

Attachment D

<p>Clause 4.6 Variation Request – Floor Space Ratio</p>
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Clause 4.6 Exceptions to development standards Written request – Floor Space Ratio

Alterations and additions to an existing three storey commercial building



44 Mountain Street, Ultimo

Prepared for: Stangcorp Pty Ltd
Project No: D632
Date: August 2021

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**Clause 4.6 Written Request to Vary a Development Standard
Sydney Local Environmental Plan 2012**

Applicant's name	Stangcorp Pty Ltd
Site address	44 Mountain Street, Ultimo
Proposal	Alterations and additions to an existing three storey commercial building
Environmental Planning Instrument	<i>Sydney Local Environmental Plan 2012 (SLEP 2012)</i>
Development standard to be varied	<p>Clause 4.4 – Floor Space Ratio</p> <p>The relevant subclause states:</p> <p><i>(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 (2.0:1).</i></p>

Below is the written request relating to the proposed variation to Clause 4.4 of SLEP 2012 in accordance with the provisions of clause 4.6 of SLEP 2012.

Details of development standard sought to be varied

Clause 4.4 of SLEP 2012 prescribes the maximum floor space ratio (FSR) for land to which the plan applies. The entirety of Clause 4.4 is reproduced below:

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.*

The FSR map prescribes a maximum FSR of 2.0:1 to the subject site.

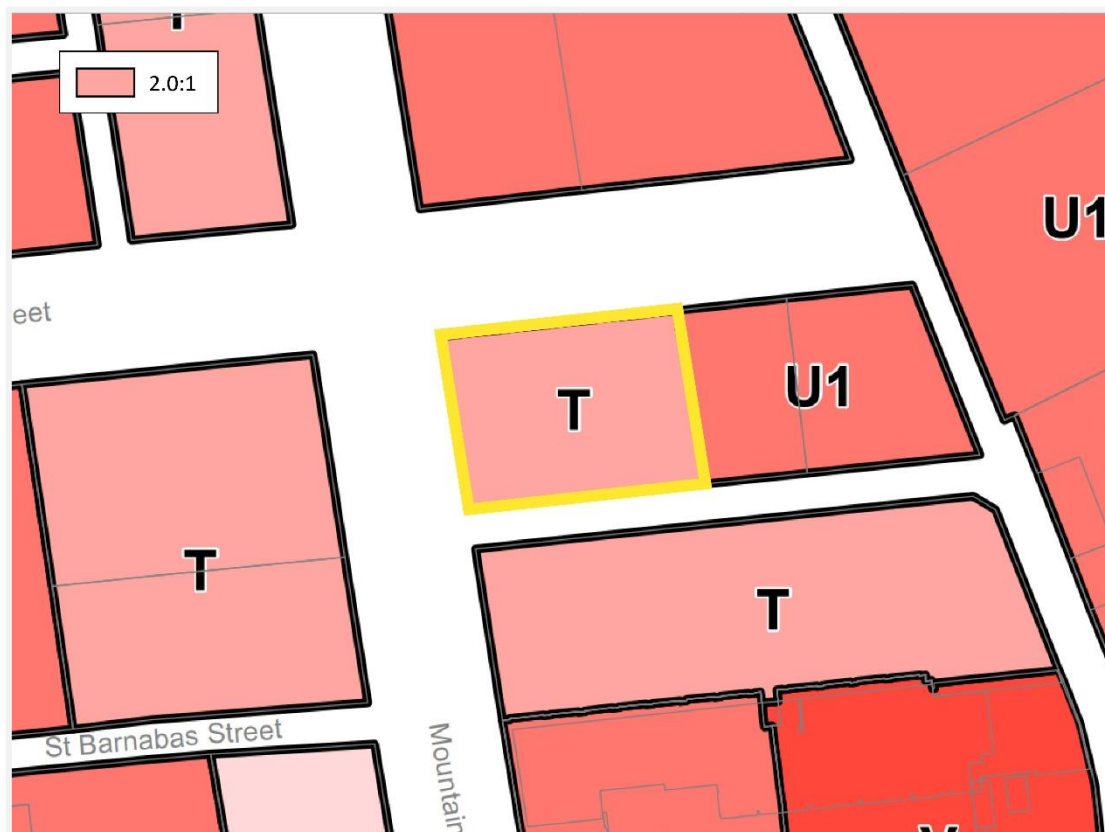


Figure 1: Floor Space Ratio Map Extract. Subject site identified in yellow outline.

