Attachment C

Clause 4.6 Variation Request – Floor Space Ratio

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Alterations and Additions and Adaptive Re-use of a Heritage Listed Former Warehouse (P-24731)

25-27 Dunning Avenue, Rosebery

Submitted to City of Sydney Council
on behalf of Dunning Proprietor Pty Ltd

11 April 2025

Acknowledgment of Country

Towards Harmony by Aboriginal Artist Adam Laws

Gyde Consulting acknowledges and pays respect to Aboriginal and Torres Strait Islander peoples past, present, Traditional Custodians and Elders of this nation and the cultural, spiritual and educational practices of Aboriginal and Torres Strait Islander people. We recognise the deep and ongoing connections to Country – the land, water and sky – and the memories, knowledge and diverse values of past and contemporary Aboriginal and Torres Strait communities.

Gyde is committed to learning from Aboriginal and Torres Strait Islander people in the work we do across the country.

This report was prepared by:

Approver:	Stephen Kerr
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Project:	Alterations and Additions and Adaptive Re-use of a Heritage Listed Former Warehouse (P-24731)
Report Version:	Final

This report was reviewed by: Stephen Kerr

Contents

Glossary and Abbreviations

Term/Acronym	Description
AS	Australian Standards
BCA	Building Code of Australia
BC Act	*Biodiversity Conservation Act 2016*
CEMP	Construction Environmental Management Plan
Council	City of Sydney Council
CPTED	Crime Prevention through Environmental Design
DA	Development Application
DCP	Development Control Plan
EP&A Act	*Environmental Planning and Assessment Act 1979*
The Regulations	Environmental Planning and Assessment Regulations 2021
ESD	Ecologically Sustainable Development
FSR	Floor Space Ratio
GFA	Gross Floor Area
INP	Industrial Noise Policy
LALC	Local Aboriginal Land Council
LEP	Local Environmental Plan
LGA	Local Government Area
NCC	National Construction Code
SEPP	State Environmental Planning Policy
WSUD	Water Sensitive Urban Design

1. Introduction

This revised request has been prepared in accordance with Clause 4.6 of the *Sydney Local Environmental Plan 2012* (LEP) to justify a variation to the floor space ratio (FSR) standard in a development application (DA) submitted to the City of Sydney Council (Council) for the site at 25-27 Dunning Avenue, Rosebery. Since lodgement in February 2025, the DA has been amended in response to the Council's request for information.

The DA is for alterations and additions and adaptive re-use of a former warehouse building on the site, which is listed as a heritage item under the LEP. The proposed development includes the following:

- Retention of the majority of the sawtooth roof, including its overall form and structural members.
- Retention of the majority of the external enclosing walls. The façades will be repaired with the existing openings and the 'Paradise Garage' sign retained.
- Removal of amenities, stairs, partition walls, fixtures and mezzanine floors.
- Insertion of a new service core and additional fire stairs in the northern and eastern parts of the building respectively.
- Reconfiguration of the ground floor level to provide a shared lobby and retail floor space, car parking, bicycle storage, end of trip facilities and building services.
- Construction of a new level 2 with a void on the southern side, which is contained within the existing building envelope.
- Construction of a three-storey addition above the sawtooth roof, which is setback from the Dunning Avenue and Cressy Street frontages.

The proposal will result in a five-storey building providing floor space for commercial premises.

The site is subject to a maximum FSR of 1.5:1 (or 1,434 sqm in gross floor area (GFA)) under Clause 4.4 Floor space ratio of the Sydney LEP 2012. The proposal also benefits from additional floor space pursuant to the following provisions in the LEP:

- Clause 6.13 End of journey floor space – This clause allows for an additional floor space equivalent to that occupied by end of journey facilities, comprising showers, change rooms, lockers and bicycle storage areas, but not exceeding an FSR of 0.3:1. As illustrated in the architectural drawings, the proposed end of trip facilities amount to a GFA of 64 sqm, equating to an FSR of 0.067:1. The above end of journey floor space can be applied to the proposal in addition to the maximum FSR for the site.
- Clause 6.14 Community infrastructure floor space at Green Square – The site is within Area 6 according to the FSR Map and is eligible for a bonus FSR of up to 0.5:1 if the development includes Green Square community infrastructure. The applicant proposes to enter into a voluntary planning agreement (VPA) with Council for a monetary contribution towards provision of community infrastructure within the Green Square redevelopment area, in accordance with Schedule 10 of the *Sydney Development Control Plan 2012* (DCP). The monetary contribution relates to the community infrastructure floor space equivalent to an FSR of 0.5:1.

When considering the additional floor space above, the site benefits from an aggregate maximum FSR of 2.067:1 (1,976 sqm).

Clause 4.6(8) prescribes matters the contravention of which does not allow the granting of development consent. The end of journey floor space and community infrastructure floor space at Green Square are not prescribed in the above sub-clause and is understood to be variable. However, to be prudent, this Clause 4.6 variation considers the full extent of the exceedance over and above the base FSR control under Clause 4.4 of the LEP.

Request for information from Council

The DA was officially lodged with Council on 3 February 2025. On 13 March 2025, Council issued a request for information (RFI) requiring reduction to the floor area in order to lower the degree of variation to the FSR controls (base and bonus FSRs), among other things. This is to be achieved by expanding the upper level setback from the Dunning Avenue frontage, and expanding the void on level 02.

