

Attachment C

Clause 4.6 Variation Request – Floor Space Ratio
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Clause 4.6 Variation

923-935 Bourke Street, Waterloo

Submitted to the City of Sydney
on behalf of Fabcot Pty Ltd



'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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1.0 Introduction

1.1 Overview

This clause 4.6 variation has been prepared by Ethos Urban on behalf of Fabcot Pty Ltd (Woolworths Property). It is submitted to the City of Sydney (the Council) in support of a development application (DA) for the construction of a mixed-use development at 923-935 Bourke Street, Waterloo (the Site).

Clause 4.6 of the Sydney Local Environmental Plan 2012 (Sydney LEP 2012) enables the consent authority to grant consent for development even though the development contravenes the development standard. This Clause 4.6 Variation relates to the development standard for floor space ratio (FSR) 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.

The objectives of clause 4.6 are to provide an appropriate degree of flexibility in applying certain development standards, and to achieve better outcomes for and from development by allowing flexibility in particular circumstances. Clause 4.6(3) requires that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances (clause 4.6(3)(a)), and
- There are sufficient environmental planning grounds to justify the contravention of the development standard (clause 4.6(3)(b)).

This document demonstrates that compliance with this 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 development standard. As such, this document satisfies the provisions of clause 35B(2) of the *Environmental Planning and Assessment Regulation 2021* (EP&A Regulation).

This clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the FSR controls, the proposed development:

- Achieves the objectives of clause 4.4 of the Sydney LEP 2012 for the following reasons:
 - The site has been designed in the interests of meeting current demand for supermarket floorspace, whilst in part meeting the forecast requirement in Waterloo from continued growth and subsequent demand for residential and commercial floor space.
 - The additional FSR and GFA sought over the total quantum allowable on the site is technical in nature, due to their location and is otherwise equivalent to floor space allowable for the site dedicated to 'end of journey' (EOT) and waste storage areas. These do not increase the bulk and scale of the building envelope, but infill void space within the volume established through the planning proposal and Competitive Design Alternative Process and otherwise allow for efficient and optimal use of space. These two elements, EOT and waste storage, do not increase the intensity of the use and thus will not increase vehicle or pedestrian traffic over what is already anticipated for the site.
 - The proposed development is able to adequately utilise existing infrastructure including, bike paths, local roads, Green Square Train Station, Waterloo Metro Station and frequent bus services along Bourke Street. Infrastructure in the form of potable water, sewer, electrical, gas and telecommunications are sufficient and available to the development site, with all necessary augmentations and/or diversions appropriately assessed in detail through the development application.
 - The proposed development has been skilfully designed, in accordance with the outcomes of the site-specific Planning Proposal and subsequent City of Sydney design excellence process to align with the desired future character and strategic intent of the locality.
- There are sufficient environmental planning grounds to justify the contravention, including:
 - The proposed FSR and resulting massing strategy has undergone a Competition Design Alternatives Process and achieves design excellence, with the proposed variations having no impact on the built form and having been contemplated in the winning competition scheme.

- The proposed FSR and resultant massing strategy is entirely compliant with the building height controls of the Sydney LEP 2012, does not cause adverse environmental impacts which would render it incompatible with the surrounding land uses and ensures the proposal is appropriate for the context of the site.
- The additional FSR sought is technical in nature due to its location in the built form and is otherwise equivalent to the quantum of floor space allowable for EOT and waste facilities (714.8m² dedicated to these uses) which is principally located within the ground floor mezzanine and loading dock and vehicle entry volume and is not perceptible as building mass.
- The additional GFA will ensure that the development provides highly accessible EOT and appropriate waste facilities to meet the contemporary expectations for mixed-use developments, tenant needs, occupant amenity and achieves the relevant sustainability targets.

This clause 4.6 variation has demonstrated consistency with the objects of the EP&A. 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.

1.2 Legal Guidance

The Land and Environment Court has established a set of factors to guide assessment of whether a variation to development standards should be approved. The original approach was set out in the judgment of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89 in relation to variations lodged under *State Environmental Planning Policy 1 – Development Standards* (SEPP 1). This approach was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe). While these cases referred to the former SEPP 1, the analysis remains relevant to the application of Clause 4.6(3)(a).

Further guidance on Clause 4.6 of the Standard Instrument has been provided by the Land and Environment Court in a number of decisions, including:

- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
- *Moskovich v Waverley Council* [2016] NSWLEC 1015.

In accordance with the above requirements, this Clause 4.6 variation:

- Identifies the site and proposed development (**Section 2.0**);
- Identifies the development standard to be varied (**Section 3.0**);
- Establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (**Section 4.1**); and
- Demonstrates there are sufficient environmental planning grounds to justify the contravention (**Section 4.2**).

