



44-52 Anderson Street, Chatswood

Clause 4.6 Variation Request

Clause 6.25 Shop top housing in Zone MU1 – Non-residential floor space

Willoughby Local Environmental Plan 2012

PREPARED FOR

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1 Introduction

This Clause 4.6 Variation Request accompanies a State Significant Development Application (**SSDA**) for a shop-top housing development at 44-52 Anderson Street, Chatswood (the **site**). The development proposes to vary the development standard for non-residential floor space provision pursuant to Clause 4.6 of the *Willoughby Local Environmental Plan 2012* (the **LEP**).

The objectives of Clause 4.6 are:

- (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.*

This Clause 4.6 Variation Request demonstrates that strict compliance with the non-residential floor space development standard is unreasonable and unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds to justify the contravention.

This Clause 4.6 Variation Request demonstrates that, notwithstanding the non-compliance, the proposed development will:

- Provide much-needed affordable housing within a highly accessible location, whilst utilising additional height and floor space ratio (**FSR**) made available via Chapter 2 of the *State Environmental Planning Policy (Housing) 2021 (Housing SEPP)*;
- Provide a suitable amount of non-residential floor space within the building podium to promote commercial and retail activity in the Chatswood CBD;
- Provide high quality retail tenancies on ground level to activate street frontages along Anderson Street, O'Brien Street, Day Street, and the western laneway;
- Attract pedestrian traffic and contribute to the vibrancy of the public realm along Anderson Street, O'Brien Street, Day Street, and the western laneway;
- Provide a two-level podium which is comprised of non-residential uses;
- Encourage a mix of retail and commercial uses on the lower levels, that will generate employment opportunities;
- Contribute to the provision of employment floor space within in the Chatswood CBD;
- Optimise the provision of non-residential floor space within the building envelope;
- Create residential opportunities on the periphery of the Chatswood CBD whilst supporting the economic growth of the MU1 Mixed Use zone; and
- Respond to the desired future character of the locality.

Therefore, the development application can be supported notwithstanding the breach of LEP Clause 6.25 minimum non-residential floor space development standard in accordance with the flexibility afforded under Clause 4.6 of the LEP.



2 Development Standard to be Varied

The development standard sought to be varied under this written request is Clause 6.25 Shop top housing in Zone MU1 under the LEP 2012.

2.1 Clause 6.25 Shop top housing at certain sites at Chatswood

Clause 6.25 of the LEP states:

*“Development consent for the purposes of shop top housing on land in Zone MU1 Mixed Use must not be granted unless the consent authority is satisfied **at least 17% of the gross floor area of the building will be used for non-residential purposes.**”*

The proposed development provides a total Gross Floor Area (**GFA**) of 20,959m² which is equivalent to an FSR of 7.8:1. In accordance with Clause 6.25, a total GFA of 20,959m², requires a minimum non-residential floor space of 3,563m².

The proposal provides a non-residential floor space of 2,741m² which equates to 13.08% of the total GFA proposed or 821m² less than that required.

2.2 Is the Planning Control in Question a Development Standard?

The non-residential floor space requirement under Clause 6.25 of the LEP is a development standard involving a measurable quantum that can be varied.

It is noted that Clause 6.25 has no objectives, as such reference is made to **Section 3.1** and **4.1** of this report, which discusses the intent of Clause 6.25 as set out in the Department endorsed *Chatswood CBD Planning and Design Strategy 2036 (Chatswood CBD Strategy)*.



