

# **Attachment C**

<p><b>Clause 4.6 Variation Request (Height of Buildings)</b></p>
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# Clause 4.6 Variation Request

Height of Buildings

8-24 Kippax Street, Surry Hills

Submitted to City of Sydney  
on behalf of Canva



**'Gura Bulga'**

Liz Belanjee Cameron

'Gura Bulga' – translates to Warm Green Country. Representing New South Wales.



**'Dagura Buumarri'**

Liz Belanjee Cameron

'Dagura Buumarri' – translates to Cold Brown Country. Representing Victoria.



**'Gadalung Djarri'**

Liz Belanjee Cameron

'Gadalung Djarri' – translates to Hot Red Country. Representing Queensland.

Ethos Urban acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture.

We pay our respects to their Elders past, present and emerging.

In supporting the Uluru Statement from the Heart, we walk with Aboriginal and Torres Strait Islander people in a movement of the Australian people for a better future.

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<b>This document has been prepared by:</b>	<b>This document has been reviewed by:</b>
	

Liam Serra/Jules Wittenoom Louw	12 December 2023	Stephen Gouge	12 December 2023
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# 1.0 Introduction

This Clause 4.6 Variation request to vary Clause 4.3 Height of Buildings of the Sydney Local Environmental Plan 2012 (Sydney LEP 2012) has been prepared by Ethos Urban on behalf of Canva. It is submitted to the City of Sydney (Council) in support of a development application (DA) for the adaptive reuse of the existing commercial building at 8-24 Kippax Street, Surry Hills.

Specifically, this DA seeks consent for the following:

- Adaptive reuse of the existing building, comprising the following structural and make-good internal works:
  - Retention of the existing building structure;
  - Demolition of existing lift and stair core as well as internal walls;
  - Demolition of existing loading dock and basement ramp and 55 car parking spaces;
  - Introduction of new circulation core at the eastern end of the building floorplate;
  - Internal structural bracing to balance the new core location;
  - Reinforcement of existing columns; and
  - Reinforcement of existing façade brick walls to meet current regulations.
- Demolition and replacement of podium level facades;
- Removal and replacement of existing glazing;
- Internal fit out works, comprising:
  - Introduction of wintergardens in the north-western corner of the floor plates on Levels 1 to 9;
  - Conversion of ground and lower ground floors to employees' communal space with reception lounge, café, retail tenancy space, gym, studio space, commercial kitchen and town hall;
  - Conversion of levels 1 to 9 to open plan office space; and
  - Reconfiguration of basement and lower ground to allow for end of trip facilities and bicycle parking.
- Creation of lower ground floor community retail tenancy with frontage to Sophia Street and Terry Street
- Removal of existing rooftop plant and lift overrun and replacement of new rooftop area to include:
  - Landscaped terrace area and adjoining servery area as well as amenities;
  - Bio-solar green roof and solar canopy over the roof terrace; and
  - Plant area;
- Upgrades to parts of Sophia Street to create a shared way for the extent of the site;
- Relocation and upgrade works to the transformer chamber substation on Sophia Street;
- Four (4) signage zones; and
- Associated landscaping and productive/edible planting.

This Clause 4.6 Variation Request relates to the standard for height of buildings under Clause 4.3 of the Sydney LEP 2012 and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated December 2023, including supporting documentation.

This clause 4.6 variation request demonstrates that compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard.

This Clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the height development standard, the proposed development is acceptable as:

- The built form will largely remain consistent with the existing bulk and scale building located on the site;
- The proposal is consistent with the objectives of the standard
- There are sufficient environmental planning grounds to justify contravention of the standard,

Therefore, the DA should, in our view, be approved with the variation as proposed in accordance with the flexibility allowed under Clause 4.6 of the Sydney LEP 2012.

