

Attachment C

<p>Clause 4.6 Variation Request – Below Ground Floor Space</p>

757-763 George Street, Haymarket

Clause 4.6 Variation Request

Clause 6.60F(6) – Below Ground Floor Space Ratio
Sydney Local Environmental Plan 2012

PREPARED FOR
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1 Introduction

This Clause 4.6 Variation Request accompanies a Development Application (**DA**) for a mixed-use hotel and commercial development at 757-763 George Street, Haymarket (**the site**). The DA proposes to vary the site-specific development standard for below ground floor space ratio (**FSR**) (Clause 6.60F(6)) pursuant to Clause 4.6 of the *Sydney Local Environmental Plan 2012 (SLEP 2012)*.

The objectives of Clause 4.6 of the SLEP 2012 are:

- (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.*

This Clause 4.6 Variation Request demonstrates that strict compliance with the below ground FSR development standard is unreasonable and unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds to justify the variation.

This Clause 4.6 Variation Request demonstrates that:

- Strict application of the standard is unreasonable and unnecessary as the stated objectives of the standard are achieved notwithstanding non-compliance with the standard (*Wehbe* test 1).
- Sufficient environmental planning grounds has been demonstrated to justify the variation to the development standard, summarised as follows:
 - The additional below ground floor space results from the provision of end of journey facilities in Basement 2, which are required to provide the suitable amenities for staff and supports the functions of the development.
 - The provision of end of journey facilities is consistent with the Section 3.11.3 of the *Sydney Development Control Plan 2012 (SDCP 2012)*, relating to the provision of personal lockers and toilet facilities.
 - The proposed additional below ground floor space would not be visible from the public domain and does not alter the external appearance or built form of the development.
 - Given the location of the below ground floor space and its functions, the additional floor space does not give rise to any amenity impacts.
 - In accordance with Clause 6.60F(6)(b), the below ground floor space is proposed to be used solely for the purpose of a retail premises (bar) and services which are ancillary to the hotel. The provision of additional floor space below ground ensures adequate servicing areas are provided for the hotel and also delivers a viable retail space, contributing the desired character, night-life and activation in Haymarket.
 - The provision of end of journey facilities encourages the use of active transport modes by hotel staff for their journey to and from work.
 - By providing the end of journey facilities in the basement, this allows the ground floor to be optimised for the provision of active uses, which would attract pedestrian traffic.

In light of the above, the DA can be supported notwithstanding the proposed variation to Clause 6.60F(6) of the SLEP 2012 relating to the site-specific below ground FSR development standard in accordance with the flexibility afforded under Clause 4.6 of SLEP 2012.



2 Development Standard to be Varied

The development standard sought to be varied under this written request is Clause 6.60F(6) of the SLEP 2012, relating to the site-specific provisions for 757-763 George Street, Haymarket.

2.1 Clause 6.60F 757-763 George Street, Haymarket

Clause 6.60F(6) of SLEP 2012 states:

“The maximum floor space ratio for the part of a building located below ground level (existing) is 0.63:1 if—

(a) part of the building located at or above ground level (existing) will be used for the purposes of hotel or motel accommodation, and

(b) the consent authority is satisfied the part of the building located below ground level (existing) will be used only for retail premises or entertainment facilities ancillary to the hotel or motel accommodation, and

(c) there will be a separate entrance at street level that provides direct access to the part of the building located below ground level (existing).”

With a site area of 1,030.7m², the 0.63:1 below ground FSR standard permits a maximum GFA of 649.3m².

The proposal comprises a below ground FSR of 0.74:1 (GFA of 763m²), which represents a variation to the development standard of 17.5%.

Compliance with subclauses (a) to (c) has been addressed in the Statement of Environmental Effects prepared by Mecone. This Clause 4.6 Variation Request has been prepared to address the numerical non-compliance with the maximum below ground FSR.

2.2 Is the Planning Control in Question a Development Standard?

The below ground FSR provision under Clause 6.60F(6) of SLEP 2012 is a development standard involving a measurable quantum that can be varied.



3 Extent of Variation Proposed

The proposed variation to Clause 6.60F(6) of the SLEP 2012 is summarised in **Table 1** below.

