

# **Attachment C**

## **Clause 4.6 – Floor Space Ratio**

31/10/2019

Development Assessments

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Request under clause 4.6 Exceptions to Development Standards to vary the floor space ratio development standard under clause 4.3 of the Sydney Local Environmental Plan 2012

## Introduction

This 4.6 variation is to be read in conjunction with the Statement of Environmental Effects for the proposed alterations and additions to the existing residential building at 86 Foveaux Street, Surry Hills – Development Application D/2019/412. This Clause 4.6 variation addresses the relevant matters raised by Council in its preliminary assessment letter sent to the applicant dated 3 October 2019.

In particular, the proposal seeks to restore the existing façade of the building, provide an additional level within the residential building to accommodate 2 x bedrooms with ensuites and provide a trafficable green roof. It is noted that the proposed development complies with the height of buildings standard which applies to the site.

Across the building the proposed Gross Floor Area (GFA) is 142 m<sup>2</sup> resulting in a Floor Space Ratio (FSR) of 2.29:1. Refer to submitted plan to see how the floor plates of the building have been considered for this calculation.

This 4.6 variation seeks to vary the floor space ratio density provisions contained within the Sydney Local Environmental Plan 2012 (SLEP 2012).

The site is located in the B4 Mixed Use zone. Clause 4.4 contains a floor space ratio standard of 1.75:1 for the subject site in accordance with Council's LEP mapping.

This submission forms a request to grant an exception to the development standard Floor Space Ratio in clause 4.4 of the SLEP 2012 under clause 4.6 "Exceptions to development standards" of the SLEP 2012. This application breaks down the considerations, justifications and demonstrations required by clause 4.6 in the following sections.

### **4.6 Exceptions to development standards**

(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 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.

(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) Not Applicable

(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 (only relevant clauses included):

(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.

### **Court Principles and Guidance around Application of 4.6 Exceptions**

A number of court cases have assisted to guide expectations and facilitate appropriate application for and justification of the variations sought. Significant cases are cited below and will be drawn upon to assist with this application:

1. In 2007, in the case *Wehbe v Pittwater Council* (CJ Prseton) five (5) ways of establishing that compliance was unreasonable or unnecessary was discussed.

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).*
  2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).*
  3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).*
  4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Method).*
  5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Method).*
2. In 2015, in the case *Four2Five Pty Ltd v Ashfield Council* (C Pearson) and later 2016 *Moskovitch v Waverley Council* (Tuor) it was established that written requests made under clause were required to demonstrate that:
- a. that compliance was unreasonable or unnecessary in the circumstances of the case to be consistent with the objectives of the development standard (cl4.6 (3)(a), and
  - b. sufficient environmental planning grounds (4.6(3)(b)) exist to support the variation.

In 2018, in the case *Initial Action Pty Ltd v Woollahra Municipal Council* (CJ Preston) it was established that Commissioner Smithson had misinterpreted and misapplied cl 4.6 of the Woollahra LEP 2014. In this case, the commissioner herself considered whether compliance was unreasonable or unnecessary rather than determining whether the written request had adequately addressed the matter. In summary the court found that:

*The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction.*

Further, the Commissioner (Smithson) had required that to be considered unreasonable or unnecessary, the non compliance with the standard needed to have a neutral or beneficial effect relative to a development that complied with the standard. CJ Preston said:

*'Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.... Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion.*

With reference to sufficient environmental planning grounds CJ Preston further held:

*Clause 4.6 does not directly or indirectly establish this test. The requirement ...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.'*

### **Development Standard to be Varied – Floor Space Ratio**

This clause 4.6 variation request relates to a departure from a numerical standard set out under clause 4.4 of the SLEP 2012 Floor Space Ratio Map in relation to the specified floor space ratio of 1.75:1.

This development standard relates to the density of the development, clause 4.4 of the SLEP 2012 falls within a scope of a “development standard” as defined under section 4 of the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act).

Clause 4.4 of the SLEP 2012 contains the following objectives which apply to the proposal:

**4.4 Floor space ratio**

(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](#).

*Floor Space Statistics*

Under clause 4.4 the site has a prescribed maximum floor space ratio of **1.75:1**.

The proposed development results in the following resultant floor space:

- The maximum floor space permitted is 108.36m<sup>2</sup>
- The proposed floor space ratio is 2.29:1 - 142m<sup>2</sup>.
- The total floor area proposed is thus 33.64m<sup>2</sup> over the floor space ratio standard.
- This represents a 31% variation to the floor space ratio standard.

Refer to Figure 1 below for the applicable Floor Space Map.



