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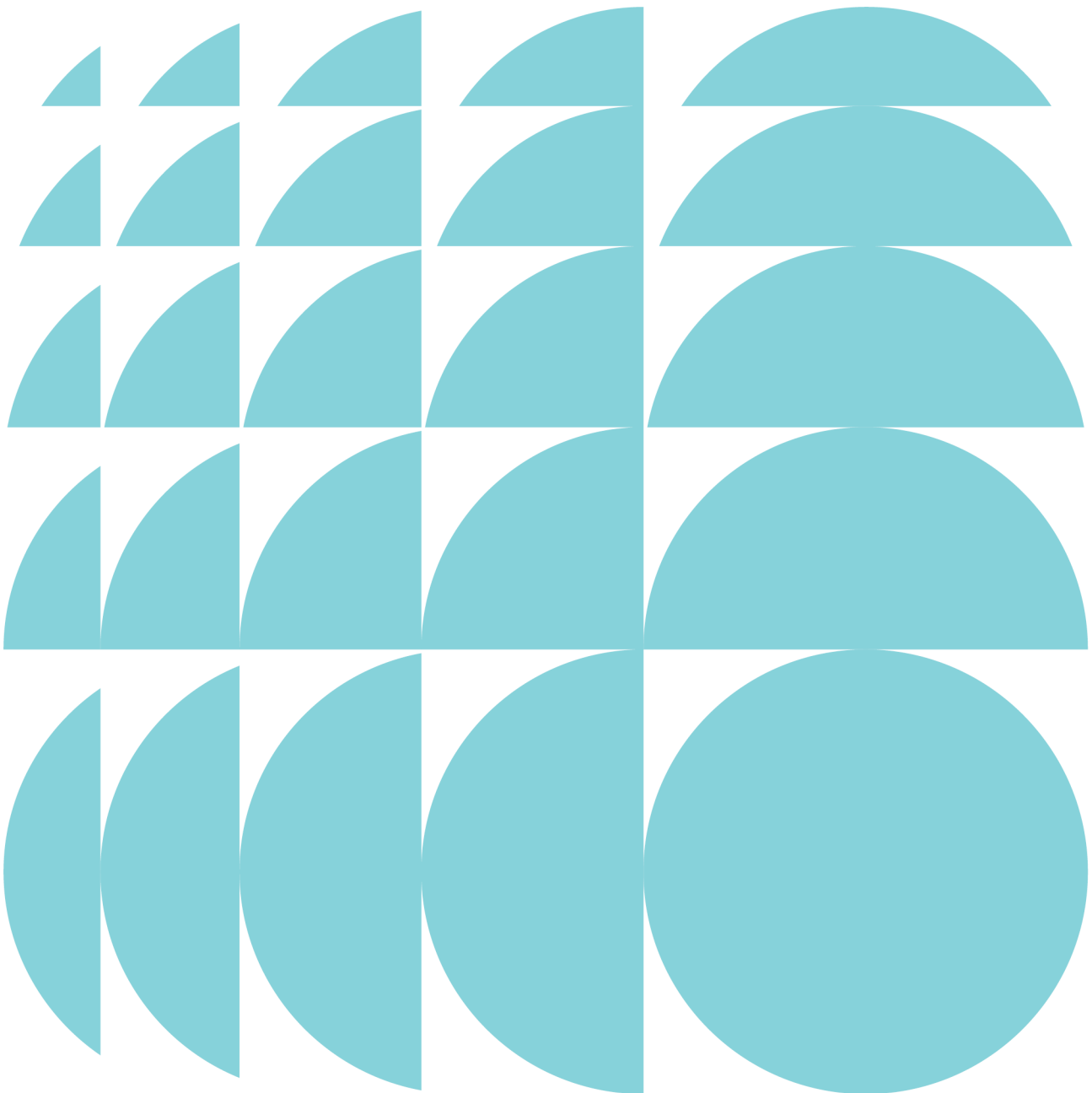
Clause 4.6 Variation to Development Standard – Maximum Building Height

26-42 Eden Street and 161-179 Princes Highway,
Arncliffe
Eden Street Communities Plus

Submitted to Department of Planning, Industry
and Environment

On behalf of Arncliffe Eden Property Pty Ltd

8 February 2022 | 218757



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1.0 Introduction

This Clause 4.6 Variation Request has been prepared by Ethos Urban on behalf of Arncliffe Eden Property Pty Ltd. It is submitted to the Department of Planning, Industry and Environment (DPIE) in support of a State Significant Development Application (SSDA) at 26-42 Eden Street and 161-179 Princes Highway, Arncliffe (the site).

