

Attachment D

**Clause 4.6 Variation Request – Floor Space
Ratio**

ANNEXURE C

Clause 4.6 Variation – Floor Space Ratio



Clause 4.6 Variation Statement – Floor Space Ratio (Clause 4.4)

1. Floor Space Ratio Standard

Clause 4.4 of the *Sydney Local Environmental Plan 2012* (SLEP 2012) prescribes the maximum floor space ratio for the site and refers to the Floor Space Ratio (FSR) Map. The relevant map [sheet FSR_021] indicates the base FSR permitted at the subject site is 2.5:1, as shown in **Figure 26** below.

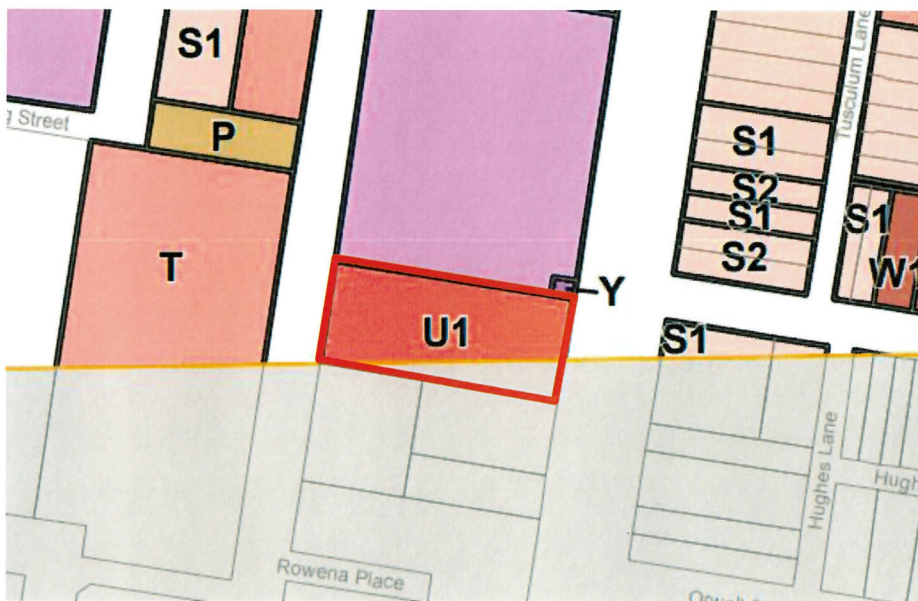


Figure 27 Extract from the Floor Space Ratio Map [U1=2.5:1]

This application has been amended pursuant to *Part 2 Development for affordable housing, Division 1 In-fill affordable housing, Section 16 Affordable housing requirements for additional floor space ratio*, subsection (2) of the Housing SEPP. Specifically, this application seeks to benefit from a 21% floor space ratio bonus under Section 16(2) of the Housing SEPP, where affordable housing is provided to 10.5% of the total GFA for a minimum 15-year period. Accordingly, and per the Housing SEPP, the subject site is permitted a maximum FSR of 3.02:1, where the 2.5:1 limit applies.

However, this development application was made, but not determined on or before 14 December 2023, and therefore the recent reforms cannot apply per *Schedule 7A Savings and transitional provisions, Section 8 State Environmental Planning Policy Amendment (Housing) 2023* of the Housing SEPP. Notwithstanding this, the intent of the Housing SEPP has been satisfied and therefore the maximum floor space, as increased by the bonuses, are a matter for consideration.

