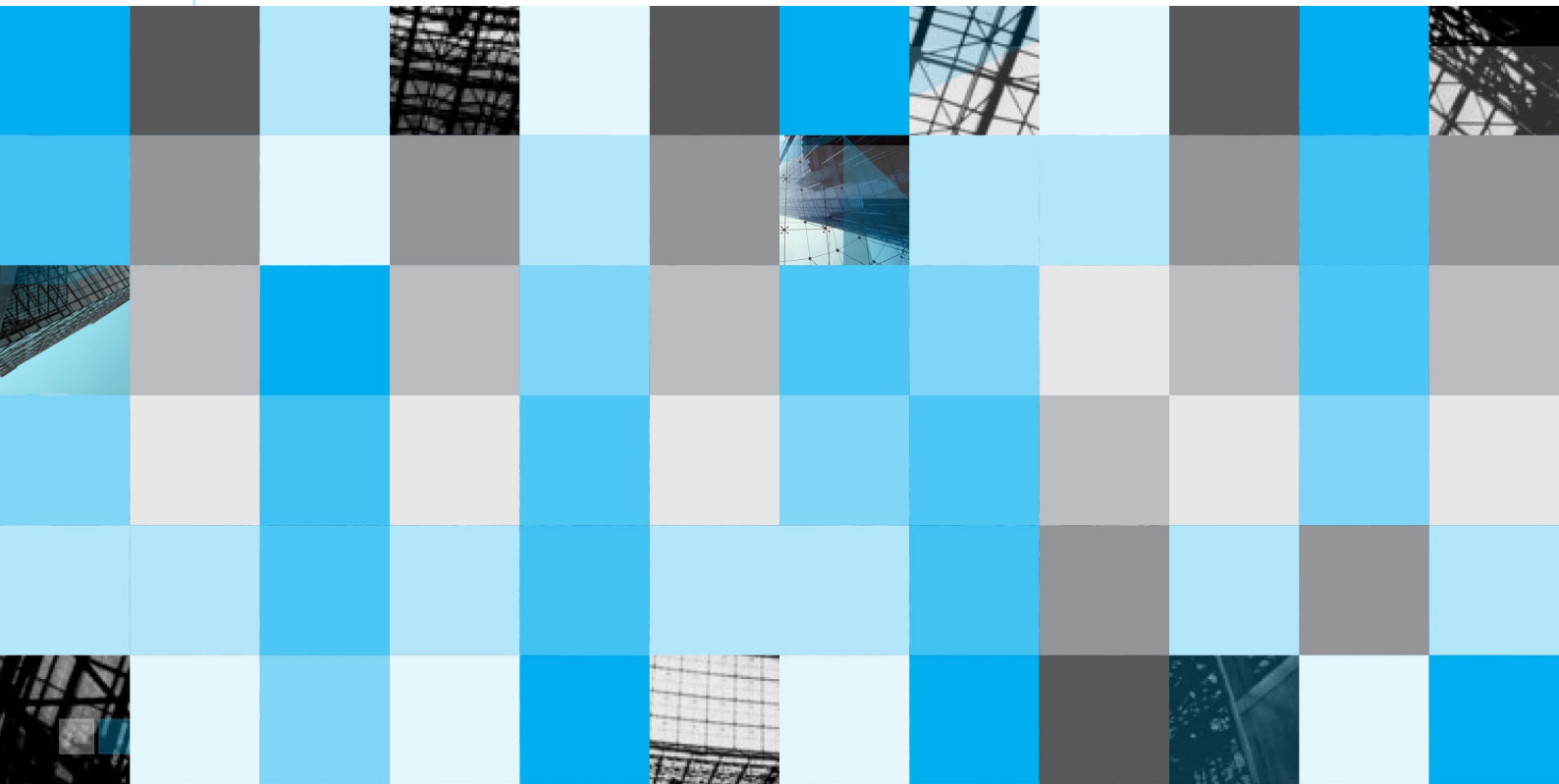


# **Attachment D**

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



375 Glebe Point Road, Glebe

# Clause 4.6 Floor Space Ratio

# Clause 4.6 Floor Space Ratio

**375 GLEBE POINT ROAD, GLEBE**

Alterations and additions to an existing mixed-use  
development

**10 May 2022**

Prepared under instructions from  
[Environa Studio](#)

by

[Amy Sutherland](#)  
B Planning UNSW (Hons)

[amy@sutherlandplanning.com.au](mailto:amy@sutherlandplanning.com.au)  
PO BOX 814 BOWRAL NSW 2576

## CLAUSE 4.6 REQUEST FOR AN EXCEPTION TO THE FLOOR SPACE RATIO DEVELOPMENT STANDARD

### Introduction

This request for an exception to a development standard is submitted in respect of the development standard contained within Clause 4.4 of the Sydney Local Environmental Plan 2012 (SLEP). The request relates to an application for alterations and additions to the existing mixed-use building at 375 Glebe Point Road, Glebe.

### Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the SLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the SLEP, or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant requests that the floor space ratio development standard be varied.

### Development Standard to be varied

Clause 4.4(2) of the SLEP provides that 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 is within area 'S1' on the Floor Space Ratio Map and accordingly an FSR of 1.5:1 applies as shown in Figure 1.



Figure 1:

Extract from the SLEP Floor Space Ratio Map

### Extent of Variation to the Development Standard

The existing building on the site has a gross floor area of 440.1 square metres which equates to an FSR on the site of 1.9:1 (based on the site area of 232.2 square metres). The existing building therefore exceeds the floor space ratio standard by 91.8 square metres or 26.36%.

The proposal has a gross floor area of 434.3 square metres which equates to a floor space ratio of 1.87:1. The proposed development therefore exceeds the maximum gross floor area permitted by 86 square metres or 24.7%.

The proposed development results in a reduction in the floor area of the existing building by 5.8 square metres. The reduction in floor space is predominately associated with the removal of the two external laundries and use of this space as a deck. An additional 2.4 square metres is proposed where the common vertical circulation space has been converted to floor space that connects the existing wine bar to the new wine bar area.

### Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council*. [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of *Randwick City Council v Mical Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five-part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

**1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;**

The specific objectives of the floor space ratio development standard, as specified in clause 4.4 of the Sydney Local Environmental Plan 2012 are identified below. A comment on the proposal’s consistency with each objective is also provided.

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

The development provides housing and employment floor space in a location where there is demand for housing and employment generating uses. The demand for floor space in this area is driven by the unique and extensive range of services, facilities and opportunities available in the City.

The development application results in a minor reduction in the floor area of the building on the site yet maintains sufficient floor space on the site to meet the development needs in the area.

- (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 results in a minor reduction of 5.8 square metres to the floor area of the building and as such the density of development on the site remains similar despite the proposed modifications. The proposal does not increase the number of apartments or commercial tenancies. No additional car parking spaces are proposed.

The application seeks consent to convert an existing storage area (which is included in the gross floor area calculation) to additional floor area for the wine bar to accommodate the 50 patrons permitted in the wine bar/cafe under D/2009/136 and the additional 26 seats proposed. The increase to patron numbers will result not result in any significant or unreasonable impacts on the surrounding properties noting that the acoustic impact resulting from the increase in patron numbers has been addressed by West and Associates in a letter dated 4 May 2022 and has found to be compliant with the applicable standards.

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

The development can be adequately serviced by utilities and 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.

The proposed change to the gross floor area of the building is generally related to the changes to the circulation spaces and the removal of two laundries. The changes to the floor space of the building occur within the existing building envelope will not therefore result in any adverse impact on the character of the locality or the amenity of the locality. Specifically, the minor additional shadow cast by the proposed development is a result of the balconies to the rear of the building. Also, the changes to the floor space ratio of the building do not result in any privacy impacts on the surrounding properties.

**2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;**

The underlying objective of the floor space ratio standard is to provide sufficient floor space to meet the development needs within the capacity of existing and planned infrastructure and with minimal adverse impacts on the amenity of the locality. The objectives of the standard are relevant to the proposal.

**3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;**

The underlying objective of the floor space ratio standard is to provide sufficient floor space to meet anticipated development needs within the capacity of existing and planned infrastructure and with minimal adverse impacts on the character and amenity of the locality.

The existing building exceeds the applicable floor space ratio standard and compliance cannot therefore be attained, without significant changes to the existing building which is a heritage item. The proposed development seeks to reduce the floor space ratio of development on the site from 1.9:1 to 1.87:1 through minor changes to the building, including the demolition of two laundries. Requiring compliance would reduce the floor space in the area and impact on the character of the locality by altering key elements of a heritage building. In this regard, requiring compliance is unreasonable as the underlying objective of the standard would be defeated.

**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;**

The existing building exceeds the applicable floor space ratio standard and compliance cannot therefore be attained. The proposed development seeks to reduce the floor space ratio of development on the site from 1.9:1 to 1.87:1. As the existing building on the site does not comply with the standard, requiring compliance with the standard in this instance is unnecessary and unreasonable.

**4. 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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**

The proposed zoning of the land is reasonable and appropriate.

