

Attachment C

<p>Clause 4.6 Variation Request – Floor Space Ratio</p>
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Clause 4.6 – Exceptions to Development Standards Request to Vary Clause 4.4 – Floor Space Ratio

Address: 52 Waterloo Street, Surry Hills

Proposal: External alterations and additions to an existing retail unit (Tenancy G07)

Date: 02 June 2021

1.0 Introduction

This is a written request to seek an exception to a development standard pursuant to Clause 4.6 – Exceptions to Development Standards of the Waverley Local Environmental Plan (WLEP) 2012. The development standard for which the variation is sought is Clause 4.4 – Floor Space Ratio under SLEP 2012.

2.0 Description of the planning instrument, development standard and proposed variation

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

The Sydney Local Environmental Plan (SLEP) 2012.

2.2 *What is the zoning of the land?*

The land is zoned B4 Mixed Use.

2.3 *What are the Objectives of the zone?*

The objectives of the zone are:

- *To provide a mixture of compatible land uses;*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling; and*
- *To ensure uses support the viability of centres.*

2.4 *What is the development standard being varied?*

The development standard being varied is the 'Floor Space Ratio' development standard.

2.5 *Is the development standard a performance based control?*

No. The Floor Space Ratio development standard is a numeric control.

2.6 *Under what Clause is the development standard listed in the environmental planning instrument?*

The development standard is listed under Clause 4.4 of SLEP 2012.

2.7 What are the objectives of the development standard?

The objectives of the FSR development standard are contained in Subclause 4.4(1)(a)-(d), and are:

- (a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,
- (b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,
- (c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,
- (d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.”

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

Clause 4.4 establishes a maximum FSR of 2.5:1 for the site, as illustrated in the extract of the Floor Space Ratio Map included in Figure 1 below.

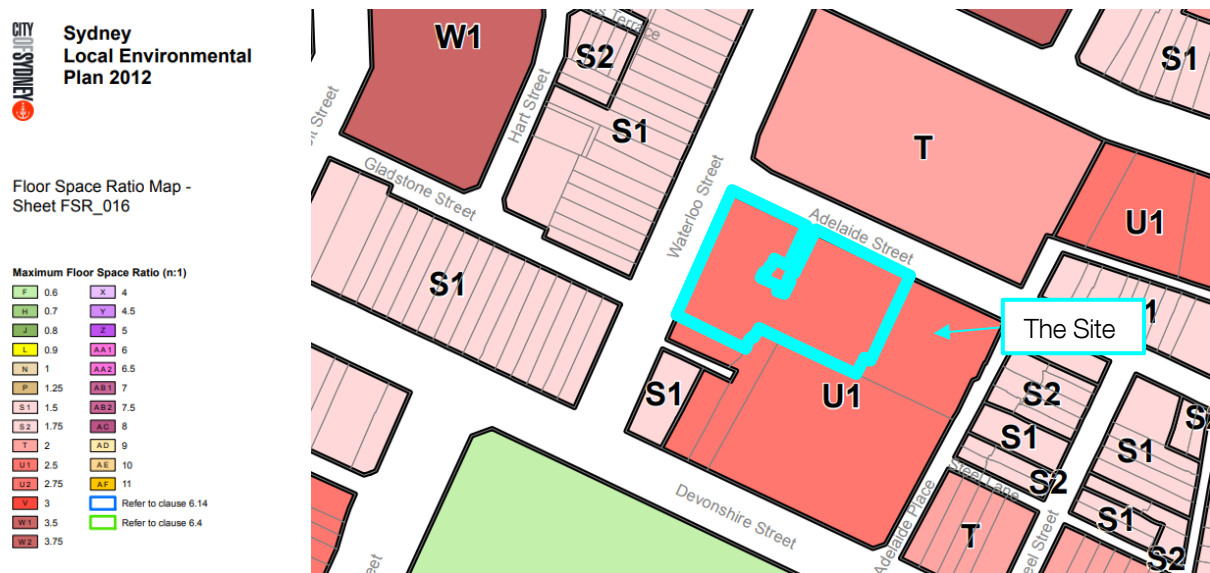


Figure 1: Extract of SLEP 2012 Floor Space Ratio Map (site outlined in blue)

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

The proposed development involves a minor addition of 36 m² of Gross Floor Area (GFA) to the existing and approved building on the site (i.e. 0.71% increase in GFA).

The existing and approved building on the site has a GFA of 5064.1 m² and resultant FSR of 3.03:1 (as approved under DA/2006/1083/G). The proposal will result in a total FSR of 3.05:1, which equates to an increase of 0.02:1.

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

By virtue of the fact that the existing building on the site exceeds the FSR standard by 21% (as approved under DA/2006/1083G), the proposal will result in a total variation of 22% (i.e. a minor increase of 0.71%).

3.0 Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to Development Standards establishes the framework for varying development standards applying under a local environmental plan.