Clause 4.6 of the *Bayside Local Environmental Plan 2021* (BLEP 2021) enables a consent authority to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clauses 4.6(3) and (4)(a)(ii) require that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard. These three matters are detailed below:

- that the Applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the Applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

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 request:

- identifies the development standard to be varied (**Section 2.0**);
- identifies the variation sought (**Section 3.0**);
- establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (**Section 4.0**);
- demonstrates there are sufficient environmental planning grounds to justify the contravention (**Section 5.0**);
- demonstrates that the proposed variation is in the public interest (**Section 6.0**); and
- provides an assessment of the matters the secretary is required to consider before providing concurrence (**Section 7.0**).

Therefore, the SSDA may be approved with the variations proposed in accordance with the flexibility allowed under Clause 4.6 of the Bayside LEP 2021.

2.0 Development Standard to be Varied

This Clause 4.6 variation request seeks to justify contravention of the development standard set out in Clause 4.3 of the BLEP 2021. Clause 4.3 states as follows:

(1) *The objectives of this clause are as follows—*

- (a) *to ensure that building height is consistent with the desired future character of an area,*
- (b) *to minimise visual impact of new development, disruption of views, loss of privacy and loss of solar access to existing development,*
- (c) *to nominate heights that will provide an appropriate transition in built form and land use intensity.*

(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.*

As illustrated in the extract at **Figure 1** below, the site is mapped with a maximum building height of 70 metres. It is not eligible for any area-specific FSR bonuses under subclauses 2A – 2B of Clause 4.3, or Clause 4.3A.

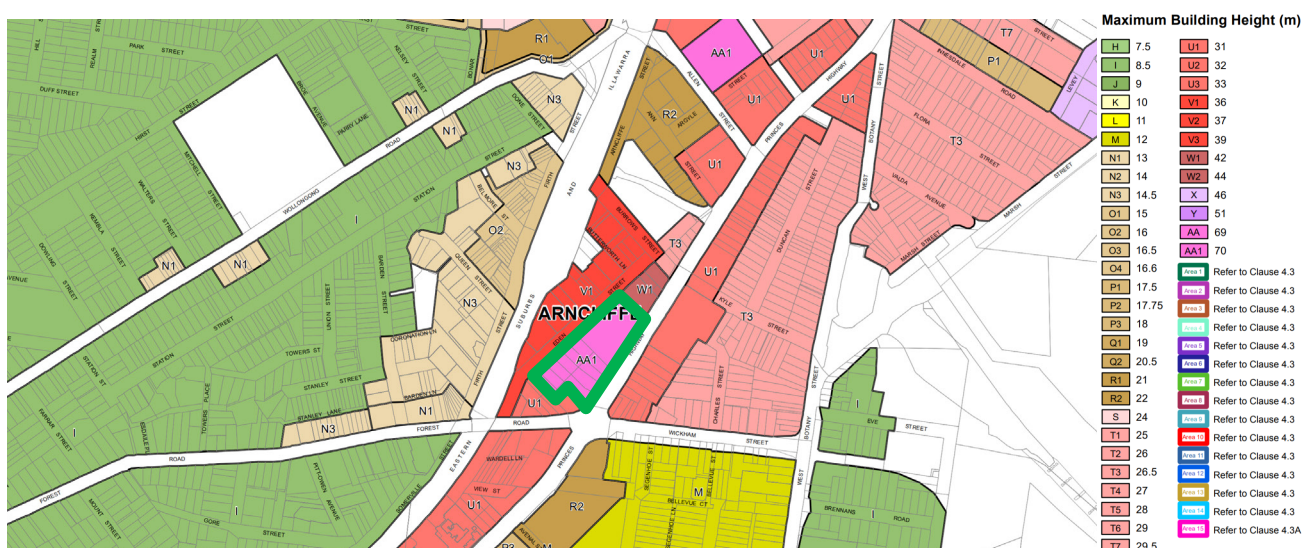


Figure 1 Extract of Height of Buildings Map (site in green outline)

Source: Bayside LEP 2021, edits by Ethos Urban

3.0 Nature of the Variation Sought

The extent of the proposed variation is limited to the lift overrun atop Building B. The overrun exceeds the maximum building height by 1.5 metres, for a maximum building height of 71.5 metres. This represents a negligible variation of 2.14%. Refer to **Figure 2**.

All other proposed buildings (A, C and D) are fully compliant with the height limit.

