

Attachment B

<p>Clause 4.6 Variation Request – Floor Space Ratio</p>
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Request to Vary the Floor Space Ratio
Standard under Clause 4.6 of S.L.E.P.
2012:

56A Allen Street, Glebe

(2 Storey Rear Addition for 2 Units)

Introduction

This written contravention request supports a development application (DA), for a new rear two-storey addition for 2 units at No. 56A Allen Street, Glebe. It should be read in conjunction with the Statement of Environmental Effects by Perica and Associates Urban Planning Pty Ltd, plans by Antonio Caminiti Architect and the information submitted with the DA.

The proposal exceeds the maximum 0.7:1 Floor Space Ratio control in Clause 4.4 of Sydney Local Environmental Plan 2012 (SLEP 2012). This control is a “development standard” in accordance with the definition in Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act 1979).

Clause 4.6 of SLEP 2012 relevantly states:

4.6 Exceptions to development standards

- (1) *The objectives of this clause are as follows:*
 - (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.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (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.*
- (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, and*
 - (b) *the concurrence of the Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General must 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 Director-General before granting concurrence.
- (6) –(8)... [not relevant]

1. Identifying and quantifying the non-compliance

Clause 4.4 of Sydney Local Environmental Plan 2012 (“SLEP 2012”) specifies a maximum Floor Space Ratio (“FSR”) of 0.7:1, by reference to the relevant LEP Map (extract below).

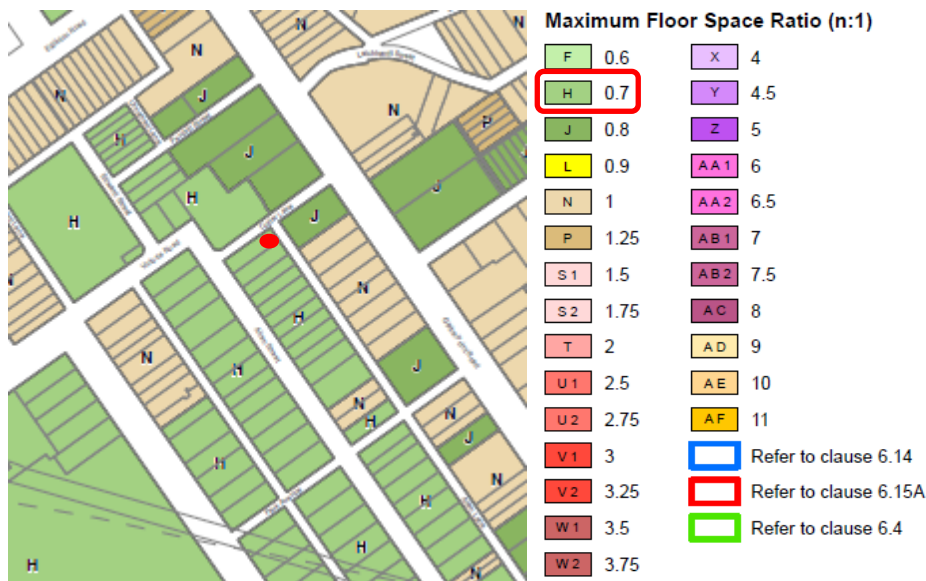


Figure 1 - FSR Map Extract – SLEP 2012

As can be seen in the FSR Map extract above, the FSR development standard to the immediate north and east of the site range between 0.8:1 and 1:1.

The proposal has a Gross Floor Area (“GFA”) of 298.42sqm. The site has an area of 314.5sqm. So, the FSR proposed equates to a FSR of 0.949:1. The development standard is 0.7:1. So the proposal exceeds the FSR standard by 0.249:1, equating to GFA of 78.3sqm. This represents a non-compliance of 35.56%.

FSR calculation diagrams have been provided with the plans by Antonio Caminiti Architect.

2. Objectives of Clause 4.6 of SLEP 2012

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.

