



## AMENDED CLAUSE 4.6 VARIATION STATEMENT

MAXIMUM FLOOR SPACE RATIO – CLAUSE 4.4 OF MARRICKVILLE LEP  
2011

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Demolition of existing buildings and construction of an 8 storey shop top housing development  
comprising two commercial tenancies, 81 boarding rooms and basement parking

2-18 Station Street, Marrickville

Prepared for: Emag Apartments Pty Ltd

Ref. 0399/21

DATE: 16 December 2021



# PLANNING

I N G E N U I T Y



# Amended Clause 4.6 Variation Statement – Floor Space Ratio (Clause 4.4)

## 1. INTRODUCTION

This Clause 4.6 Variation Statement is prepared in the interests of abundant caution. There are conflicting authorities in the Land & Environment Court in relation to this matter.

Arguably, by reason of cl 8 of SEPP ARH, the provisions of SEPP ARH prevail to the extent of any consistency between SEPP ARH and the provisions of MLEP. That is consistent with the line of authority provided in the judgments of Moore J and Smithson C in *193 Liverpool Road Pty Ltd v Inner West Council* [2017] NSWLEC 13 and *Maham Group Pty Ltd v Blacktown City Council* [2019] NSWLEC 1168, respectively, in that the provisions of SEPP ARH, including those in cl 29(4), provide a source of power for a consent authority to consent a boarding house development, such as is proposed by the Applicant, whether or not the development complies with the standards set out in subclause (1) or (2) of cl 29. Those standards include, under cl 29(1)(c), floor space ratio. An alternative interpretation of cl 29(4) of SEPP ARH is set out by Gray C in *Parker Logan Pty Ltd v Inner West Council* [2018] NSWLEC 1339.

Due to the case law perhaps not being settled on this issue, we provide this Clause 4.6 Variation Statement to remove any potential jurisdictional hurdle to approval.

## 2. FSR DEVELOPMENT STANDARD

Clause 4.4 of MLEP 2011 prescribes the maximum Floor Space Ratio (FSR) for the site and refers to the Floor Space Ratio Map. The relevant map (sheet FSR\_004) indicates that the maximum FSR permitted at the subject site is 3:1 (GFA of 2,085m<sup>2</sup>).



Figure 1 Extract from the Floor Space Ratio Map [V1=3:1]

The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area. Gross floor area is defined to mean:

**gross floor area** means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—

(a) the area of a mezzanine, and

- (b) *habitable rooms in a basement or an attic, and*
- (c) *any shop, auditorium, cinema, and the like, in a basement or attic,*

*but excludes—*

- (d) *any area for common vertical circulation, such as lifts and stairs, and*
- (e) *any basement—*
  - (i) *storage, and*
  - (ii) *vehicular access, loading areas, garbage and services, and*
- (f) *plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and*
- (g) *car parking to meet any requirements of the consent authority (including access to that car parking), and*
- (h) *any space used for the loading or unloading of goods (including access to it), and*
- (i) *terraces and balconies with outer walls less than 1.4 metres high, and*
- (j) *voids above a floor at the level of a storey or storey above.*

### 3. PROPOSED FSR VARIATION

The Respondent contends that the bonus FSR afforded by Clause 29(1)(c)(i) of ARH SEPP does not apply to the subject site and is therefore a matter for legal submission. As such and on a precautionary basis, to avoid doubt this Clause 4.6 Variation Statement has been prepared on the basis that the bonus FSR does not apply.

Accordingly, the MLEP 2011 FSR of 3:1 (2,085m<sup>2</sup>) applies to the proposal. If it is found that the ARH SEPP applies, the outcome is that the extent of the variation will be reduced. Specifically, pursuant to Clause 29(1)(c)(i) of *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARH SEPP), the additional FSR afforded to the site is 0.6:1 or 20% of the 3:1 FSR. With a site area of 695m<sup>2</sup> the permissible FSR is therefore 3.6:1 with an allowable GFA of 2,502m<sup>2</sup>. Under the newly gazetted SEPP (Housing) 2021, if that were to be applied to the proposal, the bonus FSR is 10% which would provide for a maximum of 3.3:1 with an allowable GFA of 2,294m<sup>2</sup>.

