

# **Attachment B**

**Clause 4.6 Variation Request**



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## WRITTEN REQUEST PROVIDING GROUNDS FOR VARIATION TO FSR DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.6 OF SYDNEY LEP 2012

### MODIFICATION 2019/88 – 161 CASTLEREAGH STREET, SYDNEY – THE LIBERTY PLACE BAR

#### Context – Background

This written request has been prepared with respect to cl 4.6 of *Sydney Local Environmental Plan 2012 (LEP 2012)* to accompany Development Application 2019/88 seeking consent for fitout of four existing retail tenancies and the construction of an additional tenancy for use as a pub as well as public domain changes (*the Application*).

The base building approval, D/2007/1792, when lodged was caught by savings provisions under *Sydney LEP 2005 (LEP 2005)*. It was subject to *Central Sydney Local Environmental Plan 1996 (LEP 1996)*. At the time of originally granting consent in 2007, the permissible Floor Space Ratio (*FSR*) was 12.5:1 which was varied to 14.2:1 (as permitted at the time under *State Environmental Planning Policy No 1*).

An increase in Gross Floor Area approved under D/2007/1792/H of 1,217.9sqm. Because that application was a modification, it did not require a SEPP 1 request. Development standards only apply to development applications.<sup>1</sup> The power to modify a consent is a standalone power.

The FSR that applies under *Sydney Local Environmental Plan 2012 (LEP 2012)* is 8:1, with additional floor space available under cl 6.4 of 4.5:1 for the current land uses. That is a total of 12.5:1. Consequently, the current development exceeds the FSR limit for the site.

In addition to the above, the lot is burdened by an instrument created under s 88 of the *Conveyancing Act, 1919*. Clause 43A(4) of LEP 1996 required a covenant to be imposed on the title limiting floorspace to the approved level and consolidation of the lots. The subject site comprises a consolidated site where a covenant was placed on the title. That restriction reads as follows.

<sup>1</sup> *North Sydney Council v Michael Standley & Associates Pty Ltd* [1998] NSWSC 163.

### 13. Terms of restriction on the use of land numbered 13 in the Plan

13.1. The Grantor must limit the sum of the floor space ratio of all the Lots taken together to no more than 14.51:1, calculated in accordance with the Central Sydney Local Environmental Plan 1996.

13.2. The terms of this restriction on the use of land cannot be released, varied or modified without the consent of the Council of the City of Sydney.

The site has an area of 4,487sqm. The ratio of 14.51:1 provide a 65,103.4sqm of Floor Space Area (FSA).<sup>2</sup> D/2018/269 was granted consent on 23 May 2018, permitted an additional 35.82sqm through the infill of a stair void. This increased the FSR to 14.52:1 and so beyond the above limit on the title.

When D/2007/1792 was first approved, the variation sought was a 13.8% increase beyond the 12.5:1 FSR that applied to the lot. As noted above however, further increases have been approved. Seven reasons were provided in support of the variation in the original determination. Reason four is most relevant to this Application as follows (which in itself provides three reasons).

- (4) *The proposed development is of an exceptionally high standard of design and provides for a number of public and social benefits, including a public “Ethics” Plaza, a mid block connection between Castlereagh and Pitt Streets and rent free accommodation for the not for profit organisation, St James Ethics Centre,*

The subject Application, through construction of an additional building and public domain changes, will reduce to some degree the scope of “Ethics Plaza”. Notwithstanding, the numerical reduction in public access in terms of square metres, the site will be accessible and useability and amenity will be substantially improved. Public usability can also be improved throughout Ethics Plaza.

The remaining benefits including the mid-block connection and rent-free accommodation for the St James Ethics Centre would be maintained.

The **enclosed** survey calculations provided by Veris submit that the proposed FSA is presently 65,048.4sqm, some 50sqm less than the permitted amount under the covenant.

### Clause 4.6 of Sydney Local Environmental Plan 2012

Clause 4.6 of the LEP provides:

- (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.*

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<sup>2</sup> It should be noted that under LEP 1996 *Floor Space Area* is used to calculate Floor Space Ratio. Under D/2007/1792/H, a new definition of *Gross Floor Area* was used. Despite the different terms, there is no relevant difference for the purpose of this application.

- (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 document constitutes the written request referred to in Clause 4.6(3) in relation to the Application's variation of the height development standard.

It is noted that the NSW Department of Planning and Environment provides guidance on how to prepare cl 4.6 variations in the form of *Varying development standards: A Guide* (August 2011). This written request to vary the standard is based on the DP&E's Guide.

This written request has also been prepared having regard to the recent judgment in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*). At [17] – [21] of *Initial Action*, Preston CJ confirmed the findings in *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) based on *State Environmental Planning Policy No 1 – Development Standards* continues to apply to cl 4.6 variations. *Wehbe* established that compliance with a development standard can be found to be unreasonable or unnecessary in the circumstances of the case (in accordance with the test provided by cl 4.6(3)(a) of the LEP) if the objectives of the development standard are achieved notwithstanding non-compliance with the standard (*Initial Action* at [17]).