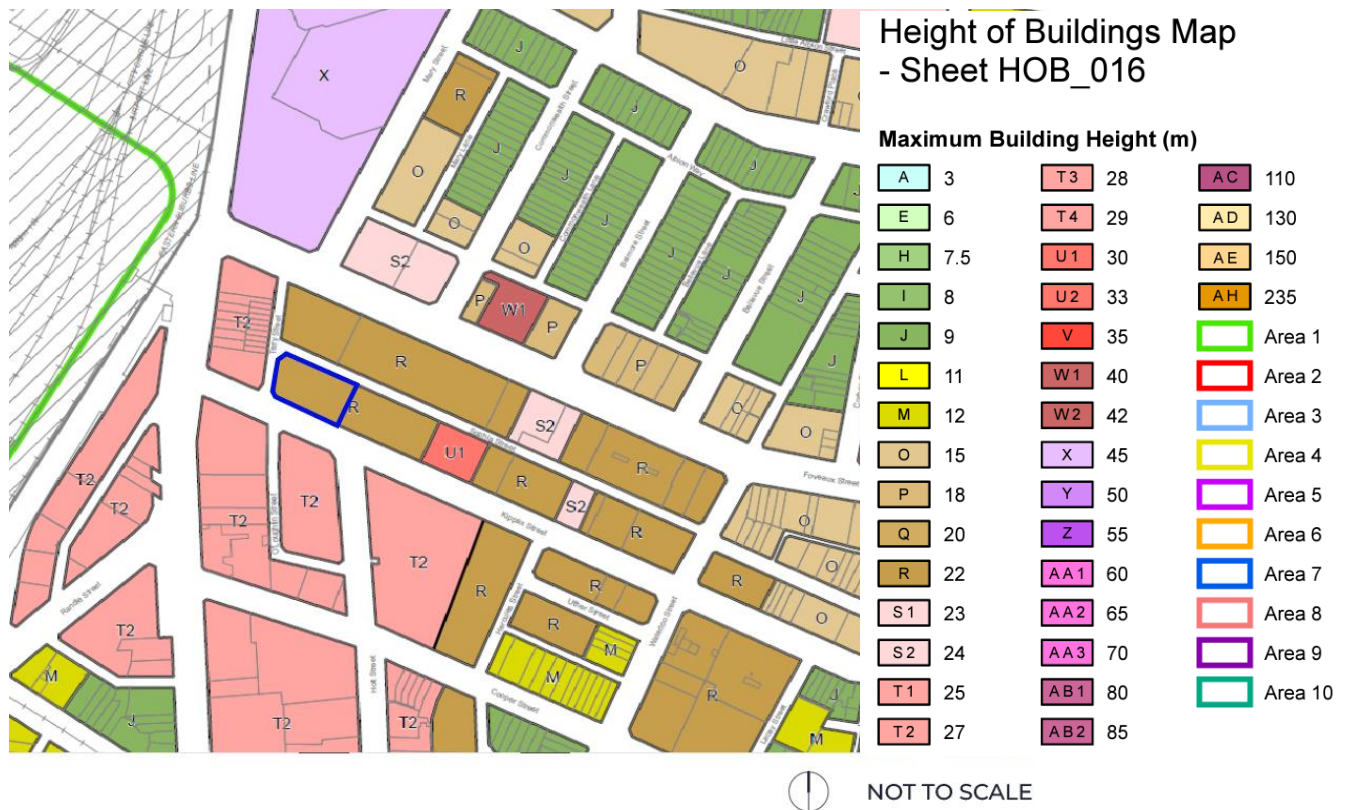
## 2.0 Development Standard to be Varied

This Clause 4.6 Variation Request seeks to justify the contravention of the development standard set out in Clause 4.3 of the Sydney LEP 2012. Under the Sydney LEP 2012, the site has a maximum building height of 22 metres. Clause 4.3 of the Sydney LEP 2012 states:

### 4.3 Height of Buildings

- 1) The objectives of this clause as follows –
  - a. to ensure the height of development is appropriate to the condition of the site and its context,
  - b. to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,
  - c. to promote the sharing views outside Central Sydney,
  - d. to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,
- 2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map

An extract from the Sydney LEP 2012 Height of Buildings map is provided at **Figure 1** below.



