

# GYDE

## Clause 4.6

# Variation Request

Clause 4.4 Floor Space Ratio  
Canada Bay Local Environmental Plan 2013  
25-27 Leeds Street, Rhodes

submitted to the City of Canada Bay Council  
on behalf of Billbergia

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## EXECUTIVE SUMMARY

This request has been prepared to justify a variation to Clause 4.4 Floor Space Ratio (FSR) of the *Canada Bay Local Environmental Plan 2013* (CBLEP) that is proposed in a Development Application (DA) for a mixed use development at the site located at 25-27 Leeds Street, Rhodes.

The objective of the proposal is to seek development consent for a mixed use development at the site, which will replace the existing warehouse buildings and contribute to the initial stage of transformation of the Rhodes East precinct. The proposal for which development consent is sought has been subject to an Architectural Design Competition and a review by the Design Integrity Panel post-competition.

Clause 4.4 of the CBLEP prescribes a maximum FSR for the site of 2.3:1, which equates to a gross floor area (GFA) of 26,892.52sqm. The proposed development seeks consent for 29,373.10sqm of GFA which equates to an FSR of 2.51:1, being a 9.22% variation from the base FSR standard. However, under Clause 7.11 of the CBLEP, BASIX affected buildings in the Leeds Street Character Area can benefit from a 5% bonus in floor space if they comply with the following:

- (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.

The proposal has been designed to be capable of exceeding the BASIX commitments above. Regarding the BASIX commitment for water, the project ESD consultant, has confirmed that the additional 20 points can only be achieved through incorporation of recycled water into the development. This requires the development to connect to the Recycled Water Plant to be located in the basement area of a new development in the Station Gateway East or Leeds Street Character Areas. There is currently no Recycled Water Plant in operation. It is however required by Section K18.8 Control 21 of the DCP to be operational prior to the connection of the first development. Notwithstanding this, the proposal has been designed to enable connection to the Recycled Water Plant once operational. It is on this basis that the proposed development is subject to the bonus 5% FSR pursuant to Clause 7.11 of the CBLEP. Inclusion of the 5% bonus FSR results in a permissible maximum FSR of 2.415:1 and 28,237.15sqm of GFA. The proposal therefore technically seeks to vary the maximum FSR (inclusive of the bonus) by 4.02% or 1,135.95sqm of GFA.

There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6: *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85]. As Commissioner Clay explained in his decision in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112, that the application of Clause 4.6 should not be constrained by a perceived maximum number by which a standard may be varied (this decision was upheld by the Chief Judge of the Land and Environment Court on appeal in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115). Irrespective, it is noted that the variation, as set out above, is minor, and as discussed further in this report, entirely associated with the inclusion of the floor area of the wintergardens on the western elevation of the development in the GFA/FSR calculation. On advice from the project acoustic consultant, E-Lab Consulting, the balconies on the western elevation are required to accommodate acoustic attenuation, to mitigate acoustic impact from the railway line immediately to the west of the site. They have therefore been modified into a wintergarden design, to ensure the acoustic amenity of those private open space areas is achieved. This outcome is consistent with the endorsed Architectural Design Competition Brief for the project (endorsed by Council on 4 July 2022 which clearly stated that “wintergardens should be used where acoustic amenity may be compromised” (page 23)).

To summarise the findings of this written Clause 4.6 variation request, the requirement to comply with the FSR development standard is unreasonable and unnecessary in the circumstances of this case because the proposed development:

- would comply with the maximum FSR development standard (inclusive of the BASIX bonus) if not for the acoustic constraints imposed on the site from the nearby railway line. The 4.02% variation is entirely attributed to the requirement to acoustically attenuate the balconies to the apartments on the western elevation of the development.
- does not result in any adverse impacts in terms of visual amenity, bulk and scale, overshadowing, views or the like, as a consequence of providing wintergardens in lieu of balconies on the western elevation of the development. The DIP also reviewed the western elevation of the development with the inclusion of wintergardens, with no concern raised regarding design quality or impact.
- maintains a sufficient level of amenity to the private open space areas that comprise the proposed wintergardens on the western elevation. In fact, the amenity of those areas will be enhanced, in an acoustic sense, through their wintergarden configuration/design.
- has a comparable bulk and scale to a fully FSR compliant set of building envelopes. The only exception is a minor addition of façade detailing as a result of acoustically attenuating west-facing balconies.
- does not generate any additional habitable floorspace.
- Is compliant with the Apartment Design Guide (ADG) which envisages wintergardens in “*noisy or hostile environments*”. The ADG also outlines that “*when setting FSR controls in these situations, consider providing additional area to compensate for the enclosing of balconies*”.

This written request demonstrates that compliance with the FSR development standard is unreasonable and unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds to justify the contravention. Further, the proposal is consistent with the objectives of the zone for the site and the development standard itself and is, therefore, in the public interest.

## 1. INTRODUCTION

This request has been prepared in accordance with Clause 4.6 of the CBLEP to justify a variation to the FSR development standard proposed in a DA submitted to the City of Canada Bay Council (Council) for a mixed use development at 25-27 Leeds Street, Rhodes.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)]; and
3. That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out [clause 4.6(4)].

This request also addresses the requirement for the concurrence of the Secretary as required by clause 4.6(4)(b).

## 2. STANDARD TO BE VARIED

The standard proposed to be varied is the FSR development standard which is set out in Clause 4.4 of the CBLEP as follows:

*“4.4 Floor Space Ratio*

*(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio map.”*

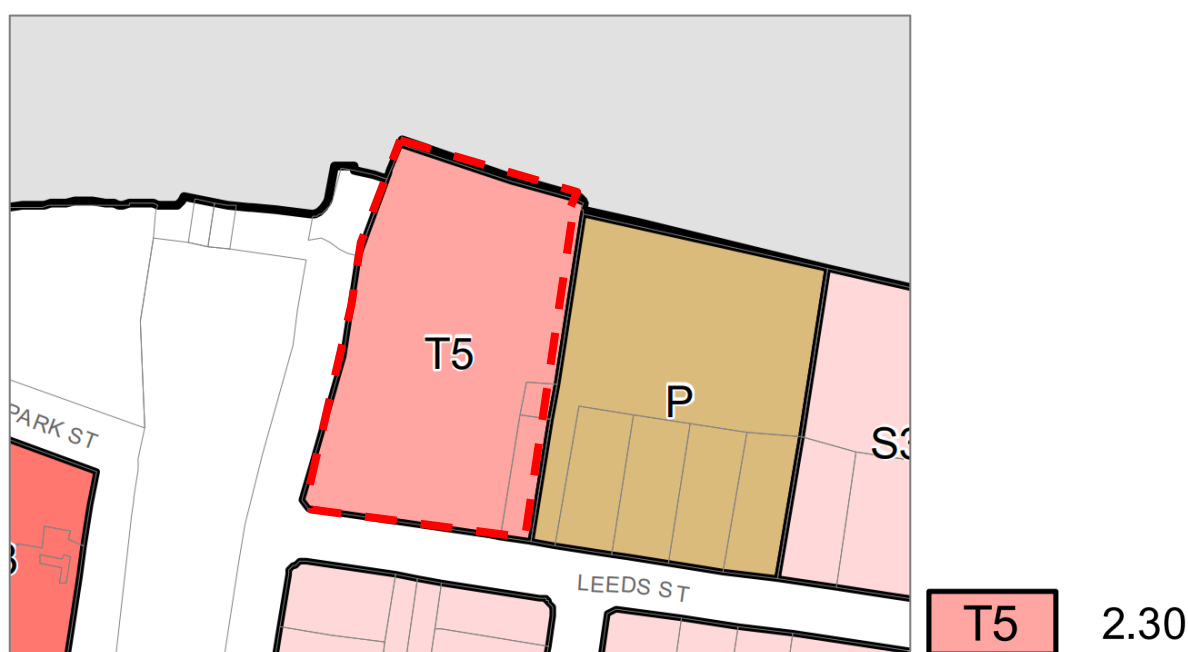


Figure 1: CBLEP FSR map, site outlined in red (Source: NSW Legislation)

The numerical value of the development standard proposed to be varied is 2.3:1, which equates to a gross floor area (GFA) of 26,892.52sqm. The proposed development seeks consent for 29,373.10sqm of GFA which equates to an FSR of 2.51:1, being a 9.22% variation from the base FSR standard.

However, it should be noted that the proposal has been designed to exceed the relevant BASIX commitments and therefore, the bonus 5% FSR applies. Inclusion of the 5% bonus FSR results in a permissible maximum FSR of 2.415:1 and 28,237.15sqm of GFA. The proposal therefore technically seeks to vary the maximum FSR (inclusive of the bonus) by 4.02% or 1,135.95sqm of GFA. The FSR development standard is not excluded from the operation of Clause 4.6 of the CBLEP.

### 2.1. Site area for the purpose of calculations

In accordance with the definition provided in Clause 4.5 of the CBLEP, the site area is the whole of the land comprising 25-27 Leeds Street (legally described as Lot A DP329241, Lot C DP367132 and Lot 2 DP1192949), being 11,692.40sqm. All proposed gross floor area GFA is to be contained within the site.

### 3. EXTENT OF VARIATION

#### 3.1. Overview

Clause 4.4 of the CBLEP prescribes a maximum FSR for the site of 2.3:1, which equates to a maximum GFA of 26,892.52sqm.

The proposed development seeks consent for 29,373.10sqm of GFA which equates to an FSR of 2.51:1, being a 9.22% variation from the base FSR standard.

However, as discussed in the Executive Summary, the proposal is capable of exceeding the BASIX commitments identified under Clause 7.11 of the CBLEP. As such, inclusion of the 5% bonus FSR results in a permissible maximum FSR of 2.415:1 and 28,237.15sqm of GFA.

The proposal therefore technically seeks to vary the maximum FSR (inclusive of the bonus) by 4.02% or 1,135.95sqm of GFA.

The table below summarises the relevant FSR base and bonus provisions and the proposed variations, which shows that the proposed wintergardens are wholly attributed to the FSR variation.

*Table 1: Permissible and Proposed GFA*

CBLEP FSR Provisions	
Permissible base	26,892.52 sqm
Bonus	1,344.6 sqm
Total	28,237.15 sqm
Proposed GFA	
Total proposed	29,373.10 sqm (inclusive of 1,176.20 sqm of wintergardens)
Variation to base FSR (Clause 4.4)	2,480.58 sqm
Variation inclusive of BASIX Bonus (Clause 7.11)	1,135.95 sqm

The exceedance of the FSR development standard is wholly attributed to the floor area associated with the wintergardens on the western elevation of the proposed development (refer to Figure 3). In fact, the GFA of the wintergardens is more than the proposed variation. Therefore, if it were not for the requirement to acoustically attenuate those west-facing balconies, the total FSR for the development would sit under the maximum permissible GFA/FSR (inclusive of the BASIX bonus).

The wintergarden configuration/design has been provided in direct response to the acoustic constraints of the site, which result from the noise impact from the nearby railway line (refer to Figure 2).





Figure 2: Aerial image showing subject site in blue and railway line to the west (Source: Nearmap)

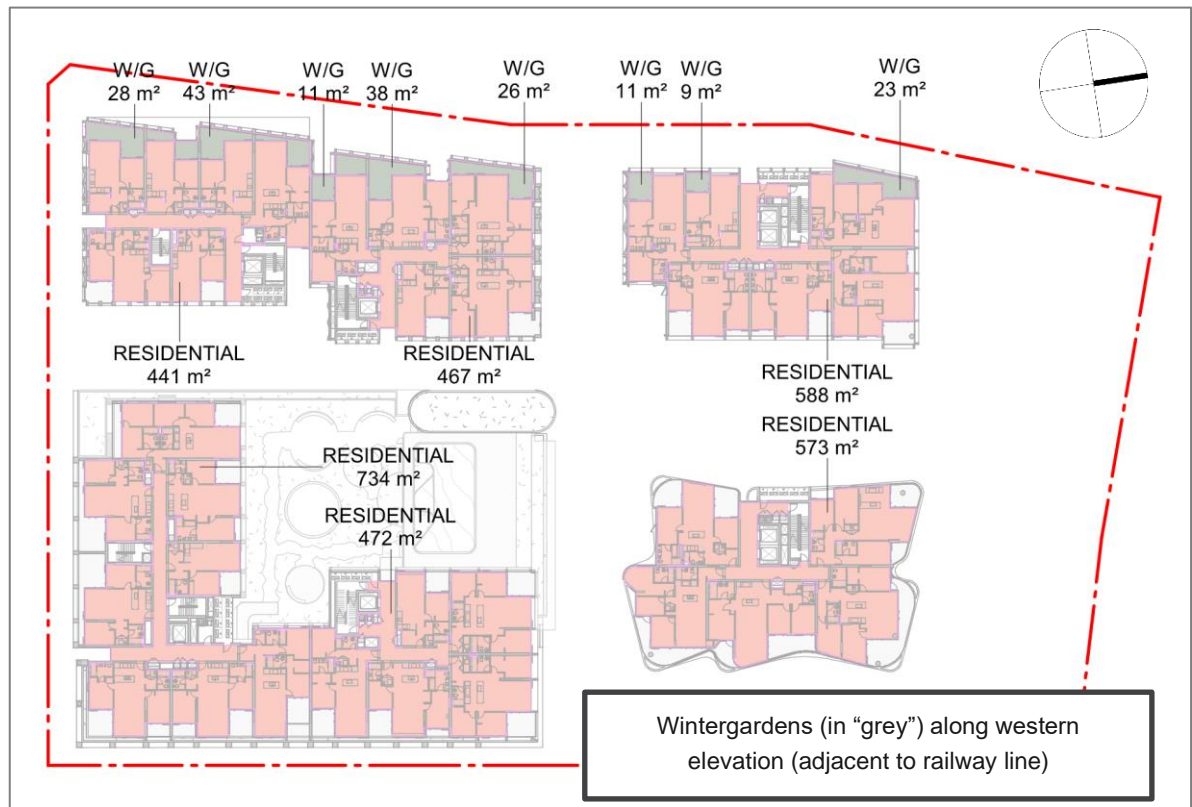


Figure 3: Extract of Level 4 GFA Plan (Source: SJB)

## 4. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by Clause 4.6(3)(a) of the CBLEP.

The Court has held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The five (5) ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated, thwarted or undermined (*Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]) if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; and
5. The zoning of the land is unreasonable or inappropriate.

