



Clause 4.6 Variation – Floor Space Ratio

Section 16 of the Housing SEPP
& Clause 4.4 of Randwick LEP 2012
Amending Detailed DA | 11 Jennifer Street, Little Bay

Prepared for Jennifer St Developments Pty Ltd

Beam Planning acknowledge that Aboriginal and Torres Strait Islander peoples are the First Peoples and Traditional Custodians of Australia. We pay respect to Elders past and present and commit to respecting the lands we walk on, and the communities we work with.

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Executive Summary

Clause 4.6 of the *Randwick Local Environmental Plan 2012* (Randwick LEP 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.

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?

11 Jennifer Street, Little Bay

What is the variation?

The Amending Detailed DA seeks consent for alterations and additions to the existing DA approval, which results in an additional 19 apartments, 15 of which will be used as affordable housing. Of these 15 affordable housing apartments, 13 would be used as affordable housing for 15 years, and 2 would be in perpetuity. The 2 provided in perpetuity is not a requirement of the Housing SEPP and represents a commitment by the proponent significantly over and above the 15 year statutory requirement of the affordable housing incentive.

The additional dwellings are realised through a 30% uplift in permitted building height and floor space ratio (FSR) under the Section 16 of the Housing SEPP, as the affordable housing component constitutes 15.1% of the gross floor area (GFA) of the whole development, equating to a total area of 1,712m² allocated as the "affordable housing component", inclusive of 97m² of corridor and lobby space directly accessed by affordable housing units. Since the provision of affordable housing exceeds the required 15%, the project is entitled to a 30% bonus in building height and FSR under Section 16 of the *State Environmental Planning Policy (Housing) 2021* (Housing SEPP), increasing the maximum permissible FSR control to 0.975:1. The proposed development comprises a FSR of 0.975:1 and therefore, is entirely compliant and as such, a variation to the development standard is unnecessary. It is noted that independent legal advice and the Department of Planning, Housing and Infrastructure has confirmed it supports this interpretation.

It is noted that the NSW Department of Planning, Housing and Infrastructure (the 'Department') has confirmed it supports the interpretation to apportioning a reasonable amount of 'common area GFA' to the 'affordable housing component' under Clause 16 of the SEPP. This interpretation has also been adopted by the Sydney Eastern City Planning Panel at 25 George St, North Strathfield (ref PPSSEC-327) and the Sydney North Planning Panel at 13-19 Canberra Avenue, St Leonards (ref PPSSNH-498), and on numerous infill affordable housing projects under assessment by the Department (discussed elsewhere in this report).

In essence, the approach recognises that the definition of the 'affordable housing component' under the Housing SEPP, being "the percentage of the gross floor area used for affordable housing", must inherently include some common area GFA within the building towards affordable housing, as common area is equally 'used' by both affordable and market dwellings, and given common area according to planning law is also GFA 'used' for the residential purposes (*Botany Bay City Council v Pet Carriers International Pty Limited* [2013] NSWLEC 147 per Preston CJ at [24] and [28]).

Accordingly, this Clause 4.6 variation request has been prepared for abundant caution and it is the proponent's position that it is not required.

Notwithstanding, Council has formed the opinion that common area and circulation space GFA should be excluded from the GFA allocated to the affordable housing component. Based on Council's interpretation, the affordable housing component has a total GFA of 1,614m² (which excludes the 97m² of corridor and lobby spaces directly accessible to the affordable housing apartments), which equates to 14.26% of the total development floor space. Under this interpretation, the FSR control is lifted by 28.52% instead of 30%, resulting in a maximum permissible FSR of 0.9639:1.

As such, if Council's interpretation is adopted, the development vary the FSR development standard under both the Randwick LEP 2012 by 0.225:1 (30%) and the Housing SEPP by 0.0111:1 (1.15%). Whilst we strongly disagree with this interpretation, this Clause 4.6 has been lodged for abundant caution, should the Sydney Eastern City Planning Panel agree with Council's interpretation.

Why is compliance with the building height development standard is unreasonable and unnecessary in the circumstances of the case?

Irrespective of the interpretation adopted, the proposal 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. Further the proposed development offers 2 apartments to be used as affordable housing in perpetuity, this is over and above the minimum requirement of 15, and as a result, the proposal will deliver more affordable housing, and for longer, notwithstanding the GFA interpretation adopted and irrespective of whether the proposal is considered to vary the standard.

Furthermore, if the more conservative interpretation is adopted, the variation at 1.15% is considered extremely minor and does not detract from the proposal's achievement of the objective of the affordable housing incentive.