There has been some legal debate about the requirement to specifically address these objectives. On one hand, the objectives are not explicitly required to be addressed or specifically considered (as typically occurs in zone objectives), and compliance with the objectives of the Clause could be read to arise when compliance with the operative provisions of the Clause are met, being the sub-clauses that follow the objectives. In other words, the objectives state what complying with the operative provisions would achieve. On the other hand, if this was the case then the objectives would have no work to do.

This matter was considered and determined in a judgement by the chief justice of the Land and Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118. That judgement held that the objectives of Clause 4.6 do not need to be specifically considered, and specifically should not be read to compel comparison with a complying development proposal.

Accordingly, compliance with the objectives of Clause 4.6 (of appropriate flexibility and better outcomes) can be assumed if the operative provisions and thresholds of Clause 4.6 are met. The objectives state what the operative clauses are designed to do.

Despite this, in very broad terms, better planning outcomes are facilitated by designing a new addition that is contextually appropriate, better activates the public domain, provides a scale/height and number of storeys consistent with Council's Development Control Plan and an addition which respects the attributes of the Conservation Area of which it is part.

3. Clause 4.6 (3)(a) and 3(b) of SLEP 2012

Clause 4.6(3) of SLEP 2012 states:

- (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*

The following responds to these provisions.

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

The submission and consideration of Objections under State Environmental Planning Policy No. 1 ("SEPP 1 Objection") and the issue of compliance being "unreasonable or unnecessary" was well summarised in the Land and Environment Court judgement *Wehbe v Pittwater Council* [2007] NSWLEC 827 ("the Wehbe case"). While that judgement applied to SEPP 1 Objections and not Clause 4.6 Contravention requests, the approach in that case has been accepted in

subsequent court cases related to Clause 4.6 Variation Requests and in town planning practice.

The onus lies upon the applicant to demonstrate this in a written request (being this submission) and that requiring compliance with the particular standard would be unnecessary or unreasonable. In this regard, the Wehbe case outlined 5 possible ways to demonstrate whether compliance would be unnecessary or unreasonable, by establishing:

- i. Compliance with the underlying objectives of the standard being breached, notwithstanding the numerical non-compliance; or
- ii. That the objectives of the standard are not relevant to the proposal; or
- iii. Requiring compliance with the development standard would “thwart” the achievement of the objectives of that standard; or
- iv. The development standard in question has been “virtually abandoned” by the Council; or
- v. The zoning of the land is not appropriate for the site and therefore the associated standards are not appropriate (with some qualifications).

Pathway (i) above is applied in this instance, although it is noted that FSR breaches are not uncommon in the area or in the Sydney LGA generally. Despite this, it is not being argued the standard has been “virtually abandoned”.

In terms of the objectives of the standard, Clause 4.4(1) of SLEP 2012 contains the following objectives:

- (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.*

The following responds to these objectives:

- a) The additional floorspace will help meet housing needs, including 2 additional units. Not all sites may meet their maximum FSR and accommodating additional justified FSR in the circumstances of the case is sound planning, particularly in light of recent significant increases to immigration and housing shortages and housing cost pressures;
- b) The proposal will not result in any significant change in land use intensity. Traffic should be reduced as a result of the proposed FSR breach, by removing parking from the site. The removal of parking from this corner site, and a vehicular crossing very close to a corner

will also improve traffic safety around the site. Pedestrian traffic will be slightly increased. This is a positive outcome, as it will help activate the adjoining laneways and public domain, improving surveillance and territorial reinforcement, important principles for Crime Prevention Through Environmental Design.

- c) The site is well serviced by infrastructure and utilities, in a relatively dense urban environment. The use of road and lane infrastructure will be made safer for the reason previously outlined. The stormwater system is able to accommodate the proposal (stormwater plans have been submitted). Utilities to service and support the proposed additions exist to the site, and their augmentation can be addressed through conditions of consent and legislative requirements (such as a Section 73 Certificate from Sydney Water). The proposal should not require a substation.
- d) As shown in the photos below, the site is surrounded by higher building forms on the site, to the north and to the east, across Cotter Lane and Allen Lane.



