

Attachment C

<p>Clause 4.6 Variation Request – Floor Space Ratio</p>
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The logo for URBIS, featuring the word "URBIS" in a bold, sans-serif font. The letters are contained within a square frame that is open on the right side. A thick black horizontal line extends from the right side of the square frame across the top of the page. A thick black vertical line runs down the left side of the page, intersecting the horizontal line at the top of the square frame.

URBIS

CLAUSE 4.6 VARIATION REQUEST – FLOOR SPACE RATIO

86-90 Bay Street, Ultimo

Prepared for
DEXUS/HBB PROPERTY
22 May 2023

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1. INTRODUCTION

This Clause 4.6 Variation Request ('the Request') has been prepared by Urbis Pty Ltd (Urbis) on behalf of Dexus Funds Management Limited (Dexus) and HBB Property Pty Limited (HBB Property) as the investment advisors to 86 Bay Street Pty Ltd (ATF Bay Street Trust) (the Applicant) and in support of a Development Application (DA) for the proposed alterations and additions to the existing three storey with a lower ground commercial building located at 86-90 Bay Street, Ultimo (the site). The proposed development for the site is designed to create a sustainable and environmentally conscious A-grade office building. This will involve the repurposing of the existing structure, as well as the addition of a timber extension that complements the built form of the surrounding area whilst enhancing the streetscape of Bay Street. The proposed alteration has considered the necessary adjustments to comply with Building Code of Australia (BCA) specifications for a class 9B structure in the event that an educational establishment is acquired based on market demand to occupy the premises.

The Request seeks an exception from the *Floor Space Ratio* (FSR) prescribed for the site under clause 4.4 of *Sydney Local Environmental Plan 2012 (SLEP)*. The variation request is made pursuant to clause 4.6 of the LEP.

This request demonstrates that compliance with the FSR control prescribed for the site is unreasonable and unnecessary, demonstrating that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

In accordance with clause 4.6(3), the applicant requests that the FSR standard be varied.

This report should be read in conjunction with the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated 22 May 2023.

The following sections of the report include:

- **Section 2:** Description of the site and its local and regional context, including key features relevant to the proposed variation.
- **Section 3:** Brief overview of the proposed development as outlined in further detail within the SEE and accompanying drawings.
- **Section 4:** Identification of the development standard, which is proposed to be varied, including the extent of the contravention.
- **Section 5:** Outline of the relevant assessment framework for the variation in accordance with clause 4.6 of the LEP.
- **Section 6:** Detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the Land and Environment Court.
- **Section 7:** Summary and conclusion.

