



## Clause 4.6 Variation

Clause 16 of the Housing SEPP &  
Clause 4.3 of Randwick LEP 2012  
Amending Concept DA | 11 Jennifer Street, Little Bay

Prepared for Jennifer St Developments Pty Ltd



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# Executive Summary

Clause 4.6 of the Randwick 2012 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*.

<b>What is the variation?</b>	<p>The Concept DA approval had a maximum building height of 4 storeys plus roof terrace at 14.85m, which varied the 9.5m height limit in Clause 4.3 of Randwick LEP 2012 by 5.35m (56.3%). In order to incorporate the Infill Affordable Housing FSR bonus and associated 15% affordable housing on site under the Housing SEPP it is proposed to increase the height of the development to a consistent 4 storeys with rooftop communal areas across the site. This results in a maximum building height of 15.85m, which is a 3.5m variation (28.34%) above Clause 16 of the Housing SEPP which provides for a 30% bonus height of up to 12.35m. For abundant caution this Clause 4.6 also seeks to vary Clause 4.3 of the Randwick LEP, which is a 6.35m variation.</p> <p>Whilst the variation to the 9.5m standard presents as numerically high, the variation relative to the increased height under the Housing SEPP is only 28.34%, and whilst the proposed height is increasing, the extent of variation to the maximum control is actually substantially less than that already approved by the court (56.3%) and results in a variation above the Housing SEPP bonus height (3.5m) that is smaller than the approved variation above the LEP (5.35m).</p>
<b>Why is compliance with the building height development standard is unreasonable and unnecessary in the circumstances of the case?</b>	<p>The proposal achieves the objectives of the Height of Buildings standard, notwithstanding the non-compliance as:</p> <ul style="list-style-type: none"><li>• the size and scale of development is compatible with the desired future character of the locality,</li><li>• the development is compatible with the scale and character of the nearby conservation areas, and</li><li>• the development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.</li></ul> <p>It also directly achieves the objective of the In-fill Affordable Housing standard which is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households which will not otherwise occur if the standard is not varied.</p>
<b>What are the sufficient environmental planning grounds to justify contravention of the development standard?</b>	<p>The environmental planning grounds to justify contravention of the Height of Buildings standard are:</p> <ul style="list-style-type: none"><li>• As part of the previous approval, the Court determined that there are sufficient environmental planning grounds to vary the standard. Specifically, the height variation:<ul style="list-style-type: none"><li>– responds to the ecological constraints and allows for the retention of a significant area of vegetation whilst still achieving the desired density;</li><li>– allows for the retention of the important public view corridor from Reservoir Street through the site to the sea;</li><li>– enables the provision of rooftop communal space that provides supreme amenity for future occupants given the locational attributes of the site and area.</li></ul></li><li>• Have regards to the specific proposal, the variation provides the GFA necessary to deliver 15% of the development for affordable housing (approximately 15 new affordable dwellings) in a manner consistent with the principles in the Housing SEPP, which allows for a relaxation in the maximum height controls to incentivise delivery of affordable housing during a housing crisis. If the variation proposed to the standard is not supported then it will result in the proponent developing the existing approved DA, that already significantly exceeds the height limit, with no affordable housing.</li></ul> <p><b>In light of the above that the consent authority can be satisfied that there are sufficient grounds to support the proposed variation.</b></p>

# 1.0 The Development Site

## 1.1 About the Site

 Address	11-27 Jennifer Street, Little Bay
 Legal Description	Lot 11 in DP 1237484
 Site Area	11,610m <sup>2</sup>
 Owner	Jennifer St Developments Pty Ltd

