

Attachment D

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

Clause 4.6 Request

Alterations and additions to an apartment
Unit 731, 8 Point Street, Pyrmont

submitted to City of Sydney Council
on behalf of Tzannes Architects

Director: Stephen Kerr

Project: P-22094

Report Version: Final

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1. INTRODUCTION

This request has been prepared pursuant to clause 4.6 of the *Sydney Local Environmental Plan 2012* (the **LEP**). The purpose of this request is to justify a variation to the floor space ratio (**FSR**) standard applying to Unit 731, 8 Point Street, Pyrmont (legally described as Lot 53 in Strata Plan 68998).

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

The variation occurs as a result of development application D/2022/51 (the **DA**). The DA seeks development consent for alterations and additions to the site comprising:

- A new external bathroom/laundry to the roof terrace
- A new jacuzzi and outdoor kitchen area
- A new pergola with sections of solid and operable louvre roof
- New windows to the existing kitchen and bathroom
- Minor internal alterations and refurbishment with general internal layout maintained

The alterations and additions result in the creation of 7m² of additional gross floor area (**GFA**).

This request has been prepared having regard to the Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (the **Court decisions**).

The Court decisions have confirmed that clause 4.6 requires a consent authority to be satisfied of three matters before granting consent to a development that seeks to vary a development standard. They are:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)];
3. 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 [clause 4.6(4)]

In the following sections of this clause 4.6 request, we address these matters.

2. WHAT IS THE STANDARD BEING VARIED?

The standard that is proposed to be varied is the FSR standard. In accordance with clause 4.4 of the LEP, the maximum FSR for a building is not to exceed 3:1 for the land on which the site is located.

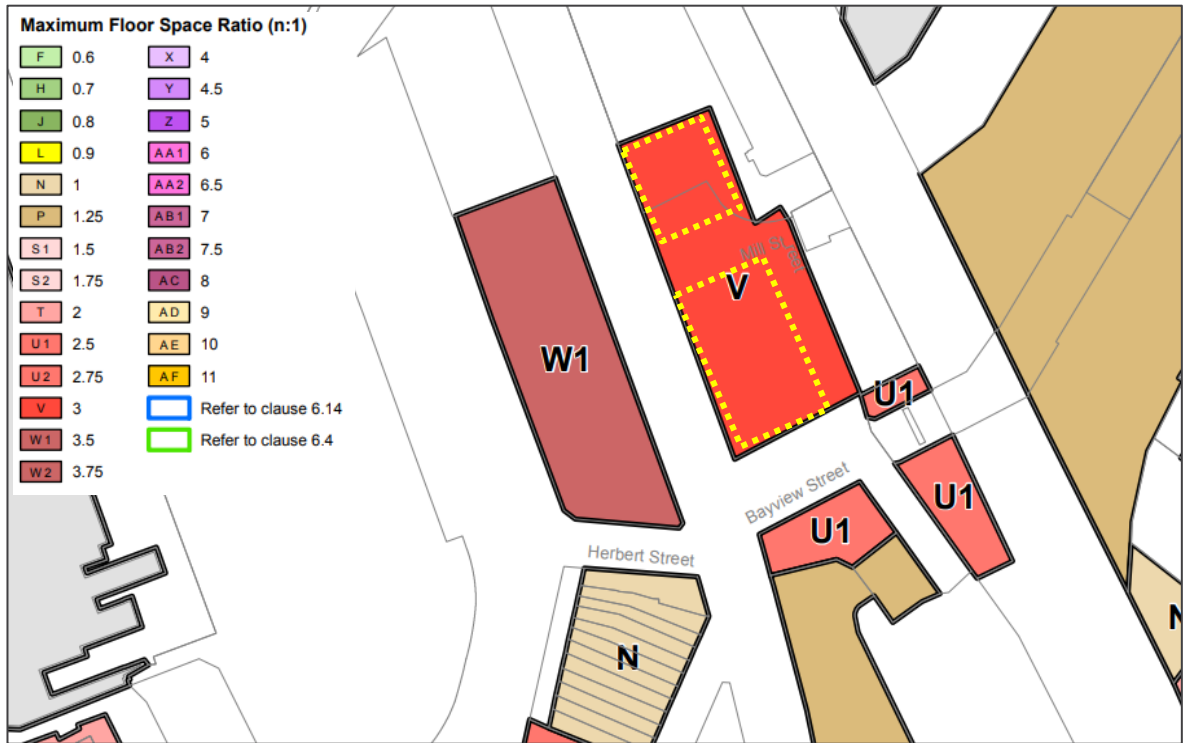


Figure 1 - Extract of LEP Floor Space Ratio Map, with site indicated by yellow dashed rectangles.

