

Clause 4.6 Variation Request Floor Space Ratio

Redfern Place

600-660 Elizabeth Street, Redfern

Submitted to Department of Planning, Housing and Infrastructure
on behalf of Bridge Housing

SSD-51274973



'Gura Bulga'

Liz Belanger Cameron

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



'Dagura Buumarri'

Liz Belanjee Cameron

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



'Gadalung Djarri'

Liz Belanjee Cameron

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

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

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

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

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Version No.	Date of issue	Prepared by	Approved by
1.0 (DRAFT)	10/06/2024	AO	JD
2.0 (DRAFT)	14/06/2024	AO	JD
3.0 (FINAL)	28/06/2024	AO	JD
4.0 (FINAL)	24/10/2024	AO	JD

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Contents

1.0	Introduction	4
1.1	Overview.....	4
1.2	Legal Guidance.....	5
2.0	Site and Proposed Development	6
2.1	Site Context.....	6
2.2	Site Description	6
2.3	Description of the Proposed Development	7
3.0	Planning instrument, development standard and proposed variation	9
3.1	Background to the variation.....	9
3.2	Details of proposed variation	10
4.0	Justification for Contravention of the Development Standard	11
4.1	Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances	11
4.2	Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard.....	18
5.0	Conclusion.....	22

Figures

Figure 1	Site Context Map.....	6
Figure 2	Site Aerial Map.....	7
Figure 3	3D Sketch of Proposed Development.....	8
Figure 4	Building height transitions – Elizabeth Street elevation.....	15
Figure 5	Mid-winter shadow diagrams at 9am, 10am, and 11am	16
Figure 6	Comparison of Planning Proposal reference scheme (left) and proposed development (right).....	21

Tables

Table 1	Planning instrument, development standard and proposed variation.....	10
Table 2	Assessment against the future character statement.....	13
Table 3	Assessment of the proposed development against the Planning Proposal objectives	16
Table 4	Assessment of consistency of the proposed development with the Objects of the EP&A Act	18

1.0 Introduction

1.1 Overview

This Clause 4.6 variation request has been prepared by Ethos Urban on behalf of Bridge Housing in partnership with the affordable housing provider, Bridge Housing. It is submitted to the NSW Department of Planning, Housing and Infrastructure (DPHI) in support of a State Significant Development Application (SSDA) for a proposed mixed use development comprising four new buildings that provide social, affordable and specialist disability housing, a community facility and commercial uses on land at 600-660 Elizabeth Street, Redfern (the site).

Clause 4.6 of the *Sydney Local Environmental Plan 2012* (SLEP) enables the consent authority to grant consent for development even though the development contravenes the development standard. This Clause 4.6 variation request relates to the development standard for Floor Space Ratio (FSR) under clause 4.4 of SLEP and should be read in conjunction with the Environmental Impact Statement (EIS) prepared by Ethos Urban dated 28 June 2024

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 the FSR 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 request demonstrates that, notwithstanding the non-compliance with the FSR development standard:

- The proposed development achieves the objectives of Clause 4.4 of the SLEP as:
 - The proposed FSR aligns with the density envisioned for the site through the Planning Proposal and the non-compliance is a minor technical discrepancy. As such, the proposed development will continue to meet the anticipated needs for the foreseeable future.
 - The proposed density of the development, the built form and land use is appropriate for the site as envisioned by the Planning Proposal. The parking provided complies with the SLEP parking rates and pedestrian traffic will be appropriately managed through the design and layout of the development.
 - The site is in proximity to existing and planned infrastructure and has been developed to adopt a scale that is consistent with strategic expectations for the site.
 - The proposed development has been designed to respond to the desired future character of the locality through the provision of height transitions, minimising overshadowing of Redfern Park and Oval and having an appropriate impact on visual, noise and historic amenity.
 - The proposal contributes to achieving the objectives of the Planning Proposal and therefore can be considered to achieve the objectives of the site-specific clause of the SLEP (Clause 6.59).
- The proposed development demonstrates that there are sufficient environmental planning grounds to vary the control in this instance because:

The development, inclusive of the variation, is consistent with the objects of the EP&A Act.

- The variation is the result of a technical non-compliance with the stretch BASIX water target under the SLEP arising from the 100% affordable/social housing tenure proposed. The development still achieves a high level of ESD performance and exceeds the intended BASIX energy target.

- The proposed FSR is consistent with that envisaged for the site during the Planning Proposal process and if not for the technical non-compliance with BASIX water targets, would be compliant with the maximum permissible FSR.
- The proposed development, notwithstanding the variation, contributes to the Planning Proposal objectives being achieved. Therefore, the SSDA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the SLEP.

It is also of note that under the *Environmental Planning and Assessment Act 1979*, s4.33(1), a consent authority must not:

- Refuse its consent to a Crown development application, except with the approval of the Minister, or
- Impose a condition on its consent to a Crown development application, except with the approval of the applicant or the Minister.

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 request:

- 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 4.0**); and
- Demonstrates there are sufficient environmental planning grounds to justify the contravention (**Section 5.0**).

2.0 Site and Proposed Development

2.1 Site Context

600-660 Elizabeth Street (the site) is situated in the Redfern Estate within the suburb of Redfern and the City of Sydney local government area (LGA).