Objectives to Clause 4.6 at 4.6(1) 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.”*

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- “(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.”*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a 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.”*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained, and Clause 4.6(5) requires the Secretary in deciding whether to grant concurrence must consider:

- “(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning;*
- (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.”*

This application has been prepared in accordance with the NSW Department of Planning, Infrastructure and Environment (DPI&E) guideline *Varying Development Standards: A Guide*, August 2001, and has incorporated as relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* (‘Four2Five No 1’);
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* (‘Four2Five No 2’);
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 248* (‘Four2Five No 3’);
- *Micaul Holdings Pty Limited v Randwick City Council (2015) NSWLEC 1386;*
- *Randwick City Council v Micaul Holdings Pty Ltd (2016) NSW LEC7;*

- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;*
- *RebelMH Neutral Bay v North Sydney Council [2019] NSWCA 130;*
- *Baron Corporation v The Council of the City of Sydney [2019] NSWLEC 61;* and
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245.*

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

3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the FSR standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The existing building on the site has a GFA of 5064.1 m² and resultant FSR of 3.03:1, which exceeds the FSR standard by 21% (as approved under DA/2006/1083/G);
- The proposed increase to GFA is a direct result of the proposed alterations and additions of 36 m² to an area that was previously excluded from GFA (i.e. outdoor dining area);
- The proposal will not affect the maximum building height of the existing mixed use building on the site. The structure is similar in height and scale to the existing hydrant booster enclosure situated adjacent to the location of proposed works; and
- The proposal remains consistent with the objectives of the FSR standard outlined in Subclause 4.4(1) despite the non-compliance, as demonstrated below:

(a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future

- The proposal has no effect on the ability for floor space to be accommodated on the subject site to meet the future development needs of the City of Sydney LGA.

(b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic

- The proposed increase to GFA is a direct result of alterations and additions to an area that was previously excluded from GFA (i.e. outdoor dining area). Accordingly, the proposal does not significantly increase the density of the existing mixed use building on the site;
- Noting the minor scale of proposed works, the predominant built form of the existing building will largely remain unaltered by the proposal. No change is proposed to the existing maximum building height; and
- Given that no change is proposed to the operating hours or patron capacity of Tenancy G07, the development will not result in any intensification of uses or increased vehicular/pedestrian traffic at the site.

(c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure

- Noting that no change is proposed to the operating hours or patron capacity of Tenancy G07, the development will not result in any intensification of uses at the site. As such, the proposal will not generate any additional infrastructure demand.

(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

- The overall scale of the development as proposed, is commensurate with the scale of the existing mixed use building at the site. Therefore, existing privacy, solar access, and view impacts will largely remain unaltered; and
- Notwithstanding the non-compliance with the FSR standard, the proposed development has had regard to, and respects the amenity and character of neighbouring properties and the surrounding locality.

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

The underlying objective or purpose of the development standard would not be defeated or thwarted if compliance was required.

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

The development standard has not been abandoned.

3.2.4 Is the zoning of the land unreasonable or inappropriate?

The zoning of the land is reasonable and appropriate given the site's location, which has a history of mixed use (i.e. retail, commercial, and residential) development.

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

It is considered that there are sufficient environmental planning grounds to justify contravening the development standard, being:

- The existing building on the site has a GFA of 5064.1 m² and resultant FSR of 3.03:1, which exceeds the FSR standard by 21% (as approved under DA/2006/1083/G);
- The proposed increase to GFA of 36 m² is a direct result of the proposed alterations and additions to an area that was previously excluded from GFA (i.e. outdoor dining area);
- The proposed new structure is a minor addition to the site and is consistent with the bulk and scale of the existing building. The single storey structure is in part nestled below the street level and is similar in height and scale to the existing hydrant booster enclosure located adjacent to the site of proposed works;
- The proposed structure includes a flat roof and will appear 'sunken' when viewed from Adelaide Street (to the north) and Waterloo Street (to the north-west) due to the significantly lower finished floor level of the existing outdoor dining area compared to the level of the Adelaide Street footpath. Further, the proposed materials provide a high level of transparency to the structure, which will minimise its perceived bulk;
- The external materials and finishes (i.e. glazed bi-fold doors, aluminium framing, sliding glazed windows, prefinished zinc cladding, and metal finishes) of the proposed structure are consistent with that of the existing building on the site and are sympathetic to the architectural design and character of the locality;
- Noting that no change is proposed to the operating hours or patron capacity of Tenancy G07, the proposal will not result in any intensification of uses at the site or any change to existing traffic and parking arrangements;
- The proposal maintains the significance of the Little Riley Street Heritage Conservation Area. The proposed works involve minor alterations to an existing contemporary building and will have no adverse impact on the fabric, setting, or view corridors of nearby Heritage Items;
- Noting the minor scale of proposed works, the proposal does not give rise to any significant adverse amenity impacts to surrounding commercial and residential properties with regard to overshadowing, visual and acoustic privacy, bulk and scale, or view loss;

- The proposed development is similar to the development approved under DA/2012/278 for an enclosure to part of the outdoor dining area of Tenancy G07 (i.e. the same structure in the same location), but which was not constructed. Specifically, the resultant GFA of the proposal is commensurate with the GFA as approved under DA/2012/278; and
- The proposed development is consistent with the existing and desired scale, design, and character of surrounding development and the streetscape.

