

beam

Clause 4.6 Variation

Section 16(1) of the Housing SEPP
79-81 Queens Road and 2-8 Spencer Street, Five dock

Prepared for DPG Project 37 Pty Ltd

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Executive Summary

Clause 4.6 of the *Canada Bay Local Environmental Plan 2013* (Canada Bay LEP 2013) enables the consent authority to grant consent for development even though it contravenes a development standard. Its objectives 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.

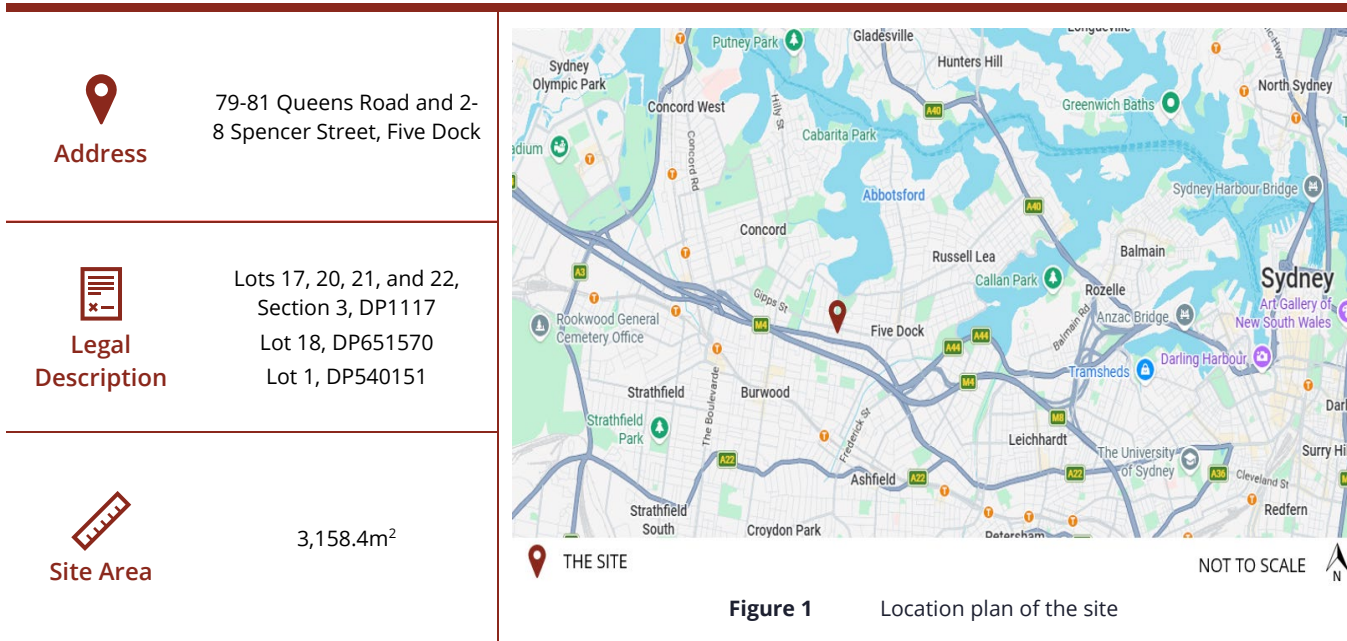
Clauses 4.6(3) requires that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances, and
- There are sufficient environmental planning grounds to justify the contravention of the development standard.

The table below provides a summary of the key matters required in a Clause 4.6 Variation set out in the Department of Planning and Environments *Guide to Varying Development Standards November 2023*.

Where is the development site?	79-81 Queens Road and 2-8 Spencer Street, Five Dock
What is proposed development?	The proposed development is for the construction of a new part 5 and part 26 storey mixed-use shop top housing development comprising ground level retail, and 134 apartments above. The proposed development will include 15% infill affordable housing pursuant to Chapter 2 of the <i>State Environmental Planning Policy (Housing) 2021</i> (Housing SEPP) and is therefore eligible for a 30% increase in height and FSR above the LEP maximums.
What is the variation?	The proposed development has a maximum gross floor area of 14,218m ² , equating to a floor space ratio of 4.5:1, which will represent a 0.21:1 (4.9%) above the 30% infill affordable housing bonus of 4.29:1 under Section 16(1) of the Housing SEPP. The 4.9% variation above the maximum permissible FSR of 4.29:1 under the Housing SEPP arises from the proposal's technical inability to access the 5% sustainability bonus under Clause 8.9 of the Canada Bay LEP 2013 due to changes in the BASIX framework following the introduction of the <i>State Environmental Planning Policy (Sustainable Building) 2022</i> (Sustainable Building SEPP) and the lack of precinct recycled water scheme, as well as site specific constraints that limit rooftop space to accommodate the maximum number of solar panels. Despite this, the development implements best practice sustainability that would have otherwise meet the requirements under the LEP prior to the subsequent changes to BASIX at a State level.
Why is compliance with the FSR development standard is unreasonable and unnecessary in the circumstances of the case?	Notwithstanding the minor non-compliance on the maximum floor space ratio, the proposal still achieves the objectives of Section 15A of the Housing SEPP, as well as Clause 4.4 of the Canada Bay LEP 2013 as follows: <ul style="list-style-type: none"> • The built form is compatible with the planned high-density mixed-use character of the Kings Bay precinct and generally aligns with the envisaged DCP building envelope. • The exceedance is minor and does not materially change the built form outcome or perceived bulk and scale or visual prominence from the public domain. • The proposal provides an appropriate balance between landscaping and built form, particularly through the provision of generous landscaped public domain setbacks, as well as communal open space. • The proposal will not give rise to any unacceptable overshadowing or privacy impacts to neighbouring development or open space. • The proposal delivers 15% affordable housing (plus an additional 4% by monetary contribution), consistent with the objectives of the Housing SEPP bonus provisions.
What are the sufficient environmental planning grounds to justify contravention of the development standard?	The environmental planning grounds to justify contravention of the floor space ratio are: <ul style="list-style-type: none"> • Regardless of the technical inability to trigger Clause 8.9, the proposal achieves strong sustainability outcomes that is aligned with the objectives of the PRCUTS and exceed the minimum BASIX target. • The proposed development is the subject of an extensive design review process, including review of a scheme that adopted the 5% sustainability bonus. Following its review, the Jury confirmed that the development is of a high quality and is capable of achieving design excellence. The FSR variation is therefore, integral to achieving design excellence, as it enables a positive sustainability outcome, enhances residential amenity, and assists in articulating the built form. • The exceedance does not result in any adverse environmental impacts, particularly in relation to overshadowing, visual impact and amenity. • The provision of affordable housing is directly aligned with several NSW strategic planning objectives and will assist in alleviating the current housing crisis. <p>In light of the above that the consent authority can be satisfied that there are sufficient grounds to support the proposed variation.</p>