3. WHAT IS THE EXTENT OF THE VARIATION?

The FSR and the site area is calculated in accordance with clause 4.5 of the LEP.

In calculating the site area, if the proposed development is to be carried out on only one lot, the site area is taken to be the area of that lot, excluding land on which the proposed development is prohibited, and community land or a public place.

The site area in this instance is the area of part of Lot 1 in DP 1045499. Lot 1 in DP 1045499 was the parent lot for Strata Plan 68998, however, only that part of Lot 1 that is now subject to a FSR control is included in the 'site' and the site area. The site area when calculated in accordance with clause 4.5 of the LEP is 1,854.6m².

The FSR of buildings on a site is the ratio of the GFA of all buildings within the site to the site area according to clause 4.5(2).

There are two buildings within the site. They are 2 Point Road and 8 Point Road (known as buildings B1 and E in the original development approval) and have a combined GFA total of 8,050m² (see Figure 2 below).

Building	Proposed Development GFA m ²	Development Consent GFA m ²	Master Plan GFA m ²
F	1,959	1,502	1,800
B2/3	4,692	4,018	4,700
B1	3,599	3,403	3,700
E	4,451	3,899	4,400
Total GFA (m²)	14,701	12,849	14,600

Figure 2 - Gross floor areas (Source: Statement of Environmental Effects Report prepared by Neustein & Associates, September 2000)

The existing FSR, therefore is 4.34:1, which exceeds the FSR development standard by 44.7%.

With the addition of the 7m² of GFA proposed in the DA, the resulting FSR remains at 4.34:1.

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The permissible GFA on the site is 5,563.8m². The extent of the proposed variation relative to the permissible GFA is 0.12% and relative to the existing GFA is 0.09%.

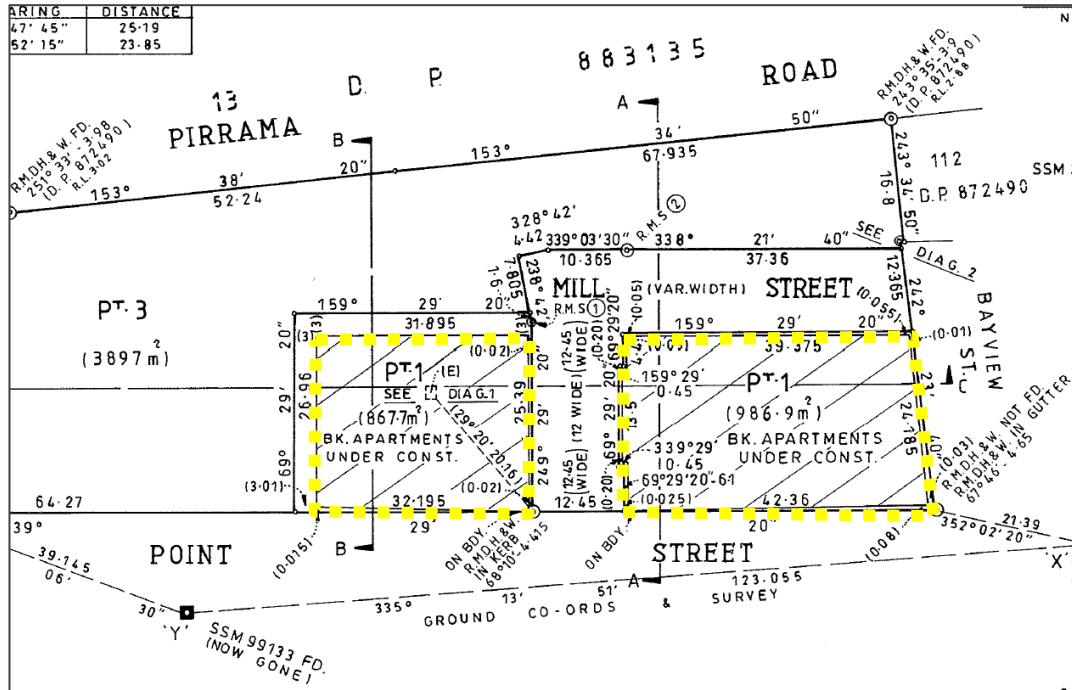


Figure 3 – Extract of DP 1045499 with those parts of Lot 1 which comprise the site area indicated in yellow.