The condition of the site is also on a corner, with a relatively large building currently over the height limit. The current blank garage poses traffic safety issues and limited surveillance, leading to potential for vandalism and anti-social behaviour, reflected by the current condition:



The context is also affected by the planning controls being in transition around the site, noting:

- A higher FSR (affecting mass and scale) to the immediate north and east, varying from 0.8:1 – 1:1; and
- A higher height limit to the immediate north and east, being 9m in height (compared to 6m at the site).

Two storey forms (and higher) are common in the immediate context of the site.

In terms of the existing and desired future character of the area, as outlined in the SEE, the site is located within the Toxteth Locality as designated in SDCP 2012.



Figure 2 – DCP Extract – Part 2.6.5 - Toxteth Locality

The DCP contains the following locality character statement:

This locality is bounded by Wigram Lane to the south, Glebe Point Road to the east, and the western parklands to the north and west.

This neighbourhood will continue to be a predominantly residential neighbourhood supported by the existing educational and cultural/religious institutions. The

neighbourhood is characterised with a combination of consistent elements including building scale, front and side setbacks, wall and roof forms and mature planting in both the private and public domain which will be protected and enhanced.

The precinct provides many attractive, elevated views across parkland towards the water or surrounding hillsides.

The proposal is consistent with the character statement for the area, retaining and adding to a residential use. The particular setting of this site is not “consistent” as for other areas within the precinct, and this is reflected in the Building Contribution designation of this site and adjoining sites to the north and east, as well as the scale and design of adjoining buildings. The public domain will be enhanced by the proposal. No parkland or waterway views will be affected.

The DCP also lists 7 principles relating to development in this area, as below, together with a response to each:

(a) Development must achieve and satisfy the outcomes expressed in the character statement and supporting principles.

Response: Addressed above and below.

(b) Development is to respond to and complement heritage items and contributory buildings within heritage conservation areas, including streetscapes and lanes.

Response: Achieved. The heritage impacts have been addressed by an expert HIS report. Adjoining buildings are not contributory and the proposal will not adversely affect a heritage item to the north-west of the site.

(c) Retain elevated glimpses along terminating streets to the Harold Park paceway site and long views across the contours that reveal the topography.

Response: Achieved. The proposal does not affect nominated glimpses or long views across contours.

(d) Encourage detached houses on large lots on Glebe Point Road south of Eglinton Road, with uses including accommodation, professional suites, non-government and community services

Response: Achieved/not compromised. The site is not on Glebe Point Road.

(e) Provide large setbacks to plant substantial vegetation including large trees to enhance the streetscape

Response: Achieved. The front setback to Allen Street is not altered. The existing garage is built to the side and rear lane, and the proposed form and setbacks are contextually appropriate and will result in improved streetscape/lanescape outcomes.

(f) *Support high quality, boutique accommodation where the depth of lots and the presence of rear lanes can buffer them from neighbouring residences*

Response: Achieved. The form of development, while small in scale, is “boutique” in terms of its design response, and the site has frontage to two laneways that help in the “buffering” to neighbouring residences.

(g) *Integrate the sandstone cliffs and rocky outcrops edging Jubilee Park and the retaining walls to the north of Glebe Point Road with landscaping.*

Response: Achieved/not compromised. The site is not in the area nominated

As can be seen, the proposal is entirely consistent with the context and setting of the site as currently exists (in turn affected by the transitional nature of planning controls around the site) while also being consistent with the existing character statement of the area and all stated desired future characteristics for the area, as expressed in Sydney Development Control Plan 2012.

In summary, given all the above, the proposal is wholly consistent with the objectives of the development standard and using the accepted approach in *Wehbe v Pittwater Council* [2007] NSWLEC 827, compliance with the development standard can be considered unnecessary or unreasonable.

(b) that there are sufficient environmental planning grounds to justify contravening the development standard

The case *Four2Five v Ashfield Council* [2015] NSWLEC 1009, NSWLEC 90, NSWCA 248 raises the issue that the grounds should relate to a site and specific proposal, rather than generic reasons.