**Figure 1** Sydney LEP 2012 Floor Space Ratio Map

## Assessment of the Provisions of Clause 4.6 Exceptions to development standards

Clause 4.6 of the SLEP 2012 allows for flexibility to be applied to development standards where objectives can be obtained notwithstanding the variation. The mechanics of the clause, the objectives of the floor space ratio standard and a response are all outlined below; however, the main opportunities and justifications for the floor space ratio variation are presented here:

- The proposed additional floor presents a modest floor plate that is slightly recessed from the existing floors below. The proposed variation would not impact upon the heritage significance of the subject building within the conservation area, presenting as a contemporary addition to the building. It is noted the additional façade works allow for the retention and restoration of the existing building's façade. Refer to the submitted façade design package that visually depicts the proposal in its setting.
- The site is zoned B4 Mixed Use zone and immediately surrounding sites and precincts have predominantly greater floor space ratio opportunities. As a result, the proposal is not inconsistent and actually submissive in terms of the bulk, scale and rhythm of buildings in the streetscape and therefore would not result in visual disharmony within the locality.
- The proposed variation does not result in unreasonable amenity impacts upon adjoining properties and the broader locality, including acoustic and visual privacy, solar access, nor does it interrupt views.

The locality contains a variety of FSR requirements and densities, and the proposed variation would not appear to be an over development of the site noting the surrounding context. The increase to floor space to this site would not significantly increase the overall bulk and scale of the building within the site context.

The site and the surrounding area can support the increased floor space ratio, as the proposal maintains compliance with the relevant building envelope controls including building storeys, setbacks, and height of buildings

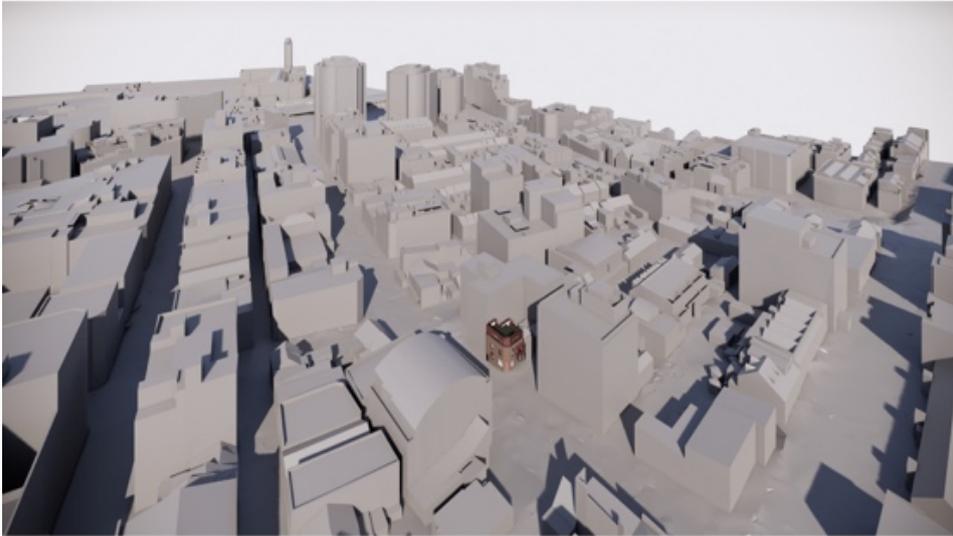
Refer to the below streetscape pictures and submitted perspectives prepared by the Architect for surrounding character.



**Figure 2** Foveaux Street streetscape facing west



**Figure 3** Intersection of Foveaux Street / Corben Street facing north



**Figure 4** Modelling diagram indicating densities and forms surrounding the site and the subject proposal.

**Clause 4.6.3 (a)(b) - Unreasonable or Unnecessary / Environmental Planning Grounds**

Commentary provided below to address the requirements of this clause.

**Table 1** Request to vary development standard 4.4 Floor Space Ratio

<b>Objective</b>	<b>Comment</b>
(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and	<p>Pursuant to clause 4.6(3)(a) of the LEP, variation to the FSR development standard is acceptable in the circumstances of this case and compliance is considered unreasonable and unnecessary because the proposed variation is consistent with the objectives of the standard, notwithstanding non-compliance with the standard:</p> <p>The proposal is consistent with the objectives of the FSR standard, in that:</p> <ul style="list-style-type: none"> <li>(a) The proposed additional floor space will meet the anticipated development needs of the residents of the subject site through the provision of additional bedrooms, providing 2 x 2 bedroom apartments to accommodate growing households.</li> <li>(b) The proposed variation will not result in a significant increase in the intensity of the approved land use on the site, being 2 x additional bedrooms. The proposal will retain its residential use being 2 x dwellings. Further, the proposal will not result in an overdevelopment of the site presenting a built form that is not inconsistent with the various built forms within the street. Finally, the additional</li> </ul>