3 Clause 4.6(3)(b) Sufficient environmental planning grounds to justify contravention of the development standard

There are sufficient environmental planning grounds to justify the proposed variation to the minimum 17% non-residential floor space development standard under Clause 6.25 because:

- The proposed percentage of non-residential floor space reflects the provision of affordable housing which also allows for additional height and floor space to be awarded in accordance with Chapter 2 Part 1 Division 1 of the Housing SEPP.
- The proposed percentage of non-residential floor space results from the provision of an appropriate building envelope that is compliant with infill affordable housing requirements and the building height and FSR standards under Section 16 of the Housing SEPP. It also meets the quantum of required non-residential floor space for an LEP compliant scheme with 6:1 FSR, which is the quantum anticipated for the Chatswood CBD under the Chatswood CBD Strategy.
- The proposed non-residential floor space provision is consistent with the underlying objective of the standard as demonstrated in **Section 4.1.1** of this report.
- The objectives of the MU1 Mixed Use zone are as follows:
 - *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*
 - *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
 - *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
 - *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
 - *To allow for city living on the edges of the city centre of Chatswood, which encourages public transport use, shopping and the use of businesses and recreational services that contribute to the vitality of the city, without undermining its commercial role.*

The proposed non-residential floor space provision is consistent with the abovementioned MU1 zone objectives as it:

- enables the provision of residential, retail and non-residential uses within the building.
 - Encourages a range of potential non-residential uses, making the space versatile to a range of employment uses; and
 - Provides active street frontages, pedestrian site links that will attract pedestrian traffic, thus contributing to provision of vibrant, diverse and functional streets.
- The proposed non-residential floor space provision is consistent with the intent of the Chatswood CBD Strategy in that it provides a wholly non-residential podium, with non-residential floorspace located over four floors, thereby contributing to the supply of employment floor space in the Chatswood CBD.



- The proposal has optimised the provision of non-residential floor space within the constraints of the required setbacks in the site-specific DCP and the ADG, as well as the vehicular access requirements and endorsement of the Design Competition Jury.
- The proposed non-residential floor space includes the provision of active uses at ground level, which facilitates street activation and improves the amenity of the public domain. Combined with the non-residential floorspace on Level 1, the proposal will increase the supply of employment floor space in the Chatswood CBD and create job opportunities close to home, contributing to the 30-minute city concept of the North District Plan.
- The variation to the non-residential floor space development standard does not affect the proposal's ability to provide a mixed-use development that is of appropriate bulk and scale. Notably, the proposal is compliant with the maximum 117m building height and maximum overall FSR of 7.8:1 allowable in accordance with *Part 2, Division 1 of the Housing SEPP*. Compliance with these other key controls will deliver a high-density mixed-use development that is reflective of the desired future character of the Chatswood CBD while also contributing much needed housing supply.
- Strict compliance with the non-residential floor space would require either:
 - provision of excessive non-residential floor space within the tower component (i.e. top of podium) thereby reducing the quantum of housing, and/or
 - result in a 3-4 storey podium which would lead to an exceedance in the street wall height control, impacting the desired approach to the streetscape and public domain; and/or
 - Substantially less deep soil and landscaping to the northern and eastern parts of the site; and/or
 - Increase in waste collection and loading bay requirements.

All of these options would result in a poorer design outcome as they would either diminish the top-of-podium residential amenity and podium articulation, remove landscape area, deep soil and street setbacks, as well as surrounding sites, and result in on-street waste loading.

Furthermore, they would undermine the design excellence of the scheme and be inconsistent with the merits of the design competition scheme which were identified by the design competition jury.

Importantly, adjusting the proposal to achieve strict numerical compliance with the standard by reducing the quantum of affordable housing is unreasonable as it contradicts the objective of in Section 15A of the Housing SEPP relating to facilitating the delivery of new in-fill affordable housing to meet the needs of very low-, low- and moderate-income households.

Reducing the provision of housing is also inconsistent with the NSW Government's commitment to delivering 377,000 new homes across the state by 2029 and the 5-year housing target of 3,400 new homes for the Willoughby LGA under the National Housing Accord.

These options would result in outcomes which would be inconsistent with the future desired character of the area.

- Provision of 821m² of additional non-residential floor space would result in the lower floors of the tower being converted to non-residential floorspace, and therefore the loss of approximately 12 apartments which would be inconsistent with the Housing SEPP



objectives to maximise the provision of additional housing opportunities.

