

Attachment D

Clause 4.6 Variation Request – Floor Space Ratio

Sydney LEP 2012
Clause 4.6 Exceptions to
Development Standards –
Floor Space Ratio (FSR)

Substantial Alterations and Additions to a Dwelling House
(effectively a new dwelling) at

No. 75 Kepos Street,
Redfern

Prepared for:

Andrew & Michelle Morony

C/- Lintel Studio for Architecture
Suite 202/61 Marlborough Street
Surry Hills NSW 2010

Prepared by:

GSA PLANNING

Urban Design, Environmental & Traffic Planners
(A.B.N 89 643 660 628)

95 Paddington Street, Paddington NSW 2021

p: 02 9362 3364

e: info@gsaplanning.com.au

JOB NO. 22269

September 2022

© GSA PLANNING 2022

**SYDNEY LOCAL ENVIRONMENTAL PLAN (LEP) 2012
CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS**

APPLICANT'S NAME: Lintel Studio

SITE ADDRESS: No. 75 Kepos Street, Redfern

PROPOSAL: Substantial Alterations and Additions to a Dwelling House (effectively a new dwelling)

1. (i) Name of the applicable planning instrument which specifies the development standard:

Sydney Local Environmental Plan (LEP) 2012

(ii) The land is zoned:

R1 General Residential. The objectives of the zone are stated, inter alia:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To maintain the existing land use pattern of predominantly residential uses.*

(iii) The number of the relevant clause therein:

Clause 4.4 – Floor Space Ratio. Clause 4.4 is stated, inter alia:

- (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.*

This Clause 4.6 Exception to Development Standards should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by GSA Planning.

2. Overview

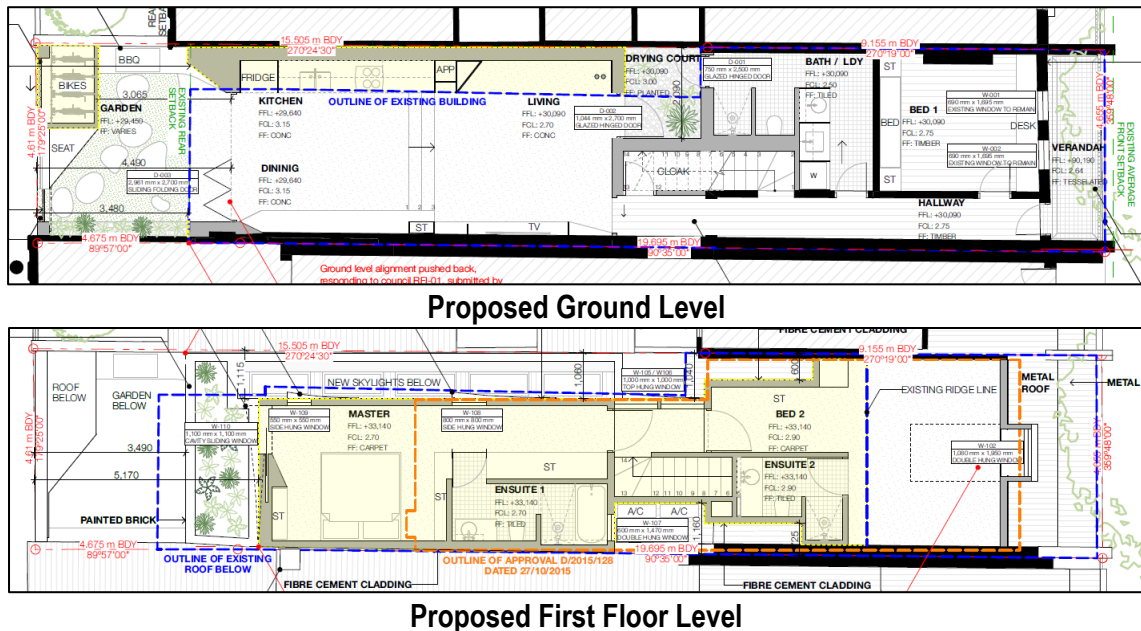
This Clause 4.6 Exception to Development Standards has been prepared in accordance with the most recent case law. In our opinion, the variation is consistent with the objectives of the zone and development standard and has demonstrated there are sufficient environmental planning grounds to justify contravening the development standard.

3. Specify the nature of Development Standard sought to be varied and details of variation:

The development standard to which this request for variation relates is Clause 4.4 of the LEP – Floor Space Ratio. This Clause operates in conjunction with the FSR Map which indicates a maximum FSR of 0.8:1 applies to the subject site. Clause 4.4 is consistent with the definition for a development standard under Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act).