Table 1: Below ground FSR variation summary

Clause	Standard	Proposed	Variation
Clause 6.60F(6) 757-763 George Street, Haymarket	Maximum 0.63:1 GFA: 649.3m ²	0.74:1 GFA: 763m ²	17.5%

The exceedance of the maximum below ground FSR has occurred due to the floor space required to deliver the proposed speakeasy / small bar (retail premises) in accordance with Clause 6.60F(b) of the SLEP 2012; the provision of the end of journey facilities in Basement 2 in accordance with Section 3.11.3 of the SDCP 2012; and the provision of the necessary ancillary hotel services.

As identified in the GFA Diagram within the Architectural Plans (**Appendix 3**), the bicycle storage area in Basement 2 has not been included in the calculation of GFA (see **Figure 1**). This is consistent with the decision in *Britely Property Pty Ltd v Randwick City Council (No 2)* [2020] NSWLEC 1389 (**Britely**), which held that bicycle storage areas located in a basement were excluded from GFA calculation at [58] because:

- Consistent with the decision in *Connoisseur Investments Pty Ltd v Sutherland Shire Council* [2020] NSWLEC 1181, only habitable spaces (or shops, auditoriums or cinemas and the like) in the basement contribute to GFA; and
- The bike cages fell within the storage exclusion in (e)(i) of the GFA definition, i.e. excluding any basement storage.

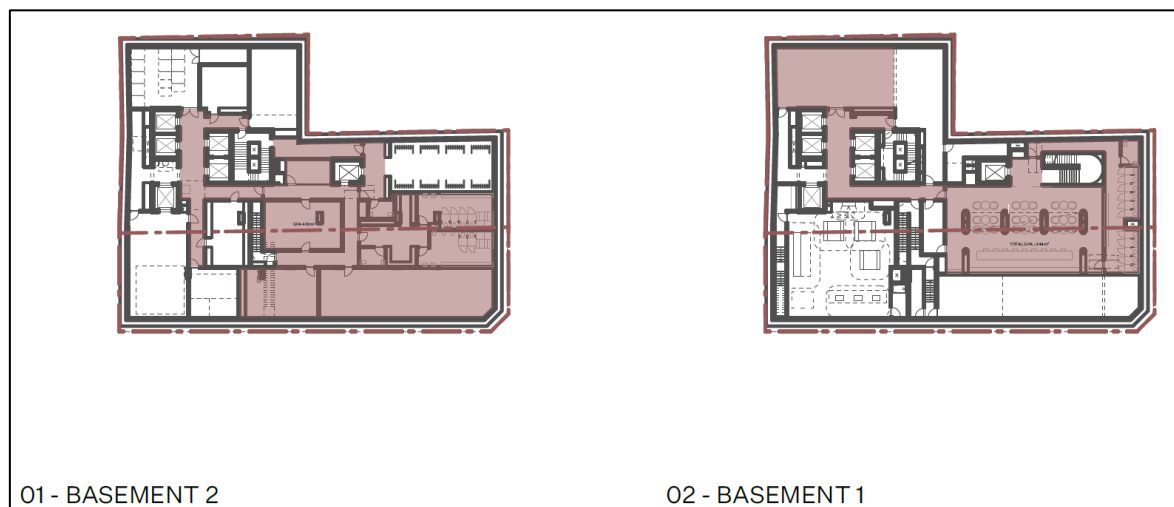


Figure 1 Below ground GFA diagrams

Source: Architecture AND

This Clause 4.6 Variation Request has therefore been prepared to justify the technical non-compliance with the maximum below ground FSR under Clause 6.60F(6).



4 Clause 4.6(3) Justification for Contravention of the Development Standard

Clause 4.6(3) of SLEP 2012 provides that:

4.6 Exceptions to Development Standards

(3) *Development consent must not be granted for 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 contravention of the development standard.*

Furthermore, clause 4.6(1) of LEP 2012 allows for exceptions to development standards where it meets the following objectives:

- (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.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court (**LEC**) in:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90

The relevant matters contained in Clause 4.6 of SLEP 2012, with respect to the below ground FSR development standard, are each addressed below, having regard to these decisions. —

4.1 Clause 4.6(3)(a) Compliance with the development standard is unreasonable or unnecessary in the circumstances

The LEC judgement in *Wehbe v Pittwater Council* [2007] NSW LEC 827 sets out five possible ways for strict application of a standard to be unnecessary or unreasonable. In applying the tests of *Wehbe* to the proposal, the ‘**first way**’ is relevant to establishing that compliance with the maximum below ground FSR development standard pursuant to Clause 6.60F(6) of SLEP 2012 is unreasonable or unnecessary:

- 1. The objectives of the standard are achieved notwithstanding non-compliance with the standard.**

4.1.1 First way: The objectives of the standard are achieved notwithstanding non-compliance with the standard

The objectives of Clause 6.60F are achieved as detailed below.

