Attachment C

4.6 request - floor space ratio

APPENDIX 1

WRITTEN REQUEST SYDNEY LOCAL ENVIRONMENTAL PLAN 2012
CLAUSE 4.6 – FLOOR SPACE RATIO

WRITTEN REQUEST PURSUANT TO CLAUSE 4.6 OF SYDNEY LOCAL ENVIRONMENTAL PLAN 2012

15/190 VICTORIA STREET, POTTS POINT

FOR THE CONSTRUCTION OF ALTERATIONS AND ADDITIONS TO AN EXISTING RESIDENTIAL UNIT

For:	Construction of proposed alterations and additions to an existing residential unit
At:	15/190 Victoria Street, Potts Point
Owner:	Margaret & Raj Soni
Applicant:	Margaret & Raj Soni C/- Anton Kouzmin Architecture

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Sydney Local Environmental Plan 2012. In this regard it is requested Council support a variation with respect to compliance with the maximum floor space ratio as described in Clause 4.4 of the Sydney Local Environmental Plan 2012 (SLEP 2012).

2.0 Background

Clause 4.4 restricts the floor space ratio of a building within this area of Potts Point locality and refers to the maximum floor space ratio noted within the "*Floor Space Ratio Map*."

The relevant floor space ratio for this locality is 2:1 and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act. With a site area of 273.3m², the allowable gross floor area is 546.6m^2. Currently, the building presents a gross floor area of 869m² or 3.18:1.

Due to the extent of the existing development on site, the proposed new works will result in a gross floor area of 891m² or a floor space ratio of 3.26:1. Importantly, the proposed GFA is only 22m^2 more than the existing GFA due to the extent of the existing non-compliance.

The proposal will exceed the maximum gross floor area by 344.4m² or 63%.

Is clause 4.4 of SLEP 2012 a development standard?

(a) The definition of "development standard" in clause 1.4 of the EP&A Act means standards fixed in respect of any aspect of the development and includes:

"(d) the cubic content of floor space of a building."

(b) Clause 4.4 relates to floor space of a building. Accordingly, clause 4.4 is a development standard.

3.0 Purpose of Clause 4.6

The Sydney Local Environmental Plan 2012 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 118* have been considered in this request for a variation to the development standard.

4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

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

The decision of Chief Justice Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in ***RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [1], [4] & [51]*** where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of SLEP provides:

> *(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.*

Clause 4.4 (the FSR development standard) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of SLEP.

Clause 4.6(3) of SLEP provides:

> *(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 proposed development does not comply with the FSR development standard pursuant to clause 4.4 of SLEP which specifies an FSR of 1.5:1 however, strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

Clause 4.6(4) of SLEP provides:

> *(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 Planning Secretary has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required

to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Planning Secretary (of the Department of Planning and the Environment) has been obtained.

Under cl55 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 cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of SLEP provides:

(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.

Council and the Court on appeal has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), and should consider the matters in cl 4.6(5) 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; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.4 of SLEP from the operation of clause 4.6.

This submission has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

5.0 The Nature and Extent of the Variation

5.1 This request seeks a variation to the FSR development standard contained in clause 4.4 of SLEP.

5.2 Clause 4.4 of SLEP specifies an allowable gross floor area for a site in this part of Potts Point of 2:1 or for this site with an area of 273.3m^2, the allowable gross floor area is 546.6m^2.

5.3 The proposal will introduce additional gross floor area of 22m^2 at the roof top level, which although results in a technical building height non-compliance, does not involve any increase to the existing overall building height and presents a total gross floor area of 891m^2 or 3.26:1.

5.4 The total non-compliance with the FSR control is 344.4m^2 or 60%.

6.0 Relevant Caselaw

6.1 In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

> *17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
>
> *18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
>
> *19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
>
> *20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
>
> *21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate*

for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

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 of 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.

6.2 The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.4 of SLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

   (a) compliance is unreasonable or unnecessary; and

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

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.4 and the objectives for development for in the B4 Mixed Use zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.4 of SLEP.

7.0. Request for Variation

7.1 Is compliance with clause 4.4 unreasonable or unnecessary?

(a) This request relies upon the 1st ways identified by Preston CJ in Wehbe.

(b) The first way in Wehbe is to establish that the objectives of the standard are achieved.

(c) Each objective of the FSR standard and reasoning why compliance is unreasonable or unnecessary is set out below:

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

The proposal seeks to provide for a modest increase in the gross floor area through the provision of a living and dining area at the roof level, which does not alter the overall existing height of building and is not prominently visible from any surrounding public spaces.

The minor increase in floor area for the subject dwelling will enhance the residential opportunity for the dwelling and meet anticipated needs of the occupants through additional flexible floor space for a range of uses, which is important in the modern work/life balance requiring work from home opportunities.

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

The proposed modest changes to the dwelling to increase the floor area will not result in any substantial change in the bulk, scale and density of the development and will not result in additional vehicle or pedestrian traffic generation.