1.0 The Development Site



2.0 The Proposed Development

The proposal involves the redevelopment of the site for the purposes of a mixed-use shop top housing development, comprising ground level retail, and residential accommodation above (including 15% infill affordable housing). Specifically, the proposed works include the following:

- Site preparation works, including demolition and excavation.
- Construction of 2 x shop top housing buildings, including a 5-storey building along Queens Road, and a 26-storey building along William Street, comprising a shared single storey non-residential podium, with approximately 134 dwellings above (including affordable housing).
- Construction of a shared basement carpark accessed from Spencer Street.
- Public domain and landscaping upgrades, including landscaped street setbacks to all boundaries, and the provision of part of a shared through site link connecting Queens Road to Spencer Street.
- Associated infrastructure upgrades and diversions.

Architectural drawings and a design report prepared by Plus Architecture illustrating the proposed development are included with the SSDA. An Artist Impression of the proposed development is provided **Figure 3**.



Figure 3 Artist Impression

Source: Plus Studio

3.0 Background to the Variation

3.1.1 Concurrent Planning Proposal

In November 2016, Urban Growth NSW released the Parramatta Road Corridor Urban Transformation Strategy (PRCUTS) which outlines the 30-year strategy to revitalise the Parramatta Road Corridor. With dedicated precincts between Granville and Camperdown, PRCUTS aimed to upgrade land use and transport to accommodate 27,000 new dwellings and 50,000 jobs across the Parramatta Road Corridor, in addition to public domain upgrades to transport Parramatta Road into a vibrant, active and liveable corridor. A Ministerial Direction, specifically Direction 7.3, was issued by the Minister for Planning under Section 9.1 of the EP&A Act in December 2016, giving the PRCUTS Strategy and Implementation Tool Kit statutory weight.

To support the Strategy, a Council-led Planning Proposal to implement Stage 1 of PRCUTS was lodged by the City of Canada Bay in 2021. The Proposal sought to amend the Canada Bay LEP 2013 and the City of Canada Bay Development Control Plan (DCP) to include specific planning controls for three dedicated Stage 1 precinct including Kings Bay, Burwood-Concord and Homebush North. The amendments were approved and came into effect in December 2022, with the amended DCP adopted in March 2022. The adopted planning controls support the renewal of the Parramatta Road Corridor and align with the vision of the precinct established under the Strategy.

The Canada Bay LEP 2013 and Section K20 of the Canada Bay DCP provide specific controls for land within the Kings Bay Precinct. Under Part 8 of the Canada Bay LEP 2013, the site is identified as being located within Area 17, which has a total site area of 4,136.1m², and includes land owned by DPG Project 37 Pty Ltd (the 'applicant') (3,158.4m² or 76.36%), as well as residual land at 10-12 Spencer Street that is not owned by the applicant (977.7m² or 23.64%). In accordance with Clause 8.3 of the Canada Bay LEP 2013, subject to meeting the requirements in Clauses 8.4-8.8 (where applicable), redevelopment of the site could achieve a maximum height of 67m and a maximum floor space ratio (FSR) of 3:1 (excluding any additional uplift under the LEP or other planning policy).

However, per Clause 8.4, achieving the maximum height and FSR requires a minimum site area of 4,096m². Achieving the minimum site area requires amalgamation of the applicant's site with the adjoining land at 10-12 Spencer Street, Five Dock. The amalgamation aims to facilitate the orderly redevelopment of Area 17 in accordance with the Canada Bay LEP 2013 and DCP controls. Notwithstanding, the applicant is unable to acquire the adjoining property at 10-12 Spencer Street, despite multiple documented attempts to negotiate its purchase.

Therefore, a Concurrent Planning Proposal is being progressed with Council seeking amendments to the Canada Bay LEP 2013.

Specifically, the Planning Proposal seeks to modify the amalgamation boundary for Area 17 of the Kings Bay Precinct, to essentially split the site in two and identify 10-12 Spencer Street as Area 17A, ensuring that the proposed development can meet the minimum site area requirements and therefore, utilise the relevant incentive development standards. In doing so, the planning proposal seeks to introduce new planning controls to support separate redevelopment on both sites in an orderly and coordinated manner that remains consistent with the envisaged built form under the Canada Bay DCP, which essentially anticipates a five storey building on the adjoining land, which is connected to the podium of the 20 storey tower on the applicant owned land.