Council's advice has been carefully considered. A meeting between the project team and Council's planning staff subsequently occurred on 25 March 2025 to discuss the items stated in the RFI letter. As a result of the discussions, the design scheme has been amended in the following manner:

- Reducing the GFA and FSR from the lodged scheme of 2,495 sqm / 2.61:1 to the current proposal of 2,477 sqm / 2.59:1; and
- Increasing the size of the void at level 02 from 5.895m-7.11m x 11.17m to 7.5m-8.715m x 11.17m. The enlarged void aligns with the southern-most gutter line and the supporting trusses of the sawtooth roof above.

Any further increase to the upper level setback to the Dunning Avenue frontage would result in negligible change or benefit to the streetscape. The scale, built form and setbacks of the proposed vertical addition (in its current form) respond appropriately to the site's corner location, as well as the prevailing scale of recently completed and approved buildings in the vicinity. The currently proposed setbacks from both Dunning Avenue and Cressy Street are adequate, and the addition would not adversely affect the character and amenity of the streetscape or surrounding development, and would also be subservient to the heritage item on the site.

The void is directly above the commercial lobby and retail space at level 01. The proposed dimensions are adequate to allow appreciation of the spatial volume of the heritage building.

Quantum of variation

As a result of the design revision, the proposed development will have an FSR of 2.59:1 or a GFA of 2,477 sqm. For the purposes of this Clause 4.6 variation request, the proposed development will result in a variation to the FSR standard (base control) by 1.09 or 1,043 sqm (73%). If the additional floor space eligible for the site is factored in, the proposal would exceed the combined total FSR by 0.523:1 or 501 sqm.

As Commissioner Clay of the NSW Land and Environment Court (LEC) explained in his decision in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112, the application of Clause 4.6 should not be constrained by a perceived maximum number by which a standard may be varied. This decision was upheld by the Chief Judge of the LEC upon appeal in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying certain development standards to particular development, and to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

This request has been prepared having regard to the Department of Planning and Environment's *Guidelines to Varying Development Standards* (November 2023) and various recent decisions in the NSW Land and Environmental Court and the NSW Court of Appeals.

This request demonstrates that compliance with the FSR development standard is unreasonable and unnecessary in the circumstances of the proposal, as the objectives of the development standard are achieved notwithstanding the non-compliance with the standard.

There are sufficient environmental planning grounds to justify the variation as detailed in the body of this request.

It is therefore appropriate in these circumstances for Council, as the consent authority, to grant the variation to the development standard.

2. Standard to be Varied

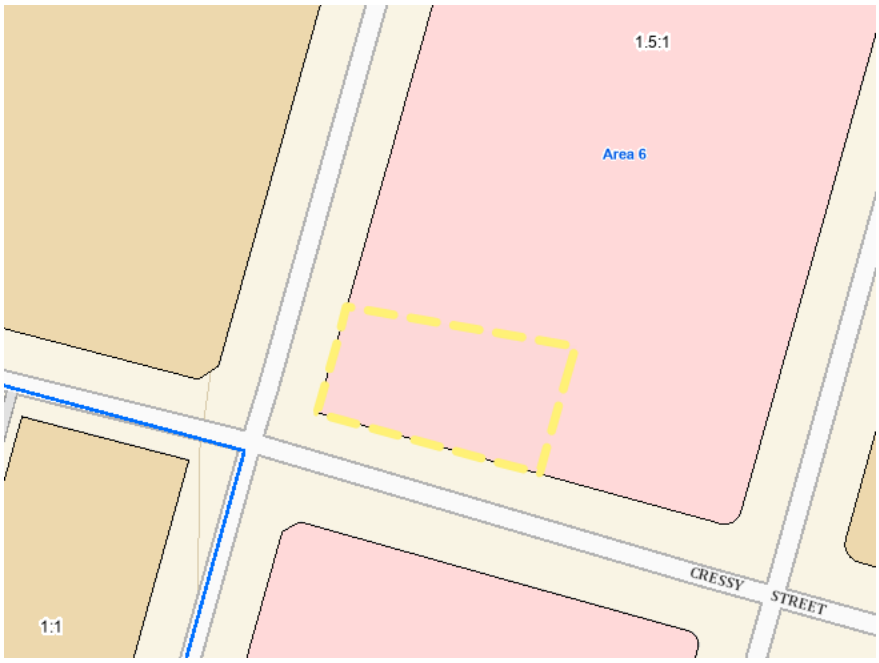
2.1 Floor space ratio development standard

The standard that is proposed to be varied is the floor space ratio (FSR), which is set out in Clause 4.4 of the Sydney LEP 2012 as follows:

4.4 Floor space ratio

…

(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.



Map 1 Excerpt of the FSR Map, with the site outlined in yellow dotted line (source: NSW Planning Portal)

The development standard to be varied is not excluded from the operation of Clause 4.6 of the LEP.

Clause 4.4 and the FSR Map prescribe a maximum FSR of 1.5:1 (or 1,434 sqm GFA) for the site.

2.2 Additional floor space outside Central Sydney

Relevantly, the proposal also benefits from additional floor space pursuant to the following provisions under Part 6, Division 2 of the Sydney LEP 2012:

- Clause 6.13 End of journey floor space – This clause allows for an additional floor space equivalent to that occupied by end of journey facilities, comprising showers, change rooms, lockers and bicycle storage areas, but not exceeding an FSR of 0.3:1.
- Clause 6.14 Community infrastructure floor space at Green Square – The site is within Area 6 according to the FSR Map and is eligible for a bonus FSR of up to 0.5:1 if the development includes Green Square community infrastructure.