- The proposed 13.08% (2,741m²) of non-residential floor space still represents significant contribution to employment floor space in the mixed-use zone, which will support the economic growth and reinforce the commercial role of the Chatswood CBD core.
- Despite the proportional variation of 23%, the extent of variation is numerically small in the context of the overall development and will be imperceptible in the context of the wider CBD.
- The shortfall of 3.9% (821m²) is both insignificant and imperceptible in a CBD location that already has significant non-residential floor space and that is expected to grow through the development of other similar mixed use and new commercial developments elsewhere in the CBD. The proposed non-residential floor space provision is consistent with the underlying objectives and aims of the Chatswood CBD Strategy as demonstrated in **Section 3.1** of this report.

The proposed non-residential uses will be located within the podium of the building in a highly accessible location within the Chatswood CBD. The site is within proximity to the Chatswood Transport Interchange, which will promote public transport patronage.

The proposal will facilitate city living on the periphery of the Chatswood CBD and contribute to the vitality of the city centre. The provision of non-residential floor space within the development will support the economic growth of the Chatswood CBD without undermining the commercial role of the CBD core.

Based on the above appraisal the proposed development has numerous environmental grounds to justify the variation sought to Clause 6.25 of the LEP.

3.1 Future Vision for Chatswood CBD

The Chatswood CBD Strategy has been in place since 2018 and was given effect by LEP Amendment No. 34 in June 2023. The proposal is consistent with the aims and intent of the proposed controls with respect to non-residential floor space provision under the Chatswood CBD Strategy, as discussed below.

The aims of the Chatswood CBD Strategy include:

- **Achieve a sustainable balance between commercial, retail, residential, education, cultural and other uses to ensure on-going vibrancy (p. 6).**

Response: The proposed development provides a mix of residential and non-residential uses to create a high-density environment with convenient access to local services, shops and employment opportunities. It also includes active street frontages and high levels of pedestrian amenity in the public realm on Anderson Street, O'Brien Street, and Day Street, as well as western boundary.

The proposed mix of residential and non-residential floor space is appropriate as it will provide a suitable level of commercial floorspace to support the ongoing vibrancy of the surrounding area. The residential component will support the commercial core of Chatswood by providing high density residential communities within proximity to the commercial, cultural and community uses in the CBD.



- **Ensure Chatswood’s future as an employment centre is protected whilst allowing capacity for strong residential growth at the edge of the CBD (p. 11).**

Response: The proposed development will preserve the role of the Chatswood commercial core as an employment centre whilst supporting the growth of residential opportunities beyond the core of the Chatswood CBD. Importantly, the provision of non-residential floor space within the site seeks is contained wholly within the building podium. This will support the vitality of the proposed mixed-use development and activation of the street, which serves a different role (being an extension to the CBD) to the commercial core of Chatswood. The core Chatswood CBD will maintain its strong position as an employment hub with a variety of offices and major retail facilities and will continue to be a vital component of the Eastern Economic Corridor.

Further, the proposed development will support residential growth on the periphery of the CBD, consistent with the principles of the CBD Strategy. In particular, the proposal will provide a high-density residential environment and increase the supply of residential accommodation in Chatswood.

Affordable housing contributions will also be made in accordance with LEP 2012 to ensure the availability of accommodation for a diverse range of residential population. The proposed residential units will therefore support strong residential growth on the edges of the city centre of Chatswood.

Accordingly, the proposed shop top housing will not undermine the commercial role of the Chatswood city centre and will realise the mixed-use development on the edges of the CBD to contribute to the vitality of the centre as intended by the Chatswood CBD Strategy.