2. Proposed variation to FSR Development Standard

The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area. Gross floor area is defined to mean:

...gross floor area means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—

- (a) the area of a mezzanine, and*
- (b) habitable rooms in a basement or an attic, and*
- (c) any shop, auditorium, cinema, and the like, in a basement or attic,*
but excludes—
- (d) any area for common vertical circulation, such as lifts and stairs, and*
- (e) any basement—*
 - (i) storage, and*
 - (ii) vehicular access, loading areas, garbage and services, and*
- (f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and*
- (g) car parking to meet any requirements of the consent authority (including access to that car parking), and*
- (h) any space used for the loading or unloading of goods (including access to it), and*
- (i) terraces and balconies with outer walls less than 1.4 metres high, and*
- (j) voids above a floor at the level of a storey or storey above...'*

The architectural plans indicate that the proposed development has a maximum FSR of 3.02:1 (3,633m²) and is therefore non-compliant. The extent of non-compliance is a maximum of 630.5m², which represents a variation of 21%.

As described, if the bonuses of the recently gazetted in-fill affordable housing applied to the subject development, the proposal would technically comply with the maximum floor space permitted. That is, the proposed development seeks to provide for a total FSR of 3.02:1 and GFA of 3,633m², as outlined above. This equates to an additional GFA of 633m², FSR 0.52:1 and bonus of 21%, when compared to the permitted GFA and FSR. In accordance with Section 16(2) of the Housing SEPP, 10.5% of the total GFA (or 381.4m²) must therefore be provided as affordable housing. The proposal, as described, will provide 383m² or 10.5% of the total floor area as affordable housing and is therefore permitted a maximum FSR of 3.02:1, in which the proposal would technically comply.

The maximum FSR under Clause 4.4 is a "development standard" to which exceptions can be granted pursuant to Clause 4.6 of the LEP.

3. Clause 4.6 of SLEP 2012

Clause 4.6 was amended by the *Standard Instrument (Local Environmental Plans) Amendment (Exceptions to Development Standards) Order 2023* on 1 November 2023. However, the current Development Application was lodged before this date, so (in accordance with clause 8(1) of the *Standard Instrument (Local Environmental Plans) Order 2006*) the former terms of clause 4.6 still apply.

The objectives and provisions of Clause 4.6 are as follows:

- (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 Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning 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 Planning Secretary before granting concurrence.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(caa) clause 5.5,

(ca) clause 4.3 (Height of buildings), but only in relation to land shown as being in Area 1 or Area 2 on the Height of Buildings Map,

(cab) clause 4.5A (Balconies on certain residential flat buildings),

(cb) clause 5.3A (Development below ground level in Zone RE1),

(cc) clause 6.10 (Heritage floor space),

(cd) clause 6.11 (Utilisation of certain additional floor space requires allocation of heritage floor space),

(cda) clause 6.11A (Temporary alternative heritage arrangements in relation to allocation of heritage floor space),

(cdb) clause 6.16 (Erection of tall buildings in Central Sydney),

(ce) clause 6.17 (Sun access planes),

(cf) clause 6.18 (Overshadowing of certain public places), unless the additional overshadowing is caused by playground equipment, a shade structure, an awning, a sculpture or artwork, a community notice or a public information sign,

(cg) clause 6.19 (View planes), except in relation to the Martin Place View of western sky view protection plane,

(cga) clause 6.26 (AMP Circular Quay precinct),

(cgb) clause 6.29 (58–60 Martin Place, Sydney),

(cgc) clause 6.33 (230–238 Sussex Street, Sydney),

(cgd) clause 6.35 (45 Murray Street, Pyrmont), but only if the development is an alteration or addition to an existing building,

(cge) clause 6.36 (12–20 Rosebery Avenue, 22–40 Rosebery Avenue and 108 Dalmeny Avenue, Rosebery),