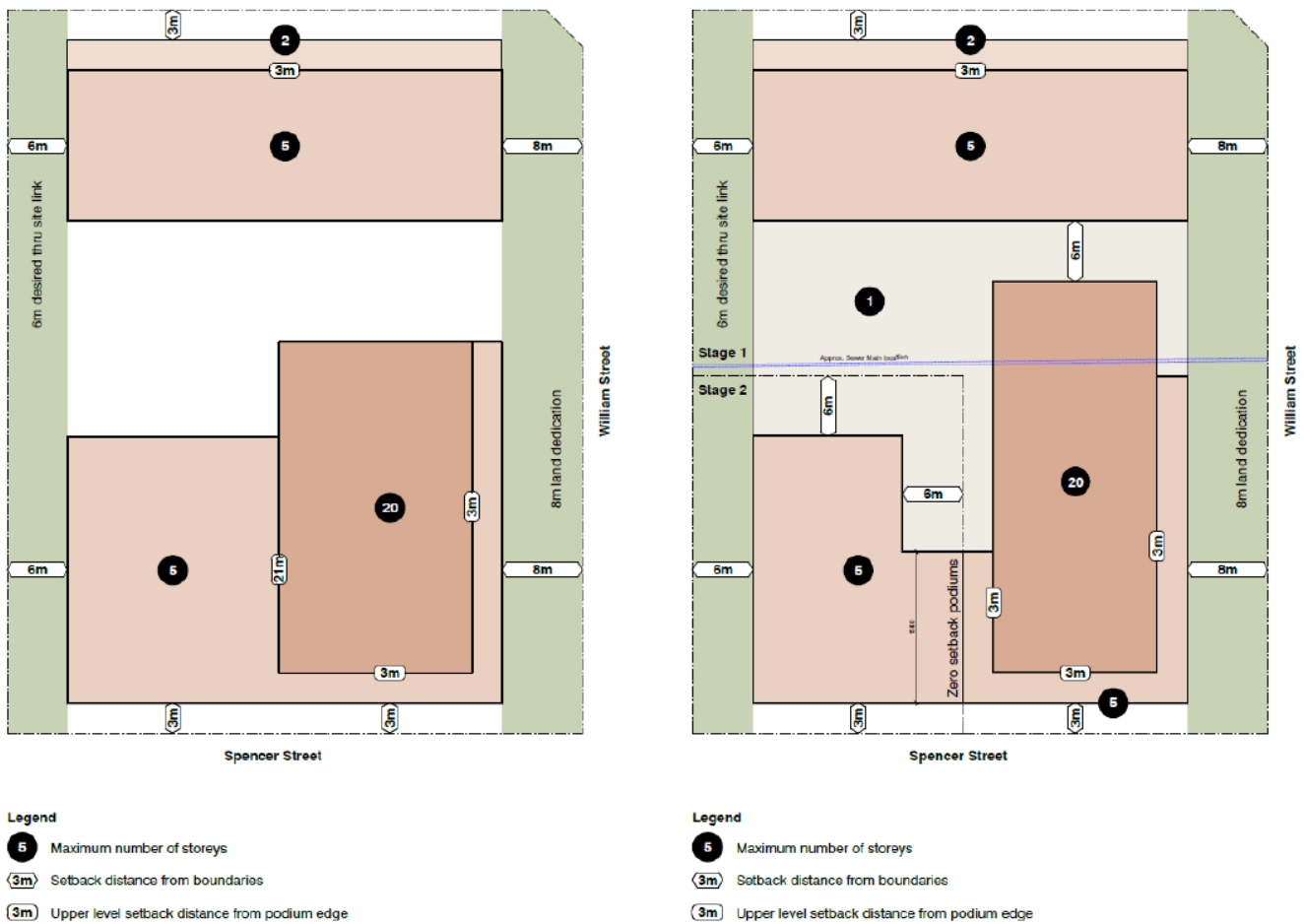
Table 1 summarises the proposed amendments to the planning controls under the Canada Bay LEP 2013.

Table 1 Proposed Canada Bay LEP 2013 Amendments

Development Standard	Existing Control	Proposed Control	
		Subject Site (Area 17)	10-12 Spencer St (Area 17A)
Clause 2.1 - Land Use	MU1 Mixed Use for majority of the site, with a small portion of the site along William Street zoned RE1 Public Recreation	Rezone the RE1 portion of the land to MU1	No change.
Clause 4.3 - Height of Building	12m	No change to principal development standards as the	No change to principal development standards as the

Development Standard	Existing Control	Proposed Control	
Clause 4.4 – Floor Space Ratio	1:1	site is subject to Part 8 of the Canada Bay LEP 2013.	site is subject to Part 8 of the Canada Bay LEP 2013.
Clause 8.3 – Additional floor space ratio and building heights for Areas 1-35	Height: Part 67m and part 2.5m FSR: 3:1	Height: No change FSR: 3.3:1	Height: Part 19m and Part 2.5m FSR: 1.8:1
Clause 8.4 – Minimum site area requirements	4,069m ²	3,095m ² (2% less than actual site area)	936m ² (2% less than actual site area)

Figure 4 below provides a comparison between the current DCP envelope and the amended DCP envelope, which can be facilitated through the abovementioned changes to the planning controls.



DCP Compliant Envelope

Amended Building envelope under the PP

Figure 4 DCP Compliant vs Amended Building Envelope

Source: Projected Design Management

In addition to the proposed changes to the planning controls, the Planning Proposal also seeks to rezone the portion of the site that is currently zoned RE1 Public Recreation to MU1 Mixed Use. This is because Clause 4.5(4) of the Canada Bay LEP 2013 excludes land on which the proposed development is prohibited from the site area calculation. As a result, the existing RE1 zoning materially constrains the calculation of site area, and consequently, the gross floor area (GFA) achievable under the applicable FSR controls. Given the built form, FSR and building massing anticipated under the PRCUTS indicated the full site area, it is necessary to rezone this land to ensure the development can be delivered in a manner consistent with the strategic intent and built form outcomes envisaged under the applicable planning framework.

