

Attachment C

<p>Clause 4.6 Variation – Height & Floor Space Ratio</p>

Clause 4.6 Variation Requests

BUILDING HEIGHT AND FSR

MAY 2020



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CLAUSE 4.6 DEPARTURE – FSR

BACKGROUND

This Clause 4.6 variation has been prepared in support of a development application for the alterations and additions to an existing vacant building (previously operating as an aged care facility) for the purposes of a boarding house at No. 274-276 Glebe Point Road, Glebe.

The proposal comprises alterations and additions to an existing vacant facility which currently exceeds the prescribed maximum Height of Building and maximum Floor Space Ratio within Sydney Local Environmental Plan 2012.

VARIATIONS

The proposal seeks to increase the floor space ratio and proposes works above the building height.

Floor Space Ratio

The Floor Space Ratio map for the site identifies an FSR of 1:1 and the maximum building height on site is 9m.

The original Development Application varied the control by 80% with an FSR of 1.9:1.

This clause 4.6 variation has been prepared in support of the non-compliance to the prescribed FSR within Sydney Local Environmental 2012. The development application proposes an FSR of 2.32:1, and a comparison of the GFA between the existing and proposed is summarised as follows –

Existing GFA Breakdown:	Proposed GFA Breakdown:
Basement = 32.5m ²	Basement = 56.08m ²
Lower Ground = 216.8m ²	Lower Ground = 755.14m ²
Ground Floor = 718.8m ²	Ground Floor = 717.27m ²
Level 1 = 702.9m ²	Level 1 = 708.88m ²
Level 2 = 702.9m ²	Level 2 = 708.76m ²
Level 3 = 207.9m ²	Level 3 = 209.52m ²
Total Existing GFA = 2581.8m ²	Total proposed GFA = 3155.65m ²

The development application proposes a total FSR of 2.32:1 having regard to the proposed GFA of 3155.65m² and site area of 1355.5m² by calculation.

Building Height

The proposal includes works above the 9m height of building control. It is noted that the works are below the maximum height of the existing building, but above the height

of building control of 9m. The below section demonstrates that the existing building exceeds the 9m height of building and it is confirmed that works are proposed to the existing building, that includes works above the height of building. These works include balustrade, solar panels, Air Conditioning units, a rooftop farm, pergola and general rooftop communal facilities.



LAND AND ENVIRONMENT CASE LAW

The decision by Chief Judge Preston in a judgement dated 14 August 2018 in the matter of *Initial Action Pty Ltd v Woollahra Council* confirmed that the absence of impact was a suitable means of establishing grounds for a departure and also confirmed that there is no requirement for a development that breaches a numerical standard to achieve a 'better outcome'.

However recent developments in the law in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 have set out to confirm that the approach taken in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 ('*Al Maha*') is also relevant. In simple terms, *Al Maha* requires that a Clause 4.6 departure will have only adequately addressed Clause 4.6(3) if the consent authority is satisfied the matters have been demonstrated in the Clause 4.6 request itself- rather than forming a view by the consent authority itself. This Clause 4.6 request demonstrates the matters if Clause 4.6 (3).

The key tests or requirements arising from recent judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is "consistent with" the objectives of the development standard and zone is not a requirement to "achieve" those objectives. It is a requirement that the development be compatible with the objectives, rather than having to 'achieve' the objectives.
- Establishing that 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' does not always require the

applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in Wehbe v Pittwater.

- When pursuing a clause 4.6 variation request it is appropriate to demonstrate environmental planning grounds that support any variation; and
- The proposal is required to be in ‘the public interest’.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the FSR and Building Height standards;
- Demonstrating consistency with the R1 zoning; and
- Satisfying the relevant provisions of Clause 4.6.

This Clause 4.6 Variation requests deals with the FSR and Height of Building matters in turn below.

ADDRESSING CLAUSE 4.6 PROVISIONS- FSR

Clause 4.6 of the Sydney Local Environmental Plan 2012 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

- (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 Director-General has been obtained.*

- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

Clause 4.6 does not fetter the consent authority's discretion as to the numerical extent of the departure from the development standard. Each of the relevant provisions of Clause 4.6 are addressed in turn below.

Clause 4.6(3)- Environmental Planning Grounds

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved. Having regard to the above it is noted that the following key points indicate the proposal is consistent with underlying objectives given;

- The development proposes no change to the overall form and scale of the existing building which will provide sufficient floor space to meet the needs of the boarding house proposal.
- The proposal does not alter the built form and land use intensity from that which exists, but comprises the use of an existing building.
- The floor space does not result in significant additional generation of vehicle and pedestrian traffic from the approved use on the site.
- The proposal provides for an intensity of development that is capable of being serviced by the existing infrastructure, as has been established by the existing development on the land.
- The proposal seeks to improve the presentation of the building to the street and have a positive impact in turn upon the character of the locality.
- The subject site currently accommodates a six storey vacant facility and is within proximity of local amenities including employment opportunities, educational establishments, public transportation and recreational activities.
- The proposed FSR is not readily perceived when compared with the existing approved building.

