



Clause 4.6 – Exceptions to Development Standards

Request to Vary Clause 4.4 - Floor Space Ratio

Address: 163 and 169-185 Hunter Street, Newcastle

Proposal: Newcastle East End Stage 1 Hotel DA – Adaptive reuse of the former David Jones building (Building B) at 163 and 169-185 Hunter Street for a hotel and associated alterations and additions.

1.0 Introduction

This is a written request to seek an exception to a development standard pursuant to clause 4.6 – Exceptions to Development Standards of the Newcastle Local Environmental Plan 2012 (NLEP 2012). The development standard for which the variation is Clause 4.4 Floor Space Ratio under NLEP 2012.

1.1 Overview of the Proposal

The proposal is for the adaptive reuse of the former David Jones building at 163 and 169-185 Hunter Street, Newcastle for a hotel.

The site is located within Block 1 of the Newcastle East End project, which is the subject of a detailed Stage 1 Development Application Consent (Ref. DA 2017/00700). The Stage 1 DA forms of the Newcastle East End Project, which is the subject of Staged Concept Development Application Consent (Ref. DA2017/00701).

The proposal broadly incorporates:

- A 104 guest rooms, ancillary bars and restaurant and gaming lounge.
- Provision of a new mezzanine level accommodating hotel staff amenities and facilities;
- Alterations to, and reinstatement of floor levels of the former Mitchell & Co. portion of the building fronting Perkins Street;
- Restoration and repair of facades and openings;
- Demolition of existing rear (southern wall) above the ground level, lift lobby and stairs;
- Construction of new lift cores and fire stairs; and
- A rear addition and roof-top addition incorporating guest rooms, a roof-top bar and terrace.

2.0 Description of the planning instrument, development standard and proposed variation

2.1 *What is the name of the environmental planning instrument that applies to the land?*

The Newcastle Local Environmental Plan 2012 (NLEP 2012).

2.2 What is the zoning of the land?

The land is zoned B4 Mixed Use.

2.3 What are the Objectives of the zone?

The objectives of the zone are:

Zone B4 Mixed Use

- To provide a mixture of compatible land uses.
- 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.
- To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.

2.4 What is the development standard being varied?

The development standard being varied is the Floor Space Ratio development standard.

2.5 Is the development standard a performance based control?

No.

2.6 Under what Clause is the development standard listed in the environmental planning instrument?

The development standard is listed under Clause 4.4 of NLEP 2012.

2.7 What are the objectives of the development standard?

The objectives of clause 4.4 are as follows:

- (a) to provide an appropriate density of development consistent with the established centres hierarchy,
- (b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy."

2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.4 establishes a maximum floor space ratio (FSR) of 4:1 for the site as illustrated on the extract of the Floor Space Ratio Map included in Figure 1.

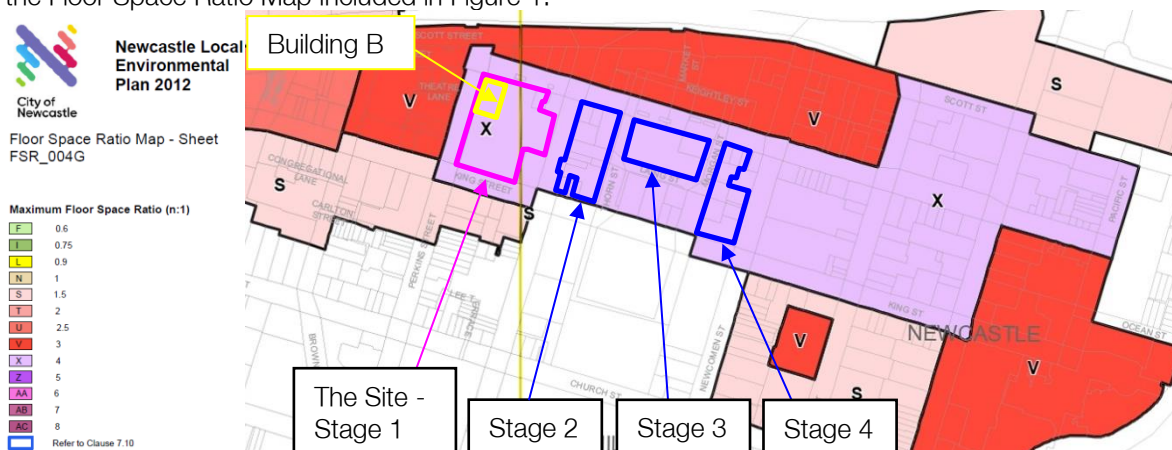


Figure 1: Extract from NLEP 2012 Floor Space Ratio Map

2.9 What is the proposed numeric value of the development standard in the development application?

Building B will have a gross floor area (GFA) of 4,994m² which results in total GFA of 27,466m² for the Stage 1 DA site. This which equates to an FSR of 4.19:1.