(cfg) clause 6.37 (296–298 Botany Road and 284 Wyndham Street, Alexandria),

- (cgg) clause 6.41 (7–15 Randle Street, Surry Hills),*
- (cgh) clause 6.42 (102–106 Dunning Avenue, Rosebery),*
- (cgi) clause 6.40 (2–32 Junction Street, Forest Lodge),*
- (cgj) clause 6.43 (Danks Street South Precinct),*
- (cjk) clause 6.52 (1–11 Oxford Street, Paddington),*
- (cgl) clause 6.55—4–22 Wentworth Avenue, Surry Hills,*
- (cgm) clause 6.56—24–40 Wentworth Avenue, Surry Hills,*
- (cgn) clause 6.58—187–189 Thomas Street, Haymarket,*
- (ch) Division 1 of Part 7 (Car parking ancillary to other development),*
- (ci) clause 6.19A (Views of Sydney Harbour),*
- (cj) clause 6.21E(2) and (5) (Tower cluster areas),*
- (ck) clause 6.60C—2 Chifley Square, Sydney,*
- (cl) clause 6.60D—Oxford Street Cultural and Creative Precinct,*
- (cm) clause 6.60E—Flinders Street and Oxford Street,*
- (cn) clause 6.60G—15–23 Hunter Street and 103–107 Pitt Street, Sydney.*

The development standards in Clause 4.4 are not “expressly excluded” from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum floor space ratio of 3.02:1 which equates to a variation of 0.52:1 or 21%.

4. Compliance is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))

In *Wehbe V Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The 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.”

The judgement goes on to state that:

“ The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is

able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on numbers 1, 3 and 4 for the purposes of this Clause 4.6 variation [our underline]):

- 1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- 2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- 3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- 4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting 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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 16), Preston CJ refers to *Wehbe* and states:

"...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- The development is consistent with the standard and zone objectives, even with the proposed variation (refer to Section 7 below);
- there are no additional significant adverse impacts arising from the proposed non-compliance; and
- important planning goals are achieved by the approval of the variation.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

5. Sufficient Environmental Planning Grounds (Clause 4.6 (3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 24) states:

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].



The assessment of this numerical non-compliance is also guided by the recent decisions of the NSWLEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 whereby Justice Pain ratified the decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum FSR:

1. The bonuses under the recently amended Housing SEPP are a matter for consideration

- a. D/2023/862 was lodged with Council on 21 September 2023. At the time in which this application was lodged, the proposed changes to the Housing SEPP were exhibited via the Department of Planning's media release dated 15 June 2023 titled 'New planning rules mean more affordable housing'. Following this and on 14 December 2023, the amendments were gazetted and formed part of the Housing SEPP. As these amendments were exhibited and subsequently gazetted, they are a matter for consideration under Section 4.15(1)(a)(ii) of the *Environmental Planning and Assessment Act, 1979* (EP&A Act). As a result, these amendments are both imminent and certain, carrying determinative weight as they establish an appropriate density of development for affordable, transit orientated development.
- b. Following the above, the proposed development provides for a maximum GFA of 3,633m² and FSR of 3.02:1, per the 21% bonus afforded by the Housing SEPP. In this regard, the proposed development would comply with the maximum FSR permitted on the subject site in accordance with the bonuses afforded by Section 16 of the Housing SEPP, in lieu of allocating an appropriate number of affordable apartments. In this regard, the non-compliance is considered to be a result of a technicality, whereby the savings provisions under the Housing SEPP prohibit the implementation of the recently gazetted reform to the subject development.
- c. Finally, whilst the recent Housing SEPP reforms do not strictly apply, the proposal will deliver a distinctive public benefit through the provision of 5 affordable housing apartments, which will be allocated for a period of 15 years to a registered community housing provider. The considerable public benefit afforded by delivering a high quality contemporary development, with an appropriate quantum of affordable housing, must be considered in this variation request. To require strict compliance with the base standard would significantly impact the provision of affordable housing and is an inferior outcome.

2. The non-compliant FSR is located within a building envelope which is compatible existing building and surrounding development

- a. The variation to FSR is entirely reasonable when considering the compatibility with streetscape, surrounding properties and location of the site. That is, the site is capable of accommodating an



increase in density as the development aligns with the building envelope of that existing on-site and within surrounding properties, including street frontage heights and setbacks. The increase in density will not bring with it a bulk or scale which is physically or visually greater than the surrounding properties, particularly when viewed from Victoria Street and Brougham Street, therefore limiting any adverse impact created by the proposal.