The Planning Proposal has received Gateway Determination and is currently on public exhibition. Following completion of the exhibition period, the proposal will be reported to Council and is anticipated to be finalised prior to, or concurrently with, the determination of this SSDA.

Therefore, this Clause 4.6 Variation Request has been prepared on the basis that the incentive floor space ratio is 3.3:1 and that the entire site is zoned MU1 Mixed Use, allowing the entire site area to be used for GFA calculation.

3.1.2 Sustainability Bonus

Clause 8.9 of the Canada Bay LEP 2013 provides a 5% floor space bonus for BASIX buildings located within the Kings Bay precinct where the development achieves prescribed outperformance targets. The bonus is available if the building:

- (a) exceeds the BASIX commitment for energy for the building by at least 15 points, and
- (b) exceeds the BASIX commitment for water for the building by at least 20 points.

This clause was introduced in December 2022 as part of Council's Planning Proposal to implement Stage 1 of the PRCUTS and was informed by the Sustainability Strategy Report prepared by Kinesis for Council (20 July 2020). The Kinesis report recommended uplift targets of +15 energy (above a 25 point base), and +10 water (above a 40-point base), where no recycle water scheme is available. Despite this recommendation, the LEP adopted a higher +20 water rate on the assumption that precinct scale recycled water scheme would be provided.

Since then, the statutory context has changed, with the adoption of the *State Environmental Planning Policy (Sustainable Building) 2022* (Sustainable Building SEPP) in October 2023. The Sustainable Building SEPP increased the minimum BASIX energy target to 63 points (with no change to the base water target), as well as adopted a much more stringent assessment criteria. As a result, the benchmark to obtain the Clause 8.9 bonus has increased from 40 points (25 + 15) to 78 points (63 + 15), which is materially more challenging, particularly on small and constrained sites such as the subject site.

An ESD Memo prepared by Efficient Living assesses the proposal against the relevant benchmarks and concludes:

- **Water:** Applying the LEP's +20 water rate is unreasonable, as the site does not have access to, and is unable to provide, a recycled water scheme due to its small scale and nature. Therefore, a +10 uplift consistent with Kinesis' recommendation (where no recycle water scheme exists), is a fairer benchmark for this site.
- **Energy:** When the uplift intent is translated into the new BASIX framework, a like for like target is approximately 68 points, instead of 78 points, which should be adopted as a fairer benchmark for the site.

Table 2 below provides a comparison of the previous and current requirement, as well as the BASIX rating that the proposed development is achieving.

Table 2 BASIX Assessment

BASIX	PRCUTS BASIX 2022	New BASIX 2023	Proposed BASIX
Energy	40 points (25 base + 15 bonus)	78 points (25 base + 15 bonus)	70 points, resulting in a shortfall of 8 points on the new BASIX tool
Water	60 points (40 base + 20 bonus)	60 points (40 base + 20 bonus)	54 points, resulting in a shortfall of 6 points on the new BASIX tool.

Having regard to the original PRCUTS and Kinesis intent, and the subsequent introduction of the Sustainable Building SEPP (which materially increased BASIX stringency), the proposal's performance should be assessed in context, noting it continues to deliver a positive outcome that meaningfully achieves a high performing and sustainable building in line with the intended objectives of Clause 8.9.

4.0 The Proposed Variation

This section outlines the relevant environmental planning instrument (EPI), the development standard to be varied and proposed variation.

Table 3 Planning instrument, development standard and proposed variation

Matter	Comment																
Environmental planning instrument (EPI) sought to be varied	<i>Canada Bay Local Environmental Plan 2013 (Canada Bay LEP 2013) and State Environmental Planning Policy (Housing) 2021 (Housing SEPP)</i>																
The site's zoning	<p>MU1 Mixed Use</p> <p>The objectives of this land use zone are:</p> <ul style="list-style-type: none"> • <i>To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.</i> • <i>To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.</i> • <i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i> • <i>To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.</i> <p>It is noted that a small portion of the site along the William Street boundary is zoned RE1 Public Recreation, which is the area that will comprise the 8m landscaped and public domain setback. The objectives of the RE1 Public Recreation zone have not been considered under this Clause 4.6 Variation Request, as the concurrent planning proposal discussed seeks to rezone the entire land to MU1 Mixed Use. The reasoning for this is further detailed in Section 3.1.1 above.</p>																
Housing SEPP Development standard sought to be varied	<p>Section 16 Affordable housing requirements for additional floor space ratio</p> <p>The section does not have a specific objective, however, the objective of the division is <i>"to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households."</i></p> <p>The section provides for development to exceed the maximum permitted floor space under the LEP (see below) by 30%, subject to the provision of 15% affordable housing. The proposal seeks to dedicate 15% of the total GFA to affordable housing and therefore, the site has a maximum floor space ratio of 4.29:1.</p>																
The proposed variation	<p>The proposed development has a maximum gross floor area of 14,218m², equating to a floor space ratio of 4.5:1, which results in a variation to the relevant floor space ratio development standards, as detailed in the following table:</p> <table border="1"> <thead> <tr> <th>Development Standard</th> <th>Permissible FSR</th> <th>Allowable GFA</th> <th>Proposed Variation</th> </tr> </thead> <tbody> <tr> <td>Clause 4.4 of Canada Bay LEP 2013</td> <td>1:1</td> <td>3,158.4m²</td> <td>3.48:1 (348%) +11,004.6m²</td> </tr> <tr> <td>Clause 8.3(2) of Canada Bay LEP 2013</td> <td>3.3:1 (as proposed to be amended under the Planning Proposal)</td> <td>10,422.72m²</td> <td>1.18:1 (35.8%) +3,740.28²</td> </tr> <tr> <td>Section 16 of Housing SEPP</td> <td>FSR: 4.29:1</td> <td>13,549.536m²</td> <td>0.21:1 (4.9%) +668.464m²</td> </tr> </tbody> </table>	Development Standard	Permissible FSR	Allowable GFA	Proposed Variation	Clause 4.4 of Canada Bay LEP 2013	1:1	3,158.4m ²	3.48:1 (348%) +11,004.6m ²	Clause 8.3(2) of Canada Bay LEP 2013	3.3:1 (as proposed to be amended under the Planning Proposal)	10,422.72m ²	1.18:1 (35.8%) +3,740.28 ²	Section 16 of Housing SEPP	FSR: 4.29:1	13,549.536m ²	0.21:1 (4.9%) +668.464m ²
Development Standard	Permissible FSR	Allowable GFA	Proposed Variation														
Clause 4.4 of Canada Bay LEP 2013	1:1	3,158.4m ²	3.48:1 (348%) +11,004.6m ²														
Clause 8.3(2) of Canada Bay LEP 2013	3.3:1 (as proposed to be amended under the Planning Proposal)	10,422.72m ²	1.18:1 (35.8%) +3,740.28 ²														
Section 16 of Housing SEPP	FSR: 4.29:1	13,549.536m ²	0.21:1 (4.9%) +668.464m ²														

