

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

Demolition of Existing Building and Construction of a
Shop-top Housing Development at

**Nos. 19-27 Cross Street,
Double Bay**

Prepared for:

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COUNCIL LOCAL ENVIRONMENTAL PLAN (LEP) 2014
CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

APPLICANT'S NAME: Tri-Anta Pty Ltd
 C/- SDH & Associates

SITE ADDRESS: Nos. 19-27 Cross Street, Double Bay

PROPOSAL: Demolition of existing building and construction of a shop-top housing 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 stated 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 centers.
- 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 4.4 - Floor Space Ratio. Clause 4.4 is stated as follows.

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

(a) for development in Zone R3 Medium Density Residential—

- (i) to ensure the bulk and scale of new development is compatible with the desired future character of the area, and*
- (ii) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain, and*
- (iii) to ensure that development allows adequate provision on the land for deep soil planting and areas of private open space,*

(b) for buildings in Zone B1 Neighbourhood Centre, Zone B2 Local Centre, and Zone B4 Mixed Use—to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale.

(2) 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.

(2A) Despite subclause (2), the floor space ratio for a building on land shown on the Floor Space Ratio Map does not apply to a building that is a dwelling-house, dual occupancy or semi-detached dwelling.

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

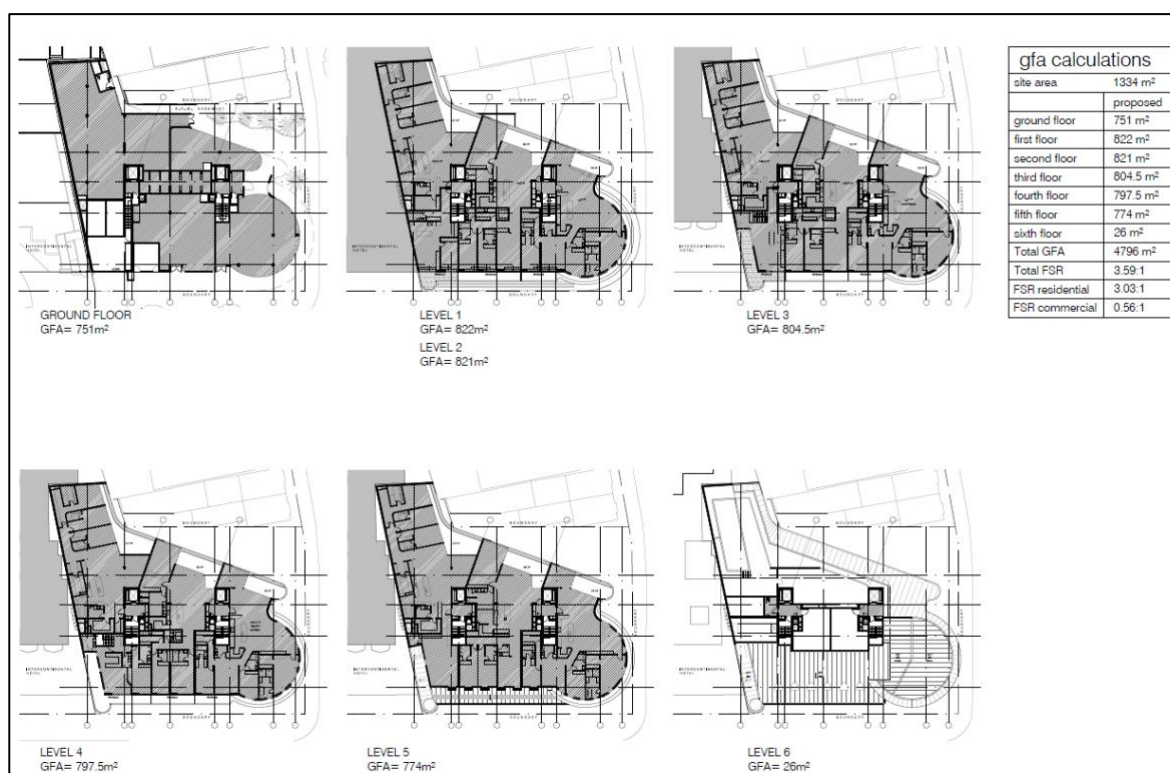
2. Overview

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 4.4 of the LEP – Floor Space Ratio. This Clause operates in conjunction with the FSR. Map which indicates a maximum 2.5:1 applies to the subject site. Clause 4.3 is consistent with the definition for a development standard under Section 1.4 of the *Environmental Planning and Assessment Act 1979* (EPA Act).