Objective	Comment
	<p>bedrooms are to cater for the existing household growth (children) will not result in additional parking/traffic generation noting no increase in number of dwellings is proposed.</p> <p>(c) As detailed above, the additional bedrooms will not intensify the use of the site beyond that of the capacity of existing infrastructure, noting no additional dwellings are proposed and the works will provide for the housing needs of growing households within the building.</p> <p>(d) The proposed variation is not inconsistent with the varied built forms within the surrounding streetscape, and in fact reflects the desired character of the locality by maintaining the intact neutral item on the site while providing a recessed addition which responds to the scale of the building and surrounding development. Further, the proposal will not result in unreasonable amenity impacts upon adjoining properties and the broader locality, including acoustic and visual privacy, solar access, or view loss.</p>
<p>(b) that there are sufficient environmental planning grounds to justify contravening the development standard.</p>	<p>There are no significant adverse environmental impacts created by this proposal and in particular the additional 33.64m<sup>2</sup> of floor space, which further supports the application of flexibility in this instance.</p> <p>The proposed addition is not excessive in bulk and scale and has been recessed from the floors below to ensure the heritage significance of the existing building is retained. The proposed addition has been treated through materials and finishes to minimise its visual impact upon the existing building and adjoining properties.</p> <p>The existing building to the west has been designed with a blank wall and would not be impacted by the proposal. Any overshadowing caused by the proposal will fall to the south upon Foveaux Street. The proposal would not impact upon the amenity of the northern adjoining properties with respect to overshadowing, visual/acoustic privacy, and view loss.</p>

#### 4.6.4 (i) (ii) - Achieving Consistency with the Objectives of the Standards

##### 4.6 Exceptions to development standards

(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.*

In terms of Clause 4.6 (4)(a)(i) this submission is the written request that address the matters contained required to be considered in subclause (3).

**Table 2** Clause 4.6(4) ii assessment

<b>Objectives for Consideration</b>	<b>Comment</b>
<p>The objectives of the B4 Mixed Use zone are as follows:</p> <ul style="list-style-type: none"> <li>• To provide a mixture of compatible land uses</li> <li>• 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.</li> <li>• To ensure uses support the viability of centres.</li> </ul>	<p>The proposal is not antipathetic to the objectives of the zone, as it continues to provide a compatible residential land use that does not result in land use conflicts with other permissible uses in the zone.</p> <p>The proposal presents as a form that is suitable in the surrounding context noting the varied densities and rhythm of built forms in the street.</p> <p>The proposal allows for a minor addition to the existing dwellings (2 x bedrooms) which is within an accessible location being in close proximity to bus and rail transport options.</p>
<p>The relevant objectives of the floor space standard include:</p> <p>(a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,</p> <p>(b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,</p> <p>(c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,</p> <p>(d) to ensure that new development reflects the desired character of the locality in which it is located and minimises the adverse impacts on the amenity of that locality.</p>	<p>An assessment of the proposed variation in accordance with the objectives of the development standard has been provided previously, in demonstrating that compliance with the FSR standard is unreasonable and unnecessary.</p> <p>In summary, the proposed variation is acceptable because:</p> <ul style="list-style-type: none"> <li>(a) The proposed additional floor space will meet the anticipated development needs of the residents of the subject site.</li> <li>(b) The proposed variation will not result in a significant increase in the intensity of the approved land use on the site, being 2 x additional bedrooms.</li> <li>(c) The variation will not intensify the use of the site beyond that of the capacity of existing infrastructure, noting no additional dwellings are proposed.</li> <li>(d) The proposed variation is not inconsistent with the varied built forms within the Riley Precinct locality, and will not result in unreasonable amenity impacts upon adjoining properties and the broader locality.</li> </ul>

**Clause 4.6(5) Considerations**

**4.6 Exceptions to development standards**

- (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.*

The matters for consideration in clause 4.6(5) have been addressed in Table 2

**Table 2** Clause 4.5(5) assessment

<b>Matters of Consideration</b>	<b>Comment</b>
(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and	The contravention does not raise any matters of state or regional significance.
(b) the public benefit of maintaining the development standard, and	There is no public benefit in maintaining the standard. The proposal maintains amenity including privacy, overshadowing and views, which the additional floor space does not impact. The relaxation of this standard will not result in an adverse impact upon development in the immediate locality and it has been demonstrated that relaxing the standard is appropriate in the site circumstances presented by this application.
(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.	N/A

**Conclusion**

The proposed application remains consistent with the objects of Part 1.3 and requirements of Part 4 of The Act. The proposed use is permissible with consent and uses the subject site to its full potential. The proposal will create a development that:

- Will not result in disharmony within the existing streetscape.
  - Does not impact the natural environment.
  - Does not impact views or privacy.
  - Supports the needs of the residents and ability for cohabitation to take place by two households.
  - Promotes the orderly and economic use and development of the land.
- Promotes good design and amenity of the built environment.

The proposal responds to the character and nature of the Riley Precinct streetscape and the proposed non-compliance with the floor space ratio requirement would not result in any significant adverse impacts, as the additional floor space will not impact neighbouring amenity or privacy. Further, the proposed variation meets the objectives of the standard or the zone and therefore, strict compliance with the floor space ratio standard is considered unreasonable and unnecessary in this case.

Yours Faithfully,

A handwritten signature in black ink, appearing to read 'Nicole Lennon', written in a cursive style.

Nicole Lennon

Director. Planik Pty Ltd