It is sufficient to demonstrate only one (1) of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

In this case, it is demonstrated that Test 1 has been satisfied.

### 4.1. The objectives of the development standard are achieved notwithstanding the non-compliance with the standard

In the following section we consider whether the objectives of the development standard in Clause 4.4(1) are achieved notwithstanding the proposed contravention (Test 1 under *Wehbe*). The objectives of the development standard for development in zone MU1 Mixed Use (in which the proposed development is situated) are as follows:

#### 4.4 Floor space ratio

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

- (a) *to ensure that buildings are compatible with the bulk, scale, streetscape and desired future character of the locality,*
- (b) *to provide a suitable balance between landscaping and built form,*
- (c) *to minimise overshadowing of, and loss of privacy to, neighbouring properties,*
- (d) *to maximise solar access and amenity for public places,*

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

These are discussed as follows:

Table 2: Achievement of Objectives of Clause 4.4(1) of CBLEP

Objective	Basis for addressing this objective
(a) to ensure that buildings are compatible with the bulk, scale, streetscape and desired future character of the locality,	<p>The site is located within the Rhodes Precinct in the Leeds Street Character Area. The current land uses in the locality are industrial/mixed use premises to the east of the site, low density residential developments to the south and high density residential developments to the south-west.</p> <p>Although the surrounding character comprises mostly industrial and low density residential uses, the future character of the precinct will reflect the new development controls under the CBLEP which came into effect in October 2021 and supplemented by the DCP. The zoning of land to the north of Leeds Street (including the subject site) is for mixed use development. The site directly to the east, has a height of up to 55.8m RL (an additional 12.4 metres when compared to the subject site) and approximately 200 metres to the east of the site allows for FSRs of up to 2.6:1 (an additional 0.3:1 when compared to the subject site).</p> <p>As sites in the Rhodes East precinct are redeveloped, there will be a gradual transition to the higher density residential and mixed use developments that the new CBLEP controls contemplate (refer to Figure 4).</p> <p>Any additional bulk associated with the proposed FSR variation is limited to the western elevation in the form of acoustic attenuation of balconies. The DIP has reviewed and endorsed the design, bulk and scale of the development as a whole, but in full knowledge of the acoustic constraints and proposed wintergarden design.</p> <p>The proposed development is therefore expected to be compatible with the future uses of the adjacent sites (in particular to the east), which are expected to transition to mixed use developments in the short to medium term.</p>

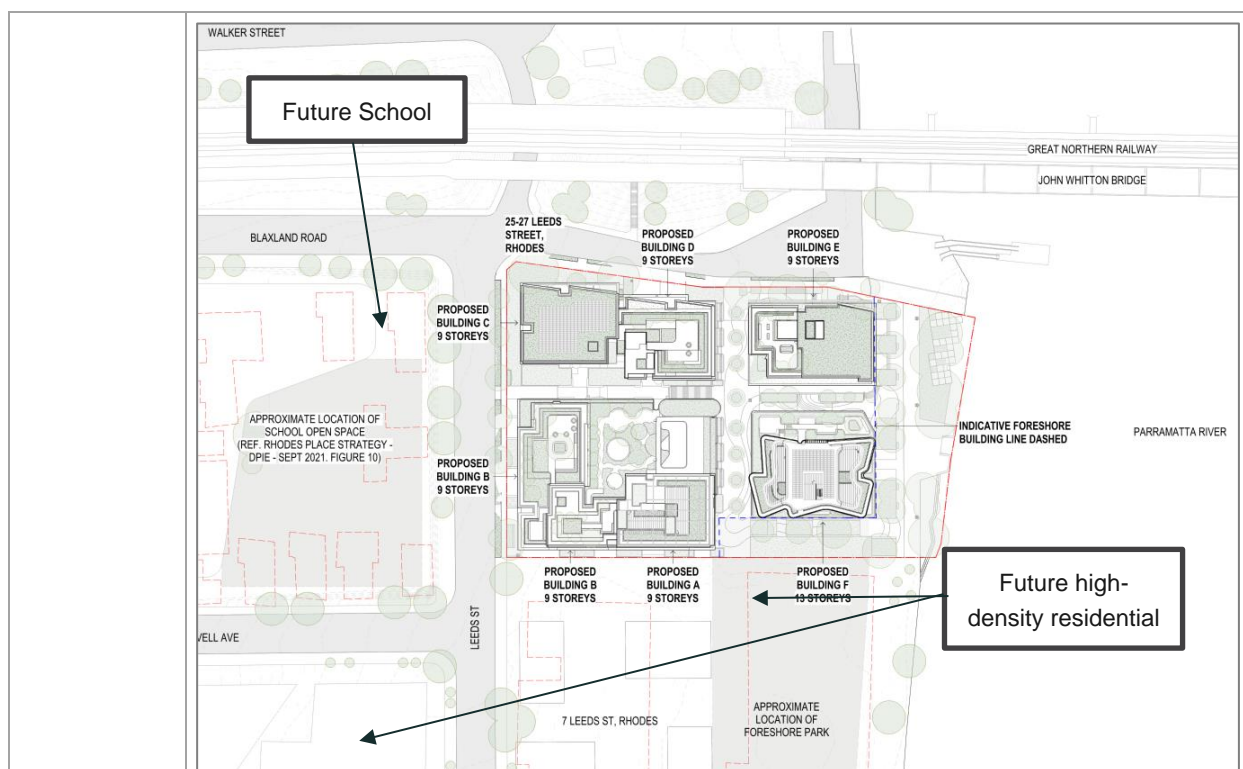


Figure 4: Future Context Diagram (Source: SJB)