Redfern Estate is a precinct to the south of Sydney's CBD that is known for its Aboriginal community and rich history of social and public housing in urban Sydney, as well as being a thriving cultural centre of arts, entertainment, retail and startup businesses. In addition to the redevelopment at the subject site which was previously occupied by public housing, Redfern is experiencing extensive growth along the Innovation Corridor, including the Redfern North Eveleigh Mixed-Use Renewal Precinct, Waterloo Social Housing Estate and the Waterloo Metro transport and over-station development.

The site's locational context is provided in **Figure 1**.

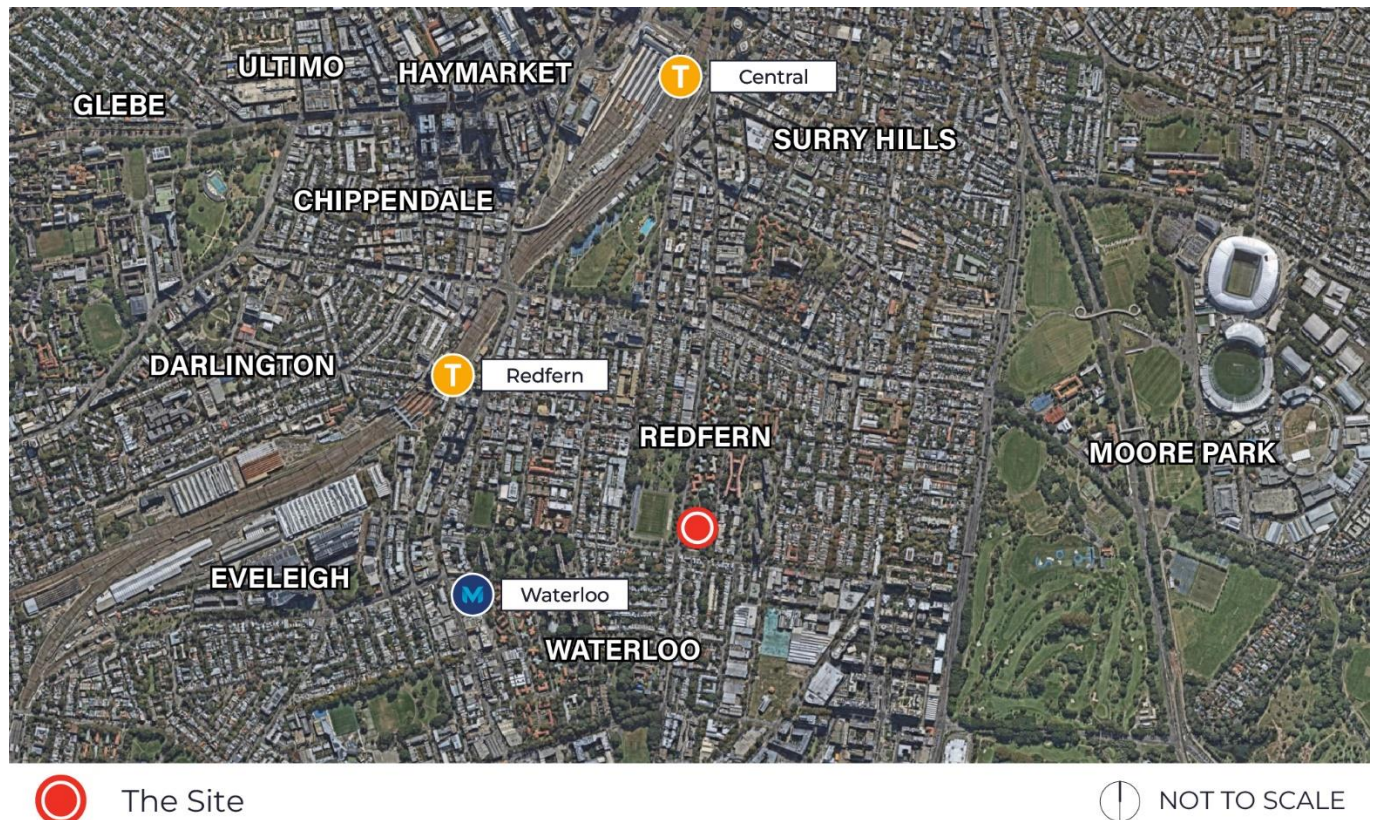


Figure 1 Site Context Map

Source: Nearmap and Ethos Urban

2.2 Site Description

The site is legally described as Lot 1 DP1249145 and is rectangular in shape covering an area of approximately 10,850m². It has a frontage of approximately 145m to Elizabeth Street to the west, 75m to Phillip Street to the south, 145m to Walker Street to the east and 75m to Kettle Street to the north.

The site is largely partially vacant (approximately 70% of the entire site). Buildings to the site's southern portion are currently occupied by the Policy Citizens Youth Club (PCYC) South Sydney and for recreational purposes.

A site aerial map is provided in **Figure 2**.