**Figure 1** Extract from Sydney LEP 2012 Height of Buildings Map

Source: Sydney LEP 2012/Ethos Urban



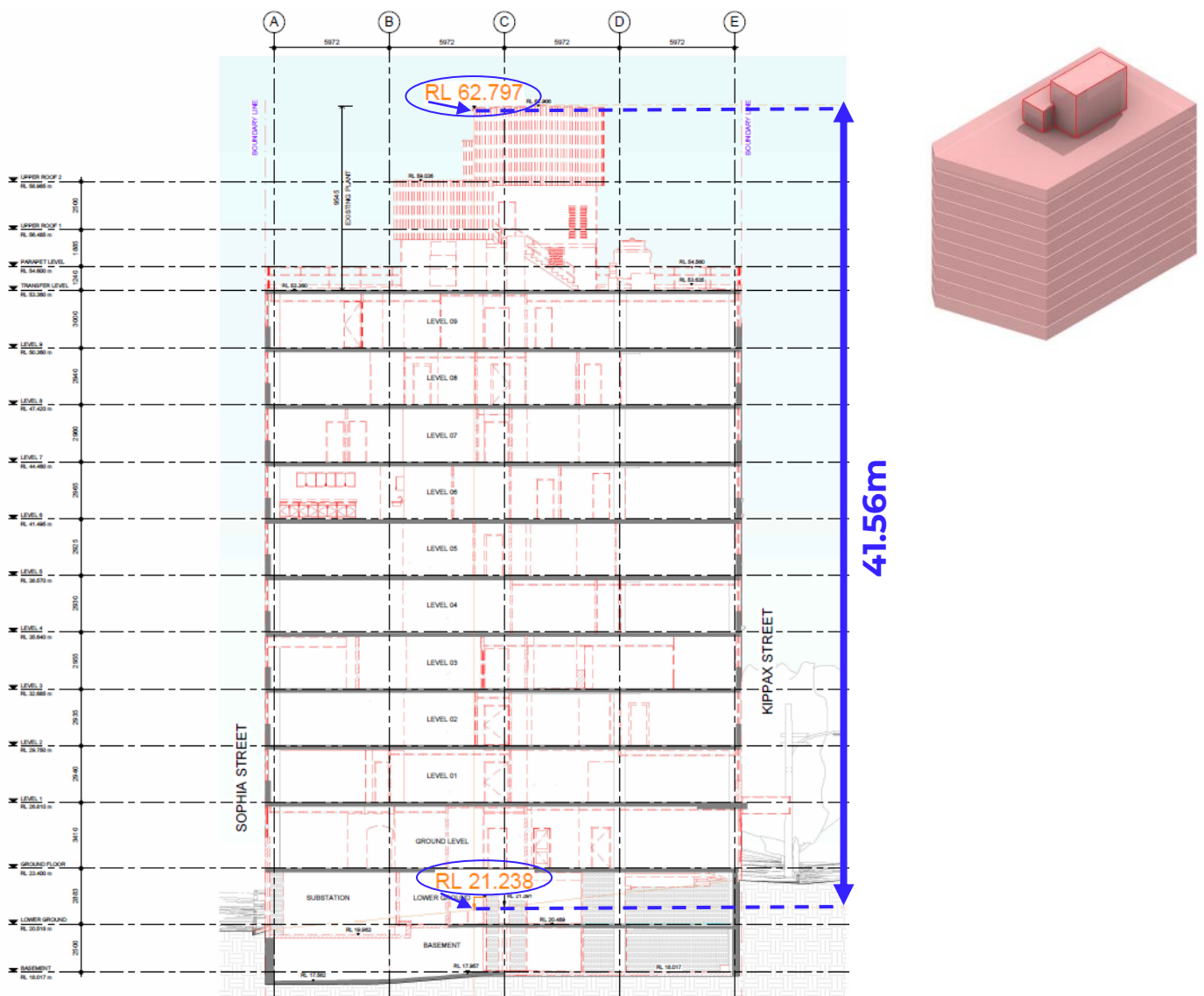
# 3.0 Nature of Variation Sought

The existing commercial building on the site to be refurbished exceeds the mapped 22m height limit with a current height of 39.5m. The proposed works, including to existing levels 7, 8 and 9) are below what currently exists, but exceeds the maximum height of buildings control of 22m. The extent of the technical non-compliance along with a comparison of the existing and proposed is summarised in **Table 1** below.

**Table 1** Nature of proposed variation and Standard

Control/Standard	#	Existing height	Proposed height	Variation to 22m Control
4.3 – Height of Buildings (numeric control)	22m	41.56m (89% variation to 22m control)	39.91m (4% less than existing height)	17.91m or 81%

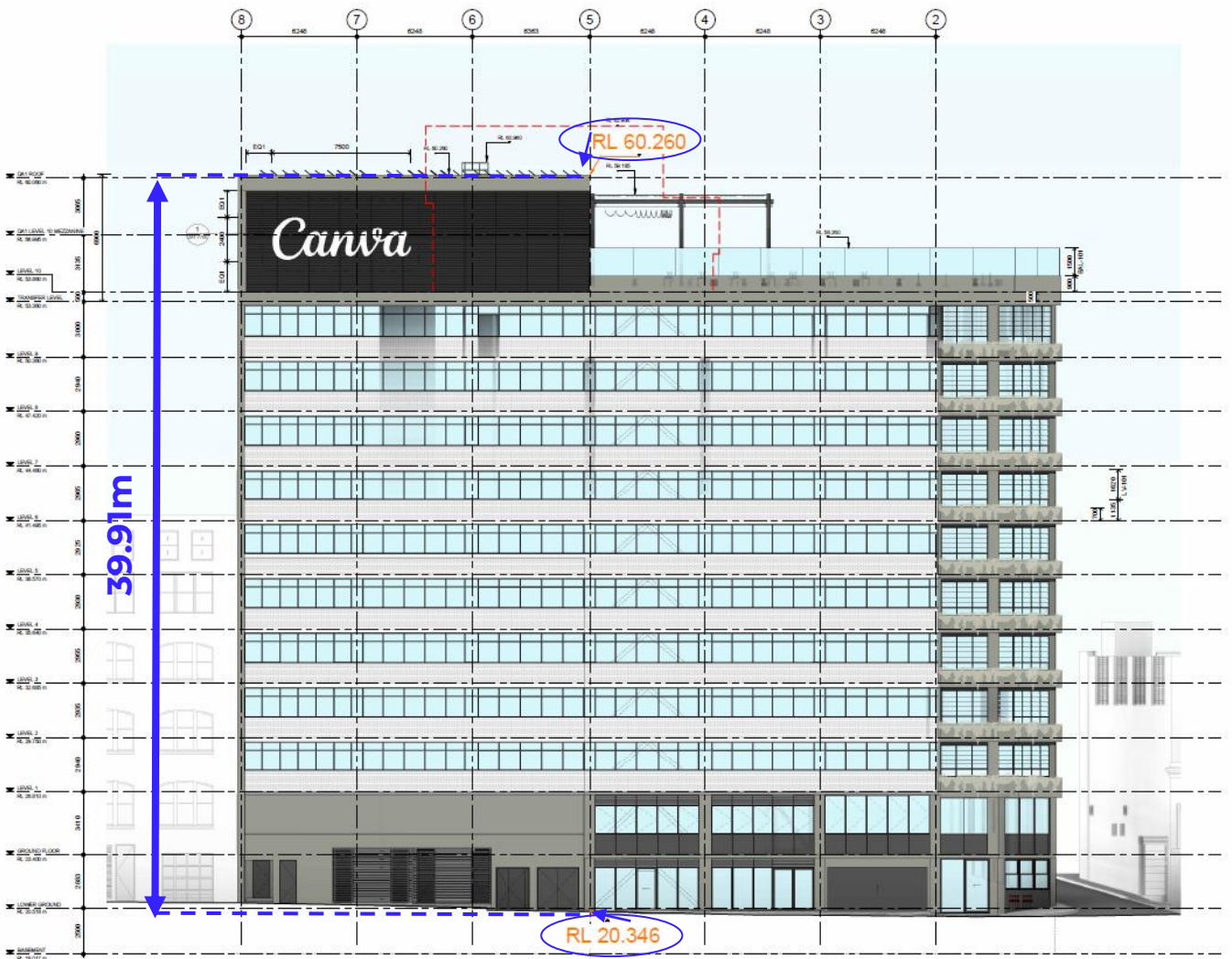
Images of the existing development and proposed additions in relation to the maximum height of buildings development standard is illustrated in **Figure 2** and **3** below.