With regards to the above, on the applicant's calculations the proposed development will provide an FSR of 4.08:1 (2,834m<sup>2</sup>) which is non-compliant with the FSR development standard under the MLEP 2011. As discussed above, if it is found that the ARH SEPP and/or SEPP (Housing) 2021 applies, the proposal is still non-compliant.

Based on the calculations provided in the architectural drawings by *TIER Architects* (Issue I, dated 16/12/2021), the proposed development will provide a total GFA of 2,834m<sup>2</sup>. This total GFA calculation excludes the lobby areas, vertical circulation areas and the areas of corridors/breezeways that are open at both ends from Level 1 to 7 in accordance with the decisions in *GGD Danks Street P/L and CR Danks Street P/L v Council of the City of Sydney* [2015] NSWLEC 1521 and *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] NSWLEC 1243. The calculation of FSR includes the GFA of one car space that is in excess of the ARHSEPP requirements. If the Court were to disagree with the applicant's calculations in favour of the Respondent's approach, the increase in GFA as a result of including corridors would be 425.6m<sup>2</sup>.

The Respondent has put forward in the course of these Proceedings that, if the SEPP (Housing) 2021 were to apply, excess parking proposed would increase because of the reduced car parking rates under the newly gazetted SEPP. This would add 311m<sup>2</sup> of calculable floor space. It is noted that this additional GFA would be entirely below the ground and not visible from the public domain or adjoining properties.

With the inclusion of corridors and car parking per the SEPP (Housing) 2021 provision, the total GFA would be 3,570.6m<sup>2</sup>, an FSR of 5.14. Whilst the applicant does not agree with this calculation for the reasons stated above, it is included to assist the Court on a precautionary basis and to remove any jurisdictional hurdle to the granting of development consent. Any finding on the actual numeric for GFA would not affect the assessment or conclusions reached in this variation statement.

The FSR requirement under Clause 4.4 is a "development standard" to which exceptions can be granted pursuant to Clause 4.6 of the LEP.

#### 4. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

The objectives and provisions of Clause 4.6 are as follows:

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

(1) *The objectives of this clause are as follows—*

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

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

(3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—*

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

(4) *Development consent must not be granted for development that contravenes a development standard unless—*

- (a) the consent authority is satisfied that—*
  - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
  - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- (b) the concurrence of the Planning Secretary has been obtained.*

(5) *In deciding whether to grant concurrence, the Planning Secretary must consider—*

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

(6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—*

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

**Note**— When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(ca) clause 6.9, 6.17 or 6.18,

(cb) clause 6.21(4).

It is noted that Clause 4.4 is not “expressly excluded” from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum FSR of 4.08:1.

#### **5. THAT COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(a))**

In *Wehbe V Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

*“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”*

The judgement goes on to state that:

*“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”*

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):



1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. The 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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

*"...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."*

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- the development is consistent with the standard and zone objectives, even with the proposed variation (refer to Section 7 below);
- there are no additional significant adverse impacts arising from the proposed non-compliance; and
- important planning goals are achieved by the approval of the variation.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

Notably, under Clause 4.6(4)(a)(ii) a consent authority must now be satisfied that the contravention of a development standard will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out. Clause 4.6(4)(a)(ii) is addressed in this submission.



## 6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS (CLAUSE 4.6(3)(b))

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum FSR:

1. The proposal provides for an appropriate scale and form that reflects the established and desired future character for development at the site. That is, the amended proposal has been designed with a compliant building height and street setbacks, and therefore achieves a building envelope that is generally consistent with the expected urban form as it presents to the street frontages and to Marrickville Station. The additional FSR on the site will not be readily perceptible from the public domain or surrounding properties, as the building envelope ensures an acceptable design and planning outcome as viewed from the public domain. Importantly, the additional GFA does not adversely change the character of the development in terms of streetscape nor does it bring with it a form of development on the site that is incompatible with the existing or desired future character of the locality.
2. In accordance with the above and when considering the urban design and architectural character of the proposal, the building massing and envelope represents a significant improvement when compared to the DCP envisaged







masterplan. That is, the supporting documentation prepared by *Urban AC* demonstrates that the proposed building envelope is compatible with the streetscape and relationship to neighbouring properties when compared to the building envelope of the DCP. The improved urban design outcome, which in part can be attributed to the FSR non-compliance, will result in a significant improvement to the character of the locality and should therefore be given weight in considering the variation.

