

Attachment C

<p>Clause 4.6 Variation Request - Floor Space Ratio</p>
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Clause 4.6 Variation – Floor Space Ratio (FSR)

Alterations and Additions and Change of Use for Hotel Accommodation

34-36 Oxford Street, Darlinghurst
Lot 15 DP 6064

**Prepared by Willowtree Planning Pty Ltd on behalf
of Eastern Property Alliance**

November 2019

Clause 4.6 Variation – Floor Space Ratio

Alterations and Additions and Change of Use for Hotel Accommodation
34-36 Oxford Street, Darlinghurst

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Clause 4.6 Variation – Floor Space Ratio

Alterations and Additions and Change of Use for Hotel Accommodation
34-36 Oxford Street, Darlinghurst

TABLE OF CONTENTS

PART A	PRELIMINARY.....	3
1.1	INTRODUCTION.....	3
1.2	PROPOSED NON-COMPLIANCE.....	3
1.3	STRATEGIC PLANNING JUSTIFICATION.....	4
2.1	CLAUSE 4.6 OF THE SLEP 2012.....	5
2.2	CASE LAW	5
PART C	STANDARD BEING OBJECTED TO	7
3.1	CLAUSE 4.6 FLOOR SPACE RATIO OF SLEP 2012	7
PART D	PROPOSED VARIATION TO CLAUSE 4.4 FLOOR SPACE RATIO.....	8
4.1	OBJECTIVES OF THE CLAUSE 4.4 FLOOR SPACE RATIO UNDER SLEP 2012	8
4.2	OBJECTIVES OF THE ZONE.....	9
4.3	ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY ...	9
4.4	SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD.....	10
4.5	PUBLIC INTEREST	10
4.6	MATTERS OF STATE AND REGIONAL SIGNIFICANCE.....	11
4.7	PUBLIC BENEFIT IN MAINTAINING THE STANDARDS.....	11
PART E	CONCLUSION	13

Clause 4.6 Variation – Floor Space Ratio

Alterations and Additions and Change of Use for Hotel Accommodation
34-36 Oxford Street, Darlinghurst

PART A PRELIMINARY

1.1 INTRODUCTION

This Clause 4.6 Variation request has been prepared in support of an amending Development Application (DA) for alterations and additions and a change of use for hotel accommodation within the existing building at 34-36 Oxford Street, Darlinghurst (the Site). The Site is legally described as Lot 15 and DP 6064.

The proposal exhibits a technical non-compliance with **Clause 4.4 (Floor Space Ratio)** under the Sydney Local Environmental Plan 2012 (SLEP 2012).

The proposed Floor Space Ratio (FSR) variation was previously supported and approved under **D/2017/1293** granted on 19 May 2018 for:

Construction and use of a two storey contemporary addition on top of an existing heritage listed building, internal refurbishment works of existing levels to facilitate access and services, change of use of existing Levels 1 and 2 from hotel to commercial office, and external heritage conservation works.

This amending DA seeks to impose a condition of development consent to **D/2017/1293** in order to modify details of the development subject to **D/2017/1293** pursuant to Section 4.17(1)(b) of the *Environmental Planning and Assessment Act 1979* (EP&A Act). The approved building envelope and GFA is to be retained. Accordingly, this Clause 4.6 Variation request represents a 'technical' non-compliance as it does not seek any further FSR increase from what has previously been approved.

This variation request has been prepared in accordance with the requirements of Clause 4.6 of SLEP 2012, which includes the following objectives:

- (a) *To provide an appropriate degree of flexibility in applying certain development standards to particular development; and*
- (b) *To achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

1.2 PROPOSED NON-COMPLIANCE

Under the provisions of Clause 4.4 in SLEP 2012, the Site is subject to a maximum permissible FSR of **2.5:1**. Based on a Site area of **282.5m²** and an FSR control of **2.5:1**, a maximum GFA of **706.25m²** may be obtained at the Site.