The FSR Map specifies a maximum FSR of 2.5:1 on the site. The subject site has a lot size of 1,334m² and therefore a maximum gross floor area (GFA) of 3,335m². The proposal has a total gross floor area of 4796m² and an FSR of 3.59:1, having a variation of 1,461 m² (43.8%) which results in similar form to nearby developments (see **Figure 1**).



Source: Luigi Rosselli

Figure 1: GFA Calculations

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(1) 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. Cross Street comprises a broad and evolving mix of development, containing both residential and commercial uses of up to six storeys in height. The six-storey proposal complements the existing and desired future character of the streetscape, with a bulk and scale that is compatible with surrounding development.

In *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 (SJD)*, a six-storey shop-top housing development was granted consent at Nos. 28-34 Cross Street with an FSR of 3.54:1 by Clay AC on 12 March 2020. This decision, appealed by Council, was dismissed in *Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115 (SJD DB2)* by Preston CJ on 18 August 2020. The decision indicates that six storey development of similar scale and density is appropriate for this part of Double Bay, and this scale and density can be considered to contribute to the desired future character of Cross Street.

Flexibility in this circumstance will also provide a better outcome from development. The proposed bulk and scale which is consistent with nearby existing and approved development. Additional floorspace within the mansard roof form is not readily discernible from Cross Street and the curved tower will become an important corner feature. Importantly, the proposal complements the mixed-use character of the locality, with a compatible bulk and scale which will enhance the Cross Street streetscape.

To refuse this application would prevent the orderly and economic use and development of the land. Accordingly, in our opinion, as the proposal is consistent with the objectives of Clause 4.6, the variation is acceptable 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 a number 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;

It is noted that under Clause 4.6(4)(a)ii, 'achieved' has been replaced by the lesser test of 'consistent'. Despite the non-compliance, the proposal is consistent with the desired density character of the area. The proposal provides a height, bulk and scale that is generally consistent with that envisaged by Council's controls. Consistency with the objectives of the FSR Standard will now be discussed.

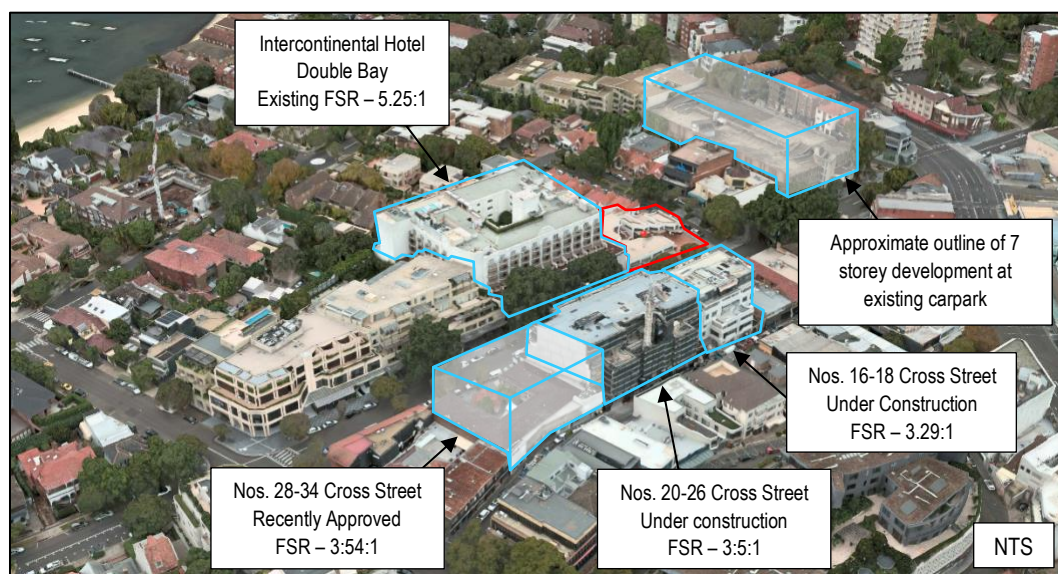
FSR Objective (a): *For development in Zone R3 Medium Density Residential—*
 (i) *to ensure the bulk and scale of new development is compatible with the desired future character of the area, and*
 (ii) *to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain, and*
 (iii) *to ensure that development allows adequate provision on the land for deep soil planting and areas of private open space,*

Response: As the proposal is in Zone B2 Local Centre, these objectives are not applicable.