Based on the site area of 113.6m², the site has a maximum permitted Gross Floor Area (GFA) of 90.88m² and floor space ratio (FSR) of 0.8:1. The existing building has a gross floor area (GFA) of 68.95m² and a floor space ratio (FSR) of 0.61:1. The previous development consent for the site (D/2015/128) had a GFA of 113.15m² and an FSR of 0.996:1, which exceeded the development standard by 24%.

The proposed works will have a GFA of 120.49m² and an FSR of 1.06:1. This represents a 32.6% variation from the development standard. However, it is only a 7.34m² increase from the previously approved GFA. The additional GFA is largely a result of extending the ground floor level to the northern boundary, and part of the first floor addition, some of which will not be readily noticeable from the public domain (see Figure 1).



Source: Lintel Studio

Figure 1: Extent of Proposed Extension Compared with the Existing and Approved Dwelling
(new floor areas shaded yellow)

4. Consistency with Objectives of Clause 4.6

The objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (*Initial Action*), Preston CJ notes at [87] and [90]:

Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development...In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

However, it is still useful to provide a preliminary assessment against the objectives of the Clause. The objectives of Clause 4.6 and our planning response are as follows:

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

Flexibility is sought in the application of the FSR development standard to the proposed development in the circumstance of this particular case. The site is located in the R1 General Residential Zone which allows for a range of uses. The proposal is for substantial alterations and additions (essentially a new dwelling) as the existing single storey dwelling is in poor condition and has limited internal and external amenity.

The variation is a function of providing an improved internal layout when compared to the approved DA. This is achieved by extending the floor area to the northern boundary at ground level, and extending the first floor addition to match the glazing line of the adjoining two storey addition at No. 73 Kepos Street. The additional FSR facilitates a dwelling that maintains a single storey appearance from the street, and two storeys from the rear, which is consistent with the scale of existing and emerging development along Kepos Street which comprise first floor additions at the rear (see **Figure 2**).



Source: Lintel Studio

Figure 2: Aerial View of Existing Development Pattern
(longer two storey additions at the rear of properties are marked in yellow)

Flexibility in these particular circumstances allows a better outcome both for and from the development. The additional GFA will improve the internal amenity of the dwelling within the R1 General Residential Zone, while maintaining a built form at the Kepos Street frontage that is favourable in terms of heritage and conservation. Additionally, it is noted that the additional FSR is likely to maintain the amenity of surrounding development. Reducing the FSR would unreasonably restrict development of the site, without any noticeable benefits to surrounding properties.

5. Justification of Variation to Development Standard

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The Clause states, inter alia:

- (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.*

This written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in the circumstances; and there are sufficient environmental planning grounds to justify the non-compliance. These matters are discussed in the following sections.

5.1 Compliance with the Development Standard is Unreasonable and Unnecessary in the Circumstances of the Case

Clause 4.6(3)(a) requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. In *Wehbe v Pittwater Council* (2007) 156 LGERA 446 (*Wehbe*), Preston CJ established five potential tests for determining whether a development standard could be considered unreasonable or unnecessary. This is further detailed in *Initial Action* where Preston CJ states at [22]:

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

It is our opinion that the proposal satisfies Test 1 established in *Wehbe* and for that reason, the development standard is unreasonable and unnecessary in this instance. The relevant test will be considered below.

Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard;

Despite the proposed development's non-compliance with the applicable FSR development standard, the proposal is consistent with the desired character of the area. The proposal provides a height, bulk and scale that is generally consistent with that envisaged by Council's controls. Reasons why the proposed development is consistent with the objectives of the FSR standard are explained below.

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

The additional floor space will provide sufficient floor area to meet the anticipated needs of the owner. The works will provide upgraded internal areas with enhanced amenity. The additional FSR will not affect the site's capacity for future development. The development will enable a range of demographic types to remain in the area, including young families.

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

The proposal is for the conversion of a single storey terrace to one that appears as single storey from the street and two storeys at the rear. It will retain its low intensity single residential use which will not increase the generation of vehicle and pedestrian movement, when compared to the existing situation.

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

The intensity of the development as a single residence will be maintained, notwithstanding the proposed FSR. The works will have no impact on 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.

The site is located in the R1 General Residential Zone. The area in the vicinity of the subject site is characterised by predominantly one and two storey buildings containing residential uses. A number of these dwellings comprise contemporary rear additions that are also likely to exceed the FSR development standard.

The proposal will transform an existing single storey terrace into a two storey terrace that will provide a bulk, scale, and character in keeping with existing and emerging development in the area, including the adjoining property at No. 73 Kepos Street. The terrace will continue to present as single storey to Kepos Street with traditional dormer additions and will have a contemporary two storey appearance to the rear, which is supported on heritage grounds as part of the Heritage Impact Statement submitted separately. The proposal will have a maximum roof ridge at the front that will match those of adjoining development to the north and south, and it is noted that a portion of the additional GFA is located at ground level and within the principal roof form. As such, this extent of GFA will not result in amenity impacts to the locality and will not be visible from the street.