<p>(b) to provide a suitable balance between landscaping and built form,</p>	<p>The conversion of balconies to wintergardens does not result in any reduction in landscape opportunities on the site. In fact, landscape has been enhanced with the inclusion of ground plane and rooftop landscaped areas compared to existing.</p> <p>The proposed development also complies with the relevant landscaping requirements in the ADG/DCP, including exceeding the minimum 1:1 landscape replacement ratio and the 25% tree canopy coverage, which are both DCP requirements. Additionally, the proposal complies with the ADG's 7% deep soil requirement, by providing a total of 9.42% deep soil.</p>
<p>(c) to minimise overshadowing of, and loss of privacy to, neighbouring properties,</p>	<p><b>Privacy to neighbouring properties</b></p> <p>The proposed variation is entirely associated with the wintergardens along the western elevation. To the west of the wintergardens is a train line and public recreation area. Therefore, having wintergardens along this interface will not impact the privacy of any neighbouring dwellings.</p> <p>Additionally, the wintergardens are proposed to enclose a balcony area only, to accommodate acoustic attenuation and amenity for future occupants. Having an enclosed wintergarden (rather than an open balcony) offers additional privacy opportunities.</p> <p><b>Solar access to adjoining sites</b></p>



As outlined in Figure 5, from 9am mid-winter, there is some shadowing to the front yards of the dwellings south of the site. This area is planned to be redeveloped to accommodate a new school and its open space areas. By 12pm, the shadowing is still limited to the immediate frontage of the existing dwellings (refer to Figure 6). By 3pm, the shadowing is generally limited to the existing industrial buildings to the east, which are expected to be redeveloped to accommodate high-density residential uses. The proposed development will not restrict these dwellings achieving compliance with the ADG's solar guidelines, as the proposed development only casts shadows in the afternoon period (with no shadowing prior to 12pm).

The proposed wintergardens on the western façade will not result in any discernible additional shadow cast to the land surrounding the site compared to open balconies on that frontage/elevation.

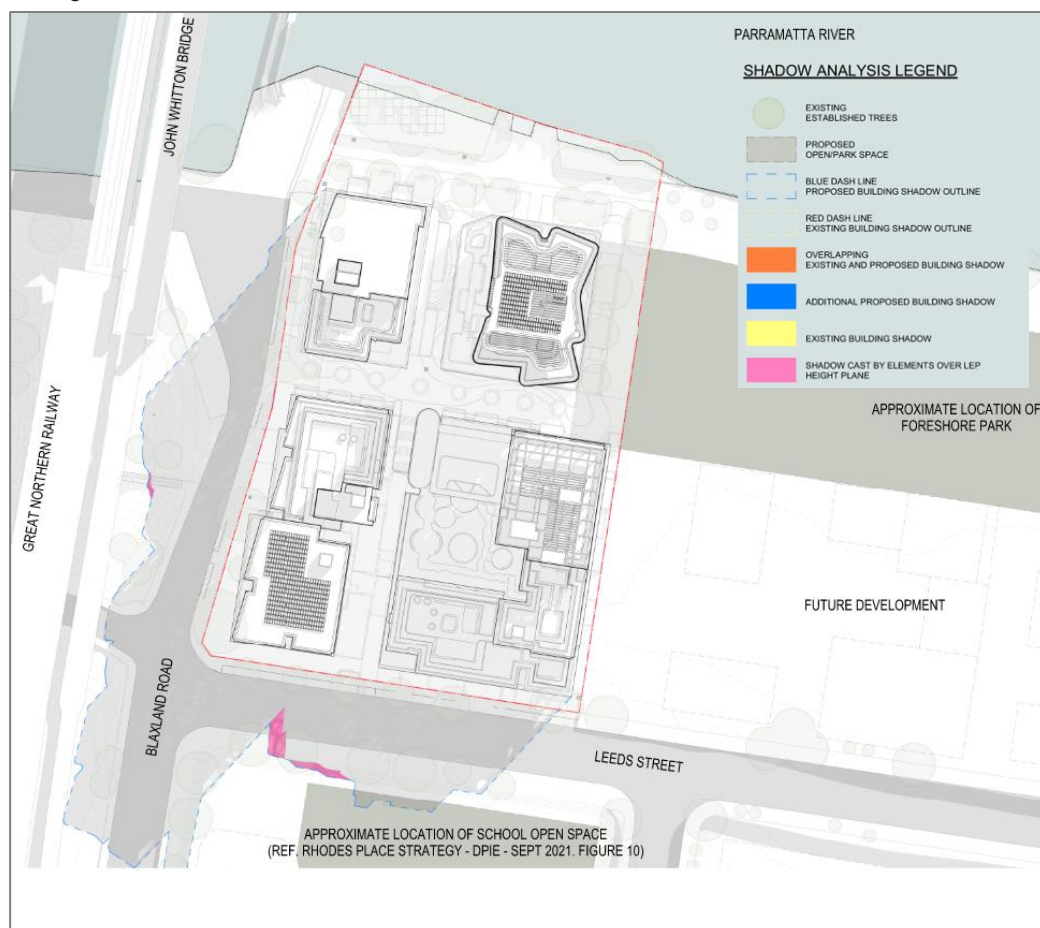
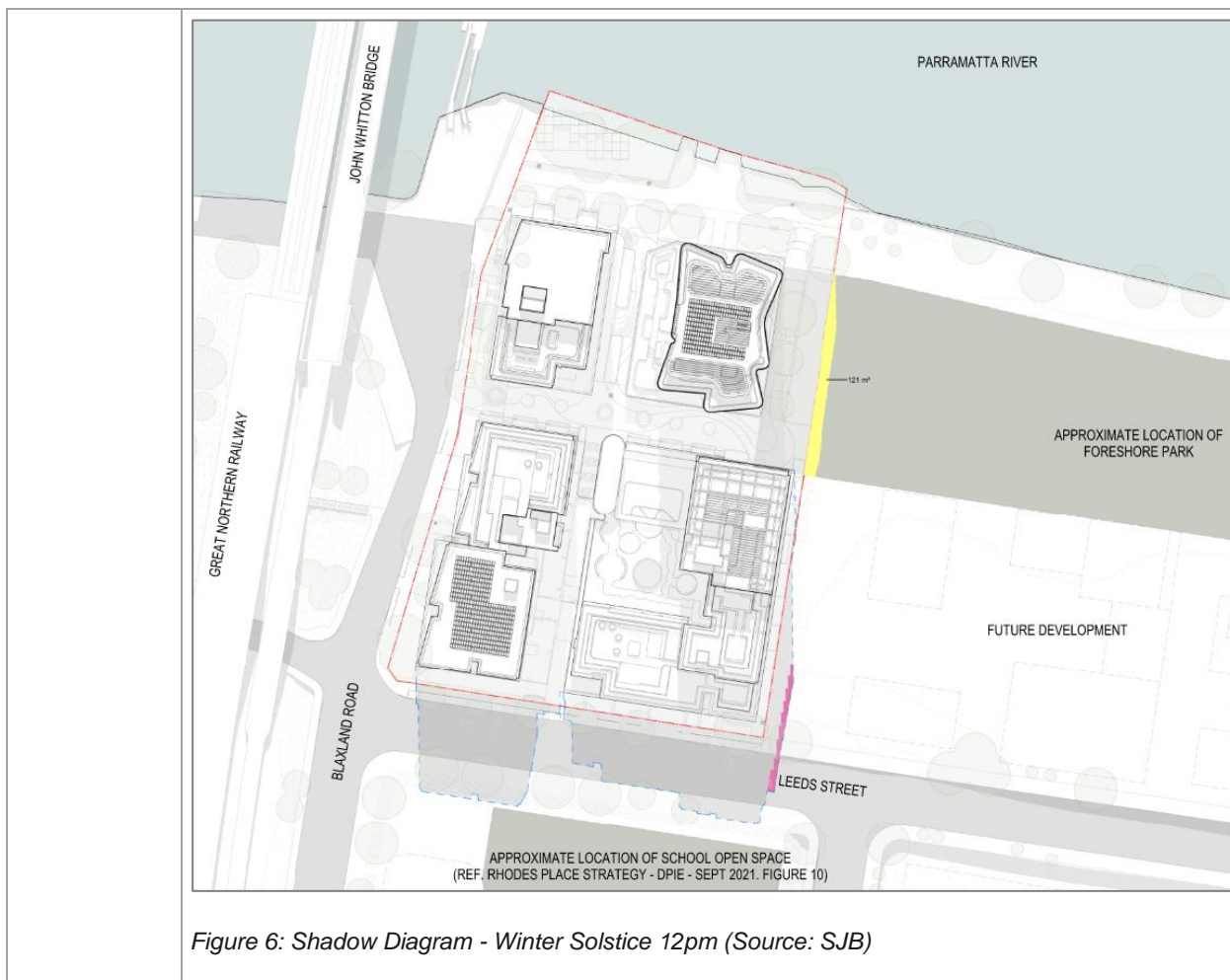