2.0 Site and Proposed Development

2.1 Site Description

The site is located at 923 – 935 Bourke Street, Waterloo within the City of Sydney Local Government Area. The Site is located approximately 3.5km South of Sydney's Central Business District (CBD) and 1.3km Southwest of Moore Park. The Site is proximate to a number of key public transport links including Redfern Train Station (1.4km Northwest), ES Marks Light Rail Stop (1.4km Southeast), the Waterloo Metro Station (900m Northwest), with direct Bus service at the Bourke Street at McEvoy Street stand.

The site is legally described as SP22322 and lies between Young Street and Bourke Street, bookended by McEvoy Street situated in the south-east section of Waterloo. The site's area is approximately 6,534m². Existing uses on site comprise 3 low-rise strata-titled warehouse-type tenancies. The western boundary fronts Young Street, the northern boundary fronts McEvoy Street and the eastern boundary fronts Bourke Street.

There are multiple vehicular access points that exist on site, all of which are located along the Young Street frontage. Pedestrian access is also achieved along Young Street as well as the north-eastern juncture of the site at McEvoy Street and Bourke Street. A site aerial is shown in **Figure 1**.



 The Site  Bus Stop

 NOT TO SCALE

Figure 1 *Site Aerial*

Source: Nearmap, Ethos Urban

2.2 Existing Development

The site is currently occupied by an existing double-storey retail and commercial use complex comprising a mix of commercial tenants. The site currently has vehicular access along Young Street, with a separate entry and egress driveway to support on-site parking arrangements provided on-grade fronting Young Street.



Figure 2 Existing development streetscape photo (Young Street)



Figure 3 Existing development streetscape photo (McEvoy Street)



Figure 4 Existing development streetscape photo (Bourke Street)

Sources: Google Maps

2.3 Surrounding Development

The site is located in the Green Square urban renewal area (as defined by the Sydney DCP 2012) and is characterised by primarily medium scale mixed use development with higher buildings located along the Bourke Street spine. Photographs of the surrounding development are provided at **Figure 5**.

North

Further north of the site lies expanses of commercial and retail developments, shop top housing and medium-rise residential developments. In particular, to the north of McEvoy Street is the Dank Street South precinct redevelopment which has a future medium to high-rise urban form.

East

To the east of the site is 840 Bourke Street, former industrial lands which has been redeveloped into to mixed-use precinct over the last decade. The development comprises varying 6-12 storey buildings with central internalised communal open space, set on either side of Archibald Avenue, connecting east-west to Bourke Street.

Further east of the site sits pockets of newly established medium to high-rise residential apartment and mixed-use complexes as part of the masterplanned Lachlan precinct. Further to the east and adjacent to South Dowling Street is the Supa Centa Moore Park shopping mall and recreational spaces including Moore Park and ES Marks Athletics Field.

South

To the site's south and south-west are 1-2 storey light industrial and retail showroom premises along Young and Powell Street, within older brick and masonry built form.

Further south of the site comprises retail and residential developments, Zetland and Green Square town centre including a library and train station.

West

Directly to the west of the site on Young Street is a contemporary 4 storey residential flat building, fronting Hunter Street.

To the south-west is a current planning proposal to facilitate the redevelopment of 242-258 Young Street, Waterloo for a six-storey building to facilitate an independent primary and secondary school.

Further west of the site includes a mix of shop-top housing, lower-scale commercial developments and pockets of green space including Waterloo oval and Alexandria Park.



View to the south-east to developments on the corner of Archibald Ave and Bourke Street



Looking South along Bourke Street within the frontage of the site



View to the west along McEvoy Street within the frontage of the site



View to the east along McEvoy, fronting the 840 Bourke Street building and Dank Street South to the left



Looking South along Young Street in front of the site



Looking North along Young Street in front of the site

Figure 5 Photographs of the Surrounding Development Context

Source: Ethos Urban

2.4 Description of the Proposed Development

This DA seeks approval for a demolition of all existing on-site structures and the construction of a mixed-use development accommodating a subterranean Woolworths supermarket with retail, commercial and residential land uses above ground. The ground plane is to provide through site links, footpath widening and public domain upgrades, and retail offerings with active street frontages to McEvoy Street and Bourke Street.

Specifically, the development will comprise:

- Demolition of all existing on-site structures;
- Construction of a part eight (8) storey part six (6) storey mixed-use building, with three (3) basement levels:
 - 110 residential apartments, including affordable housing provision, comprising:
 - 21 x 1 bed units;
 - 68 x 2 bed units; and
 - 21 x 3 bed units.
 - Commercial and Retail Gross Floor Area (GFA) totalling 6,850m² comprising:
 - 3,200m² of Woolworths supermarket GFA;
 - 1,584m² of retail GFA; and
 - 2,066m² of commercial GFA.
- Ground floor loading dock, plant and turntable, a Woolworths 'Direct-to-Boot' pick up facility with 6 loading spaces and an internal mezzanine with bicycle parking, end-of-trip and bin store facilities.
- A basement comprising one (1) supermarket and retail level and two (2) car parking levels for resident, staff and visitor use with a total of 225 car parking spaces, incorporating:
 - 97 car spaces designated for residential use, including 11 visitor spaces, 18 adaptable spaces ;
 - 96 spaces designated for the supermarket and retail component including accessible spaces;
 - 28 spaces allocated for the commercial use including accessible spaces;
 - 3 car share spaces;
 - Car wash bay, storage, bicycle and motorbike spaces
- Stratum subdivision of the commercial, retail and residential components;
- Public domain improvements and landscaping works, including:
 - A new public plaza and through site pedestrian links connecting Bourke Street to Young Street and McEvoy Street;
 - Landscape and footpath widening and upgrades to the street frontages to the site; and
 - Tree removal, protection, new plantings and landscaping works.