**Figure 2** Existing Building Height

Source: Cox/Ethos Urban

Note: For the purpose of establishing the existing height of building (for comparison purposes only) guidance from *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 (**Bettar**) (and reinforced by *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189 (**Stamford**)) has been used.



**Figure 3 Proposed Height of Building (at maximum height extent) at the northern elevation/Sophia Street)**

Source: Cox/Ethos Urban

*Note: The maximum height of building on this particular site occurs that the Sophia Street elevation of the site, intersected with the known and measurable ground level existing at that location, as shown in **Figure 3**. No reliance is required to be place on inferring what ground level existing would be (as provided in **Figure 2**).*



# 4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the SLEP 2012 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 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.*

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 in:

1. *Wehbe v Pittwater Council* [2007] NSWLEC 827; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in Clause 4.6 of the Sydney LEP 2012, with respect to the height of buildings development standard, are each addressed below, including with regard to these decisions.

### **Drafting Note**

We note that this Clause 4.6 Variation Request has been prepared based on the recent amendments to the Standard Instrument that took effect on 1 November 2023. This amendment (as shown below) will ultimately see the Sydney LEP 2012 revised to reflect the text below, however at the time of drafting the change from the previous Clause 4.6 wording had not yet occurred on the NSW legislation website.

### **3 Amendment of Standard Instrument prescribed by Standard Instrument (Local Environmental Plans) Order 2006**

#### **Clause 4.6 Exceptions to development standards [compulsory]**

Omit clause 4.6(3)–(5) and (7). Insert instead—

- (3) Development consent must not be granted to 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 the contravention of the development standard.

**Note—** The *Environmental Planning and Assessment Regulation 2021* requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

- (4) The consent authority must keep a record of its assessment carried out under subclause (3).

The relevant wording of clause 4.6 within SLEP 2012 as at lodgement of the application (version dated 15 December 2023) was (and remains to be):

#### *4.6 Exceptions to development standards*

*(3) Development consent must not be granted to 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 the contravention of the development standard.*

## 4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case

In *Wehbe v. Pittwater Council* [2007] NSW LEC 827 (*Wehbe*), Preston CJ provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown to be unreasonable or unnecessary. The five methods outlined in *Wehbe* are:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
- The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (**Fourth Method**).
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the **First** and **Fourth Methods**.

### 4.1.1 The underlying objectives or purposes of the development standard

The objectives of the development standard contained in Clause 4.3 of the Sydney LEP 2012 are:

- *To ensure the height of development is appropriate to the condition of the site and its context*
- *To ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas*
- *To promote the sharing views outside Central Sydney*
- *To ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas*

### 4.1.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method)

#### **Objective (a): to ensure the height of development is appropriate to the condition of the site and its context**

The proposed development is proposed to reduce the maximum building height by 2.6m from of the existing development on the site. For these reasons, the height proposed is considered to remain appropriate to the site.

The Statement of Environmental Effects (**Appendix B**) identifies the built form context for the site. It identifies a variety of heights in the immediate area. The 10 storey proposed development, albeit above the HOB development standard, does not generate a development which is inappropriate and inconsistent, in terms of height, to the immediate area and context.

In summary, the proposed height of the building facilitates a viable and contemporary commercial building which appropriately considers and integrates with the existing built form of surrounding developments and with the general streetscape in this part of Surry Hills. The design of the building and in particular the resultant overall height has also been balanced to be consistent with the desired future character of the area. As such, the proposal is consistent with Objective (a) of Clause 4.3(1) of the LEP.

