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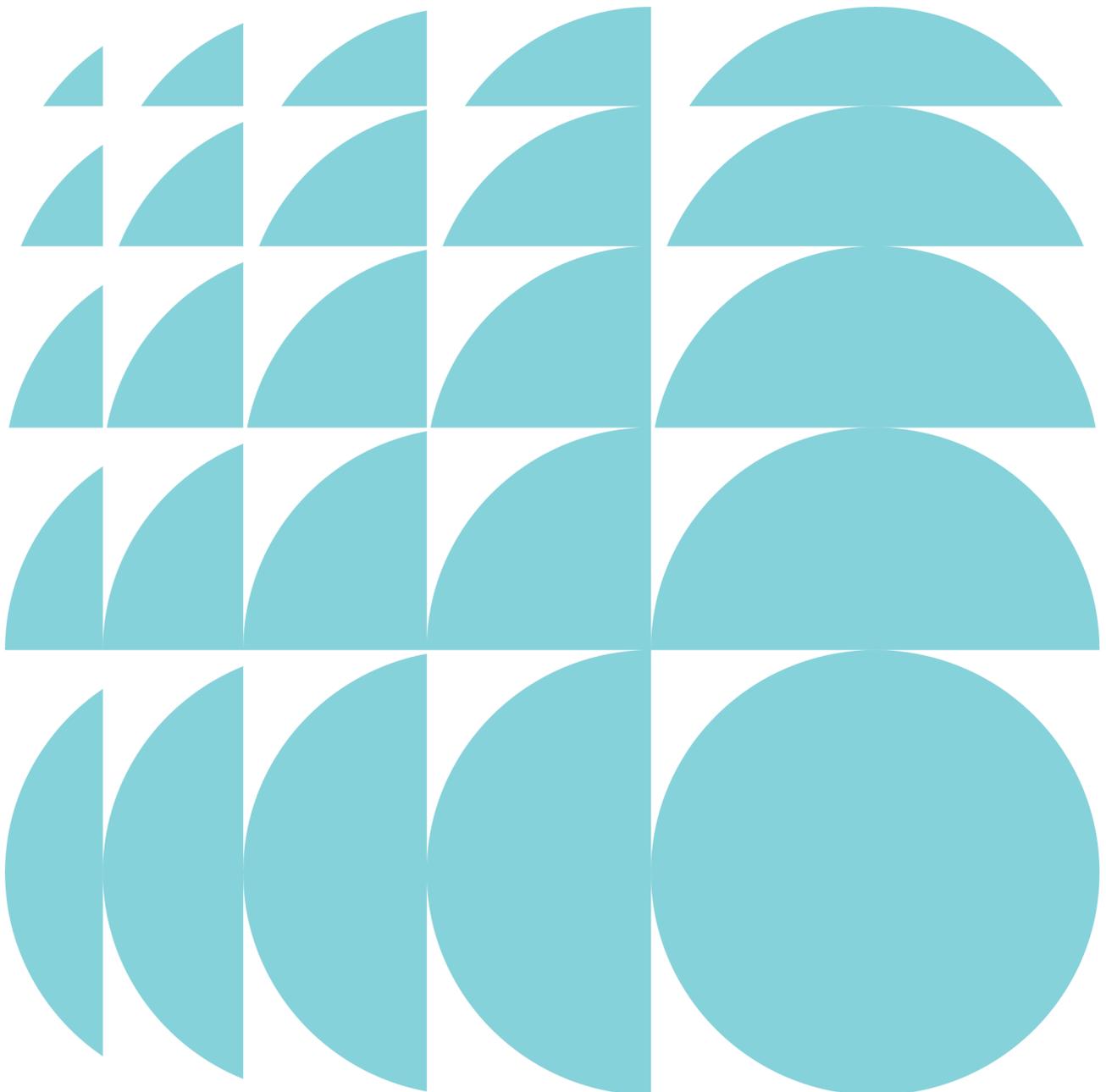
Clause 4.6 Variation to Development Standard – Floor Space Ratio

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

5 May 2022 | 218757



CONTACT

Jim Murray Associate Director JMurray@ethosurban.com 9956 6962

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This document has been prepared by:

This document has been reviewed by:



Yousheng Li

Jim Murray

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Ethos Urban Pty Ltd
ABN 13 615 087 931.
www.ethosurban.com
173 Sussex Street, Sydney
NSW 2000 t 61 2 9956 6952

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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 standards set out in Clause 4.4 of the BLEP 2021. Clause 4.4 states as follows:

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

- (a) *to establish standards for the maximum development density and intensity of land use,*
- (b) *to ensure buildings are compatible with the bulk and scale of the existing and desired future character of the locality,*
- (c) *to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,*
- (d) *to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation,*
- (e) *to ensure buildings do not adversely affect the streetscape, skyline or landscape when viewed from adjoining roads and other public places such as parks and community facilities.*

(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.*

As illustrated in the extract at **Figure 1** below, the site is mapped with a maximum FSR of 4:1. It is not eligible for any area-specific FSR bonuses under subclauses 2A – 2H of Clause 4.4.

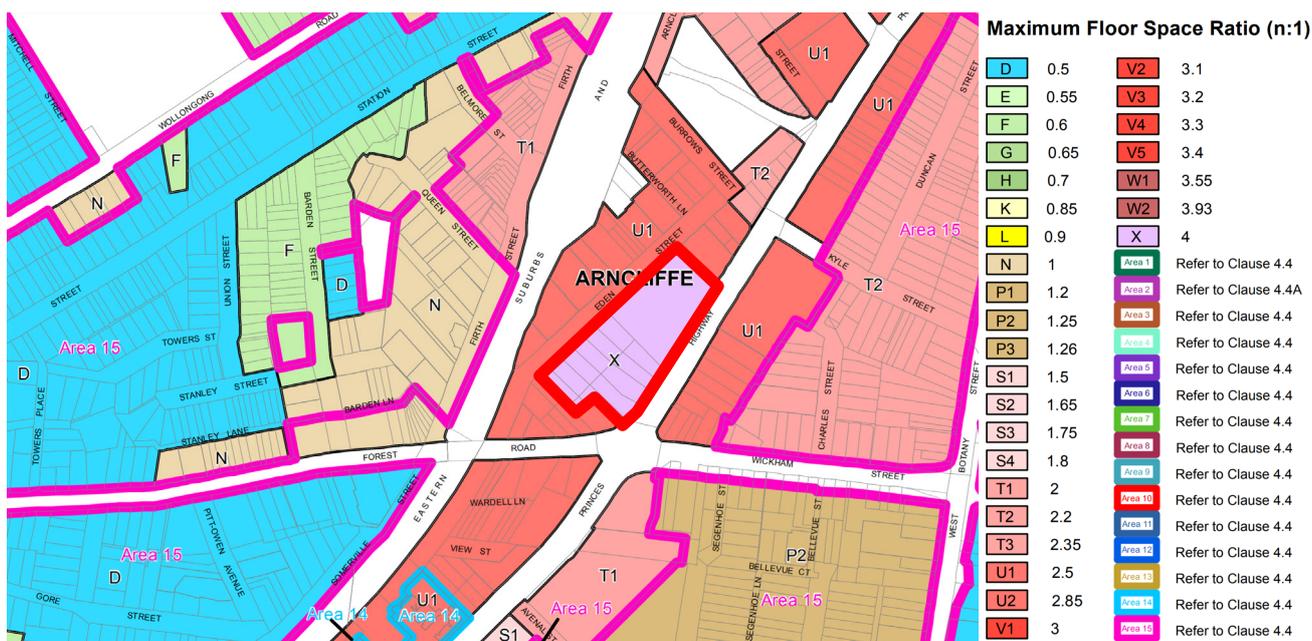


Figure 1 Extract of Floor Space Ratio Map (site in red outline)

Source: Bayside LEP 2021, edits by Ethos Urban

2.1 Affordable Housing Bonus

State Environmental Planning Policy (Affordable Rental Housing) 2011 (SEPP ARH) continues to apply to the amended development for the purposes of affordable housing as stated at Schedule 7 Clause 2 'General savings provisions' of State Environmental Planning Policy (Housing) 2021.