The proposed development retains the approved GFA of **941m²** and an FSR of **3.33:1**.

The proposed development therefore has a technical non-compliance with Clause 4.4 FSR development standard of 2.5:1 by **234.75m² (33.2%)**.

Table 1 | Variation Summary

SLEP 2012	SLEP 2012 Development Standard	Existing Development Non Compliance	Proposed Development Non Compliance
Clause 4.4 - Floor Space Ratio	Maximum FSR of 2.5:1	The proposal acknowledges an existing technical non-compliant FSR, as approved under D/2017/1293 is 3.33:1	The proposal retains the approved technical non-compliance of 3.33:1 (33.2%) .

Clause 4.6 Variation – Floor Space Ratio

Alterations and Additions and Change of Use for Hotel Accommodation
34-36 Oxford Street, Darlinghurst

As outlined in **Table 1** above, the approved GFA for the Site is **941m²** (as proposed under **D/2017/1293**) which equates to an FSR of **3.33:1** and a 33.2% departure from the Clause 4.4 FSR development standard.

It is important to note that the building height subject to this amending DA remains consistent with the approved building envelope as per **D/2017/1293** and will not be altered by the proposed works. As such, the proposal will continue to preserve the amenity of all surrounding sites as previously approved.

1.3 STRATEGIC PLANNING JUSTIFICATION

This Clause 4.6 Variation request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards under SLEP 2012. It considers the various planning controls, strategic planning objectives and existing characteristics of the Site, and concludes the proposed FSR development standard non-compliance is the best means of achieving the objective of encouraging orderly and economic use and development of land under Section 5 of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

Clause 4.6 Variation – Floor Space Ratio

Alterations and Additions and Change of Use for Hotel Accommodation
34-36 Oxford Street, Darlinghurst

PART B THRESHOLDS THAT MUST BE MET

2.1 CLAUSE 4.6 OF THE SLEP 2012

In accordance with Clause 4.6 of SLEP 2012 Council is required to consider the following subclauses:

(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.*

These matters are responded to in **Part D** of this Clause 4.6 Variation.

2.2 CASE LAW

Relevant case law on the application of the standard Local Environmental Plan Clause 4.6 provisions has established the following principles:

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, which emphasised that the proponent must address the following:
 - Compliance with the development standard is unreasonable and unnecessary in the circumstances;
 - There are sufficient environmental planning grounds to justify contravening the development standard;
 - The development is in the public interest;
 - The development is consistent with the objectives of the particular standard; and
 - The development is consistent with the objectives for development within the zone;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, which held that the degree of satisfaction required under Subclause 4.6(4) is a matter of discretion for the consent authority;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827, which emphasized the need to demonstrate that the objectives of the relevant development standard are nevertheless achieved, despite the numerical standard being exceeded. Justification is then to be provided on environmental planning grounds. Wehbe sets out five ways in which numerical compliance with a development standard might be considered unreasonable or unnecessary as follows:
 - The objectives of the standard are achieved notwithstanding the non-compliance with the standard;

Clause 4.6 Variation – Floor Space Ratio

Alterations and Additions and Change of Use for Hotel Accommodation
34-36 Oxford Street, Darlinghurst

- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- 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; or
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

These matters are responded to in **Part D** of this Clause 4.6 Variation.

Clause 4.6 Variation – Floor Space Ratio

Alterations and Additions and Change of Use for Hotel Accommodation
34-36 Oxford Street, Darlinghurst

PART C STANDARD BEING OBJECTED TO

3.1 CLAUSE 4.6 FLOOR SPACE RATIO OF SLEP 2012

The development standard being requested to be varied is Clause 4.4 Floor Space Ratio of SLEP 2012.

Table 2 outlines the proposed Clause 4.6 Variation to SLEP 2012 Clause 4.4.