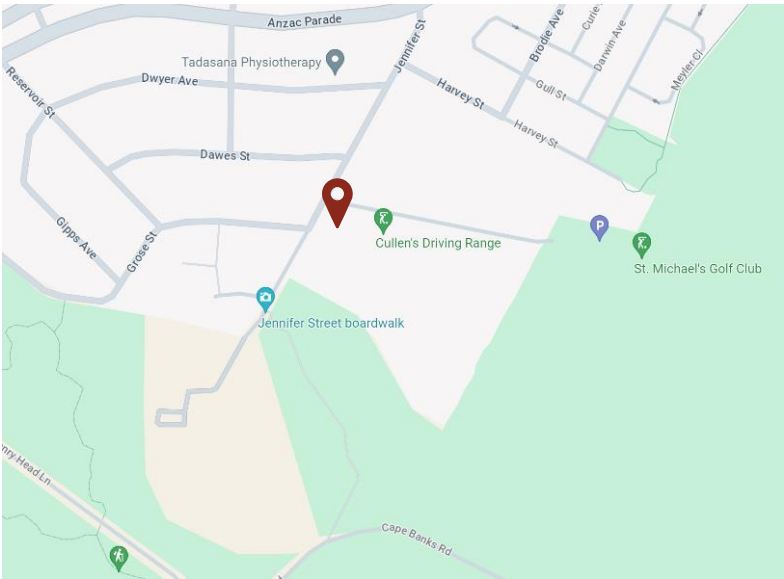


Figure 1 Location Plan



Figure 2 Aerial Photo



## Key Information about the Site

The site is currently vacant and contains a cleared area (see **Figure 3**) in accordance with DA580/2022 and an area of native vegetation (see **Figure 4**), specifically Eastern Suburbs Banksia Shrub (ESBS) which is identified as a Critically Endangered Ecological Community (CEEC) in the Sydney Basin Bioregion.



Existing  
Development



**Figure 3** View of the cleared northern part of the site



**Figure 4** View of the southern vegetated part of the site

## 2.0 The Proposed Development

This Amending Concept DA seeks to amend the approved residential flat building development (DA698/2020), through:

- Providing 15% affordable housing through increasing the total approved GFA from 8,131m<sup>2</sup> to 11,322m<sup>2</sup>.
- Accommodating the additional GFA through:
  - adding an additional level to the 3 storey parts of the buildings to provide a consistent 4 storey form with communal roof terrace above, resulting in an increase in the overall building height from RL63.2 up to RL65.25.
  - consolidating the two northern buildings into a single building.
- Addition of a half basement level.
- General refinement of the building envelope footprint to reflect the approved detailed DA (DA580/2022).

No change is proposed to the following key elements approved in the Concept DA:

- The northern and southern portions of the site being divided by a 2m wide, fenced (bushfire) defensible zone (equivalent to an asset protection zone, APZ, as described in the plans);
- Establishment of a biodiversity 'conservation area' with native vegetation of 5,069.8m<sup>2</sup>, located across the southern portion of the site; and
- The approved tree removal, native vegetation maintenance, species relocation, landscaping and associated works through bushland management practice.

This DA is supported by Architectural drawings and a Design Statement prepared by Hill Thalys and an updated Landscape Design Concept prepared by Turf Studio.

### Key Numbers

Component	Approved Concept DA	Amending Concept DA (RFI Amendments based on lodged DA)	Change from Approved (RFI Amendments based on lodged DA)
GFA	8,131m <sup>2</sup>	11,322m <sup>2</sup>	+ 3,191m <sup>2</sup>
FSR	0.7:1	0.975:1	0.275:1 (30%)
Maximum Height	4 Storeys RL 63.2	4 Storeys RL 65.25 (-1.15)	No change + 2.05m (-1.15m)
Setbacks <ul style="list-style-type: none"> <li>• North</li> <li>• South</li> <li>• East</li> <li>• West</li> </ul>	4m 43m 4m 3m	4m 43m 4m 3m	No change
Indicative Apartments	83 apartments Note: 75 were ultimately approved in the detailed DA	94 apartments (-4)	19 apartments (-4)
Indicative Affordable Apartments	0 apartments	15 apartments	+15 affordable apartments
Indicative Car Parking	139 car spaces	155 car spaces	+ 16 spaces
Landscaped Area	8,019.5m <sup>2</sup> (69%)	7,729m <sup>2</sup> (67%)	- 290m <sup>2</sup>
Communal Open Space	2,951.9 (25%)	3,321.8 (28.6%)	+ 369.9m <sup>2</sup>
Deep Soil Area	6,008.9 (52%)	6,346 (54%)	+ 337m <sup>2</sup>

