

# REQUEST TO CONTRAVENE A DEVELOPMENT STANDARD UNDER CLAUSE 4.6

Cl 4.4, Marrickville LEP 2011: Floor Space Ratio



2-18 Station Street, Marrickville NSW

Demolition of Existing Structures and Construction of a Mixed Use  
Development comprising a Boarding House and Commercial Premises

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**Weir  
Phillips**  
Heritage  
and Planning

Level 19, 100 William Street, Sydney, NSW 2011  
Phone: (02) 8076 5317

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<b>Report Preparation</b>	
Associate Director	Philip North, BAppSc(EnvDes), BArch, MURP, GradCertHeritCons, RAIA RIBA MPIA CPP
Consultant	-

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## 1.0 INTRODUCTION

This request to contravene a development standard in respect of floor space ratio under Clause 4.4 of Marrickville LEP 2011 is submitted to accompany a development application for:

*demolition of existing structures and construction of a mixed use development comprising commercial premises and boarding house*

at 2-18 Station Street, Marrickville 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:

Marrickville Local Environmental Plan 2011 (MLEP 2011)

### 2.2 The number of the relevant clause:

Clause 4.4 – Floor space ratio.

### 2.3 The provisions of the relevant clause:

Clause 4.4 – Floor space ratio.

The development standard to which this request for contravention relates is Clause 4.4(2) of MLEP 2011 – 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 nominated FSR on the map is 3:1.

## 3.0 THE CONTRAVENTION SOUGHT:

### 3.1 Description of the contravention:

The proposed development would contravene the development standard as follows:

#### 3.1.1 Maximum floor space ratio:

3:1 (2,085m<sup>2</sup>)

#### 3.1.2 Proposed floor space ratio:

4.66:1 (3,241m<sup>2</sup>)

#### 3.1.3 Extent of proposed contravention:

1.66:1 (1,156m<sup>2</sup>) (55%)

#### 3.1.4 Causes of the contravention:

The contravention would result from:

- the provision of an additional two storeys along the northern elevation and part of the western elevation; and
- an appropriate density to support the adjacent transit nodes, town centre and demand for accommodation from front-line workers.

## 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 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	<p>The proposal would achieve better outcomes:</p> <ul style="list-style-type: none"> <li>• <b>For</b> the development: The contravention would permit: <ul style="list-style-type: none"> <li>○ An additional two storeys;</li> <li>○ A more articulated built form.</li> </ul> </li> <li>• <b>From</b> the development: The contravention would result in: <ul style="list-style-type: none"> <li>○ A greater density of affordable rental housing adjacent a major transit node (Marrickville Railway Station) and the community and commercial facilities associated with Marrickville Town Centre to reinforce social equity with improved walkability and access to public transport;</li> <li>○ A density consistent with Council's dwelling target for the site which nominates 56 dwellings and would effectively require an FSR of approximately 5.5:1 (<a href="https://forecast.id.com.au/inner-west/residential-development?WebID=250">https://forecast.id.com.au/inner-west/residential-development?WebID=250</a>);</li> <li>○ Increased provision of affordable rental housing in an area of high demand, specifically designated for front-line workers who require affordable accommodation close to their area of work (see Attachment A): <ul style="list-style-type: none"> <li>▪ A Memorandum of Understanding with the Police Association of NSW (accompanying the Development Application) to provide affordable rental accommodation for police officers at below market rents (including no bond and one month rent free);</li> <li>▪ Pre-registration for accommodation by the Police Association of NSW which could utilise much of the provided residential capacity but also allow for affordable accommodation for other low to middle income groups;</li> </ul> </li> <li>○ Optimal activation of the street and an existing underutilised public square;</li> <li>○ Reduced reliance upon private vehicles and associated pressure on the road network;</li> <li>○ More efficient utilisation of public transport due to the proximity to Marrickville Railway Station and major bus routes on Illawarra Road;</li> <li>○ A more effective urban place marker for Marrickville Railway Station in the broader context of Marrickville Town Centre;</li> <li>○ An overall height and built form consistent with the considered future urban design character of the precinct (as articulated in multiple expert studies including the Architectus Peer Review, the Inner West Architectural Excellence Panel report</li> </ul> </li> </ul>