2.10 What is the percentage variation (between the proposal and the environmental planning instrument)?

The proposal exceeds the maximum FSR development standard 0.19:1 (1242m²), which equates to a variation of approximately 5%.

3.0 Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan.

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 Secretary has been obtained.*

(5) *In deciding whether to grant concurrence, the 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 Secretary before granting concurrence.*

This request has been prepared having regard to the authorities on clause 4.6, contained in the following guideline judgements:

- *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 No 1');*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 ('Four2Five No 2');*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 ('Four2Five No 3').*
- *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;*
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7; and*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118.*

3.2 Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

3.2.1 The objectives of the development standard can be achieved notwithstanding non-compliance with the development standard

The proposal remains consistent with the objectives of the FSR standard outlined in Subclause 4.3(1) despite the non-compliance, as demonstrated below:

"(a) to provide an appropriate density of development consistent with the established centres hierarchy,

The density of development is appropriate for the site and is not inconsistent with the density of development across the Newcastle East End. Notwithstanding the departure to the FSR control, the proposal reinforces the desired character of the East End as outlined in Section 6.01.02 of the Newcastle DCP and reproduced below:

"East End centres on Hunter Street Mall and the terminus of Hunter Street at Pacific Park. The precinct is characterised by hilly topography and a mix of uses focusing on the retail spine of Hunter Street Mall. The subdivision is more finely grained than other areas of the city centre. A mix of heritage listed and historic buildings give this part of Newcastle a unique character and offer interesting and eclectic streetscapes."

The proposed density enables the adaptive reuse of an existing historic building within the East End for a hotel use. The accommodation and the new dining and entertainment offering will encourage visitors and locals to the area, while fostering new employment opportunities. The proposal will contribute to the ongoing renewal of the East End, while maintaining the important heritage character.

"(b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy."

The building density, bulk and scale respects the heritage significance of the building, site and locality. The contemporary, well-designed additions that accommodate the additional floor space, are integrated within the building to avoid dominating its status as a landmark corner building. The additional floor space is contained wholly within the building height standard.

The proposed building density, bulk and scale positively contributes to the desired built form of the New Castle East End as it:

- Respects the heritage buildings and the heritage elements that need to be protected;
- Maintains key view corridors to and from the Cathedral and is subservient to the Cathedral, and does not dominate the views available from public places;
- Delivers greater mix of land uses with the inclusion of a hotel, in addition to the residential and retail uses; and
- Facilitates the adaptive reuse of the heritage building for a hotel, which will enable public access to the building and the appreciation of the heritage elements and spaces, in line with the historic commercial use.

3.2.2 Is the underlying objective or purpose of the standard not relevant to the development?

The underlying objective or purpose of the standard are relevant to the proposal and addressed above.

3.2.3 Would the underlying objective or purpose be defeated or thwarted if compliance was required?

The underlying objective or purpose of the development standard would not be defeated or thwarted if compliance was required.

3.2.4 Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

The development standard has not been abandoned.

3.2.5 Is the zoning of the land unreasonable or inappropriate?

The zoning of the land is appropriate for the site.

3.2.6 Other reasons

3.2.6.1 Consistency with the Objectives of the zone

The proposal remains consistent with the objectives of the B4 Mixed Use zone, despite the non-compliance with the Floor Space Ratio control as demonstrated in the assessment of the objectives below.

"To provide a mixture of compatible land uses."

The proposal provides for hotel accommodation and ancillary retail uses, incorporating restaurants, bars and gaming lounge. This contribute to the mix of compatible land uses.

"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 integrates a hotel use with the residential and retail uses under construction on site and within the wider locality, in a highly accessible location.

"To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres."

The proposed hotel will support and enhance the vitality of the Hunter Street Mall and East End precinct by providing accommodation and associated dining and entertainment facilities for visitors and tourists, as well as the local community.

3.2.6.2 Impacts of the Proposal

As detailed below, the proposal does not result in unreasonable amenity impacts, notwithstanding the FSR breach.

Views

As detailed in the View Impact & Street View Analysis – Hotel Building B, Stage 1, prepared by SJB Architects, the proposal does not have unreasonable view impacts.