Further, Preston CJ found in *Initial Action*, at [87] and [88], in the context of Clauses 4.6(3)(a) and (b) that:

*“...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...”*

*...The requirement in Clause 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard...”*

### **Written Request**

The proposed increase in GFA relates to the construction of the proposed pavilion building, to be known as tenancy 10. There are other minor changes to the scope of the approved tenancies, that do not affect the bulk and scale of the building but also result in a minor increase in GFA.

The existing FSR for the site is understood to be 14.52:1. However, the results of the detailed survey of the site show that that current FSA is 64,887.1sqm. That results in an FSR of 14.46:1. The application results in an additional 181.33sqm, and so a total FSA of 65,048.4sqm or 14.49:1.

The questions set out in the DP&E’s Guide are addressed below.

#### **1. What is the name of the environmental planning instrument that applies to the land?**

Sydney Local Environmental Plan 2012.

#### **2. What is the zoning of the land?**

The land is zoned B8 Metropolitan Centre.

#### **3. What are the objectives of the zone?**

The objectives of the B8 Zone are:

- *To recognise and provide for the pre-eminent role of business, office, retail, entertainment and tourist premises in Australia’s participation in the global economy.*
- *To provide opportunities for an intensity of land uses commensurate with Sydney’s global status.*
- *To permit a diversity of compatible land uses characteristic of Sydney’s global status and that serve the workforce, visitors and wider community.*
- *To encourage the use of alternatives to private motor vehicles, such as public transport, walking or cycling.*
- *To promote uses with active street frontages on main streets and on streets in which buildings are used primarily (at street level) for the purposes of retail premises.*

#### **4. What is the development standard being varied?**

The development standard being varied is the FSR development standard.

**5. *Under what Clause is the development standard listed in the environmental planning instrument?***

The development standard is listed under clause 4.4 of LEP 2012.

**6. *What are the objectives of the development standard?***

The objectives of clause 4.4 are:

- (a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*
- (b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,*
- (c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,*
- (d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.*

**7. *What is the numeric value of the development standard in the environmental planning instrument?***

The numeric value of the development standard in LEP 2012 is approximately 56,087sqm. The building was approved under LEP 1996 which permitted 56,084.87sqm of FSA under LEP 1996. The final variation permitted construction of 65,103.4sqm of GFA under ELP 2012, approved under D/2007/1792/H.

**8. *What is the proposed numeric value of the development standard in your development application?***

The proposed additional GFA is 181.33sqm, for a total of 65,048.4sqm. That is a 0.27% increase in GFA.

**9. *What is the percentage variation (between your proposal and the environmental planning instrument)?***

The percentage variation from the current FSR under LEP 2012 of 12.5:1 is approximately 15%. However, it is less than the total amount of floor space previously approved and required to be imposed on the title of the land by 50sqm or so.

**10. *How is strict compliance with the development standard unreasonable or unnecessary in this particular case?***

In the circumstances of the case, it is considered that strict compliance with the FSR of buildings development standard applicable to the site is unreasonable and unnecessary for the following reasons:

**A. *The objectives of the development standard are achieved notwithstanding non-compliance with the standard (cl 4.6(3)(a), cl 4.6(4)(ii) and Initial Action at [17])***

- (a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*



- (b) *to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,*
- (c) *to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,*
- (d) *to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.*

**Assessment:**

The subject site is within the Central Business District, the Metropolitan Centre Zone, for the City of Sydney. The Application intends to cater to the existing demand in the City for hospitality offerings. The businesses will primarily cater to office workers, with the busiest days being during the week. Consequently, there would be no increased pedestrian or vehicular generation or otherwise any adverse impact upon infrastructure.

The need to create additional floor space for the purpose demonstrates there is insufficient appropriately located floor space to meet the needs for hospitality focussed offerings in the CBD. It also demonstrates that the current design and relationship with the public domain is undesirable, requiring significant changes to improve its attractiveness to the City's users.

The built-form is not affected from outside the development. The subject site is located within Central Sydney Specific Area. There is no specific character statements relating to internal open areas that would be relevant to the changes proposed to the character of Liberty Place.

The assessment to which this variation request is appended demonstrates that the proposed use will not impact adversely upon the surrounding area, consistent with the objectives above.

**B. Consistency with the objectives of the B8 Local Centre zone (cl 4.6(4)(a)(ii))**

**Assessment:**

As well as achieving the applicable objectives of clause 4.4 as demonstrated above, the Application, including the FSR variation, is also in the public interest as it is consistent with the relevant objectives of the B8 Metropolitan Centre zone in that it contributes significantly to active ground floor land uses.

**11. *How would strict compliance hinder the attainment of the objects specified in Section 1.3(a) and (c) of the Act?***

Compliance with the relevant FSR standard would hinder the attainment of the objects of section 1.3(a) and (c) of the Act, which are to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources, in addition to promoting and coordinating orderly and economic use and development of land.