Clause 6(2) of SEPP ARH states the following:

(2) *In this Policy, residential development is taken to be for the purposes of affordable housing if the development is on land owned by the Land and Housing Corporation.*

Therefore, as the Eden Street site is owned by LAHC, it is considered that 100% of the residential floorspace of the site is considered to be affordable housing, within the context of SEPP ARH.

Under clause 13 of SEPP ARH, development used for the purposes of affordable housing is eligible for bonus floorspace. As the site has an existing FSR limit (under the Bayside LEP 2021) that is greater than 2.5:1, and more than 50% of the floorspace of the site is to be used for affordable housing (under the definition established under clause 6(2) earlier), clause 13(b)(i) applies, which states the following:

(2) The maximum floor space ratio for development to which this Division applies is the existing maximum floor space ratio for any form of residential accommodation permitted on the land on which the development is to occur, plus—

(b) if the existing maximum floor space ratio is greater than 2.5:1—

(i) 20 per cent of the existing maximum floor space ratio—if the percentage of the gross floor area of the development that is used for affordable housing is 50 per cent or higher.

As the site has a maximum FSR of 4:1 under the LEP, a total FSR limit of 4.8:1 applies to the development following the application of the bonus.

3.0 Nature of the Variation Sought

As described in the Statement of Environmental Effects (SEE) and illustrated on the Architectural Drawings prepared by Group GSA, the FSR of the proposed development will exceed the maximum FSR of 4.8:1 by approximately 1,773m² (0.13:1) which equates to a 2.69% variation.

The principal reason for the variation is a result of the site's location on the Princes Highway. To achieve an appropriate level of acoustic amenity, certain apartments with balconies with a primary aspect towards the Princes Highway have been enclosed (i.e. becoming wintergardens). These are located on the eastern facades of Buildings A, B and D. Building C does not have an aspect to the Princes Highway and does not require wintergardens.

Wintergarden locations are shown within Drawings DA4100 – 4103 of the Amended Architectural Plans (**Appendix A** of this RTS response). The specific areas of the wintergardens within the relevant buildings are:

- 402m² of wintergarden to Building A;
- 889m² of wintergarden to Building B; and
- 484m² of wintergarden to Building D.

The enclosure of these balconies to form wintergardens will significantly improve their acoustic amenity for future residents, making them truly useable spaces. They are functionally identical to the 'open' balconies found in apartments without a primary frontage to the Princes Highway. They will not be treated or perform as additional living rooms.

Strict numerical compliance (i.e. by not enclosing them) would result in a significantly reduced level of amenity to these spaces and would be an undesirable planning outcome.

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 floor space ratio 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 4.4 of the BLEP 2021 are:

- (a) to establish standards for the maximum development density and intensity of land use,*
- (b) to ensure buildings are compatible with the bulk and scale of the existing and desired future character of the locality,*
- (c) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,*
- (d) to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation,*
- (e) to ensure buildings do not adversely affect the streetscape, skyline or landscape when viewed from adjoining roads and other public places such as parks and community facilities.*

The proposal is assessed against the objectives for the FSR development standard below.
to establish standards for the maximum development density and intensity of land use

Objective (a): to establish standards for the maximum development density and intensity of land use,

The proposed development, including the FSR variation does not compromise the development's ability to be consistent with this control. The proposed variation is by virtue of a technical non-compliance, where due to the definition of Gross Floor Area (GFA) under the BLEP 2021 and Standard Instrument LEP, wintergardens are considered to contribute towards GFA whereas standard balconies do not.

Being functionally identical to the regular balconies found elsewhere throughout the proposed development, the wintergardens do not contribute to additional development density or land use intensity at the site.

The enclosure of these private open spaces is necessary to maintain acoustic amenity. We are aware of several consent authorities who exclude wintergardens from the calculation of floorspace if the wintergarden is provided in direct response to an amenity issue. One example of this is the City of Sydney.

Objective (b): to ensure buildings are compatible with the bulk and scale of the existing and desired future character of the locality,

The proposed development is consistent with the future desired character of Arncliffe as established in the *Bayside West Precincts 2036 Plan*. The development will generate new housing and employment opportunities that capitalise on the close proximity of the site to transport and the Arncliffe Town Centre.