Figure 5: Shadow Diagram - Winter Solstice 9am (Source: SJB)



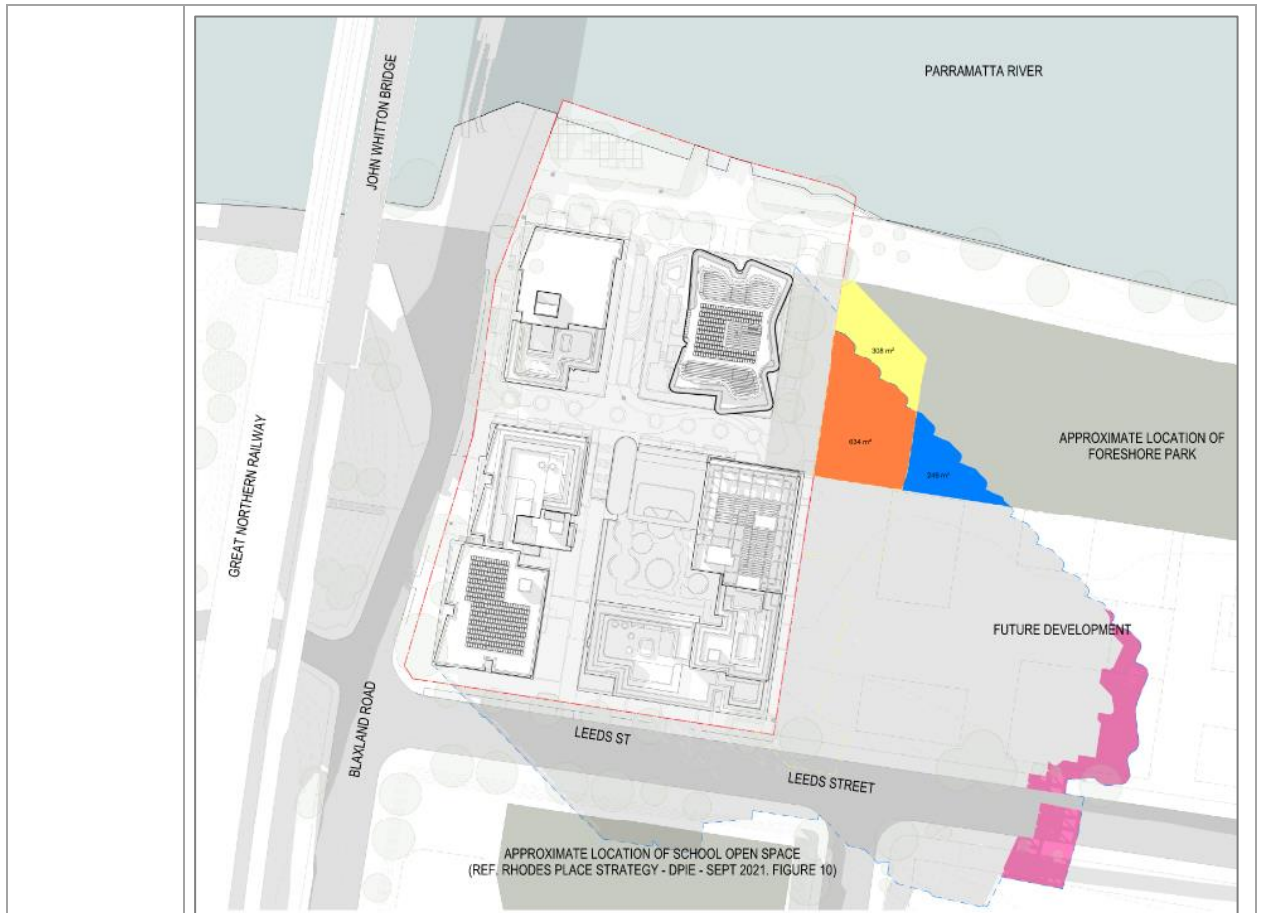
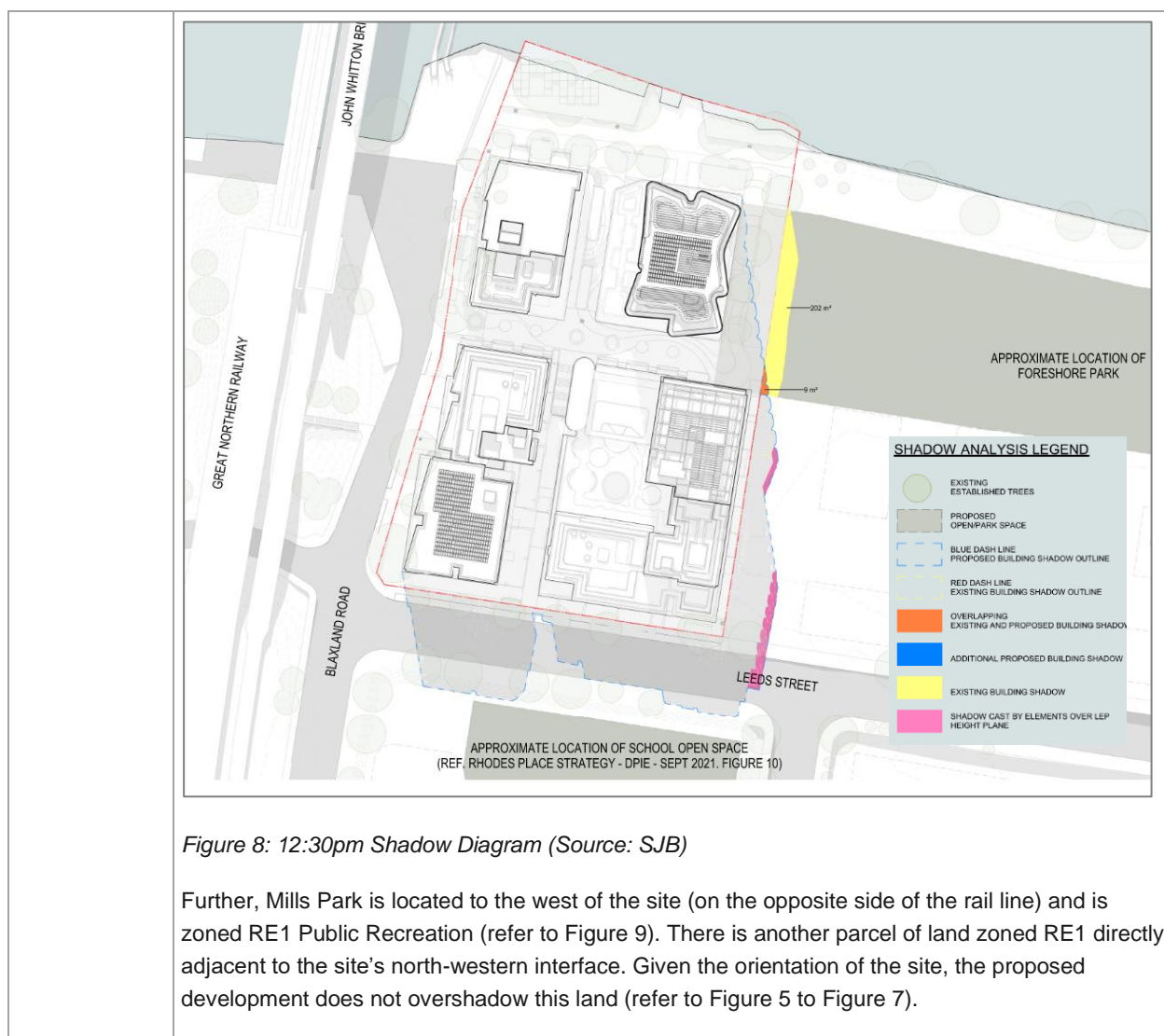