Indicative photomontages of the proposed development are provided below at **Figure 6**.



View of the McEvoy & Bourke Street interface



View of the proposed internal public plaza



View of the Young Street frontage – proposed residential terraces



View from Bourke Street frontage



View of the proposed southern through site link

Figure 6 *Proposed development photomontages*

Source: Bates Smart

3.0 Development Standard to be Varied

This clause 4.6 variation seeks to justify contravention of the development standard set out in clause 4.4 of the Sydney LEP 2012. The FSR available to the proposal consists of a base ratio under clause 4.4 in addition to several other provisions in the LEP that provide for bonus floorspace subject to meeting miscellaneous requirements. Specifically, the application seeks to utilise the following floorspace provisions:

- Mapped FSR (clause 4.4);
- Community infrastructure floorspace at Green Square (clause 6.14);
- Design excellence bonus (clause 6.21D(3)); and
- Site specific FSR for the purposes of shops and markets (clause 7.35).

Considering the aggregate of the above, the site is afforded a maximum FSR of 2.7:1. The area of the site is 6,534m² and this provides for a maximum GFA of 17,642m². The proposal provides a total gross floor area (GFA) of 18,356.8m², which equates to an FSR of 2.81:1. The proposed FSR therefore exceeds the maximum FSR development standard by 0.11:1, or some 714.8m² of GFA. The variation is equivalent to the areas of the development proposal which specifically relate to mezzanine void “infill”, floorspace attributed to end of trip facilities and waste bin storage.

Table 1 below breaks down the respective components of the maximum FSR, and demonstrates the variation sought to clause 4.4.

Table 1 FSR standards applicable to the proposed development and proposed variation

Clause	Permitted FSR	Permitted GFA	Proposed GFA	Difference	Resultant FSR
Clause 4.4	1.5:1	9,801m ²	10,515.8m ²	+714.8m ²	1.61:1
Clause 6.14	0.5:1	3,267m ²	3,267m ²	-	0.5:1
Clause 6.21D(3)	0.2:1	1,307m ²	1,307m ²	-	0.2:1
Clause 7.35	0.5:1	3,267m ²	3,267m ²	-	0.5:1
Total	2.7:1	17,642m²	18,356.8m²	+714.8m²	2.81:1

The extent of variation sought is the equivalent of the building components of end of trip facilities and waste bin storage areas within the mezzanine, as indicated within **Figure 7** below.