Matter	Comment
	<p>The proposed 4.9% variation to the maximum permissible floor space ratio under Section 16 of the Housing SEPP arises entirely because the development is unable to technically access the 5% sustainability bonus under Clause 8.9 of the Canada Bay LEP 2013, notwithstanding that the bonus was intended to apply to high-performing development in the Kings Bay precinct.</p> <p>As detailed in Section 3.1.2, Clause 8.9 was drafted against a former BASIX framework. Since gazettal, the Sustainable Building SEPP and updated BASIX framework has been adopted, materially increasing the threshold to a level that is not reasonably achievable for this site. As a result, the 5% uplift is not triggered in practice, and the proposal presents a minor exceedance to the FSR. Despite this, it is important to note that if the recommendations of Kinesis were implemented and the Sustainable Building SEPP had not been adopted, Clause 8.9 could be applied and in this case, the proposal would be entirely permissible and compliant with the maximum FSR.</p> <p>Notwithstanding this technical constraint, the development delivers the sustainability outcomes sought by Clause 8.9 by exceeding minimum BASIX requirements and achieving meaningful performance improvements consistent with PRCUTS and the State's net zero by 2050 objective. The consent authority is therefore requested to consider the circumstances accordingly and treat this 4.4% exceedance as a minor and technical variation to the development standards.</p>

5.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Canada Bay LEP 2013 provides that:

- 3) *Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:*
 - (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *there are sufficient environmental planning grounds to justify contravening the development standard.*

These key considerations are considered in their respective sections below.

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

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 control pursuant to the 'First Method' outlined in Wehbe.

Given the Housing SEPP does not contain any specific objectives relating to the floor space ratio development standard, an assessment against the objectives of the floor space ratio development standard under Clause 4.4 of the Canada Bay LEP 2013 has been undertaken. Furthermore, an assessment against the overarching objectives of the Housing SEPP infill Affordable Housing objective has been undertaken, demonstrating that the objectives can still be achieved notwithstanding the non-compliance.

5.1.1 Assessment against the Floor Space Ratio Development Standard Objectives

Objective 4.4(1)(a) to ensure that buildings are compatible with bulk, scale, streetscape and desired future character of the locality

The proposed building is compatible with the intended bulk and scale of the desired future character of the locality, particularly with consideration of the evolution and transformation of the Kings Bay precinct, along with the broader Parramatta Road Corridor. These areas have been identified for future urban growth, which will include new residential and mixed-use developments. As the precinct transitions from a low-rise industrial area to a high rise mixed-use urban centre, the proposed height, bulk and scale of the development will directly respond to the shift in urban context.

The extent of non-compliance is minor and does not change the compatibility of the built form noting that the controls provide for an FSR greater than that proposed and the Deicorp site adjacent to the development utilises the 30% infill affordable bonus as well as the sustainable building bonus and therefore will be a very similar bulk and scale.

It is noted that through the design excellence process minor tower setback encroachments to the east and west are proposed. These setback variations are not the product of the FSR exceedance but are the outcome of maximising the amenity of the dwellings and creating additional modulation in the tower form which does not materially increase the perceived bulk or scale of the development when viewed from the public domain. Ultimately, the proposal delivers a high quality contemporary built form outcome consistent with the strategic vision of the locality, which has been thoroughly reviewed by the Design Integrity Panel (DIP) and deemed capable of achieving design excellence.

It is also important to note that the proposed development seeks significant landscaping and public domain improvements along all street frontages, as well as a through site link along the western boundary, ensuring that the proposed development, irrespective of the minor variation will positively contribute to the streetscape and public spaces.

Objective 4.4(1)(b) to provide a suitable balance between landscaping and built form

The proposed variation has no impact on the balance of landscaping and built form which was determined by the site-specific controls in the DCP. The proposal provides a strong landscape and public domain response that achieves an appropriate balance between built form and open space. This includes 3m landscaped setbacks to Queens Road and Spencer Street, an 8m landscaped and public domain setback to William Street, and a 6m wide through site link along the western boundary.

In addition, the development comprises an abundance of communal open space, including at the podium rooftop, and on Level 5 of the tower, which support residential amenity and landscaping opportunities. Collectively, the landscaped areas at these spaces account for a total of 686m² which equates to 21% of the site. As such, the proposal will deliver high quality landscaped area that will contribute to an increase in urban greening and canopy coverage by 16% within the precinct. The proposed landscape strategy also assists with reducing the perceived bulk and scale at the street level, through planting, and adequate deep soil zones. As such, the proposal achieves this objective, notwithstanding the minor FSR variation.