There is at present, a significant underutilisation of Ethics Plaza. The area was intended to be used by the public, in particular, patrons of the four approved retail tenancies. That did not occur, and three of those four retail tenancies are vacant. The rear of Ethics Plaza is almost entirely inactive during the busiest parts of the day and entirely devoid of life in the evening. This is an unacceptable outcome in the Sydney CBD, where access to ground level

active uses is highly prized. The additional FSA will occupy an area within an undercroft, which presently provides scattered seating. Seating will continue to be available notwithstanding, and so there is considered to be no great impact on the public as a result of the change. The Application will however assist in activating the entirety of the Ethics Plaza by installing an anchor land use at its rear.

The Application satisfies the zone and development standard objectives and therefore strict compliance with the standard is not required in order to achieve compliance with the objectives. Strict compliance would result in an inflexible application of policy. It does not serve any purpose that should outweigh the positive outcomes of the development and therefore a better planning outcome overall.

The Application as proposed, including the FSR variation, is consistent with the provisions of orderly and economic development as provides for the activation of Liberty Place and in a built-form which responds appropriately to existing surrounding development, and neighbouring development and which will have no impact on the character of the streetscape and the locality.

In this regard, the Application also meets the object of the Act with respect to good design and amenity of the built environment.

**12. *Is the development standard a performance based control? Give Details.***

The FSR development standard is a numerical based control.

**13. *Would strict compliance with the standard, in your particular case, be unreasonable or unnecessary? Why?***

This matter is addressed in detail above in the answer to Question 10. Strict compliance would result in an inflexible application of policy. It does not serve any purpose that should outweigh the positive outcomes of the Application which improve the enjoyment and access to Liberty Place.

The intended outcome for this area is to create an active outdoor space, supported by a popular hospitality offering. It is appropriate and necessary to seek to increase usability of the built environment, particularly in an area such as the CBD where the efficient use of land is key to its success in both business and in creating a desirable location for workers and residents.

Leaving Ethics Plaza as it is presently designed is not an acceptable outcome. The areas which are sought to be used are not presently set aside in any way or designed to be used by the public. As an urban area, as opposed to an open park or the like, it is appropriate that the built environment is designed in a way that is attractive and usable by the public. An open concrete area scattered with chairs is not an attractive space for use by the public.

The publicly accessible aspect of this area was limited to sporadic seating which could only be used by patrons of the adjoining retail uses. No dining tables or tables generally are provided, which might have been of some benefit to surrounding workers. That would not fundamentally change as a result of the application. The only active use is a table tennis table.



The Application is consistent with the provisions of orderly and economic development and good design and amenity of the built environment.

**14. *Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.*** (cl 4.6(3)(b) and *Initial Action* at [24])

There are sufficient environmental planning grounds to support the variation to the FSR of applicable to the site, being:

- The variation is minor, making up 0.27% of the existing FSA at the subject site. It is also within the scope of the maximum FSA previously approved.
- The additional GFA is primarily sought is to be located within an existing undercroft and so would not add to the overall height or bulk of the development. Notwithstanding, its construction would not impact upon the public domain outside of the redevelopment.
- The development will ensure activation of Liberty Place. The additional building would be most suited to be used as an early morning café and breakfast spot, reflecting the success of two similar offerings in Liberty Place closer to Castlereagh Street. Due to its underutilisation of the undercroft, there is presently no public benefit being accrued by its existence.
- The additional building is proposed to act as an attractor to encourage potential patrons from Castlereagh Street, deeper into the development. The fact that 3 out of the 4 businesses in the existing retail tenancies did not survive at the base of ANZ Tower shows demonstrates the underutilisation of this space.
- The FSR variation will not give rise to any significant adverse amenity impacts on surrounding development in terms of overshadowing, loss of solar access or loss of views.
- The proposed development, including the FSR variation, achieves compliance with the relevant underlying objectives of the standard and the objectives of the zone.

The above factors confirm that there are sufficient environmental planning grounds to justify the variation and that the Clause 4.6 variation request is well-founded.

### **Summary**

Accordingly, there are more than sufficient environmental planning grounds to justify the variation of the FSR standard on the basis that compliance with the standard would be unreasonable and unnecessary in the circumstances of this particular case. As demonstrated above, the proposed development will be in the public interest because it is consistent with the objectives of the FSR standard, the objectives of the B8 zone and will achieve the objects of the EP&A Act. Most importantly, the Application will reinvigorate the secluded urban environment which was always intended to be used by surrounding retail workers but instead is empty during the busiest times of the day. The Application will ensure its use day and night.

In the context of the other requirements of Clause 4.6, no matters of State or regional planning significance are raised by the Application. Moreover, it is considered that there would be no public benefit in maintaining the particular planning control in question, in the case of this specific development.

The Application also meets the objects of the EP&A Act with respect to good design and amenity of the built environment and will contribute to a better environment by providing a built form which respects the scale and definition of the existing streetscape and will improve the built environment through activation and use of the public domain.

This request is considered to adequately address the matters required by Clause 4.6 and demonstrates that compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case.

Despite the proposal's non-compliance with the FSR development standard, the proposed development is considered to meet the objectives of the standard and the objectives of the B8 zone.