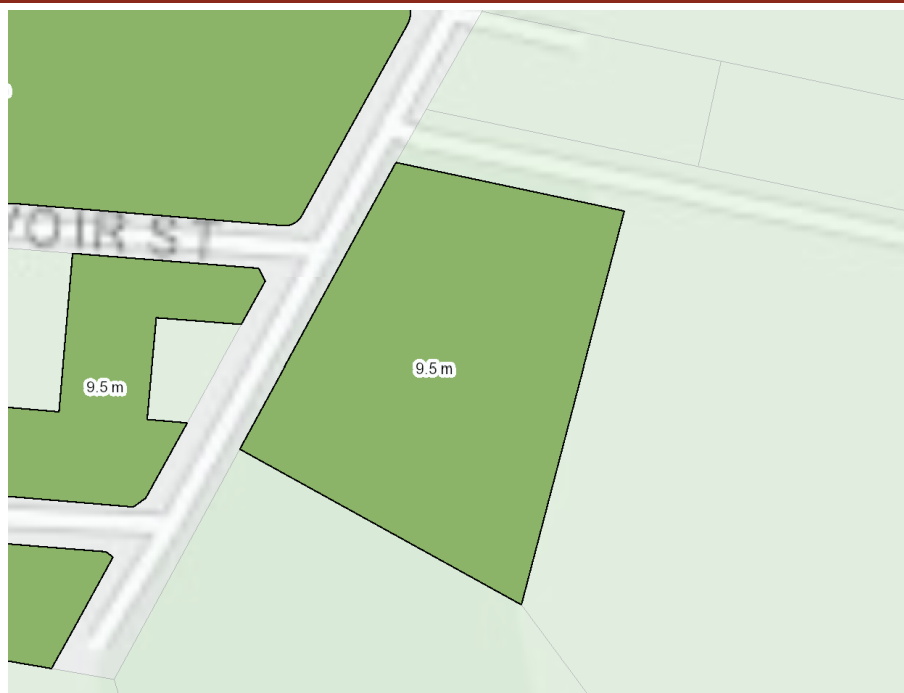
## 3.0 The Proposed Variation

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

**Table 1** Planning instrument, development standard and the proposed variation

Matter	Comment
<b>Environmental planning instrument sought to be varied</b>	State Environmental Planning Policy (Housing) 2021 & Randwick Local Environmental Plan 2012 (LEP 2012)
<b>The site's zoning</b>	<p>R3 Medium Density Residential</p> <p>The objectives of this land use zone are:</p> <ul style="list-style-type: none"> <li>• To provide for the housing needs of the community within a medium density residential environment.</li> <li>• To provide a variety of housing types within a medium density residential environment.</li> <li>• To enable other land uses that provide facilities or services to meet the day to day needs of residents.</li> <li>• To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area.</li> <li>• To protect the amenity of residents.</li> <li>• To encourage housing affordability.</li> <li>• To enable small-scale business uses in existing commercial buildings.</li> </ul>
<b>SEPP Development standard sought to be varied</b>	<p>Clause 16 Affordable housing requirements for additional floor space ratio</p> <p>The clause does not have a specific objective but the objective of the division is "to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households."</p> <p>The clause provides for development to exceed the maximum permitted height under the LEP by 30%, being <b>12.35m</b>.</p>
<b>LEP Development standard sought to be varied</b>	<p>Clause 4.3 Height of Buildings</p> <p>The objectives of this clause are:</p> <ol style="list-style-type: none"> <li>to ensure that the size and scale of development is compatible with the desired future character of the locality,</li> <li>to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,</li> <li>to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.</li> </ol> <p>The maximum height of buildings standard is <b>9.5m</b> (refer to <b>Figure 5</b>).</p>