3. Extent of Variation

The proposed development has an FSR of 2.59:1 or a GFA of 2,477 sqm. For the purposes of this Clause 4.6 variation request, the proposed development will result in a variation to the FSR standard under Clause 4.4 (1.5:1) of the Sydney LEP 2012 by 1.09:1 or 73%. The variation equates to a GFA of 1,043 sqm.

When factoring in the provisions under Part 6, Division 2 of the Sydney LEP 2012, the site would be eligible for the following additional floor space over and above the base FSR control:

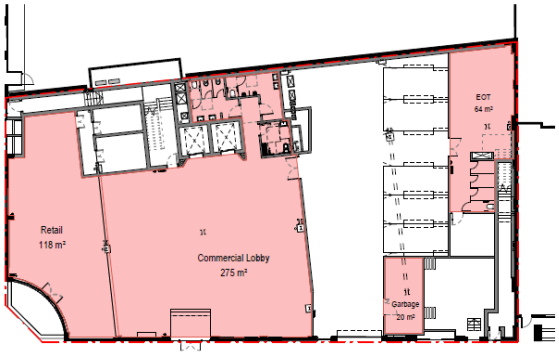
- Clause 6.13 End of journey floor space – As illustrated in the architectural drawings, the proposed end of trip facilities amount to a GFA of 64 sqm, equating to an FSR of 0.067:1. The above end of journey floor space can be applied to the proposal in addition to the maximum FSR for the site.
- Clause 6.14 Community infrastructure floor space at Green Square – The applicant proposes to enter into a voluntary planning agreement (VPA) with Council for a monetary contribution towards the provision of community infrastructure within the Green Square area, in accordance with Schedule 10 of the Sydney DCP 2012. The monetary contribution relates to the community infrastructure floor space equivalent to an FSR of 0.5:1.

If the above additional floor space is taken into account, the proposal would exceed the aggregate FSR for the site (i.e. 1.5:1 + 0.067:1 + 0.5:1 = 2.067) by 0.523:1 or 501 sqm (25%).

The above is summarised in the table below. The GFA calculation drawings are reproduced below.

Table 1 Summary of the proposed FSR, maximum FSR standard and additional floor space eligible for the site

Item	FSR	GFA (sqm)
Proposed development	2.59:1	2,477
(A) FSR standard (base – Clause 4.4)	1.5:1	1,434
Extent of variation sought	**1.09:1 (73%)**	**1,043 (73%)**
(B) End of journey floor space (Clause 6.13)	0.067:1	64
(C) Community infrastructure floor space at Green Square (Clause 6.14)	0.5:1	478
Aggregate total FSR available to the site (A + B + C)	2.067:1	1,976
Extent of exceedance over and above the aggregate total FSR available to the site	**0.523:1**	**501**



1 | L1 GFA - PROPOSED
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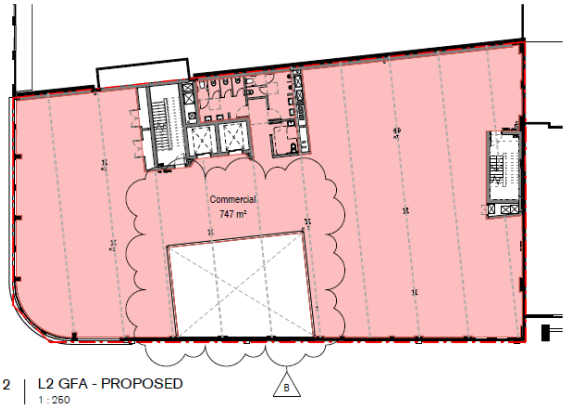

2 | L2 GFA - PROPOSED
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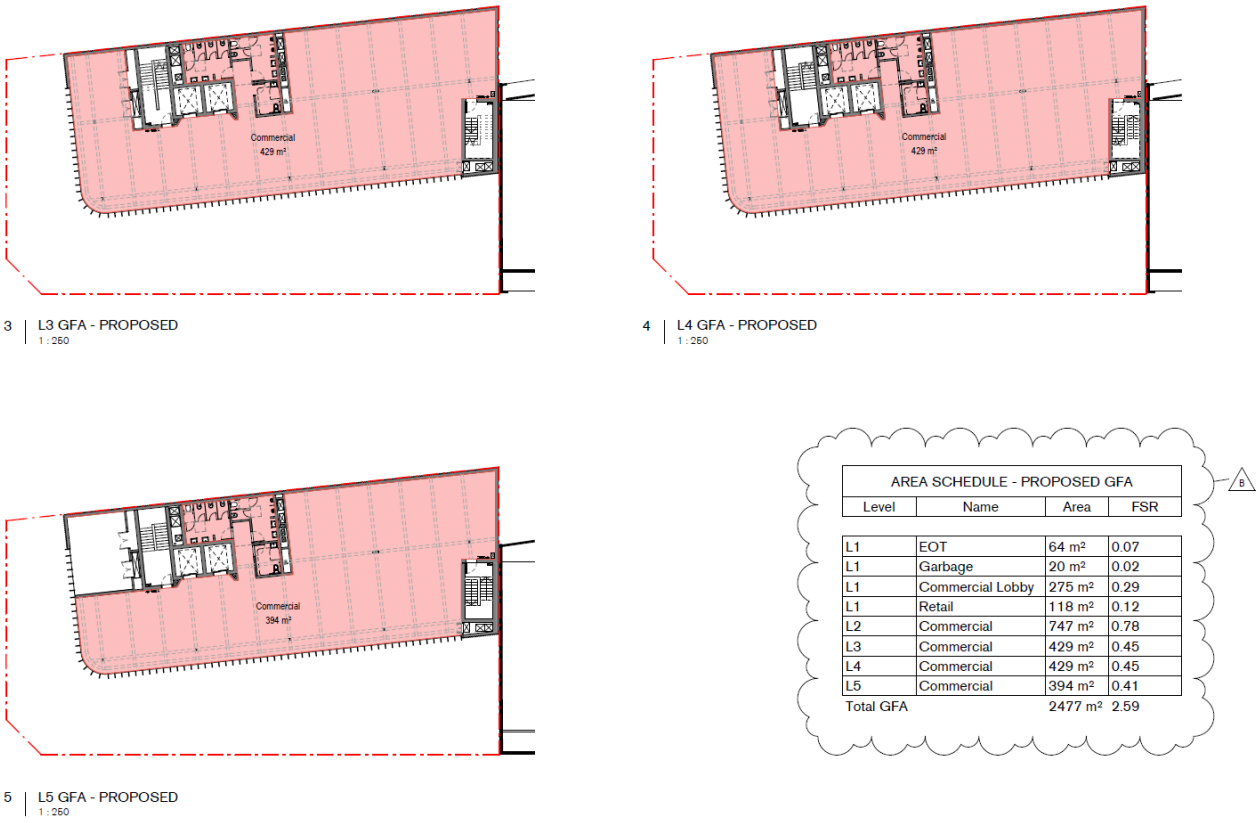


