

**WOOLLAHRA LEP 2014
Clause 4.6 Exceptions
to Development
Standards – Floor
Space Ratio (FSR)**

Proposed Commercial Development at

**No. 55 Bay Street,
Double Bay**

Prepared for:

Doonside Holdings Pty Ltd

c/- Stafford Architecture

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Rushcutters Bay NSW 2011

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WOOLLAHRA LOCAL ENVIRONMENTAL PLAN (LEP) 2014

CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

APPLICANT'S NAME: Doonside Investments Pty Ltd

SITE ADDRESS: No. 55 Bay Street, Double Bay

PROPOSAL: Partial demolition of existing building and construction of five storey commercial development

1. (i) Name of the applicable planning instrument which specifies the development standard:

Woollahra Local Environmental Plan (LEP) 2014

(ii) The land is zoned:

B2 Local Centre. The objectives of the zone are as follows:

- 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 attract new business and commercial opportunities.
- To provide active ground floor uses to create vibrant centres.
- To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.
- To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

(iii) The number of the relevant clause therein:

Clause 4.4A – Exceptions to Floor Space Ratio (Areas 1 and 1A – Double Bay). Clause 4.4A is stated, inter alia:

4.4A Exceptions to floor space ratio (Areas 1 and 1A—Double Bay)

- (1) The objective of this clause is to encourage the development of prominent corner buildings in Double Bay.
- (2) This clause applies to land identified as “Area 1” and “Area 1A” on the Floor Space Ratio Map.
- (3) Despite clause 4.4, development consent may be granted to development on land to which this clause applies that results in a floor space ratio that does not exceed—
 - (a) in respect of Area 1—3:1, or
 - (b) in respect of Area 1A—4.5:1,

if the consent authority is satisfied that the development will be compatible with the desired future character of the zone in terms of building bulk and scale.

This Clause 4.6 Exception to Development Standards should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by GSA Planning

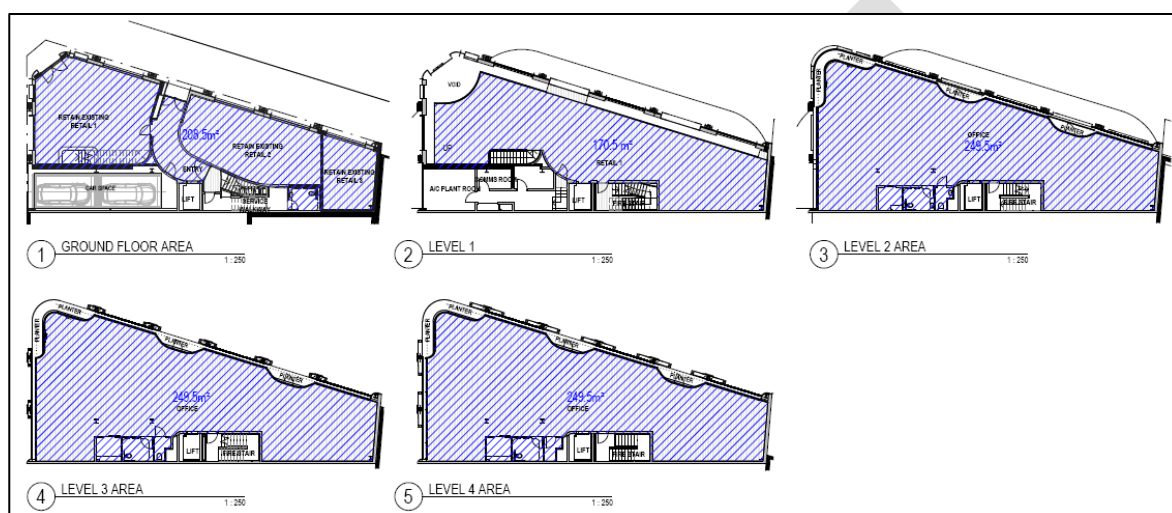
2. Overview

This Clause 4.6 Exception to Development Standards has been prepared in accordance with the most recent case law. In our opinion, the variation achieves the objectives of the zone and development standard and has demonstrated there are sufficient environmental planning grounds.

3. Specify the nature of Development Standard sought to be varied and details of variation:

The development standard to which this request for variation relates is Clause 4.4A of the LEP – Exceptions to Floor Space Ratio (Areas 1 and 1A – Double Bay). The subject site is located in 'Area 1' and therefore a FSR of 3:1 applies. This is 0.5:1 more than surrounding sites. Clause 4.4A is consistent with the definition for a development standard under Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act).

