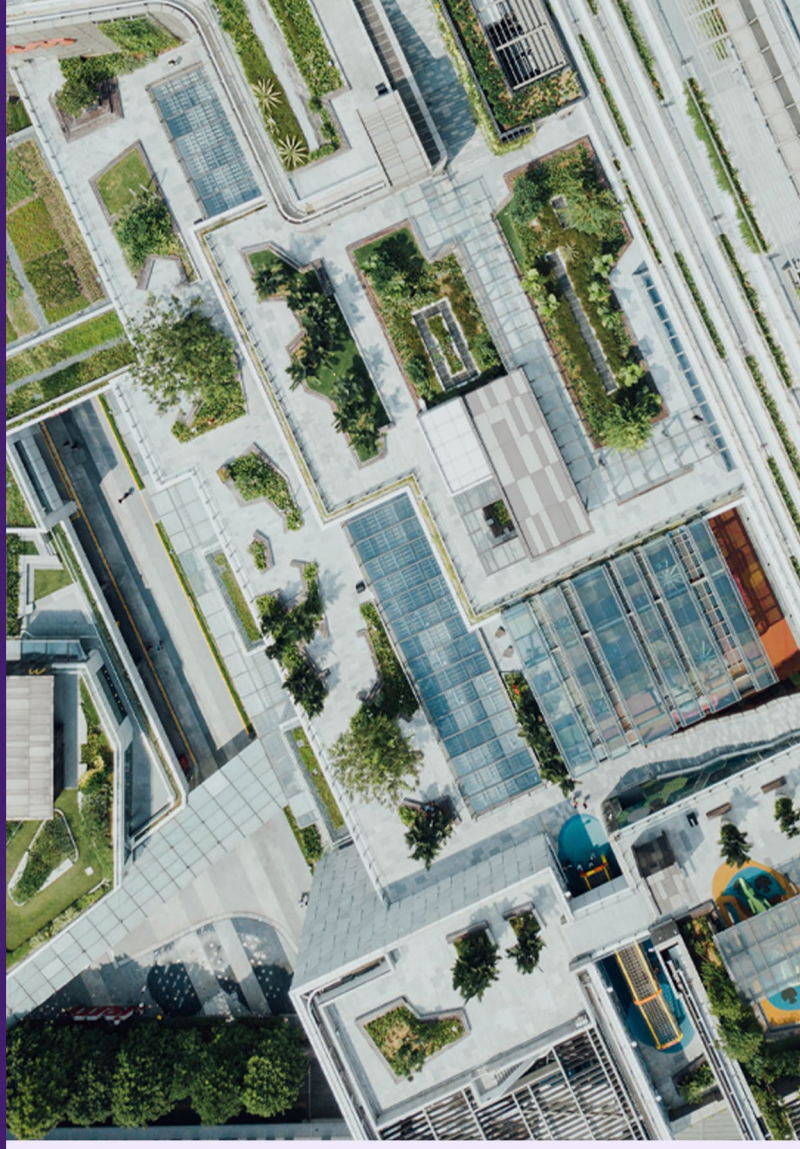
# Attachment D

## Clause 4.6 Variation Request
## Floor Space Ratio

The Planning Studio



# 184-200 Broadway, Chippendale NSW 2008

**Clause 4.6 Variation Request – Floor Space Ratio (FSR)**

On behalf of Tricon Management Group

7 April 2025

The Planning Studio acknowledges the traditional custodians of the lands + waters of Australia, particularly the Gadigal People on whose traditional lands our office is located, and pay our respects to Elders past, present + emerging. We deeply respect the enduring Connection to Country + culture of Aboriginal and Torres Strait Islander peoples and are committed to walk alongside, listen + learn with community as we plan for equitable, sustainable, generous, and connected places. Always was, Always will be.

