

# **Attachment E**

**Clause 4.6 Variation Request – Floor Space  
Ratio**

# 413-415 Sussex Street, Haymarket

Clause 4.6 Variation Request to Clause 4.4 Floor Space Ratio of the Sydney Local Environmental Plan 2012

On behalf of  
*Elegant Dixon Property Pty Ltd ATF Elegant Dixon Trust*  
July 2021



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# 1 Introduction

This Clause 4.6 variation request accompanies a Development Application (**DA**) submitted to the City of Sydney (the **City**) for the demolition of the existing commercial building and construction of a new 17 storey mixed use development comprising student accommodation, lower retail/commercial floors, communal roof top garden and two levels of basement located at 413-415 Sussex Street and 82-84 Dixon Street, Haymarket (**subject sites**).

In addition, the proposal seeks to undertake conservation works to the heritage item at 82-84 Dixon Street, and the dedication in stratum of level 1 and Level 2 of 84 Dixon Street to the City.

This Clause 4.6 variation request seeks to vary the development standard for the Floor Space Ratio under Clause 4.4 of the *Sydney Local Environmental Plan 2012* (**SLEP 2012**).

Clause 4.4 of the SLEP 2012 states the following:

*"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."**

The site comprises two land holdings: 413-415 Sussex Street, Haymarket (also known as 80 Dixon Street, Haymarket) and 82-84 Dixon Street, Haymarket (a three (3) storey heritage listed building which is currently vacant).

Under Clause 4.4, the site has a base FSR of 7.5:1. Under Clause 6.4, the site is also eligible for an additional 1.5:1 FSR for the residential component.

The proposal also utilises the 20% bonus FSR for 413-415 Sussex Street awarded under Clause 29 of the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (**ARH SEPP**) for only the boarding house component.

Pursuant to Clause 29(1)(c) of the ARH SEPP:

**"29 Standards that cannot be used to refuse consent**

- (1) A consent authority must not refuse consent to development to which this Division applies on the grounds of density or scale if the density and scale of the buildings when expressed as a floor space ratio are not more than—*
  - (a) the existing maximum floor space ratio for any form of residential accommodation permitted on the land, or*
  - (b) if the development is on land within a zone in which no residential accommodation is permitted—the existing maximum floor space ratio for any form of development permitted on the land, or*
  - (c) if the development is on land within a zone in which residential flat buildings are permitted and the **land does not contain a heritage item that is identified in an environmental planning instrument or an interim heritage order or on the State Heritage Register**—the existing maximum floor space ratio for any form of residential accommodation permitted on the land, plus—*

- (i) 0.5:1, if the existing maximum floor space ratio is 2.5:1 or less, or
- (ii) 20% of the existing maximum floor space ratio, if the existing maximum floor space ratio is greater than 2.5:1."

While we submit that the land on which affordable housing is proposed does not include nay heritage item, Council have expressed the view that as the site of the overall development does include the heritage item at 82-84 Dixon Street, that Clause 29 (1)(c) is excluded.

For abundant caution we have therefore prepared this request on the basis of Council's interpretation.

The following sections of this report provide an assessment of the request to vary the Development Standard relating to the FSR in accordance with Clause 4.6 of SLEP 2012. Consideration has been given to the following matters within this assessment:

- *Varying Development Standards: A Guide*, prepared by the Department of Planning and Infrastructure dated August 2011; and
- Relevant planning principles and judgements issued by the Land and Environment Court in particular *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

## 2 Exceptions to Development Standards

Clause 4.6 of the SLEP includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 are as follows:

- *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing a Consent Authority to support a DA for approval, even where it does not comply with certain development standards where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for the development.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6(3) requires that the Consent Authority consider a written request from the applicant, which demonstrates that:

- Compliance with the development standard is **unreasonable or unnecessary in the circumstances** of the case, and
- There are **sufficient environmental planning grounds** to justify contravening the development standard.

Furthermore, the Consent Authority must also be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone, and the concurrence of the Secretary has been obtained. The concurrence of the secretary has been assumed in this instance.

The proposed non-compliance in FSR has been assessed against the objectives of the zone and development standard in **Section 5** and **Section 7**.

The assessment of the proposed variation has been undertaken in accordance with the requirements of the SLEP, Clause 4.6(3) Exceptions to Development Standards in the assessment in **Section 4** and **Section 5**.

