

# **Attachment D**

<p><b>Clause 4.6 Variation Request – Floor Space Ratio</b></p>
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UPDATED CLAUSE 4.6 TO CLAUSE 4.4 OF SYDNEY LEP 2012

**EXCEPTIONS TO DEVELOPMENT STANDARDS – FLOOR SPACE RATIO (FSR) VARIATION**

*Demolition of the existing building and erection of a 6 storey retail/commercial building, basement parking and a roof terrace with associated landscaping (accompanying plans by SJB Architects, dated 13 and 25 November 2024)*



**141 – 155 COMMONWEALTH STREET, SURRY HILLS**

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## **SYDNEY LEP 2012 - CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS**

This Clause 4.6 variation request has been prepared to accompany the development application for the demolition of the existing building and construction of part 4 and part 5 commercial building.

Clause 4.6 of the Sydney LEP 2012 allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards.

### ***Clause 4.6 Exceptions to development standards***

- (1) *The objectives of this clause are as follows—*
  - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
  - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted 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.*

#### *Note—*

*The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).*

- (4) *The consent authority must keep a record of its assessment carried out under subclause (3).*
- (5) *(Repealed)*
- (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) *(Repealed)*
- (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 6.16(3)(b)

**Development Standard to be Varied**

Pursuant to Clause 4.4 of the Sydney LEP 2012, the site is subject to an FSR of 3:1. The proposal seeks to vary this FSR standard.



**Figure 1: Excerpt of the LEP FSR map**

The proposed maximum FSR of 3.12:1 represents a variation of 0.12:1 (113sqm or 4%) from the numerical FSR standard in the LEP. This includes the end-of-trip facilities, which are therefore excluded from the over FSR. Therefore, the maximum FSR becomes 3.07:1, representing a variation of 0.7:1 (66sqm or 2.3%) from the numerical FSR standard in the LEP.

<b>1</b>	LOWER GROUND	Retail	232 m <sup>2</sup>
	LOWER GROUND	Service	66 m <sup>2</sup>
	GROUND	Retail	268 m <sup>2</sup>
	GROUND	Commercial	379 m <sup>2</sup>
	LEVEL 1	Commercial	651 m <sup>2</sup>
	LEVEL 2	Commercial	651 m <sup>2</sup>
	LEVEL 3	Commercial	552 m <sup>2</sup>
	LEVEL 4	Commercial	5 m <sup>2</sup>
			2,804 m <sup>2</sup>
	<b>TOTAL</b>		<b>2,852 m<sup>2</sup></b>
SITE AREA		= 913 m <sup>2</sup>	
MAX. FSR		= 3:1	
MAX. GFA		= 2,739 m <sup>2</sup>	
PROPOSED GFA		= 2,852 m <sup>2</sup>	
MAX. EOT FSR		= 0.3:1	
MAX. EOT AREA		= 274 m <sup>2</sup>	
PROPOSED EOT		= 48 m <sup>2</sup>	

**Figure 2: Excerpt of the updated GFA Calculations**

**Justification for Contravention of the Development Standard**

This written request is considered to justify the contravention of the development standard and addresses the matters required to be demonstrated by Clause 4.6(3), of which there are two aspects. Both aspects are addressed below:

*(a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*

**Assessment:**

Whilst it pertained to SEPP 1, the Land and Environment Court judgment, *Wehbe v Pittwater Council* [2007] NSWLEC 827 (21 December 2007) (*Wehbe*), remains equally applicable to addressing this subclause. Specifically, in *Wehbe*, the Court identified five different 'ways' in which it can be established that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. This list of ways is not exhaustive and provides as follows:

- 1. the objectives of the standard are achieved notwithstanding noncompliance 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 objective 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 compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

In regard to the circumstances of the proposed development and this Clause 4.6 Written Request, it is considered that strict compliance with the development standard for FSR on the site is unreasonable or unnecessary because of the site's specific context in addition to Wehbe Ways 1 (as underlined above).

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (Initial Action Pty Limited v Woollahra Municipal Council [2018] NSWLEC 118 at [22], RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [28]) and SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 at [31]. Further, it is only necessary to demonstrate that strict compliance is either unreasonable or unnecessary.

