

## Clause 4.6 Variation Request Floor Space Ratio Development Standard: Waverley Local Environmental Plan 2012.

552-568 Oxford Street, Bondi Junction

Submitted to Waverley Municipal Council On behalf of Denscen Pty Ltd

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### Report Revision History

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This document is preliminary unless approved by a Director of City Plan Strategy & Development

#### CERTIFICATION

This report has been authorised by City Plan Strategy & Development, with input from a number of other expert consultants, on behalf of the Client. The accuracy of the information contained herein is to the best of our knowledge not false or misleading. The comments have been based upon information and facts that were correct at the time of writing this report.

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### 1. Introduction

This is a formal written request that has been prepared in accordance with Clause 4.6 of the *Waverley Local Environmental Plan 2012*. It has been prepared in support a development application submitted to Waverley Municipal Council for the construction of a shop-top-housing development comprising of, in summary, nineteen (19) storeys, ninety (90) dwellings, three (3) commercial units and four (4) levels of basement car parking, at 552-568 Oxford Street, Bondi Junction.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

The development standard that this request seeks approval to vary is the floor space ratio control in Clause 4.4(2) of the *Waverley Local Environmental Plan 2012* (WLEP).

The numeric value of the floor space ratio control development standard is 7:1. The proposal is for 7.1:1, or 122sqm above the maximum permitted Gross Floor Area (GFA).

The development standard is not specifically excluded from the operation of Clause 4.6 of the LEP.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal<sup>7</sup>.

In **Sections 3** and **4** of this request, we have explained how flexibility is justified in this case in terms of the matters explicitly required by clause 4.6 to be addressed in a written request from the applicant. In **Sections 4**, **5**, **6** and **7** we address, where relevant and helpful, additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 or the assumed concurrence of the Secretary.

In summary, this request is largely reliant upon the built form arising from the subject site's south to north gradient of approximately 4.5 metres. Inevitably, it results in part of the proposal's basement being aboveground, and part of the level above the basement being more than 1 metre above existing ground level. The parts of the basement above ground would not be consistent with the WLEP's definition of 'basement', but rather consistent with its definition of GFA. It must therefore be included for the purposes of calculating FSR.

Those parts of the basement above ground in this case equate to 122sqm. The proposed GFA is non-compliant by 122sqm. The non-compliance can be attributed entirely to the aboveground basement. The DA does not seek additional non-compliant GFA elsewhere in the proposed envelope, such as additional top storeys or the like.

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<sup>&</sup>lt;sup>1</sup> Relevant decisions include: Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46; Wehbe v Pittwater Council [2007] NSWLEC 827; Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009; Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248; and Moskovich v Waverley Council [2016] NSWLEC 1015.

### 2. Extent of variation

The subject site has a maximum allowable FSR of **7:1**, as shown in the WLEP Floor Space Ratio Map in **Figure 1**.

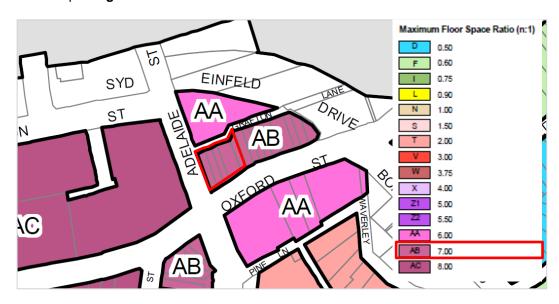


Figure 1 - Extract of the Floor Space Ratio Map, site outlined in red (Source: Sixmaps NSW)

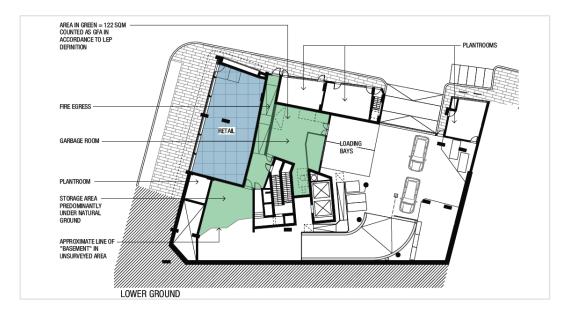


Figure 2 - Extract of the GFA Calculation Plan, excess area identified in green (Source: UP Architects)

As demonstrated on **Figure 2** and the architectural plans prepared by UP Architects & Kann Finch, the development reaches a maximum GFA of 8,010sqm, or 7.1:1 when expressed as an FSR.

The exceedance of the FSR is contributed to a technical non-compliance associated with the location of building service elements comprising a garbage room, fire egress and storage area on Lower Ground level (i.e. the basement). Their location is predominantly under natural ground level but partly situated above ground level due to the sloping topography affecting the site, thereby included in GFA calculation. Refer to **Figure 3** below.