Objective 4.4(1)(c) to minimise overshadowing of, and loss of privacy to, neighbouring properties

The proposed built form has been designed having regard to both the existing and future context for the Kings Bay precinct, and has been designed to minimise amenity impacts on adjoining land, particularly with consideration of overshadowing and visual and acoustic privacy.

The proposed FSR variation arises entirely from the proposal technical ability to access the 5% sustainability bonus under Clause 8.9. That bonus would otherwise have been available under the original PRCUTS/Kinesis intent and the old BASIX framework, prior to October 2023. In this context, the development has been designed to achieve the envisaged built form outcome for the site and to avoid adverse impacts, particularly in relation to overshadowing and privacy.

Shadow analysis prepared by Plus Studio demonstrates that the minor FSR exceedance and associated east and west tower setback encroachments result in only minor additional overshadowing, as shown in the shadow diagrams at **Figure 5**. Any additional shadow is limited and does not give rise to unreasonable impacts to neighbouring properties or surrounding public open space.

Given the marginal nature of the exceedance, the change in perceived bulk is negligible and is unlikely to be noticeable from within the neighbouring properties and surrounding open space. Furthermore, privacy outcomes are maintained, with the east and west setbacks (despite their variation), meeting or exceeding the minimum building separation recommendations under the ADG, ensuring no additional impact on visual or acoustic privacy.

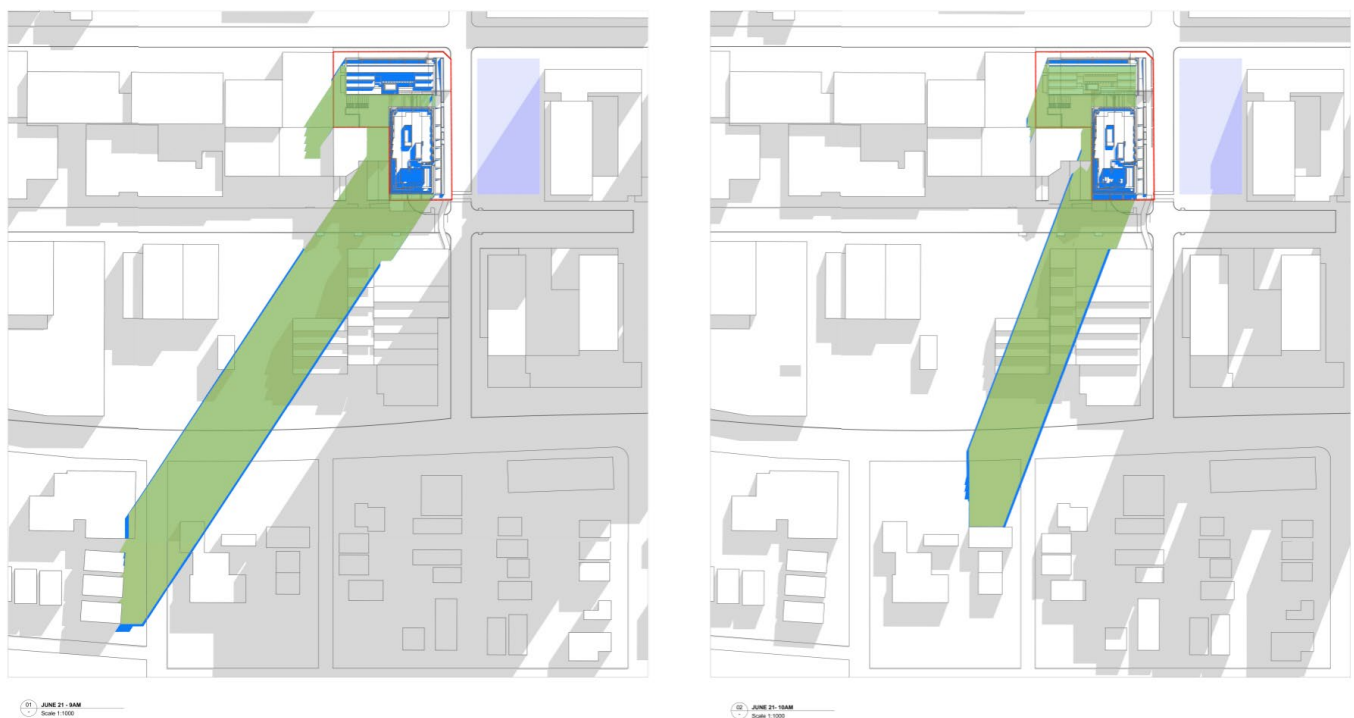




Figure 5 Shadow Diagrams

Source: Plus Studio

Objective 4.4(1)(d) to maximise solar access and amenity for public places

The proposal has been designed to maintain solar access and enhance amenity within the public domain and surrounding open spaces. Consistent with the intent of the Kings Bay precinct, the ground plane has been deliberately designed to provide generous landscaped setbacks and a publicly accessible through site link along the western boundary, which improves permeability, connection and overall pedestrian amenity.

Furthermore, shadow analysis had been undertaken (refer to **Figure 5** above), which confirms that the minor FSR exceedance and associated east and west tower setback encroachments do not result in any unreasonable additional overshadowing of public spaces. In particular, the proposal does not materially increase shadow impacts beyond those anticipated under the adopted precinct controls, including in relation to the future open space to the east and the Charles Heath Reserve to the north.

Accordingly, the development satisfies this objective by maintaining a high level of solar access to key public places and delivering a public domain outcome that improves amenity through landscaping, canopy coverage, and active street frontages.