It is considered that strict compliance with the development standard for FSR on the site is unreasonable and unnecessary in the circumstances for the following reasons:

**Consistency with the FSR of a previously approved DA on the subject site**

The proposed FSR of 3.12:1 is comparable to the approved FSR of 3.13:1 approved on this site. It is acknowledged that the previously approved FSR was associated with a boarding house development (DA2014/1060), which benefited from an FSR bonus under the Affordable Rental Housing (SEPP) 2009, as it was then known. However, such FSR was associated with a bulk and scale that were considered appropriate for the site. The proposed commercial building is considered to exhibit a high degree of architectural quality. It compares favourably with the approved, built form, as shown by the comparison between the approved and proposed:



Figure 17: Photomontage of proposal (corner of Commonwealth and Reservoir Streets)

**Figure 3: Approved montage**



**Figure 4: Proposed montage**

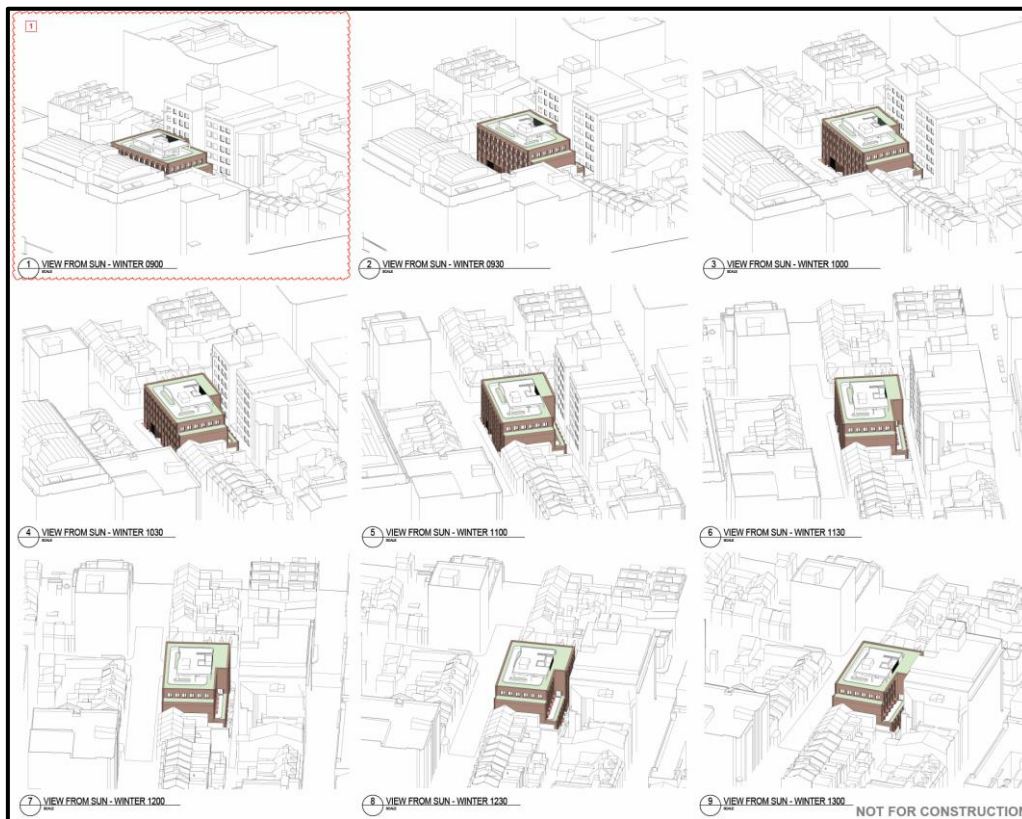
**No adverse impacts generated by the additional FSR**

The additional FSR is not responsible for any adverse impacts to any surrounding neighbour, with the sole immediately adjoining property being to the north. Such property has a blank south-facing wall to the blank north-facing wall of the subject proposal. On this basis, there are no adverse shadow, privacy, or visual bulk impacts on that property.

Commercial properties are located to the south across Reservoir Street, and thereby, they are unaffected by shadow, privacy, or visual bulk impacts.