Source: legislation.nsw.gov.au

Clause 6.13 of SLEP 2012 provides that the development is able to benefit from additional end of journey floor space, equal to the floor space occupied by the following facilities:

- Showers
- Change rooms
- Lockers
- Bicycle storage areas

The site area is 1,014m² (survey) and has an existing non complying FSR of 2.1:1 (2,130m²).

The proposal seeks to increase the maximum FSR to 3.67:1 (3,723m²) which includes 78m² for end of journey facilities, equivalent to 0.08:1 of FSR. Pursuant to clause 6.13, the development would benefit from an additional permitted FSR of 0.08:1 for a total permitted FSR of 2.08:1. The proposal provides a 1,614m² or 76% variation to the allowable floor space for the site. A breakdown of existing gross floor area (GFA) against the proposal is provided below:

	Existing GFA	Proposed GFA
Ground Floor	301m ² (includes 113m ² of GFA for car parking exceeding maximum car parking of 22 car spaces)	475m ² (includes 78m ² of end of trip facilities)
First Floor	909m ²	901m ²
Second Floor	920m ²	879m ²
Third Floor	-	756m ²
Fourth Floor	-	696m ²
Fifth Floor	-	16m ²
Total	2,130m ²	3,723m ²
Proposed FSR	2.1:1	3.67:1
Permitted FSR	2.0:1	2.08:1 (accounting for end of journey facilities)

Amendments to the proposed development have occurred during the assessment process following feedback from Council's planning, heritage and urban design officers. Most notably, the deletion of the sixth storey and provision of a landscaped rooftop terrace at this level.

While the proposed building height remains unchanged to that which was lodged, built form elements above the maximum building height of 18 metres constitute the lift core, lift lobby, stairwell, accessible amenities, and mechanical plant only, equating to just 78m², or 16m² gross floor area per the standard instrument definition. The remainder of the rooftop terrace comprises landscaped area, tree plantings and outdoor workspaces. Refer to **Figures 2-7** for detail. It is noted that the sixth storey initially proposed provided 411m² GFA.



Figure 2 Photomontage of western elevation (as lodged)
Source: SJB Architects



Figure 3 Photomontage of western elevation (current)
Source: SJB Architects

Clause 4.6 Exceptions to Development Standards - Sydney Local Environmental Plan 2012

Clause 4.6 of SLEP 2012 is the mechanism by which a consent authority is able to grant consent to a development despite non-compliance with a prescribed development standard. Clause 4.6 is reproduced below:

- (1) The objectives of this clause are as follows:*
 - (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) the consent authority is satisfied that:*
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) the concurrence of the Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the Secretary must consider:*
 - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) the public benefit of maintaining the development standard, and*
 - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*
- (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary*

Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note. When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E3 Environmental Management or Zone E4 Environmental Living.

- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following:*
 - (a) a development standard for complying development,*
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) clause 5.4*
 - (ca) clause 4.3 (Height of buildings), but only in relation to land shown as being in Area 1 or Area 2 on the Height of Buildings Map,*
 - (cab) clause 4.5A (Balconies on certain residential flat buildings),*
 - (cb) clause 5.3A (Development below ground level in Zone RE1),*
 - (cc) clause 6.10 (Heritage floor space),*
 - (cd) clause 6.11 (Utilisation of certain additional floor space requires allocation of heritage floor space),*
 - (cda) clause 6.11A (Temporary alternative heritage arrangements in relation to allocation of heritage floor space),*
 - (ce) clause 6.17 (Sun access planes),*
 - (cf) clause 6.18 (Exceptions to sun access planes),*
 - (cg) clause 6.19(1)(d)–(h) and (j), unless the additional overshadowing is caused by playground equipment, a shade structure, an awning, a sculpture or artwork, or a community notice or public information sign,*
 - (cga) clause 6.26 (AMP Circular Quay precinct),*
 - (cgb) clause 6.29 (58–60 Martin Place, Sydney),*
 - (cgc) clause 6.33 (230–238 Sussex Street, Sydney),*
 - (cgd) clause 6.35 (45 Murray Street, Pyrmont), but only if the development is an alteration or addition to an existing building,*

- (cge) clause 6.36 (12–20 Rosebery Avenue, 22–40 Rosebery Avenue and 108 Dalmeny Avenue, Rosebery),
- (cgf) clause 6.37 (296–298 Botany Road and 284 Wyndham Street, Alexandria),
- (cgg) clause 6.41 (7–15 Randle Street, Surry Hills),
- (cgh) clause 6.42 (102–106 Dunning Avenue, Rosebery),
- (cgi) clause 6.40 (2–32 Junction Street, Forest Lodge),
- (cgj) clause 6.43 (Danks Street South Precinct),
- (cgk) clause 6.52 (1–11 Oxford Street, Paddington),
- (ch) Division 1 of Part 7 (Car parking ancillary to other development).