Objective 4.4(1)(e) to manage the visual impact of development when viewed from public places, including the Parramatta River

The proposal manages visual impact by delivering a built form that is largely consistent with the envisaged built form under the Canada Bay DCP, that is entirely compatible with the desired future character of the new high-density, mixed-use precinct. Specifically, the proposal adopts a slender tower form, that is well articulated, above a well-defined street wall, which provides a human scale interface to the public domain and assists in breaking down the perceived bulk and scale.

As detailed within the Visual Impact Assessment prepared by Bonus & Associates, the minor variations to the east and west tower setbacks which are not a product of the FSR variation, do not alter the development's overall visual presence or result in any material increase in perceived bulk when viewed from surrounding streets or other public places. When viewed from more distant public vantage points, including the Parramatta River corridor, the proposal will be read in the context of the broader Parramatta Road Corridor renewal and emerging precinct, and the minor variation will be visually imperceptible amongst the broader context and skyline.

5.1.2 Assessment against the Housing SEPP Infill Affordable Housing Objective

Objective 15A To facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households

The proposed development seeks to deliver a minimum of 15% affordable housing, equating to 27 dwellings, which are located within Spencer Street tower. In addition to the provision of on-site affordable housing, the proposed development also seeks to deliver an additional 4% affordable housing by way of monetary contribution.

Therefore, despite the minor exceedance in floor space ratio, the proposed development directly responds to this objective in that it will deliver new affordable housing to meet the needs of very low-, low- and moderate-income households. The provision of different housing typologies will support the varying demographic needs and household types, while also fostering an inclusive and equitable community that will assist in alleviating the current housing crisis, a key strategic planning objective.

Requiring a strict compliance with the FSR would reduce GFA by 668.5m², which is equivalent to two storeys, and therefore, will result in the loss of 6-10 dwellings and a corresponding reduction in the affordable housing yield, contrary to the specific objective of the Housing SEPP in relation to the Infill Affordable Housing bonus. In this context, the negligible impacts of the minor FSR variation are outweighed by the public benefit of delivering additional housing within a built form that is consistent with the precinct's desired future character and does not give rise to any material additional impacts on surrounding development.

5.1.3 Assessment against the zoning objectives

Furthermore, the proposed development (inclusive of the proposed floor space ratio exceedance) is consistent with the objectives of the MU1 Mixed Use land use zone, as presented in **Table 4**.

Table 4 The proposed development’s alignment with the objectives of the MU1 Mixed Use zone

Objective	Alignment
<i>To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.</i>	The proposed supports land use diversity and employment generation by delivering ground floor retail and commercial, alongside residential accommodation (including 15% affordable housing). Flexible commercial and communal areas broaden the mix of uses, increase day-to-day activity and reinforce the mixed-use function intended under the MU1 zone.
<i>To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.</i>	The ground floor is designed to create an active and legible public interface through non-residential uses and high-quality landscape treatment. Generous public domain setbacks (including an 8m setback) and the through site link along the western boundary improve permeability, strengthen pedestrian connections and contribute to an engaging, safe and functional streetscape.
<i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i>	The building form, orientation and site planning ensure an appropriate interface with surrounding existing and future development, minimising potential conflicts to adjoining land use zones. Specifically, the proposal has given regard to the external environmental considerations and has designed the building accordingly. For example, the western façade has been designed accordingly to incorporate angled shade structures to assist with managing the heat load.
<i>To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.</i>	The development incorporates non-residential uses at ground level to support activity at the street edge and contribute to the mixed-use character of the precinct. This provides opportunities for five grain retail and business premises, which will enhance passive surveillance and activation of the public domain. It will also allow for out spill onto the future open space to the east, as well as the existing Charles Heath Reserve to the north.

In summary, the proposed development achieves the objectives of the Housing SEPP development standard, the floor space ratio development standard and the zoning objectives, notwithstanding the non-compliance with the standard.

5.2 Clause 4.6(3)(b): Sufficient environmental planning grounds to justify the contravention of the development standard

Clause 4.6(3)(b) of the LEP requires the contravention of the development standard to be justified by demonstrating 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 at [60].

In this instance, the relevant aspect of the development is the proposed exceedance of Floor Space Ratio. There are sufficient environmental planning grounds to justify this contravention, as described below.

5.2.1 Sustainability

The proposal delivers the level of sustainability performance the floor space incentive was intended to secure under the PRCUTS. As previously stated in **Section 3.1.2**, the proposed variation is a technical, unintended consequence of the introduction of the Sustainable Buildings SEPP which changed the standards for BASIX, without the necessary associated amendment to the Canada Bay LEP. It is our understanding that despite the changes to the framework, Clause 8.9 has not been subject to further feasibility testing in response to the updated BASIX requirements.

Efficient Living confirms the Clause 8.9 BASIX outperformance settings are outdated and misaligned with the Sustainable Building SEPP BASIX framework, which has significantly increased the base threshold. In this context, the proposal achieves positive sustainability outcomes but cannot meet the bonus requirements due to infrastructure and physical site constraints. A summary of the sustainability outcomes for the proposed development is provided below:

BASIX Water

The proposal achieves BASIX Water 54 by delivering strong potable water reduction through the following:

- High efficiency fixtures (6 star taps, 4 star showers and toilets)
- Rainwater tank for irrigation, toilet flushing and apartment laundry taps
- Low water use planting
- Closed loop fire sprinkler test water saving measures
- Efficient appliances (4.5 star clothes washer and 5.5 star dishwasher).

Clause 8.9 of the Canada Bay LEP 2013 requires BASIX Water 60 (40 base + 20 bonus). As detailed within the ESD Report, achieving this target would necessitate recycle water, which is not available within the precinct and would require coordinated delivery beyond the scope of the project. An on-site recycled water system is also not considered viable for a project of this scale due to cost and operational requirements. Consistent with the original Kinesis PRCUTS evidence based analysis, a +10-water outperformance approach is considered a more reasonable benchmark in this context.