 The Site

 NOT TO SCALE

Figure 2 Site Aerial Map

Source: Nearmap and Ethos Urban

2.3 Description of the Proposed Development

The SSDA seeks consent for the detailed design, construction and operation of a mixed use development comprising four new buildings that provide social and affordable housing, a community facility and commercial uses.

Specifically, this development application seeks consent for the following:

- demolition of existing buildings;
- tree removal;
- bulk earthworks including excavation;
- construction of a one (1) three (3) storey community facility building (Building S1);
- construction of two (2) residential flat buildings (Buildings S2 and S3) up to 14 and 10 storeys respectively comprising a mixture of social and affordable housing;
- construction of one (1) five (5) storey mixed use building (Building S4) comprising commercial uses on the ground level and social and disability support housing above;
- construction of one (1) basement level below Buildings S2, S3 and part of S4 accessible from Kettle Street; and
- site-wide landscaping and public domain works including north-south and east-west pedestrian through-site link and dedications for footpath widening along Elizabeth Street and Phillip Street.

A artist impression of the proposed development is shown at **Figure 3**.



Figure 3 3D Sketch of Proposed Development

Source: Hayball, Silvester Fuller and Architecture AND

3.0 Planning instrument, development standard and proposed variation

3.1 Background to the variation

Homes NSW previously proposed amendments to the SLEP via a site-specific Planning Proposal (PP-2020-456), to provide controls to facilitate the redevelopment of the site. This Planning Proposal was gazetted in February 2022 and the appropriate density for future development at the site was established. It was concluded that the maximum permissible FSR for the site would be 2.442:1, comprising the following:

- Base mapped FSR of 1:5.
- An additional 0.57:1 under Clause 6.59(3)(a) of the SLEP, if 3,500sqm of floor space area is used for a community facility.
- An additional 0.15:1 under Clause 6.59(3)(b) of the SLEP, if *all BASIX affected development on the land exceeds the BASIX commitments for energy and water for the development by at least 5 points*.
- Up to an additional 10% on all of the above, under Clause 6.21D(3)(b) of the SLEP if the Consent Authority is satisfied that the proposed development exhibits design excellence.

It should also be noted that community facilities do not contribute to the overall GFA of the development.

At the time of gazettal of the Planning Proposal, the minimum BASIX requirements were set by *SEPP (BASIX) 2004*. Since this time, *SEPP (Sustainable Buildings) 2023* (the Sustainable Buildings SEPP) has come into effect. The Sustainable Buildings SEPP raised the minimum BASIX standards for energy significantly, making the additional 5 points required under Clause 6.59(3)(b) (the “stretch” target) significantly more difficult to achieve than anticipated at the time of gazettal of the Planning Proposal. In recognition of this change, the City of Sydney Council has proposed to amend the SLEP to remove the stretch BASIX requirements for energy under Clause 6.59(3)(b). The draft Planning Proposal was endorsed by Council on 11 December 2023 as part of the broader Sydney Local Environmental Plans – Policy and Housekeeping Amendments 2023. The proposed amended wording is as follows:

*if all BASIX affected development on the land exceeds the BASIX commitments for **energy and** water for the development by at least 5 points — up to 0.15:1.*

Since the Planning Proposal has not been adopted or publicly exhibited, it is not yet a matter for consideration under Section 4.15 of the EP&A Act for development assessment. Notwithstanding, the proposed development will achieve the BASIX energy targets as per the current wording of the SLEP, demonstrating a significant commitment to sustainability.

Despite the above, the BASIX water stretch target is not proposed to be amended in Council's PP. It is noted that the stretch water target was set at the Planning Proposal stage on the assumption that a future development would most likely be part affordable/social housing (approximately 30%) and part market housing (approximately 70%). Since that time, a consortium led by Bridge Housing (a Tier 1 not-for profit Community Housing Provider) was selected as the development partner for the site and the proposed development now comprises 100% social and affordable housing.

In order to achieve the stretch BASIX water target, appliances of an adequate level of performance need to be provided to all apartments, or very sophisticated and costly water recapture and recycling devices would be required. These additions are typically not supplied or maintained by a community housing provider to social and affordable housing as this would divert funding away from their core purpose of providing and managing new housing. As a result, the stretch BASIX water target cannot be met, since the BASIX assessment has to assume the worst-case appliances are provided where none are specified in the DA documentation. This would typically not be the case for private market housing where appliance would likely be provided and sold onto the purchaser with the property and the long term maintenance and replacement costs of the appliances would not need to be covered by the developer.

As a result of the above, the additional 0.15:1 FSR available for achieving stretch BASIX targets under Clause 6.59(3)(b) of the SLEP cannot be accessed by the proposed development, and the 10% design excellence floor space would not be applied to this 0.15:1.

This SSDA proposes a maximum FSR that complies with the intended maximum intended density for the site as per the Planning Proposal, but due to not achieving the BASIX stretch water target, results in a technical non-compliance with the FSR development standard.

Accordingly, this Clause 4.6 Variation Request has been prepared to demonstrate strict compliance with the FSR development standard is unreasonable and unnecessary in the circumstances of the case. Further, a balance between the provision of affordable housing and sustainability standards should be considered.

3.2 Details of proposed variation

A summary of the environmental planning instrument (EPI), development standard and proposed variation is summarised in **Table 1**.