The subject site has a site area of 320.5m², which equates to a maximum permissible gross floor area (GFA) of 961.5m². The proposed development will have a GFA of 1,127.5m² and an FSR of 3.5:1, representing a 17.26% variation (see **Figure 1**).



Source: Stafford Architecture

Figure 1: Diagram Showing GFA Calculations

The proposed FSR will result in a built form compatible with the bulk, scale and form of nearby developments within the Double Bay Centre and along Cross Street. The proposed FSR will also provide a more suitable built form on a corner site, facilitating a five storey built form with a roof parapet compliant with the height standard.

4. Consistency with Objectives of Clause 4.6

The objectives of Clause 4.6 seek 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. In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (*Initial Action*), Preston CJ notes at [87] and [90]:

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...In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

However, it is still useful to provide a preliminary assessment against the objectives of the Clause. The objectives of Clause 4.6 and our planning response are as follows:

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

The proposal seeks flexibility in the application of the FSR development standard to the development in the circumstance of this particular case. The proposed FSR facilitates a scale of development which is compatible with the surrounding urban context.

Flexibility in this circumstance will achieve a better outcome both for and from the development. The proposed FSR will accommodate a well-designed development with an overall bulk and scale that is not inconsistent with existing and approved development on the southern side of Cross Street, particularly in comparison to the existing built form on the site. The proposed FSR allows a well-designed building which accentuates the prominent corner location.

A reduction in FSR would limit the provision of office tenancies within an otherwise generally compliant building envelope, which would unnecessarily impact the proposal's contribution to meeting the demand for high quality commercial floorspace within the Double Bay Centre. Reducing the FSR would unreasonably restrict the development of the site, without noticeable benefits to surrounding properties.

Accordingly, the proposal provides an improved planning outcome both for and from the development and flexibility should be afforded in this instance.

5. Justification of Variation to Development Standard

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The Clause states, inter alia:

- (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.*

This written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in these circumstances; and there are sufficient environmental planning grounds to justify the non-compliance. These matters are discussed in the following sections.

5.1 Compliance with the Development Standard is Unreasonable and Unnecessary in the Circumstances of the Case

Clause 4.6(3)(a) requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. In *Wehbe v Pittwater Council* (2007) 156 LGERA 446 (*Wehbe*), Preston CJ established five potential tests for determining whether a development standard could be considered unreasonable or unnecessary. This is further detailed in *Initial Action* where Preston CJ states at [22]:

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

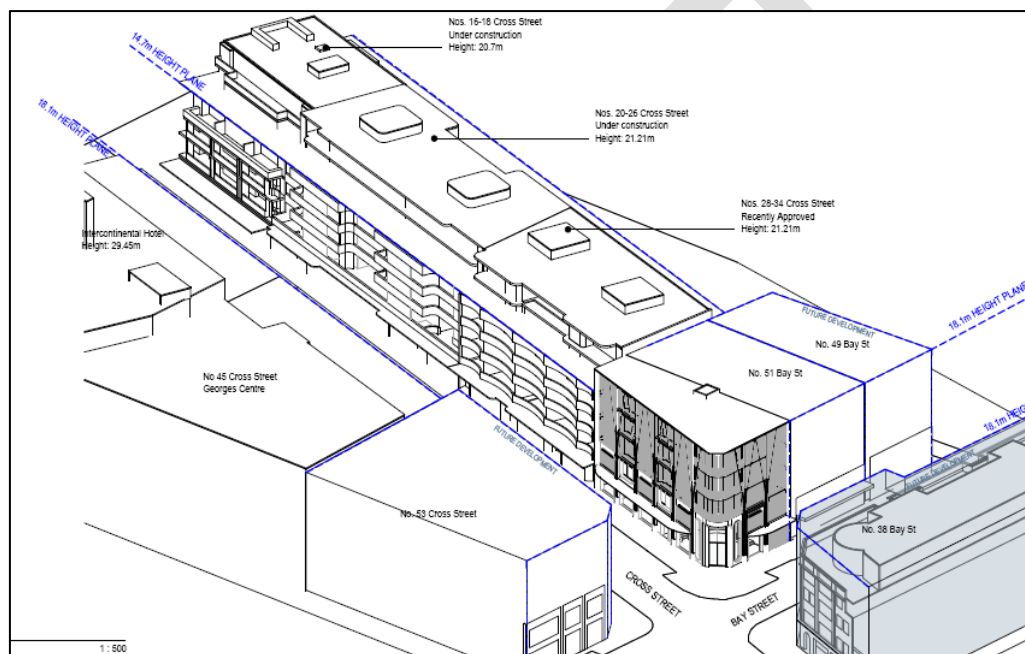
It is our opinion that the proposal satisfies two of the five tests established in *Wehbe* and for that reason, the development standard is unreasonable and unnecessary in this instance. The relevant tests will be considered below.

Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard;

Despite the proposed development's non-compliance with the applicable FSR development standard, the proposal is consistent with the desired density and commercial character of the area. There is only one objective for Clause 4.4A. Reasons why the proposed development is consistent with this objective are explained below.

(1) The objective of this clause is to encourage the development of prominent corner buildings in Double Bay.

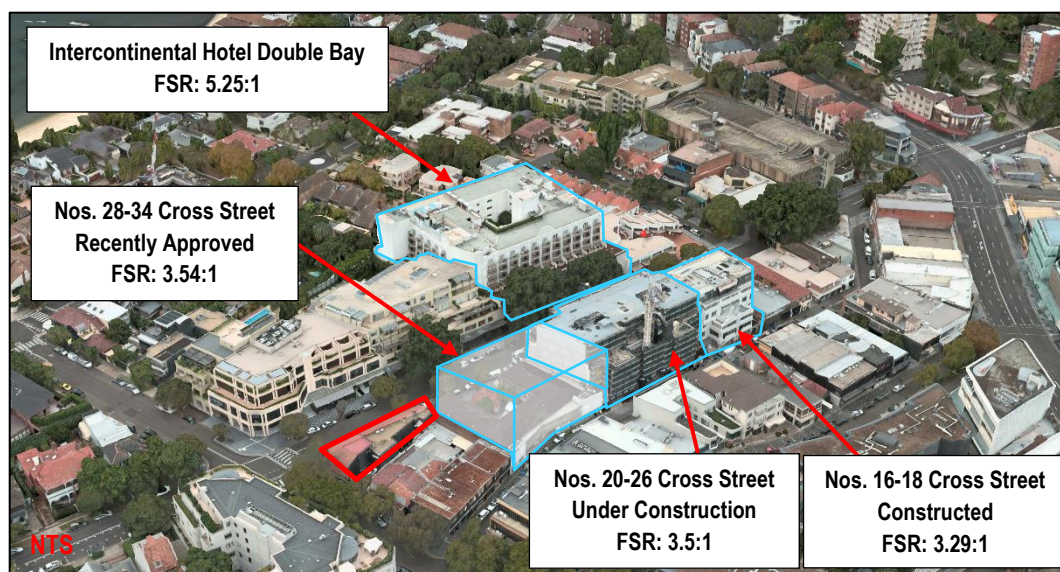
The proposal utilises the corner allotment to provide a prominent building which forms a gateway to Cross Street. The building will address both frontages and provide a high level of visual amenity (see Figure 2).



Source: Stafford Architecture

Figure 2: 3D Diagram Showing Proposed Relationship to the Corner

The proposed development will have a scale and density consistent with recently approved development along the southern side of Cross Street, most of which also exceed the FSR development standards (see Figure 3 and Table 1 on the following page).



Aerial view of subject site from south west



Aerial view of the subject site from the south east

Subject Site

Source: Woollahra 3D Mapping

Figure 3: Aerial View Showing FSR of Development in the Double Bay Centre**Table 1: Nearby Approved FSR Breaches**

DA No.	Location	Distance from Subject Site	Development Standard	DA Consent	Modification Consent	Final Variation
617/2017	28-34 Cross Street	0m	2.5:1	3.54:1	N/A	42%
390/2015	20-26 Cross Street	5m	2.5:1	3.51:1	3.5:1	40%
571/2014	16-18 Cross Street	100m	2.5:1	3.29:1	N/A	32%
289/2019	30-36 Bay Street	100m	3:1	3.33:1	N/A	11%

The subject site has a higher FSR development standard (3:1) than adjoining allotments to the east along the southern side of Cross Street (2.5:1). This is matched by an increased height limit and reflects Council's desire for the corner allotment to have a distinct presence in the streetscape.

Test 3 - The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

In our opinion, the underlying purpose of the development standard is to present a building that enhances the prominent corner site, and is compatible with context and character of the locality.