Given the proposal maintains the front setback, provides an enhanced rear setback, and complies with a majority of the built form and amenity provisions of the DCP, the works result in a building envelope envisioned by Council's controls. Therefore, the works will maintain the amenity of the locality in respect of solar access, and this is outlined in shadow diagrams submitted separately. The additional GFA will also not create adverse impacts in respect of privacy, as the additional GFA occurs at ground level and within the principle roof form which will not be readily visible from the public domain. Some of the additional GFA also occurs at the rear of the first floor, which will have no adverse impacts on privacy due to the careful location of windows, the absence of elevated balconies, and a rear setback that aligns with No. 73 Kepos Street. Additionally, the additional GFA is located within a built form that is no higher than the maximum roof line of the adjoining properties and will therefore not affect views.

The proposed FSR will result in a better design outcome which minimises adverse environmental impacts, will be compatible with the Baptist Street HCA, existing and emerging development in the locality and the desired future character.

5.2 There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

There are sufficient environmental planning grounds to justify the FSR non-compliance, especially as the proposal will have a built form that is similar to adjoining and nearby development. Indeed, as the additional FSR is located below the maximum ridge line which matches the adjoining properties, it will not substantially alter the density and scale of the area. In *Initial Action v Woollahra Municipal Council* [2019] NSWLEC 1097, Commissioner O'Neill states at [42] that:

I am satisfied that justifying the aspect of the development that contravenes the development standard as creating a consistent scale with neighbouring development can properly be described as an environmental planning ground within the meaning identified by His Honour in Initial Action [23], because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome (see s 1.3(g) of the EPA Act).

In addition to satisfying the objectives of the zone and the development standard, environmental planning grounds that justify the proposed FSR is outlined below.

Permissibility

The proposal is permissible in the R1 General residential zone and satisfies the 'unreasonable and unnecessary' test established by the court in *Webbe*.

Location of Variation

The extent of variation is located behind the principle built form and is compatible with the rear setback of adjoining properties, in particular No. 73 Kepos Street. The variation is partly located within the roof form fronting Kepos Street, within an extended portion to the north at the ground floor level, which will not be readily visible from the public domain. The variation that is partly visible from Kepos Lane is articulated with setbacks at the first floor to minimise visual impacts and is compatible with the adjoining two storey terrace at No. 73 Kepos Street.

Compatibility with the Streetscape

Despite the variation, the proposed FSR facilitates a scale of residential development that continues to appear as a single storey with an attic fronting Kepos Street, and two storeys at the rear, which is compatible with the existing and emerging development in the area and consistent with the planning objectives. Strict compliance would prohibit alterations and additions, or new works, resulting in a built form that is not in keeping with the pattern of emerging development in the street, which includes a number of first floor additions that may also exceed the FSR.

Neighbour Amenity

The FSR variation would not create material impacts on the amenity of adjoining development in respect of privacy given some of these areas are located within the roof form and at ground level. Where it is visible from the rear lane, setbacks and careful window location prevent overlooking. The variation will also not create adverse material impacts to adjoining development in respect of solar access (as outlined in the shadow diagrams submitted separately) and views.

Improved On-Site Amenity

The variation results in improved internal amenity for the occupants and facilitates housing that is suitable for a wide range of demographics, including young families who wish to stay in the locality.

Accordingly, in our opinion, the non-compliance will not be inconsistent with existing and desired future planning objectives for the locality. For the reasons contained in this application, there are sufficient environmental planning grounds to justify the minor variation to the development standard in the circumstances of this case, as required in Clause 4.6(3)(b).

6. Clause 4.6(4)(a) Requirements

Clause 4.6(4)(a) guides the consent authority's consideration of this Clause 4.6 variation request. It provides that:

- (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*

The applicant submits that the consent authority can be satisfied of each of the requirements of Clause 4.6(4)(a), for all the reasons set out in this written request, and having regard to the site and locality.

In our opinion, the proposal is consistent with the objectives of the FSR Development Standard, as already demonstrated; and the R1 General Residential Zone, as discussed below:

- Objective:** *To provide for the housing needs of the community.*
Response: The proposal will improve and refine the existing dwelling house. It will provide for the needs of the future residents, while also maintaining the amenity of neighbouring properties.
- Objective:** *To provide for a variety of housing types and densities*
Response: The proposal will retain the existing built form. The dwelling will contribute to the variety of housing types and densities in the locality.
- Objective:** *To maintain the existing land use pattern of predominantly residential uses*
Response: The proposal will maintain the residential use, consistent with existing land use pattern in the locality.

From this, we consider the proposal is in the public interest and should be supported.