The objective of this clause is to encourage –

- (a) land uses other than residential accommodation or serviced apartments, and*

Response: The proposal including below ground uses does not include residential accommodation or serviced apartments. The proposed additional below ground GFA includes end of journey facilities for use by the hotel and retail staff and are ancillary to the hotel.

- (b) a satisfactory distribution of built form and floor space that is appropriate to the surrounding area, and*



Response: The proposed additional below ground GFA does not affect the external built form as it is not visible from the public domain. The proposed below ground floor space is appropriate to the surrounding area as it provides a speakeasy / small bar as a retail use which activates the locality and contributes to the nightlife of Haymarket. It also includes end of journey facilities comprising showers, personal lockers and toilets for use by the hotel staff, supporting the operation of the hotel. In this respect, the distribution of floor space is considered appropriate and will not conflict with the surrounding area.

(c) the adaptive re-use of a heritage item.

Response: The proposed additional below ground GFA would support the adaptive re-use of the heritage item on site. As the proposed speakeasy / small bar and end of journey facilities would be located in the basement, it would not result in any visual impact on the heritage item and would facilitate the adaptive reuse of the heritage item for active uses and hotel facilities within the podium.

Given the above objectives relate to the site-specific provisions and are not specific to the FSR of a development, the objectives of Clause 4.4 Floor space ratio have also been addressed below for completeness and consistency.

The objectives of Clause 4.4 are achieved as detailed below.

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

Response: The additional below ground floor space has been designed to provide sufficient floor space to accommodate retail use; ancillary hotel services; and end of journey facilities in the basement. The proposed speakeasy / small bar in Basement 1 is provided in accordance with Clause 6.60F(b) to provide for retail premises that ancillary to the hotel. This will support the provision of active, cultural and late night uses that has direct access to street level, contributing to the viability of the development and promoting night life and activation in Haymarket.

The end of journey facilities are provided in accordance with Section 3.11.3 of SDCP 2012, which are required to provide adequate amenities for the hotel staff. The provision of end of journey facilities would also encourage the use of active transport modes for the journey to and from work for the staff.

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

Response: The additional below ground GFA is located entirely in the basement and is not visible from the public domain. The perceived built form of the development would be the same regardless of the provision of additional below ground floor space. The additional GFA of 113.7m² is relatively minor across the entire development and will not increase the land use intensity of the development. Rather, it enables the provision of a speakeasy / small bar as a retail use in accordance with Clause 6.60F(6)(b) and the end of journey facilities required under Section 3.11.3 of SDCP 2012.

Regarding traffic, while the speakeasy / small bar has direct access to street level, guests will access the premise on foot or by public transport. No on-site parking is provided for guests. Further, the provision of end of journey facilities will also encourage the hotel staff to travel to and from work by active transport modes (walking and cycling). No carparking is proposed for the development and the additional below ground GFA is not anticipated to significantly increase the generation of vehicle traffic.

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

Response: The proposed additional below ground floor space does not significantly intensify the development beyond the level of a compliant development. The proposed below ground floor space will benefit from the proximity to the Haymarket Light Rail Station, bus services and the Central Station providing train and Metro services. The additional below ground GFA of 113.7m² is capable of being serviced by the 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.*

Response: The proposed additional GFA is consistent with the desired character of the Haymarket/Chinatown Special Character Area as identified in Section 2.1.3 of SDCP 2012, particularly in relation to conserving the heritage item on site and maintaining the low building height of the heritage item as a historically significant corner building. The proposal has also been designed to maintain the vistas along Valentine Street to Christ Church St Laurence.

The proposed additional below ground floor space is also consistent with the Haymarket and Chinatown Revitalisation Strategy in that it contributes to the renewal of the Market District of Haymarket, providing a speakeasy / small bar as an active use, adding to the vitality of George and Valentine Streets. The speakeasy / small bar will benefit from above ground retail uses and collectively improving the quality of retail floor space within Haymarket.