#### **Objective (b): to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas**

Appropriate height transitions and relationship between buildings are retained particularly with respect to immediately adjoining building to the east and west (opposite Tery Street) and heritage buildings located north and southwest of the site.

### **Objective (c): to promote the sharing views outside Central Sydney**

The upper portions of the proposed development (which exceed the HOB development standard) does not significantly impact existing public or private views. This is because:

- The site is not positioned within any significant view corridors;
- The existing development on the site would already inhibit any views if there were any; and
- The additional built form proposed on centre of the site which currently does not contain any built form will not block any significant northerly or north-westerly views.

### **Objective (d): to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas**

The site is not located in the transition areas surrounding Central Sydney and the Green Square Town Centre. In this instance, this objective is not applicable.

#### **4.1.3 Conclusion on Clause 4.6(3)(a)**

Strict compliance with the HOB development standard under clause 4.3 of the Sydney 2012 is considered unreasonable and unnecessary in the specific circumstances for the following reasons:

- The underlying objectives of the standard are achieved, notwithstanding the non-compliance with the numerical control as:
  - The existing maximum building height will not be exceeded. This height was considered appropriate, irrespective of its contravention to the HOB development standard, to remain appropriate to the condition of the site and its context;
  - The proposed development will refine the existing rooftop overruns to create a more cohesive rooftop design, resulting in inconsequential impacts to the heritage buildings located north and south west of the site; and
  - The proposed built form, including the elements which exceed the HOB development standard, has no impact on existing public or private views.

Council, through its own actions, has virtually abandoned (using the wording of the Case law) the HOB development standard on the site by granting consent which exceeds the standard.

## 4.2 Clause 4.6(3)(b): There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

Clause 4.6(3)(b) of the Sydney LEP 2012 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action v Woollahra Municipal Council* [24] and *Turland v Wingecarribee Shire Council* [42]).

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site.

### 4.2.1 Ground 1 – The existing development significantly exceeds the height of building standard

As detailed in **Section 3**, the existing building on the site is current 39.5m in height. The proposal seeks to reduce the overall building height by 2.6m and incorporates necessary plant and lift overrun to the eastern end of the floorplate as part of the adaptive reuse of the existing building, as opposed to its demolition and reconstruction.

### 4.2.2 Ground 2 - The proposed additions and exceedance are necessitated as part of the proposed adaptive reuse

The proposal incorporates necessary plant and lift overrun to the eastern end of the floorplate as part of the adaptive reuse of the existing building, as opposed to its demolition and reconstruction. Above the height control of 22m, amendments are also made to the existing building, internally and externally, but to retain its presentation and façade (with the exception of replacement windows).

As part of a review of the site and exploration of design options, input has been provided by ADP consulting, along with the project architects and structural engineer. These combined comments are outlined below.

Due to the buildings age, for it to be occupied by a commercial operator, BCA/NCC and structural upgrades are required. This includes necessary services (such as fire and life safety) and seismic load capacity, as well as services and plant required to meet the specified ESD and performance targets.

Given the age of the building, the floor-to-floor heights are lower than current standards. The services and systems required to operate this building safely and efficiently are also larger than those systems, which is consistent with the buildings vintage.

One key design consideration of the buildings for occupancy and performance (including compliance) is efficiency of the largest energy consumer, the mechanical HVAC system. As such, the proposal incorporates chilled beam system due to it being the most efficient and lowest ceiling height credentials of this system type and are in keeping with the buildings ESD strategy (noting the retention of the existing floor to floor heights).

Chilled beams reduce the depth of ductwork required to reticulate across the floor plates, they also require higher thermal performance of the façade compared to alternative options. This is a driver for improved façade shading, insulation, and performance of the glazing selection, and has minimised the need for more substantial interventions to the existing configuration and streetscape.

The production of chilled water and heating water is designed to very high energy efficiency standards. The required central thermal plant located at roof level, and it is not possible to locate this within the existing basement due to height constraints of the floors. The central thermal plant, together with the new air handling plant have resulted in a larger plant area being required at roof level to service the heating, ventilation, and air conditioning loads of the building, responding the existing condition of the levels below. The two main plant areas are located to the North and South of the building core measuring approximately 18m x 5m x 6m (in height).

Cooling towers are located on the northern side of the roof integrating a louvred façade at plant level allowing the make-up for cooling tower discharge to the roof above. The cooling towers are 5.5m in height and take up the full height of the plantroom. A mezzanine level is proposed to house air handling plant to the east of the towers at high level above switchgear below. After structural allowances for the roof and mezzanine, the air handling units (2.5m in height) and switchgear (2.6m clear height) take up the full plantroom height to the East of the cooling towers.

Plant area located south of the core at the roof level are also proposed with a mezzanine plant deck installed, air source heat pumps (2.5m in height) are located above water-cooled chillers (2.5m in height) and pumps at lower level. Full height of the plant room is used to accommodate plant and equipment once allowance is made for reticulation or pipework, ductwork and the addition of structure required for the mezzanine.