This Clause 4.6 Variation has been prepared as a written request seeking to justify contravention of the following provisions under the SLEP:

**"Clause 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."*

### 3 Clause 4.6 (3)(a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe v Pittwater* [2007] NSW LEC 827 (**Wehbe**) a five-part test was established in which a variation to a development standard is considered to be unreasonable or unnecessary as per Clause 4.6(3A). The five tests established in *Wehbe* are (emphasis added):

1. **The objectives of the standard are achieved notwithstanding non-compliance with the standard;**
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
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;*
5. *The zoning of the 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.*

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*Satisfaction of any one of these tests is sufficient to demonstrate the compliance with the standard is unreasonable or unnecessary.*

This objection is based on the **first test**, which is addressed at **Section 5**.

## 4 The objectives of the standard are achieved notwithstanding non-compliance with the standard

The **first test** of *Wehbe* requires demonstration that the objectives of a development standard can be achieved notwithstanding noncompliance with that particular standard.

In this case, non-compliance with Clause 4.4 floor space ratio standard of the SLEP is proposed at the site. Notwithstanding, the objectives of the standard are still achieved as outlined below:

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

- The development provides sufficient floor space which accommodates a variety of permissible uses within the zone including student accommodation, retail and community uses (of which will be dedicated to Council).
- The uses meet the requirements of the future community including additional retail tenancies and activation to support the growth of jobs within the Sydney CBD and community spaces that will provide critical spaces to the local community. The subject site is ideally situated to provide capacity to support anticipated development needs across the employment, housing, commercial and community sectors based upon the significant increase in public transport services immediately available at the site.
- Australia has become one of the most popular tertiary education destinations globally with a high demand of student accommodation in Sydney. The proposal includes a 306 rooms student accommodation development which provides a unique opportunity to accommodate this demand. Notwithstanding the current COVID-19 pandemic, by the time the construction of the proposed development is completed, it is anticipated that Australia's significant tertiary education industry will have returned to pre-pandemic levels.
- The proposed mixed-use development will not only provide the need for student accommodation, but also offers additional employment opportunities for the community. The proposed commercial/retail component will offer a variety of job opportunities that promotes the viability of the Haymarket/China town and continues to attract local and international visitors.
- Further, the proposal will generate additional direct and indirect employment as a result of providing employment opportunities during construction, as well as stimulating economic activity within the local economy once operational.

Taking into consideration the above, objective (a) of the standard is achieved, notwithstanding the non-compliance.

**(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 development will be located in an accessible location which is in proximity to Central train station and a number of bus services and light rail stops which will maximise public transport patronage.
- The application is accompanied by a *Transport Impact Assessment* in **Appendix 11**. The report concludes that:
  - The proposal does not provide any car parking facilities, satisfying The SLEP car parking requirements;

- The site is well connected to the regional Sydney bike network and comprises 122 bicycle parking spaces which satisfies the SDCP and ARH SEPP bicycle parking requirements;
- All servicing, loading and waste collection operations associated with the proposal is an acceptable arrangement and is not expected to have a significant impact on existing on-street conditions of the surrounding road network;
- The development proposes no carparking. Consequently, the subject development is expected to be nil (0), with low traffic volumes associated with the servicing driveway. This will have no noticeable effect on traffic flow efficiency in the surrounds of the site.

Taking the above into consideration, objective (b) is achieved, notwithstanding the non-compliance with the standard.

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

- The subject site is within a highly accessible location with close proximity to a number of public transport and commercial services and accordingly, as discussed above, the proposed development does not comprise any car parking.
- With the integration of 122 bicycle parking spaces, the development, which is located in a highly accessible location, promotes the use of more sustainable forms of transport including public transport, cycling and walking and is consistent with Council's approach to traffic and parking, which is to reduce private vehicle trips within the LGA and Central Sydney in particular.
- Moreover, the site is located within an established metropolitan area and currently contains all necessary services including electricity, gas, water, communications, drainage and sewerage. Furthermore, future development on the site can be connected to these services as required.

Overall, the proposed density of the development is considered commensurate with the capacity of the existing and planned infrastructure in the locality and taking these above points into consideration the above, objective (c) is achieved, notwithstanding the non-compliance with the standard.

**(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 proposal responds well to the envelope massing as the envelope is highly modulated to respond to site, context and heritage constraints. It also ensures that the transitions between the components of the envelope contribute positively to the streetscape and established character of the Chinatown / Haymarket special character area.
- The proposed development integrates a suitable development with uses that are permissible in the B8 zone and located in an accessible location which will maximise public transport patronage and encourage walking and cycling.
- The developments' built form is considered compatible with the character of the Chinatown/ Haymarket locality creating a positive social and economic impact in the locality. The DA is supported by a *Heritage Impact Statement* which discusses the proposed development's appropriate contextual relationship to the area and its neighbouring buildings.
- Consistent with the SDCP2012 character statement and its supporting principles, the proposal will retain the heritage built form and structure at 82-84 Dixon Street, whilst including conservation works to ensure its longevity into the future.