Given the modified building envelope is reflective of the site and locality characteristics (per the supporting documentation), this additional FSR can be classified as “internalised” and will not be readily perceptible from the public domain or surrounding properties. That is, the proposal adopts a building envelope that is reasonably anticipated within the surrounding locality and planning controls, and, when viewed externally from the site, will appear as a compatible building.



3. The non-compliance with FSR will not result in any adverse impact to the density or intensity of use within the site. Despite the proposed variation, the additional boarding rooms have been designed to protect, to a reasonable extent, the amenity of neighbouring properties (as discussed below) and is provided with the appropriate services and amenities to meet the needs of future occupants. Further, the location of the subject site adjacent to Marrickville Station (which connects direct to Sydney City and surrounding centres) and Marrickville Town Centre ensures that the additional density created by the non-compliance is suited to its location. Insistence on strict compliance will not afford any improvements to the amenity of neighbouring properties and is not in public interest.

The amended built form is entirely compatible with the potential bulk, scale and intensity of the neighbouring properties to the south as set out in the DCP. That is, the proposed street setbacks (across all levels) and nil southern setback will align with the future redevelopment envisaged for neighbouring properties. The proposed building envelope, which is compliant with the building height development standard, will provide an appropriate transition of built form (as anticipated by the MLEP) from north to south as envisioned. The south-eastern corner of the proposal is massed or “notched out” consistent with the principles of the DCP. Additional floor space is contained in the 3m eastern setback area envisioned by the DCP and in the 12m setback area envisaged to the southern boundary. As set out in the Urban AC Report, the floor space in these areas performs an urban design function, in a manner that is considered to be superior to the DCP form. The 3m eastern site setback is intended to enable a widening of road connection to Leofrene Street from Station Street which would rely on redevelopment of the site to the south which is uncertain and not envisaged by the DCP. The land is not earmarked for acquisition under MLEP 2011. In any case, a connection exists today and therefore the purpose is not to introduce one. As set out in the Urban AC report, it is noted that the 12m southern setback effectively provides a southern outlook to a blank side elevation with poor solar access providing for poor amenity, and no amenity benefits for east facing windows. The southern neighbouring property cannot use the space for light and air without easement, fire separation issues would arise and therefore the setback is of little or no benefit.

Accordingly, the purpose of the setbacks to the southern and eastern boundaries set out in the DCP is not well made and this aspect of the built form under the DCP is considered unnecessary. The provision of additional FSR in these areas does not undermine the urban design intent for the street block. The Urban AC report sets out a revised masterplan for the street block which is considered appropriate and in fact superior to the DCP version which lacks rigour when analysed. As set out above, the location of the additional FSR does not adversely affect streetscape, public domain or amenity of surrounding properties.



4. The proposal is understood to be consistent with a number of discussions and related submissions to Council staff and the Architectural Excellence Panel between 2012 and 2019 where the site was nominated for increased density (given its strategic location and context) with discussion around building heights ranging from 10 to 15 storeys, over the 7 year period. These aspects are outlined in the Statement of Environmental Effects prepared by Weir Phillips Heritage & Planning dated 29 June 2020 and submitted with the DA. The future strategic planning context and character is therefore likely to change in the short to medium term.
5. As discussed, the proposed FSR variation does not bring with it a form of development on the site that is noticeably larger than anticipated by the controls or inconsistent with the character for the locality generally. The proposal will appear as a compatible building when viewed from the public domain given the provision of compliant street setbacks and consistency with the existing and desired contemporary buildings in the locality. That is, the proposed building envelope is entirely reasonable despite the variations and in accordance with the submitted





documentation. Specifically, the envelope as modified in the current plan set will allow for an appropriate transition to developments to the south, provide greater streetscape articulation (being a defined base, middle and top) and maximise the desired corner and civic streetscape presence. As such, the non-compliant FSR and associated alternative urban design approach to that set out in the DCP is considered to be acceptable with regards to the bulk and scale of the locality.