4. WHY COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE.

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827). Furthermore, it is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

The five ways of establishing that compliance is unreasonable or unnecessary are:

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

As demonstrated in Table 1 below, compliance with the FSR development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding the non-compliance.

Table 1 - Achievement of the objectives of the FSR Development Standard

OBJECTIVE	DISCUSSION
to provide sufficient floor space to meet anticipated development needs for the foreseeable future	As noted earlier, the proposed variation is extremely minor (0.12%). The variation occurs as a result of alterations and additions to ensure the apartment continues to meet the needs of its occupants into the foreseeable future. In this regard the very minor variation facilitates the achievement of this objective, notwithstanding the non-compliance.
to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic	The proposed variation will not cause an increase in vehicle and pedestrian traffic, nor an increase in dwellings or an intensification of the use of the apartment. The impact of the variation of the FSR development standard on the built form will not be discernible because of its extremely minor nature. The variation will not prejudice the achievement of this objective.
to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure	As noted above, the variation will not increase the intensity of the use of the site and will place no additional demands on infrastructure. This objective will continue to be achieved notwithstanding the non-compliance.

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<p>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</p>	<p>The proposed alterations and additions are designed to tie in with the structure and architectural language of the existing building and therefore will not materially affect the character of the existing building (refer to the Architectural Plans at Appendix 1).</p> <p>Additionally, there is no impact on the desired character of the locality as described in the locality statement in Section 2.12.1 of the DCP. The proposal improves the amenity of the existing apartment and supports the continued function of Pymont Point as a living/working precinct. The minor additions are located on the roof terrace, substantially above street level and maintain views of Central Sydney from the public domain (see View Analysis Diagrams at Appendix 2).</p> <p>The proposal will have no discernible impact on the amenity of the locality. As demonstrated by the shadow diagrams (Appendix 3), the minor addition causes minimal additional overshadowing and does not prevent any of the surrounding apartments from achieving in excess of the solar access requirement prescribed in the Apartment Design Guide.</p> <p>The view analysis diagrams (Appendix 2) demonstrate that the minor expansion of the floor area which accommodates the proposed bathroom and laundry has only a minimal effect on views. Surrounding properties continue to enjoy CBD skyline views and most notably, where currently available, they continue to enjoy uninterrupted views of the iconic Centrepoint Tower and the more recently constructed Crown Tower.</p>
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5. WHY THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD.

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be sufficient environmental planning grounds to justify a request to vary a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The variation relates to an additional 7m² of GFA created by a new bathroom and laundry which extends into the rooftop terrace associated with the apartment.

The proposed bathroom and laundry, as can be seen in Figure 3 below, is setback from the edges of the rooftop terrace and is integrated with the architecture of the building. It will cause no adverse overshadowing, visual, or other environmental impacts (see earlier discussion in Table 1).

The proposed bathroom and laundry will, however, improve the functionality and amenity of the apartment and in this regard the proposed variation will promote the seventh objective of the *Environmental Planning and Assessment Act* by providing for good design and amenity of the built environment.