It is also noted that proposal incorporates a large kitchen and community meeting space including kitchen exhaust systems for charity food preparation, in line with the existing operations of Canva and its contribution to the community. These services also require additional, separate plant space as well as clear discharge at high level of the building for kitchen exhaust fans and apparatus.

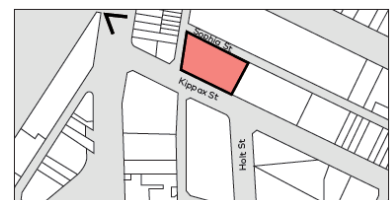
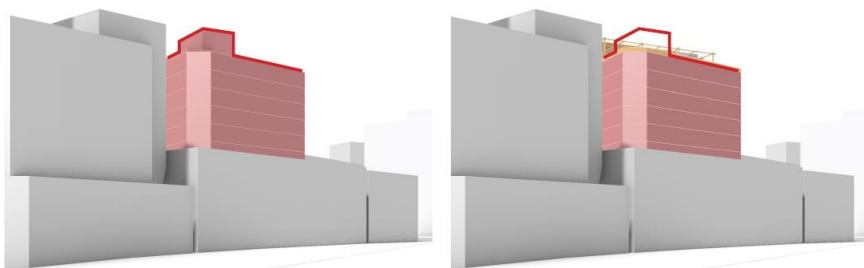
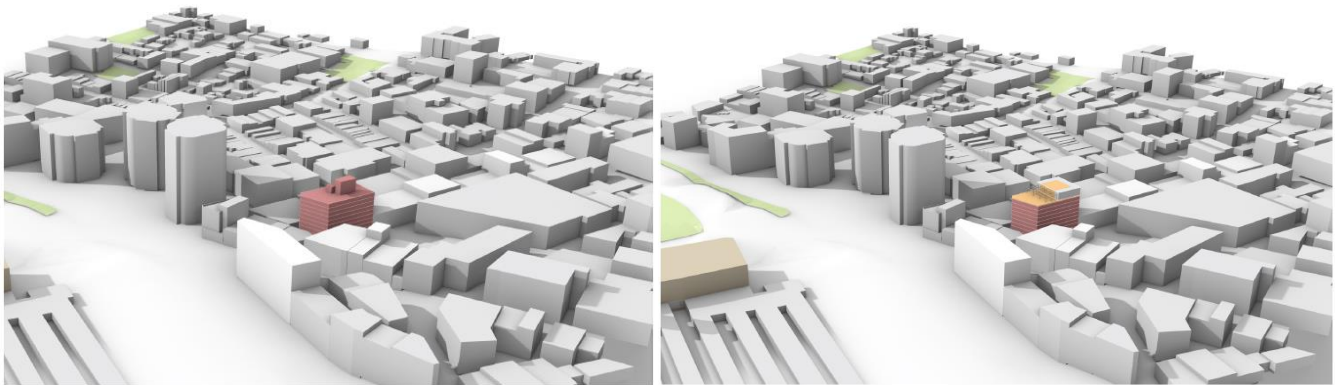
**4.2.3 Ground 3 - The proposal does not radically transform the built form or relationship to the surrounding character**

The site is located within the Surry Hills Central locality area as identified in Section 2 of the Sydney DCP 2012. It is therefore subject to the relevant provisions of Section 2.7.11 of the Sydney DCP 2012 which outline the intended character of the locality. Relevant to the consideration of building height and form is the intent for the large footprint warehousing buildings being retained in the west and to allow the commercial precinct around