6. Importantly, the site is anticipated to undergo change and contains development standards which are greater than the immediate locality. Therefore, despite numerical non-compliance with the FSR, the proposed building will retain its place in the desired hierarchy of built form in terms of bulk and scale. Per the above and the supporting urban design documentation, the proposed building envelope has been carefully considered and is supported by the context of other neighbouring and nearby developments (both existing and desired). The proposed development adopts a similar typology to other adjoining and nearby examples of buildings in terms of setbacks and architectural character. This also assists with mitigating the scale of the additional FSR when viewed from the public domain. When viewed by the casual observer, the additional FSR is located within the setbacks which have been established by surrounding properties and in-part, by the DCP. The alternative approach to the DCP provides a built form appropriately setback from the site boundaries, is compatible with surrounding mixed use development and displays a high quality architectural design. The proposal will not have any significant additional impact to the amenity of the adjoining properties or the streetscape character compared with a compliant FSR. Accordingly, the proposal provides high quality and highly accessible boarding rooms within a well resolved building.
7. The proposed building envelope has been carefully considered and is supported by the context of other neighbouring and nearby developments, including developments to the north and north west on the opposite side of Marrickville Station that are 7 to 8 storeys in height. Specifically, the proposed 8 storey building (which is compliant with the maximum building height) ensures that the built form and scale is not visually or physically greater than that permitted on the subject site and should be given weight in the variation request.
8. It is considered that there is an absence of any significant material impacts of the proposed non-compliance on the amenity of the environmental values of the locality, the amenity of future building occupants and on area character. Specifically, the extent of non-compliance with the FSR development standard:
  - a. The FSR breach creates no significant additional overshadowing when compared to a compliant building envelope. Shadows cast fall largely onto the surrounding street frontages and have minimum impacts on north facing windows and private open space of dwellings to the east and south-east. Specifically, properties to the south will not be impacted by the proposal throughout mid-winter, noting the majority of shadows cast onto these properties will be onto the rooftop of these neighbours. Furthermore, the properties to the east and south-east will only be impacted from 1pm to 3pm and is therefore acceptable. As such and when considering the overshadowing against the backdrop of the applicable planning controls, the extent of overshadowing is created by the additional FSR is insignificant or nil;
  - b. The FSR breach does not result in any significant additional privacy impacts. That is, the building has been designed to ensure all primary living areas are orientated to look over the adjacent street frontages and overlooking is minimised as far as practicable. When considered against the backdrop of the applicable planning controls, the extent of privacy impacts created by the additional FSR is considered to be insignificant or nil; and
  - c. The additional FSR does not create any significant additional view loss because no significant views are enjoyed across the subject site currently.
9. The proposed development meets the objectives of the development standard and meets the objectives of the B2 Local Centre zone (as further detailed in Section 7 below);
10. The social benefits of providing additional boarding accommodation, including adaptable rooms, within a highly sought after location should be given substantial weight in the consideration of the variation request. The proposed development achieves an environmental planning outcome by providing additional affordable housing without having an adverse impact on the amenity of adjoining properties and being compatible with the character and built form of the locality.

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11. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
    - a. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential uses (1.3(c));
    - b. The proposed development promotes the delivery and maintenance of affordable housing (1.3(d)); and
    - c. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).
  12. The proposed development meets the aims stipulated in Clause 3 of the ARH SEPP.

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development. Despite non-compliance, the proposal will seek to achieve a high level of external and internal amenity for the development without any unreasonable adverse impacts to the amenity of neighbouring properties or streetscape character of the site. Importantly, the non-compliant FSR is a result of a (predominately) compliant building envelope and height which ensures that the non-compliance will not result in a built form which is incompatible with what is envisaged on the subject site. Insistence on compliance with the FSR control will result in the removal of a number of boarding rooms which will reduce affordable housing within close proximity to numerous land uses and public transport and is a disproportionate outcome given the impacts of the proposal.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

*86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*

*87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

## **7. CLAUSE 4.6(4)(a)**

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These

matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in 7a below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

## **8. THE PROPOSED DEVELOPMENT WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE PARTICULAR STANDARD AND THE OBJECTIVES FOR DEVELOPMENT WITHIN THE ZONE IN WHICH THE DEVELOPMENT IS PROPOSED TO BE CARRIED OUT (CLAUSE 4.6(4)(a)(ii))**

### **Objectives of Development Standard**

The objectives and relevant provisions of clause 4.4 of MLEP 2011 are as follows, inter alia:

- (a) to establish the maximum floor space ratio,*
- (b) to control building density and bulk in relation to the site area in order to achieve the desired future character for different areas,*
- (c) to minimise adverse environmental impacts on adjoining properties and the public domain.*

In order to address the requirements of Subclause 4.6(4)(a)(ii), the objectives of Clause 4.4 are addressed in turn below.