To the east across Commonwealth Street are terraces and the Lord Albert Hotel. The built form presents as a stepped form that follows the slope down Commonwealth Street as viewed from these properties. The substantial distance of separation between the respective properties ensures that no adverse shadow or privacy impacts are generated by the excess FSR.

The converted warehouse building to the west across Beauchamp Lane has a nil setback to its eastern boundary to the lane, which makes it vulnerable to visual bulk, privacy, and morning shadow impacts. Nevertheless, the proposed built form has been sensitively designed to reasonably minimise impacts on the units within that property. The provision of a setback to the lane of 1.5-5.5m allows for reasonable retention of solar access in the morning period on June 21, as shown in the 3D view from the sun diagrams. The significant recesses along the western side of the built form and the stepped form of development combine to ensure that the excess FSR is not responsible for any adverse impacts.



**Figure 5: Excerpt of amended sun eye diagrams**

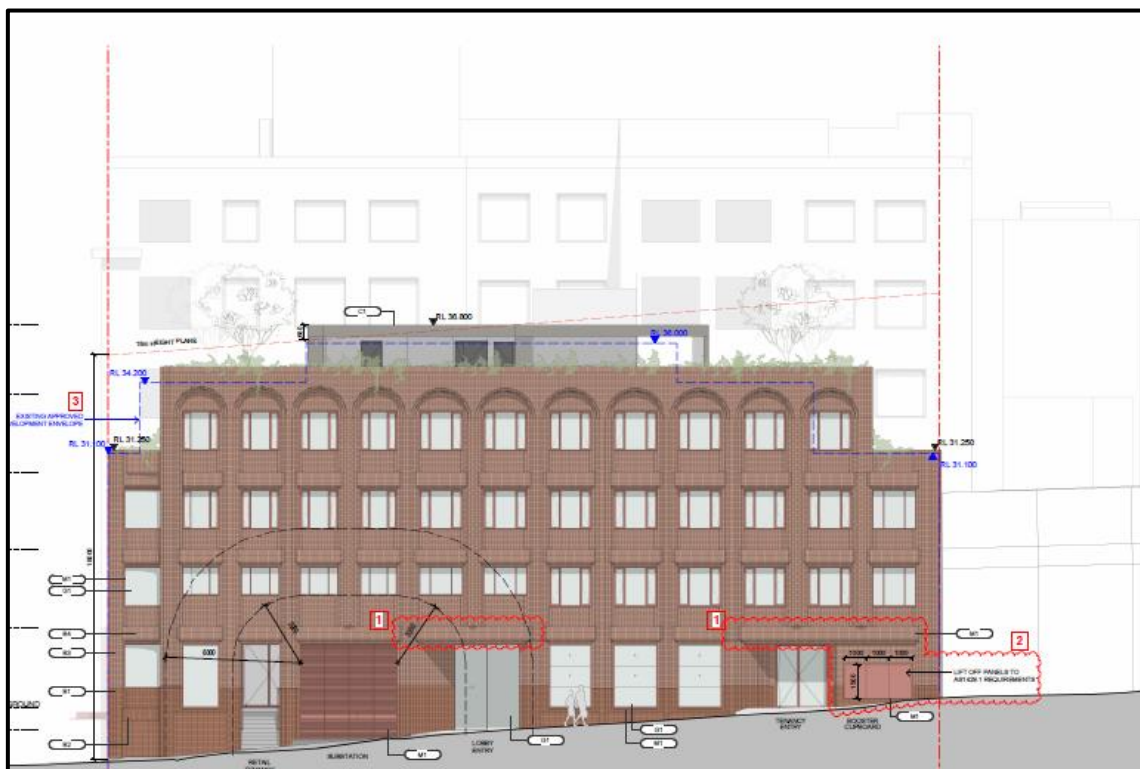


The attractive and articulated nature of the built form breaks down the apparent bulk and scale of the building, which includes the additional GFA beyond the standard. The stepped and indented form of development allows for the retention of outlook, daylight, sunlight and ventilation to the east-facing rooms and balconies of the warehouse building.

