

# **Attachment B**

<p><b>Clause 4.6 Variation Request Floor Space Ratio</b></p>
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# REQUEST TO CONTRAVENE A DEVELOPMENT STANDARD UNDER CLAUSE 4.6

Cl 4.4, Sydney LEP 2012: Floor space ratio



195 Harris Street, Pyrmont NSW

Alterations and additions to existing boarding house & subdivision (boundary adjustment)

19 April 2023 | P401

Revision A

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## 1.0 INTRODUCTION

This request to contravene a development standard in respect of floor space ratio under Clause 4.4 of Sydney LEP 2012 is submitted to accompany a development application for:

*Alterations and additions to existing boarding house*

193-195 Harris Street, Pyrmont NSW.

It has been prepared with particular reference to the decisions of the Court in respect of:

- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;
- Four2Five Pty Limited v Ashfield Council [2015] NSWLEC 90;
- Wehbe v Pittwater Council [2007] NSWLEC 827;

and other relevant case law.

## 2.0 THE DEVELOPMENT STANDARD

### 2.1 The applicable planning instrument which specifies the development standard:

Sydney Local Environmental Plan 2012 (SLEP 2012)

### 2.2 The number of the relevant clause:

Clause 4.4 – Floor space ratio.

### 2.3 The provisions of the relevant clause:

Clause 4.4 – Floor space ratio.

The development standard to which this request for contravention relates is Clause 4.4(2) of SLEP 2012 – Floor space ratio, which specifies 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 nominated minimum subdivision lot size on the map is 1:1.

## 3.0 THE CONTRAVENTION SOUGHT:

### 3.1 Description of the contravention:

The proposed development would contravene the development standard as follows:

#### 3.1.1 Site Area (preceding boundary adjustment):

126.8m<sup>2</sup>

#### 3.1.2 Maximum FSR:

1:1 (126.8m<sup>2</sup>)

#### 3.1.3 Proposed FSR:

1.08:1 (138.5m<sup>2</sup>)

#### 3.1.4 Extent of proposed contravention:

0.09:1 (11.7m<sup>2</sup>): 9.2%

## 4.0 PROVISIONS OF CLAUSE 4.6

### 4.1 Cl. 4.6(1): Objectives

Clause 4.6 seeks 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. The objectives of Clause 4.6 are as follows:

Cl. 4.6(1) Objectives of Clause		
Clause	Control	Justification
(1)(a)	to provide an appropriate degree of flexibility in applying certain development standards to particular development	The proposal contravenes the standard which sets a maximum floor space ratio. It seeks to utilise this clause to provide appropriate flexibility in application of the standard to permit approval.
(1)(b)	to achieve better outcomes for and from development by allowing flexibility in particular circumstances	The proposal would achieve better outcomes: <ul style="list-style-type: none"> <li>• <b>For</b> the development: The contravention would permit: <ul style="list-style-type: none"> <li>○ An additional boarding room; and</li> <li>○ more efficient utilisation of the site.</li> </ul> </li> <li>• <b>From</b> the development: The contravention would result in: <ul style="list-style-type: none"> <li>○ Additional supply of affordable rental housing in an area of high demand; and</li> <li>○ A scale and intensity of use consistent with surrounding development.</li> </ul> </li> </ul>

### 4.2 Cl. 4.6(3): Justification of the Contravention of the Development Standard

Under the provisions of clause 4.6(3) – Exceptions to development standards of SLEP 2012, the consent authority must consider a written request from the applicant that seeks to justify the contravention of the development standard. This justification is summarised in the table below:

Cl. 4.6(3) Justification of Contravention		
Clause	Control	Justification
4.6(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:	This written request addresses this clause.
4.6(3)(a)	That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and	Compliance with the development standard is unnecessary given that: <ul style="list-style-type: none"> <li>• The objectives of the development standard are met (see below); and</li> <li>• The objectives of the zone are met; notwithstanding the non-compliance.</li> </ul>
4.6(3)(b)	That there are sufficient environmental planning grounds to justify contravening the development standard.	<ul style="list-style-type: none"> <li>• Contravention of the development standard is justified on the following environmental planning grounds:</li> </ul>
	As established in Initial Action [23], 'environmental planning grounds' 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 EPA Act. These are as follows:	-