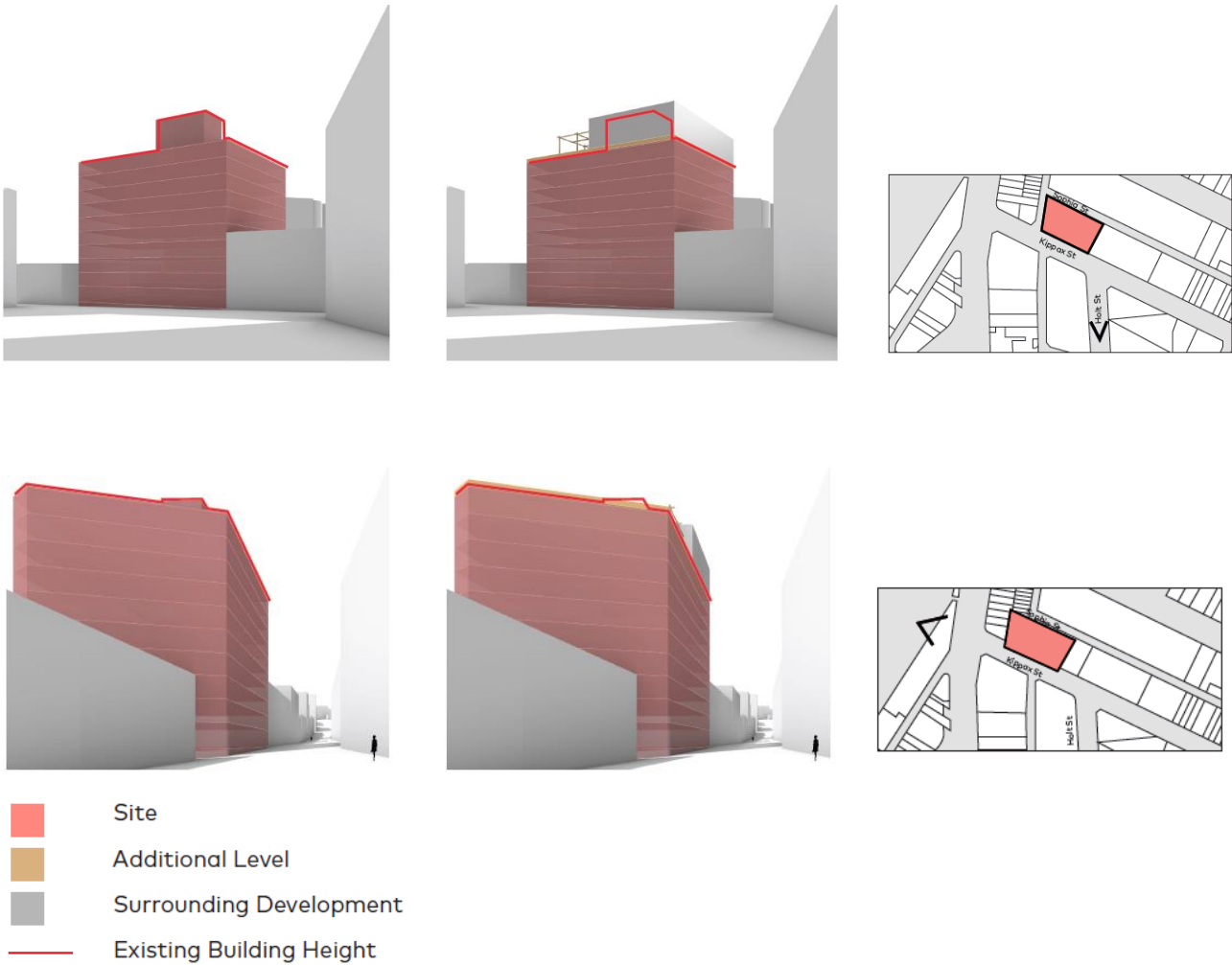
*The area is to continue to constitute the retail centre of Surry Hills with active frontages consolidated along Crown, Foveaux and Kippax Streets. The future built form character is to maintain the transition in scale and use, from large footprint warehouse buildings in the west to small lot retail, shop-top and terrace houses in the east*

Allow the commercial precinct around Waterloo Street between Kippax and Devonshire Streets to continue, defined by remnant commercial warehouses, and landmarks A

As shown in the visual analysis prepared by COX, the reduction in height of existing lift motor room (effective building height by 2.6m) and material benefits to key views from public domain and publicly accessible areas, particularly within Sydney CBD and Metro Station. As such, whilst the proposed development (as compared to the existing) exceeds the height of building control, the nature of the design is such that it has sought to reduce the impact of this from key vantage points. Where the change in building form, and associated height breach is more visible (to the each and south of the site), these views are seen in the context of already large street walls on relatively narrow streets.







**Figure 4** Visual Assessment of the proposal from key vantage points.

Source: Cox Architecture

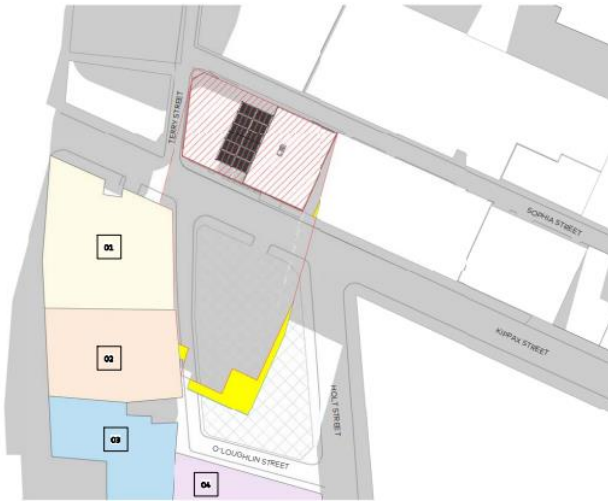
#### 4.2.4 Ground 4 - No adverse overshadowing impacts from the proposal

An overshadowing analysis of the existing built form and proposed built form has been undertaken by Cox Architecture (refer to **Appendix A** – Architectural Design Report (as revised)). The analysis of existing vs proposed has been undertaken at 9:00am to 3:00pm at the winter and summer solstice as well as the equinox to provide a comprehensive demonstration of the shadow impacts generated from the proposed works. Whilst comparison against the existing building is provided, focus is given to the impacts arising from the proposal itself – see **Figure 5**.