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

3.4.1 Objectives of the FSR standard

As demonstrated at Part 3.2.1 of this Statement, the proposal remains consistent with the objectives of the FSR standard outlined in Subclause 4.4(1) despite the non-compliance.

3.4.2 Objectives of the zone

The proposal remains consistent with the objectives of the B4 Mixed Use zone, despite the non-compliance with the FSR control as demonstrated in the assessment of the objectives below.

“To provide a mixture of compatible land uses.”

The proposal does not involve any change to the approved retail, commercial, and residential uses at the site.

“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.”

The proposal does not involve any change to the approved retail, commercial, and residential uses at the site, which is located in close proximity to a range of public transport options.

“To ensure uses support the viability of centres.”

The proposal seeks to improve the amenity of the outdoor dining area of an existing restaurant, in terms of climate control, weather protection, and noise mitigation. This will assist in the ongoing economic success of the restaurant, which in turn, will support the viability of the wider Surry Hills mixed use centre.

The proposal will also improve the relationship between the subject site and the public domain and therefore contribute to a viable and vibrant centre. The proposed new structure will provide a physical separation between the restaurant dining area and the public domain yet will maintain a visual connection by way of the proposed translucent and operable window and door openings.

3.5 Whether contravention of the development stand raises any matter of significance for the State or regional environmental planning?

The contravention is a local matter and does not raise any matter of state or regional significance. Council can assume the Secretary’s concurrence under Planning Circular PS 18-003 issued on 21 February 2018.

3.6 How would strict compliance hinder the attainment of the objects specified in Section 1.3 (a), (b) and (c) of the Act?

The objects specified in Section 1.3 (a), (b), and (c) are as follows:

Objective	Comment
(a) <i>to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,</i>	The proposal will promote the social and economic welfare of the site and wider Surry Hills locality. The proposed additions will facilitate an efficient and practical use of an existing and well-designed mixed use building situated in a prominent and desirable location.
(b) <i>to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,</i>	The proposal demonstrates ecologically sustainable development. The proposed operable bi-fold doors, windows, and skylights will act as a means of passive heating and cooling and will provide weather control (i.e. shading and rain protection), as well as natural ventilation.
(c) <i>to promote the orderly and economic use of land,</i>	The proposal maintains the approved retail uses (i.e. food and drink premises) at the site.

Table 1: EP&A Act 1979 – Section 1.3 objectives compliance assessment

3.7 ***Is there public benefit in maintaining the development standard?***

Generally, there is public benefit in maintaining standards. However, there is also public benefit in maintaining a degree of flexibility in specific circumstances.

In this case, a non-compliance currently exists, and no public benefit would accrue in the circumstances of requiring strict numerical compliance with the FSR development standard.

3.8 ***Is the objection well founded?***

Yes, the proposal is consistent with the objectives of the B4 Mixed Use zone and the FSR development standard. It is considered that the objection is well founded in this instance and that granting an exception to the development can be supported in the circumstances of the case.

4.0 **Conclusion**

The proposed variation is based on the reasons contained within this formal request for an exception to the Floor Space Ratio standard.

The proposal accords with the stated objectives for the B4 Mixed Use zone and the Floor Space Ratio development standard (Clause 4.4). The proposal is consistent with surrounding mixed use development and will have a positive amenity outcome for restaurant patrons and surrounding commercial and residential properties. As such, it is considered that the proposal is consistent with the planning purposes for the area.

Noting the minor nature of the proposed works, the additional FSR does not contribute to significant adverse amenity impacts by way of bulk and scale, overshadowing, acoustic and visual privacy impacts, or view loss. The proposal maintains an appropriate built form on the site and does not result in a structure that is out of proportion or scale with surrounding development. The external building materials of the proposed structure are consistent with that of the existing mixed use building on the site, and are sympathetic to the design of surrounding development.

A development strictly complying with the numerical FSR standard would not significantly improve the amenity of surrounding land uses. In fact, the proposed enclosure of the dining area seeks to mitigate acoustic spill from that part of the site and provide improved climate control and shading. In the context of the locality, it would be unreasonable for strict compliance to be enforced.

The non-compliance is not considered to result in any precedents for future development within the locality or broader LGA, given the site circumstances and surrounding pattern of development.

As demonstrated in this submission, it would be unreasonable for strict compliance with the FSR control to be enforced. It is concluded that the variation to the FSR development standard is well founded as compliance with the standard is both unnecessary and unreasonable in the circumstances of this case.