Table 1 Planning instrument, development standard and proposed variation

Matter	Comment
Environmental planning instrument (EPI) sought to be varied	Sydney Local Environmental Plan 2012 (SLEP)
The site's land use zone	R1 General Residential
Development standard sought to be varied	<p>Floor Space Ratio</p> <p>Clause 4.4 Floor Space Ratio</p> <p>The objectives of this clause are as follows:</p> <ul style="list-style-type: none"> (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. <p>Clause 6.59 600-660 Elizabeth Street, Redfern</p> <p>Additional FSR is permitted under Clause 6.59.</p> <p>Clause 6.59 has no specific objectives.</p>
Type of development standard	Numerical development standard
Numeric value of the development standard in the EPI	<p>The maximum FSR for the site is made up of the following components:</p> <ul style="list-style-type: none"> • Base mapped FSR of 1:5. • Additional 0.57:1 if 3,500sqm floor area is provided for community facility (Clause 6.39(3)(a)). • Additional 0.15:1 if BASIX stretch targets are achieved (Clause 6.59(3)(b)). • Up to 10% design excellence additional floor area. <p>As discussed above, the development does not meet the BASIX water requirements for the 0.15 bonus (Clause 6.59(3)(b) of the SLEP).</p>
Difference between the existing and proposed numeric values. Variation percentage between the proposal and the EPI	The development proposes an FSR of 2.442:1 , which exceeds the base FSR of 1.5:1 by 0.942:1 . If the BASIX water target was met, up to 2.2771:1 would be available. Therefore, the variance is considered to be 6.75%
Visual representation of the proposed variation	N/A

4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Sydney LEP 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*)

The relevant matters contained in clause 4.6 of the SLEP, with respect to the FSR 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

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 SLEP 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 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**).

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the FSR development standard pursuant to the 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 SLEP are as follows—

- (a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*
- (b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,*
- (c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,*
- (d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.*

The site specific LEP clause, Clause 6.59, does not have objectives listed in the SLEP. Notwithstanding, the objectives of the clause can be inferred from the Planning Proposal which established the site-specific clause. The objectives of the Planning Proposal were as follows—

Introduce new planning controls for the site under the Sydney LEP 2012

Facilitate development of the site for new social and affordable housing

To deliver a high-quality, predominately residential development, supported with a range of small-scale neighbourhood uses, that will renew the site and contribute to local character

Provide floor space for the continued operation of the Police Citizens' Youth Club

To facilitate development that responds to its context and achieves a high level of amenity to neighbouring properties; and

To ensure no overshadowing to Redfern Park.

The proposed development achieves the above objectives as described below.

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

As discussed in **Section 3.1**, the Planning Proposal for the site established an appropriate FSR of 2.442:1 for the site. This FSR was determined with careful consideration of the anticipated development needs for the foreseeable future along with thorough built form testing.

The proposed development complies with this envisaged FSR, however, there is a minor technical non-compliance due to the stretch BASIX water target not being achieved. Despite this, the development maintains high levels of ESD performance, including exceeding the stretch BASIX energy target. Therefore, it can be concluded that the proposed development provides a sufficient amount of floor space to meet the anticipated future development needs.

Therefore, the proposal contributes to the provision of anticipated development needs for the foreseeable future and achieves objective (a).

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 proposed development's density is considered appropriate, through the realisation of an FSR of 2.442:1 as envisioned at the Planning Proposal stage. The built form is appropriate for the site and has been subject to a thorough design excellence process. It responds to the site's surrounds through height transitions and a range of building forms. The proposed land uses consist of community facilities, affordable housing, social housing, and commercial floor space. This land use intensity is suitable for the site as it provides an orderly and economic use and development of the land.

The proposal includes one (1) storey of basement and 66 car parking spaces. This is well below the maximum SLEP rate of 224 parking spaces based on the sites location and land-use split as defined in the SLEP. Therefore, as concluded by Ason Group's Transport Assessment (appended to the EIS), the parking supply is appropriate and supported having regard to the site's highly accessible location and range of high-frequency public transport services in close proximity (both existing and near future services).

Pedestrian traffic will be managed through the provision of north south and east west through site links along with public domain dedications along Elizabeth Street and Phillip Street. These have been designed in accordance with the 'Design Guide – 600-660 Elizabeth Street, Redfern' (The Guide) and therefore are appropriate for the density, built form and land use envisioned for the site.

Traffic modelling undertaken as part of the SSDA indicates that the estimated generation resulting from the proposed development will be up to 30 vehicle trips per peak hour. This results in minor traffic impacts on the surrounding road intersections during AM and PM peak hours. Modelling indicates all existing and future scenarios retain level of service A to B, with no noticeable degradation of the intersection degree of saturation, average delay, or queue length associated with the increased traffic generation. The proposal will therefore have an acceptable impact on the performance of the surrounding road network.

Therefore, the proposed development achieves objective (b).

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

The proposed intensity of development was developed through a site-specific Planning Proposal and thorough design excellence process. This enabled the proposed density to accurately reflect the capacity of the existing and planned infrastructure of the site and the surrounding area.