Figure 1 Excerpts of GFA measurement drawings, including area schedule (source: Tzannes)

The proposal has carefully considered the matters previously raised by Council and as part of the appeal proceedings in the Land and Environment Court with respect to the 2021 DA for the site (Council's reference: D/2021/1491). The previous DA proposed a total FSR of 3.1:1 (2,966 sqm GFA), and resulted in a variation to the base FSR standard by 1.6:1 (107%).

By way of comparison with the 2021 proposal, the current scheme has substantially reduced the FSR and GFA by 0.49:1 and 471 sqm respectively. As will be elaborated in the following sections, the proposal presents a well-considered design with an appropriate scale and form that respect the Post-War Functionalist warehouse on the site. The building is also consistent with the scale of recent residential apartment developments in the locality.

When compared to the DA as lodged in February 2025, the current proposal has further reduced the GFA by 18 sqm from 2,495 sqm to 2,477 sqm, with the FSR decreased from 2.61:1 to 2.59:1.

4. Unreasonable or Unnecessary

In this section, it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by Clause 4.6(3)(a) of the Sydney LEP 2012.

The Court held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. See *Wehbe v Pittwater Council* [2007] NSWLEC 827 *(Wehbe).*

The five ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objectives would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)
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 the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

It is sufficient to demonstrate only one of these ways to satisfy Clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827*, 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]).

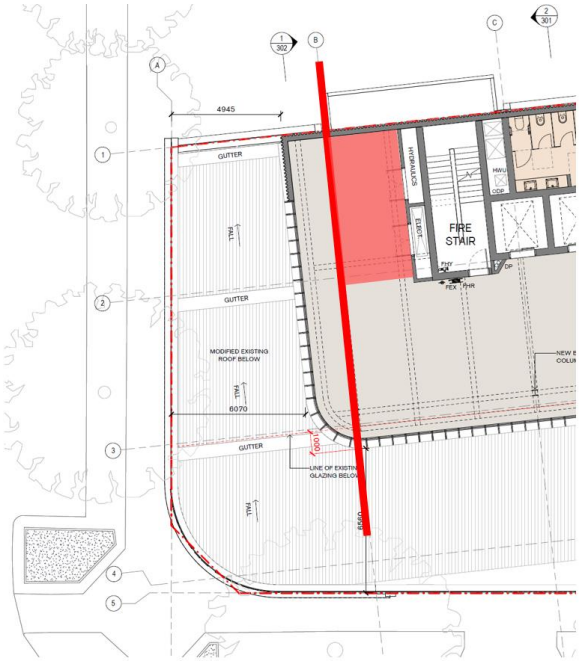
Nonetheless, we have considered each of these ways as follows.

4.1 The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

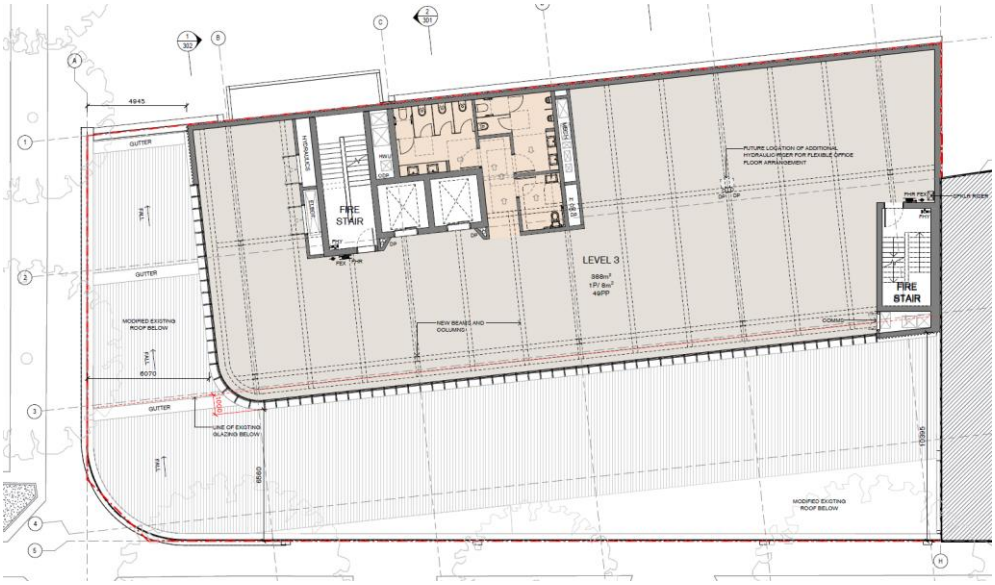
The following table considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (first test under *Wehbe*).