- b. The floor space non-compliance is carefully considered and does not alter the transition of bulk and scale throughout the locality. The additional floor space is located centrally within the site, concealed from the public domain and nestled into the topography, ensuring compatibility with the locality. The FSR variation does not bring with it a density of development that is greater than what is anticipated for the site, ensuring that the bulk and scale of the development will not be visually or physically jarring as viewed by the casual observer. That is, the built form as it addresses Victoria Street and Brougham Street would be unchanged if a strictly compliant development was proposed.
- c. Following the above, the proposed building envelope is supported by the context of other neighbouring and nearby developments. The proposal adopts a similar typology and in fact outperforms other adjoining and nearby buildings in terms of building design, separation, transition of height and internal amenity. This also assists with mitigating the scale of the additional FSR when viewed from the public domain. When viewed by the casual observer, the non-compliant area is setback from the public domain and is located centrally within the site, where it is hidden through the high-quality architectural design.

3. The distribution of additional floor area does not result in any adverse impacts to the character of the locality

- a. When viewed by the casual observer, the additional GFA will not be visually or physically obtrusive by virtue of compatibility with the character of Victoria Street or Brougham Street. That is, building envelope, bulk and scale of the development is proportionate to the location of the site, is consistent with the neighbouring properties and is concealed within a compatible building envelope. Importantly, whilst non-compliant with the FSR standard, the proposed built form is consistent with an envelope reasonably anticipated on the subject site, as informed by the existing building and surrounding developments, including those recently approved. As discussed within the Clause 4.6 Height of Building, the building height is entirely consistent with that existing on-site and to the neighbouring properties, thus ensuring a compatible streetscape character. The distribution of additional floor area centrally within the site, nestled into the topography limits any impacts to the public domain or surrounding properties, through the incorporation of appropriate setbacks and architectural elements. It would be contrary to the objectives of the zone to deny the provision a well-articulated urban form which is consistent with the bulk and scale of the locality, despite the non-compliance.

4. Site Characteristics, Location and Accessibility

- a. The non-compliance with FSR will deliver a public benefit through the provision of additional residential accommodation, including affordable housing, in a highly accessible site. There would be no distinctive benefit realised by requiring strict compliance as the additional floor area is located within an envelope which is entirely consistent with the character of the locality and does not result in any adverse amenity impacts. As detailed, the setbacks and location of building envelope and form, including the non-compliances, have considered the relationship to surrounding properties and public domain to deliver an appropriately designed residential flat building. The proposal appropriately responds to the topography of the site and is consistent with the character of the locality, locating the non-compliant floor area centrally within the site thus mitigating any adverse impact.

5. The intensity of development on-site will be reduced, when compared to existing

- a. Existing on the subject site are 45 residential apartments, with a sub-par level of amenity in a dilapidated built form. The proposed development will demolish the existing building to provide 25 high-quality residential apartments, including much needed affordable housing. As such, whilst there will be non-compliance with the FSR development standard, the proposal will reduce the intensity of development on-site providing for numerous benefits to the locality, including but not limited to, acoustic privacy, visual privacy, traffic generation and reliance of on-street parking.

6. Orderly and Economic Use of Land

- a. The proposal provides for the orderly and economic use of the land when considering the existing building, relationship to surrounding properties and highly accessible location. These characteristics support the proposed variation and it would be entirely contrary to the public interest to remove a considerable quantum of residential accommodation (including affordable housing), to only achieve numerical compliance, given the proposal is compatible with the character of the surrounding locality. That is, the site is capable of supporting the uplift in density without any adverse impact to the heritage conservation area, public domain or amenity of surrounding properties.
- b. Further to the above, there are clear social benefits of providing additional, high-quality residential accommodation, including much needed affordable housing, within a highly sought after and strategic location and should be given substantial weight in the consideration of the variation request. The proposed development achieves an environmental planning outcome by providing additional accommodation opportunities within the R1 zone, in close proximity to public transport and various uses without having an adverse impact on the amenity of adjoining properties and being compatible with the character and built form of the locality.