The case *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 highlighted that:

1. The term “*environmental planning grounds*” is not defined and would include the objects of the EPA Act (Section 1.3);
2. The grounds must relate to the contravention of the development standard in question, not the whole development; and
3. The consent authority must indirectly be satisfied the applicant’s written request provides sufficient environmental planning grounds, not directly form an opinion about there being sufficient environmental planning grounds to justify the contravention.

Also, given the term “*environmental planning grounds*” is wide in its nature, context and understanding, and given the Objects of the EPA Act 1979 give effect to all other planning instruments, DCPs and wide assessment criteria, a wide appreciation of the term is warranted.

In this context, the following environmental planning grounds are given to justify the proposed contravention of the FSR development standard, on this particular site and for this particular development:

- a) The proposal achieves a two-storey form, as encouraged by the Council's specific DCP controls for number of storeys applying to the site:



Figure 3 – SDCP 2012 Extract (Number of Storeys)

- b) The scale is modest and subservient in form to the existing larger and higher residential flat building on the site;
- c) The site can be considered transitional in nature, with higher and larger building forms and masses around the site, and with higher FSRs (0.8:1-1:1, similar to that proposed) to the north and south. The proposed massing and scale of the addition is contextually appropriate and not excessive;
- d) The unique corner location helps to mitigate the proposed massing and provide "space: around it, helping to visually recede the mass and reduce impacts to surrounding land;
- e) The overall form and design are supported by heritage considerations and an expert Heritage Impact Statement;
- f) The proposal, including the FSR non-compliance, results in a significant visual and built form improvement and contribution to the area compared to the current situation;
- g) The additional FSR is greater than the additional visual massing and scale. That is because the existing double garage (around 34sqm) is not counted as FSR, yet is building massing. If this is taken into account the additional bulk floorspace is less than the comparative FSR numerical figures indicate. Also, the removal of the existing garage will improve traffic safety by removing a driveway on a blind corner;
- h) The bulk is moved towards the north, with a reasonable side setback and roof shape to consider and reasonably reduce amenity impacts on neighbours, including No. 56 Allen Street to the south;
- i) Apart from the context, there are a number of sound environmental planning reasons to support a bulk and FSR of the two-storey form location on the site, namely:
- The unique corner location, surrounded by two lanes and larger blank walls directly to the east;



- The second level helps provide passive surveillance to the adjoining public domain/lanes;
 - The rear addition is complementary to the building design, massing, shape, roof form and materials of the existing building on the site.
- j) The mass and form have been modulated for visual interest and articulation, combined with high-quality materials.
- k) In terms of the Objects of the EPA Act, the proposal, specifically including the non-compliant FSR of the building, is consistent with the following Objects of the Act:
- i. *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations* – noting the FSR and design facilitates high amenity on the site yet with acceptable impacts upon others;
 - ii. *to promote the orderly and economic use and development of land* – noting the mass and mass transition in the surrounding context is orderly, while a modest increase in density represents economic use of land on a well-connected site, with an appropriate use existing and permissible in the zone;
 - iii. *to promote the sustainable management of built and cultural heritage* – noting an appropriate heritage outcome for the site; and
 - iv. *to promote good design and amenity of the built environment* – due to the high-quality design and for the same reasons above.
- l) As noted previously, the Objects of the EPA Act provide a framework for the Act itself, and its operative provisions, which include giving effect to other Environmental Planning Instruments. The proposal and specifically the FSR non-compliance also facilitates the following aims and objectives within Sydney LEP 2012 (Clause 1.2(2)), as outlined below in relation to the FSR non-compliance:
- *to promote ecologically sustainable development*, for reasons outlined previously;
 - *to encourage the growth and diversity of the residential population of the City of Sydney by providing for a range of appropriately located housing*, as the design and bulk/FSR facilitates a unique and well-considered proposal;
 - *to ensure that the pattern of land use and density in the City of Sydney reflects the existing and future capacity of the transport network and facilitates walking, cycling and the use of public transport*, as the benefits of the non-compliant FSR provide benefits that are not outweighed by disbenefits (and allows removal of car-parking);
 - *to achieve a high quality urban form by ensuring that new development exhibits design excellence and reflects the existing or desired future character of particular localities*, for reasons outlined previously and within the S.E.E. responding to design excellence.