2. SITE CONTEXT

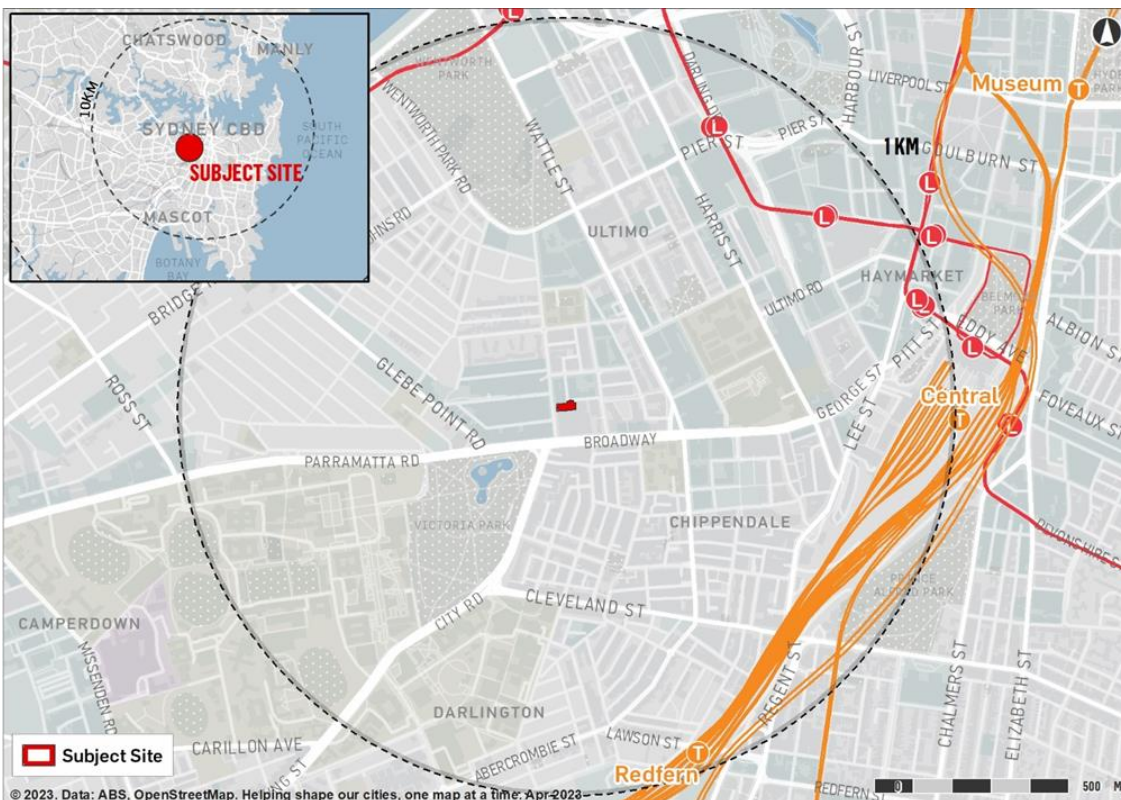
2.1. SITE DESCRIPTION

The site is identified as 86-90 Bay Street, Ultimo, legally described as SP 21479. The site assumes a rectangular configuration with an east-west alignment, comprising a total land area of 1,011 sqm (as surveyed). Notably, there exists a topographical differential of 2.75 metres between the front-facing Bay Street facade and the rear-facing St Barnabas Street. Moreover, the present ground floor slab is elevated above the Bay Street and footpath levels, featuring an 800mm incline towards the northern direction.

The site is located within 100m north of Broadway and is in the middle of a predominantly commercial and retail local hub within the Mount Street Ultimo Heritage Conservation Area. The site is located in the southern end of the Mountain Street Locality which contains adaptively reused older warehouse buildings and is surrounded within walking distance by major education precincts like UTS and TAFE to the east, the new mixed-use hub of Central Park to the southeast, Broadway shopping centre to the west and public parks to the north (Wentworth Park) and the southwest (Victoria Park).

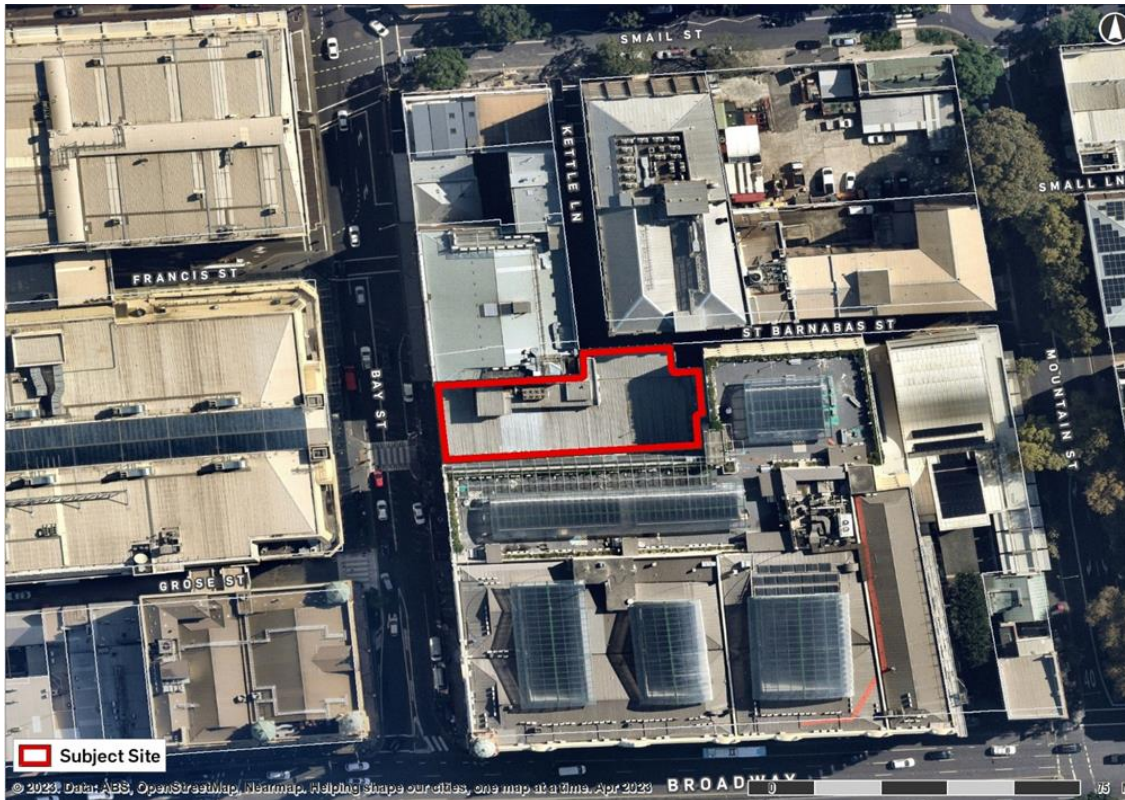
The block where the site is located includes the Uni Lodge building, one of the old Grace Brothers department stores and the Readers Digest building both heritage listed and in Federation Queen Anne style. The rest of the buildings are simpler warehouse style most re-adapted to commercial or residential uses. The site currently contains a 3 storey commercial building with vehicle and service access off St Barnabas Street via a narrow lane of Smail Street.