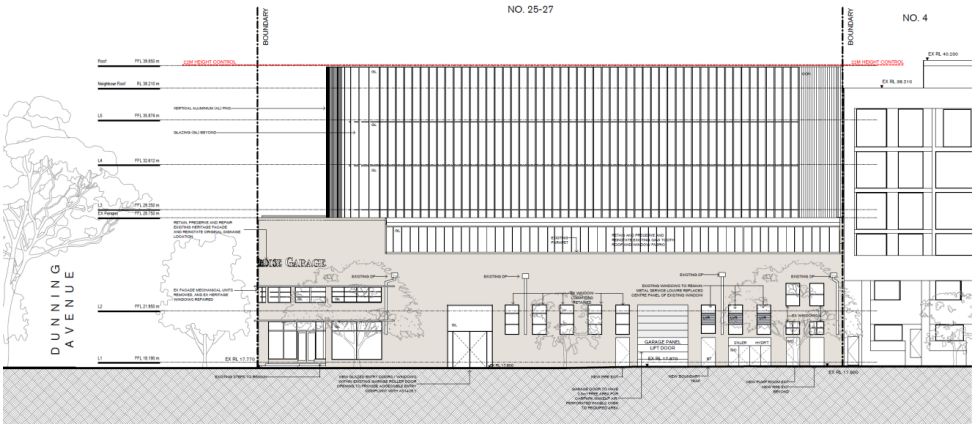
Table 2 Consistency with objectives of Clause 4.4 Floor space ratio

Objective	Demonstration
4.4 Floor space ratio The objectives of this clause are as follows –	
(a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,	The proposal will provide floor space for commercial premises (retail premises at the ground level and office premises at the levels above), which will generate employment opportunities. As the locality is being transformed with recent developments focusing on residential apartments, the proposal would diversify the land uses and secure employment floor space to meet the needs of the community for the foreseeable future. In so doing it uniquely promotes the objectives of the Mixed Use zone applying to the locality. Council's *City Plan 2036: Local Strategic Planning Statement* (LSPS) sets out a 20-year land use vision, which seeks to balance the need for housing and economic activities, while protecting and enhancing local character, heritage, public places and spaces. Priority P3 under the theme of Productivity aims to foster an economic environment that is competitive, resilient and equitable by "*Protecting industrial and urban services in the Southern Enterprise Area and evolving businesses in the Green Square-Mascot Strategic Centre*".

Objective	Demonstration
	The site is located within the Green Square-Mascot Strategic Centre. In conjunction with the Southern Enterprise Area, the Strategic Centre has been identified in the LSPS to have the potential for accommodating up to 11,400 additional jobs by 2036 to meet the baseline jobs target in the Eastern City District Plan. Further, the objective for P3 states that "*The Green Square-Mascot Strategic Centre and Southern Enterprise Area continue to support a range of evolving businesses, services and specialised industries that contribute to the productivity of the Eastern Economic Corridor, Harbour CBD and international trade gateways*." The proposed uses and quantum of floor space are consistent with the above planning priority and objective by providing opportunities for local businesses and services in close proximity to public transport. The design scheme features flexible floor plates that would be suited to a broad range of businesses and enterprises. Council's *Employment Lands Strategy 2014-2019* (dated June 2014) applies to the southern employment lands, South Dowling Street precinct and Parramatta Road precinct. The site is outside the study area of the above strategy. Council is in the process of reviewing the strategy and a new version has not been released. However, given the locational advantage of Green Square in proximity to the Sydney Airport and Port Botany as well as Central Sydney, employment and business uses are expected to maintain their importance in the area in supporting economic growth. The proposal would provide sufficient floor space to facilitate ongoing employment growth at a strategic location and fully satisfy objective (a) for the FSR standard. Council's RFI request has suggested increasing the setback of the vertical addition from the Dunning Avenue boundary up to structural grid B. The north-western part of the floor plate on levels 03 to 05 has been configured for use as meeting areas or 'break-out' spaces. The adherence to the recommended setback to the section B truss (see red bolded line in the figure below) would make the space in between the inner face of the enclosing wall and the building service rooms unsuitable for such purposes. The area in question would become very restricted and difficult to furnish without creating any material public benefits. As such, no additional setback is proposed in the current design. 