The subject site is currently underdeveloped. The proposal replaces the existing two-storey building with a five storey commercial development that responds to the corner site location, and the evolving and rapidly developing character of the Double Bay Centre. The proposed built form will have a bulk and scale that is not inconsistent with the desired future character of the area.

Enforcing strict compliance would require a significant reduction of the upper level, or its complete removal, which would result in a streetscape presentation significantly lower than the emerging character of the streetscape, thereby not being a prominent corner building. This would also minimise the potential for increased commercial floorspace on the subject site, unreasonably impacting development of the site without noticeable benefits to neighboring properties. Strict compliance would therefore be incompatible with the object of the EPA Act, to promote orderly and economic development.

Accordingly, the proposal is considered to be appropriate as the built form enhances the prominent corner site, is consistent with the bulk and scale of surrounding development and will maintain the amenity of the streetscape and surrounding properties.

5.2 There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

There are a number of environmental planning grounds that justify the additional FSR in this particular circumstance. In addition to compliance with the objectives of the zone and development standard; environmental planning grounds include the prominent corner site; consistency with the desired future character; commercial use; acceptable environmental impacts; and the urban design benefits of the proposal. These will now be addressed.

Consistent with Desired Future Character

This report demonstrates that the proposed additional height is compatible with desired future character the area. The desired future character of this area of Double Bay was discussed in the Judgement for SJD, as Clay AC notes at [68]:

The desired future character in my opinion must take into account the form of the buildings to the east [Nos. 16-18 & 20-26 Cross Street] which the Council approved under effectively the same controls as present. Those buildings exceed the height and floor space ratio controls. As the Applicant pointed out in submissions, this is not a case where there is an adjacent development approved and constructed many years ago which sits as an anomaly in the street. The developments under construction represent the recently expressed attitude of the Respondent [Council] to the controls and what is desired in this part of Cross Street.

The scale and bulk of the additional FSR is not incompatible with the character of the surrounding approved and constructed built forms. Certainly, a development that complies with the FSR would result in a bulk and scale that is not compatible with the desired future character of the area, and would not align with the relevant objective of the FSR standard.

Commercial Use

The proposal responds to a recognised demand for commercial floor space within the Woollahra Local Government Area (LGA) generally and the Double Bay Centre specifically. The commercial use will provide additional local employment and contribute to the daytime activation and vibrancy of Double Bay. There may also be economic multiplier benefits.

Urban Design Benefits

The proposal provides a high level of urban design which minimises the perceived scale. The facades will be highly articulated with balconies and soft landscaping (see **Figure 4**).



Source: Stafford Architecture

Figure 4: The Proposal in the Streetscape

The provision of the proposed FSR facilitates a good urban design outcome by allowing for a strong corner location development, which is in context with the surrounding built form. This includes an improved relationship with the public domain at a human scale at the corner of Cross and Bay Streets. The proposed awning will also benefit pedestrian amenity. Further, the commercial use requires larger floorplates which contribute to additional FSR. The quality design has the potential to stimulate further renewal in the area.

For the reasons contained in this application, there are sufficient environmental planning grounds to justify the variation to the development standard, as required in Clause 4.6(3)(b). We therefore consider contravening the development standard to be justified.

6. Clause 4.6(4)(a) Requirements

Clause 4.6(4)(a) guides the consent authority's consideration of this Clause 4.6 variation request. It provides that:

- (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*

The applicant submits that the consent authority can be satisfied of each of the requirements of Clause 4.6(4)(a), for all the reasons set out in this request, and having regard to the site and locality.

In our opinion, the proposal achieves the objective of the FSR Development Standard, as already demonstrated; and the B2 Local Centre, as discussed below:

Objective: 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.

Response: The ground floor will retain and upgrade the retail tenancies, to maintain a mix of services in the area for residents, workers and visitors. The tenancies will provide a high level of amenity and accessibility.

Objective: To encourage employment opportunities in accessible locations.

Response: The proposed FSR will facilitate five levels of refurbished and new retail and office floorspace to encourage employment opportunities. The site is in highly accessible location nearby bus, train and ferry services, and pedestrian and bike links.

Objective: To maximise public transport patronage and encourage walking and cycling.

Response: The subject site is highly accessible by public and active transport networks. There are a range of public transport options in close proximity including bus, train and ferry services. The high level of pedestrian amenity in Double Bay encourages walking and cycling to access the proposed retail/business uses.