**Desired future character**

The proposed FSR variation does not compromise achieving the desired future character. The 5-storey form of development is consistent with the scale of development anticipated by the controls. The high-quality architecture by SJB will provide a positive contribution to the streetscape along both Reservoir and Commonwealth Streets, whilst the articulated and stepped form of development will also provide a more desirable outlook when viewed from properties with a frontage to Beauchamp Lane. Extensive landscaping at the upper levels (22.4% canopy cover) is provided. As shown in the montage above, the FSR variation is associated with a responsive and attractive visual outcome whereby the built form will sit neatly in the context of surrounding built forms.

The proposal is largely compliant with the 5-storey DCP control for the site, with the Commonwealth Street frontage presenting as 4-storeys and the Reservoir Street and Beauchamp Lane frontages as 5-storeys. The presentation of the built form to the respective street frontages is shown below, which highlights the responsive distribution of height, bulk and scale on the site:

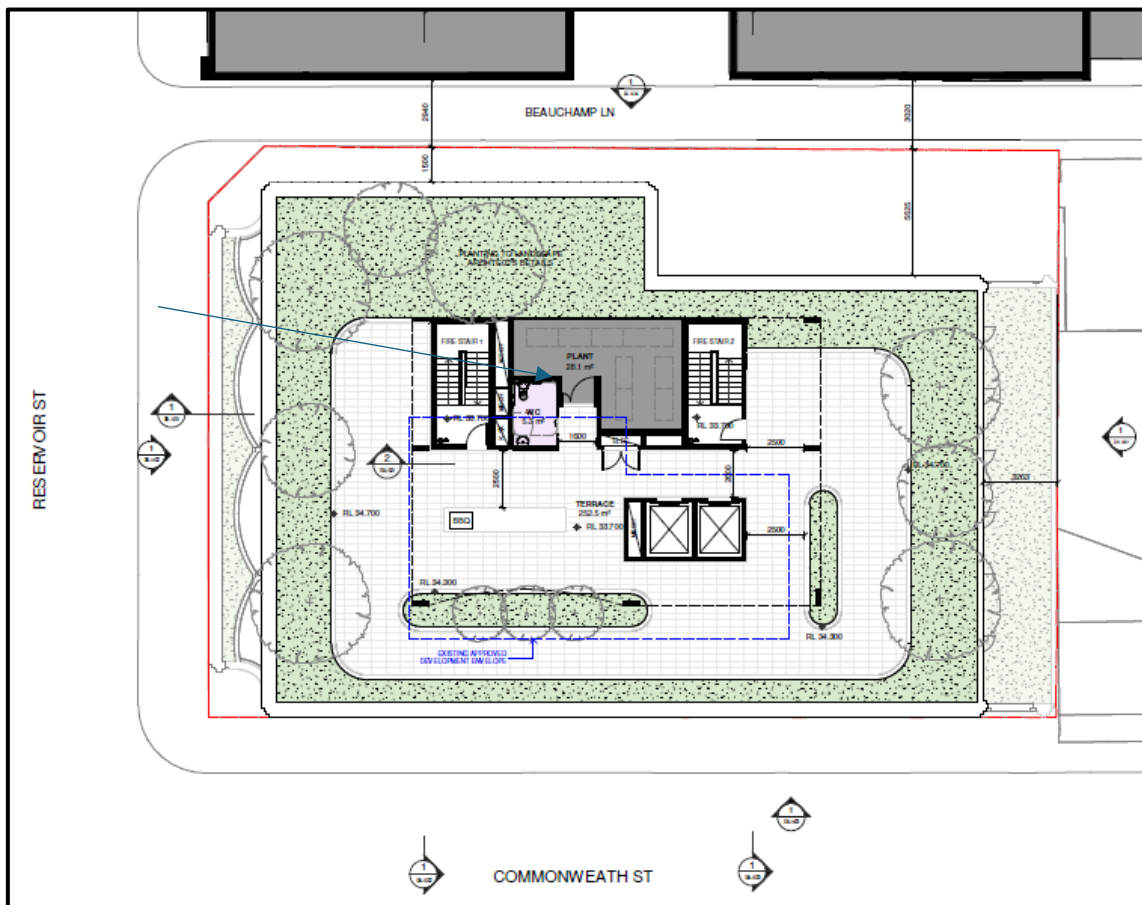


**Figure 6: Commonwealth St presentation noting the 3-storey element at the northern end where the site adjoins the 2-storey plus pitched roof terraces. The recessed nature of the upper-level communal elements ensures that the built form will primarily present as 4-storeys along Commonwealth Street.**