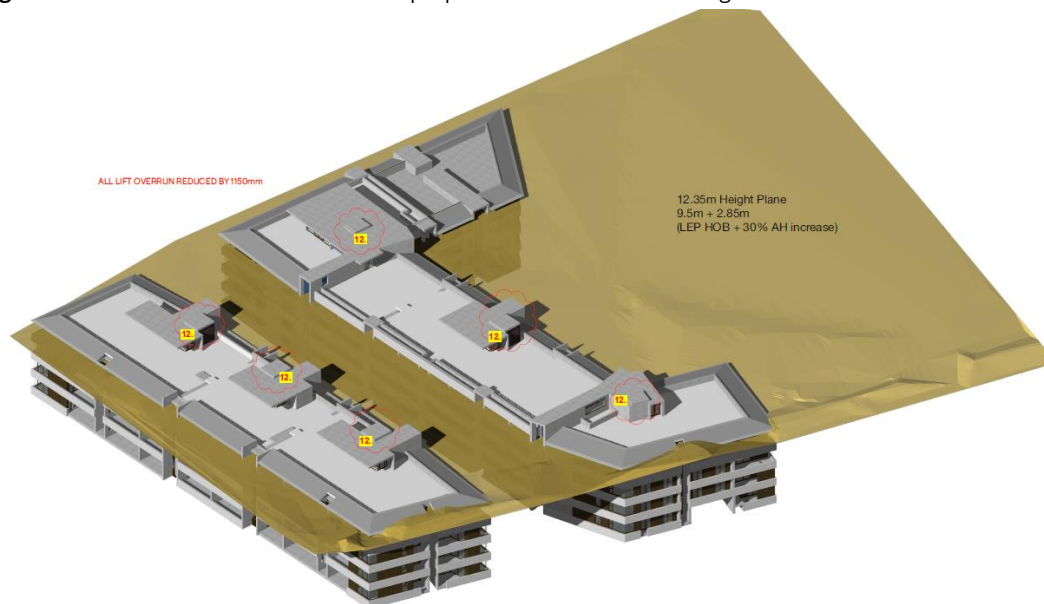
**Figure 5** Height of Buildings Map

### The proposed Variation

The proposed development has a maximum height of 17m, which is a **3.5m** variation to the Housing SEPP development standard and **6.35m variation** to the LEP development standard.

By virtue of the existing approval on the site for a 14.85m building, the proposal, which seeks to deliver the 15% affordable housing bonus within the site, necessitates a further 2.05m variation to the existing approval. This results in a variation above the Housing SEPP bonus height of 3.5m, which is smaller than the approved variation of 5.35m.

**Figure 6** below illustrates the extent of the proposal above 12.35m Housing SEPP Bonus.



**Figure 6** The proposal compared to the 12.35m height plane

## 4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the LEP 2012 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.

### 4.1 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 height control pursuant to the 'First Method' outlined in Wehbe.

The discussion under the following subheadings demonstrates how the proposed height variation achieves the objectives of the Height of Building development standard notwithstanding the non-compliance.

#### Objective 4.3(a) To ensure that the size and scale of development is compatible with the desired future character of the locality

The Little Bay area has transformed over recent decades with the very successful redevelopment of the former Prince Henry Hospital site and the early stages of Little Bay Cove to its immediate north (see **Figure 7**). As identified in the Design Statement (see **Figures 7** and **8**) the scale and character of the local area is diverse with older 1 and 2 storey houses rapidly being extended or replaced by much larger houses and new duplexes to the west, and new buildings with heights of between 3 and 6 storeys to the north. The recent developments to the north demonstrate in the immediate precinct how midrise 4-6 storey buildings can successfully relate to 1-2 storey forms in the same street, particularly through the use of landscape setbacks.