Studies prepared as part of the SSD application demonstrate that the proposed density can be accommodated by the existing infrastructure in the area and that there will not be any unacceptable impacts in respect of the operation of the surrounding road network as a result of the traffic generated by the proposed development.

The proposed wintergardens, being functionally identical to regular balconies, do not generate additional bulk and scale or result in the development being inconsistent with Arncliffe's desired future character. This is supported by the submitted Visual Impact Assessment.

Objective (c): to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,

The proposed development has been designed to comply with the relevant planning controls in respect of maintaining a suitable level of amenity to adjoining properties. The proposed development maintains suitable separation distances and buildings have been designed so as to minimise overshadowing of neighbouring properties as demonstrated in the submitted EIS and Submissions Report to which this document is attached.

Objective (d): to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation,

The proposed site is located within the Arncliffe Precinct which is identified to undergo significant change as outlined in the *Bayside West Precincts 2036 Plan*. As can be seen in **Figure 2**, the site is centrally located within the precinct and will be located within a high density area. The proposed density of development is therefore consistent with the future character identified for the precinct and the Site, as further discussed the submitted EIS and Submissions Report to which this document is attached.

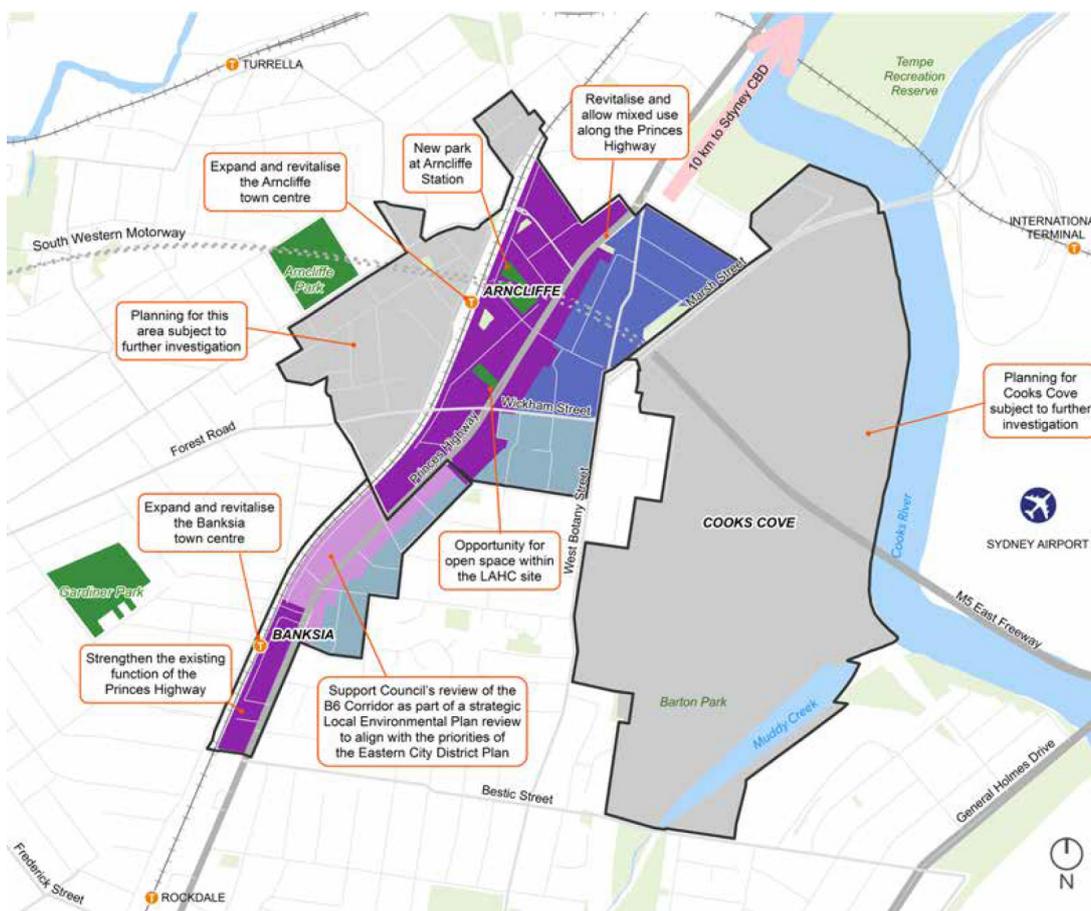


Figure 2 Arncliffe Precinct 2036 Plan
 Source: Department of Planning, Industry and Environment

Objective (e): to ensure buildings do not adversely affect the streetscape, skyline or landscape when viewed from adjoining roads and other public places such as parks and community facilities.