Specifically, the Planning Proposal was supported by a Community Infrastructure Study that outlined the existing social infrastructure available to service the development, and any demand for additional infrastructure generated by the development. The Study concluded that the proposal would be appropriately supported by the existing and future infrastructure in the area.

Specifically, the site is located approximately 850m (approx. 13 minute walk) east of Redfern train station providing access to the comprehensive train network that traverses NSW and 800m from the future Waterloo Metro Station. The site is also in proximity to four bus routes that connect the site to Greater Sydney including at the Elizabeth Street and Phillip Street frontages of the site.

Accordingly, despite the minor variation, the proposed development adopts a scale that is consistent with strategic framework for the site which is suitably located to benefit from existing and planned infrastructure. Therefore, the proposed FSR achieves objective (c).

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

Character of the locality

The proposed development, inclusive of the FSR variation, reflects the desired future character of the locality. This is confirmed through the development's alignment with the The Guide. The Guide supplements the provisions of the SLEP by providing more detailed provisions to guide development at the site.

Specifically, Part 2.1 provides a future character statement for the site. An assessment of the proposed development against the future character statement is provided below.

Table 2 Assessment against the future character statement

Future Character Statement	Assessment
The future development has:	-
(a) substantial affordable housing occupying the land	The proposed development provides 100% affordable and social housing, totalling 355 dwellings. Specifically: <ul style="list-style-type: none"> • 147 social housing dwellings. • 197 affordable housing dwellings. • 11 specialist disability accommodation dwellings (including a carers unit).
(b) a PCYC or similar community facility on site	A community facility, intended for use by PCYC, is proposed in Section 1 (S1) of the development.
(c) very high levels of environmental performance including PV arrays that supply substantial energy, smart use of water and passive design features like external sun access and shading and natural cross ventilation suitable for Sydney's climate	The proposed development will provide high levels of environmental performance through the provision of: <ul style="list-style-type: none"> • Photovoltaic panels on the rooftop of S4 for on-site renewable energy generation. This energy will be used for the centralised domestic hot water heat pumps, all common area lighting and ventilation, lifts and the commercial office space energy demand. • Water sensitive urban design including:

Future Character Statement	Assessment
	<ul style="list-style-type: none"> - Centralised rainwater capture tank will be installed to retain water for irrigation, complemented by sensor-based irrigation systems adjusting watering schedules based on weather and soil conditions. - Rainwater is captured from non-trafficable roof surfaces for landscape irrigation, conserving water resources. - Water leak detection systems are installed throughout the premises, reporting to the Building Management System (BMS) to promptly address any issues. - High-efficiency WELS water fixtures and fittings will be installed to help minimize water usage. • Maintaining and replacing street trees will be to provide shade, mitigate heat, and enhance biodiversity. • Façade shading and balcony depths are optimised to maximise passive design solutions, providing both shade and ample daylight while reducing cooling energy use. <p>The proposed development will achieve the following ESD targets and benchmarks:</p> <ul style="list-style-type: none"> • All Development: <ul style="list-style-type: none"> - 5-star Green Star Buildings Design and As Built • Residential Development: <ul style="list-style-type: none"> - BASIX Energy 62 + 5 - BASIX Water 40 - NatHERS Thermal Comfort 7 Star average • Commercial Areas <ul style="list-style-type: none"> - 5.5-star NABERS Energy rating - 4.5-star NABERS Water rating
(d) a rich landscape setting with substantial tree canopy cover and landscaping that screens walls that protect the interiors of buildings from flooding	<p>The landscape design underwent a thorough design review as part of the Design Excellence Process. As a result, the proposed development provides comprehensive, site-wide landscaping that screens walls and a substantial tree canopy that exceeds the landscape and deep soil area targets for the site. This is described further in the Landscape Plans and Landscape Report appended to the EIS. The site has been designed to comply with the relevant flood planning levels as per the Flood Impact Assessment prepared by BG&E as part of the EIS, including raising the central publicly accessible area of the site to RL32.10. Flood storage is also provided beneath building S4 to ensure floodwaters are conveyed appropriately in a flood event.</p>
(e) building heights that maintain solar access to Redfern Park throughout the year	<p>As shown in Figure 5, the proposed buildings, inclusive of the proposed FSR variation, do not overshadow Redfern Park and Oval between 9am and 3pm.</p>
(f) a permeable pattern of walking connections through the site that also provide on-site at grade servicing	<p>The development includes two through site links located in north south and east west directions as envisioned throughout The Guide. Servicing is provided from within the basement, per consultation and advice from the Design Review Panel and the City of Sydney technical staff resulting in a fully pedestrian and cycle environment within the site.</p>
(g) commercial, community and/or retail uses fronting Elizabeth Street at ground level	<p>The proposed development provides commercial and community uses fronting Elizabeth Street.</p>
(h) a rich variety of architectural approaches, diverse apartment types, building heights and form in a collection of well-constructed, low maintenance buildings	<p>The proposed overall development provides a range of building types, with heights ranging from RL51.7 to RL87.5. A tailored design excellence process resulting in three architects and a landscape architect designing the project means there will be a rich variety of architecture at the site. The development also has considered the construction and maintenance of the buildings throughout the design review process to ensure design excellence can be achieved. This includes the provision of natural materials for the exterior of the</p>

Future Character Statement	Assessment
	building that are able to weather and age gracefully over time, which is critical to the success of affordable and social housing development that will be owned long-term and in single ownership.
(i) a built form that responds to the lower scale of the buildings to the south, by stepping down in height towards Phillip Street	The overall development responds to the lower scale buildings to the south through stepped forms lowering in height towards Phillip Street, acknowledging the surrounding building heights.