A study of similar conditions where R2 low density areas interface with 4-6 story apartments in the Randwick LGA has also been provided as part of the Architectural Package which demonstrates that the scale proposed can coexist in harmony with established low density areas and is common place in the Randwick and in particular along the coastline.

When considering the public interest as part of the Concept DA, Commissioner Bish concluded that the proposal, which included a 4 storey component and a 58% height variation:

*"does not pose adverse amenity impacts to residents or the surrounding area; **it complements the existing natural habitat and character of the local area**; and it protects/supports the sensitive surrounding natural habitat, specifically ecologically endangered communities."*

In considering the Clause 4.6, Commission Bish made the further conclusion:

*The height non-compliance, as conceptualised, is not inconsistent with what is envisaged in an R3 zone and I assess that **the breach is not incompatible with the character of the local area**, whilst acknowledging that the immediate surrounding area is predominantly low-density residential development with substantial areas of native vegetation.*

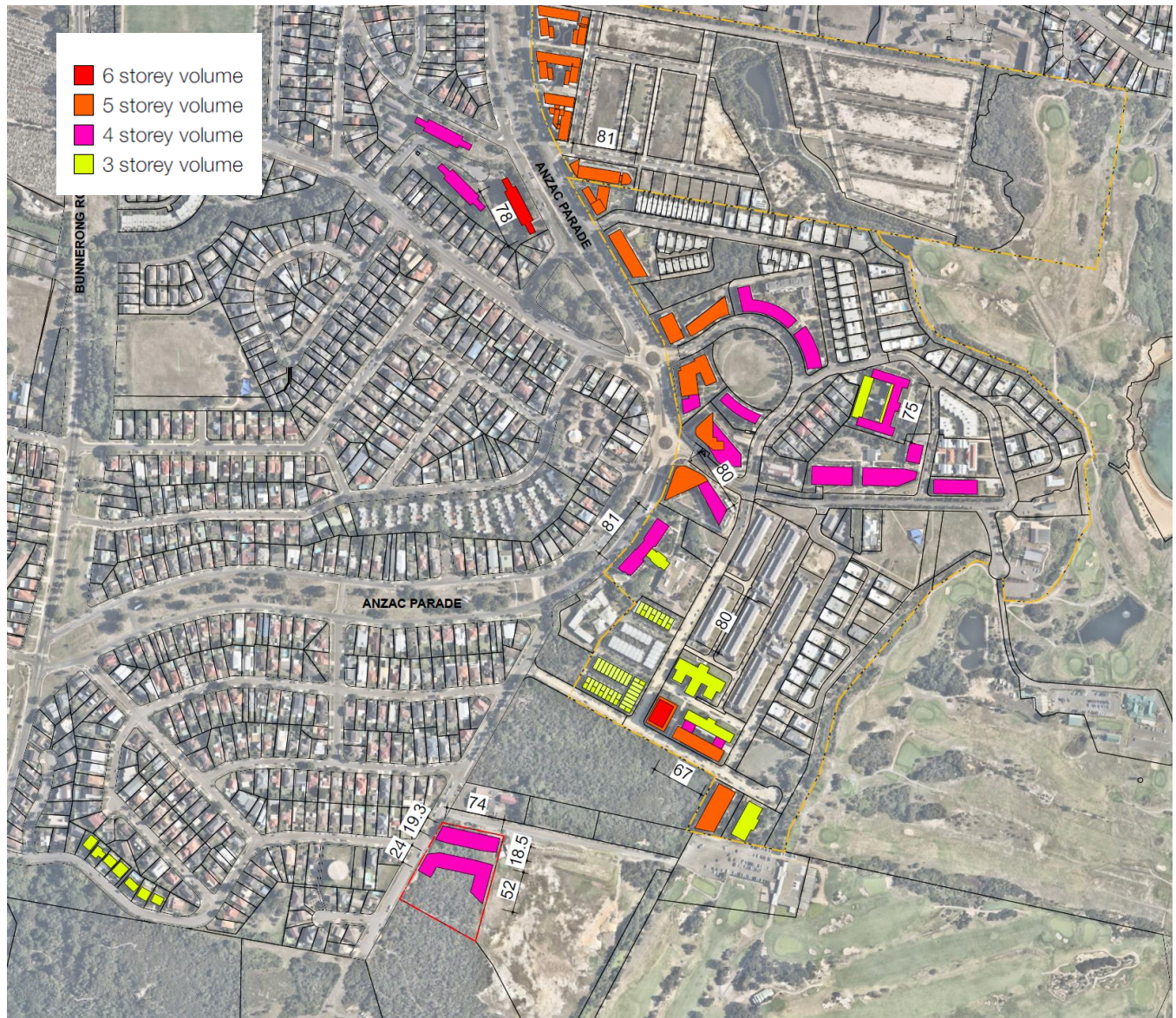
This Amending DA does not change the fundamental aspects of the approved Concept DA which was determined in the Land and Environment Court to 'complement the existing natural habitat and character of the local area', specifically:

- The amendment to apply 4 storeys consistently across the site, which is a scale that is already approved on the site, still results in a development that is consistent with the scale and desired future character of the precinct.



- The consolidation of the two northern buildings into one is consistent with the length of buildings already approved on the site and in the precinct (see **Figure 8**).

Therefore this objective is still being achieved notwithstanding the further variation proposed because the size and scale of development is compatible with the desired future character of the locality.



**Figure 7** Built Form Footprint and Height Analysis

Source: Hill Thalís





**Figure 8** Interface Analysis

Source: Hill Thalys

**Objective 4.3(b) To ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item**

The site itself is not listed as a heritage conservation area, however, the impact of the proposed height on heritage was a contention during the Concept DA proceedings, on the basis of the potential impacts on the surrounding heritage conservation areas, namely the Kamay Botany Bay National Park Conservation Area (listed C5 in Schedule 5 of the RLEP) and Prince Henry Hospital Conservation Area (listed C6 in Schedule 5 of the RLEP).

In her judgement, Commissioner Bish concluded the following in relation to heritage

*I did not perceive that the visibility of the upper levels of the future RFB, as positioned on the site, would likely have an adverse impact to the view or setting. This is due to the significant separation of the building envelope from the National Park across the proposed biodiversity conservation area, and its positioning on the site. There is an extensive and expansive depth/height of native vegetation between the conceptual building and within the National Park. I also consider that the view (northward) from the National Park is generally towards an existing urban streetscape. A person standing in the National Park would unlikely find the screened view of the upper stories of a future building on the site as unexpected or out of visual place. I am satisfied there is no adverse impact to the setting, view or fabric of the National Park Conservation Area.*

An updated Heritage Impact Statement has been prepared by Weir Philips. Whilst visible from the National Park in certain locations, the application of 4 storeys plus roof terrace consistently across the site does not change any of the original conclusions of Bish regarding the extent of impact or the appropriateness of being able to see an urban streetscape to the north from the national park.

Therefore this objective is still being achieved notwithstanding the further variation proposed because the development is compatible with the scale and character of the nearby conservation areas.

Objective 4.3(c) To ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.

#### Visual bulk

The proposed development does not have any immediate residential neighbours who would be directly impacted by the visual bulk of the development. At 4 storeys with generous landscape setbacks the building is considered to sit comfortably in the landscape, and as discussed above, complements the existing natural habitat and character of the local area which has a number of buildings of a similar scale and visual bulk.

#### Loss of privacy

The nearest dwellings on the opposite side of Jennifer Street are more than 24m away and the additional height will not have any adverse privacy impacts.

#### Overshadowing

The shadow analysis prepared by Hill Thalys illustrates that the impacts of the additional height do not fall on any residential properties between 9am-3pm during mid-winter and the shadow cast on the golf driving range in the early morning has no impact on the amenity or use of that space.