**Figure 7: Reservoir Street presentation, which primarily consists of 4-storeys with a recessed 5<sup>th</sup> element, noting that the 5-storey is recessed by 3-metres from the 4-storey built form aligned to Reservoir Street**

The recessed roof terrace level, which includes a bathroom, will not be perceptible from the public domain, ensuring that the building is visually compliant with the storey control as it presents to the street and lane frontages.



**Figure 8: Excerpt of the 6<sup>th</sup> storey, noting that the W/C (highlighted in pink and indicated by arrow) is the only element that contributes to this level being counted as a storey**



**Figure 9: Excerpt from the architect's design report, which shows the recessed nature of the uppermost 6th storey and associated pergola, lift and fire stair components, which are primarily responsible for the height variations. The perimeter planting will also assist in minimising the visual impact of the upper-level components when viewed from public vantage points around the site.**

The building design has also incorporated setbacks on the western façade and upper level of the southern facade to reduce any perceived visual bulk and shadow impacts and minimise any impacts associated with the height and FSR exceedance. In addition, to further create a better transition, the building steps down to 3 storeys on the northern frontage as it adjoins the two-storey terraces at the northeastern corner of the site.

On this basis, the built form will present as compliant with the envisaged number of storeys that apply to the site and is thereby considered to be consistent with the desired future character, notwithstanding the FSR variation.

Despite the non-compliance, the proposal achieves the objectives of the development standard and the zoning, as demonstrated in the following table:

Consistency with the objectives of the height standard in the LEP	
Objectives	Assessment
4.4 Floor space ratio (1) (a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,	<p>This objective is considered strategic. Nevertheless, the proposed FSR variation facilitates the provision of high-quality commercial and retail floor space.</p> <p>The retail floor space supports the surrounding mixed-use area, while the commercial space will provide economic growth and employment opportunities in a well-served location.</p>

	<p>On this basis, the FSR variation does not generate any inconsistency with the objective.</p>
<p><i>(1) (b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,</i></p>	<p>As outlined above, the proposed FSR variation is associated with a development that includes a numeric FSR close to the numeric density allocated for the site.</p> <p>The minor nature of the departure would not generate any discernible impacts on land use intensity beyond that of a compliant development.</p> <p>The subject site and its surroundings are well-served by public transport, including Central Station. The major bus terminus at Eddy Avenue is also within walking distance.</p> <p>There is also sufficient capacity along surrounding streets for pedestrian traffic generated by the proposal and the associated FSR variation. The FSR variation can be attributed to non-habitable service areas, which do not contribute to the intensity of development on the site.</p> <p>On this basis, the FSR variation does not generate any inconsistency with the objective.</p>
<p><i>(1) (c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,</i></p>	<p>As outlined above, the proposed minor FSR variation will not generate any discernible demands beyond that of development with a compliant FSR.</p> <p>The site would be considered one of the most well-served in the Council area due to its proximity to established services (Central Station) that have recently undergone major upgrades.</p> <p>The proximity of the site to the bus interchange and light rail services also ensures that the intensity of development is commensurate with the capacity of existing and planned infrastructure.</p> <p>On this basis, the FSR variation does not generate any inconsistency with the objective.</p>
<p><i>(1) (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.</i></p>	<p>As outlined above, the FSR variation will be associated with the presentation of a 5-storey commercial building that is consistent with the desired future character (5-storeys).</p> <p>The uppermost communal level is recessed behind substantial canopy tree planting areas on the rooftop. The FSR variation is contained within an attractive and articulated built form, which is consistent with the scale of the built form</p>