Figure 3 - Extract of the West Elevation, indicative location of subject areas illustrated in red (Source: UP Architects)

The sloping topography illustrated in **Figure 3** dictates the inclusion of these elements in GFA calculation as they are predominantly above ground level, and the floor immediately above is greater than 1 metre above existing ground level (as provided by the definition of 'basement' in the WLEP 2012). Therefore, the contravention of the development standard is the result of a technicality associated with the definition of "gross floor area" and "basement".

As will be demonstrated in **Section 3-4**, the location of these service is pertinent to the practicality and ongoing servicing of the development throughout is lifecycle, particularly with respect to garbage removal. It will improve the internal amenity of residents as the storage areas are located in an appropriate location which can be easily accessed from multiple entry points. The garbage rooms can be accessed along Grafton Lane utilising the single proposed vehicle access point.

Further, the finished floor level of the ground level, as proposed, achieves the expected relationship with Oxford Street (i.e. it is mostly level or convenient access to/from Oxford Street and the proposed ground floor tenancy). The proposed ground floor's finished floor level, however, renders it, in part, 1 metre above existing ground level. Subsequently, the basement area below must be considered as GFA, as described earlier. Conversely, the ground floor finished floor level could be 'pushed' down such that it is not greater than 1 metre above existing ground level (and therefore the basement below would not be GFA), but this results in a poor relationship with Oxford Street.

The maximum GFA exceedance is 122sqm. This is a 1.5% increase to the maximum FSR, less than a 10% variation and therefore, not an unreasonable contravention of the development standard. Further, it does not contribute to bulk or scale with respect to the external appearance of the building.

# 3. Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case. [cl. 4.6(3)(a)]

### Achieves the objectives of the standard

Compliance with the floor space ratio development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in Table 1 (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard<sup>2</sup>.

Table 1 - Achievement of Development Standard Objectives

Objective	Discussion
(a) to ensure sufficient floor space can be accommodated within the Bondi Junction Centre to meet foreseeable future needs,	The development proposes an FSR of 7.1:1, with 375sqm of commercial floor space and 7,431.5sqm of residential floor space. The proposal therefore provides adequate floor space for three (3) commercial tenancies and residential dwellings, bringing numerous tangible benefits to the immediate and wider community such as new employment opportunities, tenancies for shops and local services and dwellings to immediately contribute to housing supply. In this regard, the development provides adequate floor space to support the Bondi Junction Centre.
	The exceedance of the FSR is contributed to building services included in GFA calculation as a result of the sloping topography of the site, largely the result of a technicality. The maximum GFA excess is 122sqm and does not restrict the site's, or adjoining sites, potential to provide floor space to support the Bondi Junction Centre. It should be noted that the excess GFA is minor relative to the proposal and other developments in Bondi Junction. It is not a quantity which would allow for an unanticipated advantage for example.
(b) to provide an appropriate correlation between maximum building heights and density controls,	The exceedance of the FSR control does not affect the relationship between the maximum building height and FSR.
(c) to ensure that buildings are compatible with the bulk, scale, streetscape and	The contravention of the development standard will not affect the appearance of the development, as a tower-on-podium design, with a proposed height and density consistent with the surrounding development.
existing character of the locality,	As is concluded in the SEE, the proposal's overall height is substantially compliant with the WLEP 2012. Its podium is strictly compliant along the

<sup>&</sup>lt;sup>2</sup> In Wehbe v Pittwater Council [2007] NSWLEC 827 Preston CJ identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established. Although the decision concerned SEPP 1, it remains relevant to requests under clause 4.6 as confirmed by Pain J in Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii). The 5 ways in Wehbe are: 1. The objectives of the development standard are achieved notwithstanding noncompliance with the standard; 2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; 3. The objective would be defeated or thwarted if compliance was required with the consequence that 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 the standard is unreasonable and unnecessary; or 5. The zoning of the land is unreasonable or inappropriate.

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Oxford Street frontage, and achieves a high level of integration with the podium at the recently completed 'The Vue'.

The minor nature of the FSR exceedance would not render the proposal's overall bulk as unreasonable. Rather, both the proposed podium and tower are consistent with established and recently completed developments at the northern end of Oxford Street.

Reference can also be made to the urban design review of the proposal, undertaken by Architectus, confirming that the proposal's built form outcomes are acceptable, and more specifically, of a high standard (refer to **Appendix 7** of the SEE).

(d) to establish limitations on the overall scale of development to preserve the environmental amenity of neighbouring properties and minimise the adverse impacts on the amenity of the locality.

The contravention of the development standard has no impact on the built form or scale of the building. In this regard, the exceedance of the FSR will not give rise to any impact on residential amenity with regard to additional overshadowing, loss of privacy or views or increased traffic impacts. The Statement of Environmental Effects (SEE) accompanying the DA concludes that appropriate amenity will be provided for residents of the proposed developments, residents in existing adjoining developments, as well as the public domain generally. Specifically, the SEE includes an independent assessment (at **Appendix 24**) by Steve King, confirming that its solar access and ventilation outcomes are consistent with the intent of SEPP 65 and the ADG.