Height transitions

The site is located adjacent to Redfern Park and Oval (heritage item 02016) and within the vicinity of Waterloo, Redfern Estate and Baptist Street Heritage Conservation Areas (HCAs). The proposed development has been sympathetically designed using height transitions which step down from the higher scale buildings to the north-east to the lower scale Waterloo HCA to the south of the site – ensuring that the development minimises overshadowing to the surrounding HCA and Redfern Park to the west.

Specifically, S2 is the tallest building which is located furthest from Redfern Park and Phillip Street. Building S3 has been designed so that the height steps down from a maximum of 10 storeys at the northern end, 7 storeys at its centre and 4 storeys at the Phillip Street boundary as shown below in **Figure 4**. The proposed FSR variation does not impact the development’s ability to provide these height transitions, therefore, the amenity of the locality is protected and objective (d) is achieved.



Figure 4 Building height transitions – Elizabeth Street elevation

Source: Hayball

Overshadowing

The overall development provides a stepped building form and a pitched roof at the highest point of building S2, so as to not overshadow Redfern Park between 9am and 3pm at any time during the year. This is evidenced by the shadow diagrams provided at **Figure 5**. The proposed development also complies with the overshadowing requirements of the Design Guide which seek to protect an acceptable level of sunlight to the Walker Street terraces and residences across Phillip Street to the south. The proposed FSR standard exceedance does not hinder the developments compliance with overshadowing requirements.



Figure 5 Mid-winter shadow diagrams at 9am, 10am, and 11am

Source: Hayball

Visual impact

The proposed visual impact of the development has been considered within the Visual Impact Assessment prepared by Ethos Urban that accompanies the EIS. The assessment concludes that the proposed development, inclusive of the FSR variation, has an acceptable visual impact on the surrounding area as it aligns with the locality and the bulk of nearby residential buildings as well as the desired future character of the site.

Noise

A Noise and Vibration Impact Assessment has been conducted and is appended to the EIS. The assessment concludes that the operational noise will have an acceptable impact on surrounding receivers, which can be mitigated through the implementation of a range of acoustic treatments as needed. As such, the proposed development, inclusive of the FSR variation, will minimise adverse impacts on the acoustic amenity of the locality.

Heritage

A Statement of Heritage Impact has been prepared and is appended to the EIS. The Statement concludes that the proposed development has an acceptable impact on the heritage items in the vicinity of the site. Further, the design and layout of the development sympathetically respond to the Redfern Park and Oval and the Waterloo HCA. Therefore, the proposed development, inclusive of the FSR variation, will minimise adverse impacts on the historic amenity of the locality.

As a result of the above discussion, the proposal achieves objective (d).

Objectives of Clause 6.59 (inferred from Planning Proposal Objectives)

The proposed development achieves the inferred objectives of Clause 6.59, since it contributes to achieving the objectives of the site-specific Planning Proposal. An assessment of the proposal against the Planning Proposal objectives is provided in **Table 3**.

Table 3 Assessment of the proposed development against the Planning Proposal objectives

Objective	How it is achieved
Introduce new planning controls for the site under the Sydney LEP 2012	The development, inclusive of the FSR, will be assessed against the new controls that were adopted in the SLEP.
Facilitate development of the site for new social and affordable housing	The proposed development including the FSR exceedance will result in 355 new social and affordable dwellings.
To deliver a high-quality, predominately residential development, supported with a range of small-scale	The design of the proposed development includes a competition winning design and has been assessed by a

Objective	How it is achieved
neighbourhood uses, that will renew the site and contribute to local character	Design Review Panel, who conclude that the design and proposed FSR is capable of achieving design excellence in accordance with the SLEP. The proposal includes predominantly residential development, as well as a community facility and commercial floor space for use by local neighbourhood organisations.
Provide floor space for the continued operation of the Police Citizens' Youth Club	A new community facility is proposed (Building S1). The building has been designed to accommodate the needs of the PCYC.
To facilitate development that responds to its context and achieves a high level of amenity to neighbouring properties; and	As described above, the proposal, inclusive of the proposed FSR, has been designed to respond to its specific context and ensure a high level of amenity to surrounding properties.
To ensure no overshadowing to Redfern Park.	The proposed development inclusive of the FSR exceedance will not overshadow Redfern Park as described above. The stepped building form and pitched roof to S2 are deliberate design moves implemented to ensure this is achieved.