#### Figure 5.



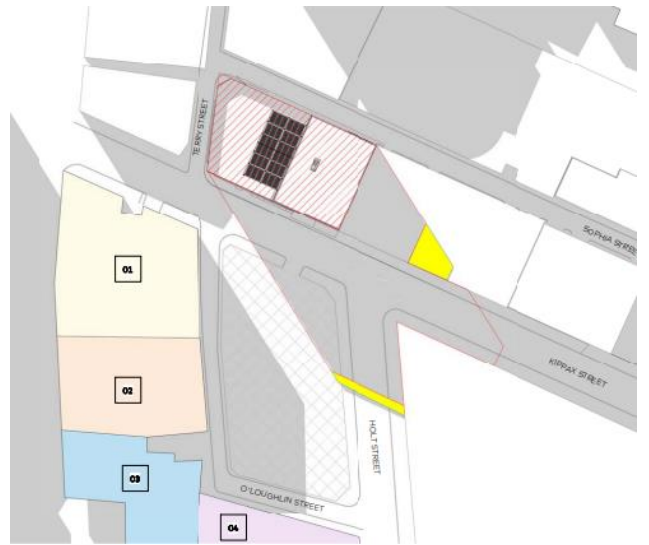
Winter Solstice – 9:00am to 10a:00am



Winter Solstice – 11:00am to 12:00pm












Winter Solstice – 1:00pm to 2:00pm



Winter Solstice – 3:00pm

**LEGEND**

-  8-24 KIPPAX STREET
-  EXISTING SHADOW EXTENT
-  PROPOSED SHADOW EXTENT
-  ADDITIONAL SHADOW BETWEEN CURRENT AND PROPOSED
-  EXISTING CARPARK
-  01 BUILDING 01
-  02 BUILDING 02
-  03 THE ICON APARTMENTS
-  04 CALIBRAE APARTMENTS

**Figure 5 Winter Solstice Shadow Analysis**

Source: Cox Architecture

As demonstrated above, the proposal is expected to generate minor additional overshadowing to surrounding sites. The overshadowing impacts are considered acceptable as the shadows are predominately cast on the existing commercial buildings at 328-244 and 348-354 Elizabeth Street and the existing carpark located opposite the site on Kippax Street. It is understood the carpark currently comprises the same mixed-use zoning as the site and is subject to an FSR of 4:1 and height limit of 27m.

Furthermore, Cox Architecture have undertaken testing on a hypothetical residential envelope on the carpark site to ensure adequate sunlight is still achieved at the site. It was found that the proposal would not impact the site's ability to be designed for a mixed use development.

The proposed works will not impact the amenity of the residential buildings (Icon Apartments and Calibrae Apartments) located south west of the site, which has been considered in further detail through the elevations overshadowing analysis (see **Appendix A** – Architectural Design Report).

The absence of any adverse overshadowing impacts, particularly to residential, supports that in the circumstances of this site (and the associated benefits discussed in the DA), the proposed variation to height is not unreasonable.

#### **4.2.5 Conclusion on Clause 4.6(3)(b)**

The preceding environmental planning grounds relate specifically to the height of the proposed development and demonstrate, for the reasons given, the height of the proposed development is suitable to the site and its context contributes to a better planning outcome for the site and the locality.

## 5.0 Conclusion

The assessment above demonstrates that compliance with the maximum height of buildings development standard contained in Clause 4.3 of the Sydney LEP 2012 is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allowing for a better outcome in planning terms.

This Clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the maximum height of buildings development standard, the proposed development:

- Compliance with the height of building development standard is unreasonable and unnecessary in the circumstances of the case as the objectives of the standard are achieved notwithstanding non-compliance with the standard as:
  - The existing maximum building height will not be exceeded, but reduced and reconfigured
  - The proposed height, reflecting a similar form to the existing building, is considered appropriate to the condition of the site and is context at the western of the Surry Hills Central locality and fringe of the CBD
  - The proposed development will refine the existing rooftop overruns to create a more cohesive rooftop design, resulting in inconsequential impacts to the heritage buildings located north and southwest of the site;
  - Appropriate height transitions and relationship between buildings are retained particularly with respect to immediately adjoining building to the east and west (opposite Terry Street) and heritage buildings located north and southwest of the site.
  - The proposed built form, including the elements which exceed the HOB development standard, has no impact on existing key public or private views, and improved the view and visual impact from many prominent vantage points, including central station platforms and the public domain surrounding the station entry (adjacent to the light rail station).
  - The proposal, retaining a similar form but reducing the existing building height, maintains the transition from Central Sydney to the adjoining areas of residual land in Surry Hills.
- There are sufficient environmental planning grounds to justify contravention of the standard, as:
  - The existing development significantly exceeds the height of building standard
  - The proposed additions and exceedance are necessitated to achieve adaptive reuse
  - The proposal does not radically transform the built form or relationship to the surrounding character
  - No adverse overshadowing arises to surrounding uses and public domain, with no impacts to existing residential.

Therefore, Council can be satisfied that there is sufficient justification to vary the maximum height of buildings development standard in this instance. The DA may therefore be approved with the variation as proposed in accordance with the flexibility allowed under Clause 4.6 of the Sydney LEP 2012.