Table 1 Variation Summary			
SLEP 2012	SLEP 2012 Development Standard	Existing Development Non Compliance	Proposed Development Non Compliance
Clause 4.4 - Floor Space Ratio	Maximum FSR of 2.5:1	The proposal acknowledges an existing technical non-compliant FSR, as approved under D/2017/1293 is 3.33:1	The proposal retains the approved technical non-compliance of 3.33:1 (33.2%) .

The total permissible gross floor area across the Site is **706.25m²** which equates to an FSR of **2.5:1**. The proposed GFA, as approved under **D/2017/1293** is **941m²**, equating to an FSR of **3.33:1**.

The proposed works will not impact on the building envelope or building footprint, as approved under **D/2017/1293** and as such will preserve the amenity of all surrounding sites as previously approved.

Clause 4.6 Variation – Floor Space Ratio

Alterations and Additions and Change of Use for Hotel Accommodation
34-36 Oxford Street, Darlinghurst

PART D PROPOSED VARIATION TO CLAUSE 4.4 FLOOR SPACE RATIO

4.1 OBJECTIVES OF THE CLAUSE 4.4 FLOOR SPACE RATIO UNDER SLEP 2012

A key determination of the appropriateness of a Clause 4.6 Variation to a development standard is the proposed development's compliance with the underlying objectives and purpose of that development standard. Indeed, *Wehbe v Pittwater Council* recognised this as one of the ways in which a variation to development standards might be justified (refer to **Section 2.2**). In *Four2Five Pty Ltd v Ashfield Council*, it was found that the proponent must demonstrate compliance with these objectives (refer to **Section 2.2**).

Therefore, while the Site is subject to relevant numerical standards for FSR, the objectives and underlying purpose behind these development standards are basic issues for consideration in the development assessment process.

The proposed development is consistent with the relevant objectives of the control for the reasons outlined in **Table 3**.

Table 3 Consistency of the Proposed Development with the Floor Space Ratio Objectives	
OBJECTIVE	COMMENT
a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,	<p>The proposed development will return the building to its historic use as an hotel providing accommodation.</p> <p>The proposal will not alter the GFA as previously approved under D/2017/1293. The proposal largely complies and is generally consistent with SLEP 2012 and SDCP 2012 development controls albeit FSR and building height.</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>The proposal seeks 30 short-stay accommodation rooms and one (1) site manager accommodation, located in a highly accessible area.</p> <p>The 242m² GFA above the maximum GFA allowed. However, the basement contains 164m² of GFA which does not contribute to the overall bulk and scale of the building as perceived from Oxford Street.</p> <p>The Site does not currently contain car parking spaces. Due to the nature of the proposed land use and the high accessibility to public transport, no car parking spaces are to be provided on-site.</p> <p>The proposed will not alter the existing traffic and transport arrangements on Site.</p>
c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,	<p>The proposed development would create tourist and visitor accommodation floorspace within an established mixed-use precinct, which would continue to support the ongoing operations and employment.</p>
d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on	<p>The proposal is for a change of use and internal fit-out to an approved building envelope pursuant to D/2017/1293.</p>

Clause 4.6 Variation – Floor Space Ratio

Alterations and Additions and Change of Use for Hotel Accommodation
34-36 Oxford Street, Darlinghurst

the amenity of that locality.	The proposal results in a significant improvement and revitalisation of the Site, including upgrades to the heritage façade and the reinstatement of the historic use as tourist and visitor accommodation. The additional floor space, as approved, creates an outcome that is viable and sustain for the Site without adversely impacting on the streetscape, heritage and conservation values or amenity.
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4.2 OBJECTIVES OF THE ZONE

The Site is currently zoned B2 Local Centre under SLEP 2012. The proposed development is located within an established commercial precinct and is permissible at the Site. The proposed development is consistent with the following B2 zone objectives.