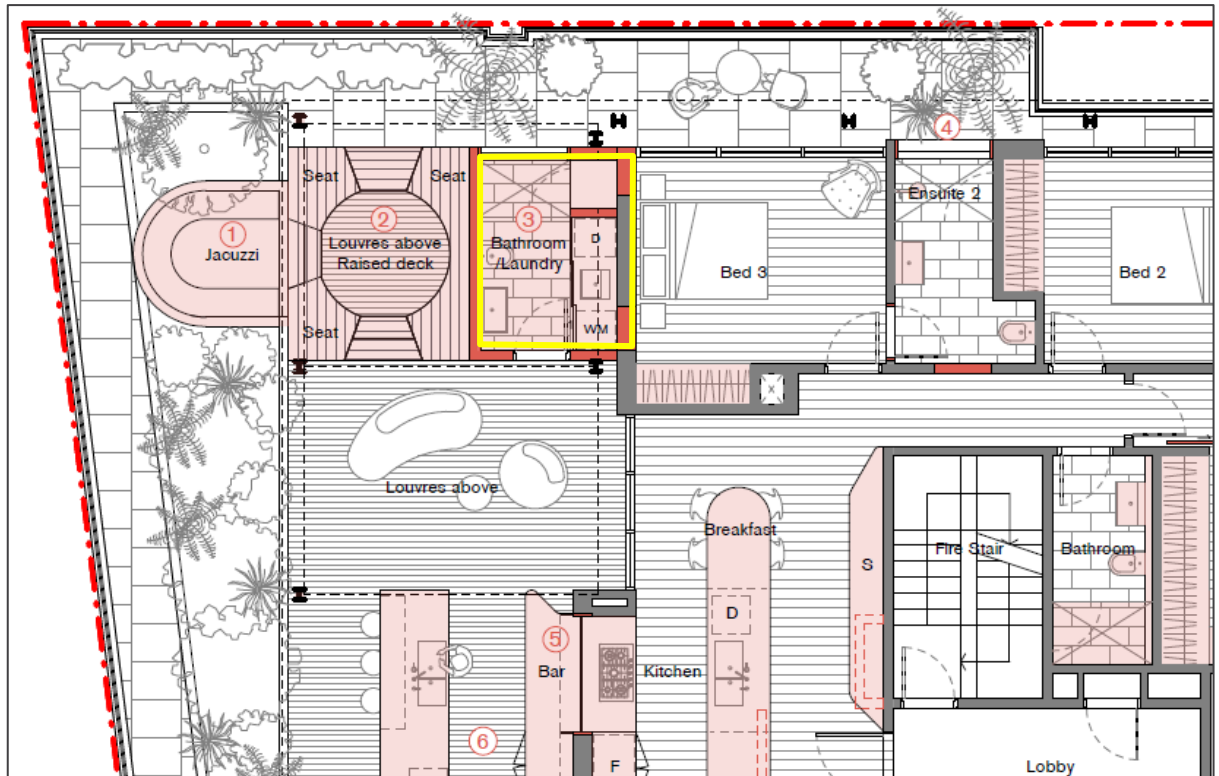


Figure 4 - Extract of floor plan with additional GFA indicated in yellow.

It is also worth observing that the existing development on the site was approved prior to the current LEP at a time when no FSR standard applied to the site. Giba Park, which is now excluded from the calculation of the site area, was an integral part of the original site and serves to provide communal open space for the residents of Buildings B1 and E. Consequently, what now constitutes the 'site' is fully occupied by buildings B1 and E which distorts the FSR calculation.

The FSR control has also never reflected the approved development on the land. There is nothing to infer that Council's intention when imposing the FSR control was that somehow part of the existing buildings should be removed, or that the bulk and scale of the existing buildings was unacceptable. It is appropriate, therefore, to consider the proposed variation in the context of the existing development on the site. Within this context the variation is exceptionally minor (0.09%). In many respects, the variation of the development standard in the circumstances of this particular site is a technical anomaly. Importantly, however, there are sufficient environmental planning grounds to justify contravening the development standard as discussed earlier.

6. HOW THE PROPOSED DEVELOPMENT WILL BE IN THE PUBLIC INTEREST.

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 Table 1 it was demonstrated that the proposed development will achieve the objectives of the FSR development standard. For the same reasons it is considered that the proposed development as a whole will be consistent with the objectives of the FSR development standard.

Table 2 (below) demonstrates that the proposed development will be consistent with the objectives of the B4 Mixed Use Zone that applies to the site.

Table 2 - Consistency with the objectives of the B4 Mixed Use Zone.

OBJECTIVE	DISCUSSION
To provide a mixture of compatible land uses.	The proposal will not affect the mix of land uses. In this regard the proposal is consistent with this objective.
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 site is within an accessible location. The proposal will improve the functionality and amenity of the existing apartment without affecting the mix of land uses or diminishing public transport patronage or walking and cycling.
To ensure uses support the viability of centres.	The proposal will ensure the existing apartment continues to provide a desirable place to live and the occupants will continue to support, albeit in a small way, the viability of centres.

The proposed development, therefore, will be in the public interest.

7. CONCLUSION

It is appropriate to exercise the flexibility provided by clause 4.6 to vary the FSR development standard because as has been demonstrated:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development because the objectives of the development standard are achieved notwithstanding the variation.
- There are sufficient environmental planning grounds to justify the contravention.
- The development achieves the objectives of the development standard and is consistent with the objectives of the B4 Mixed Use Zone and therefore is in the public interest.

Moreover, the proposed variation is extremely minor and is largely of a technical nature. Exercising the flexibility provided by clause 4.6 will facilitate a small but valuable improvement to the amenity and functionality of an existing apartment and is commended for this reason also.