Figure 1 Location Plan



Source: Urbis, 2023

Figure 2 Aerial Photograph



Source: Urbis, 2023

The site is within the Mountain Street Heritage Conservation Area which features a number of heritage items and contributory buildings. The area currently accommodates a mix of residential, retail and commercial land uses across the historic warehouse buildings and contemporary developments. It is noted that in the SDCP 2012 that the area will continue to provide a diverse mix of uses across adaptively reused early warehouse buildings. Consequently, a wide variety of built forms have been established across the HCA as to support the adaptive re-use of the buildings.

The building is identified as a detracting item within the HCA. It is not listed as a heritage item and does not have any specific statement of significance. The Bay Street corridor is comprised of a mixture of building scales as well as a blend of historic and contemporary stylings.

There is a mix of surrounding buildings varying from one storey to 8 storeys and varying from contemporary to early twentieth century in style. Of note, there are a number of contributory warehouse buildings that have undergone substantial modifications to the original face brickwork in support of adaptive re-use. This is evident at the warehouses at 60 Small Street, 25 Kelly Street and 22-36 Mountain Street which have all seen their facades and detailing altered with contemporary features. Of note, 14 Mountain Street includes a contemporary, multiple storey roof addition above warehouse form with minimal setbacks at the upper-level additions.

Figure 3 Site Pictures



Picture 1 View of the site looking northeast.

Source: Fitzpatrick + Partners, 2023



Picture 2 View of the site and the Uni Lodge building looking south east.

Source: Fitzpatrick + Partners, 2023



Picture 3 View of the site and Bay Street looking north.

Source: Fitzpatrick + Partners, 2023



Picture 4 View of St Barnabas Street located on the northern boundary of the site looking west.

Source: Fitzpatrick + Partners, 2023

The features immediately surrounding the site include:

- **North** The site is bound to the north by the Reader's Digest a 4-storey heritage retail and commercial building. Further to the north is a three-storey masonry building at the south end of the site and a 7-storey building approved under D/2013/1458 for retail and low-cost rental apartments at 68-74 Bay Street, Ultimo. The 7 storey tower interfaces with the subject site with a blank, northern façade that is built up to boundary. The existing tower exceeds the height limit (built to a height of 23.1m) and is built to a nil setback to the north (towards the subject site) with minimal articulation to the building form.
- **South** Directly adjoining the site to the south is the Uni Lodge building, a 5-storey heritage listed used as student accommodation currently undergoing renovation works.
- **West** Directly opposite the site to Bay Street is Broadway Shopping Centre. The structure to the north west is the 1990s Broadway carpark which is a large scale, modern building with a neutral toned, unarticulated pre-cast panelled form. The existing building is four storeys tall and well in excess of the 15-18m maximum building height applicable to the site.