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

The proposed additional floor area will not place further demand on public infrastructure nor result in additional traffic generation in the locality.

(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 proposed additional floor area has been located at the roof level and is not prominently visible from the surrounding public places in Victoria Street.

The works will not have any direct or adverse impact on the solar access amenity or outlook for the neighbouring properties.

7.2 Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

> *23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would 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.*
>
> *24. The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) 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: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, 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 cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

There are sufficient environmental planning grounds to justify contravening the development standard.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposed alterations and additions to the dwelling introduce modulation and architectural relief to the building's facade, without seeing any substantial increase to the building's bulk, which promotes good design and improves the amenity of the built environment (1.3(g).

- The proposed addition will maintain the general bulk and scale of the existing surrounding dwellings and maintains architectural consistency with the prevailing development pattern which promotes the orderly and economic use of the land (cl 1.3(c)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the provision of a building that provides sufficient floor area for future occupants whilst minimising the calculable gross floor area and manages the bulk and scale and maintains views over and past the building from the public and private domain.

The minor additional floor area at the roof level of the building will provide for a more flexible floor area arrangement to meet the work from home requirements of a modern work environment, which presents the opportunity for the owners to enjoy the existing development and support future family residential accommodation.

These are not simply benefits of the development as a whole, but are benefits emanating from the breach of the floor space ratio control.

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

7.3 Is the proposed development in the public interest because it is consistent with the objectives of clause 4.4 and the objectives of the MU1 Mixed Use Zone?

(a) Section 4.2 of this written request suggests the 1st test in Wehbe is made good by the development.

(b) Each of the objectives of the MU1 Mixed Use Zone and the reasons why the proposed development is consistent with each objective is set out below.

I have had regard for the principles established by Preston CJ in *Nessdee Pty Limited v Orange City Council [2017] NSWLEC 158* where it was found at paragraph 18 that the first objective of the zone established the range of principal values to be considered in the zone.

Preston CJ found also that "*The second objective is declaratory: the limited range of development that is permitted without or with consent in the Land Use Table is taken to be development that does not have an adverse effect on the values, including the aesthetic values, of the area. That is to say, the limited range of development specified is not inherently incompatible with the objectives of the zone".*

In response to *Nessdee,* I have provided the following review of the zone objectives:

It is considered that notwithstanding the extent of the non-compliance with the maximum floor space ratio control, the proposed new works will be consistent with the individual Objectives of the B4 Mixed Use Zone for the following reasons:

- ***To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.***

The proposal retains the existing retail uses at the ground level, continuing to provide a diversity of land uses that generate employment opportunities.

- ***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.***

The proposed works located at Level 6 will not have any adverse impact on the existing street frontage with the works being largely imperceptible from the Victoria Street streetscape. The proposal will continue to provide for a diverse and active street frontage, providing for high-quality pedestrian amenity, while continuing to provide for a vibrant, diverse and functional street.

- ***To minimise conflict between land uses within this zone and land uses within adjoining zones.***

The site and development are well-removed from nearby zones with a consistency of land uses in the surrounding area. The proposed works and resulting building height encroachment will not generate unwanted conflict between land uses within the zone and other land uses within adjoining zones.

- ***To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.***

The proposed development will not alter the existing retail, business and other non-residential land uses on the ground floor of surrounding buildings with the existing retail uses on the subject site being unaffected.

- ***To ensure land uses support the viability of nearby centres.***

The existing land uses will not be altered and will continue to support viability of Potts Point and surrounding areas.

- ***To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.***

The proposal will continue to provide for a suitable use of land uses, namely residential and retail uses within an accessible location located nearby to public transport. The proposal will encourage public transport patronage and encourage walking and cycling.

As sought by the zone objectives, the proposal will provide for alterations and additions to an existing building which are sensitive to the locality.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed maximum floor area control, whilst maintaining consistency with the zone objectives.

7.4 Has the Council obtained the concurrence of the Director-General?

The Council can assume the concurrence of the Director-General with regards to this clause 4.6 variation.

7.5 Has the Council considered the matters in clause 4.6(5) of SLEP?

(a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed alterations and additions to the existing residential unit and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.

(b) As the proposed development is in the public interest because it complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.

(c) there are no other matters required to be taken into account by the secretary before granting concurrence.

8.0 Conclusion

Council's Sydney LEP 2012 control within Clause 4.4 stipulates a requires a maximum floor space of 2:1 for development in this area of Potts Point.

This development provides a departure from the maximum floor space ratio development standard, with the proposed alterations and additions to the existing unit to provide a floor space ratio of 3.26:1 or exceed the permissible gross floor area of 546.6m^2 by 22m^2 of 60%.

This objection to the maximum floor space ratio specified in Clause 4.4 of the Sydney LEP 2012 adequately demonstrates that that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the maximum floor space ratio control would be unreasonable and unnecessary in the circumstances of this case.

VAUGHAN MILLIGAN
Town Planner