Objective	Demonstration
	Figure 2 **Excerpt of the level 03 floor plan with Council's recommended setback indicated in red bold line.** In response to Council's RFI, the current design has generally aligned the void on level 02 to the roof trusses and gutter line above, as well as the extent of the service core. The east-west alignment of the void will present a coherent structural logic to the overall architectural design. The dimensions of the void would also adequately allow for the spatial volume of the former warehouse to be appreciated and understood. It should be noted that the void is directly opposite the passenger lifts. The floor space in between the lift and the northern edge of the void would be used as a reception area. Any further extension of the void towards the north would negate the provision of a meaningful reception or landing space for the future tenancy.  **Figure 3** **Excerpt of the revised level 02 floor plan (source: Tzannes)** The current design would provide additional and functional floor space with good amenity to accommodate future commercial activities.
(b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,	The scale of the proposed built form is consistent with that envisaged by the planning controls and is arguable less than surrounding development owing to the increased setbacks which ensure the additions do not dominate the existing heritage item. The proposal fully complies with the 22m height of buildings standard. As detailed in the Statement of Environmental Effects prepared by Gyde, the proposal is also consistent with the height in storeys (requirement: maximum 6 storeys; proposal: 5 storeys) and setback controls (consistent with adjoining buildings or prevailing setbacks) stated in the Sydney DCP 2012. The heritage listed Post-War Functionalist warehouse on the site will be retained and conserved; it is already constructed to the street boundaries. The proposal incorporates generous setbacks to the upper level addition, which respond to the structural grid of the retained building. The southern elevation of the addition aligns with the second bay of the sawtooth roof with a minor cantilever of 1m; it is 6.560m to 10.395m from the Cressy Street boundary. This setback is splayed in line with the disposition of the roof structures. The setback from Dunning Avenue takes the

Objective	Demonstration
	cue from the orientation of the steel trusses. The western façade is 4.945m to 6.070m from the Dunning Avenue boundary. The above design solutions minimise the massing and bulk of the addition as viewed from the public domain, thereby maintaining the visual prominence of the heritage warehouse. The simple geometry of the addition would also avoid visual competition with the form and features of the retained building. The parapet line of the addition echoes the horizontal emphasis of the Functionalist architectural style.  **Figure 2** **Architectural rendering illustrating the proposed development as viewed from Cressy Street, looking east (source: Tzannes)**  **Figure 3** **Excerpt of the level 3 floor plan showing the setbacks from Dunning Avenue and Cressy Street for the vertical addition (source: Tzannes)** The proposed upper level addition relates appropriately to the scale and height of recently completed residential developments in the vicinity to the site.

Objective	Demonstration
	The excerpt of the south elevation below shows that the proposed building is within the 22m height limit (represented by red dotted line) and is consistent with the top floor elements (RL40.23) of the adjoining residential flat building to the east at 13-21 Mentmore Avenue (also known as 4 Cressy Street). The proposal is also consistent with the height of the rooftop pergola (RL39.68) at the residential flat building to the south at 29-31 Dunning Avenue.  **Figure 4 Excerpt of the south elevation of the proposal (source: Tzannes)** The character of the locality is emerging through redevelopment of nearby properties. The proposed development would result in a harmonious streetscape and simultaneously respect and complement the heritage item on the site. The quantum of floor space proposed is by no means incompatible with the surrounding properties and the heritage values of the site. The proposed commercial land use is not deemed to be high intensity in nature, as the building would mostly be occupied during business hours from Monday to Friday. The dispersion of employment floor space in an area increasingly dominated by residential development would optimise opportunity for people to live close to work and promote walking and cycling. The proposal encourages these active transport modes for future staff and visitors through the provision of bicycle parking and end-of-trip facilities. The proposal only provides for five car spaces, including one loading bay, which are well below the maximum permitted under the LEP (being 20 car spaces) and would not result in significant vehicular traffic. The proposal therefore satisfies objective (b) of the standard.
(c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,	The site has access to utilities and services, localised upgrade or adjustment to support the use could be undertaken as part of the future development. The proposal is not expected to affect the capacity of the existing and planned infrastructure in the locality. The applicant proposes to enter into a voluntary planning agreement with Council for a monetary contribution towards the provision of community infrastructure within the Green Square redevelopment area. If agreed to by Council, the proposal will facilitate further upgrades or embellishment of community infrastructure in the area. The proposal therefore satisfies objective (c) of the standard.
(d) to ensure that new development reflects the desired	The objectives of the MU1 Mixed Use zone are, among other things, to encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities; to ensure that new development provides diverse and