	<p>anticipated by the controls. On this basis, the desired future character is achieved despite the minor FSR variation.</p> <p>As also outlined above, the FSR variation will not be responsible for any adverse impacts in relation to the streetscape, heritage, visual bulk, privacy view loss, or shadow impacts.</p> <p>The provision of effective setbacks of 1.5-5.5m along the western side reasonably minimises impacts to the most vulnerable neighbouring buildings, such as the converted warehouse building to the west.</p> <p>There are no other adverse impacts to the north, south, or east of the site, noting that the majority are commercial buildings separated by the width of Commonwealth and Reservoir Streets.</p> <p>On this basis, the FSR variation does not generate any inconsistency with the objective.</p>
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**Consistency with the objectives of the MU1 Mixed Use zone**

Objectives	Assessment
<ul style="list-style-type: none"> <li>• <i>To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.</i></li> <li>• <i>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.</i></li> <li>• <i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i></li> <li>• <i>To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.</i></li> <li>• <i>To ensure land uses support the viability of nearby centres.</i></li> <li>• <i>To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.</i></li> </ul>	<p>The proposed FSR variation facilitates the provision of a contemporary retail and commercial building that will provide high-quality spaces for visitors and employees.</p> <p>The site's proximity to established and recently upgraded services makes it ideal for the proposed development form and use.</p> <p>The minor and inconsequential impact of the FSR does not generate any inconsistency with the zone objectives.</p> <p>Overall, the proposal and FSR will align with this zone's objectives.</p>

The proposal complies with the objectives of the FSR control and the MU1 Mixed Use Zone, as indicated in the assessment in the table above.

Based on the above assessment, it is considered that strict compliance with the LEP FSR standard is unreasonable and unnecessary in this instance.

*(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*

**Assessment:** The above assessment, which demonstrates that the FSR standard is unreasonable or unnecessary, is considered to confirm that there are sufficient environmental grounds to support the FSR variation in this instance.

The following points are considered to constitute sufficient environmental planning grounds:

- No adverse or unreasonable external impacts from the FSR variation
  - The assessment above demonstrates that the FSR variation is not responsible for any adverse or unreasonable external impacts on the surrounding neighbours to the north, east, south or west.
  - The built form (including the FSR variation) has been appropriately designed to provide effective setbacks to the most vulnerable of these neighbours, the converted warehouse building to the west.
  - The provision of setbacks of 1.5-5.5m is beyond the typical nil setbacks prevalent in the surrounding context for commercial buildings and shop-top housing developments.
  - The provision of such setbacks thereby represents a sympathetic design response that has suitably distributed the FSR and built form on the site to minimise impacts.
  - The minor nature of the FSR variation embedded in the articulated built form ensures that such GFA beyond the built form is not responsible for any adverse or unreasonable impacts.
- Desired future character is achieved
  - As outlined above, the minor FSR variation is associated with a built form that presents as a 5-storey building, which is consistent with the scale of the built form anticipated by the LEP and DCP height controls.
  - The built form sympathetically responds to the sloping nature of the site as well as the flood requirements.
  - The built form sensitively transitions from the terraces to the north along Commonwealth Street down to the corner of Reservoir Street.
  - The 4-storey built form is well below the height limit at the northern end, adjoining the terraces, whilst the roof components are substantially recessed to be imperceptible from Commonwealth Street.

- The 5-storey presentation to Reservoir Street is also consistent with the scale of built form anticipated by the controls whilst being subservient to the established taller buildings to the west and southwest along Reservoir Street.
  - The built form is also subservient to the 8-storey commercial building directly to the southeast.
  - The appropriate nature of the built form as it presents to the respective street and lane frontages ensures that the FSR variation is associated with a built form that is consistent with the desired future character despite the minor numeric variation.
- Minor and discreet elements associated with the variation
    - As outlined above, the components of the GFA that can be attributed to the FSR variation are embedded in the built form in a discreet manner and would not be readily perceptible from surrounding public and private vantage points.
    - Such assessment confirms that the FSR variation would be indiscernible to the casual observer. When this factor is considered in conjunction with the above two environmental grounds, it is confirmed that there are sufficient environmental grounds to sustain the minor numeric variation in this instance.

Based on the above points, it is considered that there are sufficient environmental planning grounds to permit the FSR variation in this instance.

## **Conclusion**

For reasons mentioned herein, this Clause 4.6 variation is forwarded to support the development proposal at 141 – 155 Commonwealth Street, Surry Hills. The consent authority is requested to consider it favourably.