#### **Objective (a): “to establish the maximum floor space ratio”**

This objective articulates the ultimate function of the floor space ratio development standard. As previously described, the maximum floor space ratio permitted on the subject site is 3:1 and the maximum FSR of the proposal is 4.08:1. The proposal contravenes the standard, which has prompted the preparation of this written variation request. Despite the nature and scale of development proposed by this Development Application, Clause 4.4 achieves the objective of establishing a maximum floor space ratio for the site, using the floor space ratio Map as a mechanism to do so. This written request identifies the extent of variation proposed and explains why the variation is acceptable in the circumstances.

#### **Objective (b): “to ensure that the size and scale of development is compatible with the desired future character of the locality”**

It is noted that objective (b) refers to being “compatible” with adjoining development. It is well established that “compatible” does not promote “sameness” in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191:



*“22 There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.”*



In accordance with the objective, the subject site is located within the “Marrickville Town Centre (Commercial)” precinct under Section 9 of the Marrickville DCP 2011. The desired future character of the area is detailed in Section 9.40.2 of the DCP and states:

- 1. To retain, as a minimum, the front portion of contributory buildings where they are contributory to the heritage conservation area (HCA) and/or streetscapes.*
- 2. To protect the identified heritage values of the Civic Precinct Heritage Conservation Area.*
- 3. To protect and preserve contributory and period buildings within the precinct and require their sympathetic alteration or restoration.*
- 4. To allow and encourage a greater scale of development within the commercial centre, including the provision of new dwellings near local shops, services and public transport to meet market demand, create the opportunity for high access housing choice and support sustainable living.*
- 5. To support excellence in contemporary design.*
- 6. To ensure the street building frontage of infill development complements the siting (location and orientation), scale, form (height, massing and setback), proportion (height to width and solid to void), rhythm, pattern, detail, material, colour, texture, style and general character in the design of the existing predominantly traditional two storey commercial streetscape, without being imitative.*
- 7. To ensure new development at rear upper levels is a maximum of five storeys and is designed to be subservient to retained portions of contributory buildings or infill development to the street building front.*
- 8. Where required, to ensure there are active commercial fronts to new buildings facing onto streets to create a vibrant and safe streetscape.*
- 9. To support pedestrian access, activity and amenity including maintaining and enhancing the public domain quality.*
- 10. To build on the eat street and cultural character of the commercial centre.*
- 11. To ensure that higher density demonstrates good urban design and environmental sustainability and provides suitable amenity for occupants of those developments.*
- 12. To ensure that the design of higher density development protects the residential amenity of adjoining and surrounding properties.*
- 13. To ensure orderly development on masterplan sites in accordance with the principles of the masterplan vision, including allotment amalgamations, where required, that are not detrimental to achieving the overall masterplan structure and achieve an efficient and high quality built outcome.*
- 14. To facilitate efficient parking, loading and access for vehicles that minimises impact to streetscape appearance, commercial viability and vitality and pedestrian safety and amenity.*
- 15. To renew the former Marrickville Hospital site to accommodate a range of civic and commercial land uses and a public square that fronts Marrickville Road and Livingstone Road, with mixed use and residential uses to the north that transition to the adjoining lower density residential areas.*

Objectives 1, 2, 3, 7 and 15 are not relevant to the subject proposal. Of the remaining objectives, the amended proposal is consistent as outlined in further detail below. Importantly, it is considered that the proposal has been designed to ensure compatibility with the development standards despite the proposed FSR non-compliance and is considered to be sympathetic to the desired future character of the locality and established buildings to the north, south and east. Specifically, the alternative design approach to the DCP will limit the perceivable visual and physical impact of the non-



compliance by virtue of a responsive massing that takes into account development of the street block, and the high quality architectural design which sets an improved streetscape and wider character as detailed in the supporting urban design documentation.