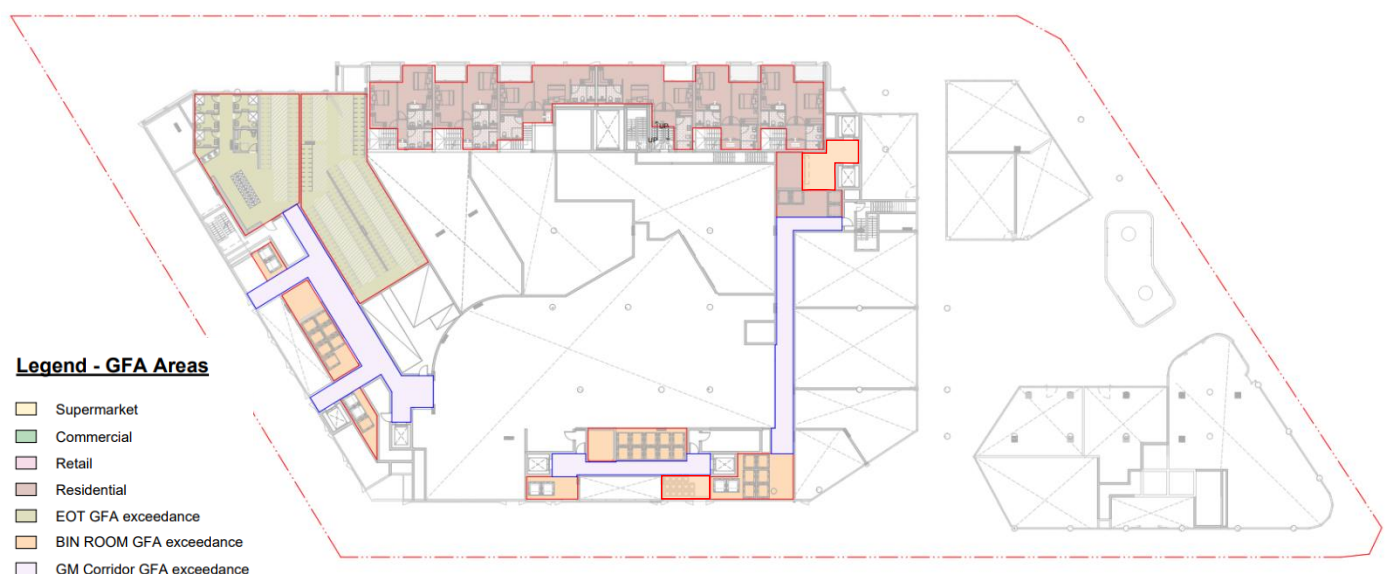


Figure 7 Equivalent area of GFA exceedance as highlighted in the proposed mezzanine diagram

Source: Bates Smart

4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Sydney LEP 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 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.

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] NSW LEC 827 (*Wehbe*);
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (*Four2Five*);
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*)

Role of the consent authority

The role of the consent authority in considering this request for a clause 4.6 variation has been explained by the NSW Court of Appeal in *Initial Action*. This requires the consent authority to be satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by clauses 4.6(3)(a) and (b).

This document provides the basis for the consent authority to reach this level of satisfaction. The relevant matters required to be demonstrated in accordance with clause 4.6 of the Sydney LEP 2012 with respect to the FSR development standard are each addressed below, including with regard to the above decisions.

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

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses similar language to clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the Sydney LEP 2012 is essentially the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation.

The five methods outlined in *Wehbe* include:

- 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**).

This clause 4.6 variation establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances because the objectives of the FSR development standard are achieved notwithstanding the non-compliance with the standard (**First Method**).

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

The objectives of the development standard contained in clause 4.4 of the Sydney LEP 2012 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.*

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

The development comprises a contextually sensitive mixed-used development with above ground retail opportunities, a high quality and amenity public domain, above ground residential apartments and subterranean supermarket. The site has been designed with the interests of future-proofing Waterloo in anticipation of continued future growth and development, and subsequent demand for residential and commercial development.

Further, the retail floor space proposed has been attuned to realise a unique mixed-use development, which is consistent with the City's Green Square and Southern Areas Retail Review, which identified an undersupply of supermarket floor space in Waterloo.

The design of the development has taken a holistic approach to floorspace allocation and arrangement, which is responsive to the local area and specific characteristics of the development site. Specifically, the development has been tailored to meet the floorspace needs for the foreseeable future by:

- Providing a full line supermarket and supporting speciality retail. As was established through the planning proposal, there is substantial existing unmet and future demand for supermarket floorspace together with additional infill residential dwellings, with projections for Green Square to house 70,000 people by 2036. These housing and retail under supplies have economic, welfare and amenity impact on the current and future residents of the area.
- Providing commercial space that will facilitate employment opportunities close to housing and transport, and will add to the diversity of the area, spreading activation and economic activity throughout the day.
- Providing much needed market and affordable housing. The development provides 110 dwellings, including affordable housing dwellings in perpetuity (by way of a Voluntary Planning Agreement), responding to the housing crisis and the concentrated demand for well-located and affordable housing.

These components come together to facilitate a cohesive project that will provide high amenity for residents, visitors and the broader community, and are enhanced through the provision of well-located EOT facilities to encourage sustainable transport and highly considered and efficiently designed waste management areas to enable the residential and commercial components to function whilst optimising space efficiency and mitigating conflicts between uses. This approach, rather than focusing on compliance with the numeric FSR control, will yield an optimal outcome to support the prospective occupants and users of the mixed-use development and will ensure viability of the end uses.

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 presents a density supported throughout the Competitive Design Alternative Process, as it does not amplify the residential, commercial or retail density of the development, but simply provides for an efficient use of space, however resulting in a technical exceedance. The proposal presents an overall density intended by the applicable FSR controls. As the site is proposed to comprise a range of land uses, the ultimate design outcome responds appropriately to the site's context through provision of a cohesive built form, which will not be impeded upon by the proposed exceedance.

The appropriate level of density for the site was carefully established through a thorough planning proposal process and Competitive Design Alternative Process. Together, these established the appropriate built form massing and level of intensity for the subject site.

The additional GFA over the total quantum allowable on the site, is the equivalent of EOT facilities for residential and non-residential uses and waste bin storage areas that do not increase the apparent bulk and scale of the building envelope. This is the case as the floorspace the equivalent of the variation quantum sought is located within void space within the volume established through the planning proposal and Competitive Design Alternative Process and otherwise within the loading dock and vehicle entry volume. These two elements, EOT and waste storage, do not increase the intensity of the use and thus will not increase vehicle or pedestrian traffic over what is already anticipated for the site.