4. Clause 4.6(4) of SLEP 2012

Clause 4.6(4) of SLEP 2012 states:

- (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, and*
 - (b) *the concurrence of the Secretary has been obtained*

These are matters for the consent authority to be satisfied (as opposed to the applicant justifying as in Clause 4.6(3)). Despite this, further commentary is given to assist the consent authority in its deliberations. They also relate to the whole development, not just the non-compliance subject to the Clause 4.6 Contravention request.

Clause 4.6(4)(a)(i) has been addressed in the previous Section of this written request. The objectives of the standard have also been addressed in the previous Section of this written request.

The site is zoned **R1 – General Residential** in SLEP 2012, which also applies to the surrounding blocks. The proposal is specifically permissible with consent in the zone (as a residential flat building).

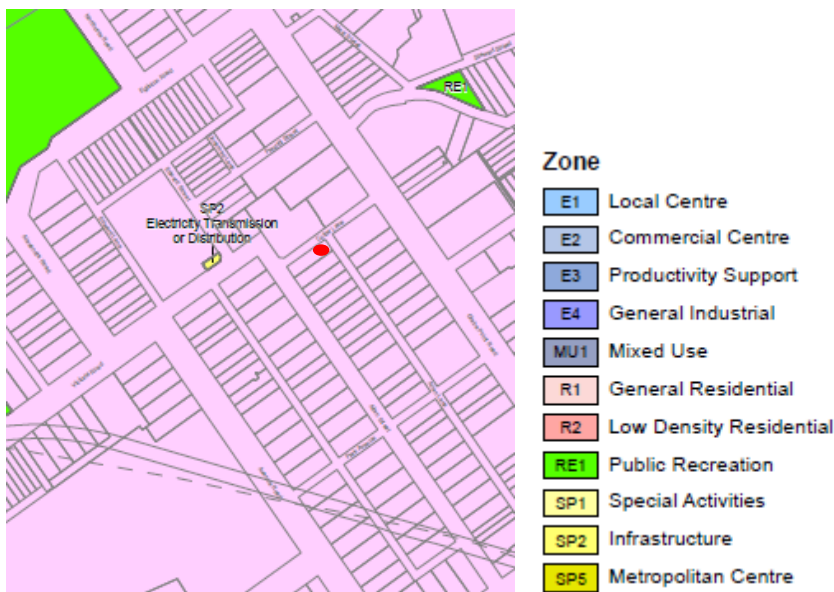


Figure 4 – Zoning Map Extract – SLEP 2012

The objectives of the zone are:

- *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.*

The proposal is consistent with these zone objectives, noting:

- The proposal is specifically designed to meet the housing needs of the growing community, and to provide housing choice on a well-connected inner-city site (and likely to be more affordable than housing typical in the area);
- The proposal provides diverse housing due to its unique design responding to the site characteristics, and diversity to single dwellings and houses common in the surrounding area;
- The use is permissible and does not compromise facilities or services being provided elsewhere, but instead supports such services by modest increased density, including business uses along Glebe Point Road; and
- The land use at the site retains the existing use and is residential, as well as being permissible in the zone.

The proposal is entirely consistent with the zone objectives applying to the site.

Clause 4.6(4)(b) – Concurrence of the Secretary

Concurrence of the Secretary is not required.

4. Clause 4.6(5) of SLEP 2012

Clause 4.6(5) of SLEP 2012 states:

- (5) In deciding whether to grant concurrence, the Secretary must 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.*

In this regard, the City of Sydney has written notice to assume such concurrence for variations of development standards (other than those to be determined by the Local Planning Panel), through a NSW Department of Planning and Environment Planning Circular.



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For all the reasons given in this written request, the proposal should be approved and is justified, notwithstanding the numerical non-compliance with the Floor Space Ratio development standard in Clause 4.4 of *Sydney Local Environmental Plan 2012*.

Jason Perica
Director