Attachment B

Clause 4.6 Variation – Floor Space Ratio

REQUEST TO CONTRAVENE A DEVELOPMENT STANDARD UNDER CLAUSE 4.6

cl. 4.4(2), Sydney LEP 2012: Floor space ratio



163 Victoria Street, Potts Point NSW

Alterations and additions to existing residential flat building and change of use to dwelling house

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Revision A			PN

We acknowledge that the land on which we live, learn and work as the traditional country of the Gadigal people of the Eora Nation. We acknowledge these traditional owners of this land and acknowledge their living cultures and the unique roles they have played in maintaining life, language, and culture in this region. We pay respect to their Elders past, present and emerging and all aboriginal people.

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1.0 INTRODUCTION

This request to contravene a development standard in respect of height of buildings under Clause 4.4(2) of Sydney Local Environmental Plan 2012 is submitted to accompany a development application for:

Alterations and additions to an existing residential flat building and change of use to a dwelling house

at 163 Victoria Street, Potts Point NSW.

It has been prepared with particular reference to the decisions of the Court in respect of:

- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;
- Four2Five Pty Limited v Ashfield Council [2015] NSWLEC 90;
- Wehbe v Pittwater Council [2007] NSWLEC 827;

and other relevant case law.

2.0 THE DEVELOPMENT STANDARD

2.1 The applicable planning instrument which specifies the development standard:

Sydney Local Environmental Plan 2012 (SLEP 2012)

2.2 The number of the relevant clause:

Clause 4.4 –Floor space ratio.

2.3 The provisions of the relevant clause:

a) Clause 4.4 – Floor space ratio.

The development standard to which this request for contravention relates is Clause 4.4(2) of SLEP 2012 – Floor space ratio, which specifies that:

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.

The Floor Space Ratio Map nominates an FSR of 1.5:1.

3.0 THE CONTRAVENTION SOUGHT:

3.1 Description of the contravention:

The proposed development would contravene the non-discretionary development standard as follows:

3.1.1 Site Area:

- 149m^2

3.1.2 Maximum FSR:

- 1:5:1 (223.5m^2)

3.1.3 Proposed FSR

- 1:82:1 (270.6m^2)

3.1.4 Extent of Proposed Contravention:

- 0:32:1 (47.1m^2)
- 21%

3.1.5 Elements comprising contravention:

The contravention comprises:

- The area at the front of the lower ground floor (which could technically defined as basement): 26m^2; and
- The attic level (which is contained primarily within the roof form): 21m^2;

- Being a total of 47m^2.

3.1.6 Cause of the contravention:

The contravention results from a combination of the following:

- the use of the attic space and the front part of the lower ground floor which total a GFA of 47m2 which is the entire extent of the contravention.

If the attic space were deleted and the front part of the lower ground floor allocated to 'storage' or non-habitable uses, then the FSR would be compliant.

4.0 PROVISIONS OF CLAUSE 4.6

4.1 Cl. 4.6(1): Objectives

Clause 4.6 seeks to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. The objectives of Clause 4.6 are as follows:

Cl. 4.6(1) Objectives of Clause		
Clause	**Control**	**Justification**
(1)(a)	to provide an appropriate degree of flexibility in applying certain development standards to particular development	The proposal contravenes the development standard which sets a maximum floor space ratio. It seeks to utilise this clause to provide appropriate flexibility in application of the standard to permit approval.
(1)(b)	to achieve better outcomes for and from development by allowing flexibility in particular circumstances.	The proposal would achieve better outcomes: • ***For*** the development: The contravention would permit: o The use of roof space and the lower ground floor which would otherwise be empty volumes. • ***From*** the development: The contravention would result in: o A development consistent with the character of surrounding properties.

4.2 Cl. 4.6(2): Development standards excluded form operation of clause

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.

The relevant clause is not expressly excluded from the operation of clause 4.6.

4.3 Cl. 4.6(3): Justification of the Contravention of the Development Standard

Under the provisions of clause 4.6(3) – Exceptions to development standards of WLEP 2011, the consent authority must satisfied that the applicant has demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify contravening the development standard. This is summarised in the table below:

Cl. 4.6(3) Justification of Contravention		
Clause	**Control**	**Justification**
4.6(3)	Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant has demonstrated that:	This written request addresses this clause.
4.6(3)(a)	compliance with the development standard is unreasonable or	Compliance with the development standard is unnecessary given that:

Cl. 4.6(3) Justification of Contravention		
Clause	**Control**	**Justification**
	unnecessary in the circumstances (see the test under Wehbe v Pittwater Council below and assessment against the objectives of the zone and development standard), and	• The objectives of the development standard are met (see below). notwithstanding the non-compliance. Compliance with the development standard is unreasonable given that: • The development standard has been varied in similar circumstances to a greater degree where there is no impact on neighbours, no impact on character of area, no material increase in intensity of use; • There are no adverse amenity impacts which arise from the contravention; • The built form would remain the same even if the attic and lower ground floor level were deleted; and • The site is bookended by other sites with an FSR limit of 2:1 at Nos. 159 and 165-167 (the latter appears to significantly exceed even this FSR).
4.6(3)(b)	That there are sufficient environmental planning grounds to justify contravening the development standard.	Sufficient environmental planning grounds, in accordance with the criteria established in Initial Action, are outlined below:
	As established in Initial Action [23], 'environmental planning grounds' refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act. These are as follows:	See below:
1.3(a)	to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,	The contravention would maximise use of existing urban infrastructure and marginally lessen demand for development on the urban edge.
1.3(b)	to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,	The contravention would maximise use of existing urban infrastructure and marginally lessen demand for development on the urban edge.
1.3(c)	to promote the orderly and economic use and development of land,	N/A.
1.3(d)	to promote the delivery and maintenance of affordable housing,	N/A.
1.3(e)	to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	The contravention would maximise use of existing urban infrastructure and marginally lessen demand for development on the urban edge.
1.3(f)	to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	The contravention would result in a built form which is compatible with the character of the conservation area and heritage items in the vicinity of the site.
1.3(g)	to promote good design and amenity of the built environment,	The contravention would allow a development consistent with the character of surrounding development by providing a built form and scale consistent with the character of the locality.

Cl. 4.6(3) Justification of Contravention		
Clause	**Control**	**Justification**
1.3(h)	to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,	N/A
1.3(i)	to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,	Not applicable.
1.3(j)	to provide increased opportunity for community participation in environmental planning and assessment.	Not applicable.

In Wehbe v Pittwater Council [2007] NSWLEC 827, Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. These are examined below:

The Five Part Test: (in accordance with Preston CJ in Wehbe v Pittwater Council [2007] NSW LEC 827)		
Part	**Test**	**Discussion**
1.	The objectives of the standard are achieved notwithstanding non-compliance with the standard.	The objectives of the development standard are achieved. See discussion under 4.4 below.
2.	The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.	The objectives of the standard are relevant to the proposal and an assessment of compliance is provided above. It is considered that the objectives of the standard have been met and therefore strict compliance is unnecessary.
3.	The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.	The underlying object would be thwarted if compliance were required as it would result in: • A development markedly inconsistent with the established character and scale of surrounding development.
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	Council has varied the FSR to a similar and greater extent in similar circumstances where the development is consistent with that of the surrounding development and does not result in adverse impacts (refer to Council's 4.6 register). • 157 Victoria Street (DA/2013/536): 2:1 • 165-167 Victoria Street (adjacent property): approx. 3:1 – this is a historical consent; • 169 Victoria Street (DA/2011/1505): 3.41:1 • 186 Victoria Street (DA/2016/746): 2.96:1
5.	the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.	Not applicable. The zoning of the land is considered appropriate.

4.4 Cl. 4.6(3)(a) Objectives of the Zone & Development Standard

Under the Five Part Test established in Wehbe v Pittwater Council, it may be demonstrated that the objectives of the standard are achieved notwithstanding non-compliance with the standard. This can be determined by an assessment of the consistency of the contravention with the objectives of the development standard. This assessment is summarised in the table below:

Cl. 4.6(3)(a): Objectives of the development standard		
Clause	**Objectives**	**Justification**
4.4	**Floor space ratio**	
1(a)	to provide sufficient floor space to meet anticipated development needs for the foreseeable future,	The contravention would provide anticipated floor space requirements for the subject site.
1(b)	to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,	The contravention would not be associated with any additional pedestrian or vehicular traffic generation as it would not increase the occupancy anticipated on the site.
1(c)	to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,	The contravention would not result in any additional occupancies and would not exceed the capacity of existing infrastructure to support it.
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.	The contravention would result in a development of a scale consistent with surrounding and adjacent development including: • 165-167 Victoria Street (adjacent property): approx. 3:1 (with a nominated max FSR of 2:1) • 157 Victoria Street: 2:1

In circumstances where there are no significant adverse impacts resulting from the contravention of the development standard (ie in respect of the lower ground floor and the attic), it is unreasonable and unnecessary to require strict compliance.

5.0 CONCLUSION

This Clause 4.6 contravention request to clause 4.4 of SLEP 2012 – Floor space ratio should be supported on the basis that strict application of the development standard is unnecessary and unreasonable given that:

a) The development meets the stated objectives of clause 4.4, specifically:

   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.

b) There are sufficient environmental planning grounds to justify contravening the development standard.

For the reasons set out above, the development may be granted consent notwithstanding the contravention of the development standard in respect of floor space ratio under clause 4.4 of SLEP 2012 – Floor space ratio.