## Project Director

Kate Bartlett

## Contributors

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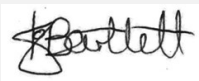
| Revision | Revision Date | Status | Authorised | |
|---|---|---|---|---|
| | | | Name | Signature |
| V1 | 11 December 2024 | Final | Kate Bartlett |  |
| V2 | 7 April 2025 | Post Lodgement | Kate Bartlett |  |

* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

## Contact

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# 1 Introduction

This Clause 4.6 Variation Request seeks to allow a variation to the Floor Space Ratio development standard associated with the Development Application at 184-200 Broadway, Chippendale NSW 2008 (the site).

The DA seeks approval for the adaptive reuse of the 'Telstra Building Exchange' building and construction of a 5-storey tourism and visitor accommodation building (backpackers' accommodation) containing:

- 148 rooms with 1,047 beds in configurations of 4, 5, 6 and 8 bed rooms;
- 570m$^2$ of communal indoor space on lower ground, ground floor and first floor, with lower-ground and first floor for use by guests of the backpackers accommodation only;
- 189m$^2$ of communal outdoor space in new courtyard at lower ground floor that is carved out of the centre of the existing building and open to the sky;
- Unlicensed café (167m$^2$) for a maximum of 78 patrons on ground floor that is publicly accessible;
- Level 5 modified as a licensed bar and roof terrace for a maximum of 250 patrons (Category A Premises), and garden with a lap pool and sunbathing deck along the southern side of the building;
- Primary building entrance from Broadway, with on-site loading occurring at the existing driveway and loading bay off Knox Street; and
- New public access point connecting to Grafton Lane at Level 1 of the building to enable connectivity between the site, City Road and the Lansdowne Hotel.

This Clause 4.6 Variation Request seeks to vary one development standard within the Sydney Local Environmental Plan 2012 (SLEP2012):

- Clause 4.4 – Floor Space Ratio

This Clause 4.6 Variation Request demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of this case and that the justification is well founded. The variation allows for a development that represents the orderly and economic use of the land in a manner which is appropriate when considering the site's context and existing building, and as such, is justified on environmental planning grounds.

As a result, the DA may be approved as proposed in accordance with the flexibility afforded under Clause 4.6 of the SLEP 2012.

# 2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the SLEP 2012 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

**The SLEP2012 Clause 4.6 Exceptions to development standards reads as follows**:

1. The objectives of this clause are as follows—
    a. to provide an appropriate degree of flexibility in applying certain development standards to particular development,

b. to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

2. Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

3. Development consent must not be granted 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.

4. The consent authority must keep a record of its assessment carried out under subclause (3).

Note: this request is the 'document' which sets out the grounds justifying variation in accordance with Clause 35B of the Environmental Planning and Assessment Regulations 2021 (the Regulations).

# 3 The Development Standard to be varied

This Clause 4.6 Variation Request has been prepared in a written format, seeking to justify the variation to the following development standard in the SLEP2012:

- Clause 4.4 (Floor Space Ratio) – which permits a maximum FSR of 3:1. Refer to the Figure below.