In accordance with Wehbe Test 1, it is clearly demonstrated that the proposed variation satisfies the objectives of Clause 6.60F and Clause 4.4 notwithstanding the numerical non-compliance with the standard for the site. As such, strict application of the standard is unreasonable and unnecessary in the circumstances.

4.2 Clause 4.6 (3)(b) – Are there sufficient environmental planning grounds to justify contravention of the development standard

There are sufficient environmental planning grounds to justify the proposed variation to the maximum below ground FSR development standard under Clause 6.60F(6) because:

- The proposed below ground floor space provision is consistent with the objectives of the standard as demonstrated in **Section 4.1.1** of this report.
- The additional below ground GFA results from the proposed speakeasy / small bar as a retail use in accordance with Clause 6.60F(b) and the provision of end of journey facilities in Basement 2 in accordance with Section 3.11.3 of SDCP 2012.
- The proposed speakeasy / small bar is provided as a below ground retail use which will support cultural and late night uses in the locality, contributing to the viability of the development and promoting the late-night economy and activation in Haymarket.
- The provision of end of journey facilities is required to provide the suitable amenities for staff and support the operations and functionality of the hotel development.
- The proposed additional below ground floor space is entirely located in the basement and does not alter the external appearance of the proposed built form. There are no visual impacts arising from the proposed below ground FSR variation. The perceived built form of the development would be the same regardless of the provision of the additional below ground FSR for the speakeasy / small bar and end of journey facilities.
- The proposed variation to the maximum below ground FSR is not anticipated to result in any unacceptable amenity impacts. A Plan of Management has been prepared by Tuscan Corp for the proposed development, including the food and drink premises. The speakeasy / small bar will comply with the patron capacity and any liquor licence approval as stipulated in the development consent.
- The Acoustic Assessment prepared by PWBA also concludes that the proposal is acoustically acceptable and meets all the detailed acoustic criteria with recommendations provided for the design and construction phases of the project.
- The proposed end of journey facilities do not result in any amenity impacts as they are of a specialised nature and are not occupied by people for extended periods.
- The provision of end of journey facilities will encourage the hotel staff to use active transport modes (walking and cycling) to travel to and from the site, which is located in a highly accessible location in Central Sydney.



- The provision of end of journey facilities in the basement will also enable the ground level to be used for active uses including food and drink premises which draws external guests into the building.
- The proposed variation to the below ground FSR standard, does not affect the proposal's ability to provide a mixed-use hotel and commercial development that is of appropriate bulk and scale. Notably, the proposal is compliant with the maximum building height of RL 117.87m and above ground FSR of 11.1 under Clause 6.60F, facilitating an employment-generating development and adaptive reuse of a heritage item in Central Sydney.
- The provision of an additional below ground GFA of 113.7m² is both insignificant and imperceptible in the Sydney CBD and will not result in any unacceptable impacts on the surrounding area.
- A strict compliance with the below ground FSR would require either reduction of end of journey facilities or the size of the speakeasy/small bar. Both options would result in a poorer development outcome as they would either undermine the functionality of the development or compromise the provision of active uses below ground as anticipated in Clause 6.60F.

Based on the above appraisal the proposed development has numerous environmental grounds to justify the variation sought to Clause 6.60F(6) of SLEP 2012.



5 Conclusion

This Clause 4.6 Variation Request is for a variation to the maximum below ground FSR development standard under Clause 6.60F(6) of SLEP 2012. The request justifies the contravention of the development standard in the terms required under Clause 4.6 of SLEP 2012.

As demonstrated throughout this Variation Request, the variation sought to Clause 6.60F(6) is well-founded in this instance and the granting of a Clause 4.6 variation to this development standard is appropriate because:

- Compliance with the development standard is unreasonable and unnecessary as explained in **Section 4.1**;
- There are sufficient environmental planning grounds to justify the contravention of the development standard as demonstrated in **Section 4.2**;
- The underlying objective of the standard is achieved notwithstanding the non-compliance with the standard, as demonstrated in **Section 4.1.1**;
- The extent of variation is considered minor and would be imperceptible in the context of the wider Sydney CBD and the proposed development itself; and
- The proposal represents an optimal development outcome when compared to scenarios for achieving strict compliance.

Accordingly, the proposed minor variation to the maximum below ground FSR development standard is well-justified and warrants approval.