Strict compliance with the floor space ratio development standard is unreasonable and unnecessary in the circumstances of the case in that:

- The proposal is consistent with the objectives of the standard as detailed above.
- The existing building exceeds the applicable floor space ratio standard and compliance cannot therefore be attained. The proposed development seeks to reduce the floor space ratio of development on the site from 1.9:1 to 1.87:1. As the existing building on the site does not comply with the standard, requiring compliance with the standard in this instance is unnecessary and unreasonable.
- As the existing building exceeds the floor space ratio standard, requiring compliance with the standard would require substantial changes to the existing building which is a heritage item. The modifications to the heritage item would impact on the amenity of the locality and the streetscape and would be inconsistent with the desired future character of the locality. In this regard requiring compliance would be contrary to the objectives of the control and requiring compliance would be unreasonable.
- The proposed modifications do not increase the floor space ratio of the building and the modifications to the floor space within the development have no impact on the bulk and scale of the building.
- The proposed variation to the floor space ratio of the building do not give rise to any significant impacts on the amenity of the locality.

As the proposal is consistent with the objectives of the floor space ratio standard, compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

[Clause 4.6\(3\)\(b\) Are there are sufficient environmental planning grounds to justify contravening the development standard?](#)

The Land & Environment Court matter of *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018*, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify

contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and

- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.
- the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature. 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 Environmental Planning & Assessment Act 1979 (EP&A Act).

Further guidance is also provided in *Eather v Randwick City Council [2021] NSWLEC 1075* and *Petrovic v Randwick City Council [202] NSW LEC 1242* which indicate that the small departure from the actual numerical standard and the lack of any material impacts are environmental grounds.

The environmental planning grounds relevant to the standard that is to be varied are:

- The existing building exceeds the applicable floor space ratio standard and compliance cannot therefore be attained without significant changes to the existing building, which is identified as a heritage item in Schedule 5 of the SLEP. Significant changes to the building to achieve full compliance with the numeric standard would be contrary to object (f) of the EP&A Act which is to promote the sustainable management of built and cultural heritage.
- The development reduces the floor area of the building by 5.8 square metres as a result of the removal of the two laundries on Level 2 and changes to the circulation spaces. The change to the floor area of the building represents a minor change to the floor space ratio of the existing building.
- There are no unreasonable environmental impacts arising from the proposed departure of the standard given the development actually results in a reduced floor space ratio and the changes to the gross floor area of the building are a result of reducing the envelope of the building by removing two laundries.
- The variation requested does not hinder the attainment of the objects of the EP&A Act. The proposed variation to the floor space ratio is the result of changes to the use of floor space within the existing building to improve the amenity of the dwellings and use the existing floorspace more efficiently and economically by converting storage space to an additional seating area for the wine bar. In this regard the development is consistent with object (c) of the Act which is to promote orderly and economic use and development of and and object (g) which is to promote good design and amenity of the built environment.

Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public and in this particular circumstance there are sufficient environmental planning grounds to warrant the proposed variation to the floor space ratio standard.

[Clause 4.6\(4\)\(a\)\(i\) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6\(3\)](#)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five-part test described in *Wehbe v Pittwater Council [2007] NSWLEC 827* for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the



establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

[Clause 4.6\(4\)\(a\)\(ii\) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives](#)

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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.

#### **Objective of the Development Standard**

The consistency of the proposed development with the specific objectives of the floor space ratio development standard is addressed above.

#### **Objectives of the Zone**

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B2 Local Centre zone. The objectives of the B2 Local Centre zone are:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To allow appropriate residential uses so as to support the vitality of local centres.

The proposed development seeks to expand the wine bar on the site (by converting a storage room to part of the wine bar). The proposed works will allow for the growth of the existing wine bar use that serves the needs of people who live in, work in and visit the local area. The proposal will improve the amenity of the existing residential accommodation on the site. No additional onsite parking is proposed and in this regard the development will support the use of public transport and walking and cycling. For the reasons given the proposal is consistent with the objectives of the B2 zone.

#### **Objectives of Clause 4.6**

The specific objectives of Clause 4.6 are:

- (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.

The architectural package prepared by Environa Studio which accompanies the subject application illustrates the relationship of the proposed development within the context of the site. It demonstrates a high-quality outcome for the site which will result in improvements to the internal amenity of an existing mixed-use development whilst remaining compatible with the existing character of development in this location. In this regard providing flexibility to the standard in this instance will achieve better outcomes for the development.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the floor space ratio development standard will achieve a better design outcome in this instance in accordance with objective 1(b).

### Conclusion

Strict compliance with the floor space ratio development standard contained within clause 4.3 of the Sydney Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. Further there are sufficient environmental planning grounds to justify the proposed variation. In this regard it is reasonable and appropriate to vary the floor space ratio development standard to the extent proposed.