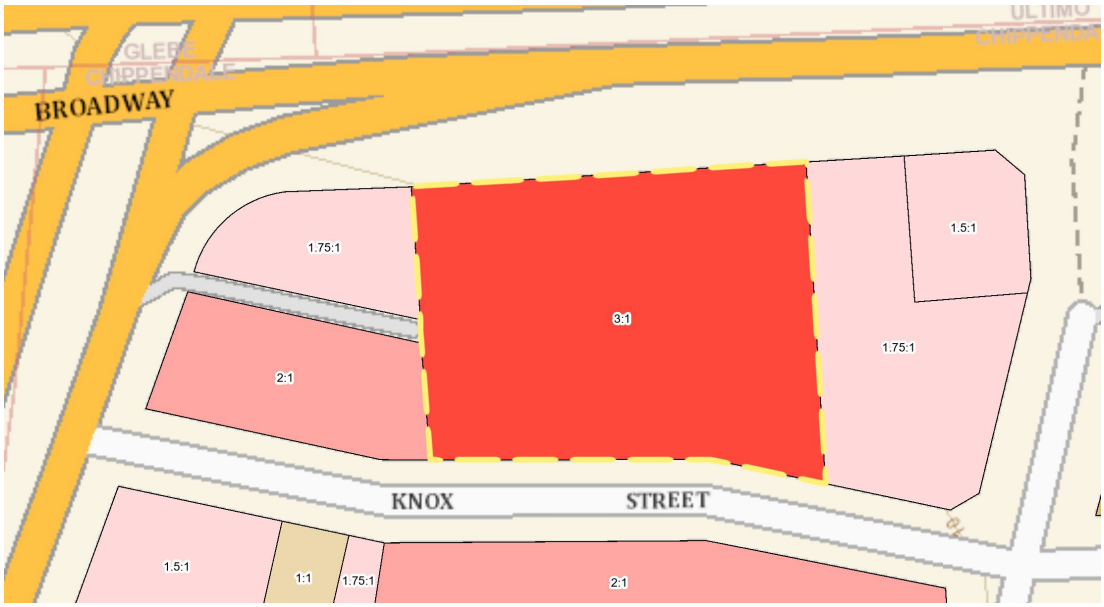


**Figure 1:** Floor Space Ratio SLEP 2012 map extract (NSW Planning Spatial Viewer)

**4.4 Floor Space Ratio**

1) The objectives of this clause are as follows—

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

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

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

   d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.

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.

# 4 Extent of Variation to the Development Standard

The application proposes a FSR of 3.785634:1 (6,746m$^2$), which represents a variation of 1,400m$^2$ or 26.187% to the Floor Space Ratio control.

It is also noted that the existing building on site exceeds the maximum FSR control, with an existing GFA of 5,810.6m$^2$ or 3.260718:1, which represents a variation of 464m$^2$ or 8.7% variation to the FSR control.

# 5 Assessment

## 5.1 Clause 4.6(3)(a) – compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

As detailed in *Williams v Ku-ring-gai Municipal Council [2017] NSWLEC 1098, Wehbe v Pittwater Council [2007] NSWLEC 827 at [44]–[48]*, a number of approaches could be used to establish that compliance with a development standard is unreasonable or unnecessary.

Furthermore, *Preston CJ in Wehbe v Pittwater Council (2007) 156 LGERA 446 [42]-[51]* outlined five common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary which are summarised below:

- Test 1: The objectives of the standard are achieved notwithstanding non-compliance with the standard;
- Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- Test 3: The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- 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 compliance with the standard is unnecessary and unreasonable; or
- Test 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.

These five ways to demonstrate that compliance is unreasonable or unnecessary are not exhaustive. With respect to the subject application, we consider strict compliance with the FSR standard as 'unreasonable or unnecessary' in the circumstances for the following reasons:

- The application seeks to adaptively re-use an existing building, which was approved as a services exchange building for Telstra in the 1970s.
- The existing building on site has a larger envelope and footprint compared to the subject application, as the subject application proposes to carve a large void in the centre of the building from the existing lower-ground up to level 5, which reduces the building envelope and footprint compared to the existing configuration.
- The reduced envelope of the proposal compared to the existing can be most clearly shown in the Figure below, which is the level 5 demolition plan showing the architectural void that goes to the lower-ground in hatched red.