Therefore, the proposal's 54 points achieved provides a strong water sustainability outcome consistent with the original intent of the PRCUTS. It is also 14 points above the new BASIX minimum.

BASIX Energy:

The proposed development is designed as an all electric building and achieves BASIX Energy 70 through:

- Air source heat pump hot water
- ~70 kW solar PV (maximised to available roof area)
- LED lighting, induction cooking, efficient ducted air conditioning
- Heat pump clothes dryers and efficient applicants

Clause 8.9 of the Canada Bay LEP requires BASIX Water 78 (63 base + 15 bonus). The ESD Report identifies that achieving this would require approximately ~160kW solar PV, which is not feasible due to limited roof space typical of a slender tower built form. Furthermore, the LEP outperformance target was established prior to the updated BASIX framework in October 2023, which significantly increased baseline energy stringency. Efficient Living identifies a like for like outperformance threshold of BASIX Energy 68 in the current BASIX framework. The proposal exceeds this benchmark, achieving a total of 70 points, which is 7 points above the minimum BASIX requirement.

Overall, the proposal delivers a high performing all electric building and provides a framework for future renewable electricity procurement to further reduce emissions. These matters constitute sufficient environmental planning grounds, particularly with consideration of the site and the nature of this contravention, and therefore, the variation is justified.

5.2.2 Design Excellence

The proposed development has been the subject of extensive design review to ensure that the proposal can exhibit design excellence. Specifically, this process involved a competitive design competition, as well as a subsequent design integrity process, whereby the Jury/Design Integrity Panel (DIP) expressed clear support for the built form and massing of the development.

The competitive design process was undertaken on the basis that the 5% sustainability bonus could be achieved, and therefore, the winning scheme comprised a 5% variation, consistent with the subject development. This process ultimately verified that the overall built form, inclusive of the additional FSR is capable of achieving design excellence.

Furthermore, the east and west tower setback variations, which are not a product of the FSR variation, are a direct result from the recommendations of the design competition jury, which supported exploration of encroachments into the eastern and western setbacks where this would improve residential amenity, articulation and façade expression, provided there were no adverse impacts on surrounding development, or non-compliance with NCC requirements.

In response to this, the design was amended and variations to the setbacks were introduced. The amended scheme was subsequently presented and reviewed by the Design Integrity Panel (DIP), which comprised of the same Jury members, who provided support for the variations, specifically stating the following:

- **The Panel notes the increase in the tower floorplate to improve the quality of the apartments and was not concerned by the proposed variations to the setbacks.**
- **The refined tower expression, in particular the angled articulation, is considered positive.** However, the Panel noted that it is important that the use angles are meaningful, and encourages the design team to consider how they can be developed further whilst having regard to the impact on the apartment layouts.
- **The Panel also feels the refinement of the western elevation is generally positive.** It supports reducing the setback to the boundary, however, it would like to ensure the western elevation does not result in any large expanse of blank wall. It recommends this elevation continue to be developed further to minimise blank walls having specific regard to how it is viewed from Spencer Street and Queens Road looking east.

Therefore, the setback encroachments and associated floor space variation, are an integral component of the endorsed design scheme that has been under extensive review and scrutiny. They contribute to improved apartment layouts, enhanced solar access and outlook towards the north, and a more articulated and visually dynamic tower form. The angled façade treatments and wing elements have been further refined since the DIP meeting and are critical in breaking down perceived bulk, and reinforcing verticality and presentation of a slender tower form.

Furthermore, the minor additional floor space also enables the introduction of sustainability initiatives that exceed minimum BASIX requirements, reinforcing the proposal's overall design quality and environmental performance

In this context, the setback variations and associated FSR exceedance are intrinsically linked to the achievement of design excellence and a high-quality architectural outcome and therefore, it is justified on this basis.

5.2.3 Environmental Impacts

The proposed floor space ratio exceedance will not generate any adverse environmental impacts such as overshadowing or visual impacts. The small setback variations, while slightly increasing the extent of the shadow, will not give rise to unreasonable solar access impacts on neighbouring properties or surrounding public open space.

In addition, a visual impact assessment has been undertaken, which confirms that the proposal, including the minor variation, achieves an appropriate built form outcome that is generally consistent with the envisaged DCP envelope and planned high density character of the Kings Bay Precinct. Therefore, the variation does not result in a significant increase in perceived bulk and scale, height, or visual prominence when viewed from the public domain and surrounding development. Accordingly, the exceedance is appropriate in nature and will not result in any adverse environmental impacts that would warrant strict compliance.

5.2.4 Delivery of housing diversity and supply

The proposed development comprises 134 dwellings, including 15% affordable housing, equating to 27 dwellings, which will support very low-, low-, and moderate income households. This significant provision of housing, integrating both market and affordable housing will foster an equitable and inclusive community, while supporting a diverse mix of housing tenures and apartment sizes that will accommodate a wide demographic of community needs.

The proposed development, including the minor floor space ratio exceedance, is inherently linked to the broader goal of maximising residential yield, including affordable housing, which is critical in addressing the growing housing crisis. This approach is directly aligned with several strategic planning outcomes established by NSW Government initiatives and will assist in alleviating housing shortages and affordability and contribute to the achievement of housing targets established under the National Housing Accord, a Federal Government commitment to delivering one million new homes across Australia over a five-year period.

In light of the above, it is clear that the minimal environmental impacts posed, together with the delivery of housing diversity and supply, particularly affordable housing provides sufficient environmental planning grounds to justify the contravention to the floor space ratio development standard.