#### Views

There is an existing vista along Reservoir Street eastward towards the horizon, which is considered to be an important public view. As per the Concept DA approval, the amended development has been designed and sited to protect this view by providing a wide open corridor through the site on axis of Reservoir Street, allowing public and private views through the site towards the sea and horizon.

There are no other significant views from the subject site or surrounding land uses that need to be protected by the proposed development and the additional height will not have any adverse impact on private views from surrounding properties.

### R3 Zone Objectives

The proposed development (inclusive of the proposed height exceedance) is consistent with the objectives of the R3 Medium Density land use zone, as presented in **Table 2**.

**Table 2** The proposed development's alignment with the objectives of the R3 zone

Objective	Alignment
<ul style="list-style-type: none"><li>To provide for the housing needs of the community within a medium density residential environment.</li></ul>	This proposed variation results in the delivery of 15% affordable housing within the project that would not otherwise be provided, specifically meeting the housing needs of the community in a medium density environment.
<ul style="list-style-type: none"><li>To provide a variety of housing types within a medium density residential environment.</li></ul>	The proposed variation delivers a diverse range of apartment types, including affordable housing in a medium density residential environment.
<ul style="list-style-type: none"><li>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</li></ul>	N/A
<ul style="list-style-type: none"><li>To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area.</li></ul>	As demonstrated above the proposed variation respects the desirable elements of the streetscape, such as views to the sea.
<ul style="list-style-type: none"><li>To protect the amenity of residents.</li></ul>	As demonstrated above the proposed variation protects the amenity of residents.
<ul style="list-style-type: none"><li>To encourage housing affordability.</li></ul>	The proposed variation is a direct application of the NSW Government's recent reforms to incentivise affordable housing.
<ul style="list-style-type: none"><li>To enable small-scale business uses in existing commercial buildings.</li></ul>	N/A



**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 purpose of the variation is to accommodate the GFA necessary to deliver 15% of the development for affordable housing (approximately 15 new affordable dwellings) in a manner consistent with the principles in the Housing SEPP, which allows for a relaxation in the maximum height controls to incentivise delivery of affordable housing during a housing crisis. As discussed in further detail in Section 4.2, as the existing approval is above the bonus height, a further variation is required to the SEPP standard. If the variation is not supported then it will result in the proponent developing the existing approved DA with no affordable housing, directly undermining the objective of the standard.

**In light of the above, it is clear that the proposed height variation achieves the objectives of the Height of Building development standard as well as the R3 zone objectives notwithstanding the non-compliance.**

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

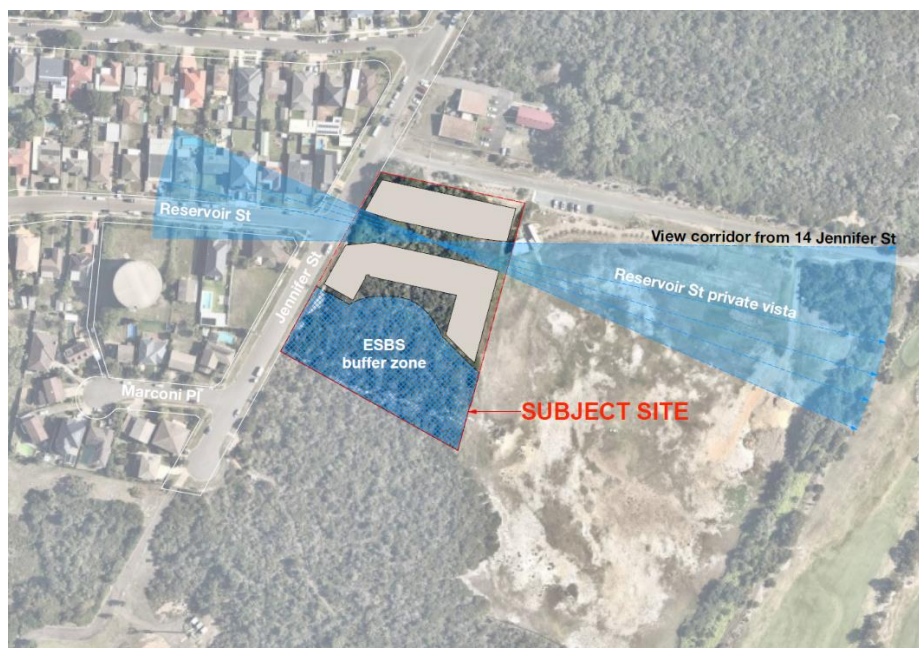
Clause 4.6(3)(b) of the LEP requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole.

