

Attachment D

Clause 4.6 Variation Request (Floor Space Ratio)

Clause 4.6 Variation Request

Floor Space Ratio

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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Version No.	Date of issue	Prepared by	Approved by
1.0 (DRAFT)	04/12/2023	LS/JWL	SG
3.0 (FINAL)	12/12/2023	LS/JWL/SG	SG
3.0 (REVISED FINAL)	09/02/2024	JWL	SG
4.0 (REVISED FINAL)	23/04/2024	JWL	SG

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1.0 Introduction

This Clause 4.6 Variation request to vary Clause 4.4 Floor Space Ratio (FSR) 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 floor space ratio under Clause 4.4 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 maximum FSR 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;
- Compliance with the FSR 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; and
- There are sufficient environmental planning grounds to justify contravention of the standard, as:
 - It is consistent with the first objective of Clause 4.6 of the Sydney LEP 2012, which allows a degree of flexibility in applying the FSR development standard in instances where it is considered appropriate to the circumstances of the development;
 - Is consistent with the second objective of Clause 4.6 of the Sydney LEP 2012 in that the proposed variation will enable the achievement of a better outcome for the development enabling rooftop amenity and the adaptive reuse of an existing building; and

- The proposal is consistent with the built form of Surry Hills and in particular the medium to high density buildings located within the vicinity of the site, maximising commercial floor space within close proximity to major public transport nodes such as Central Station.

Therefore, the DA may 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 4.4 of the Sydney LEP 2012. Under the Sydney LEP 2012, the site has a maximum FSR of 3.5:1. Clause 4.4 of the Sydney LEP 2012 states:

4.4 Floor space ratio

- 1) *The objectives of this clause as follows –*
 - 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.*
- 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.*

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



Figure 1 Extract from Sydney LEP 2012 FSR Map

Source: Sydney LEP 2012/Ethos Urban

3.0 Nature of Variation Sought

The existing commercial building on the site to be refurbished already exceeds the mapped 3.5:1 FSR maximum with a current FSR of 9.1:1. The works which primarily seek alterations to the existing envelope and a rooftop addition will generate a total exceedance of 215m² (excluding end of trip) or 543.45m² (including end of trip) beyond the existing GFA located on the site. The extent of the technical noncompliance is summarised in **Table 1** below.

In accordance with Clause 6.13 of the Sydney LEP 2012, buildings on land (other than land in Central Sydney) that are used solely for the purposes of a commercial premises and contains all of the end of trip facilities together in one area of the building, are eligible for an amount of additional floor space equal to the floor space occupied by showers, change rooms, lockers and bicycle storage areas up to 0.3:1. The end of trip facilities comprise a GFA of 328.45m² which equates to a 0.32:1 which essentially means the permissible FSR is 3.5:1 (base) + 0.3:1 (end of trip bonus).

Table 1 Nature of proposed variation

Clause	Mapped FSR	Existing FSR	Proposed FSR (including end of trip)	Proposed FSR (excluding end of trip)	Difference between Existing and Proposed (excluding end of trip GFA)
4.4 – Floor Space Ratio	3.5:1 + 0.3:1 (Clause 6.13 bonus end of journey floor space)	9.1:1 (9,374m ²)	9.6:1 (9,899.52m ²)	9.3:1 (9,571.07m ²)	0.2:1 (215m ²)

- **Site Area** = 1,031sqm
- **Maximum Permissible GFA** (based on 3.5:1) = 3,609sqm
- **Proposed GFA** (excluding EOT) = 9,571.07sqm
- **Difference** = 5,962.07sqm
- **Percentage Difference/exceedance** – 165%
- **Percentage exceedance compared to existing GFA** = 2.1%

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).

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 4.4 of the Sydney LEP 2012 are:

- *to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*
- *to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,*
- *to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,*
- *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.*

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

The objectives of the FSR development standard under clause 4.4 of the SLEP 2012 is set out in **Section 2.1** above.

Broadly speaking, these development standards aim to regulate the density of new development to ensure that appropriate built form and land use intensity is achieved within the City of Sydney LGA, with developments within proximity to the subject site aiming to be compatible with the medium to high density of the Surry Hills area.

As aforementioned, the proposed development's exceedance of the mapped FSR limit is the result of the proposed works to refurbish the existing built form which already sits above the mapped FSR limit. The proposal will generate an additional 543.45m², of which 328.45m² relates to end of trip facilities proposed within the Basement Level, replacing the carparking which was previously not considered as GFA. The remaining existing levels see an increase of 31.32m², while the rooftop proposes a minor portion of GFA (183.68m²) relating to the amenities and server space. The built form associated with the rooftop addition is comparable with the bulk of the overrun currently located on the roof of the existing building, resulting in little difference in the perceived bulk. The extent of height, including the necessity for plant at the rooftop is considered and justified in a separate Clause 4.6 variation request.

Notwithstanding the above, an assessment of the proposal against the objectives of the standard are provided below.