The statutory obligations of the applicant and Council

The authority established within *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, provides that a 4.6 variation need not establish that a development containing a variation provides a better or even neutral outcome for a development site compared with that which would be provided by a compliant development.

In light of this judgement, it is also necessary to distinguish between the obligations of the applicant, and the obligations of Council. The applicant is required only to address the matters required by 4.6(3). Note however that for completeness and to assist Council in its assessment, this variation request has addressed 4.6(3) and 4.6(4). However, given the inevitable overlap between these matters, this request should be read in its entirety as generally fulfilling the applicant's obligations as they are described by 4.6(3).

4.6(3) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and there are environmental planning grounds to justify the contravention of the standard

The authority established by *Four2Five Pty Ltd v Ashfield Council* (2015) NSWCA 248, necessitates that environmental planning grounds for the proposed variation must be established aside from the consistency of the development with the objectives of the standard and the objectives of the zone.

In *Wehbe V Pittwater Council* (2007) NSW LEC 827, Preston CJ set out the following 5 different ways in which an objection (variation) may be well founded:

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 particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

It is generally understood that Clause 4.6(3) can be satisfied if it is established that a development satisfies one or more of points 2-5 above.

Having regard for the authority within *Wehbe*, compliance with the maximum FSR development standard has been determined to be unreasonable and unnecessary in the circumstances of the case, and the following outlines the environmental planning grounds for the proposed variation:

- The prescribed FSR of 2.0:1 (notwithstanding proposed end of journey facilities) for the subject site is only adequate for the existing three storey building on site which is built to the boundary and currently already exceeds the prescribed FSR. Similarly, the prescribed FSR for immediately surrounding sites within the heritage conservation area of 2.0-2.5:1 does not reflect the existing context which comprises predominantly historical warehouse buildings built to all boundaries and originally built of a three to six storey height (not including any later additions).

These warehouses as original would similarly have already exceeded the prescribed maximum FSR notwithstanding any additions approved later on as discussed in more detail below. The FSR non-compliance is acknowledged by Council in the assessment of similar additions as being common to buildings of this form within the locality. In this regard, the underlying objective or purpose of the standard is not relevant to the development and surrounding context, hence compliance is unnecessary.

- Compliance is not possible as it would require partial demolition of the existing former warehouse building. In addition, the prescribed FSR is inappropriately low in this locality. In this regard, the underlying object or purpose of the FSR standard would be defeated or thwarted if compliance were required and therefore compliance is unreasonable. Further, it would not allow for achievement of the five storey or 18m height limit prescribed for the area.
- There is a clear mismatch between the maximum FSR and building height standards for the site and immediate locality, particularly given the locality is largely characterised by non-residential buildings that are built to all site boundaries. The permissible FSR on the site is exhausted within the first three levels of the development, despite an 18m permitted height limit.
- The mismatch between the development standards, in a context of buildings with nil setbacks and complete site coverage, is evident when noting FSR and height of building variations that have been approved as part of additions or for new development for immediately surrounding sites. The table below summarises both the variations approved by Council, as well as existing known non-compliant buildings within the local area:

Sites	LEP Maximum FSR	Approved/Existing	LEP Maximum Height	Approved/Existing height
Subject site	2.0:1 (2.08:1 including end of journey bonus FSR)	Proposed 4.13:1 (+98%)	18m	Proposed 22.12 (+22.89%)
35-39 Mountain Street (D/2013/2004)	2.0:1	4.65:1 (+132.5%)	18m	22.47m Part 6/Part 7 storeys (+24.83%)
41 & 43-49 Mountain Street (U/01/00833, D/2005/1562 and subsequent modifications)*	2.0:1 & 2.5:1	4.43:1 (+>90%)	18m and 22m	27.7m Part 5/Part 7/Part 8 storeys (+53.89%)
11 Smail Street (D/2009/2200 and subsequent modifications)	2.5:1	3.4:1 (+36%)	22m	21.931m Part 5 / Part 6 storey (21.84%)
46-52 Mountain Street (Heritage item with no known additions)	2.0:1	Assumed >4.0:1 (+100%)	25m	5 storeys
22-36 Mountain Street (No record of known additions)	2.5:1	Assumed >5.0:1 (+100%)	25m	5 Storeys

* Development consent was surrendered following a change in land ownership.