Indeed, additional EOT GFA which would in equivalent circumstances would be treated as 'end of journey floor space' under clause 6.13 for a commercial premises (refer to **Section 4.2.1**) and waste storage exempted from constituting GFA were it able to be located in the basement. Both elements are contained entirely within the mezzanine level of the development, and despite this, the proposed built form is fully compliant with the maximum height controls under the Sydney LEP 2012.

Notwithstanding the above, the site benefits from transport infrastructure, including proximity to Green Square Station and Waterloo Metro Station, as well as being located along a major separated cycling route into the Sydney CBD, both of which provide alternative transport options and utilisation is better facilitated by the highly convenient location of the EOT facilities. The proposed development further supports traffic management through limited parking provisions, promoting active and public transport usage. Additionally, the design includes generous setbacks and pedestrian linkages, enhancing permeability and mitigating any potential adverse traffic effects.

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

Holistically, the proposal provides an acceptable quantum of floor space which has been matched to the capacity of the site from a servicing and infrastructure aspect. The proposal provides a compliant quantum of floor space across the site which has been enforced by the Sydney LEP 2012 with consideration to the existing and planned infrastructure, with the exception of the EOT and waste storage floor space. The area of additional GFA over the allowable quantum is dedicated to EOT and waste facilities in the mezzanine which does not increase the capacity or intensity of development.

The proposed development is able to adequately utilise existing infrastructure or provide new infrastructure where required. Specifically, the proposed development is directly supported by the new Waterloo Metro Station which will provides efficient public transport offerings for workers and visitors between Bankstown and Tallawong, through the Sydney CBD. Existing frequent bus services also service the site along Bourke Street.

Infrastructure in the form of potable water, sewer, electrical, gas and telecommunications are also available to the development site, with sufficient supply and all necessary augmentations and/or diversions appropriately assessed in detail through the development application.

The proposed FSR variation aligns with the capacity of existing and planned infrastructure in Waterloo, which is supported by significant investment in public amenities such as Gunyama Park, Green Square Library, and enhanced transport networks. The end-of-trip facilities and bin storage do not contribute to a higher residential or commercial density but instead improve the usability and operational efficiency of the development.

The proposed development explicitly integrates infrastructure considerations, including active street frontages and foliage-dominant landscaping, ensuring the development is well-positioned to meet the demands of the growing population. Furthermore, this minor exceedance is in keeping with the City of Sydney's strategic objectives of sustainable intensification in areas of high accessibility.

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 proposed development is located within the Green Square Precinct which is subject to a locality statement within Section 5.2 of the Sydney DCP 2012. The locality statement promotes the use of employment generating land uses, ensuring that any residential use in the area does not impede on the delivery of non-residential uses. Additionally, the character statement speaks to serving the worker, resident and visitor population of Green Square. The proposed development has been skilfully designed to align with the desired future character and strategic intent of the locality. Particular attention has been paid to ensure that building massing has been responsive to the strong presence of trees around the site, with appropriate setbacks, and reflective of existing and future surrounding development height, in line with the controls of the Sydney LEP 2012.

The design and placement of the additional floor space within the loading dock void and mezzanine maintain the architectural integrity and desired mixed-use character of the Waterloo precinct. As outlined in the SEE, the development incorporates features such as active street frontages, substantial tree retention, and enhanced public domain setbacks, ensuring it blends seamlessly with the surrounding built environment.

The minor FSR exceedance supports necessary ancillary facilities without adding perceptible bulk or scale to the development. This approach minimizes impacts such as overshadowing, overlooking, and congestion. By adhering to design excellence standards and leveraging sustainable practices, the proposal upholds and enhances the amenity of the locality, fostering a vibrant and cohesive urban environment.

4.1.2 Conclusion on clause 4.6(3)(a)

The above subsections have demonstrated that compliance with clause 4.4 of the Sydney LEP is unreasonable or unnecessary in the circumstances of the case. The objectives of the applicable development standard, set out in clause 4.4 have been achieved by the proposed development, notwithstanding variation to the mapped FSR control. Further, the above section demonstrates that compliance with the mapped alternative FSR controls would contravene the ability to achieve flexibility for an innovative design approach which achieves an improved local amenity outcome.

4.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the Sydney LEP 2012 requires the consent authority to be satisfied the applicant has demonstrated that there are sufficient environmental planning grounds to justify the contravention. 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* at [24]).

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation must be particular to the circumstances of the proposed development on that site at [60]. In this instance the relevant aspect of the development is GFA that results in the exceedance of the development standard.

There are sufficient environmental planning grounds to justify contravention of the development standard in this specific instance, as described below.

Design Excellence

Clause 6.21D of the Sydney LEP requires a competitive design process to be conducted for any development with a height above 25m outside of Central Sydney. As such, a Competitive Design Alternatives Process was held for

the proposed development. This Competitive Design Alternatives Process is outlined in greater detail at **Section 2.3** of the SEE.