Notwithstanding the above and when considering the existing buildings directly to the south, these will be redeveloped over time and provide a bulk and scale which will reinforce an appropriate transition of built form. To the east, the proposal is appropriately setback from the R2 Low Density Residential zone providing a highly articulated façade and recessed upper levels. The separation and staggered built form reduces the bulk and scale of the development as to limit impact and ensure harmony with the lower density zone. To the north and on the opposite side of Marrickville Station, the established 7 storey building (at No. 259 Illawarra Road) dictates a built form which is reasonably anticipated in the locality. Of relevance to this application, the proposal provides a recessed built form opposing the low density zone therefore articulating the façade and establishing an appropriate transition of character.

Given the above, the burden of strict compliance would result in the removal of numerous boarding rooms which would be an unreasonable and unnecessary outcome given that the bulk and scale of the proposal is consistent with the desired character of the B2 Zone and will not adversely impact on the amenity of the neighbouring properties as is discussed in objective (c). It is considered that the proposal will positively contribute to the existing and future character of the Marrickville locality when viewed with the buildings along Station Street. Given the eclectic mix of buildings in the immediate locality, the proposal has been designed as a contemporary structure. The defined base, articulated middle and recessed upper levels will reduce the sense of perceived bulk and scale and ensure compatibility character of the locality.

In accordance with the above, the proposal directly responds to the objectives set by the "Marrickville Town Centre (Commercial)" precinct in the DCP, as follows:

- The proposal achieves a scale of development that is appropriate to its location and proximity to shops, services and public transport. It will provide affordable housing choices that is in demand in the locality. As discussed in this Statement, the proposed building envelope is considered to provide an appropriate urban design response to the constraints of the site and will achieve a high quality development which will benefit the locality. The amended proposal achieves a visual outcome that is architecturally unique, interesting and functional, and will serve and as a landmark. It has a contemporary appearance and purpose that has been designed to conceal the non-compliant FSR and ensure a compatible streetscape character and relationship to neighbouring properties
- The proposal complements the siting (location and orientation), scale, form (height, massing and setback), proportion (height to width and solid to void), rhythm, pattern, detail, material, colour, texture, style and general character prevalent in the streetscape through the artistic interpretation of the local history, as outlined in the architectural plan package and urban design documentation
- The proposal includes commercial uses at ground level to activate the street frontages and is consistent with objectives 8, 9 and 10. The non-compliant FSR does not have any bearing on the proposal providing suitable and useable commercial floor area.
- The proposal achieves high levels of solar access to the boarding rooms, proposed communal open spaces, and proposed balconies for each boarding room. The boarding rooms will therefore provide high levels of amenity for occupants. In addition, the proposal will be compliant with the requirements of SEPP BASIX and encourage public transport usage.
- As demonstrated throughout this Statement, the proposed FSR breach does not result in any additional unacceptable impacts on the residential amenity of adjoining and surrounding properties. As represented in the shadow diagrams and sun eye view drawings, the residential properties to the east and south-east will maintain 5 hours solar access at mid-winter, whilst properties directly to the south will be generally unaffected. In addition, in terms of privacy impacts, the difference between a compliant and non-compliant design is considered to be immaterial given the permitted building form on the site.

Therefore objective (b) is achieved.

**Objective (c): “to minimise adverse environmental impacts on adjoining properties and the public domain.”**

The proposal has minimised adverse environmental impacts on the adjoining properties and the public domain. In building envelope terms, the proposal has been built to the street frontages and side boundary which is the typical typology and the building envelope that is encouraged by the DCP controls. The additional floor space, beyond the control, can be appreciated as being “internalised” on the site, a product of building depths. Furthermore and when viewed from the neighbouring properties, the proposed setbacks and articulated design provide appropriate visual and physical separation thus mitigating any potential sense of enclosure.