- **East** Across Kettle Lane/St Barnabas Street to the northeast is an eight-storey commercial office building. The commercial building is far in excess of the 22m height limit and establishes a high-density context at the immediate locality. Heritage listed sewer pump station is located further east.

The site is located directly opposite to the main retail area of Ultimo and is well served by public transportation including bus connections along Paramatta Road to the west, Glebe to the northwest and east towards Central and the Sydney CBD. The site is located 900m from Central Station providing excellent train, light rail and further bus connections across Sydney.

Figure 4 Surrounding Development Section



Source: Fitzpatrick + Partners, 2023

3. PROPOSED DEVELOPMENT

This Clause 4.6 Variation Request has been prepared to accompany a DA for a six storey commercial building with one retail tenancy located on the ground plane and additional end of trip facilities located at the lower ground level. Whilst a commercial land use is sought, the proposal has considered the suitability of both a commercial and educational land use within the building, thereby allowing a future utilisation of the property for educational purposes.

A detailed description of the proposed development is provided in the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated 22 May 2023. The proposal is also detailed within the architectural drawings that form part of the DA prepared by Fitzpatrick and Partners.

Key numeric aspects of the proposal are summarised below.

- Demolition of the external façade and roof, maintaining the main structural building elements of the building, demolition of existing services, lifts, and fire stairs.
- Construction of a new six storey and lower ground building, inclusive of;
 - A lower ground carpark, ground floor retail and office spaces,
 - CLT Mass Timber structure above the existing structure,
 - A new internal courtyard light well
 - New services, lifts and fire stairs
 - New amenities including end of trip facilities.

The proposal is described in further detail within the following sections of this report.

Table 1 Numeric Overview of Proposal

Descriptor	Proposed
Land Use Activities	Commercial and Retail Premises
Site Area	1,011 sqm
Height of Building	26 m maximum height RL+34.44
Gross Floor Area	Total - 4,785 sqm (Including 2,685 sqm existing GFA, and 262 sqm of retail GFA)
Floor Space Ratio	Total - 4.73:1 (Including 0.08 for EOT, and 2.65:1 existing FSR)
Total Storeys	6 storeys with a lower ground level
Car Parking Spaces	9 parking spaces (inclusive of 1 accessible space) and 1 service vehicle bay 1 loading bay 2 motorcycle spaces 48 Bicycle spaces including 13 for visitors EOT facilities

Figure 5 Façade Modelling of Proposed Development



Source: Fitzpatrick + Partners, 2023

Figure 6 Architectural Section



Source: Fitzpatrick + Partners, 2023

4. EXTENT OF CONTRAVENTION

This section of the report identifies the development standard, which is proposed to be varied, including the extent of the contravention. A detailed justification for the proposed variation is provided in **Section 6** of the report.

4.1. DEVELOPMENT STANDARD SEEKING VARIATION – MAXIMUM FSR

The site is restricted by a maximum floor space ratio development standard under clause 4.4 of *Sydney Local Environmental Plan 2012*. The relevant floor space ratio map in **Figure 7** stipulates a maximum FSR rate of 2.5:1 for 86 Bay Street Ultimo.

Figure 7 Maximum FSR Map – SLEP 2012



Source: Urbis, 2023

The entirety of Clause 4.4 is reproduced below:

(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.*

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 to a maximum FSR of 0.3:1:

- Showers.
- Change rooms.
- Lockers.
- Bicycle storage areas.

The maximum permissible FSR is therefore 2.8:1 (mapped FSR of 2.5:1 + EOT FSR of 0.3:1).

4.2. PROPOSED VARIATION TO CLAUSE 4.4

The development has a site area of 1,011sqm with an existing GFA of 2,685sqm and therefore an existing FSR of 2.65:1.