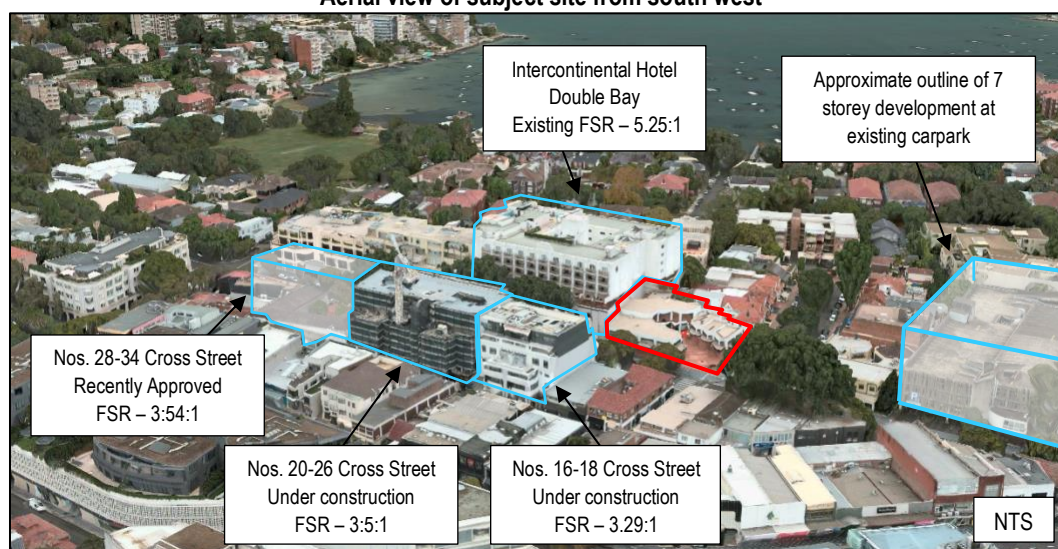
FSR Objective (b): *For buildings in Zone B1 Neighbourhood Centre, Zone B2 Local Centre, and Zone B4 Mixed Use—To ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale.*

Response: The proposal is for a building with an appropriate scale that is compatible with nearby existing and approved development. The existing building is inconsistent with the area's desired future character. The existing building is a dated, one-to-two storey commercial building that includes a central open plaza area that does not contribute to the streetscape.

The current building is dominated by the adjoining multi-storey property to the west, the 'Intercontinental Hotel Double Bay' and other nearby development along Cross Street (see **Figure 2** on the following page). As a corner site, it is an important opportunity to provide Cross Street with the strong and quality streetscape presence. This opportunity is currently lost.