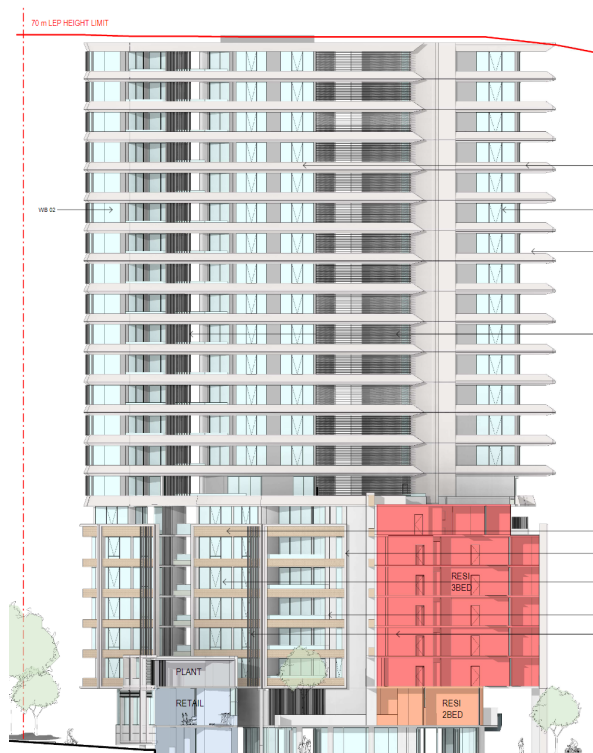


Figure 2 Building B north east elevation – showing 1.5m exceedance in lift overrun

Source: Group GSA

4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the BLEP 2021 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.*

Further, clause 4.6(4)(a) of the BLEP 2021 provides that:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*

- (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- (b) *the concurrence of the Secretary has been obtained.*

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; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in clause 4.6 of the BLEP 2021, with respect to the height of buildings development standard, are each addressed below, including with regard to these decisions.

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

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 the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the BLEP 2021 is 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 request.

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**).

Of assistance in this matter is the First Method. This is addressed below.

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 4.3 of the BLEP 2021 are:

- (a) *to ensure that building height is consistent with the desired future character of an area,*
- (b) *to minimise visual impact of new development, disruption of views, loss of privacy and loss of solar access to existing development,*
- (c) *to nominate heights that will provide an appropriate transition in built form and land use intensity.*

The proposal is assessed against the objectives for the height of building development standard below.

Objective (a): to ensure that building height is consistent with the desired future character of an area,

To determine whether the proposed variation in height for Building B is acceptable, the existing building height control of 70 metres is taken to represent a baseline for an appropriate building height that is consistent with the desired future character of the area.

Therefore, the question is whether the non-compliant aspects of the development (i.e., the Building B lift overrun) result in a building height that is inconsistent with this character.

In this regard, the Building B lift overrun is not considered to result in additional impacts that would render the proposal inconsistent with the area's desired future character, for the following reasons:

- Due to its location within the Building B floorplate, the lift overrun will generally be imperceptible when viewed from the public domain and streetscape, and therefore will not generate additional visual impacts.
- Within the context of the development being a large, multi-building mixed use precinct, the proposed variation is minimal both in area (being highly localised with regards to the site's overall size) and extent (1.5m of a site with a 70m building height limit, or 2.14%).
- There is no usable floorspace or GFA area located above the height limit. The lift overrun being 1.5 metres over the height limit facilitates mechanical servicing equipment for the operation of the elevators.

Objective (b): to minimise visual impact of new development, disruption of views, loss of privacy and loss of solar access to existing development,

The proposed development has been designed to sensitively respond to the surrounding context with regards to view loss, privacy, solar access, and overshadowing. Refer to Sections 8.5 and 8.9 of the Submissions Report to which this document is attached.

As noted above, the 1.5m exceedance of the Building B lift overrun does not alter the development's consistency with this objective by virtue of the overrun being generally imperceptible when viewed from the public domain, and therefore will not generate additional visual impacts.

Objective (c): to nominate heights that will provide an appropriate transition in built form and land use intensity.

The site is located within the Arncliffe town centre and has been zoned to accommodate tall residential buildings. The site to the north is zoned to accommodate buildings up to 42m; the site to the east is zoned to accommodate 36m buildings; and the site to the south is zoned to accommodate buildings up to 31m.

Situated on the Princes Highway, the site is to become an important landmark signifying the Arncliffe town centre and building heights transition to the surrounding area. The additional height resulting from the lift overrun, being a highly localized 1.5 metre variation, is a minimal exceedance that is imperceptible when viewed from the public domain. Building B complies with the maximum 70m height limit at all its parapets and will present as a 70m building when considered in the context of the future development on the neighbouring sites.

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

Clause 4.6(3)(b) of the BLEP 2021 requires the consent authority to be satisfied that the Applicant's written request has adequately addressed clause 4.6(3)(b), by demonstrating:

That there are sufficient environmental planning grounds to justify contravening the development standard.