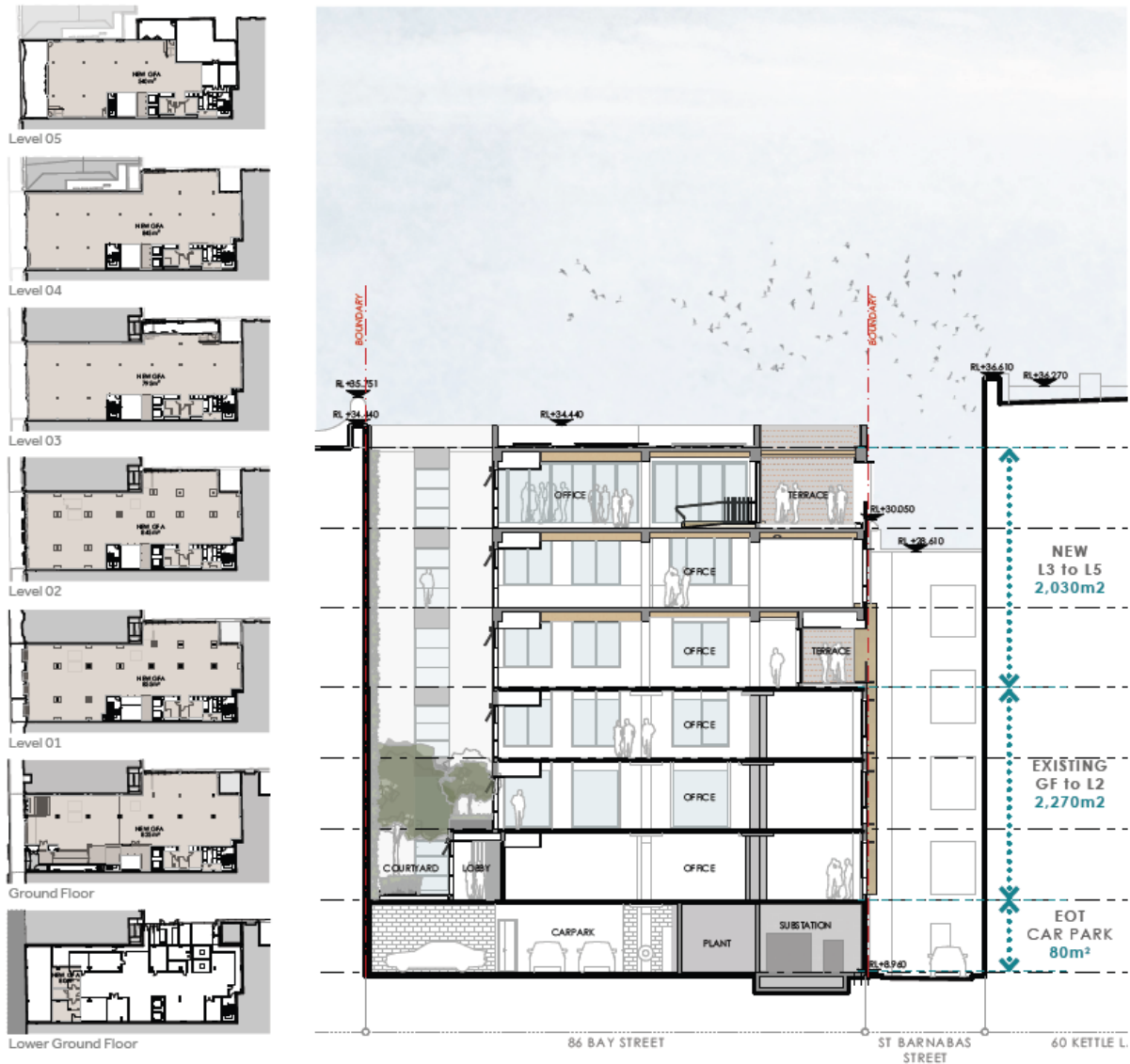
The proposal seeks to provide an increased GFA of 4,785sqm including 80sqm of EOT facilities and therefore will have an FSR of 4.73:1 including 0.08:1 for EOT facilities. Pursuant to clause 6.13 of SLEP, the development will benefit from an additional permitted FSR of 0.3:1 for a total permitted FSR of 2.8:1. The proposal provides a 2,176.62sqm or an 83% variation to the allowable floor space for the site.

A breakdown of existing gross floor area (GFA) against the proposal is provided below.

Table 2 Floor Space Allocation

Level	Existing GFA	Proposed GFA
Lower Ground	1,010 sqm (GBA)	80 sqm EOT (1,010 sqm GBA)
Ground	875 sqm	825 sqm
Level 1	905 sqm	855 sqm
Level 2	905 sqm	845 sqm
Level 3	-	795 sqm
Level 4	-	845 sqm
Level 5	-	540 sqm
TOTAL:	2,685 sqm	4,785 sqm

Figure 8 Building Section and GFA Calculations



Source: Fitzpatrick + Partners, 2023

5. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of SLEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of SLEP 2012 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.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development 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.*

Clause 4.6(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 4.6(3). The consent authority should also be satisfied that that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which it is proposed to be carried out.