7. The range of amenity impacts have been established by the existing development

- a. As detailed, the proposed development will generally maintain the bulk and scale established by the existing building. Whilst there will be an increase in gross floor area on the subject site, the proposal is purposefully designed so that the range of amenity impacts created by the proposed

development are consistent with those already established on-site. That is, the non-compliances to floor area will not result in any adverse impact to the overshadowing, views or privacy of the surrounding locality beyond that created by the existing buildings.

- b. It is therefore considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:
 - i. The extent of the additional floor space creates no adverse additional overshadowing impacts to adjoining properties when compared to the existing building envelope. That is, despite the additional shadow cast by the new development, this is relatively minor ensuring that the proposal will not impact the solar gain of the surrounding locality. The proposal will not create any adverse overshadowing impact to properties to the south, when considering the existing building and context of the locality. Specifically, the neighbouring apartments at No. 119 Victoria Street will retain an appropriate quantum of solar access (despite non-compliance), particularly when compared to the existing building on-site. As such and in totality, additional overshadowing caused by the non-compliant elements would be insignificant; and
 - ii. The FSR breach does not result in any adverse additional privacy impacts. Where the additional floor space is located centrally, this includes blank facades, privacy screens and landscape elements, incorporated with appropriate setbacks, as a visual and physical buffer to the neighbouring properties. This ensures that that any additional loss of privacy caused by the non-compliant elements would be insignificant; and
 - iii. The FSR non-compliance does not result in adverse view loss when compared to the existing building on-site. When considering the extent of view sharing, it is noted that the FSR breach is located centrally, nestled within the site. Any view loss is generally consistent with the existing building and the additional extent of variation (to FSR) will not result in any adverse view loss to Sydney Harbour. This is confirmed in the View Loss Assessment prepared by *Planning Ingenuity* and View Impact Imagery prepared by *Urbaine*. As such, it is anticipated the extent of view loss caused by the non-compliant element would be insignificant or nil.

8. The proposal meets aims and objectives of key planning documents

- a. The proposed development meets the objectives of the development standard and meets the objectives of the R1 General Residential zone (as further detailed in Section 7 below);
- b. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - i. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential uses (1.3(c));

- ii. The proposal promotes the delivery of additional, high quality affordable apartments (1.3(d)); and
 - iii. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).
- c. The variation to the height of buildings development standard will give better effect to the aims of *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development* (SEPP 65). In particular:
- i. The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));
 - ii. to achieve better built form and aesthetics of buildings and of the streetscapes and the public spaces they define (clause 2(3)(b);
 - iii. to contribute to the provision of a variety of dwelling types to meet population growth (clause 2(3)(f);
 - iv. Approval of the proposed variation will support a variety of housing types by providing a well-located and compact development that will be a better choice for families (clause 2(3)(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development. Specifically, the subject site contains a building which has established the envelope and footprint on-site. The proposal will seek to demolish the existing structures and erect a built form with an envelope which is consistent with that on-site and on neighbouring properties, with additional floor space available through significant improvements to the arrangement of built form. Resultantly, insistence on strict compliance with the FSR control will result in the removal of a considerable number residential accommodation which will reduce the provision of dwellings in a highly accessible location, and is antipathetic to the objectives of the zone.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ 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:

86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.

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.

6. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), Clause 4.6(4)(a)

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard this is addressed in 7a below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 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 particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

7. 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 (Clause 4.6(4)(a)(ii))

Objectives of Development Standard

The objectives of Clause 4.4 per the SLEP 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.*

In order to address the requirements of Subclause 4.6(4)(a)(ii), the objectives of Clause 4.4 are addressed in turn below.