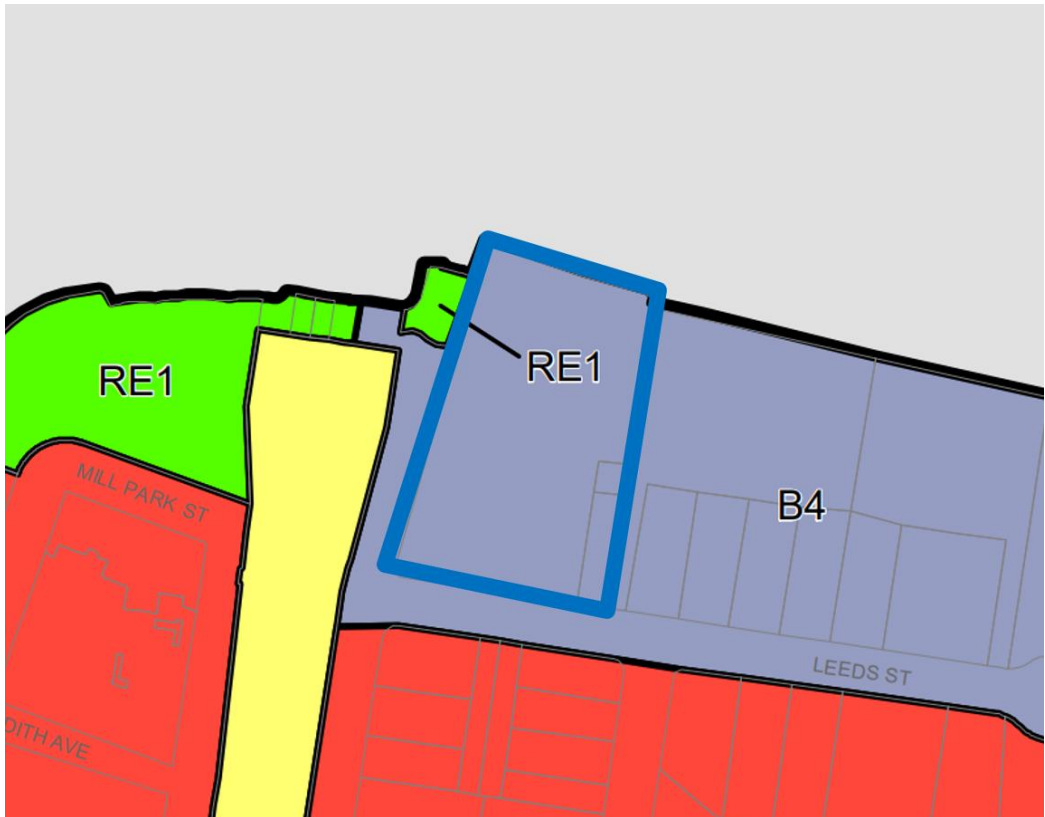
Figure 7: Shadow Diagram - Winter Solstice 3pm (Source: SJB)

(d) to maximise solar access and amenity for public places,

The future Leeds Street Open space is located within the subject site and continues to the east along the waterfront. The proposal, notwithstanding the variation to the FSR standard, complies with the shadow controls under Clause 7.3 of the CBLEP. Specifically, the proposal does not result in any additional overshadowing of the Leeds Street Open Space between 8:30am and 12:30pm and will not cause overshadowing of more than half of Leeds Street Open Space between 12:30pm and 3pm. Refer to the 12:30pm shadow diagram below.