Clause 4.6(4)(b) requires the concurrence of the Secretary to have been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary 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.*

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under section 64(1) of the Environmental Planning and Assessment Regulation 2000 and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The Secretary can be assumed to have given concurrence if the matter is determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

This clause 4.6 request demonstrates that compliance with the maximum floor space ratio development standard prescribed for the site in clause 4.4 of the SLEP 2012 is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

In accordance with clause 4.6(3), the applicant requests that the maximum floor space ratio development standard be varied (subject to the applicant's position that such a request should not actually be necessary).

6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the maximum floor space ratio development standard prescribed for the site in clause 4.4 of the SLEP 2012.

Detailed consideration has been given to the following matters within this assessment:

- Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court.

The following sections of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of the LEP.

6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 4.6(2)

The maximum floor space ratio development standard prescribed for the site in clause 4.4 of the SLEP 2012 is a development standard capable of being varied under clause 4.6(2) of SLEP 2012.

The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of SLEP 2012.

6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 4.6(3)(A)

Historically, the most common way to establish a development standard as being unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge 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 first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to the non-existent or inconsequential adverse impacts arising from the proposed non-complying development. This disproportion provides sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

- ***The objectives of the standard are achieved notwithstanding non-compliance with the standard*** (the first method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43])

The specific objectives of the maximum floor space ratio development standard as specified in clause 4.4 of the SLEP 2012 are detailed in **Table 3** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 3 Assessment of Consistency with Clause 4.4 Objectives

Objectives	Assessment
<i>(a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,</i>	The proposal will provide additional commercial floor space in the form of renewed retail floor space at ground and new high quality office floor space to meet the demand in the growing mixed-use fringe of the city centre.
<i>(b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,</i>	<p>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 commercial building complement the heritage significance of the existing building and the character of the Heritage Conservation Area.</p> <p>The proposed built form is in keeping within the density and surrounding context of surrounding development within the Mountain Street Heritage conservation area and adjoining heritage items.</p> <p>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.</p>
<i>(c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,</i>	The proposed development is in line with the capacity of existing and planned infrastructure for the locality.
<i>(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.</i>	<p>The proposed development would revitalise the existing detracting commercial building and improve the overall character of the Heritage Conservation Area and streetscape generally.</p> <p>The proposed development would not have any adverse amenity impacts on the locality including the adjoining UniLodge building to the south as demonstrated by the shadow diagrams in the architectural set and noise assessment report, ensuring the operational aspects of the proposal are appropriate acoustically.</p>

The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report.

- **The underlying object or purpose would be undermined, if compliance was required with the consequence that compliance is unreasonable** (the third method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43] as applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24])

Whilst the object or purpose of clause 4.4 of SLEP 2012 as shown in **Table 3** would not be undermined if compliance was required, the proposed development, subject to the proposed exceedance remains fully capable meeting the objectives of clause 4.4.

- **The burden placed on the community (by requiring strict compliance with the FSR standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences**

attributable to the proposed non-compliant development (cf Botany Bay City Council v Saab Corp [2011] NSWCA 308 at [15]).

Full compliance with clause 4.4 would require the removal of not only the proposed new Level 3, 4 and 5 office tenancy spaces, but would require the removal of 76.62 sqm of existing floor space as the existing FSR of the development is noncompliant, with a current FSR of 2.66:1. The removal of these additional levels would result in the missed opportunity for additional commercial space within the City of Sydney and result in a substandard built form outcome that is inconsistent with the immediate heritage context.

Compliance would also result in the continued provision of a building that doesn't follow the natural roof/parapet stepping of the adjoining properties and potentially still retaining the detracting gap in the streetscape. The proposed exceedance will have nil impact on the local community as the additional floor space do not result in any additional impact to the public domain along Bay Street.

6.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 4.6(3)(B)

The Land & Environment Court judgment in Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018, assists in considering the sufficient environmental planning grounds. Preston J observed:

“...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”

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above.

The prescribed FSR of 2.5:1 (notwithstanding the 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 FSR 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).