7. Clauses 4.6(4)(b) and 4.6(5) Requirements

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning and Environment) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

Under Clause 55 of the Environmental Planning and Assessment Regulation 2021, the Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice. While the proposal exceeds the development standard by over 10%, the Planning Circular provides for the Local Planning Panel to assume concurrence.

Nevertheless, the matters in Clause 4.6(5) should still be considered when exercising the power to grant development consent for development that contravenes a development standard (*Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at [100] and *Wehbe* at [41]). In deciding whether to grant concurrence, the Secretary is required to consider the following:

- (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.*

The proposal is not considered to raise any matter of significance for State or regional environmental planning. The FSR non-compliance will enhance the amenity and functionality of the proposed alterations and additions without significantly, unreasonably or unacceptably impacting neighbouring properties.

The public benefit of maintaining the development standard is not considered significant given that, regardless of the non-compliance, the proposal will appear consistent in the streetscape.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted. The non-compliance contributes to a quality development which is consistent with the desired character of the precinct and is, in our opinion, in the public interest.

8. Conclusion

This written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard. This is summarised in the compliance matrix prepared in light of *Initial Action* (see **Table 1** on the following page).

We are of the opinion that the consent authority should 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 of the R1 General Residential Zone pursuant to the LEP. On that basis, the request to vary Clause 4.4 should be upheld.

Table 1: Compliance Matrix

Para (Initial Action)	Requirement	Section of this Report	Summary	Satisfied
10	Is it a development standard (s.1.4)	1	Yes	
11	What is the development standard	1	Clause 4.4: FSR	
12	What is the control	1 & 2	0.8:1	
14	First Precondition to Enlivening the Power – Consent authority must form 2 positive opinions:		Both positive opinions can be formed as detailed below.	YES
15, 25	1st Positive Opinion – That the applicant’s written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3). There are two aspects of that requirement.	5	The Clause 4.6 variation has adequately addressed both matters in Clause 4.6(3) by providing a detailed justification in light of the relevant tests and planning considerations.	YES
16-22	First Aspect is Clause 4.6(3)(a) - That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Common ways are as set out in <i>Wehbe</i> .	5.1	The proposal satisfies Test 1 of <i>Wehbe</i> : <ul style="list-style-type: none"> The objectives of the standard are achieved notwithstanding the non-compliance with the standard; 	YES
23-24	Second Aspect is Clause 4.6(3)(b) – 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 Clause 4.6(4)(a)(i) that the written request has adequately addressed this matter. The environmental planning grounds must be “sufficient” in two respects: <ol style="list-style-type: none"> The environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus 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. 	5.2	Sufficient environmental planning grounds include, inter alia: <ul style="list-style-type: none"> The proposal is permissible in the R1 General residential zone and satisfies the ‘unreasonable and unnecessary’ test established by the court in <i>Wehbe</i>; The extent of variation is located behind the principle built form and is compatible with the rear setback of adjoining properties, in particular No. 73 Kepos Street; The variation is partly located within the roof form fronting Kepos Street, within an extended portion to the north at the ground floor level, which will not be readily visible from the public domain. The variation that is partly visible from Kepos Lane is articulated with setbacks at the first floor to minimise visual impacts and is compatible with the adjoining two storey terrace at No. 73 Kepos Street; Despite the variation, the proposed FSR facilitates a scale of residential development that is compatible with the existing and emerging development in the area and consistent with the planning objectives; 	YES

			<ul style="list-style-type: none"> • Strict compliance would prohibit alterations and additions, or new works, resulting in a built form that is not in keeping with the pattern of emerging development in the street, which includes a number of first floor additions that may also exceed the FSR; • The FSR variation would not create material impacts on the amenity of adjoining development in respect of privacy given some of these areas are located within the roof form and at ground level. Where it is visible from the rear lane, setbacks and careful window location prevent overlooking; • The FSR variation will not create adverse material impacts to adjoining development in respect of solar access (as outlined in the shadow diagrams submitted separately) and views; and • The variation results in improved internal amenity for the occupants. 	
26-27	<p>2nd Positive Opinion – That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out.</p>	6	The proposed development is consistent with the objectives of the FSR standard as addressed under Test 1 of <i>Wehbe</i> . The proposal is also consistent with the objectives of the R1 Zone.	YES
28-29	<p>Second Precondition to Enlivening the Power – That the concurrence of the Secretary has been obtained [Clause 4.6(4)(b)]. On appeal, the Court has the power to grant development consent, subject to being satisfied of the relevant matters under Clause 4.6.</p>	7	As the relevant matters for consideration under Clause 4.6 have been satisfied as outlined above, the Council can grant development consent.	YES

© GSA PLANNING 2022

This document is and shall remain the property George Karavanas Planning Pty Ltd (trading as GSA Planning). The document may only be used for the purposes for which it was commissioned and in accordance with the Letter of Instruction. Unauthorised use of this document in any form whatsoever is prohibited