Aerial view of subject site from south west



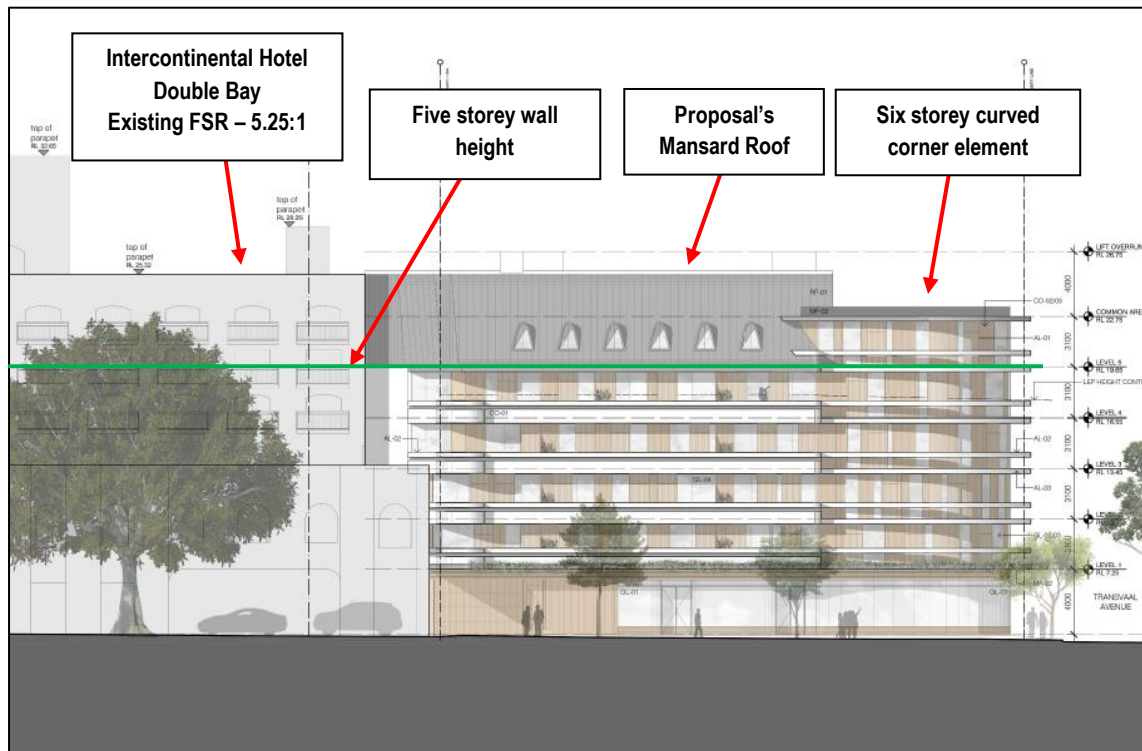
Aerial view of the subject site from the south east

Source: Woollahra 3D Mapping

Subject Site

Figure 2: Aerial View Showing Scale of Development in the Double Bay Centre

The proposal will replace the existing building with a development that is consistent with existing and future nearby development. The proposal will align with the adjoining property, the 'Intercontinental Hotel Double Bay' to unify the streetscape along Cross Street (see **Figure 3** on the following page).



Source: Luigi Rosselli

Figure 3: South Elevation Showing Alignment with Adjoining Property

Approvals for larger development with higher FSRs on Cross Street have responded to the growing needs and evolving character of the area. These six storey developments along Cross Street contribute to the area's high density streetscape. This includes Nos. 16-18 Cross Street which presents a six storey mixed use development with an approved FSR of 3.29:1, which is opposite the subject site (see **Figure 4**).



APR Architects

Figure 4: Approved Development at No. 16-18 Cross Street (FSR of 3.29:1)

Adjoining the previous site is Nos. 20-26 Cross Street, a large six storey mixed use development is currently under construction with an approved FSR of 3.5:1 (see **Figure 5**).



Source: Bates Smart

Figure 5: Nos. 20-26 Cross Street mixed use development currently under construction (FSR of 3.5:1)

Adjoining Nos. 20-26 Cross Street is Nos. 28-34 Cross Street which has been approved by the Court for a six storey mixed use development with an FSR of 3.54:1 (see **Figure 6**).



Source: Bates Smart

Figure 6: Recently Approved Nos. 28-34 Cross Street mixed use development (FSR of 3.54:1)

Accordingly, it is considered that the proposal is consistent with the existing and future development along Cross Street and is appropriate in terms of bulk and scale in this context.

The proposal has the potential to create economic multipliers and stimulate further renewal in the area through the additional floor level, in accordance with the desired future character.

Cross Street Character

Importantly, the proposal is consistent with the objectives relating to the Cross Street in Part D5.4.7 of Council's DCP. The relevant objectives of this area and our responses are as follows:

- | | |
|-------------------|--|
| <i>Objective:</i> | <i>Unify the street on the north side by building to the street boundary</i> |
| Response: | The existing development is inconsistent with the evolving character of Cross Street and results in a inconsistent streetscape. The proposal will better unify the street through providing a bulk and scale that is consistent with the nearby approvals and development currently under construction along Cross Street. |
| | The proposal is built to the Cross Street boundary to align with the adjoining hotel to the east with curved articulation at the western corner. The built form will align with the adjoining hotel to the east to provide a consistent scale along the northern side of Cross Street on this block. |
| <i>Objective:</i> | <i>Retain street level connections to Knox Lane.</i> |
| Response: | As the proposal is on the northern side of Cross Street and does not have a frontage to Knox Lane, this objective is not relevant. |
| <i>Objective:</i> | <i>Allow 4 storeys on 50% of each site frontage to Knox Lane.</i> |
| Response: | As the proposal is on the northern side of Cross Street and does not have a frontage to Knox Lane, this objective is not relevant. |
| <i>Objective:</i> | <i>Encourage arcades and courtyards on the south side that cater for outdoor eating and informal gathering.</i> |
| Response: | As the proposal is on the northern side of Cross Street, this objective is not relevant. |
| <i>Objective:</i> | <i>Strengthen built form on corner sites</i> |
| Response: | The proposal is located on a corner site that is current occupied by a one-to-two-storey building that currently has little street presence. The site is currently dominated by the large blank eastern façade wall of the adjoining hotel. The proposal will replace this development with a notable and contemporary mixed-use building. |
| | The proposal's cylindrical corner element responds to the curve of the street curb and provides a bookend to the block. This will reinforce its position as a corner site on the busy intersection of Transvaal Avenue and Cross Street. |
| | The proposal strengthens the built form and presence of the subject site and improve the unity of Cross through aligning with the height and street boundary setback of the adjoining property to the west (see Figure 7 on the following page). |



Source: Luigi Rosselli

Figure 7: Existing and Proposed Built Form

Accordingly, although the proposal will exceed the FSR control, the proposal is consistent with the evolving streetscape and the desired future character of the area.

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 is compatible with the bulk, scale, context, and character of the locality whilst preserving the amenity of adjoining properties.

As demonstrated, the proposal presents a built form of an appropriate bulk and scale that responds to the desired future character of the area. Enforcing strict compliance would limit development on the site, which will result in an inconsistent and 'missing tooth' streetscape presentation with reduced potential for increased floorspace on the subject site. This would be inconsistent with the object of the *Environmental Planning and Assessment Act 1979* (EPA Act) to promote orderly and economic development, and will not contribute to the necessary and important revitalisation of Double Bay.

The proposed FSR will allow increased dwelling numbers in accordance with Greater Sydney Commission requirements, by providing high quality residential units and contributing to the shopping areas with large open spaces for retail tenancies. Additionally, the proposed redevelopment is necessary to capitalise on site potential and attract high profile tenants to the site and to Double Bay.

Accordingly, the proposal is considered to be appropriate as the works are consistent with the bulk and scale of surrounding development and will maintain streetscape and neighbours amenity developments.

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

The proposal is permissible in the B2 Local Centre Zone; is consistent with the zone and Double Bay Centre objectives; the desired future character objectives of the Cross Street Precinct; and with the surrounding density and scale in the area. The proposal satisfies a number of the 'unreasonable and unnecessary' tests established by the Court in *Wehbe*.

This report demonstrates the proposed FSR will facilitate a new development that is compatible with nearby existing and future development. 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.

Accordingly, the Acting Commissioner considered the desired future character should be informed by the approved and constructed development along Cross Street. This approach which did not limit 'desired future character' to the development standards, was confirmed by Preston CJ in the Woollahra v SJD DB2 appeal, who considered at [60]:

Neither the height of buildings development standard in cl 4.3 nor the FSR development standard in cl 4.4 is expressly excluded from the operation of cl 4.6. This contemplates that development that contravenes the height and FSR development standards may be approved under cl 4.6.

As indicated, the proposal's FSR is similar to and compatible with that of the approved developments at Nos. 16-18 Cross Street, Nos. 28-34 Cross Street, and Nos. 20-26 Cross Street. Therefore, the proposal can be considered compatible with the desired future character of this area of Double Bay.

The additional FSR will increase the capacity of the well-connected and assessable site. The proposal's design encourages pedestrian activity and connectivity with the adjacent Heritage Conservation Area. This is supported by the Urban Design Report prepared by GMU, which states:

The new plaza encourages the terraces to open to its new space and to provide a laneway linkage along their rear boundaries to enhance the existing laneway network.

Cross Street is enlivened with the new active uses and the widened footpath linking with the hotel provides a continuous high quality retail experience.

Therefore, we consider that the scale and design will improve the pedestrian-to-development relationship and the elements contributing to the proposal's additional FSR as being appropriate in this circumstance. Together with the approved proposals and development currently under construction in this area of Cross Street, the proposal will contribute to the revitalisation of this area of Double Bay.