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

The application of the FSR development standard would be contrary to Objective (a) is to provide sufficient floor space to meet anticipated development needs. Canva have invested in the property with the intention to maximise its existing floor space. The proposal has been designed to maximise the GFA within the existing building and the floorplates of each of the levels. Strict compliance with the development standard would result in the reduction of 5,962.07m² of commercial floor space (not including end of trip uses) in a prime location within a walking distance of Central Station.

Objective (b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic

The proposal seeks to retain the existing built form which is embedded within the fabric of Surry Hills and is comparable to the built form surrounding the site. The rooftop addition (which includes non GFA generating uses), will rationalise the existing lift and stair overrun on the site, providing a simplified built form. The GFA located on the rooftop comprises an area of 183.68m², which is 1.9% of the overall proposed GFA (the remaining GFA of which is contained within the existing building envelope), resulting in minimal additional bulk and scale.

A Traffic Report has been prepared by TTPA and accompanies the DA. It confirms the proposal will not result in any unsatisfactory traffic or parking implications. This is evidenced by the fact the proposed works propose no space allowance for carparking. Whilst it is anticipated that the change of use associated with the development from a previously part wholesale retail use to a fully commercial office premises, is likely to generate greater patronage and therefore pedestrian movement, building entries accommodated within the proposed design will accommodate the flow of those entering and exiting the site.

Objective (c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure

The proposal's exceedance in GFA will maximise high-quality commercial office space within close proximity to public transport. It is understood City of Sydney's primary objectives is to locate people closer to public transport. Significant investment has been put into the renewal of Central Station located just 100 metres from the site which will significantly benefit the Surry Hills locality, creating a vibrant technology precinct, of which strongly aligns with Canva's ethos. The proposal, occupants/owners and business typology all align with the NSW government's Tech Central ambitions, incentivising and curating tech based industries in the precinct.

Objective (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.

The exceedance in GFA mostly contained within the building envelope. The proposed works have been undertaken to complement an existing building which sits within the Kippax Streetscape. The additional GFA located on the roof top will provide a level of workplace amenity which will complement the buzz of Surry Hills as well as meet Council's desired character of the 'Surry Hills Central' locality where the site is located (in accordance with the Sydney Development Control Plan 2012 (Sydney DCP 2012)). The Sydney DCP 2012 envisages the maintenance and preservation of large footprint warehouse buildings in the western part of Surry Hills (where the site is located) to small lot retail, shop-top and terrace housing within the eastern part of Surry Hills.

4.1.3 Conclusion on Clause 4.6(3)(a)

It is for the reasons outlined in Section 4.1.2 above that compliance with the FSR development standard in the Sydney LEP 2012 is unreasonable or unnecessary in the case of this proposal.

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 the site.

The additional GFA proposed is considered negligible when considering the numerical difference between the existing built form and what is proposed, and that the works are primarily contained within the building envelope (refer to **Appendix B** of the Statement of Environmental Effects).

It should be noted that according to Clause 6.3 of the Sydney LEP 2012, development on land in Central Sydney that results in the use of any part of a basement of a building being changed from a car park or from an area that is used for parking cars to any other use, causes the building to be eligible for an amount of additional floor space equal to the area of any such changed use. Whilst it is acknowledged the site is not located within Central Sydney, it should be a consideration that the floor space located on the Lower Ground Level which relates to communal gathering space (Town Hall), pop up retail space gym space should be allocated as additional floor space given it proposes to convert existing car parking spaces and access to them to GFA.



Figure 2 Basement (lower and upper) Car Parking - Existing

Source: Historic building plans

The additional GFA to allow for improved access to the existing building's rooftop space as well as provide a servery area and amenities, is minor (183.68m²) and will significantly enhance amenity for future employees and visitors to Canva. Removing the rooftop space is considered to result in a sub-optimal design and amenity outcome for residents.

4.2.1 Conclusion on Clause 4.6(3)(b)

In light of the above, it is considered that there are no environmental planning grounds that warrant the enforcing of the FSR development standard in this instance. Rather, there are clear and justifiable environmental planning merits that validate the flexible application of the FSR control by Clause 4.6 of the Sydney LEP 2012.

5.0 Conclusion

The assessment above demonstrates that compliance with the maximum FSR development standard contained in Clause 4.4 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 more sustainable outcome.

This Clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the FSR 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;
- Compliance with the FSR 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; and
- There are sufficient environmental planning grounds to justify contravention of the standard, as:
 - It is consistent with the first objective of Clause 4.6 of the Sydney LEP 2012, which allows a degree of flexibility in applying the FSR development standard in instances where it is considered appropriate to the circumstances of the development;
 - Is consistent with the second objective of Clause 4.6 of the Sydney LEP 2012 in that the proposed variation will enable the achievement of a better outcome for the development enabling rooftop amenity and the adaptive reuse of an existing building; and
 - The proposal is consistent with the built form of Surry Hills and in particular the medium to high density buildings located within the vicinity of the site, maximising commercial floor space within close proximity to major public transport nodes such as Central Station.

Therefore, Council can be satisfied that there is sufficient justification to vary the maximum FSR 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.