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

This objective articulates that floor space is provided to meet the needs for the foreseeable future. It seeks to provide “sufficient” floor space for those development needs, which suggests that the site has been identified as the least amount of floor space considered appropriate for a certain sites in Potts Point. Compliance with the maximum FSR in this case is unreasonable and or unnecessary because the proposal achieves this objective notwithstanding the variation, for the following reasons.

The proposal seeks to provide an increase in floor space within a building envelope which is compatible with that existing on-site and within the surrounding locality. The floor space non-compliance will not result in a development which is incompatible with the streetscape and will ultimately meet the development needs for the foreseeable future through the provision of well-designed residential accommodation in the Potts Point locality.

Further to the above, the proposal will provide much needed in-fill affordable housing in accordance with the recently amended Housing SEPP. Whilst these amendments cannot technically apply due to the savings provisions contained under the Housing SEPP, the development would comply with the maximum FSR permitted on-site (per the bonuses) in lieu of allocating 5 apartments as affordable housing.

Therefore, insistence on compliance would not result in a better planning outcome given the proposed development is consistent with the architectural character and form as developments address the public domain. As such, the proposal achieves Objective (a).

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

This objective has two aspects:

- to regulate the density of development, built form and land use intensity, and
- to control the generation of vehicle and pedestrian traffic.

Compliance with the maximum FSR in this case is unreasonable and or unnecessary as the proposal achieves this objective notwithstanding the variation, for the following reasons.

The proposal provides a building envelope and footprint, inclusive of street frontage heights and setbacks, which is generally consistent with that established on-site and within the surrounding locality. This results in a density, built form and intensity of land use which is entirely compatible with the locality. Whilst there will be an increase in floor area, this is located centrally, nestled into the topography and will deliver an envelope and form which is consistent with the established character of Victoria Street and Brougham Street. To the causal observer, the building would comprise of a built form and architectural language that is entirely compatible with the surrounding buildings along both street frontages, including the neighbouring heritage items and recently approved development. In this sense, the proposal achieves the built form aspect of the objective predicated on consistency in street frontage character with the surrounding locality.

Further, the proposal seeks to provide a residential flat building development with 25 residential apartments, including affordable housing, and a roof top communal open space. The use of the building is permissible within the R1 General Residential zone and is located in proximity to public transport options and a variety of uses. In this regard, the proposed development, inclusive of the non-compliance, will provide a compatible land use and form of development within the Potts Point locality. The location of the site is entirely capable of accommodating the proposed density of the residential flat building development. Importantly, the existing building contains 45 subpart residential apartments, which are to be removed and replaced with 25 high quality apartments. Whilst there will be a non-compliance in FSR, the intensity of the development is technically reduced and is therefore acceptable in this regard.

Additionally, the proposed floor area does not exceed the bonuses afforded by the Housing SEPP, where the proposal allocates 5 apartments as affordable housing for a period of 15-years. The proposed density of development is therefore

entirely reasonable and anticipated by the changes recently gazetted and desire for affordable housing in close proximity to public transport.

As such, it would be contrary to the public interest and objectives of the R1 zone to require strict compliance and remove residential accommodation, including affordable housing, where there is no adverse physical or visual impact to the public domain or surrounding properties. This aspect of the objective is achieved.

In terms of the generation of traffic, the proposed development will provide for 25 residential apartments within close proximity to Kings Cross railway and bus services along Darlinghurst Road and William Street. Whilst the proposal will include the provision of 23 parking spaces, there will be no significant generation of traffic. This is confirmed in the Traffic Report prepared by *Traffix*, which is submitted with this application. As detailed, the proposal will reduce the quantum of residential apartments on-site, thereby reducing traffic generation and reliance of on-street parking. As such, whilst the proposal will result in a non-compliant FSR, the overall generation of vehicular traffic will be reduced when compared to the existing building. It is also noted that the proposal will provide bicycle parking on-site, as an alternative form of transport. This coupled with the site's distance of less than 300m to Kings Cross railway station and various bus services, will ensure vehicular traffic generation will be minimised.