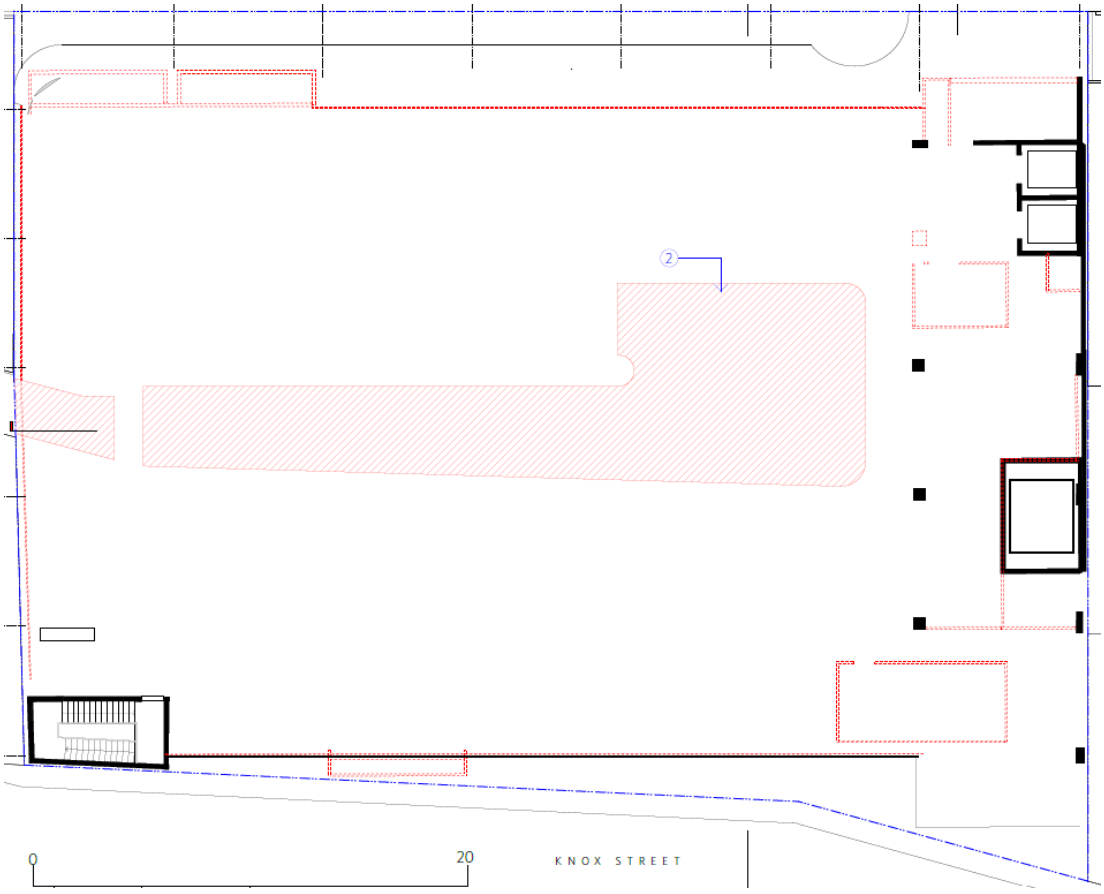


**Figure 2:** Level 5 demolition plan showing carved void descending to lower ground (Durbach Block Jaggers)

- The existing building on site exceeds the maximum FSR control, with an existing GFA of 5,810.6m$^2$, or 3.26:1, which represents a variation of 464m$^2$ or 8.7% variation to the FSR control.

- However, under the current definition of 'gross floor area' in the Sydney LEP (refer to existing GFA calculations in the Figure below) a number of areas in the existing building footprint are excluded on the lower ground, ground and level 1, including:
    - Lower-ground: substation, mechanical plant room, fan cooling room and diesel generation room;
    - Ground floor: Car park and associated vehicular access; and
    - Level 1: loading dock, LPS Room, plant and services rooms.
- Whilst some of the above uses would be excluded from floor space in any site's redevelopment, the building's former approved use as a services exchange building has meant that these excluded areas take up a much greater proportion of the building envelope than in an ordinary mixed use development.
- In addition, the existing ground-floor car parking area constitutes an entire storey of the current building that does not contribute towards FSR, even though it forms part of the building footprint that is being used for more appropriate and active uses consistent with the intent of the site's MU1 mixed use zone. The removal of this level of car parking creates an improved development outcome when considered against the FSR objective (b) to "control the generation of vehicle and pedestrian traffic".

| | GFA |
|---|---|
| Lower Ground | 910.4 |
| Ground | 31.6 |
| L1 | 1,009.9 |
| L2 | 1,297.9 |
| L3 | 1,303.2 |
| L4 | 1,245.0 |
| L5 | 12.6 |
| TOTAL | 5,810.6 m² |