Additionally, the proposal also achieves the objectives of the FSR development standard under the Randwick LEP 2012, notwithstanding the non-compliance as:

- the size and scale of development is compatible with the desired future character of the locality,
- the design of the development ensures a building that is well articulated and responds to environmental and energy needs,
- the development is compatible with the scale and character of the nearby conservation areas, and
- 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.
- the perceived variation does not add any visible bulk or scale to the building, and does not generate any additional infrastructure demand or additional environmental impacts.

What are the sufficient environmental planning grounds to justify contravention of the development standard?

The environmental planning grounds to justify contravention of the development standard is the provision of affordable housing, specifically, the proposed 2 out of the 15 affordable housing dwellings that are to be used as affordable housing in perpetuity, which will result in guaranteed , long-term provision of affordable housing in the Randwick LGA and is not a statutory requirement. This long-term commitment to affordable housing will have a positive impact, not only because it addresses the immediate needs of the local community but also because it helps to create a balanced and equitable neighbourhood in the future. Ultimately, this benefit far outweighs the theoretical shortfall in affordable housing based on Council's interpretation of the calculation, and it is reiterated that this commitment is well in excess of the 15 year requirement of the Housing SEPP incentive and is not a requirement of the Housing SEPP.

In light of the above that the consent authority can be satisfied that there are sufficient grounds to support the proposed variation.

1.0 The Development Site

1.1 About the Site

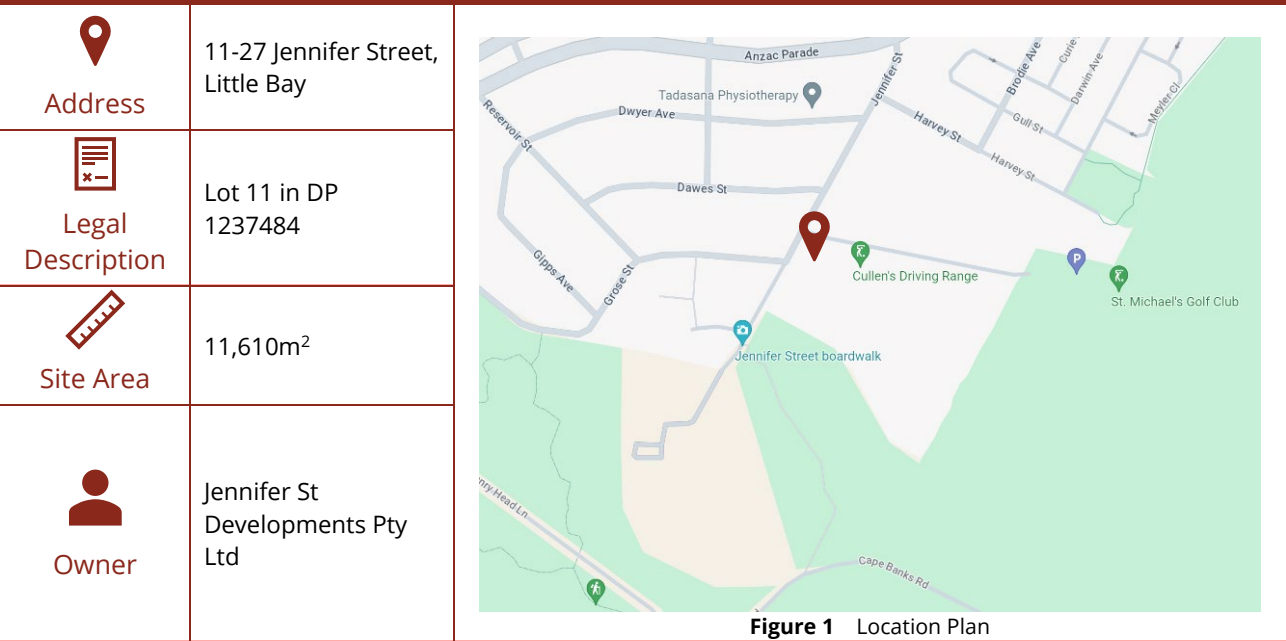


Figure 2 Aerial Photo

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 Detailed DA seeks to amend the approved residential flat building development (DA580/2022), through:

- Providing 15% affordable housing through increasing the total approved GFA from 8,131m² to 11,322m².
- 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.
- Expansion and refinement of the rooftop communal areas, including relocation of the communal room from ground level to the roof terrace.
- Minor amendments to the apartment layouts and mix to accommodate the above changes.
- Minor reconfiguration of the basement and the addition of a half basement level resulting in an additional 32 car spaces.

No change is proposed to the following key elements approved in the Detailed 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 5069.8m², located across the southern portion of the site;
- The approved tree removal, native vegetation maintenance, species relocation, landscaping and associated works through bushland management practice;
- The materiality and architectural expression of the buildings.