Underlying Objectives of the Standard - Compliance unreasonable or unnecessary

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control, and the objectives of the zone, are achieved despite the non-compliance to the numerical development standard as set out above, which satisfies Wehbe Test 1.

Clause 4.4 of Sydney LEP 2012 demonstrate the objectives of FSR development standard are stated as:

- (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.*

In accordance with the provisions of both clauses it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the FSR and Height control are achieved. Having regard to the above it is noted that the following key points indicate the proposal is consistent with underlying objectives given;

There are sufficient environmental planning grounds to justify contravening the development standard.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances.

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control, however we also note the following additional matters that demonstrate suitable environmental planning grounds exist to justify contravening the development standard and further demonstrates that the FSR departure does not give rise to any environmental impacts, and therefore the proposal is an appropriate design response for the subject site:

- The environmental conditions of the site are unchanged as the proposal will result in the retention of an existing building and the additional FSR will contribute to the buildings physical improvement and thereby improve its presentation and contribution to the street and locality.
- This proposal seeks to increase the floor space ratio to the currently vacant building to accommodate a desirable form of residential accommodation, without the building being perceived as substantially increasing in bulk or scale.
- The exceedance of the FSR does not result in any significantly greater impact to the adjoining land.
- The departure enables the alterations and additions of an existing vacant building with suitable density within walking distance to the light rail stations, bus stops as well as local amenities along Glebe Point Road. Noting compliance with the FSR prescribed would reduce the delivery of housing supply in a general residential context and in a location identified for greater density to take advantage of proximity to services and infrastructure.

Clause 4.6(4)

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3).

As addressed the proposed development is in the public interest as it remains consistent with the objectives of the FSR control.

In addition, the proposal is consistent with the objectives of the R1 zone, insofar as the development is not antipathetic to the zone objectives (per *Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21*). The zone objectives are outlined below and discussed in turn.

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To maintain the existing land use pattern of predominantly residential uses.*

The proposal, despite the numerical noncompliance remains consistent with the objectives as set out in the following analysis against each objective –

Objective - To provide for the housing needs of the community

Objective - To provide a variety of housing types and densities

The proposal contributes to the creation of housing supply that will serve the communities demand for accommodation.

The proposal will provide a variety of housing types comprising studio and cluster rooms of different configurations, bedroom numbers and internal sizes. The proposal is directly responsive to known housing affordability demands in the area.

Objective - To enable other land uses that provide facilities or services to meet the day to day needs of residents.

The proposal contributes to the creation of housing supply that will serve the communities demand for residential accommodation and create demand for facilities or services in the area.

Objective - To maintain the existing land use pattern of predominantly residential uses.

The development proposal is residential in nature and does not ensure that the predominance of residential uses in the area is maintained.

On the basis of the above points the development is clearly in the public interest because it is consistent with the underlying objectives of the FSR control; and the objectives of the R1 zone; and the numerical departure from the FSR control facilitates a positive design outcome on the site.

Clause 4.6(5)

As addressed, it is understood the concurrence of the Director-General may be assumed once the Consent Authority makes a decision and the following points are made in relation to this clause:

- a) The contravention of the FSR control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal and unique attributes of the site and interface of the R1 zoned land; and
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the FSR control is acceptable in the circumstances given the underlying objectives are achieved and it will not set an undesirable precedent for future development within the locality based on the observed building forms in the locality and based on the unique site attributes.

Strict compliance with the prescriptive FSR requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The public benefit of the variation is that it will appropriately facilitate the provision of housing as sought by Council when zoning the land R1- General Residential. The design response aligns with the intent of the control and provides for an appropriate relationship to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed.

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that the consent authority support the development proposal.



CLAUSE 4.6 DEPARTURE – HEIGHT

BACKGROUND

This Clause 4.6 variation has been prepared in support of a development application for the alterations and additions to an existing vacant (previously an aged care facility) building to a boarding house at No. 274-276 Glebe Point Road, Glebe.

The proposal comprises alterations and additions to an existing vacant facility which currently exceeds the prescribed maximum building height and maximum Floor Space Ratio within Sydney Local Environmental Plan 2012.

VARIATION

The proposal seeks consent for works above the 9m building height development standard as per Clause 4.3 of the Sydney LEP 2012. While it is noted that the works are below the maximum height of the existing building, a Clause 4.6 Variation Request is required for any new works that are located above the 9m building height limit.

There are minor changes to the approved building which exceed the 9m height limit including new works, such as but new balustrade on rooftop, AC units, rooftop farm, pergola, solar panels, and rooftop communal area.

ADDRESSING CLAUSE 4.6 PROVISIONS - HEIGHT

Clause 4.6 of the Sydney Local Environmental Plan 2012 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

- (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 Director-General has been obtained.*

- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

Clause 4.6 does not fetter the consent authority's discretion as to the numerical extent of the departure from the development standard. Each of the relevant provisions of Clause 4.6 are addressed in turn below.