	 <p>Figure 9: Land Zoning Map, site outlined blue (Source: NSW Legislation)</p>
<p>(e) to manage the visual impact of development when viewed from public places, including the Parramatta River.</p>	<p>The proposed variation is entirely associated with enclosing the balconies, creating wintergardens, along the site's western elevation. The variation does not result in any additional habitable or non-habitable floorspace. Therefore, the proposed wintergardens will not have any additional view impact when viewed from the public domain.</p> <p>The variation relates to one aspect of the much broader development proposal, comprising multiple buildings. There will be some additional façade structure/detailing to provide acoustic attenuation to the balconies/wintergardens along the western facade, but in the context of the broader development of the site, this is not envisaged to be visually perceptible, particularly at street level and when viewed from the nearby river.</p>

As demonstrated, the objectives of the FSR development standard (in clause 4.4(1) of the CBLEP) are achieved notwithstanding the proposed contravention.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA

170; [2018] NSWCA 245, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the FSR development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

- 4.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

- 4.3. The objective would be defeated or thwarted (undermined) if compliance was required with the consequence that compliance is unreasonable

This test is not relied upon.

- 4.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary

The standard has not been abandoned by Council actions in this case and so this reason is not relied upon.

- 4.5. The zoning of the land is unreasonable or inappropriate

The zoning of the land is reasonable and appropriate and therefore is not relied upon.

- 4.6. Other grounds

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the FSR development standard is demonstrated to be unreasonable or unnecessary and the requirements of Clause 4.6 have been met on the first way alone.

## 5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In this section it is demonstrated that there are sufficient environmental planning grounds to justify contravening the FSR development standard as required by clause 4.6 of the CBLEP

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning grounds to justify the contravention of the FSR development standard are set out below. As discussed above, the FSR variation does not result in any overall adverse environmental impact and instead provides a built form that achieves the desired future character for the area for the area, improved acoustic residential amenity for the development to respond to the site's constraints and is consistent with the objectives of Clause 4.4.

The relevant environmental grounds and the statutory planning goals achieved are as follows:

- It would be possible, but less desirable in planning terms (when compared to the proposed development) to develop the building that complies with the maximum permitted GFA for the site inclusive of the BASIX bonus. The proposed additional GFA and building mass is entirely attributed to ensuring the private open space areas within the western extent/façade of the development achieve an appropriate level of acoustic amenity. That is, acoustic amenity that is otherwise compromised by the proximity of those apartments and their private open space to the nearby railway line.
  - in the *Environmental Planning and Assessment Act 1979* (EP&A Act) – the objective in section 1.3(c) to '*promote the orderly and economic use and development of land*'.
- The built form of a compliant scheme would result in an inferior outcome including poor amenity of the private open space for the apartments within the western façade of the proposed development. The development, notwithstanding non-compliance with the FSR development standard, is an orderly and economic use and development of the land but also promotes good design and amenity of the built environment. The design of the wintergardens achieves the functional intent of a balcony and adequate amenity.

The proximity of the railway line to the west of the site presents a challenge in terms of creating acoustically comfortable spaces for the apartments on Blaxland Road, particularly for the balconies. Blocks to the west are turned slightly towards the views whilst creating angles of deflection to mitigate noise from the existing rail line.

In addition to this, a combination of double glazing and enclosed balconies are provided for acoustic attenuation.

All balconies are separated from the living spaces by glass sliding doors. The enclosed balconies have been designed to incorporate operable double stacked glazed sliding doors at the facade so that two thirds can be opened.

The design of the proposed wintergardens is illustrated in Figure 10.



Figure 10: Wintergarden design (Source: SJB)

This achieves key objects of the EP&A Act as below:

- in the EP&A Act - the objective in section 1.3(c) as quoted above, and section 1.3(g) to '*promote good design and amenity of the built environment*'.
- The contravention of the standard does not result in any material adverse environmental impacts to adjoining properties, and the proposal has been designed to respond to the future built form character of the area. From a visual, view and solar perspective, there is no extra impact from the additional GFA on the western elevation. This is because it is effectively an additional façade detailing over the balconies. The overall building envelopes would not change if the acoustic attenuation, and inherent FSR variation, were not required. The inclusion of the proposed wintergardens in the GFA calculation for the development does not conflict or undermine the desired future character for the broader locality. This promotes the sustainable management of built form and achieves the key objects below:
  - in the EP&A Act - the objective in section 1.3(e) to '*protect the environment*' and (f) to '*promote the sustainable management of built and cultural heritage*'; and

- in the CBLEP – the objective in clause 4.4 (1)(a) to *‘to ensure that buildings are compatible with the bulk, scale, streetscape and desired future character of the locality’*.
- The proposal promotes good design and amenity of the built environment, as endorsed by the Design Integrity Panel (DIP) that reviewed the proposal post-Architectural Design Competition. This results in improved urban design and amenity considerations for both the local community and future occupants of the building. This achieves key objects below:
  - in the EP&A Act - the object in section 1.3(g) as quoted above.
- The perceived building mass is not increased as a result of the provision of winter gardens instead of balconies. The variation relates to one aspect (being the wintergardens) of the much broader development, comprising multiple proposed buildings. There will be some additional façade structure/detailing to provide acoustic attenuation to the balconies/wintergardens, but in the context of the broader development of the site, this is not envisaged to be visually perceptible, particularly at street level and when viewed from the nearby river. This is consistent with the key objectives below:
  - in the EP&A Act - the objective in section 1.3(c) as quoted above; and
  - in the CBLEP – the objective in clause 4.4(1)(e) to *“to manage the visual impact of development when viewed from public places, including the Parramatta River”*.
- The portion of the development that contravenes the FSR development standard will not impact on any of the following:

Table 3: Potential Impacts

Potential Impact	Discussion
<b>Views</b>	The proposed variation is entirely associated with the wintergardens along the western elevation. To the west of the wintergardens is a train line and public recreation area. Therefore, having wintergardens along this interface will not impact views to or from any neighbouring dwellings. When considering views from the nearby public domain it is important to note that the enclosure of the balconies is similar to the introduction of privacy screens to part of a balcony. In the context of the wider development, the proposed wintergardens on one façade will not result in any unreasonable view impacts.
<b>Solar access (to the apartments on the site, adjoining sites and public spaces)</b>	<p><b>Solar access to apartment on the site</b></p> <p>The proposed development achieves 71% (177 apartments) solar access mid-winter as required by the ADG. All apartments from Level 4 and above, along the western elevation (where the FSR variation is proposed), achieve at least 2 hours of solar access in mid-winter. Levels 1-3, along the western elevation, do not achieve full compliance, given the location of existing buildings, which limits the amount of solar access.</p> <p><b>Solar access to adjoining sites</b></p> <p>Refer to Table 2.</p> <p><b>Solar access to public open space</b></p> <p>Refer to Table 2.</p>