- **Deliver sufficient floorspace appropriate to the projected growth requirements for Chatswood CBD (p. 11).**

Response: Under the North District Plan, Chatswood has a baseline jobs target of 31,000 and a higher target of 33,000, requiring an additional 6,300 to 8,300 jobs by 2036. While the Chatswood CBD Strategy highlights the importance to meet the job targets set out by the North District Plan and maintain Chatswood’s share of office employment amongst the strategic centres in Greater Sydney, it acknowledges that residential use is currently the most financially attractive land use which poses pressure on the existing stock and growth potential of Chatswood’s office market. Without the provision for mixed use development, most development would favour residential over commercial.

In this regard, the proposed mixed-use development enables the delivery of both residential and commercial uses in response to the increasing demand for residential accommodation and employment opportunities. While the proposal involves a variation to the minimum non-residential floor space standard, the proposed 2,741m² non-residential floor space provision still represents a significant contribution to the employment floor space and provision of high-quality residential accommodation would support the vitality of the Chatswood CBD and respond to the market conditions that favour residential uses.



4 Clause 4.6(3) Justification for Contravention of the Development Standard

Clause 4.6(3) of the LEP provides that:

4.6 Exceptions to Development Standards

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that -

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
- (b) there are sufficient environmental planning grounds to justify contravention of the development standard.*

Furthermore, Clause 4.6(1) of the LEP allows for exceptions to development standards where it meets the following objectives:

- (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.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court (**LEC**) in:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90

The relevant matters contained in Clause 4.6 of the LEP, with respect to the minimum non-residential floor space development standard, are each addressed below, having regard to these decisions.

4.1 Clause 4.6(3)(a) Compliance with the development standard is unreasonable or unnecessary in the circumstances

The LEC judgement in *Wehbe v Pittwater Council* [2007] NSW LEC 827 sets out five possible ways for strict application of a standard to be unnecessary or unreasonable. In applying the tests of *Wehbe* to the proposal, the **'first way'** is relevant to establishing that compliance with the minimum non-residential floor space development standard pursuant to clause 6.25 of the LEP is unreasonable or unnecessary:

- 1. The objectives of the standard are achieved notwithstanding non-compliance with the standard.**

4.1.1 First way: The objectives of the standard are achieved notwithstanding non-compliance with the standard

Clause 6.25 does not include objectives for the non-residential floor space development standard. Notwithstanding, the intent of Clause 6.25 is set out in the Chatswood CBD Strategy. This Strategy is endorsed by Council and the Department of Planning, Housing and Infrastructure (**DPHI**).

The Chatswood CBD Strategy seeks to increase non-residential floor space within the Chatswood CBD to promote employment growth of the Strategic Centre. The boundary of the Chatswood CBD was expanded to the north and south and facilitates residential opportunities on the periphery of



the CBD as part of a MU1 Mixed Use zone. This periphery was to provide key housing opportunities whilst providing growth prospects for some smaller scaled commercial opportunities that supported the core of the CBD, being the E2 Commercial Core zone.

To support job growth in the CBD, the Chatswood CBD Strategy initially proposed a minimum non-residential floor space ratio of 1:1. This floor space was to be provided in the podium levels of a development that achieved a total maximum FSR of 6:1. This development standard was modified in the planning proposal and resulted in a requirement of 17% of total GFA to accommodate sites that may have or achieve a lower FSR control due to site constraints, surrounding context and the applicable built form controls.

At Page 33, the Chatswood CBD Strategy states that the objective of the recommended 1:1 minimum non-residential floor space standard (later converted to 17%) is:

- *The objective of this Key Element is to achieve a **satisfactory level of commercial** in the B4 Mixed Use* zone to deliver a reasonable amount of **employment floor space**, typically to be **within the podium** levels of a development. This will be moderated depending on the overall FSR.
(our emphasis)*

*Note: the B4 Mixed Use zone is now referred to as MU1 Mixed Use under the LEP 2012.