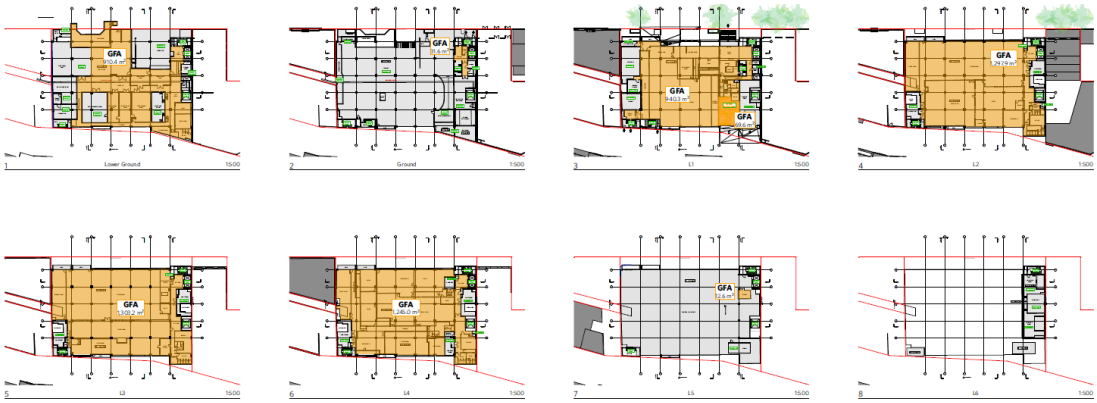

**Figure 3:** Existing building GFA calculations (Durbach Block Jaggers)

Under the circumstances, the development density is considered appropriate taking into consideration the building improvements, both in terms of land use and design, and the site's current FSR non-compliances. Therefore, strict compliance with the FSR development standard is unreasonable and unnecessary in the circumstances of the development.

## 5.2 Clause 4.6(3)(b) - There are sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

Clause 4.6(3)(b) of the SLEP 2012 requires that the consent authority be satisfied that:

> *There are sufficient environmental planning grounds to justify contravening the development standard.*

The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Turland v Wingecarribee Shire Council [2018] NSWLEC 1511 and Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*), also 'Rebel MH' and 'Baron' (2019).

The environmental planning grounds relied upon to justify the exceedance of the development standard in the circumstances of the proposal are considered sufficient and specific to the site and the proposed contravention.

As confirmed by supporting consultant reports and addressed throughout this variation request, the non-compliance with the development standard does not result in any adverse environmental planning impacts. Specifically, relative to a complying scheme that reached an FSR of 3:1, there will be no loss of significant or iconic views; no additional privacy impacts; unacceptable traffic impacts; adverse visual impacts or additional overshadowing to residential properties.

It is noted that there is an existing breach of the FSR, which is currently 3.26:1, and represents a variation of 464m$^2$ or 8.7% variation to the FSR control. There are also large parts of the existing building envelope that are excluded from the calculation of GFA under the LEP due to the prior use of the building as a services exchange building.

Given the site's zoning for mixed uses under MU1 and location on the City fringe and in close proximity to universities and active uses, the proposed use for backpackers' accommodation is more appropriate than an inactive services building that makes no contribution to the social, economic or cultural priorities of the Council.

However, due to GFA exclusions to the building footprint as a consequence of the existing services exchange use, any redevelopment for a more traditional mixed-use development will cause a further FSR breach similar to the subject application, unless the existing car park is retained, which is a poor planning and environmental outcome for the site.

For the reasons discussed above, it is contended that there are sufficient environmental planning grounds to justify the contravention to the development standard in the circumstances of the case, particularly given that the design provides a tailored and well considered response to the site's constraints and articulation.

# 6 Conclusion

The assessment above confirms that compliance with the maximum Floor Space Ratio development standard contained in Clause 4.4 of SLEP 2012 is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the contravention to the development standard.

This Clause 4.6 variation request demonstrates that notwithstanding the non-compliance with the Floor Space Ratio development standard, the proposal:

- Delivers a development that is appropriate for its context despite the breaches to development standards and therefore has sufficient environmental planning grounds to permit the variation; and
- Therefore, compliance with the development standard is unreasonable or unnecessary in the circumstances of this proposal.