Objective	Demonstration
character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.	active street frontages; and to encourage business, retail, community and other non-residential land uses on the ground floor of buildings. The zone objectives indicate that the desired future character of the locality is to comprise a diversity of land uses to support employment generation, enable street activation, and contribute to vibrancy of public spaces. The purpose and form of the development are consistent with the desired future character of the locality. The proposal is compatible with the characteristics of the site and is sympathetic to the heritage values and attributes of the retained warehouse. The adaptation of the heritage item will ensure its ongoing protection and retain its physical and economic presence in a changing context. The proposed addition has been carefully designed to be subservient to the retained warehouse and to clearly delineate the old and new, while being consistent with the emerging built form and scale in the locality. The proposal has been designed to minimise any adverse impacts on the amenity of the locality, including: • **Overshadowing** – The proposal will result in some additional overshadowing of the northern elevation of the residential flat building at 29-31 Dunning Avenue. However, the additional shadows would fall on the bedroom windows and associated private open space of the split-level apartments at the ground and first floors, which benefit from separate living area and primary private open space. Nevertheless, these north-facing bedroom windows would still receive 2 hours of sunlight in mid-winter. Shadows on the other apartments would gradually shift away during mid-winter (and beyond), such that a minimum of 2 hours of direct sunlight will be maintained for the living areas of those units. • **Privacy** – The proposal has incorporated solid walls on the northern and eastern elevations, and would not result in any adverse privacy impacts on the northern adjoining sites and the residential apartment complex at 13-21 Mentmore Avenue / 4 Cressy Street. The subject site is separated from the residential flat building to the south at 29-31 Dunning Avenue by a 20m wide local road. The degree of separation exceeds the requirements of the Apartment Design Guide. • **Views** – The upper level apartments within the residential flat building at 29-31 Dunning Avenue currently benefit from distant views that include part of the Sydney CBD skyline. While the proposed development exceeds the maximum floor space ratio, the proposed building complies with the maximum building height of 22m under the Sydney LEP 2012. The proposal would obscure part of the existing city skyline from the balcony of unit 503 and the roof terrace of unit 404. As detailed in the Statement of Environmental Effects, the impact on the apartments in question is minor to moderate in nature and is reasonable as: - The views in question comprise distant views of the city skyline, which are already partly obscured by other buildings in the locality. They are not considered highly scenic in nature. - The views are obtained across multiple (if not numerous) intervening properties to the north of the subject site. The benefits of the views to the city skyline should not be expected to be permanent, but would eventually be affected to greater or lesser extent by future development in accordance with the planning controls. - The proposal represents a skilful design and allows retention of the majority of the city skyline views (although it should be acknowledged that future redevelopment of the adjoining property to the north may result in a greater loss of views).

Objective	Demonstration
	Overall, the proposal reflects the desired future character of the locality and has minimised adverse impacts on the amenity of the surrounding properties. The proposal therefore satisfies objective (d) of the standard.

As demonstrated in Table 1 above, the objectives of the FSR development standard are achieved notwithstanding the proposed variation.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827; *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118; *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] 233 LGERA 170*,* [2018] NSWCA 245; and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130; and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the FSR development standard is demonstrated to be unreasonable or unnecessary and the requirements of Clause 4.6(3)(a) have been met on this way alone.

For completeness, the other recognised ways are considered as follows:

4.2 The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.

The underlying objective or purpose is relevant to the development and therefore, this ground is not relied upon.

4.3 The objectives would be undermined if compliance was required with the consequent that compliance is unreasonable.

If flexibility is not exercised in the application of the FSR standard in this instance, the objectives would be undermined in so much as it would prevent the adaptive re-use of the heritage item for a purpose which promotes the desired future character of the locality as a genuine Mixed Use zone.

4.4 The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary.

While it is noted there have been numerous instances where flexibility has been appropriately applied to the floor space ratio standard in the locality, we do not consider that the standard has been abandoned by Council in this case and this reason is not relied upon.

4.5 The zoning of the land is unreasonable or inappropriate.

The zoning of the land is reasonable and appropriate and this reason is not relied upon.

5. Sufficient Environmental Planning Grounds

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston C J observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning grounds to justify the departure of the FSR development standard are as follows:

- **Desired future character of the locality**

  The proposed development complies with the maximum height standard of 22m for the site under the Sydney LEP 2012.

  The proposed vertical addition will result in a five-storey building and complies with the 6-storey height control stipulated in the Sydney DCP 2012. The DCP specifies that the front setbacks are to be consistent with the adjoining properties or the prevailing pattern of the street. The adjoining residential apartment complex at 13-21 Mentmore Avenue / 4 Cressy Street has been developed to the street boundaries. The adjoining commercial / light industrial buildings to the north have nil setbacks from the street alignment. The proposal will retain the heritage listed former warehouse on the site, which is already constructed to the property boundaries. The proposal is therefore consistent with the setback control.

  The proposed development will deliver floor space for commercial purposes. It will diversify the mix of land uses in the locality and enable employment generation. The retail premises and commercial lobby at the ground floor will provide activation, improve community safety and enhance the vibrancy of the public domain. The form and nature of the development are consistent with the objectives of the zone and the desired future character of the locality.

- **Heritage conservation**

  The adaptive re-use of the Post-War Functionalist warehouse for commercial purposes promotes the conservation and ongoing protection of the item. The nature of commercial uses necessitates larger, open floorplates and centralised services, which in this instance would minimise disturbance and removal of the heritage fabric, and would allow the spatial arrangement and quality of the building interior to be appreciated and understood.

  The additional costs associated with adaptively reusing and in so doing conserving a heritage listed building are a material consideration. There are significant costs associated with conservation of the heritage item, including restoration of building fabric, and upgrades to services and construction to meet the current building code and standards and ensuring the fabric and materials of the addition are of a high standard so that they endure and respect the heritage item. The provision of additional floor space in the form of the vertical addition and internal re-arrangement is essential to fund the conservation works and to deliver a functional building that suits contemporary needs.

  That portion of the floor space exceeding the FSR standard is primarily contained within the upper floor addition. The addition has been setback from both the Dunning Avenue and Cressy Street alignments, so that the new work will be recessive and subservient to the retained former warehouse. The simple geometric form of the addition would also minimise competition with the visual primacy of the former warehouse.

The ability to appreciate the internal spatial volume of the building associated with its former warehouse use is acknowledged and is a key consideration in the design scheme. In response to Council's RFI, the dimensions of the void has been increased from 5.895m - 7.11m x 11.17m to 7.5m - 8.715m x 11.17m.