Clause 4.6(3)- Environmental Planning Grounds

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved. Having regard to the above it is noted that the following key points indicate the proposal is consistent with underlying objectives given;

- The existing building exceeds the height control and the proposal does not seek to increase the height of the building beyond that which is approved and exists.
- The works proposed in this application are above the height of building control, but below the height of the existing building. Accordingly, the works do not result in any perceived increase in height of the overall building.
- No change is proposed to the existing height transitions between the existing building and adjoining buildings or areas.
- No loss of views arise from the proposed works.
- The additional height proposed does not result in detrimental environmental planning outcomes, as it does not give rise to adverse solar access, view loss or visual or acoustic privacy impacts on site, or to neighbouring properties.
- The developments overall height, bulk and scale is unchanged.

Underlying Objectives of the Standard - Compliance unreasonable or unnecessary

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control, and the objectives of the zone, are achieved despite the non-compliance to the numerical development standard as set out above, which satisfies Wehbe Test 1.

Clause 4.4 of Sydney LEP 2012 demonstrate the objectives of Building Height development standard are stated as:

- (1) *The objectives of this clause are as follows—*
 - (a) *to ensure the height of development is appropriate to the condition of the site and its context,*
 - (b) *to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,*
 - (c) *to promote the sharing of views,*
 - (d) *to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*
 - (e) *in respect of Green Square—*

- (i) *to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and*
- (ii) *to ensure the built form contributes to the physical definition of the street network and public spaces.*

In accordance with the provisions of the clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the Building Height control are achieved. Having regard to the above it is noted that the following key points indicate the proposal is consistent with underlying objectives given.

There are sufficient environmental planning grounds to justify contravening the development standard.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances.

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control, however we also note the following additional matters that demonstrate suitable environmental planning grounds exist to justify contravening the development standard and further demonstrates that the height departure does not give rise to any environmental impacts, and therefore the proposal is an appropriate design response for the subject site:

- The environmental conditions of the site are unchanged as the proposal will result in the retention of an existing building and the proposed works that are above the height control but below the existing height of the building will contribute to the buildings physical improvement and thereby improve its amenities and so too are there related works that will improve the buildings presentation and contribution to the street.
- The works above the height of building control do not result in any impact to the adjoining land.

The departure enables the alterations and additions of an existing vacant building with suitable density within walking distance to the light rail stations, bus stops as well as local amenities along Glebe Point Road.

Clause 4.6(4)

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3).

As addressed the proposed development is in the public interest as it remains consistent with the objectives of the Building height control.

In addition, the proposal is consistent with the objectives of the R1 zone, insofar as the development is not antipathetic to the zone objectives (per *Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21*). The zone objectives are outlined below and discussed in turn.

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To maintain the existing land use pattern of predominantly residential uses.*

The proposal, despite the numerical noncompliance remains consistent with the objectives as set out in the following analysis against each objective –

Objective - To provide for the housing needs of the community

Objective - To provide a variety of housing types and densities

The proposal contributes to the creation of housing supply that will serve the communities demand for accommodation.

The proposal will provide a variety of housing types comprising studio and cluster rooms of different configurations, bedroom numbers and internal sizes. The proposal is directly responsive to known housing affordability demands in the area.

Objective - To enable other land uses that provide facilities or services to meet the day to day needs of residents.

The proposal contributes to the creation of housing supply that will serve the communities demand for residential accommodation and create demand for facilities or services in the area.

Objective - To maintain the existing land use pattern of predominantly residential uses.

The development proposal is residential in nature and does not ensures that the predominance of residential uses in the area is maintained.

On the basis of the above points the development is clearly in the public interest because it is consistent with the underlying objectives of the height control; and the objectives of the R1 zone; and the numerical departure from the height control facilitates a positive design outcome on the site.

Clause 4.6(5)

As addressed, it is understood the concurrence of the Director-General may be assumed once the Consent Authority makes a decision and the following points are made in relation to this clause:

- c) The contravention of the height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal and unique attributes of the site and interface of the R1 zoned land; and
- d) There is no public benefit in maintaining the development standard as it relates to the current proposal. The minor departure from the height control is acceptable in the circumstances given the underlying objectives are achieved and it will not set an undesirable precedent for future development within the locality based on the observed building forms in the locality and based on the unique site attributes.

Strict compliance with the prescriptive height requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The public benefit of the variation is that it will appropriately facilitate the provision of housing as sought by Council when zoning the land R1- General Residential. The design response aligns with the intent of the control and provides for an appropriate relationship to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed.

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that the consent authority support the development proposal.

CONCLUSION

Strict compliance with the prescriptive FSR and height of building requirements is unreasonable and unnecessary in the context of the proposal and its particular circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The proposal results in the alterations and additions to an existing vacant facility which currently exceeds the prescribed maximum Height of Building and maximum Floor Space Ratio controls within Sydney Local Environmental Plan 2012.

This clause 4.6 variation has been prepared in support of the non-compliance to the prescribed FSR within Sydney Local Environmental 2012.

The objection is well founded and taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council support the development including departure to the FSR and Height control.