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 Detailed DA	Amending Detailed DA (RFI Amendments based on lodged DA)	Change from Approved (RFI Amendments based on lodged DA)
GFA	8,131m ²	11,322m ²	+ 3,191m ²
FSR	0.75:1	0.975:1	0.225:1 (30%)
Maximum Height	4 Storeys RL 63.2	4 Storeys RL 65.25	No change
Setbacks <ul style="list-style-type: none"> • North • South • East • West 	4m 43m 4m 3m	4m 43m 4m 3m	No change
Apartments	75 apartments	94 apartments (-4)	19 apartments (-4)
Affordable Apartments	0 apartments	15 apartments	+15 affordable apartments (including 2 in perpetuity)
Car Parking	98 resident + 19 visitor car spaces	130 resident + 25 visitor car spaces	+ 32 resident spaces + 6 visitor spaces
Landscaped Area	8,019.5m ² (69%)	7,729m ² (67%)	- 290m ²
Communal Open Space	2,951.9 (25%)	3,321.8 (28.6%)	+ 369.9m ²

3.0 Planning Context

3.1 Calculation of GFA for the purposes of affordable housing

Our interpretation of calculating GFA for the purpose of affordable housing

The subject Amending Detailed DA was lodged with Randwick City Council (Council) in June 2024, seeking consent for a 30% uplift in building height and floor space ratio to accommodate the provision of affordable housing at a rate of 15% of the gross floor area (GFA) of the whole development, equating to a total GFA of 1,712m² allocated to the “affordable housing component” as defined under Section 15B of the Housing SEPP.

At the time of lodgement, the calculation of the GFA for the 15% affordable housing component, included the following:

- A pro-rated 15% of all common area GFA (such as circulation areas that provide access to the affordable housing dwellings); and
- A pro-rated 15% of the areas of the communal spaces which constitute GFA (e.g. rooftop amenities such as the common room, gym, sauna and bathrooms).

During the assessment period, Council raised issue with the pro-rata approach and the proponent updated the affordable housing plan to ensure the affordable housing component was made up of GFA within affordable housing apartments and common areas (specifically circulation corridors) directly associated with accessing the affordable apartments rather than the pro-rata measure, noting both methods have been used and accepted in other projects.

Based on this approach, the proposed development allocates 15.1% of the total GFA to the affordable housing component. This equates to an affordable housing GFA of 1,712m², inclusive of 97m² of corridor and lobby space directly accessed by affordable housing units. As this exceeds the required 15%, the project is entitled to a 30% bonus in building height and FSR under Section 16 of the Housing SEPP, bringing the maximum allowable FSR to 0.975:1, which the proposed development complies with.

Council's interpretation of calculating GFA for the purpose of affordable housing

During the assessment of the proposed development, Council raised concerns with the approach to calculating GFA and formed the opinion that common areas and circulation spaces should be excluded from the GFA dedicated to the affordable housing component.

Based on Council's interpretation, the affordable housing component has a total GFA of 1,614m² (excluding the 97m² of corridor and lobby spaces), which equates to 14.26% of the total development. As such, the development is to be granted an FSR bonus of 28.52% instead of 30%, resulting in a maximum FSR of 0.9639:1. If Council's interpretation is adopted, the development would be non-compliant with the floor space ratio development standard under both the Randwick LEP 2012 and the Housing SEPP as outlined in **Table 1** below and in **Section 4.0** of this report. Whilst we strongly disagree with this interpretation, however notwithstanding, this Clause 4.6 has been lodged for abundant caution, should the Sydney Eastern City Planning Panel agree with Council's interpretation.

Table 1 Comparison between our interpretation and Council's Interpretation

Development Standards	Proposed FSR	Difference	Variation
Our Interpretation			
0.975:1 30% Affordable Housing Bonus	0.975:1	0	0
0.75:1 Randwick LEP		0.225:1	N/A. The difference is a result of the 30% bonus.
Councils Interpretation			
0.9639:1 28.52% Affordable Housing Bonus	0.975:1	0.0111:1	1.15%

Development Standards	Proposed FSR	Difference	Variation
0.75:1 Randwick LEP		0.225:1	30%

3.2 Reasons supporting our interpretation of GFA for the purposes of affordable housing

In response to the feedback received from Council, the Applicant has sought advice from the Department of Planning, Housing and Infrastructure (the Department), obtained independent legal advice from Addisons, and undertook a thorough review of precedent infill affordable housing development applications approved by both the Minister of Planning and regional planning panels, which all support Beam Planning's interpretation, which is to include common areas and circulation spaces within the GFA allocated to the "affordable housing component".