There are sufficient environmental planning grounds to justify contravention of the maximum building height development standard in this specific instance as the proposal is 70 metres high and the proposed variation will not be readily visible from the public domain surrounding the site and will not impact on views or daylight access to the surrounding dwellings or public and private open space.

4.2.1 Consistency with the Objects of the Environmental Planning and Assessment Act 1979

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, in **Table 2** we consider how the proposed development is consistent with each object, notwithstanding the proposed variation of the maximum building height development standard.

Table 1 Assessment of proposed development against the Objects of the EP&A Act

Object	Comment
<i>(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</i>	The proposed development will provide increased and better fit for the purposes of social housing on the site, thereby contributing towards the social welfare of the community. The proposed buildings will also incorporate sustainability features which will seek to use the State's resources more efficiently.
<i>(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment</i>	The proposed development is considered to be ecologically sustainable in that it delivers on economic, social, and environmental aspects, including: <ul style="list-style-type: none"> • Provision of increased and better fit for purpose social housing; • Increased and more diverse market housing within close proximity to public transport and employment opportunities, adhering to the principles of transit-oriented development; • The proposed development provides new public open space for use by the broader community; and • The development provides new retail services and employment opportunities
<i>(c) to promote the orderly and economic use and development of land</i>	The proposed development will make more efficient use of the land by demolishing accommodation that is no longer fit for purpose and replacing it with modern housing which better meets the demands for housing within the locality.
<i>(d) to promote the delivery and maintenance of affordable housing,</i>	The proposed development will provide 180 social dwellings, which are better suited to the needs of the local community and will be able to accommodate more people that require this form of accommodation.
<i>(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,</i>	This object is not applicable to the site. It is noted that the proposed park will be planted with native species.
<i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),</i>	There is no existing physical cultural heritage on the site. However, the project has been designed with connection to country in mind with the advice and input of an Indigenous consultant.
<i>(g) to promote good design and amenity of the built environment,</i>	The proposed development has been designed by Group GSA, a firm which is recognised for its high quality designs. The proposal has also been the subject of several reviews by the State Design Review Panel. The SDRP have confirmed they are satisfied that the amended proposal satisfies the Bayside LEP design excellence provisions.
<i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,</i>	The proposed buildings will be designed and constructed in accordance with the relevant BCA and Australian Standard controls and provisions.
<i>(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,</i>	This object is not relevant to this proposed development.
<i>(j) to provide increased opportunity for community participation in environmental planning and assessment.</i>	The proposed development was publicly notified in accordance with requirements.

4.3 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

4.3.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the building height development standard, for the reasons discussed in **Section 4.1.1** of this report.

4.3.2 Consistency with objectives of the zone

The proposal is assessed against the objectives of the B4 Mixed Use zone below.

a) *To provide a mixture of compatible land uses.*

The proposed development will provide market and social residential dwellings and in addition to substantial retail floorspace. The development has been designed so that the uses will be compatible with each other once operational and will positively contribute to the broader Arncliffe centre.

b) *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

The proposed development will provide new housing and employment generating land uses within 100m of the Arncliffe Station. It is therefore highly accessible and an appropriate location for higher density development.

5.0 Secretary's Concurrence

Under Clause 4.6(5) of the Bayside LEP 2021, the Secretary's concurrence is required prior to any variation being granted. Under Clause 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018 to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice.

We note that none of the conditions in the table apply to the DA, therefore the Secretary's concurrence is assumed. Nevertheless, the following section provides a response to those matters set out in Clause 4.6(5) of the BLEP 2021 which must be considered by the Secretary.

5.1 Clause 4.6(5)(a): Whether a contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation does not raise any matters of significance for State or regional environmental planning. The variation to the maximum height development standard will not contravene any overarching State or regional objectives or standards or have any effect outside the site's immediate area.

5.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

There is no public benefit in maintaining the development standard in terms of State and regional planning objectives. The variation is required to provide adequate mechanical servicing area for the Building B elevators and does not result in additional visual impacts from the surrounding public domain.

5.3 Clause 4.6(5)(c): Other matters required to be taken into consideration before granting concurrence

We are not aware of any other matters that the Secretary (or the consent authority, under delegation) is required to consider before granting concurrence.

6.0 Conclusion

The assessment above demonstrates that compliance with the maximum height development standard contained in Clause 4.3 of the BLEP 2021 is unreasonable and unnecessary in the circumstances and that the justification is well founded.

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

- Will facilitate the provision of high quality social housing, market housing and retail employment floorspace;
- Will not create any unreasonable additional impacts to the surrounding public domain or residential dwellings; and
- Will promote the orderly and efficient use of land, in accordance with the objects of the Act.