While the proposed additions are visible in some views, the impacts on public views and vista are considered acceptable given:

- The Cathedral remains the prominent feature in the views from the harbour;
- Key views corridors towards the harbour and the Cathedral, as identified in the NDCP 2012, are maintained;
- The Heritage Impact Statement prepared by City Plan Heritage concludes that the proposal has an acceptable impact on significant view corridors, including views to Christ Church Cathedral and views to the heritage building;
- The height of the proposal complies with the height controls and building envelopes in the approved Concept DA;
- The impact on the quality of the streetscape and the public spaces is considered reasonable given the proposal exhibits design excellence and responds to the built form and materiality of the existing heritage Building B, the Stage 1 approval and the locality.

Given the location of the proposal and that the scale of the additions is lower than the adjoining approved Stage 1 buildings, additional impacts on private views from surrounding properties, is likely to be negligible.

Overshadowing

Shadow diagrams have been prepared by SJB Architects. The proposal does not have unreasonable overshadowing impacts, resulting from the breach in FSR. As detailed in the SEE, and summarised below, the shadow analysis indicates the following:

- The Cathedral Park is not overshadowed by the proposal.
- There is no additional overshadowing to existing surrounding residential properties;
- Hunter Street Mall, which is located to the north of the site, is not affected by the proposal;
- The additional overshadowing falls within the Stage 1 site;
- The overshadowing of the approved Stage 1 site does not compromise the achievement of the SEPP 65 ADG solar access criteria, as detailed in Section 6.3.4 of the SEE.

Heritage and streetscape

The proposal does not adversely impact on the heritage significance of the site, conservation area or nearby individual items as detailed in the Heritage Impact Statement prepared by City Plan Heritage and the following extract:

.. it is considered by City Plan Heritage that the proposed works, involving the change of use and associated alterations and additions to the former David Jones building will result in a positive heritage outcome for the heritage significance of the site, the Newcastle City Centre HCA and nearby heritage items. The proposed works aim to reactivate the site while ensuring the retention of significant heritage fabric and the appreciation of the site's history.

The proposed changes to the site to accommodate the use as a hotel, respond directly to the heritage context of the area, using architectural elements and design features that relate to the former David Jones building. This helps to facilitate a continuity of design with a clear definition of the layered history of the site identifiable through the use of modern materials where appropriate. The proposed southern addition to the laneway and the roof top additions are sympathetic to the architectural character and proportions of the building.

.. the roof-top addition to the 1914 Scott's building is designed in a manner that respects its prominent corner location by appropriately setting back the additional level over the building and allowing sufficient curtilage around the clock tower. The plane glazed façade and flat roof of the new addition provides a backdrop and ensures that the accented parapet detailing of the 1914 Scott's building remains dominant.

The rooftop addition to the former D Mitchell & Co Warehouse building responds to the different architectural composition and characteristic of the building rather than the 1914 Scott's building. As such, the design of the new rooftop addition has been specifically tailored to compliment the vertical façade articulation of the building that exists below. The height, flat roof form and regularly placed fins of the new addition make reference to the overall floor level heights of the building following the same height as the new addition to the 1914 Scott's building, and the arched window fenestration, which also differs at each level. The 0m setback of the new addition provided an opportunity to introduce a crown that terminates the building in a similar rhythmic façade treatment of the existing windows. Additionally, the addition uses form, material and colour to remain recessive to the significant façade while being easily identifiable as new work.

....The proposed works also aim to reconstruct elements of the site previously lost or obscured through recent history, including openings, floor levels and configurations, fabric and architectural detailing. This will potentially assist in the future interpretation and appreciation of the site's significant layered history.

In addition, the proposed change of use will provide an ongoing active use for the site with a broad and changing clientele. This will further enhance and assist in helping to expand the appreciation of the site to a wider audience while helping to ensure the necessary future conservation of the site.

Privacy

The proposal does not give rise to unreasonable privacy impacts within the Stage 1 DA site or to surrounding development as detailed in the SEE.

3.3 Are there sufficient environmental planning grounds to justify contravening the development standard?

3.3.1 Circumstances of the site

Heritage Item

The particular circumstance of this site that distinguishes it from others is that the former David Jones Building (Building B) is listed as a heritage item. Accommodating a hotel within the heritage building ensures that it will be accessible to a wider audience, than the current approved residential use. A hotel is a commercial use, which is more in-keeping with the historic commercial use of the building.

While the hotel use has a greater public benefit, it poses significant, site specific challenges for the adaptive reuse of the building. The functions of a hotel demand a different configuration and organisation of floor space. This includes a certain quantum of guest rooms, back-of house facilities and staff amenities. The roof-top bar provides a greater level of amenity that integral to the boutique hotel experience.

The proposed additional floor space and variation to the FSR standard is a direct response to these particular circumstances.