In terms of privacy, the FSR non-compliance does not result in any adverse additional privacy impacts beyond what is anticipated on-site. That is, the proposal provides a building envelope which is articulated and orientated to the street frontages, with additional setbacks to the façade opposing the R2 Low Density Residential zone. Specifically, to the north and west, the proposal is orientated to open, public spaces and roadway and therefore no visual privacy impact will result. Similarly, to the south, the proposal provides a nil setback (as is anticipated in the zone) and therefore the privacy of properties to the south (existing and future) will be protected. As detailed, the residential zone to the east will be protected by the abovementioned setbacks and purposeful fenestration design. This ensures that the neighbouring residential properties will be protected despite non-compliance.

With regards to overshadowing, the proposed FSR breach will not result in any adverse overshadowing as opposed to an entirely compatible built form. The shadow diagrams submitted with the architectural plans confirm that the proposal will not result in any significant additional overshadowing to the neighbouring properties beyond what is permitted by the DCP. That is, given the site orientation and anticipated density of the B2 Zone, the proposal will retain in excess of approximately five hours of solar access to the neighbouring residential properties to the south-east and east, during mid-winter. With regards to the properties to the south, given the nil setbacks and anticipated increase of density, any overshadowing is considered to be entirely reasonable. As such, the additional overshadowing impact as a result of the height breach when compared to a compliant development are insignificant.

In terms of views, the area of non-compliance will not result in any significant additional view loss compared with a compliant building. That is, no significant views are enjoyed across the subject site (as is existing) and the proposal is compliant with the maximum building height and therefore any potential loss of views or outlook is considered to be entirely reasonable.

Therefore objective (c) is achieved.

**Objectives of the Zone**

Clause 4.6(4)(a)(ii) requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of Zone B2, and a response as to how the proposal meets the objective is provided below.

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To provide housing attached to permissible non-residential uses which is of a type and scale commensurate with the accessibility and function of the centre or area.*
- *To provide for spaces, at street level, which are of a size and configuration suitable for land uses which generate active street-fronts.*
- *To constrain parking and reduce car use.*

The proposed development is consistent with the zone objectives for the following reasons:

- It will activate the street frontage with commercial tenancies that will be occupied by suitable uses to serve the local residents;



- The ground floor tenancies will offer employment opportunities;
- The proposal is directly opposite Marrickville Station and residents would be able to maximise public transport usage. Similarly, due to the low parking provision within the development, residents will be encouraged to walk and cycle to places of interest.
- The proposed boarding house is a form of housing that is permissible on the site and desirable given its adjacency to public transport and connectivity to surrounding areas, including the City of Sydney, educational establishments, hospitals and so on. The boarding house would likely be occupied by a cross section of the community that attend tertiary education, and work in hospitals and other essential front-line occupations.
- The proposed building size is appropriate to the strategic location of the site, is consistent with the building height development standard and will be comparable to the likely scale of future development adjoining to the south (as shown on the sun-eye view diagrams provided in the architectural plan package);
- The ground level business tenancies have been maximised with the entire northern and western site frontages activated. The eastern frontage is occupied by vehicular access and services required for the development.
- The proposal seeks consent for basement parking level that will contain a total of 42 residential and 3 commercial spaces, 26 motorcycle and 28 bicycle parking spaces. The proposal provides parking that is slightly less than that required by the ARH SEPP, however, given the site's location adjacent to Marrickville Station and Town Centre, reduced car parking provision is considered appropriate in the circumstances and will achieve the zone objective of constrained parking provision and reduced car use.

As such, the proposed boarding house will encourage housing affordability and diversity and will provide a high amenity for residents in a highly accessible location. In addition, the proposed boarding house allows for the revitalisation of the existing underutilised site, which will in turn provide benefits to the streetscape and broader Marrickville community.

#### **9. THE CONCURRENCE OF THE SECRETARY HAS BEEN OBTAINED (CLAUSE 4.6(4)(b))**

The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

#### **10. WHETHER CONTRAVENTION OF THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING (CLAUSE 4.6(5)(a))**

Contravention of the FSR development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

#### **11. THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD (CLAUSE 4.6(5)(b))**

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum FSR. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed FSR exceeds the maximum permitted on the site, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

#### **12. CONCLUSION**

This written request has been prepared in relation to the proposed variation to the FSR development standard contained in Clause 4.4 of MLEP 2011. Having regard to all of the above, it is our opinion that compliance with the maximum FSR standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives



of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation is acceptable in the circumstances.