Table 4 Consistency of the Proposed Development with the Zone Objectives	
Objective	Comment
<ul style="list-style-type: none">To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.	The proposed development retains the existing entertainment uses on-site, which will continue to serve the needs of residents, workers and visitors to the area.
<ul style="list-style-type: none">To encourage employment opportunities in accessible locations.	The proposal will provide for additional short term/tourist accommodation that will encourage employment opportunities in a location that is easily accessible and well serviced by public transport.
<ul style="list-style-type: none">To maximise public transport patronage and encourage walking and cycling.	The co-location short term accommodation in proximity of major public transport and other services, would encourage visitors to adopt public transport, walking and cycling, to move around and access the Sydney Metropolitan Area.
<ul style="list-style-type: none">To allow appropriate residential uses so as to support the vitality of local centres.	The proposal is for tourist and visitor accommodation which will have no adverse impacts on existing or future residential uses in the surrounding locality.

4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ set out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation:

1. *Establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.*
2. *Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
3. *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*

Clause 4.6 Variation – Floor Space Ratio

Alterations and Additions and Change of Use for Hotel Accommodation
34-36 Oxford Street, Darlinghurst

4. *Establish that 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.*
5. *Establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".*

In applying the tests of *Wehbe v Pittwater Council [2007] NSWLEC 827*, only one of the above rationales is required to be established. Notwithstanding the proposed variation, the development is consistent with the underlying objectives of the standard for Floor Space Ratio (Clause 4.4) and the B2 Zone prescribed under SLEP 2012.

In view of the particular circumstances of this case, strict compliance with Clause 4.4 of SLEP 2012 is considered to be both unnecessary and unreasonable. The proposed development does not conflict with the intent of Clause 4.4 as demonstrated above. The proposed development achieves the objectives, notwithstanding the proposed numeric variation.

The proposed development is justified on the following environmental outcomes:

- The proposal will retain the approved building envelope and GFA as approved under **D/2017/1293**;
- It represents a logical and co-ordinated development of the Site for the use as a tourist and visitor accommodation;
- It will result in improvements to the functionality and operations of the Site through a carefully designed built form that is responsive to the Site context and its continued use;
- The architectural design of the proposal provides a good quality-built form outcome for the Site and functional for the proposed outcomes;
- Development will be compatible with the desired character of the immediate locality;
- Compliance may be achieved by reducing the scale of the development, but this would undermine both the visual quality and functionality of the design and the requirements of the commercial tenants would not be achieved.

4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

The variation to the development standard for Floor Space Ratio is considered well founded because, notwithstanding the proposed non-compliance with the standard:

- The proposed development will not exceed the approved FSR under **D/2017/1293**;
- The proposed development is entirely consistent with the underlying objective or purpose of the standard as demonstrated;
- The scale of the proposal is considered to be appropriate for the Site and its operations;
- The bulk and scale of the development is limited and is consistent with the internal style and scale of development within the conservation area and streetscape;
- The proposed development will not significantly impact on the amenity of adjoining properties;
- Strict compliance with the FSR controls would unreasonably restrict the potential to develop the Site; and
- The proposed development is internally located and will not result in significant environmental or amenity impacts.

4.5 PUBLIC INTEREST

As outlined in **Section 2.2**, *Four2Five Pty Ltd v Ashfield Council* emphasised that it is for the proponent to demonstrate that the proposed non-compliance with the development standard is in the public interest. Subclause 4.6(4)(a)(ii) requires the proposed development be in the public interest because it is

Clause 4.6 Variation – Floor Space Ratio

Alterations and Additions and Change of Use for Hotel Accommodation
34-36 Oxford Street, Darlinghurst

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.

Sections 4.1 and 4.2 have already demonstrated how the proposed development is consistent with the objectives of Clause 4.4 as well as the B2 Local Centre zone under the SLEP 2012.

In *Lane Cove Council v Orca Partners Management Pty Ltd (No 2)* [2015] NSWLEC 52, Sheahan J referred to the question of public interest with respect to planning matters as a consideration of whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development.