Importantly, the key design elements of the site as identified by the Selection Panel have been retained and refined to ensure design integrity as outlined below:

- **Commercial Building and Retail Spaces:** The commercial building features a distinct identity with standalone façade materiality, prominent corner expression, and a retail courtyard shielded from McEvoy Street's noise and traffic.
- **Residential Buildings:** The residential buildings optimize views to heritage elements, integrate greenery with strategic notches, activate street frontages, and utilize articulated façades for natural ventilation, acoustic treatment, and massing.
- **Building Performance:** The development achieves high solar performance for residences and integrates acoustic and architectural benefits through innovative corner treatments and planter elements.
- **Access:** The design ensures clear and generous residential lobbies, split vehicle crossovers, and conflict-free bicycle storage linked to the through-site activation.
- **Landscape and Communal Spaces:** Landscaping includes private terraces, a well-configured courtyard, and rooftop open spaces designed for solar access and communal engagement.

Through refinements made through the competition and pre-lodgement process, the design has evolved and exhibits design excellence for the following reasons:

- The resolution of the building forms, in particular the 'L' shape residential component wrapping around Bourke Street and connecting to Young Street achieves high quality amenity for residents by maximising north facing apartments.
- The proposal integrates the tree protection constraints in an understated but comprehensive manner, utilising this constraint to deliver subtle shifts in built form and splayed end conditions that simultaneously optimise solar access, minimise cross views and open view lines to significant features beyond the site.
- The ground plane interface is purposefully designed to create a logical and functional public domain with an open space and commercial-retail relationship, including the use of the kiosk fronting McEvoy Street to improve the acoustic conditions for the retail courtyard.
- Integration of residential terraces along Young Street are a strong resolution of this frontage that create high amenity and reinforce the human scale of the proposal.
- The proposed commercial building holds the important corner of Bourke and McEvoy Streets and is differentiated from the residential buildings with architecture and materiality that establishes a distinct identity amongst the site and surrounds. The mixed materiality also achieves a bespoke neighbourhood feel and enhances the architectural interest of the site.

This design excellence is not compromised by the proposed FSR variation, and indeed responds partially to outcomes raised in the winning competition scheme by more effectively utilising the void space within the loading dock space to improve building operation within the built form envelope.

Environmental Impacts

The proposed FSR and resulting massing strategy does not cause adverse environmental impacts which would render it incompatible with the surrounding land uses and ensures the proposal is appropriate for the context of the site. The non-compliance is technical in nature and the proposal provides a compliant quantum of floor space allowable for the site, with the exception to the equivalent of 714.8m² which is utilised for EOT and waste facilities which is entirely located within the mezzanine, loading dock and vehicle entry volume and is therefore not readily perceivable.

This ensures the built form, which is entity compliant with the height of building controls, will not result in significant additional overshadowing, view or privacy impacts to the surrounding public realm or receivers surrounding the site. The mezzanine space is located within an area which would otherwise be a void space within the building – which is necessary to obtain sufficient head height clearance for the servicing of the site, which caters for heavy rigid vehicles, which is sleeved by two storey residential terraces to Young Street.

Provision of EOT and Waste facilities

All of the additional GFA above the allowable quantum relates to the area equivalent to the provision of EOT facilities and bin storage in the loading dock mezzanine, which is reflective of a growing industry trend and established contemporary requirements of:

- Well located, efficient and sustainable waste management practices; and
- High standards of amenity for occupants of mixed-use developments and encouraging active modes of transport such as walking and cycling in employment areas.

The proposed development will ensure that it meets the contemporary expectations for mixed-use buildings and tenant needs. Without such facilities, the building's viability as a sellable and leasable property would be impacted, given the significant increase in demand for the highest quality tenant amenity including waste and EOT facilities in recent years and efficient use of building volume and area.

Notably these components ensure that end of trip facilities are provided with opportunities for natural light and ventilation access directly from the façade of the mezzanine. If located in a basement in line with a typical development, this would require forced ventilation and a reliance on artificial light.

In addition, the waste strategy proposed has an optimised efficiency, as waste chutes do not need to drop down into the lowest basement intended for residential uses. Instead the loading dock mezzanine space is able to be used for bin storage by building management, and will have a shorter distance to be shuttled to the ground floor loading dock and bin presentation area.

4.2.1 Clause 6.13 End of Journey Floor Space

Clause 6.13 of the Sydney LEP 2012 provides as follows:

(1) A building on land (other than land in Central Sydney) that is used only for the purposes of commercial premises and that has all of the following facilities together in one area of the building, is eligible for an amount of additional floor space (end of journey floor space) equal to the floor space occupied by those facilities—

- (a) showers,*
- (b) change rooms,*
- (c) lockers,*
- (d) bicycle storage areas.*

(2) The amount of end of journey floor space cannot be more than the amount of floor space that can be achieved by applying a floor space ratio of 0.3:1 to the building.