The restoration, refurbishment and adaptive reuse of the heritage building and the opportunity for it to play a key role in the revitalisation and activation of the Newcastle East End precinct, has been key a driver for the proposed hotel and associated additions.

In this case, the provision 5.10(10) provides for a degree of flexibility and arguably should be given greater weight than development standards which have been not informed by a rigorous detailed design and conservation process. In this respect:

- The conservation and adaptive reuse of the heritage items would be facilitated by the granting of a consent;
- The development is consistent with the approved CMP prepared for the site and the development includes the conservation works included in the CMP; and
- The proposed development does not adversely impact on the heritage significance of the item or its setting and maintains and enhances the amenity of the surrounding area;

3.3.2 Policy Context

The site is identified as a Key Site under subclause 7.5(4) of the NLEP 2012. This requires a design competition or an exemption to a design competition issued by the Director-General (or their delegate).

The Office of the NSW Government Architect (GANSW) as the delegate of the Director-General, granted an exemption to the requirement for a design competition for this DA, subject to an approved Design Excellence Strategy.

The GANSW nominated the Council's Urban Design Consultative Group (UDCG) as the Design Review Panel for design excellence process. Meetings were held with the UDCG in preparing the DA.

The design of the proposal evolved through this process in response to feedback from the UDCG, as well as ongoing review and analysis by the design team. This process involved consideration of a range of built form and massing options for the proposed additions, which ultimately culminated in a preferred option that formed the basis of the proposal. The FSR breaches were reviewed by the UDCG and were evaluated within the context of:

- The heritage significance and values of the building and heritage conversation area,
- The streetscape and built form setting of the site, and
- The potential impacts, including impacts on views to and from the Cathedral.

As a result of this process, the proposal is considered to exhibit design excellence and satisfies the design excellence criteria contained within Clause 7.5 of the NLEP 2012.

3.3.3 The Public Interest

Generally speaking, there is public benefit in maintaining standards. However, there is public benefit in maintaining a degree of flexibility in specific circumstances.

The variation to the FSR has provided an opportunity to accommodate a hotel within a landmark heritage building of Newcastle. The hotel use will facilitate public access to the building and enable an appreciation of the heritage elements and spaces, in line with the historic commercial use.

There is, in the specific circumstances of this case, no public benefit in maintaining the development standard, as the proposed development results in a better planning outcome for the site as it facilitates wider public access to, and appreciation of, the heritage former David Jones building.

3.4 Matters for the Consent Authority to Consider

Subclause 4.6(4) sets out matters that the matters that the consent authority must be satisfied, in granting consent to a development that breaches a development standard. These matters are briefly outlined below.

3.4.1 Has the written request adequately addressed subclause 4.6(3)

The matters required to be addressed are detailed at Section 3.2 and 3.3. It is considered that the objection is well founded in this instance and that granting an exception to the development can be supported in the circumstances of the case.

3.4.2 The proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone

As detailed in Section 3.2 above, the proposal is considered to be in the public interest as it is consistent with the objectives of the building height standard and the objectives of the B4 Mixed Use Zone.

3.4.3 Concurrence of the Secretary has been obtained

In granting concurrence, the consent authority is required to consider the following matters.

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning*
- (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 contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions.

Generally speaking, there is public benefit in maintaining standards. However, there is public benefit in maintaining a degree of flexibility in specific circumstances. For reasons outlined in Section 3.2 and 3.3 in the specific circumstances of this case, there is no public benefit in maintaining the development standard.

Regarding other matters required to be taken into consideration, it is noted that the concurrence of the Secretary has been assumed.

4.0 Conclusion

The proposed variation is based on the reasons contained within this formal request for an exception to the Floor Space Ratio standard.

Development standards are a means of implementing planning purposes for a development or area.

The proposal results in an appropriate built form, at the street frontages and at the interface with the approved Stage 1 building and the surrounding adjoining development. The additional density results in a built form and scale that is compatible with the existing and emerging character of the area.

The proposed density and resultant built form is a result of a design excellence process that has carefully considered the heritage values and significance of the site.

The development will not result in unacceptable impacts with regard to the amenity of adjoining properties. A development strictly complying with the numerical standard would not significantly improve

the amenity of surrounding land uses and would not result in a better urban design response to the site. In the context of the locality it would be unreasonable for strict compliance to be enforced.

The non-compliance is not considered to result in any precedents for future development within the LGA given the particular site circumstances, heritage context and surrounding pattern of development.

As demonstrated in this submission, it would be unreasonable for strict compliance with the FSR control to be enforced. It is concluded that the variation to the FSR development standard is well founded as compliance with the standard is both unnecessary and unreasonable in the circumstances of this case.