Potential Impact	Discussion
<b>Bulk and scale</b>	The proposed variation is entirely associated with enclosing balconies, creating wintergardens, along the site's western elevation. The variation does not result in any additional habitable or non-habitable floorspace. There is no extra impact from the additional GFA on the western elevation. This is because it is effectively additional façade detailing over the balconies. The overall building envelopes would not change if the acoustic attenuation, and associated FSR variation, were not required. Therefore, the proposed wintergardens will not result in any additional bulk or scale impacts when viewed from the public domain.
<b>Acoustic</b>	<p>A Noise and Vibration Impact Assessment has been prepared by E-Lab Consulting. The Assessment states that:</p> <p><i>"the design has implemented the winter garden / enclosed balcony solution shown in Figure F3.5 of the DCP to protect building users from negative impacts associated from the nearby rail corridor. In addition to this, the SEPP Infrastructure 2021 and the Department of Planning Development Near Rail Corridors and Busy Roads Interim Guideline 2008 recommends the use of enclosed balconies (or winter gardens) as an effective means of reducing noise entering a building. By installing acoustic louvres ventilation requirements and reduced noise can be addressed. The western façade of the building B and C is most noise affected facade from the adjacent railway line. Therefore, winter gardens are recommended to provide further attenuation to reduce railway noise to the apartment areas to meet objective O1 of the City of Canada Bay's DCP 2022 (Part F), the recommendations of SEPP Infrastructure 2021, the Department of Planning Development Near Rail Corridors Interim Guideline 2008, and the recommendations of ADG Part 4J."</i></p> <p>The proposed design has included this recommendation, incorporating wintergardens along its western elevation. Subject to complying with the assessment's other recommendations, <i>"the proposed development is compliant with the relevant noise and vibration criteria controls for this type of development"</i>.</p>
<b>Ventilation</b>	The proposed development achieves 62% cross ventilation and therefore, inclusion of wintergardens does not restrict the ability for the proposal to comply with minimum ADG cross-ventilation requirements.
<b>Visual amenity / design outcome</b>	<p>As detailed in the Endorsed Jury Report (dated 14 September 2022), of the three schemes presented, the SJB scheme was determined by the Jury to be the most convincing response to the contextual fit, planning, design and commercial objectives of the brief and was selected as the preferred scheme.</p> <p>Two Design Integrity Panel (DIP) meetings were held on 3rd and 25th where the DIP endorsed the wintergarden outcome along the development's western elevation.</p>

- Strict compliance with the FSR development standard would not result in a better outcome for development. It would result in poor acoustic amenity for the affected apartments. The alternative outcome would necessitate the

removal of GFA elsewhere from the site. This would be considered unreasonable and punitive, particularly given the need for Billbergia to embellish the foreshore park. It would therefore unnecessarily complicate orderly and economic development of the land in accordance with the intentions of the zoning and the objectives of the Environmental Planning and Assessment Act 1979.

For completeness we note that the size of a variation is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6: *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85].

Some examples that illustrate the wide range of commonplace numerical variation to development standards under clause 4.6 (as it appears in the Standard Instrument) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003 the Land and Environment Court granted a development consent for a three storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187 per cent.
- In *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583 the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75 per cent (2.63:1 compared to the permitted 1.5:1).
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 the Court granted development consent to a six-storey shop top housing development with a floor space ratio exceedance of 42 per cent (3.54:1 compared to the permitted 2.5:1).
- In *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555 the Court granted development consent for a three storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27 per cent (1.27:1 compared to the permitted 1.0:1).
- In *Stellar Hurstville Pty Ltd v Georges River Council* [2019] NSWLEC 1143 the Land and Environment Court granted development consent for 12-storey residential tower, on the basis of a clause 4.6 request, with a floor space ratio exceedance of 8.3 per cent.
- In *88 Bay Street Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1369 the Land and Environment Court granted development consent for a new dwelling house, swimming pool and landscaping at 6 Bayview Hill Road, Rose Bay with a height exceedance of 49 per cent (14.16m compared to the permitted 9.5m).

The variation in the circumstances of this case is minor, at 3.93%. The variation is much less than many of those examples provided above.

In short, Clause 4.6 is a performance-based control so it is possible (and not uncommon) for variations to be approved in the right circumstances, including the circumstances of this case.

For the reasons contained in this application, there are sufficient environmental planning grounds to justify the variation to the development standard, as required in Clause 4.6(3)(b). We therefore consider contravening the development standard to be justified.



## 6. PUBLIC INTEREST

In this section it is explained how the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out. This is required by Clause 4.6(4)(a)(ii) of the CBLEP.

In Section 4 it was demonstrated that the proposed development achieves the objectives of the development standard notwithstanding the contravention of the development standard. This must also mean that the development is consistent with those standards. The table below considers whether the proposal is also consistent with the objectives of the zone.

*Table 4: Consistency with MU1 Zone Objectives.*

OBJECTIVES OF THE MU1 MIXED USE ZONE	DISCUSSION
To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.	The proposed development incorporates a diversity of land uses, including 26,098sqm of residential floorspace (inclusive of wintergardens) and 3,275sqm of retail floorspace which will be used by the community and generate employment opportunities. The wintergardens and associated FSR variation in no way restricts the ability for the development to be consistent with this objective.
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.	The proposed development incorporates a mix of different land uses, including retail and residential. The proposed uses at ground floor level will activate the precinct. The wintergardens and associated FSR variation in no way restricts the ability for the development to be consistent with this objective.
To minimise conflict between land uses within this zone and land uses within adjoining zones.	The proposal provides a built form and massing which is considered to positively contribute to the quality and transitioning identity of the locality. The proposed development is compatible with the existing built form in redeveloped parts of Rhodes, as well as the future built form of the neighbouring sites which are zoned for mixed use pursuant to the CBLEP and DCP. The wintergardens and associated FSR variation in no way restricts the ability for the development to be consistent with this objective.
To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.	Building A, B, E and F comprise of non-residential uses at the ground floor in the form of retail premises which will activate the precinct. The wintergardens and associated FSR variation in no way restricts the ability for the development to be consistent with this objective.

As demonstrated in Table 4, the proposal is consistent with the objectives of the zone and in Section 6 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

## 7. STATE OR REGIONAL ENVIRONMENTAL PLANNING AND ASSUMED CONCURRENCE

This section considers whether the contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome which would be prejudicial to planning matters of State or regional significance that would result as a consequence of contravening the development standard as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

The Secretary (of Department of Planning, Industry and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 20–002 'Variations to development standards', dated 5 May 2020. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given. The circular provides for assumed concurrence.

The Secretary can be assumed to have given concurrence to the variation, provided that the determination is not made by a delegate of the Council. (It should be noted that a panel and the Land and Environment Court are not delegates of the Council).

## 8. CONCLUSION

This submission requests a variation, under Clause 4.6 of the CBLEP, to the FSR development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard (Test 1 under Wehbe) and is consistent with the objectives of the MU1 Mixed Use Zone;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

The consent authority can be satisfied to the above and that the development achieves the objectives of the development standard and is consistent with the objectives of MU1 Mixed Use zone notwithstanding non-compliance with the FSR development standard and is therefore in the public interest.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 20-002.

On this basis, therefore, it is appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.