The proposal provides an additional 714.8m² of GFA, over the total quantum allowable across the site. All of the additional 714.8m² is entirely dedicated to EOT and waste facilities within the mezzanine. With a site area of 6,534m², the 714.8m² equates to an additional floor space ratio of 0.11:1.

It is noted that clause 6.13 allows for 'additional' FSR for end of journey floor space for facilities listed above, for buildings that are used only for the purpose of commercial premises. The proposed development includes commercial premises, but additionally includes residential uses, therefore end of journey floor space under clause 6.13 is technically not applicable. However, the office and retail components of the development will operate akin to the kind of development anticipated in clause 6.13.

The majority of workers are anticipated to use public or active transport to get to work. Indeed, the provision of high quality EOT facilities is required to support the development and its future workers and fulfil the proponent's sustainability objectives.

The proposed additional GFA is well below the 0.3:1 that, if it were a wholly commercial building, would otherwise be compliant under clause 6.13. Accordingly, while the development is not technically only for the purposes of a commercial premises, the component of additional GFA over the allowable quantum meets the objective and intent of clause 6.13, which should be taken into consideration when assessing the merits of the additional 714.8m² of GFA.

4.2.2 Gross floor area definition

The definition of GFA under the Sydney LEP 2012 is as follows (emphasis added):

gross floor area means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—

- (a) the area of a mezzanine, and*
 - (b) habitable rooms in a basement or an attic, and*
 - (c) any shop, auditorium, cinema, and the like, in a basement or attic,*
- but excludes—*
- (d) any area for common vertical circulation, such as lifts and stairs, and*
 - (e) any basement—*
 - (i) **storage**, and*
 - (ii) vehicular access, loading areas, **garbage and services**, and*
 - (f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and*

- (g) car parking to meet any requirements of the consent authority (including access to that car parking), and
- (h) any space used for the loading or unloading of goods (including access to it), and
- (i) terraces and balconies with outer walls less than 1.4 metres high, and
- (j) voids above a floor at the level of a storey or storey above.

The function of this definition effectively permits both bike storage and garbage/waste storage and management areas from inclusion in the GFA total. However, to reduce conflicts between uses and efficiently utilise building area and volume, garbage chutes were not sought to run through the subterranean supermarket and down to the basement as they would in a typical mixed-use proposal. In a similar vein, the unique layout of the site and the loading dock height creates an opportunity to locate bike storage, end of trip facilities and waste bin storage areas in a mezzanine level with easy access to the street and the public domain, rather than locating these spaces below the supermarket car parking.

Accordingly, these spaces are included in the calculation in GFA, where equivalent spaces in the basement would not be. As was outlined in **Section 4.1** above, this has been achieved through efficient planning of the existing building volume and has not resulted in any increase in the building envelope, rather infilling redundant height within sections of the loading dock to achieve a more functional and liveable building. Accordingly, while the proposed exceedance technically constitutes GFA, the rearranging of this GFA from the basement to the mezzanine represents a logical and superior outcome for the functionality and operation of the proposed development without compromising the built form, which should be taken into consideration when assessing the merits of the additional 714.8m² of GFA.

4.2.3 Consistency with Objects of the EP&A Act

In *Initial Action*, the Court stated that the phrase “environmental planning grounds” is not defined but would refer to grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the Act. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, as set out in **Table 1** we consider the proposed development is broadly consistent with each object, notwithstanding the proposed variation of the floor space development standard.

Table 2 Assessment of consistency of the proposed development with the Objects of the EP&A Act

Object	Comment
(a) 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	The FSR exceedance will enable the delivery of well located end of trip facilities and bike storage that will enable sustainable transportation modes for residents and workers. Further it optimises utilisation of the building volume and therefore results in less utilisation of resources in construction and impact on the natural environment due to its reduced form.
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment	The proposed FSR exceedance will not preclude the development from achieving ecologically sustainable development by ensuring compliance with the performance standards for the energy efficiency of buildings. Further, the FSR variation will have no negative impact on environmental and social considerations and will support the economic health of Waterloo by facilitating an integrated mixed-use outcome for the site.
(c) to promote the orderly and economic use and development of land	The existing light industrial uses on the site represent an underutilisation of the subject site, which under the proposed development would become a neighbourhood centre, complimenting the emerging mixed-use high density character of Waterloo and Green Square.
(d) to promote the delivery and maintenance of affordable housing	The proposed development includes provision of affordable housing apartments to be managed in perpetuity by City West Housing, a registered affordable

Object	Comment
	housing provider. The proposed FSR variation does not in any way preclude the delivery of this housing. Indeed, it facilitates operational outcomes that will improve the resident and management experience for tenants and community housing providers.
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats	The proposed development will have no impact on threatened species or ecological communities.
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)	The proposal will not impact the sustainable management of built and cultural heritage (including Aboriginal cultural heritage).
(g) to promote good design and amenity of the built environment	The proposed development has been designed by Bates Smart as the winners of a competitive architectural design competition and has been subject to review by the City of Sydney Design Advisory Panel. The proposed development has been sensitively designed with regard to the surrounding context and in doing so achieves design excellence. The proposed variation to the FSR development standard will result in an appropriate outcome that aligns with the objectives of the provision as detailed in Section 4.1 and will not result in an additional adverse environmental impact on the surrounding area.
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants	The proposed development will be constructed in accordance with a detailed Construction Environmental Management Plan which will minimise any environmental impacts.
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State	This object is not relevant to this proposal; however, the proposal has adhered to the required planning processes for the site and scale of development.
(j) to provide increased opportunity for community participation in environmental planning and assessment	The proposed development has provided and will continue to provide the opportunity for the local community and stakeholders to participate in consultation of the development.