The public advantages of the proposed development are as follows:

- The proposal will result in the conservation of the heritage as it allows for the retention and preservation of internal and external original heritage fabric and restoration of the Oxford Street façade;
- The change of use will result in the reinstatement of the Site's historic use as tourist and visitor accommodation;
- The proposed built form will make a positive contribution to the ongoing operation of the Site; and
- Provide a development outcome that is compatible with the existing and emerging residential areas that is a permissible land use and consistent with the land use zone objectives.

There are no significant public disadvantages which would result from the proposed development.

The proposed development is therefore considered to be justified on public interest grounds.

4.6 MATTERS OF STATE AND REGIONAL SIGNIFICANCE

The proposed non-compliances with Clause 4.4 would not raise any matters of significance for State or regional environmental planning. It would also not conflict with any State Environmental Planning Policies or Ministerial Directives under section 117 of the *Environmental Planning and Assessment Act* (EP&A Act).

Planning Circular PS 08-014, issued by the NSW Department of Planning, requires that all development applications including a variation to a standard of more than 10% be considered by Council rather than under delegation. The proposed development would result in exceedance of the development standard by a nominal **33.2%**, therefore the development will be considered by the Local Planning Panel.

4.7 PUBLIC BENEFIT IN MAINTAINING THE STANDARDS

Given that strict compliance with Clause 4.4 would result in:

- Reduce opportunity for tourist and visitor accommodation in accessible area, pursuant to Sustainable Sydney 2030;
- Greater impacts to the functional operation of the proposed use of the Site;
- The sterilisation of a significant portion of the Site from being able to be developed for residential accommodation and employment generating purposes.

As such, there is no genuine public benefit in maintaining this strict FSR control at the Site.

4.8 SUMMARY

For the reasons outlined above, it is considered that the objections to Clause 4.4 of the SLEP 2012 are well-founded in this instance and the granting of Clause 4.6 Variation to these development standards are appropriate in the circumstances. Furthermore, the objection is considered to be well founded for the

Clause 4.6 Variation – Floor Space Ratio

Alterations and Additions and Change of Use for Hotel Accommodation
34-36 Oxford Street, Darlinghurst

following reasons as outlined in Clause 4.6 of the SLEP 2012, *Four2Five Pty Ltd v Ashfield Council* and *Wehbe v Pittwater Council*:

- Compliance with the development standard is unreasonable and unnecessary in the circumstances;
- There are sufficient environmental planning grounds to justify contravening the development standard;
- The development is in the public interest;
- The development is consistent with the objectives for development within the zone;
- The objectives of the standard are achieved notwithstanding the non-compliance with the standard;
- The development does not negatively impact on any matters of State or regional significance; and
- The public benefit in maintaining strict compliance with the development standard would be negligible.

It is furthermore submitted that:

- Strict compliance with the standards would hinder the achievement of the objects of the EP&A Act;
- The proposed development is consistent with the surrounding locality;
- No unreasonable impacts are associated with the proposed development.

Overall, it is considered that the proposed Clause 4.6 Variation to the existing and maximum Floor Space Ratio control is entirely appropriate and can be clearly justified having regard to the matters listed within Clause 4.6 of the SLEP 2012.

Clause 4.6 Variation – Floor Space Ratio

Alterations and Additions and Change of Use for Hotel Accommodation
34-36 Oxford Street, Darlinghurst

PART E CONCLUSION

It is requested that the City of Sydney Council exercise its discretion and find that this Clause 4.6 Variation request adequately addresses the relevant heads of consideration under Subclause 4.6(3) of the SLEP 2012.

This is particularly the case given the relatively minor nature of the proposed exceedance, as well as the proposal being otherwise compliant with the SLEP 2012 and SDCP 2012, and the strategic suitability of the proposed development at both a Local and State Government Level.