In terms of pedestrian generation, the proposal will not result in any adverse impact to the locality. The proposal will significantly improve the character of the development as it relates to the public domain and thereby improve pedestrian safety and amenity. The proposal achieves the objective of controlling vehicle generation, by reducing the intensity of development, and improving pedestrian safety and amenity, without any adverse impact to pedestrian generation.

Accordingly, the proposed development provides a suitable density and intensity of use within the R1 General Residential zone and is entirely compatible with the scale of surrounding development, despite the numerical variation. As such, the proposal achieves Objective (b).

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

This objective seeks to provide that the proposed development is commensurate to infrastructure in the locality. Compliance with the maximum FSR in this case is unreasonable and or unnecessary because the proposal achieves this objective notwithstanding the Variation, for the following reasons.

As discussed under Objective (b), the subject site is ideally located within Potts Point and in close proximity to Kings Cross railway, various bus services, commercial premises, community facilities and key public spaces. This will ensure that the provision of additional residential accommodation can be accommodated within the existing infrastructure provisions. Further to this, the proposed FSR variation is not excessive when compared to the permitted uplift in density afforded for properties in the immediately surrounding locality, which are permitted FSR of 3.5:1 to 4.5:1. Resultantly, the variation will not impact the function of the existing and planned transport infrastructure of the locality.

The proposal, which will provide for affordable housing per the recent amendments to the Housing SEPP, reflects the desire to deliver transit orientated development.

It is also noted that the subject site is currently connected to existing electricity, water and sewage services and will continue to utilise these services as part of this development. The FSR variation will not adversely impact the services within the locality.

Therefore, the Proposal achieves objective (c).

(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.

Objective (d) also has two aspects, in that it seeks to ensure that new development:

- reflects the desired character of the locality and
- minimises impacts to the amenity of the locality.

Council does not have any specific desired future character objectives in SLEP 2012. In accordance with *Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115* where the desired future character of the locality is not defined under SLEP 2012, it is and can be set by the existing, recently approved and proposed buildings within the neighbourhood. It is noted however that the subject site is located partially within the *Woolloomooloo* (Section 2.4.3) and partially within the *Kings Cross* (Section 2.4.7) areas, per *Section 2 Locality Statement* under SDCP 2012.

In this regard, the proposed development has considered the Character Statements and Principles of both Woolloomooloo and Kings Cross. Furthermore, the proposal has also been informed by the existing building envelope on-site and within the surrounding properties. Whilst the subject application seeks to demolish the existing building, the established bulk and scale on-site will be retained, with significant improvements to architectural character and design. The additional FSR afforded by the proposal is located centrally within the site and is designed to minimise impact as viewed from the public domain. Specifically, the proposal provides street frontage heights, setbacks and architectural design is consistent with the neighbouring properties, thus limiting impacts and ensuring consistent with the character along Victoria Street and Brougham Street. In this regard, the provision of a contemporary, high-quality development with architectural language informed by the heritage conservation area and surrounding heritage items, is entirely consistent with the character of the locality and as desired within Potts Point.

In addition to the above, the floor area non-compliance will not detract from the desired future character where it aligns with the increase in density afforded by the amended Housing SEPP and desire for transit orientated development. The proposal therefore achieves this aspect of this objective.