Whilst the developments at 11 Smail Street and 41 & 43-49 Mountain Street were approved under the former South Sydney LEP and South Sydney DCP, the prescribed heights and FSR for these sites have not changed or been reduced under the current SLEP 2012. This is despite the context of the heritage conservation area having increased in height and density as a consequence of various development approvals.

The non-compliant FSR of surrounding buildings is acknowledged and summarised in previous Council assessments (depicted in the image below from Council's assessment report for 41 & 43-49 Mountain Street under D/2005/1562) (**Figure 8**).



Figure 8 Extract of FSR diagram for surrounding sites in Council's assessment report for D/2005/1562

Source: Council's assessment report for D/2005/1562 for 41 & 43-49 Mountain Street

- Council's reasons for supporting the variations for the above applications at surrounding sites are applicable to the proposed development, and these reasons include that the proposed additions/development:
 - Are complementary to the heritage significance of the existing buildings;
 - Does not result in adverse impacts on the streetscape character or Mountain Street heritage conservation area;
 - Is in keeping with the surrounding context of the area in regards to building height;
 - Does not result in adverse impacts on existing views;
 - Creates no adverse residential amenity impacts on surrounding neighbours; and
 - Is consistent with the objectives for development within the zone.

In this regard, the above reasoning is applicable to the proposed development as outlined above:

- The proposal seeks to revitalise the existing warehouse building through substantial façade upgrades, internal alterations, and a two storey modern addition with landscaped rooftop terrace above. The proposed bulk and scale of additions is proportionally compatible to the existing building and surrounding context by retaining the existing form of the building, whilst introducing a complementary modern addition that expands on the key characteristics of the existing building and enables the interpretation and appreciation of old vs new. The additions are setback from the building edges at various points along Small Street and Mountain Street with floor to ceiling glazing, to provide a clear visual differentiation for the additions.

- The proposed floor space ensures that an appropriate relationship is achieved between the existing form and the evolving character between historical and contemporary buildings in the area. It is considered the proposed additions are therefore complementary to the heritage significance of the existing building and are not considered to detract from the heritage significance of either adjacent local heritage item, as outlined within the heritage impact assessment accompanying the application.
- The proposed development is generally consistent with the visible building heights of four to seven storeys within the immediate surrounds. The warehouse character of the streetscape is enhanced with the proposed development through revitalised building facades to all street frontages. The additions have been setback to minimise visibility from the public domain, similar to 35-39 Mountain Street where the three storey addition is setback and crowns the original warehouse building; and 22-36 Mountain Street where the upper fifth storey is setback. The bulk, height, scale and character of the proposal is sympathetic to the existing locality and streetscape and commensurate with adjacent heritage listed building to the south at 46-52 Mountain Street. Overall, the proposal would improve the architectural character of the existing building and improve the streetscape character and Mountain Street heritage conservation area.
- The proposal would not result in loss of important views to adjoining properties, which predominately comprise commercial developments, with the exception of the residential apartments at 11 Smail Street to the west, which contains only north and south facing windows. The additional floor space would have limited impacts on the solar amenity of these apartments. The heritage item to the south is a commercial building and is already overshadowed by the existing commercial building. The FSR non-compliance does not create unacceptable amenity impacts.
- The development is suitable for the site and does not constitute an overdevelopment in the context of the surrounding built form.
- The proposed development is consistent with the objective of the zone as discussed below.
- The proposed development is consistent with the objectives of the FSR development standard as discussed below.
- The proposed development is generally consistent with relevant Sydney Development Control Plan (SDCP 2012) controls as detailed in the Statement of Environmental Effects.

Clause 4(a)(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,

In the judgement within *Initial Action*, Preston CJ indicated that a consent authority only needs to be satisfied that an applicant has adequately addressed the matters within clause 4.6(3), and that, pursuant to 4.6(4)(a)(ii), the development is consistent with the objectives of the standard and consistent with the objectives of the zone. Although not strictly required, this variation has addressed the reasons that the development satisfies 4.6(4)(a)(ii).

The objectives of the B4 Mixed Use zone are as follows:

- *To provide a mixture of compatible land uses.*

The proposal seeks to provide additional and renewed commercial floor space within the B4 zone. The proposed alterations and additions to the existing commercial building are complementary to the Ultimo local centre and B4 Mixed Use zone

- *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 proposed development is consistent with the above objective as it will provide new and renewed commercial office and retail space for the existing commercial building. The development further seeks to reduce existing provision of car parking from 26 to 13 spaces, whilst introducing end of trip facilities including showers, change rooms, lockers and bicycle parking, which will together promote use of public transport, walking and cycling.