4.2.4 Conclusion on clause 4.6(3)(b)

There are sufficient environmental planning grounds to justify contravening from the development standard as:

- The proposed FSR and resulting massing strategy is entirely compliant with the building height controls of the SLEP 2012, does not cause adverse environmental impacts which would render it incompatible with the surrounding land uses and ensures the proposal is appropriate for the context of the site.
- The high quality design of the proposal presents as a responsive and appropriate built form outcome which optimises use of the building volume and ensures cohesion between uses on the site.
- The FSR non-compliance is technical in nature and the proposal provides a compliant quantum of floor space allowable for the site, with the exception of 714.8m² that in other equivalent circumstances would be excluded from the calculation of GFA as described throughout this report.
- The commercial component of the development is functionally comparable to a dedicated commercial development and therefore EOT facilities for workers are essential. The additional GFA for the EOT facilities aligns with the objectives and intent of clause 6.13, which should be taken into consideration when assessing the merits the additional 714.8m² of gross floor area.
- The proposed FSR and resulting massing strategy has undergone a Competition Design Alternatives Process (as a requirement of clause 6.21C of the SLEP 2012), whereby the Competitive Design Alternative Brief provided the opportunity to consider flexible alternatives to vary the mapped FSR. The distribution of FSR and

resultant mass was a key element of the original competition scheme and was highly commended by the Selection Panel.

- The proposal has demonstrated consistency with the objects of the EP&A Act.

5.0 Conclusion

The assessment above demonstrates that compliance with the floor space development standard contained in clause 4.4 of the Sydney LEP 2012 is unreasonable and unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify the contravention. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

This clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the FSR controls, the proposed development:

- Achieves the objectives of clause 4.4 of the Sydney LEP 2012 for the following reasons:
 - The site has been designed in the interests of meeting current demand for supermarket floorspace, whilst in part meeting the forecast requirement in Waterloo from continued growth and subsequent demand for residential and commercial floor space.
 - The additional FSR and GFA sought over the total quantum allowable on the site is technical in nature, due to their location and is otherwise equivalent to floor space allowable for the site dedicated to 'end of journey' (EOT) and waste storage areas. These do not increase the bulk and scale of the building envelope, but infill void space within the volume established through the planning proposal and Competitive Design Alternative Process and otherwise allow for efficient and optimal use of space. These two elements, EOT and waste storage, do not increase the intensity of the use and thus will not increase vehicle or pedestrian traffic over what is already anticipated for the site.
 - The proposed development is able to adequately utilise existing infrastructure including, bike paths, local roads, Green Square Train Station, Waterloo Metro Station and frequent bus services along Bourke Street. Infrastructure in the form of potable water, sewer, electrical, gas and telecommunications are sufficient and available to the development site, with all necessary augmentations and/or diversions appropriately assessed in detail through the development application.
 - The proposed development has been skilfully designed, in accordance with the outcomes of the site-specific Planning Proposal and subsequent City of Sydney design excellence process to align with the desired future character and strategic intent of the locality.
- There are sufficient environmental planning grounds to justify the contravention, including:
 - The proposed FSR and resulting massing strategy has undergone a Competition Design Alternatives Process and achieves design excellence, with the proposed variations having no impact on the built form and having been contemplated in the winning competition scheme.
 - The proposed FSR and resultant massing strategy is entirely compliant with the building height controls of the Sydney LEP 2012, does not cause adverse environmental impacts which would render it incompatible with the surrounding land uses and ensures the proposal is appropriate for the context of the site.
 - The additional FSR sought is technical in nature due to its location in the built form and is otherwise equivalent to the quantum of floor space allowable for EOT and waste facilities (714.8m² dedicated to these uses) which is principally located within the ground floor mezzanine and loading dock and vehicle entry volume and is not perceptible as building mass.
 - The additional GFA will ensure that the development provides highly accessible EOT and appropriate waste facilities to meet the contemporary expectations for mixed-use developments, tenant needs, occupant amenity and achieves the relevant sustainability targets.
 - The proposal has demonstrated consistency with the objects of the EP&A Act

Therefore, the consent authority can be satisfied that this clause 4.6 variation has demonstrated the matters in clause 4.6(3) of the Sydney LEP 2012 and may grant development consent notwithstanding the contravention of the floor space development standard.