		<p>and the Revised Draft Sydenham to Bankstown Urban Renewal Corridor Strategy which all support a height of 12 or more storeys); and</p> <ul style="list-style-type: none"> <li>○ A carefully modelled built form consistent with the considered desired future urban design character of the precinct providing: <ul style="list-style-type: none"> <li>▪ An assertive northern elevation of 10 storeys fronting Marrickville Railway Station and providing a design dialogue with it;</li> <li>▪ A reduction in scale from 10 storeys on the northern side to 8 storeys on the southern side to provide a transition to the lower height limit of the adjacent sites to the south; and</li> <li>▪ A lower (and compliant) height of 8 storeys on the eastern elevation to create a transition to the adjacent 9.5m height limit low density residential zone to the east.</li> </ul> </li> </ul>
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#### 4.2 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 MLEP 2011, the consent authority must consider a written request from the applicant that seeks to justify the contravention of the development standard. This justification 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 has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:	This written request addresses this clause.
4.6(3)(a)	That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and	<p>Compliance with the development standard is unnecessary given that:</p> <ul style="list-style-type: none"> <li>• The objectives of the development standard are met (see below); and</li> <li>• The objectives of the zone are met; notwithstanding the non-compliance.</li> </ul>
4.6(3)(b)	That there are sufficient environmental planning grounds to justify contravening the development standard.	<p>The contravention would result in:</p> <ul style="list-style-type: none"> <li>• A greater density of affordable rental housing adjacent a major transit node (Marrickville Railway Station) and the community and commercial facilities associated with Marrickville Town Centre to reinforce social equity with improved walkability and access to public transport;</li> <li>• A density consistent with Council’s dwelling target for the site which nominates 56 dwellings and would effectively require an FSR of approximately 5.5:1 (<a href="https://forecast.id.com.au/inner-west/residential-development?WebID=250">https://forecast.id.com.au/inner-west/residential-development?WebID=250</a>);</li> <li>• Increased provision of affordable rental housing in an area of high demand, specifically designated for front-line workers who require affordable accommodation close to their area of work (see Attachment A): <ul style="list-style-type: none"> <li>▪ A Memorandum of Understanding with the Police Association of NSW (accompanying the Development Application) to provide affordable rental accommodation for police officers at below market rents (including no bond and one month rent free);</li> </ul> </li> </ul>

		<ul style="list-style-type: none"> <li>▪ Pre-registration for accommodation by the Police Association of NSW which could utilise much of the provided residential capacity but also allow for affordable accommodation for other low to middle income groups;</li> <li>• Optimal activation of the street and an existing underutilised public square;</li> <li>• Reduced reliance upon private vehicles and associated pressure on the road network;</li> <li>• More efficient utilisation of public transport due to the proximity to Marrickville Railway Station and major bus routes on Illawarra Road;</li> <li>• A more effective urban place marker for Marrickville Railway Station in the broader context of Marrickville Town Centre;</li> <li>• An overall height and built form consistent with the considered future urban design character of the precinct (as articulated in multiple expert studies including the Architectus Peer Review, the Inner West Architectural Excellence Panel report and the Revised Draft Sydenham to Bankstown Urban Renewal Corridor Strategy which all support a height of 12 or more storeys); and</li> <li>• A carefully modelled built form consistent with the considered desired future urban design character of the precinct providing: <ul style="list-style-type: none"> <li>▪ An assertive northern elevation of 10 storeys fronting Marrickville Railway Station and providing a design dialogue with it;</li> <li>▪ A reduction in scale from 10 storeys on the northern side to 8 storeys on the southern side to provide a transition to the lower height limit of the adjacent sites to the south; and</li> <li>▪ A lower (and compliant) height of 8 storeys on the eastern elevation to create a transition to the adjacent 9.5m height limit low density residential zone to the east.</li> </ul> </li> </ul>
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#### 4.3 Cl. 4.6(4)(a): Objectives of the Zone & Development Standard

Under the provisions of clause 4.6(4) – Exceptions to development standards of MLEP 2011, the consent authority must be satisfied that contraventions of development standards are consistent with the objectives of both the development standard itself and the zone in which the development is proposed. This assessment is summarised in the table below:

Cl. 4.6(4): Justification of contravention against development standard and zone objectives		
Clause	Objectives	Justification
4.4(2)	<b>Floor space ratio</b>	
(a)	to establish the maximum floor space ratio,	The proposal seeks to vary 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,	<p>The density proposed is consistent with the desired future character given:</p> <ul style="list-style-type: none"> <li>• The location in proximity to public transport, the town centre and employment areas;</li> <li>• Council's dwelling target for the site which nominates 56 dwellings and would effectively require an FSR of approximately 5.5:1 (<a href="https://forecast.id.com.au/inner-west/residential-development?WebID=250">https://forecast.id.com.au/inner-west/residential-development?WebID=250</a>)</li> </ul> <p>The proposal for a building of 8-10 storeys is consistent with the desired future character of the site and locality as articulated by:</p>

		<ul style="list-style-type: none"> <li>Peer Review of Planning Proposal, 2-18 Station Street and 1 Leofrene Avenue, Marrickville, Architectus, 30 December 2013;</li> <li>Inner West Architectural Excellence Panel Report (9.8.2016); and</li> <li>Revised Draft Sydenham to Bankstown Urban Renewal Corridor Strategy, 2017.</li> </ul> <p>The proposal is also consistent with the desired future character of the precinct in that it provides:</p> <ul style="list-style-type: none"> <li>An assertive element fronting the station;</li> <li>A transition in scale to the lower height limit adjacent sites to the south; and</li> <li>A lower (and compliant) height on the eastern elevation to create a transition to the adjacent 9.5m height limit low density residential zone to the east. <ul style="list-style-type: none"> <li>An assertive northern elevation of 10 storeys fronting Marrickville Railway Station and providing a design dialogue with it;</li> <li>A reduction in scale from 10 storeys on the northern side to 8 storeys on the southern side to provide a transition to the lower height limit of the adjacent sites to the south; and</li> <li>A lower (and compliant) height of 8 storeys on the eastern elevation to create a transition to the adjacent 9.5m height limit low density residential zone to the east.</li> </ul> </li> </ul>
(c)	to minimise adverse environmental impacts on adjoining properties and the public domain.	<p>The proposal would avoid adverse impacts upon adjacent properties and the public domain as follows:</p> <ul style="list-style-type: none"> <li>Overshadowing would be acceptable largely due to the favourable orientation of the site which would cast shadows predominantly onto the roofs of the properties to the south and only impact low density residential properties to the east in the late afternoon.</li> <li>Potential privacy impacts to the residential properties to the east would be minimised by: <ul style="list-style-type: none"> <li>Use of translucent glass, highlight windows or higher translucent balustrades on the eastern elevation;</li> <li>Careful control of sightlines from the upper level communal open space to prevent overlooking into the private areas of nearby residential properties.</li> </ul> </li> </ul> <p>The proposal would have positive environmental impacts upon the public domain in respect of:</p> <ul style="list-style-type: none"> <li>Street activation;</li> <li>Minimisation of car use; and</li> <li>Provision of a landmark building on a key site.</li> </ul>
<b>2.3</b>	<b>Zone B2 – Local Centre</b>	
	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.	<p>The proposal would provide extensive commercial areas at ground level which would:</p> <ul style="list-style-type: none"> <li>Support the pedestrian traffic generated by Marrickville Railway Station;</li> <li>Activate the existing poorly utilised public plaza;</li> <li>Provide passive surveillance and consequently a safer environment; and</li> <li>Support the future residents of the boarding house.</li> </ul>
	To encourage employment opportunities in accessible locations.	The commercial spaces would provide employment opportunities directly adjacent a major transit node and pedestrian thoroughfare.
	To maximise public transport patronage and encourage walking and cycling.	The provision of a high density of residential population adjacent both Marrickville Railway Station and the town

		centre, along with the provision of ample bicycle storage, would maximise use of public transport, cycling and walking.
	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.	The proposal would provide affordable housing associated with ground floor non-residential uses.
	To provide for spaces, at street level, which are of a size and configuration suitable for land uses which generate active street-fronts.	The proposal includes ground floor commercial uses with extensive glazed shopfronts which would activate not only the primary north and west frontages but also the presently unactivated eastern frontage which has been conceived as a pedestrian link but is currently poorly observed and of questionable safety.
	To constrain parking and reduce car use.	The provision of high density residential accommodation on the site in close proximity to Marrickville Railway Station, major bus routes on Illawarra Road and Marrickville Town Centre would minimise the need for both car use and car parking.

#### 4.4 cl. 4.6(4)(b): Concurrence

Under the provisions of clause 4.6(4)(b) – Exceptions to development standards of MLEP 2011, the consent authority must be satisfied that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained before it can exercise the power to grant development consent for development that contravenes the development standard.

Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, 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.