- *To ensure uses support the viability of centres.*

The proposed additional retail and commercial floor space will support the viability of the city centre location including nearby Broadway shopping centre and Central Park through increased commercial floor space and revitalisation of the existing commercial building, thereby enhancing the character of the area.

The objectives of Clause 4.4 FSR of SLEP 2012 are as follows:

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

The proposal will provide additional commercial floor space in the form of renewed retail floor space and new high quality office floor space to meet the demand in this growing mixed use fringe of the city centre.

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

As discussed earlier, despite the exceedance in prescribed FSR, the proposed design is consistent with the prevailing and emerging character of developments of a similar scale within the locality. The proposed alterations and additions to the existing former warehouse building complement the heritage significance of the existing building and the character of the heritage conservation area. The proposed built form is in keeping within the density and surrounding context of surrounding development within the Mountain Street Heritage conservation area. Further, the proposal will result in a reduction in vehicle traffic noting the proposal seeks to reduce car parking provision so as to be compliant with the applicable maximum parking rates. The proposal would result in increased pedestrian traffic to this part of Ultimo which is considered a positive for the area and local businesses.

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

The proposed development is commensurate with the capacity of existing and planned infrastructure for the locality.

(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.

As discussed earlier, the proposed development would revitalise the existing contributory commercial building and improve the overall character of the heritage conservation area. The proposed development would not have any adverse amenity impacts on the locality including the adjoining residential building at 11 Smail Street.

Conclusion

Having regard to the judgement in *Wehbe*, the objectives of the B4 Mixed Use zone and objectives of the FSR standard, the reasons for the variation can be summarised as follows:

- The prescribed FSR of 2.0:1 for the subject site is only sufficient for the existing three storey building on site which is built to each boundary and currently already exceeds the prescribed FSR. Similarly, the prescribed FSR for immediately surrounding sites of 2.0-2.5:1 does not reflect the existing context which comprises predominantly historical warehouse buildings built to each boundary of three to six storeys in height as original (not including additions). The FSR non-compliance is acknowledged by Council in the assessment of additions for surrounding sites as being common within this form of warehouse building within the locality. In this regard, the underlying objective or purpose of the standard is not relevant to the development and surrounding context, hence compliance is unnecessary.
- Compliance is not possible as it would require partial demolition of the existing former warehouse building. In addition, the prescribed FSR is inappropriately low in this locality. In this regard, the underlying object or purpose of the FSR standard would be defeated or thwarted if compliance were required and therefore compliance is unreasonable. Further, it would not allow for achievement of the five storey or 18m height requirement prescribed for the area.
- Approval of additions to former historical warehouse buildings with variations to FSR and height standards is not uncommon in this location. This includes substantial FSR exceedances of up to 132.5%, demonstrating that compliance is often wholly unreasonable in this location.
- There is a clear mismatch between the maximum building height and maximum FSR standards for the site and immediate locality, particularly given the locality is largely characterised by non-residential buildings that are built to all site boundaries. The permissible FSR on the site is exhausted within the first three levels of the development, despite an 18m permitted height limit. Existing FSR non-compliances are acknowledged by Council as being common within this form of warehouse building within the locality.
- Strict enforcement of the FSR development standard in this instance would hinder the desired development outcome for the site, the orderly and economic use of the land, and would not be in line with the scale of the established and desired future character of the Mountain Street heritage conservation area. The proposed variation provides an exceptional opportunity to improve the existing contributory building.
- The proposal seeks to revitalise the existing warehouse building through substantial façade upgrades, internal alterations, and a two storey modern addition with landscaped rooftop terrace above. The proposed bulk and scale of additions are proportionally compatible to the existing building and surrounding context by retaining the existing form of the building whilst introducing a complementary modern addition that expands on the key characteristics of the existing building. The proposed additions are therefore complementary to the heritage significance of the existing building and do not constitute an overdevelopment in the context of the surrounding built form.

- The proposal would not result in adverse environmental impacts including view loss and loss of solar amenity to surrounding development.
- The proposed development is consistent with the objective of the B4 Mixed Use zone.
- The proposed development is consistent with the objectives of the FSR development standard.
- The proposed development is generally consistent with relevant SDCP 2012 controls as detailed in the Statement of Environmental Effects.

Compliance with the development standard is unreasonable or unnecessary in the circumstances. There are sufficient environmental planning grounds to justify contravening the FSR development standard in this instance. Given the above, the requirements of clause 4.6 have been satisfied and the variation to the FSR development standard can be approved.