Objective: To attract new business and commercial opportunities.

Response: The proposed FSR contributes to providing a high quality building in a well-connected location that will be attractive for businesses and shops.

Objective: To provide active ground floor uses to create vibrant centres.

Response: The proposal retains existing active ground floor uses to contribute to the vibrant local centre.

Objective: To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.

Response: The proposed FSR, bulk and scale will be similar with the approved developments from No. 16 through to No. 34 Cross Street on the southern side of Cross Street. The proposal has been thoughtfully designed to provide appropriate levels of amenity to surrounding residential uses.

Objective: To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

Response: The proposal has a height, bulk and scale that aligns with the evolving desired future character of the Double Bay Local Centre, particularly on the southern side of Cross Street.

From this, we consider the proposal is in the public interest and should be supported.

7. Clauses 4.6(4)(b) and 4.6(5) Requirements

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning, Industry and Environment) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

Under Clause 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 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 Clause 4.6, subject to the conditions in the table in the notice. While the proposal exceeds the development standard by over 10%, the Planning Circular provides for the Local Planning Panel to assume concurrence.

Nevertheless, the matters in Clause 4.6(5) should still be considered when exercising the power to grant development consent for development that contravenes a development standard (*Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at [100] and *Wehbe* at [41]). In deciding whether to grant concurrence, the Secretary is required to consider the following:

- (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 Secretary before granting concurrence.*

The proposal does not raise any matters of significance for the State or Regional EPIs so far as the additional FSR above the compliant level does not raise questions in that regard.

Additionally, the public benefit is maintained by virtue of the outstanding design outcome associated with the proposal, including its compatibility with the context and character of the zone and surrounding development.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted and is, in our opinion, in the public interest.

8. Conclusion

This written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard. This is summarised in the compliance matrix prepared in light of *Initial Action* (see **Table 2** on the following page).

In our opinion the Consent Authority can be satisfied the proposed development will be in the public interest because it is consistent with the evolving character and density of Cross Street; the objectives of the standard and the development objectives of the B2 Local Centre Zone pursuant to the LEP. On that basis, the request to vary Clause 4.4 should be upheld.

Table 2: Compliance Matrix

Para (Initial Action)	Requirement	Section of this Report	Summary	Satisfied
10	Is it a development standard (s.1.4)	1	Yes	
11	What is the development standard	1	Clause 4.4A FSR	
12	What is the control	1 & 2	3:1	
14	First Precondition to Enlivening the Power – Consent authority must form 2 positive opinions:		Both positive opinions can be formed as detailed below.	YES
15, 25	1st Positive Opinion – That the applicant's 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). There are two aspects of that requirement.	5	The Clause 4.6 variation has adequately addressed both matters in Clause 4.6(3) by providing a detailed justification in light of the relevant tests and planning considerations.	YES
16-22	First Aspect is Clause 4.6(3)(a) – That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Common ways are as set out in <i>Wehbe</i> .	5.1	The proposal satisfies Tests 1 and 3 of <i>Wehbe</i> : <ul style="list-style-type: none"> • The objectives of the standard are achieved notwithstanding the non-compliance with the standard; and • The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable. 	YES
23-24	Second Aspect is Clause 4.6(3)(b) – The written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under Clause 4.6(4)(a)(i) that the written request has adequately addressed this matter. The environmental planning grounds must be "sufficient" in two respects: a) The environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. b) The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole.	5.2	Sufficient environmental planning grounds include, inter alia: <ul style="list-style-type: none"> • The proposed FSR facilitates a prominent corner building as envisaged by Council's planning controls; • The proposal provides a commercial use which is in demand in the area; • The non-compliance facilitates an improved urban design outcome; and • The FSR will not result in unacceptable environmental impacts. 	YES

26-27	2nd Positive Opinion – 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.	6	The proposed development is consistent with the objectives of the FSR standard as addressed under Test 1 of <i>Wehbe</i> . The proposal is also consistent with the objectives of the B2 Local Centre Zone.	YES
28-29	Second Precondition to Enlivening the Power – That the concurrence of the Secretary has been obtained [Clause 4.6(4)(b)]. On appeal, the Court has the power to grant development consent, subject to being satisfied of the relevant matters under Clause 4.6.	7	As the relevant matters for consideration under Clause 4.6 have been satisfied as outlined above, the Council can grant development consent.	YES

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