

Attachment C

<p>Clause 4.6 Variation Request – Floor Space Ratio</p>
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CITY OF SYDNEY

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NSW 2000

REQUEST PURSUANT TO CLAUSE 4.6, FOR EXCEPTION TO COMPLIANCE WITH CLAUSE 4.4(2) OF SYDNEY LOCAL ENVIRONMENT PLAN 2012

This updated Clause 4.6 variation has been prepared by Craft Architecture in relation to the Development Application (DA) for Lot 4 in DP 201387 also known as 104 Pitt St, Redfern (the site). The DA seeks consent for alterations and additions to the existing dwelling house at the site. Pursuant to the Sydney Local Environment Plan 2012 (SLEP 2012), the site is in Zone E1 – Local Centre.

This Clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matter of [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

1.0 City of Sydney Local Environmental Plan 2012

1.1 Clause 4.4 – Floor Space Ratio

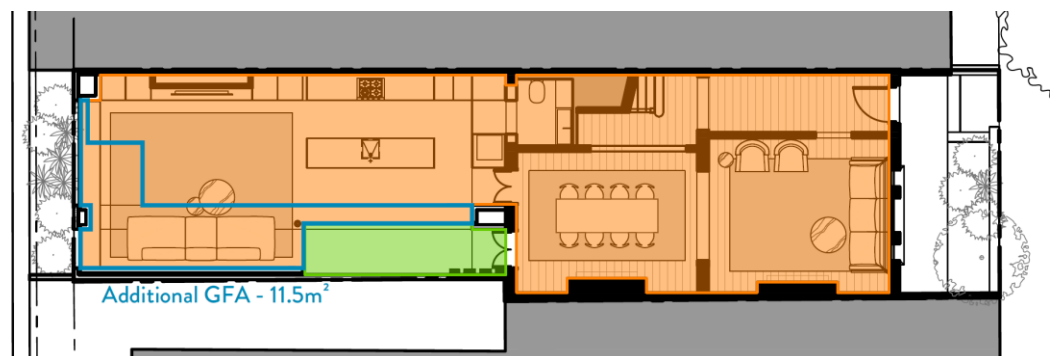
Pursuant to clause 4.4(2) of SLEP 2012 - a maximum floor space ratio of 1.25:1 is permitted.

The objectives of Clause 4.4 of SLEP 2012 are as follows:

- to provide sufficient floor space to meet anticipated development needs for the foreseeable future,
- to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,
- to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,
- 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 site has an area of 114.2m². The existing dwelling has a gross floor area of 175.8m² corresponding to a FSR of 1.56:1. The proposed development results in a gross floor area of 190.0m² and a FSR of 1.66:1. The extent of the total non-compliance (existing and new) is 47.2m² or 33%.

11.5m² of additional floorspace is proposed, as shown in the diagram below. This equates to a 6.4% increase in floor area. The additional floorspace is located at the ground floor and is not visible from the public domain.



Proposed Ground Floor (Drawing A-2900 by Craft Architecture)

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2.0 Exceptions to Development Standards

Clause 4.6(1) of SLEP 2012 provides:

(1) *The objectives of this clause are as follows—*

- *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- *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 2012 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.*

This clause applies to clause 4.4 of the SLEP 2012.

Clause 4.6(3) of SLEP 2012 provides:

(3) *Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

- a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
- b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

The proposed development does not comply with the floor space ratio controls at clause 4.4 of the SLEP 2012 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.

3.0 Request for variation

3.1 Clause 4.6(3)(a) – Is compliance with the development standard is unreasonable or unnecessary in the circumstances?

Strict compliance with Clause 4.4 is considered to be unreasonable or unnecessary in the circumstances of this case:

- The proposed development is capable of complying with the BCA
- It is considered that the proposal will have no detrimental effect relating to environmental, social or economic impacts on the locality
- The additional floorspace does not result in any unreasonable amenity impacts regarding overshadowing or privacy. Shadow diagrams provided demonstrate that no additional overshadowing occurs to the adjoining dwellings. The proposal results in improved privacy to 106 Pitt Street and the subject site. No surrounding properties are adversely affected.
- The proposal is of a nature in keeping with the overall function of the site. The premises are in a residential surrounding and amongst similar uses to that proposed.
- It is considered that the proposal will have no detrimental effect on the public interest, subject to appropriate conditions being proposed.
- The proposed FSR is consistent with surrounding development. The existing terrace to the south (106 Pitt Street) has an equivalent density with an estimated FSR of 1.63:1. The Redfern Community Health Centre immediately to the west has a built form consistent with an FSR of 2-2.5:1.

3.2 Clause 4.6(3)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

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

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].

Sufficient environmental planning grounds exist to justify the FSR variation. Specifically, the environmental planning grounds consist of the following:

- The proposed alterations and additions to the existing terrace create an open plan living, kitchen and dining space, increasing the habitable area and amenity of the terrace.
- The proposed alterations and additions will not increase the land use intensity or result in additional vehicle or pedestrian traffic. It will not result in any additional

impact on the existing or planned infrastructure. No change of use or increased occupancy is proposed.

- The additional floorspace does not result in any adverse impacts regarding overshadowing or privacy. The additions reduce the overlooking of surrounding dwellings by removing a non-sympathetic balcony and locating new structures below the new shared masonry fence.
- The proposed density and built form is consistent with the surrounding context. The form and layout of the original terrace has been retained, consistent with the neighbouring dwellings. No change to the building form is visible from the public domain.
- The proposed FSR is consistent with surrounding development. The existing terrace to the south (106 Pitt Street) has an equivalent density with an estimated FSR of 1.63:1. The Redfern Community Health Centre immediately to the west has a built form consistent with an FSR of 2-2.5:1.

The developments compliance with the objectives of the FSR standard and the lack of adverse environmental impact give weight to the acceptability of the variation sought.

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

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development represents good design and amenity of the built environment (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h))

4.0 Conclusion

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- a) the development is responsive to its context and consistent with the zone objectives
- b) the development is consistent with the objectives of the FSR standard
- c) there are sufficient environmental planning grounds to justify contravening the development standard
- d) that having regard to (a) and (b) above that compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of the case
- e) as the development is consistent with the zone and FSR objectives, approval would not be contrary to the public interest
- f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning.

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- 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.

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a FSR variation in this instance.

Yours sincerely

Charles Peters
Principal
Craft Architecture