<b>Cl. 4.6(3) Justification of Contravention</b>		
<b>Clause</b>	<b>Control</b>	<b>Justification</b>
1.3(a)	to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,	The contravention would facilitate provision of affordable rental housing and the associated social and economic benefits.
1.3(b)	to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,	The contravention would enable more ecologically sustainable development by more efficiently utilising land within an existing urban area serviced by existing utilities thereby taking pressure off development on the urban fringe.
1.3(c)	to promote the orderly and economic use and development of land,	The contravention is required to develop the land to the maximum density permitted Sydney LEP 2012 which provides for a more economic use of the land and its associated infrastructure including utilities, public transport.
1.3(d)	to promote the delivery and maintenance of affordable housing,	N/A
1.3(e)	to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	The contravention would marginally lessen the incentive for new development on the urban fringe and the associated impacts upon natural environments.
1.3(f)	to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	The contravention would enable the conservation of the existing heritage item on the site.
1.3(g)	to promote good design and amenity of the built environment,	The contravention would enable an architectural form more consistent with that of adjacent and surrounding development: <ul style="list-style-type: none"> <li>• 191 Harris Street: 1.1:1 (DA/2016/1458), 13.12.2016.</li> </ul>
1.3(h)	to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,	The contravention would facilitate the provision of an improved standard of affordable rental housing and additional facilities and amenities for the existing boarding rooms in line with modern best practice.
1.3(i)	to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,	Not applicable.
1.3(j)	to provide increased opportunity for community participation in environmental planning and assessment.	Not applicable.

### 4.3 Cl. 4.6(4)(a): Objectives of the Zone & Development Standard

Under the provisions of clause 4.6(4) – Exceptions to development standards of SLEP 2012, the consent authority must be satisfied that contraventions of development standards are consistent with the objectives of both the development standard itself and the zone in which the development is proposed. This assessment is summarised in the table below:

<b>Cl. 4.6(4): Justification of contravention against development standard and zone objectives</b>		
<b>Clause</b>	<b>Objectives</b>	<b>Justification</b>
<b>4.4</b>	<b>Floor space ratio</b>	
(a)	to provide sufficient floor space to meet anticipated development needs for the foreseeable future,	The proposal would provide sufficient floor space for the proposed development.
(b)	to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,	<ul style="list-style-type: none"> <li>• The proposal would not increase the number of dwellings or bedrooms on the site and would consequently not increase the residential density;</li> <li>• The use would complement the other adjacent food and drink premises which would likely share patrons after dining and consequently not unreasonably increase pedestrian traffic in the precinct;</li> <li>• The location in close proximity to a major public transport hub would not increase intensity of vehicular traffic.</li> <li>• The resultant built form would not change from that which exists and has already been approved.</li> </ul>
(c)	to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,	The contravention would be equivalent to approximately one additional boarding room. Given that all boarding rooms would be single occupancy, this additional density of population on the site of one person would not be inconsistent with the capacity of existing or 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.	<p>The proposal would:</p> <ul style="list-style-type: none"> <li>• Not alter the streetscape presentation to Harris Street;</li> <li>• Be consistent with the existing scale and form of development presenting to Little Mount Street;</li> <li>• Not impact unacceptably upon surrounding properties in respect of overshadowing, privacy, noise etc.</li> </ul>
<b>2.3</b>	<b>Zone B2 – General Industrial</b>	
	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.	The proposal would not hinder the variety of uses available in the locality and would support the viability of local service businesses through increased residential population.
	To encourage employment opportunities in accessible locations.	The proposal would provide affordable rental accommodation for lower income key workers in the CBD and surrounding areas in fields such as hospitality, retail, health care etc.
	To maximise public transport patronage and encourage walking and cycling.	The proposal would increase residential density in close proximity to the CBD, other surrounding mixed use business centres containing multiple services and employment opportunities and major public transport nodes which would facilitate walking and cycling.
	To allow appropriate residential uses so as to support the vitality of local centres.	The proposal would not hinder the use of the land for industrial uses which is already well established under a previous development consent.