Department and Legal Advice

The Department confirmed via email on 13 November 2024 that both a pro-rated approach, and proportional approach to counting corridors as part of the affordable housing component, is being applied to several projects using the infill affordable housing bonus under Chapter 2 of the Housing SEPP. This approach is based on the principle that all residential uses require circulation areas, which are counted as GFA under the Standard Instrument LEP. Accordingly, circulation areas and common spaces servicing affordable housing should be included in the 15% GFA allocation for affordable housing.

Additionally, legal advice has been obtained from Addisons (**Attachment A**), which supports our interpretation and the Departments position on GFA calculation. Key points from the legal advice are summarised below:

- Section 15(e) of the Housing SEPP requires the Consent Authority to ensure that land provided for affordable housing must be used for the **purposes** of the provision of affordable housing (in other words, supporting floor space should 'serve' the affordable housing apartments).
- Section 15B defines the affordable housing component as "the percentage of GFA used for affordable housing".
- Planning law focuses on the purpose of development, not the specific activity or uses. The affordable housing common areas (i.e. corridors), serve the purpose of providing affordable housing and therefore, must be included in the "affordable housing component" under Section 15B(1) of the Housing SEPP. This is in the same way that all other corridors and 'common area' GFA directly services the market dwellings in the development, and is counted as GFA for that 'purpose'.
- Recent decisions by the Sydney North Planning Panel and the Sydney Eastern City Planning Panel have confirmed this approach, including in projects at 13-19 Canberra Avenue, St Leonards and 25 George Street, North Strathfield, have consistently supported this interpretation that common spaces should be included.

For these reasons set out above and further detailed within **Attachment A**, it is strongly argued that our interpretation of the calculation of gross floor area for the purposes of the "affordable housing component" is correct in that it should include a proportionate amount of common areas.

Precedent Infill Affordable Housing Applications

A thorough review of several development applications has been undertaken to further understand how consent authorities are interpreting the calculation of GFA for affordable housing. The findings are summarised in **Table 2** below.

Table 2 Precedent Infill Affordable Housing Development Applications

Ref.	Project	Description	Status
DA33/2024 Link to application	13-19 Canberra Avenue, St Leonards	The development provided a total of 1,866m ² GFA as affordable housing, which is 15% of the total GFA as required under the Housing SEPP. This area included 23 apartments equating to a total of 1,582m ² as well as 284m ² of circulation space, which services the affordable apartments.	Approved by the Sydney North Planning Panel
DA2024/0064 Link to application	25 George Street, North Strathfield	The proposal allowed a total GFA of 2,335.85m ² as affordable housing, being 15% of the total GFA. This is made up of 24 apartments equating to 2,126m ² and 209.85m ² of circulation space serving the affordable apartments. It is noted that a total circulation space of 1,399m ² is provided, and 15% of this space equates to 209.85m ² , which will be allocated to affordable housing.	Approved by the Sydney Eastern City Planning Panel

Ref.	Project	Description	Status
SSD-68230714 Link to application	4 Delmar Parade and 812 Pittwater Road, Dee Why	This project provides a dedicated area per level exclusively used for affordable housing. In this case, the Department has counted all areas of a corridor within this dedicated area used for the “affordable housing component”, including corridor spaces.	Recommended for approval by DPHI
SSD-68067459 Link to application	6-20 Hinkler Avenue and 319-333 Teren Point Road, Caringbah	This project implements a ‘salt and pepper’ approach to the delivery of affordable housing, where the affordable housing apartments are distributed throughout the development. Whilst this project is still under assessment, the Department has confirmed that they are taking a ‘proportional’ approach on the SSDA, where common areas, including corridors, are counted as affordable housing GFA as long as the amount is proportionate to the number of affordable housing apartments accessible from the common area/corridor.	Under assessment
SSD-67895459 Link to application	106 and 120-122 Smith Street And 3a Charlotte Street, Wollongong	The project seeks approval for the construction and use of two residential apartment buildings, comprising a total of 145 residential apartments, including 25 affordable housing dwellings, which is 15% of the total GFA. Within this GFA calculation for affordable housing, circulation areas are included.	Response to Submissions
SSD-71999463 Link to application	1-9 Marquet Street, Rhodes	The project is for the construction of a 42-storey mixed use development, comprising affordable housing at a rate of 12.9% of the total GFA. Within the affordable housing component, circulation areas (i.e. corridors) are included, while communal areas are not.	Response to Submissions
SSD-68298726 Link to application	138-152 Victoria Road, Rozelle	The project is for the construction of a 16 storey mixed-use development with 227 dwellings (inclusive of 59 affordable housing dwellings, equating to 15% of the total GFA), commercial and retail uses, a registered club, public open space and site preparation, earthworks, and landscaping. Neither circulation areas or communal areas were included in the calculation of GFA for affordable housing in this application.	Response to Submissions
SSD-70617459 Link to application	378-398 Pacific Highway, Crows Nest	The project involved the construction of a 31 storey mixed use residential tower, comprising a total of 114 apartments, including 30 affordable housing dwellings, equating to 15% of the total GFA. Within the affordable housing component, both circulation and common areas were included within the GFA calculation.	On Exhibition
SSD-67175465 Link to application	173-179 Walker Street and 11-17 Hampden Street, North Sydney	The project is for the construction of two residential flat buildings with a shared five storey basement. It comprises a total of 239 dwellings, including 161 market dwellings and 78 affordable housing dwellings (inclusive of 15% under the Housing SEPP and an additional 11 required under a Voluntary Planning Agreement). All affordable housing dwellings are located in one building and therefore, circulation areas have been included within the GFA calculation for the affordable housing component.	On Exhibition
SSD-72600478 Link to application	178-186 Willarong Road, 41-47 President Avenue, and 51 President Avenue, Caringbah	The project is for an Amending SSDA and seeks approval for a shop top housing development comprising 188 residential apartments, including 42 apartments dedicated to affordable housing. More than 15% of the total GFA is allocated to affordable housing, meaning that the development is granted a 30% bonus in height and uplift. Within the GFA calculations for the affordable housing component, circulation areas are included, while common areas are not.	On Exhibition