- The additional FSR attributed to the application of ARH SEPP is only applied to the boarding house component over the site at 413-415 Sussex Street. This bonus is not applied to the landholding comprising the heritage item. The proposed additional yield applied under the ARH SEPP is therefore physically removed from the heritage item and facilitates the conservation of the heritage item for the benefit of the locality and future generations.
- The proposed uses within the heritage item include that of retail and community use. The proposed two levels of community uses that will be dedicated to Council upon completion.
- The proposal will not create any significant amenity impacts with regard to overshadowing, privacy and view loss.

Taking this into consideration, objective (d) of the standard is achieved, notwithstanding the non-compliance.

## 5 Clause 4.6 (3)(b) Sufficient environmental planning ground to justify contravening the development standard

Clause 4.6(3)(b) requires the applicant to demonstrate that there are sufficient environmental planning grounds to contravene the development standard.

In Initial Action the Court found at [23]-[24] that:

23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.
24. The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15].

Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].

In the case of the subject development, there are sufficient environmental planning grounds to justify contravening the development standard for the following reasons:

- The site (comprising two land holdings) has a base FSR of 7.5:1 under the LEP. The site is also eligible for an additional 1.5:1 FSR under Clause 6.4 for the residential component only, reduced proportionally in accordance with the percentage of residential use proposed.
- The landholding at 82-84 Dixon Street is heritage listed. The 20% bonus under ARH SEPP does not apply to this site and accordingly, the heritage item does not comprise any boarding house FSR and is not impacted by the additional ARH SEPP bonus attributed to the site at 413-415 Sussex Street.
- The proposal only utilises the ARH SEPP 20% additional FSR for the boarding house component of the land holding at 413-415 Sussex Street which is not heritage listed and complies with Clause 29 of the ARH SEPP.
- At the time of lodgement, the site at 82-84 Dixon Street was not heritage listed, however none the less, it is now a heritage listed item and therefore this Clause 4.6 report constitutes the appropriate consideration.

- Clause 29 of the ARH SEPP is a 'shall not refuse' clause and not a development standard.
- The additional yield is physically removed from the heritage item and facilitates the conservation of the heritage item. To strictly enforce the standard would be contrary to the feasibility of conserving the item. Through the proposed preservation of the heritage item and associated conservation works, the development achieves the objective (d) of Clause 4.6 by providing a development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.
- The exceedance partially results from the lack of any additional floor space on the heritage item at 82-84 Dixon Street. Whilst additional floor space for local and state heritage items can be permissible in appropriate circumstances, the subject application seeks to retain these buildings in their original form and scale to achieve a better heritage and conservation outcome for the site. As such, the development seeks to redistribute some of this space onto the less sensitive new building at 413-415 Sussex Street, which is a reasonable outcome given the proposal meets the objectives of the controls.

In addition to above, it is further noted that:

- As established in the *Liverpool Road v Inner West decision* at [44], Moore J held that Clause 29(4) of ARH SEPP is a "provision that does not provide an automatic pathway to approval but one which requires consideration of discretionary matters in an assessment of the propose height exceedance".

In this case, Moore J accepted the submission of the Applicant that approval may be granted to the development despite the non-compliance with the relevant maximum height standard in the LEP "because cl 29(4) of SEPP ARH prevails over the prohibition in clause 4.3" at [28]. He concludes that the strict regime in cl 4.6 did not apply to fetter the discretion in cl 29(4). Specifically, at [48]:

*"I do not consider that a strict cl 4.6-like approach is mandated because there is nothing in the terms of this provision of the SEPP that purports to impose fetters on the exercise of the discretion given by it in the fashion that arises from the very structured testing regime that flows from cl 4.6 itself. The absence of such a regime, in my view, means that it is inappropriate to infer that such a strict regime would be required to be applied."*

- Therefore, Clause 29(4) of the ARH SEPP removes the requirement for an applicant to submit a Clause 4.6 Variation Request, even where there is an exceedance of the relevant standards.

Furthermore, as demonstrated in **Section 6** of this report, the proposal demonstrates compliance with the objectives of the standard in that:

- It provides sufficient floor space to meet anticipated development needs for the foreseeable future;
- It regulates the density of development, built form and land use intensity and controls the generation of vehicle and pedestrian traffic;
- It provides for an intensity of development that is commensurate with the capacity of existing and planned infrastructure; and
- It ensures that the development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development represents good design (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

Therefore, it is considered that there are sufficient environmental planning grounds to justify contravening the development standard in this instance, as, amongst other reasons listed above, the development will deliver one of the key objectives of the Planning Act, will promote the delivery of efficient, healthy and sustainable office development, while also allowing for the promotion and coordination of the orderly and economic use and development of the land for commercial and retail uses.