The additional FSR will improve the capacity of the site, whilst maintaining amenity for nearby development, through ensuring appropriate levels of solar access, views and privacy to nearby development are maintained.

As detailed, strict compliance with the development standard would not result in a better outcome for development. The proposed additional FSR facilitates the orderly and economic use of the subject site by replacing the existing one and two storey commercial building with a new six storey mixed-use development.

The proposal improves the site in accordance with Object (c) of the Environmental Planning and Assessment Act 1979, to "promote the orderly and economic use and development of land". It is noted that the proposal is a contemporary and intricately designed response to the well-connected site in the heart of the Double Bay Centre.

Accordingly, in our opinion, the additional FSR will allow a development which is compatible with existing and desired future planning objectives for Double Bay. 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).

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 that each of the requirements of Clause 4.6(4)(a), have been met for the reasons set out in this request, and having regard to the site and locality.

B2 Local Centre Zone Objectives

In our opinion, the proposal achieves the objectives of the FSR Development Standard, as already demonstrated; and the B2 Local Centre Zone, 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 and mezzanine level comprise retail/business tenancies of contemporary design which will enhance the range of services in the area.

Objective: *To encourage employment opportunities in accessible locations.*

Response: Retail tenancies will be at grade and will offer employment opportunities.

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

Response: The proposal is in a highly accessible location, facing both Cross Street and Transvaal Avenue, close to public transport routes including bus, train and ferry services.

Objective: *To attract new business and commercial opportunities.*

Response: The busy corner location will be highly attractive for businesses and shops.

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

Response: Retail tenancies within a new contemporary mixed use building will provide active frontages to both streets at the ground floor level.

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

Response: The proposal's height and scale align with the adjoining development. This allows the provision of two- and three-bedroom dwellings compatible with the high standard of amenity of nearby mixed use development.

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

Response: The proposal will be consistent with approved and potential future developments at Nos. 16 to 34 Cross Street to the south and the existing hotel to the west. The proposed plaza will provide a transition to the adjoining Transvaal Avenue shops.

Double Bay Centre Objectives

The proposal also achieves the objectives of the Double Bay Centre, as discussed below.

Objective 1: *To retain and enhance through block connections which allow pedestrians to move freely within the Double Bay Centre.*

Response: While the proposal does not include through-block connections, as the proposal is on a corner allotment on the intersection of Cross Street and Transvaal Avenue, pedestrians can move freely throughout the centre. The proposed cylindrical structure softens the corner, responds to the curve of the street curb, and opens up the pedestrian pathways between Transvaal Avenue and Cross Street.

Objective 2: *To develop the particular qualities of different parts of the Double Bay Centre.*

Response: Cross Street is evolving into a centre of high quality contemporary developments, with the construction and approval of various six storey buildings along the street. The proposal will replace the existing low-rise building with a thoughtful development that will contribute to the evolving contemporary quality of this part of the Double Bay Centre. The design will also reinforce the corner site which is desirable from an urban design perspective.

Objective 3: *To encourage a diverse mix of uses in the Double Bay Centre and maintain retail uses at ground level.*

Response: The proposal is a six storey mixed use development that includes retail tenancies at the ground level to both frontages and residential above.

Objective 4: *To conserve and enhance the visual and environmental amenity of all buildings and places of heritage significance in the Double Bay Centre*

Response: As noted, the proposal is not a heritage item, is not in a heritage conservation area and is not in the vicinity of a heritage item, however, does adjoin the Transvaal Heritage Conservation Area (HCA). In designing the plaza, the proposal will provide a compliant northern setback to the Transvaal HCA, and maintains existing solar access to the heritage area.

The majority of the proposal's floorspace is also above the commercial properties on Transvaal Avenue and will maintain visual privacy to these buildings. This is supported by the Heritage Impact Statement prepared by John Oultram Heritage & Design, which states, as follows.

The proposed design is well articulated and scaled and uses appropriate materials and details. It will revitalise the site and provide for a high quality development in a prominent location without impacting on the Transvaal Avenue Heritage Conservation Area.