The building services are located internally and will be managed appropriately so as to not give rise to any adverse impact such as odour, air quality or pests.

### A better planning outcome

In Moskovich v Waverly Council [2016] NSWLEC 1015 the Court accepted that compliance with the development standard (FSR in that case) was unreasonable and unnecessary because the design achieved the objectives of the standard and the respective zone in a way that addressed the circumstances of the site, and resulted in a better streetscape and internal and external amenity outcome than a complying development.

It has been demonstrated earlier that the proposal achieves the objectives of the standard and respective land use zone, despite non-compliance. It has also been demonstrated that the proposal achieves a 'better planning outcome'. Specifically, the finished level of the ground floor tenancy, which is a contributing reason to the non-compliant FSR, achieves a better relationship and level of activation with Oxford Street, than compared to a compliant scheme.

# 4. There are sufficient environmental planning grounds to justify contravening the standard. [cl. 4.6(3)(b)]

The FSR breach is an inevitable design response to the 4.5 metre south - north gradient traversing the site. Any basement, or part thereof, on a site with such a gradient will most likely be aboveground to some degree. An above ground basement will, in most cases, be regarded as GFA and therefore included as part of any FSR calculation.

It should be noted that the non-compliant GFA (i.e. 122sqm) can be mostly attributed to that portion of the basement which is above ground. The proposal does not seek non-compliant GFA in the form of additional storeys towards the top of the proposed envelope for example.

Whilst absence of environmental impact does not, by itself, represent sufficient environmental planning grounds to justify contravening a development standard, it can be a notable reference. The SEE accompanying the DA concludes that the proposal is without any unreasonable environmental impacts. Specifically, the SEE, in conjunction with specialist reports, concludes that the proposal will achieve suitable solar access to future occupants as well as existing surrounding development. It was also found that the proposal's overshadowing impacts are reasonable, as is its urban design outcomes. Ventilation to the proposed dwellings are consistent with the intent of SEPP 65 and the ADG. This request, therefore, provides that the proposal's absence of unreasonable environmental impacts can be considered as one means to justify the FSR contravention.

In light of the above, this request provides that there are sufficient environmental planning grounds to justify the contravention.

5. The proposal will be in the public interest because it is consistent with the objectives of the standard and the objectives of the zone. [cl. 4.6(4)(a)(ii)]

In **Section 2** (above), it was demonstrated that the proposal is consistent<sup>3</sup> with the objectives of the development standard. The proposal is also consistent with the objectives of the zone as explained in **Table 2** (below).

Table 2 - Consistency with Zone Objectives

Objective	Discussion
To provide a mixture of compatible land uses.	The proposal provides a mix of retail and residential land uses. Specifically, it allows for ninety (90) dwellings and three (3) lower ground and ground floor commercial tenancies.
To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.	The proposal provides retail and residential land uses in an established podium/ multi-storey tower built form within close proximity to public transport. The subject site is also within walking distance to a range of employment, medical, retail, recreational and education services.
To encourage commercial uses within existing heritage buildings and within other existing buildings surrounding the land zoned B3 Commercial Core.	The subject site does not include any heritage items. The proposal does not restrict items of heritage significance in Bondi Junction from being occupied for commercial purposes.

As can be seen from **Table 2**, the proposal is consistent with the objectives of the standard and the objectives of the zone, and is therefore in the public interest.

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<sup>&</sup>lt;sup>3</sup> In *Dem Gillespies v Warringah Council* [2002] LGERA 147 and *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC the term 'consistent' was interpreted to mean 'compatible' or 'capable of existing together in harmony'.

6. Contravention of the development standard does not raise any matter of significance for State or regional environmental planning. [cl. 4.6(5)(a)]

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application. In particular, the minor nature of the exceedance (i.e. 122sqm) would not raise any matters of state or regional planning significance.

# 7. There is no public benefit of maintaining the standard [cl. 4.6(5)(b)]

There is no public benefit<sup>4</sup> in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the maximum floor space ratio control and, hence, there are no public disadvantages.

Conversely, compliance could technically be achieved by 'pushing' down the finished floor level of the proposed ground floor tenancy. But for the reasons detailed in **Section 2** above, this would result in an undesirable relationship with Oxford Street in terms of pedestrian accessibility.

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<sup>&</sup>lt;sup>4</sup> Ex Gratia P/L v Dungog Council (NSWLEC 148) established that the question that needs to be answered to establish whether there is a public benefit is "whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development"

### 8. Conclusion

The proposal to exercise the flexibility afforded by Clause 4.6 of the Waverley Local Environmental Plan 2012 results in a better outcome.

This variation request demonstrates, as required by Clause 4.6 of the *Waverley Local Environmental Plan 2012*, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard and is consistent with the objectives of the B4 Mixed Use Zone;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

On this basis, therefore, it is considered appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.