#### 4.4 cl. 4.6(4)(b): Concurrence

Under the provisions of clause 4.6(4)(b) – Exceptions to development standards of SLEP 2012, the consent authority must be satisfied that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained before it can exercise the power to grant development consent for development that contravenes the development standard.

Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary’s concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

#### 4.5 Cl. 4.6(5): Criteria for Concurrence

Under the provisions of clause 4.6(5) – Exceptions to development standards of SLEP 2012, the Council or the Secretary, as the concurrence authority, is required to consider the following matters:

Cl. 4.6(5) Criteria for Concurrence		
Clause	Control	Justification
(a)	whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and	The contravention of the development standard is not associated with state or regional development. It would not significantly alter the intensity of the site or its external form. As such, it would not raise any matter of significance for State or regional environmental planning.
(b)	the public benefit of maintaining the development standard, and	There would be no public benefit of maintaining the development standard given that it would not facilitate better: <ul style="list-style-type: none"> <li>• Privacy impacts;</li> <li>• Overshadowing impacts;</li> <li>• Heritage conservation;</li> <li>• Streetscape presentation;</li> <li>• Supply of affordable rental housing.</li> </ul>
(c)	any other matters required to be taken into consideration by the Secretary before granting concurrence.	The matters requiring consideration are addressed above.

#### 5.0 THE FIVE PART TEST

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. These are examined below:

The Five Part Test: (in accordance with Preston CJ in <i>Wehbe v Pittwater Council</i> [2007] NSW LEC 827)		
Part	Test	Discussion
1.	The objectives of the standard are achieved notwithstanding non-compliance with the standard.	The objectives of the development standard are achieved. See discussion under 3(c) above.
2.	The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.	The objectives of the standard are relevant to the proposal and an assessment of compliance is provided above. It is considered that the objectives of the standard are achieved more satisfactorily than provision of a compliant FSR.
3.	The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.	The underlying object of the development standard would not be thwarted if compliance were required.
4.	The development standard has been virtually abandoned or destroyed by the Council's own actions in granting	The development standard has been varied on several adjacent and nearby sites: <ul style="list-style-type: none"> <li>• 191 Harris Street: 1.1:1 (DA/2016/1458), 13.12.2016.</li> </ul>



<b>The Five Part Test: (in accordance with Preston CJ in Wehbe v Pittwater Council [2007] NSW LEC 827)</b>		
<b>Part</b>	<b>Test</b>	<b>Discussion</b>
	consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable	
5.	the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.	Not applicable. The zoning of the land is considered appropriate.

## 6.0 CONCLUSION

This Clause 4.6 contravention request to clause 4.4 – Floor space ratio of Sydney LEP 2012 should be supported on the basis that strict application of the development standard is unnecessary and unreasonable given that:

- a) The development meets the stated objectives of clause 4.4, specifically:
  - 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.
- b) The development meets the zone objectives of the Local Centre zone, specifically:
  - 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.
- c) There are sufficient environmental planning grounds to justify contravening the development standard, specifically:
  - The contravention would facilitate provision of affordable rental housing and the associated social and economic benefits'
  - The contravention would enable more ecologically sustainable development by more efficiently utilising land within an existing urban area serviced by existing utilities thereby taking pressure off development on the urban fringe.
  - The contravention is required to develop the land to the maximum density permitted Sydney LEP 2012 which provides for a more economic use of the land and its associated infrastructure including utilities, public transport.
  - The contravention would marginally lessen the incentive for new development on the urban fringe and the associated impacts upon natural environments.
  - The contravention would support the conservation of the existing heritage item on the site.

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- The contravention would enable an architectural form more consistent with that of adjacent and surrounding development.
  - The contravention would facilitate the provision of a an improved standard of affordable rental housing and additional facilities and ammonites for the existing boarding rooms in line with modern best practice.

For the reasons set out above, the development may be granted consent notwithstanding the contravention of the development standard in respect of floor space ratio in clause 4.4 of SLEP 2012.