Compliance is not possible as it would require partial demolition of the existing former commercial building. In addition, the prescribed rate or mapped FSR is inappropriately low in this locality. In this regard, the underlying object or purpose of the FSR standard would be defeated if compliance were required and therefore compliance is unreasonable. Further, it would not allow for achievement of the five storey or 22m height requirement prescribed for the area.

The prescribed FSR for the area has been consistently varied in this immediate precinct given the established built form character associated with its gentrification. In particular, FSR and height of building standard variations have been approved as part of additions or for new development for immediately surrounding sites.

Precedent Study

The prescribed FSR for the site should be considered in the context of other development that has similarly demonstrated merit for variance against the development standard. Approvals have been granted for variations in FSR standards for sites within the Mountain Street Heritage Conservation Area, whether for new development or additions. **Table 4** provides a summary of the approved variations and existing non-compliant structures in the vicinity.

Table 4 Examples of approved FSR within the Mountain Street Heritage Conservation Area

Site	LEP Maximum FSR	Variation to FSR	Approved FSR
44 Mountain Street, Ultimo (D/2020/1288)	2.0:1	+102.1%	4.04:1
35-39 Mountain Street (D/2013/2004)	2.0:1	+132.5%	4.65:1
41 & 43-49 Mountain Street (D/2005/1562)	2.0:1 & 2.5:1	+ >90%	4.43:1
11 Smail Street (D/2009/2200)	2.5:1	+36%	3.4:1

The prescribed FSR of 2.5:1 (notwithstanding proposed end of journey facilities) for the subject site is deemed insufficient for the existing three-storey building on site, which is constructed up to the boundary and currently exceeds the prescribed FSR. Similarly, the prescribed FSR for the surrounding sites within the Heritage Conservation Area, ranging from 2.0-2.5:1, does not accurately reflect the existing context. The context primarily consists of historical warehouse buildings that were originally built to all boundaries and had a height of three to six storeys (excluding later additions). These warehouses, in their original state, would have similarly exceeded the prescribed maximum FSR, even with approved later additions, as highlighted within **Table 4**. The non-compliance with the FSR standard is acknowledged in the assessment of similar additions, recognising it as a common characteristic of buildings in this locality.

Compliance with the prescribed FSR is not feasible without partial demolition of the existing former commercial building, which is not a practical solution. Moreover, the prescribed FSR is inadequately low for the locality, requiring compliance would defeat or prevent the underlying objective or purpose of the FSR standard.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed maximum FSR non-compliance in this instance.

6.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 4.6(4)(A)(I)

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).

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

6.5. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 4.6(4)(B)(II)

Clause 4.6(4)(a)(ii) states development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The consistency of the development with the objectives of the development standard is demonstrated in **Table 3** above. The proposal is also consistent with the land use objectives that apply to the site under SLEP 2012. The site is located within the MU1 Mixed Use zone. The proposed development is consistent with the relevant land use zone objectives as outlined in **Table** below.

Table 5 Assessment of Compliance with Land Use Zone Objectives

Objective	Assessment
<p><i>To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.</i></p>	<p>The proposed development comprises of commercial, and retail uses that is compatible to the adjoining commercial and retail surrounding mixed use precinct. This land use responds to the needs of the current and future population of Sydney and is in close proximity to the Broadway Shopping centre and public transport corridors.</p> <p>The proposal is consistent with this objective.</p>
<p><i>To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.</i></p>	<p>The proposed development presents an enhanced and dynamically activated street frontage, effectively complementing the diverse character of the local context. Through meticulous architectural design, particular attention has been given to the integration of the building's façade with the existing streetscape, resulting in a harmonious blend that respects the surrounding heritage fabric.</p> <p>Notably, the strategic placement of the retail tenancy at the forefront of the building plays a pivotal role in fostering pedestrian engagement and strengthening the connection to the streetscape. Overall, the proposal aligns seamlessly with the objective of encouraging non-residential land uses of retail and commercial tenancies on the ground floor, thereby creating a vibrant and functional urban environment.</p>
<p><i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i></p>	<p>The proposed development has been carefully designed to ensure a harmonious coexistence to the existing local character and minimise conflicts between land uses within the designated zone and neighbouring zones. Careful consideration to the building design, setback requirements, and the appropriate allocation of spaces for different activities.</p> <p>By adhering to zoning regulations and conducting a thorough analysis of the neighbouring land uses, the proposed development will help maintain a cohesive and balanced environment, fostering a harmonious relationship with the surrounding area. The design approach ensures that the development will contribute to a well-planned and cohesive urban fabric while promoting a sense of continuity and compatibility between land uses.</p>
<p><i>To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.</i></p>	<p>The proposed development is in strong alignment with the objective of promoting retail and commercial tenancy on the ground floor of the building. The overall design of the development has been thoughtfully crafted to activate the ground floor, resulting in a vibrant and engaging streetscape. By incorporating commercial spaces and retail tenancies at street level, the development not only contributes to the economic vitality of the area but also enhances the functionality and appeal of the public realm. The prioritisation of non-residential uses on the ground floor creates a sense of accessibility and convenience, attracting pedestrians and fostering social interaction. This approach resonates with the objective of creating a</p>