The proposed development has been designed to sensitively respond to the surrounding streetscape, skyline, and landscape. Its design integrates significant future public open spaces and facilities, including a new 4,000m² park (Eden Street Park) and public plaza. A Visual Impact Assessment has been prepared demonstrating that the proposal does not unreasonably affect views in the context of the intended bulk and scale of the site. The proposed wintergardens will have a very negligible impact on these views when compared to a fully compliant development.

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.

The environmental planning grounds relied on in the written request under Clause 4.6 must be sufficient 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]).

There are sufficient environmental planning grounds to justify a flexible approach to the application of the height control as it applies to the site. In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. The applicable circumstances that relate to the site are discussed below.

4.2.1 Acoustic impacts of the Princes Highway

The site has a frontage of approximately 160m to the Princes Highway. This road carries between 2,400 – 4,600 vehicles during the morning, afternoon and Saturday peak hours and is a significant generator of road noise. Stantec Australia Pty Ltd has carried out a Noise and Vibration Assessment (Appendix P of the exhibited EIS) to determine what treatments are required to ensure that a suitable level of amenity is achieved for the future occupants of the building.

As can be seen in **Figures 3 and 4** taken from Appendix P of the EIS, apartments which have a direct frontage to the Princes Highway are subject to a substantive amount of noise, particularly at the lower levels of the building. Stantec has advised that in order to achieve the noise criteria set out on the Department of Planning, Industry and Environment’s *Development near Rail Corridors and Busy Roads – Interim Guideline* acoustic treatments in the form of wintergardens and glazing are required for apartments with a primary aspect facing the Princes Highway.

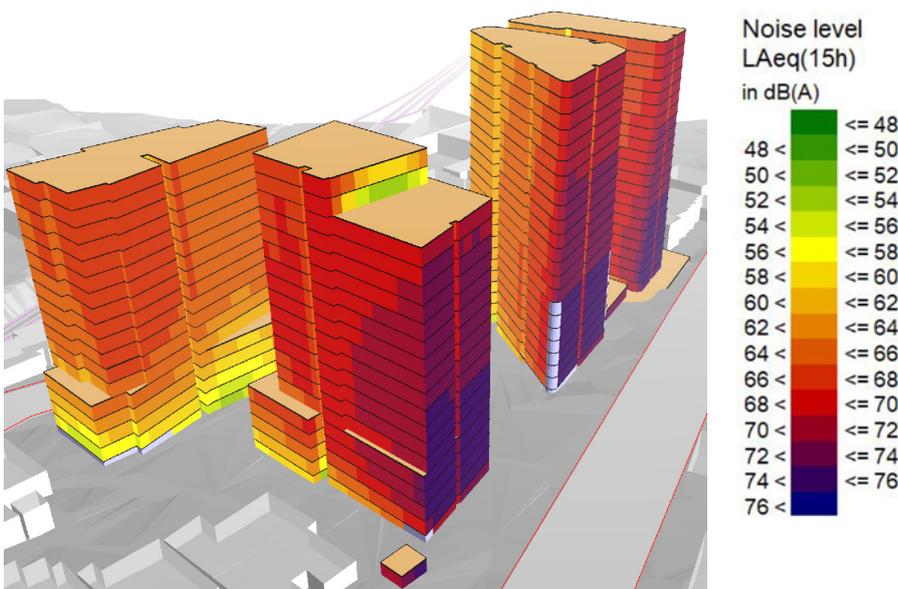


Figure 3 Noise levels on eastern and southern elevations of the proposed development (as exhibited)