Objective 5: *To enhance the way development contributes to a sense of place.*

Response: The proposal will replace the existing low-rise commercial building with a six storey mixed use building that strengthens the built form of the site as a corner development. This will contribute to the evolving character of Cross Street as a contemporary and high quality centre. The proposal provides ground floor retail tenancies fronting both Cross Street and Transvaal Avenue, continuous awning and seating to encourage pedestrian activity.

Objective 6: *To ensure a high standard of architectural and landscape design in any new developments within the Double Bay Centre.*

Response: The proposal will present an articulated contemporary development with a curved element to strengthen its built form on the corner allotment. Landscape elements will be provided along the Transvaal Street frontage on the ground floor and in the form of spill over planting along the eastern elevation.

Objective 7: *To preserve and enhance the diversity of uses in the Double Bay Centre.*

Response: The renowned Luigi Rosselli Architects have designed an articulated contemporary development with a cylindrical element for presence on an important corner. This demonstrates the ability of the site to accommodate this FSR in the site's context. Landscape elements will include planters at ground level and in the form of spill over planting along the eastern elevation.

Objective 8: *To ensure that new development is compatible with the existing built form, and streetscape and village character.*

Response: The proposal is compatible with the scale and built form of six storey mixed use developments currently under construction at Nos. 16-18 and 20-26 Cross Street; and the approved six storey development at Nos. 28-34 Cross Street. The proposal will present a contemporary six storey development that is compatible with the evolving character of the Cross Street area.

Objective 9: *To encourage view sharing and individual privacy.*

Response: The scale to Cross Street is lower with the Mansard roof hiding the six floor and rooftop plant areas. This allows the curved element to feature in the streetscape. The proposal is a contemporary six storey development that is compatible with the evolving character of the Cross Street area, such as the six storey mixed use developments currently under construction at Nos. 16-18 and 20-26 Cross Street; and the approved six storey development at Nos. 28-34 Cross Street.

Objective 10: *To ensure new development is designed to be compatible with the heritage significance of listed heritage*

Response: The subject site is not within the direct vicinity of any individually listed heritage items, however, has maximised setbacks to the Transvaal Heritage Conservation area. This provides additional breathing space between the earlier development and the evolving character of the area. The relationship of the proposal with the Transvaal Heritage Conservation Area has been outlined in the Heritage Impact Statement prepared by John Oultram Heritage & Design, stating as follows.

...the curvilinear nature of the plan and the formation of the plaza along the Transvaal Avenue frontage are strong positives in heritage terms as the building engages with the shops along Transvaal Avenue rather than presenting a blank wall close to the former houses (as is the current situation).

Accordingly, the proposals frontage to Transvaal Avenue is compatible with the streetscape values of the Heritage Conservation Area.

As demonstrated in Test 1, the proposal also satisfies the desired future character objectives of the Cross Street Precinct. 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 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 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 is not considered to raise any matter of significance for State or regional environmental planning. The additional FSR will enhance the amenity and functionality of the proposed shop-top housing development without while maintaining streetscape and neighbour amenity.

The public benefit of maintaining the development standard is not considered significant given that, regardless of the additional FSR, the proposal will appear consistent in the streetscape and aligns with future development along Cross Street. The additional FSR will also allow for large space for high quality residential units which will increase both the number of dwellings in Woollahra, and housing choices.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted. The FSR contributes to an exceptional quality development which is consistent with the B2 Local Centre and Double Bay Centre objectives; and the Cross Street Precinct desired future character objectives

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 1 on the following page).

We are of the opinion that the consent authority should be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the development objectives of the B2 Local Centre Zone pursuant to the LEP; and the Double Bay Centre and Cross Street Precinct area pursuant to the DCP. On that basis, the request to vary Clause 4.3 should be upheld.

Table 1: 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 4.3 FSR	
12	What is the control	1 & 2	2.5:1	
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; 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: <ol style="list-style-type: none"> 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. 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 development consistent with the planning objectives and density of the area; The proposed FSR will facilitate a development that is compatible in bulk and scale with nearby and future development; The additional FSR will improve the capacity and potential for the site, whilst maintaining amenity for nearby development; and The proposal improves the site in accordance with Object (c) of the Environmental Planning and Assessment Act 1979, to "promote the orderly and economic use and development of land". 	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	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; the	YES

	objectives for development for the zone in which the development is proposed to be carried out.		Double Bay Centre; and the desired future character objectives of the Cross Street Precinct.	
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