Further to the above, Section 3.1 of the Chatswood CBD Strategy provided key elements to guide future LEP and DCP controls*, including street frontage wall heights, which essentially constrain the podium levels and availability of non-residential floor space, noting that the site is subject to a maximum street wall height of 7m at the front boundary. To comply with the 17% non-residential floor space requirement, would result in a 3-4 storey podium which would lead to an exceedance in this control and impact the desired approach to the streetscape and public domain.

*Street wall heights applicable to the subject site have since been adopted into the Willoughby Development Control Plan.

Response: The proposed development responds to a number of site-specific constraints which compete for, or constrain space within the podium:

- LEP - Clause 6.7 (Active Frontages): which are required to Anderson Street, O'Brien Street, and Day Street, as well as western boundary.
- DCP – Part L (Place Based Plans): 44-52 Anderson Street Chatswood
 - Minimum 6m ground floor setbacks and Street wall height limits of 7m or two storeys to Anderson Street to the east boundary.
 - Minimum 1.15m ground floor setbacks and Street wall height limits of 7m or two storeys to O'Brien Street to the north boundary;
 - Nil ground floor setbacks and Street wall height limits of 7m or two storeys to Day Street to the south boundary;
 - Minimum 2m ground floor setbacks with additional stepped 2m setback at Podium Level, and street wall height limits of 7m or two storeys to Western (rear publicly accessible pathway) boundary;



- Active street frontages to Anderson Street, O'Brien Street and Day Street, as well as western boundary; and
- On-site loading and unloading.

While the proposed non-residential floor space provision is below the minimum 17% requirement, the extent of variation (being a shortfall of just 821m²) is relatively minor in the context of a development comprising 20,959m² of GFA. The proposal will provide an appropriate level of non-residential floor space, totalling 2,741m² within the podium of the development and in accordance with the above objective, no habitable residential floorspace is proposed within the building podium.

The proposed non-residential floor space includes ten retail tenancies on ground level, a non-residential plate across Level 1 and end of trip facilities in the basement level. The proposed non-residential uses at the basement, ground and first level are illustrated in **Figure 1**.



Figure 1: Original DA Ground Floor (left image) and revised version (right image) comparison

Source: Turner

The retail tenancies on ground level have been positioned to address the street frontages of Anderson Street, O'Brien Street and Day Street, as well as providing active street frontage on the western boundary, facilitating street activation and social interaction between the residents and the local community. It is important to note that greater attention has been given to the expression, materiality, and detailing of the non-residential space layout, in response to the Jury's recommendation, in order to strengthen the contextual response of the podium.

Level 1 has been dedicated as non-residential floorspace, providing flexibility for a variety of employment uses. The floorplate can be divided into multiple tenancies to meet the operational needs of the future businesses occupying the level. Combined, the proposed non-residential floor space will create employment opportunities in an accessible location close to homes, contributing to a 30-minute city.

Additionally, detailed design refinements have been required to be made following the conclusion of the design competition in May 2022. The winning competition scheme by MAKE Architects



proposed a shop top housing development which was recognised as demonstrating a balance between the scales of the large towers to the west and the finer grain heritage conservation areas to the east of Anderson Street through the splitting up of the development envelope into two slender forms. However, owing to exceptional circumstances, MAKE Architects were unable to be retained as the lead designer for the project and Turner Studio has now been appointed by the client as the lead designer to progress the project – a position which has been endorsed by MAKE Architects.

The Design Integrity Panel generally supported the revised proposal, noting that the design now more closely aligns with the original competition scheme.



5 Extent of Variation Proposed

The proposed variation to the non-residential floor space development standard in the LEP is summarised in **Table 1** below:

Table 1: Non-residential floor space variation summary

GFA per Willoughby LEP 2012				Housing SEPP – with 30% GFA uplift		
FSR control (GFA)	Non-residential GFA Control (17%)	Proposed non-residential GFA	Variation % to LEP	Proposed FSR (of a maximum 7.8:1)	Non-residential GFA Control (17%)	Proposed Non-residential GFA
6:1 (16,122m ²)	2,741m ²	2,741m ² (17%)	0%	7.8:1 (20,959m ²)	3,563m ²	2,741m ² (13.08%)

The proposal seeks consent for **13.08%** of the total GFA to be used for non-residential purposes. However, the quantum of non-residential floor space is fully compliant with the LEP controls of the 6:1 development standard.