The layout of the void reflects the structural grid of the roof trusses above. It is directly above the commercial lobby and retail space at level 01. The location, layout and dimensions of the void would allow interpretation and understanding of the former function, spatial quality and structural logic of the building.

It is essential for the long-term conservation of the heritage item to facilitate an adaptive re-use of the premises.

The proposal will facilitate retention and restoration of crucial components of the heritage item, including the sawtooth roof form and associated structural members, part of the steel columns and the majority of the external enclosing walls.

The provision of modern commercial floor space within a sensitively designed architectural form will promote the ongoing use, activation and hence protection of the heritage item, allowing it to be utilised and appreciated by the local community.

- **Environmental impacts**

  The proposal has been carefully designed to avoid adverse impacts on the amenity of the neighbouring properties and the heritage significance of the Paradise Garage building. The exceedance of the FSR standard does not result in any detrimental impacts in terms of overshadowing, privacy and view loss.

  In relation to visual bulk and scale, the existing heritage building fully occupies the site. However, the upper level addition, which contains the majority of the floor space above the FSR control, is significantly setback from the Dunning Avenue and Cressy Street alignments to provide an appropriate architectural relationship with the retained building below. Importantly, the height and scale of the proposed addition is also compatible with, and subservient to, other more recent residential developments in the locality, including 29-31 Dunning Avenue and 13-21 Mentmore Avenue / 4 Cressy Street.

- **Floor space ratio and commercial developments**

  The FSR control in the LEP applies to the site regardless of the proposed use. Commercial office buildings have different physical characteristics and functional requirements compared to residential flat buildings and shop top housing.

  Residential apartment development typically involves lower site coverage and smaller building depths to meet the objectives and design criteria in the Apartment Design Guide, including communal open space (25% of the site area), private open space, building separation, solar access and cross ventilation, etc. See aerial photograph below that shows the open space areas within apartment developments.

Figure 5 **Aerial photograph showing residential apartment developments (outlined in red) in the vicinity to the site (denoted by orange arrow), which have provided significant communal open space and separation between buildings (source: Nearmap)**

For a medium scaled commercial development such as the subject proposal, larger floor plates are possible while still being able to provide good amenity to the tenancies in terms of daylight, outlook and flexibility in floor layout. A greater site coverage in conjunction with larger floor plates would inevitably increase the FSR of a development. Further, commercial developments are not required to provide balconies or terraces, which are excluded from floor space calculation as per the definition for GFA in the Standard Instrument LEP, even when balcony structures could contribute to visual bulk, albeit to a lesser degree. The single FSR control applying to the site is arguably not calibrated for commercial buildings. This is reflected in Part 2D of the Apartment Design Guide (ADG) which observes that commercial and retail uses generally fill 80-85% of their envelope, which compares with 70% for residential uses. In this regard the commercial nature of the proposed building creates as much as 21% more floor area than a residential building within the same envelope. The exceedance of the control does not compromise the quality and amenity of the proposed commercial floor space, or result in detrimental environmental impacts on the locality generally.

- **Provision of employment floor space**

  The variation to the FSR control would facilitate an economically feasible development of the land and provide employment floor space in a location with convenient access to public transport and services. The proposed commercial floor space would contribute to the range of businesses and services in the Green Square-Mascot Strategic Centre and assist with achieving the State Government's jobs target. An entirely commercial development is desirable as it will provide local employment opportunities and business services, and reduce travel demand. Strict compliance with the FSR standard would deliver much less benefits to the local economy and represent an underutilised opportunity.

  The range of floor plates included in the proposal would suit a variety of enterprises. Any arbitrary reduction in the size of the floorplates due to numerical compliance consideration would compromise the viability and functionality of the building with no significant or meaningful planning benefits.

For completeness, it should be noted that the degree of the variation is not in itself, a material consideration as to whether the variation should be allowed. There is no constraint on the degree to which a consent

authority may depart from a numerical standard under clause 4.6, based on the decision in *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85].

In short, Clause 4.6 is a performance-based control, and it is possible (and not uncommon) for variations to be approved in the right circumstances.

6. Conclusion

This request for variation to the FSR development standard is made pursuant to Clause 4.6 of the Sydney LEP 2012 and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of the proposed development; and
- There are sufficient environmental planning grounds to justify the contravention of the development standard.

The proposal satisfies the relevant requirements in the LEP such that additional floor space, being end of journey floor space and community infrastructure floor space at Green Square, will be eligible for the site. Where these bonus floor space is included, the degree of departure from the numerical FSR standard would be significantly reduced. However, this request has also demonstrated that the proposal is consistent with the objectives for the FSR standard despite the numerical non-compliance.

The proposal represents a well-considered design scheme with an appropriate scale and form that respect the Post-War Functionalist warehouse on the site. The upper level addition, which contains the bulk of the floor space exceeding the control, is visually subservient to the retained building and exhibits clear order and differentiation between old and new. The conservation of the sawtooth roof, in particular, would enhance the legibility of the warehouse design and facilitate interpretation of the building's original form.

The proposal is also consistent with scale of recent residential apartment developments in the vicinity, and will result in harmonious streetscapes.

The provision of commercial floor space promotes the objectives of the MU1 Mixed Use zone, providing local employment opportunities in an area that has been gentrified and subject to significant housing growth.

The intensity of the proposed development would not result in detrimental impacts on the amenity of the locality.

On the above basis, it is appropriate for Council, as the consent authority, to exercise the flexibility conferred by Clause 4.6 of the Sydney LEP 2012 to support the proposed variation.