4.1.2 Conclusion on clause 4.6(3)(a)

The above section has demonstrated that compliance with the FSR development standard is unreasonable or unnecessary in the circumstances. The objectives of the FSR development standard, set out in Clause 4.4, have been achieved by the proposed development notwithstanding the variation as:

- The proposed FSR aligns with the density envisioned for the site through the Planning Proposal and the non-compliance is a minor technical discrepancy. As such, the proposed development will continue to meet the anticipated needs for the foreseeable future.
- The proposed density of the development, the built form and land use is appropriate for the site as envisioned by the Planning Proposal. The parking provided complies with the SLEP parking rates and pedestrian traffic will be appropriately managed through the design and layout of the development.
- The site is in proximity to existing and planned infrastructure and has been developed to adopt a scale that is consistent with strategic expectations for the site.
- The proposed development has been designed to respond to the desired future character of the locality through the provision of height transitions, minimising overshadowing of Redfern Park and Oval and having an appropriate impact on visual, noise and historic amenity.
- The proposal contributes to achieving the objectives of the Planning Proposal and therefore can be considered to achieve the objectives of the site-specific clause of the SLEP (Clause 6.59).

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

Clause 4.6(3)(b) of the SLEP 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 request must be particular to the circumstances of the proposed development on that site. In this instance the relevant aspect of the development is FSR that results in the exceedance of the development standard.

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

4.2.1 Ground 1: 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 4** we consider the proposed development is broadly consistent with each object, notwithstanding the proposed variation of the FSR development standard.

Table 4 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	<p>The overall development promotes the social and economic welfare of the community through the provision of social and affordable housing, specialist disability housing, a community facility and office space for a community housing provider. This will significantly benefit the local community and those in need. The amount of housing and community facility area proposed is commensurate with that envisaged for the site at the Planning Proposal stage despite the variation.</p> <p>If the development was to comply with the FSR development standard, less housing for those in need would be provided, which would result in less positive impact on the social and economic welfare of the community.</p> <p>As such, the proposed variation will promote the economic and social welfare of the community by providing much needed social and affordable housing for the community during a housing crisis.</p>
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment	The proposed development will achieve a high level of ecologically sustainable development, as discussed above in Row 3 of Table 2 above.
(c) to promote the orderly and economic use and development of land	The site was subject to a site-specific Planning Proposal which sought to facilitate future development for affordable housing and community uses on the site. The proposed development is generally consistent with the Planning Proposal vision for the site and has undergone extensive design evolution and revision to provide the most orderly and economic use and development of the land. As a result, the overall development provides community facilities, affordable, social and specialist disability housing at an appropriate site. These are uses for which it is difficult to

Object	Comment
	<p>compete with private market uses that can be considered the highest and best use.</p> <p>The proposed FSR variation allows for the full yield as deemed appropriate at the Planning Proposal stage to be provided on the site. In the absence of the variation, less affordable housing would be provided.</p>
(d) to promote the delivery and maintenance of affordable housing	The overall development provides a range of housing tenures including 197 affordable housing units, 147 social housing units and ten (10) disability support units (plus a carers unit)
(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 FSR exceedance will have no adverse impact on threatened species or ecological communities. A BDAR Waiver was granted by DPHI and Biodiversity Conservation and Science Group meaning no further assessment of biodiversity impacts in accordance with the Biodiversity Conservation Act 2016 is required.
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)	<p>The proposed FSR exceedance does not hinder the overall development's sustainable management of the built and cultural heritage as:</p> <ul style="list-style-type: none"> • The Aboriginal Cultural Heritage Assessment prepared for the Planning Proposal found no Aboriginal sites, objects, sandstone rock outcrops or culturally modified trees on the site. • A range of stakeholders including Aboriginal groups were consulted with throughout the design process. These groups have shown their support of the affordable and social housing provided despite the FSR variation. <p>Therefore, no items or areas of built or cultural heritage will be negatively impacted by the proposal. This is confirmed through the Heritage Impact Statement appended to the EIS.</p>
(g) to promote good design and amenity of the built environment	The proposal contributes to good design amenity of the built environment through the provision of high-quality buildings that are capable of exhibiting Design Excellence, as determined by the project Design Review Panel. A high level of amenity is retained for surrounding dwellings as described above. A complete assessment of the amenity for the proposed development is provided in the EIS. The development will achieve a high level of amenity for occupants.
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants	The proposed development, inclusive of the variation, can comply with all relevant requirements of the BCA and will promote the health and safety of occupants.
(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 will be publicly exhibited in accordance with the requirements of Council's Community Engagement Strategy and Community Participation Plan.

4.2.2 Ground 2: A high level of ESD is achieved

As noted, this clause 4.6 request is for a technical non-compliance with the FSR development standard which arises from not achieving the stretch BASIX water target in Clause 6.59(3)(b) of the SLEP. As discussed in **Section 3.1**, this is a result of the provision of affordable housing without water appliances which was not envisioned at the time of the site-specific Planning Proposal.

Despite the non-compliance with the BASIX water requirements that enable an additional 0.15:1 FSR, the proposed development still achieves a high level of ESD through the implementation of initiatives as discussed in **Row 3 of Table 2**. These initiatives are discussed in more detail within the ESD Report submitted with the EIS.