Objective	Assessment
	diverse and dynamic urban environment that supports a range of activities, stimulates economic growth, and enhances the overall character and liveability of the surrounding community.
<i>To ensure land uses support the viability of nearby centres.</i>	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 conservation area and viability of the site.
<i>To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.</i>	<p>The site is within close walking distance to high frequency transport services, and cycle links connecting with local employment opportunities and the wider Metropolitan Area.</p> <p>The proposal will provide additional office and retail space within a highly accessible inner-city location. The proposal seeks to reduce the existing car parking provision to provide 9 car spaces, 1 service bay, and 2 motorcycle spaces while providing 48 bike parking spaces and end of trip facilities to promote active transportation modes of travel. The proposal is consistent with this objective.</p>

6.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 4.6(4)(B) AND CLAUSE 4.6(5)

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

The Secretary can be assumed to have given concurrence as the matter will be determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

The matters for consideration under clause 4.6(5) are considered below.

- **Clause 4.6(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?**

The proposed non-compliance with the maximum floor space ratio development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals, especially given the existing examples of non-compliance in the immediate precinct.

- **Clause 4.6(5)(b) - is there a public benefit of maintaining the planning control standard?**

The proposed development achieves the objectives of the maximum floor space ratio development standard and the land use zone objectives despite the technical non-compliance.

It has been demonstrated that the proposed variation arises due to the three additional levels on the site resulting in intensified land use and increased building height.

Compliance also results in the continued provision of a building that doesn’t comfortably integrate with the built form context, nor follow the natural roof/parapet steeping of the adjoining properties creating a detracting gap in the streetscape. The proposed exceedance will have nil impact on the local community as

the protrusions do not result in any additional shadow impact and are not visible from the public domain along Bay Street.

There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintaining the standard.

- **Clause 4.6(5)(c) – are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed, however, there are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

7. CONCLUSION

For the reasons set out in this written request, strict compliance with the maximum floor space ratio development standard contained within clause 4.4 of SLEP 2012 is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the floor space ratio development standard contained within clause 4.4 of SLEP 2012 to the extent proposed for the reasons detailed within this submission and as summarised below:

- The proposed development remains consistent with the objectives of clause 4.4 of SLEP 2012, the SDCP 2012 controls and the objectives of the MU1 Mixed Use Zone.
- 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. Compliance is also not practical nor appropriate given the existing building is already non-compliant with the FSR standard. The proposed variation provides an exceptional opportunity to improve the existing detracting building.
- A compliant building envelope would restrict the development from providing a third, fourth and fifth floor of commercial floor space. Removal of these elements would also result in a form that is not drawing reference to height datums and reference elements of the adjoining heritage items to the north and south. The resulting building would see the continued provision of a building that doesn't follow the natural roof/parapet stepping of the adjoining properties and retain a detracting gap in the streetscape.
- An evident incongruity exists between the maximum building height and maximum floor space ratio (FSR) standards for both the site and its immediate environs. This discrepancy is especially pronounced given that the surrounding area comprises predominantly non-residential structures that are erected to the boundaries of their respective sites. There is acknowledgement that non-compliance with FSR standards is a widespread occurrence among commercial buildings of this type in the locality.

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the FSR development standard contained within clause 4.4 of SLEP 2012 should be applied.

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