In addition, it is noted that the proposed development will still produce a contextually appropriate development outcome consistent with the objectives of the development standards, despite the non-compliances with the numerical provisions.

## 6 Clause 4.6 (4a)(ii) Public Interest

Clause 4.6(4a)(ii) requires that the consent authority consider whether 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.

Preston CJ in *Initial Action* (Para [27]) described the relevant test for this as follows:

*"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.*

*If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)."*

As detailed at **Section 6** the proposed development will be consistent with the objectives of the FSR standard.

Further, it is considered that the proposal will remain consistent with the objectives of the B8 Metropolitan Centre zone as summarised below:

- **To recognise and provide for the pre-eminent role of business, office, retail, entertainment and tourist premises in Australia's participation in the global economy.**

The proposed development comprises a mixture of uses including student accommodation and retail premises which will contribute to the viability of the Haymarket Chinatown Area. The development provides adequate and appropriate retail and commercial space to meet the needs of the existing and future workers and residents.

- **To provide opportunities for an intensity of land uses commensurate with Sydney's global status.**

Australia has become one of the most popular tertiary education destinations globally with a high demand of student accommodation in Sydney. The proposal includes a 306 rooms student accommodation development which provides a unique opportunity to accommodate this demand. Notwithstanding the current COVID-19 pandemic, by the time the construction of the proposed development is completed, it is anticipated that Australia's significant tertiary education industry will have returned to pre-pandemic levels.

- **To permit a diversity of compatible land uses characteristic of Sydney's global status and that serve the workforce, visitors and wider community.**

The proposed mixed-use development will not only provide the need for student accommodation, but also offers additional employment opportunities for the community. The proposed commercial/retail component will offer a variety of job opportunities that promotes the viability of the Haymarket/China town and continues to attract local and international visitors.

- **To encourage the use of alternatives to private motor vehicles, such as public transport, walking or cycling.**

The proposed development will be located in an accessible location which is in proximity to Central train station and a number of bus services and light rail stops which will maximise public transport patronage. Furthermore, the proposal incorporates additional bicycle parking and is surrounded by a series of footpaths which will encourage walking and cycling.

- **To promote uses with active street frontages on main streets and on streets in which buildings are used primarily (at street level) for the purposes of retail premises.**

The development incorporates ground floor retail along Sussex Street, Dixon Street and Little Hay Streets which promote street activation along all the frontages.

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

## 7 Clause 4.6(5) Grounds for Consideration

In deciding whether to grant concurrence, subclause 4.6(5) requires that the Secretary consider:

1. *Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
2. *The public benefit of maintaining the development standard, and*
3. *Any other matters required to be taken into consideration by the Secretary before granting concurrence.*

The proposal has been assessed against the relative criteria below:

### **Would non-compliance raise any matter of significance for State or regional planning?**

The non-compliance does not raise any other matter of significance for State or regional planning.

### **Is there a public benefit of maintaining the development standard?**

There is no public benefit associated with maintaining strict compliance with the development standard. Doing so would fundamentally contradict the feasibility of conserving the heritage item at 82-84 Dixon Street.

### **Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

There are no additional matters that need to be considered in exercising the assumed concurrence of the Secretary.

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## 8 Conclusion

It is requested that Council supports the proposed variation to Clause 4.4 Floor Space Ratio for the following reasons:

- Compliance with the Development Standard is unreasonable and unnecessary as the development is consistent with the objectives of the standard, in that it:
  - Provides sufficient floor space to meet anticipated development needs for the foreseeable future;
  - Regulates the density of development, built form and land use intensity and controls the generation of vehicle and pedestrian traffic;
  - Provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure; and
  - Ensures that the 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 proposal achieves the objective of the FSR development standard in Clause 4.4 of SLEP 2012 (Wehbe 1 Test) despite the non-compliance with the numerical standard;
- The proposal only utilises the 20% additional FSR for the boarding house component of the land holding at 413-415 Sussex Street which is not heritage listed and complies with Clause 29 of the ARH SEPP;
- Clause 29 of the ARH SEPP is a 'shall not refuse' clause and not a development standard;
- The additional yield is physically removed from the heritage item and facilitates the conservation of the heritage item. To strictly enforce the standard would be contrary to the feasibility of conserving the item;
- There would be no public benefit in maintaining strict compliance with the Development Standard; and
- It is in the public interest because it is consistent with the objectives of the FSR standard and the B8 Metropolitan Centre zone, notwithstanding the variation to the FSR standard.