Source: Stantec

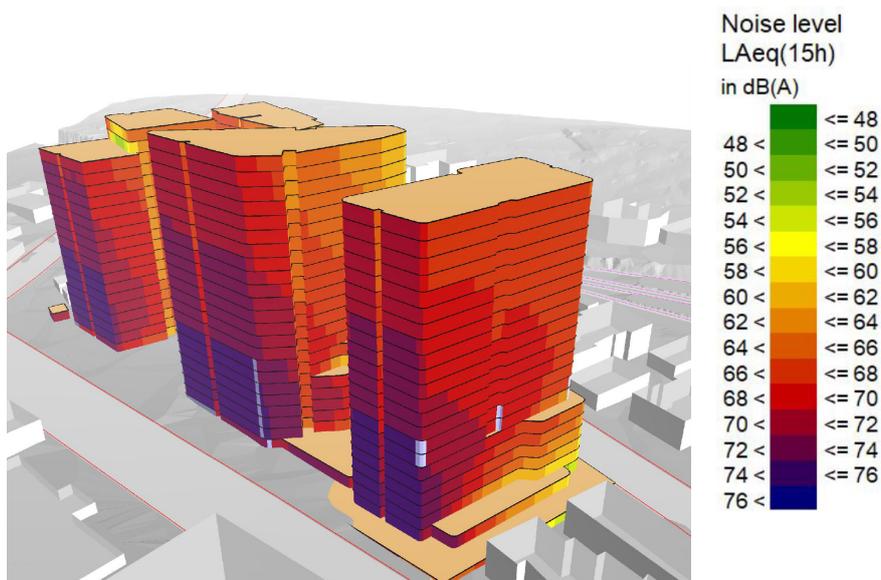


Figure 4 Noise levels on northern and eastern elevations of the proposed development (as exhibited)

Source: Stantec

In recognition that a suitable level of amenity cannot be achieved without implementing mitigation measures, Group GSA has provided these apartments with wintergardens. The wintergardens have been designed and treated as if they were a balcony space but will be able to be fully enclosed if desired by the occupants of the building. Wintergarden locations and design details have been provided at Drawings DA4100 – 4103 of the Amended Architectural Plans (**Appendix A** of this RTS response).

A precedent image of a similar wintergarden that has been approved and constructed at Wollie Creek is shown in **Figure 5**.



Figure 5 Precedent of proposed wintergarden

Source: Group GSA

4.2.2 Nature of the variation

Another environmental ground to justify the breach of the FSR standard is the size of the Site. With an area of 13,440m², the Site is of a size that the additional floor space can be accommodated without adverse environmental impacts.

The proposed variation exceeds the FSR limit by approximately 1,773m² (0.13:1) which equates to a 2.69% variation. Given the nature of the variation as being minimal in extent and due to a technicality in the definition of GFA under the BLEP 2021 and Standard Instrument LEP (where wintergardens are considered GFA but regular balconies are not), there would be no perceivable difference between a scheme that complies with the maximum FSR control and the proposed scheme.

For the above reasons, and in recognition that noise and pollution significantly reduce the amenity and useability of private open space, we are aware of several consent authorities who exclude wintergardens from the calculation of floorspace if the wintergarden is provided in direct response to an amenity issue. One example of this is the City of Sydney.

4.2.3 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 1** 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 purpose 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; • 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.

Object	Comment
<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

In *Initial Action* it is established that it is a proposed development's consistency with the objectives of the development standard and the objectives of the zone that make a proposed development in the public interest. Accordingly, it is demonstrated throughout this Clause 4.6 that the proposal is in the public interest as it is entirely consistent with the objectives of the development standard and the objectives of the zone.

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 of the BLEP 2021 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 FSR 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. To the contrary, if the development standard were to be maintained, the acoustic amenity of the development would be compromised as standard balconies in lieu of the proposed wintergardens would be provided to apartments affected by noise from the Princes Highway.

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 FSR development standard contained in Clause 4.4 of the BLEP 2021 is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded.

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

- Will ensure that residents occupying the development in an apartment with a frontage to the Princes Highway will be able to achieve a high level of amenity by way of more useable private open space; and
- Will promote the orderly and efficient use of land, in accordance with the objects of the Act.