#### 4.5 Cl. 4.6(5): Criteria for Concurrence

Under the provisions of clause 4.6(5) – Exceptions to development standards of MLEP 2011, the Council or the Secretary, as the concurrence authority, is required to consider the following matters:

Cl. 4.6(5) Criteria for Concurrence		
Clause	Control	Justification
(a)	whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and	The contravention is not of an extent which would raise regional or State environmental planning issues. It is noted, however, that it is broadly consistent with the subregional strategic planning policies for the locality.
(b)	the public benefit of maintaining the development standard, and	There would be no public benefit achieved by maintaining the development standard given that numerous planning benefits would accrue from its contravention as noted above.
(c)	any other matters required to be taken into consideration by the Secretary before granting concurrence.	The matters requiring consideration are addressed above.



## 5.0 THE FIVE PART TEST

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:

<b>The Five Part Test: (in accordance with Preston CJ in <i>Wehbe v Pittwater Council</i> [2007] NSW LEC 827)</b>		
<b>Part</b>	<b>Test</b>	<b>Discussion</b>
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 3(c) above.
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 are achieved more satisfactorily than maintaining the existing subdivision pattern.
3.	The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.	Underlying object (b) of the development standard would be thwarted if compliance were required given that the standard is not consistent with the area's strategic planning objectives or its desired future character.
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 previously abandoned its FSR development standard as follows: <ul style="list-style-type: none"> <li>• 429-449 New Canterbury Road Dulwich Hill (DA2014/477): 2.2:1 to 2.9:1 (32% departure);</li> <li>• 14 McGill Street Lewisham (DA2015/205): 2.3:1 to 4.14:1 (80% departure);</li> <li>• 66 Constitution Road Dulwich Hill (DA 2016 00079): 1.3:1 to 2.146:1 (65% departure).</li> </ul> These, and various other departures, suggest that Council has abandoned its development standard.
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.

## 6.0 CONCLUSION

This Clause 4.6 contravention request to clause 4.4 – Floor space ratio of Marrickville LEP 2011 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 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.
- b) The development meets the zone objectives of the B2 Local centre zone, specifically:
  - 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.

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- 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.
- c) There are sufficient environmental planning grounds to justify contravening the development standard, specifically that the proposed contravention would result in:
- A greater density of affordable rental housing adjacent a major transit node (Marrickville Railway Station) and the community and commercial facilities associated with Marrickville Town Centre to reinforce social equity with improved walkability and access to public transport;
  - A density consistent with Council's dwelling target for the site which nominates 56 dwellings and would effectively require an FSR of approximately 5.5:1 (<https://forecast.id.com.au/inner-west/residential-development?WebID=250>);
  - Increased provision of affordable rental housing in an area of high demand, specifically designated for front-line workers who require affordable accommodation close to their area of work (see Attachment A):
    - A Memorandum of Understanding with the Police Association of NSW (accompanying the Development Application) to provide affordable rental accommodation for police officers at below market rents (including no bond and one month rent free);
    - Pre-registration for accommodation by the Police Association of NSW which could utilise much of the provided residential capacity but also allow for affordable accommodation for other low to middle income groups;
  - Optimal activation of the street and an existing underutilised public square;
  - Reduced reliance upon private vehicles and associated pressure on the road network;
  - More efficient utilisation of public transport due to the proximity to Marrickville Railway Station and major bus routes on Illawarra Road;
  - A more effective urban place marker for Marrickville Railway Station in the broader context of Marrickville Town Centre;
  - An overall height and built form consistent with the considered future urban design character of the precinct (as articulated in multiple expert studies including the Architectus Peer Review, the Inner West Architectural Excellence Panel report and the Revised Draft Sydenham to Bankstown Urban Renewal Corridor Strategy which all support a height of 12 or more storeys); and
  - A carefully modelled built form consistent with the considered desired future urban design character of the precinct providing:
    - An assertive northern elevation of 10 storeys fronting Marrickville Railway Station and providing a design dialogue with it;
    - A reduction in scale from 10 storeys on the northern side to 8 storeys on the southern side to provide a transition to the lower height limit of the adjacent sites to the south; and
    - A lower (and compliant) height of 8 storeys on the eastern elevation to create a transition to the adjacent 9.5m height limit low density residential zone to the east.

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 in clause 4.4 of MLEP 2011.

Extract from The Daily Telegraph, 23 August 2020.



Figure 1