As detailed, the additional FSR is purposefully located so that the built form, as it addresses the public domain, will be consistent with that established on-site and within the surrounding locality. The existing built form establishes a range of acceptable amenity impacts to the public domain and surrounding properties. Although the proposal will increase the quantum of floor area and result in a non-compliance, this will not result in any adverse amenity impacts due to the skilful design. The following is noted:

- The proposal does not result in a bulk and scale that is visually jarring or noticeably different when compared to surrounding buildings in the locality or that which is existing on the subject site. In fact, the proposal, including those elements which are non-compliant, represents wholesale improvements to the character of the site;
- The development, including the non-compliant floor area, is designed to minimise privacy impacts on surrounding properties through orientation and building separation, in addition to appropriate design measures including blank facades, privacy screens and landscaped buffers. It is therefore considered that the proposed development will not result in any material loss of privacy when compared to a building with a compliant FSR;
- The proposal will not create any additional adverse overshadowing impacts to surrounding properties, particularly when compared to the existing building envelope and context of the surrounding locality. In this regard, the non-compliant FSR does not adverse increase in bulk and scale, which ensures that the solar gain of surrounding properties will be appropriately maintained. As shown in the submitted shadow diagrams and Solar Impact Assessment, the quantum of solar impact to the southern neighbour, at No. 119 Victoria Street, is considered to be acceptable. That is, this neighbouring property will retain appropriate solar access, as is existing, to the majority of apartments, despite non-compliance. It is only Apartment 3 which will be impacted, to a minor degree (being a period of 15 minutes to the private open space), by the proposed development. In this regard, it is considered that the proposed non-compliance does not contribute to this impact and is a result of a compliant envelope. Furthermore, whilst there will be a minor impact, it is noted that a number of these properties are already in shadow due to the east-west orientation of allotments, topography and density of the locality. As such, the extent of additional impact would be insignificant and limited; and

- As described above, the proposal will not result in any significant view loss when compared to the existing building envelope. The additional FSR is nestled into the site, ensuring that views will not be adversely impacted. Importantly and as demonstrated in the View Loss Assessment, the extent of additional view loss impact is in some instances improved when compared to the existing built form. As such, whilst there will be a non-compliance in FSR, the arrangement of built form ensures existing views will be maintained.

Accordingly, the Proposal achieves objective (d).

The above adequately demonstrates that compliance with the FSR development standard is unreasonable or unnecessary in the circumstances in this case where the proposal achieves the objectives of the standard, notwithstanding the Variation.

7b. Objectives of the Zone

Clause 4.6(4)(a)(ii) requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of zone R1 General Residential, and a response as to how the proposal meets the objective is provided as follows:

- *To provide for the housing needs of the community.*

The proposal will provide 25 residential apartments, comprising 5 x 1 bedroom, 4 x 2 bedroom, 11 x 3 bedroom and 5 x 4 bedroom apartment. This also includes the allocation of 5 x 1 bedroom apartments as affordable housing, for a period of 15 years to a registered community housing provider. This will meet the housing needs of the community within the R1 zone. These apartments are generously sized and designed within a highly suitable development.

- *To provide for a variety of housing types and densities.*

As above, the proposal will provide for a mixture of apartment types, including affordable housing and larger dwellings, within the Potts Point locality. This will also include 3 adaptable apartments which will improve the availability of accessible housing.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposal is not antipathetic to this objective and will support the surrounding non-residential uses.

- *To maintain the existing land use pattern of predominantly residential uses.*

The proposal will provide a residential flat building development which is entirely compatible with the existing nature of the subject site.

The proposed FSR variation is not antipathetic to the objectives for the zone and for that reason the proposed variation is acceptable.

8. The concurrence of the Secretary has been obtained (clause 4.6(4)(b))

The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under the Environmental Planning and Assessment Regulation 2021, the Secretary has given written notice, 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.

9. Whether contravention of the development standard raises any matter of significance for state or regional environmental planning (Clause 4.6(5)(a))

Contravention of the maximum FSR development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

10. The public benefit of maintain the development standard (Clause 4.6(5)(b))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum FSR. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed building FSR exceeds the maximum permitted on the site by 630.5m², the proposed development 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. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

11. Conclusion

Having regard to all of the above, it is our opinion that compliance with the maximum FSR development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.