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 historical approval and provision of affordable housing provide sufficient environmental planning grounds to justify this contravention, as described below.

The approved development exceeds the height limit because the LEP height is only 9.5m, despite the 0.7:1 FSR and R3 zoning, and through the Court process it was determined that there are sufficient environmental planning grounds to vary the standard, in particular:

- Adopting a compliant 2-3 storey terrace typology across the entire site would require the removal of the ecologically significant vegetation on the site (see **Figure 9**). By responding to the ecological constraints, the breach preserved a significant area of vegetation whilst still achieving the desired density.
- Adopting a different configuration of buildings which locates more density at the lower levels would block the important public view corridor from Reservoir Street through the site to the sea (see **Figure 9**). The breach in height allowed for this GFA to be redistributed to the upper levels and consequently for the view corridor to be maintained.
- The ecological constraints also meant that the communal open space that might typically be located at ground level needs to be provided on the roof. Providing access to the roof level further exacerbates the technical non-compliance, despite having limited to no impact, but provides supreme amenity for future occupants given the locational attributes of the site and area.
- The height limit was set many years ago and does not reflect latest BCA practice regarding floor to floor height allowances to accommodate even a 3 storey building.



**Figure 9** View Analysis

The 30% Infill Affordable Housing height bonus in the Housing SEPP is a blanket provision that applies generally across accessible areas and reflects the principle that additional height is required above planning controls to incentivise the delivery of affordable housing. The bonus naturally does not anticipate situations where existing approvals are already in place that already breach the height controls.

Under the Housing SEPP the 30% height bonus allows 12.35m. The Concept DA approval has a maximum building height of 4 storeys at 14.85m, which varied the 9.5m height limit by 5.35m (56.3%). In order to incorporate the Infill Affordable Housing FSR bonus and associated 15% affordable housing on site it is proposed to increase the height of the development to a consistent 4 storeys with rooftop communal areas across the site. This results in a maximum building height of 15.85m, which is a 2.05m increase in the overall height variation compared to what is approved. As illustrated in **Figures 6** illustrates the variation above the 12.35m Housing SEPP bonus height, which in practice results in an additional storey above the 9.5 height limit with roof top access and plant setback behind the parapet, or in the case of the 12.35m height limit the building parapet being at the effective limit.

Whilst the variation to the 9.5m standard presents as numerically high, the variation relative to the increased height under the Housing SEPP is only 28.34%, and whilst the proposed height is increasing, the extent of variation to the maximum control is actually substantially less than that already approved by the court (56.3%) and results in a variation above the Housing SEPP bonus height (3.5m) that is smaller than the approved variation above the LEP (5.35m).

Importantly, the variation in the circumstances of this proposal directly provides the GFA necessary to deliver 15% of the development for affordable housing (approximately 15 new affordable dwellings) in a manner consistent with the principles in the Housing SEPP, which allows for a relaxation in the maximum height controls to incentivise delivery of affordable housing during a housing crisis. If the variation proposed to the standard is not supported then it will result in the proponent developing the existing approved DA, that already significantly exceeds the height limit, with no affordable housing.

**In light of the above, it is clear that the historical approval and provision of affordable housing provide sufficient environmental planning grounds to justify the contravention.**