposed works are situated at Level 27 and the rooftop level. The addition will not be visible from the street level and will not result in any unreasonable impacts on adjoining properties in terms of views, privacy or Consideration of Applicants Written Request - Clause 4.6(4) (a) (i) and (ii).
26. Development consent must not be granted unless the consent authority is satisfied that:
- (a) the applicant's written request has adequately addressed the matters required to be demonstrated by Subclause 3 of Clause 4.6 being 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 standard; and
  - (b) 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.

Does the written request adequately address those issues at Clause 4.6(3)(a)?

27. The applicant has not adequately argued that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case.
28. The existing facade is proposed to be altered and would be viewed from the public realm, contrary to the statements made in the applicant's submission.
29. The design of the existing building has its upper levels setback from Kent Street and with its facade arranged in into a tri part configuration with windows set within a masonry frame.
30. The Statement of Environmental Effects (SEE) made in support of the original design noted "*Setting the upper levels of the building back from Kent Street in order to create a height for the lower levels at the street frontage in accordance with the heritage nature of nearby developments.*" The SEE also notes "*The strong decorative parapet line of the building immediately to the south and also across the road (is) being carried through in detailing of the facade of the proposed development*".
31. Further to this, the officer's planning assessment report considered by the Central Sydney Planning Committee (CSPC) noted that the "*proposal incorporates design elements which relate satisfactorily to neighbouring buildings*" and "*the upper levels of the building incorporate decorative architectural features to create an interesting skyline*".

32. The proposed addition would result in dark tinted glazing sitting flush with the masonry frame, incongruent with the remainder of the building and undermining the original design intent to have a recessive upper level framed in masonry.
33. The pergola structure proposed to sit above the addition is also non-symmetrical with the existing building, which would create a visual outcome of poor quality.

Does the written request adequately address those issues at clause 4.6(3)(b)?

34. The applicant has not adequately addressed that there are sufficient environmental planning grounds to justify contravening the development standard.
  - (a) The existing gross floor area is already in excess of the permissible gross floor space of 11:1 that is permissible under Clauses 4.4 and 6.4 of the Sydney LEP 2012. A further increase of 38.6sqm to 6,703.714sqm and an FSR of 13.95:1 would only further undermine the floor space ratio controls where approval would create a negative precedent for other applicants seeking increases to floor space.
  - (b) The calculations submitted with the application were based on the 1996 consent which is not reliable to Council as it is over 20 years old, and because the aspects of a building that are included and excluded from the calculation of gross floor area have changed. In 1996, development consent for the building was initially refused as the FSR proposal was for an FSR of 16.5:1, when the permitted floor space was then 15.5:1 under the Central Sydney LEP 1996. Subsequently, amendments were made to the interiors of Levels 1, 2 and 8 of the building in order to comply with the permissible floor space control.
  - (c) The proposed development would have a negative impact on the scale and bulk of the building.

Is the development in the public interest?

35. The proposed development is not in the public interest because it is not consistent with the objectives of the FSR development standard.
  - To regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic.
  - To provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,
  - 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.
36. The proposal would not reflect the desired character of the York/Clarence/Kent Street Special Character area and locality. It would be visible to the public realm and exacerbated due to the proposed glazing design not being in keeping with the rest of the finishes of the building's exterior.

Conclusion

37. For the reasons provided above the requested variation to the FSR development standard is not supported as the applicant's written request has not adequately addressed the matters required to be addressed by Clause 4.6 of the Sydney Local Environmental Plan 2012.

**Other Impacts of the Development**

38. The proposed development is capable of complying with the BCA.
39. It is considered that the proposal would have a significant detrimental effect environmental, social and economic impacts on the locality.

**Suitability of the site for the Development**

40. The proposal is of a nature in keeping with the overall function of the site. The premises are in a commercial and residential surrounding and amongst similar uses to that proposed.

**Internal Referrals**

41. The assessments of other sections of Council have been included with the proposal.
42. Building Services Unit - The application was discussed with the City's Building Services Unit. No objections were raised subject to the recommended conditions of Council.

**External Referrals****Notification, Advertising and Delegation (Submission Received)**

43. In accordance with Schedule 1 the Sydney DCP 2012, the proposed development is required to be notified. As such the application was notified for a period of 14 days between 15 March 2019 and 1 April 2019. As a result of this notification 1 submission was received.
  - (a) Many owners have concerns that what was summarised in the notification letter being two new bedrooms, a kitchen, a dining and living area are not what was proposed in the development application that was submitted.

**Response** - The summary of the proposed works written in the notification letter are in accordance with what was submitted in the plans and reflected in the statement of environmental effects. It was claimed that many homeowners and local residents have raised concerns about this issue. It is noted that there will be a total of two bedrooms under the proposal as opposed to the existing one bedroom configuration but was worded as 'new' due to the relocation of the existing bedrooms. The proposal can then be implied and summarised as not being in the interests of many owners of the Strata-titled serviced apartments and surrounding residents who reside in and near the subject building.

**Public Interest**

44. It is considered that the proposal will have detrimental social, environmental and economic effects on the public interest.

**S61 Contribution**

45. The cost of the development is in excess of \$200,000. The development is therefore subject to a levy under the City of Sydney Development Contributions Plan 2015, should the application be approved.

**Relevant Legislation**

46. The Environmental Planning and Assessment Act 1979.
47. The Sydney Local Environmental Plan 2012.

**Conclusion**

48. The proposed alterations and additions will be clearly visible from the surrounding area, despite what the applicant claims. The works are not considered to achieve design excellence and do not integrate with the remainder of the building.
49. The proposed variation from the floor space ratio is already in excess of the permissible FSR to the site. Approval of this development standard would set a negative precedent for subsequent development applications which seek additional FSR.
50. Accordingly, the development application is recommended for refusal.

**GRAHAM JAHN, AM**

Director City Planning, Development and Transport

Costa Dantos, Cadet Planner