The proposed development, inclusive of the FSR variation, will meet the following ESD standards:

- All Development:
 - 5-star Green Star Buildings Design and As Built
- Residential Development:
 - BASIX Energy 62 + 5
 - BASIX Water 40
- NatHERS Thermal Comfort 7 Star average
- Commercial Areas
- 5.5-star NABERS Energy rating
- 4.5-star NABERS Water rating

It is noted that the BASIX energy target is exceeded under the Sustainable Buildings SEPP definition, which is significantly higher performance than was envisaged at the Planning Proposal stage (40 points). This is due to a range of factors including the significant extent of PV panels on the rooftop of S1 and S4. It should also be noted that the mechanism to achieve the BASIX water target (45 points) would involve a significant capital and operational cost to the community housing provider through the installation and long term maintenance (and replacement) of water appliances in the social and affordable housing. This would result in reduced social and affordable housing outcomes across Bridge Housing's portfolio.

Therefore, it can be concluded that the proposed development will achieve high levels of ESD performance notwithstanding the technical FSR variation.

4.2.3 Ground 3: Consistent with the density envisioned for the site

The Planning Proposal for the site implemented a place-based approach to density, seeking to respond to the site's heritage context and protecting amenity to neighbours, while providing increased housing and creating a great place that encourages social interaction in a new integrated community.

As part of the Planning Proposal process, a Reference Scheme (**Figure 6**) was designed to demonstrate how, at a high level, the proposed height and FSR controls might be realised on the site. The Reference Scheme also assisted in the development of more detailed built form, amenity and design detail to ensure the new controls can result in a high-quality development. The Reference Scheme had an FSR of 2.75:1, which is higher than that of the currently proposed development (2.442:1, excluding community facility in accordance with SLEP Clause 6.59) as shown in **Figure 6**.

Further, the maximum potential FSR for the site under the SLEP is 2.442:1. The proposed development has an FSR of 2.442:1, which was determined as an appropriate density for the site at the Planning Proposal stage. The non-compliance with BASIX water targets means that the maximum 2.442:1 is not available for the proposed development and a technical non-compliance with the FSR development standard arises.

Notwithstanding the variation, the proposed FSR does not exceed the amount that was determined appropriate for the site through the Planning Proposal and therefore the density of the site.



Figure 6 Comparison of Planning Proposal reference scheme (left) and proposed development (right)

Source: Architectus

4.2.4 The objectives of the Planning Proposal are achieved

As described in **Section 4.1.1** and **Table 3**, the proposed development achieves the objectives listed in the Planning Proposal, notwithstanding the variation. In particular, the variation allows for an appropriate amount of new social and affordable housing to be provided and does not result in any overshadowing to Redfern Park.

4.2.5 Conclusion on clause 4.6(3)(b)

There are sufficient environmental planning grounds to support contravention of the development standard in this circumstance, including:

- The development, inclusive of the variation, is consistent with the objects of the EP&A Act.
- The variation is the result of an unforeseen technical non-compliance with the stretch BASIX water target under the SLEP arising from the 100% affordable/social housing tenure proposed. The development still achieves a high level of ESD performance and exceeds the intended BASIX energy target.
- The proposed FSR is consistent with that envisaged for the site during the Planning Proposal process and if not for the technical non-compliance with BASIX water targets, would be compliant with the maximum permissible FSR.
- The proposed development, notwithstanding the variation, contributes to the Planning Proposal objectives being achieved.

5.0 Conclusion

The assessment above demonstrates that compliance with the FSR development standard contained in clause 4.4 of the SLEP 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 development standard:

- The proposed development achieves the objectives of Clause 4.4 of the SLEP as:
 - The proposed FSR aligns with the density envisioned for the site through the Planning Proposal and the non-compliance is a minor technical discrepancy. As such, the proposed development will continue to meet the anticipated needs for the foreseeable future.
 - The proposed density of the development, the built form and land use is appropriate for the site as envisioned by the Planning Proposal. The parking provided complies with the SLEP parking rates and pedestrian traffic will be appropriately managed through the design and layout of the development.
 - The site is in proximity to existing and planned infrastructure and has been developed to adopt a scale that is consistent with strategic expectations for the site.
 - The proposed development has been designed to respond to the desired future character of the locality through the provision of height transitions, minimising overshadowing of Redfern Park and Oval and having an appropriate impact on visual, noise and historic amenity.
 - The proposal contributes to achieving the objectives of the Planning Proposal and therefore can be considered to achieve the objectives of the site-specific clause of the SLEP (Clause 6.59).
- The proposed development demonstrates that there are sufficient environmental planning grounds to vary the control in this instance because:

The development, inclusive of the variation, is consistent with the objects of the EP&A Act.

- The variation is the result of an unforeseen technical non-compliance with the stretch BASIX water target under the SLEP arising from the 100% affordable/social housing tenure proposed. The development still achieves a high level of ESD performance and exceeds the intended BASIX energy target.
- The proposed FSR is consistent with that envisaged for the site during the Planning Proposal process and if not for the technical non-compliance with BASIX water targets, would be compliant with the maximum permissible FSR.
- The proposed development, notwithstanding the variation, contributes to the Planning Proposal objectives being achieved. Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the SLEP.

Therefore, the consent authority can be satisfied that this Clause 4.6 Variation Request has demonstrated the matters in clause 4.6(3) of the SLEP and may grant development consent notwithstanding the contravention of the FSR development standard.