The shortfall of 3.9% non-residential GFA (equivalent to **821m²**). This arises as a result of providing additional affordable housing by utilising additional building height and FSR awarded under the in-fill affordable housing provisions in Chapter 2 of the Housing SEPP.

As shown in **Table 1** above, the proposal complies with the provision of 17% non-residential GFA based on the LEP FSR control of 6:1.

In accordance with Clause 16(1) of the Housing SEPP, the site is eligible for the 30% ‘bonus’ uplift in GFA and height, which came into effect 1 July 2024. The intent of these bonuses was to permit additional market and affordable housing. However, the implications for other associated GFA requirements for sites was not contemplated when the Housing SEPP amendments were drafted. As such the Housing SEPP controls did not consider Willoughby LEP requirements at Clause 6.25, relating to the proportion of non-residential uses required.

Strict application of Clause 6.25 of the LEP to the additional floor space bonus under the Housing SEPP would therefore require 17% of the uplifted GFA to be non-residential floor space. This does not align with the intent of Clause 16(1) of the Housing SEPP, which is to provide new infill affordable housing in locations with good access to public transport and services, such as the subject site. Nor does it align with the intent of the Chatswood CBD Strategy as discussed further at **Section 3.1** and **4.1** of this report.

The proposed variation to the non-residential floor space standard is considered to be appropriate in the context of a **117m** shop top housing development with a total GFA of **20,959m²** that both fulfils the requirements of the Housing SEPP to maximise the provision of new housing while also achieving Council’s expectations for street activation and providing the opportunity for on-site jobs. With an entirely non-residential podium, the proposal has been designed to optimise the provision of non-residential uses whilst accommodating the spatial requirement of ground level loading and waste collection.

The proposed non-residential floor space includes the provision of active uses at ground level, which facilitates street activation and improves the amenity of the public domain and through-site link. Combined with the non-residential tenancies on Level 1, the proposed non-residential floor space will increase the supply of employment floor space in the Chatswood CBD and creates job opportunities close to home, contributing to the 30-minute city concept of the North District Plan.

The proposal also remains consistent with the intent of the non-residential floor space requirement under the Chatswood CBD Strategy as detailed in **Section 4.1.1** of this report.



6 Conclusion

This Clause 4.6 Variation Request is for a variation to the minimum non-residential floor space development standard under Clause 6.25 of the LEP. The request justifies the contravention of the development standard in the terms required under Clause 4.6 of the LEP.

As demonstrated throughout this Variation Request, the variation sought to Clause 6.25 is well-founded in this instance and the granting of a Clause 4.6 variation to this development standard is appropriate because:

- The proposed non-residential floor space provision results from the provision of affordable housing by utilising building height and FSR uplifts under Chapter 2 of the Housing SEPP.
- There are sufficient environmental planning grounds to justify the contravention of the development standard as demonstrated in **Section 3**;
- The proposed development is consistent with the future vision of Chatswood CBD as discussed in **Section 3.1**;
- Compliance with the development standard is unreasonable and unnecessary as explained in **Section 4.1**;
- The underlying objective of the standard is achieved notwithstanding the non-compliance with the standard, as demonstrated in **Section 4.1.1**;
- The extent of variation is considered minor and would be imperceptible in the context of the wider Chatswood CBD and the proposed development itself; and
- The proposal represents an optimal development outcome when compared to scenarios for achieving strict compliance.

Accordingly, the proposed minor variation to the minimum non-residential floor space development standard is well-justified and warrants approval.