Based on the above and attached documents, we believe there is clear support for our interpretation to calculating GFA for the purposes of affordable housing and therefore, the proposed development is entirely compliant with the floor space ratio development standard. Notwithstanding, this Clause 4.6 Variation Request, while we believe is unnecessary, has been prepared for abundant caution to address Council’s concerns and enable the development application to proceed to determination.

4.0 The Proposed Variation

This section outlines the relevant environmental planning instrument (EPI), the development standard to be varied and proposed variation based on Council's interpretation that common areas and circulation spaces should be excluded from the amount GFA dedicated to the affordable housing component.

Table 3 Planning instrument, development standard and proposed variation

Matter	Comment
Environmental planning instrument (EPI) sought to be varied	State Environmental Planning Polic (Housing) 2021 (Housing SEPP) & Randwick Local Environmental Plan 2012 (Randwick LEP 2012)
The site's zoning	<p>R3 Medium Density Residential</p> <p>The objectives of this land use zone are:</p> <ul style="list-style-type: none"> • To provide for the housing needs of the community within a medium density residential environment. • To provide a variety of housing types within a medium density residential environment. • To enable other land uses that provide facilities or services to meet the day to day needs of residents. • 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. • To protect the amenity of residents. • To encourage housing affordability. <p>To enable small-scale business uses in existing commercial buildings.</p>
SEPP Development standard sought to be varied	<p>Section 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 floor space ratio under the LEP by 28.52%, therefore, allowing a maximum FSR of 0.9639:1.</p>
LEP Development standard sought to be varied	<p>Clause 4.4 Floor Space Ratio</p> <p>The objectives of this clause are:</p> <ol style="list-style-type: none"> (a) to ensure that the size and scale of development is compatible with the desired future character of the locality. (b) to ensure that buildings are well articulated and respond to environmental and energy needs, (c) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item, (d) 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. <p>The maximum floor space ratio is 0.75:1 (refer to Figure 5).</p>

Matter	Comment
	 <p>Figure 5 Maximum Floor Space Ratio Map Source: Randwick LEP 2012</p>
<p>The proposed Variation</p>	<p>The development proposes a floor space ratio of 0.975:1, which based on Council's interpretation of calculating GFA for the purpose of affordable housing results in a 0.0111:1 exceedance of the maximum permitted floor space ratio of 0.9639:1 under the Housing SEPP, which represents a 1.15% variation.</p> <p>Based on the base maximum floor space ratio of 0.75:1 under the Randwick LEP 2012, the proposed development exceeds the maximum by 0.225:1, resulting in a 30% variation.</p> <p>Despite the above, it is emphasised that should our interpretation of calculating GFA for the purposes of affordable housing stand correct and that common areas can be included within the dedicated "affordable housing component", the proposed floor space ratio is entirely compliant with both the Housing SEPP and Randwick LEP 2012 maximum floor space ratio standard.</p>

5.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Randwick 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.

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 Webhe.

The discussion under the following subheadings demonstrates how the proposed FSR variation achieves the objectives of the FSR development standard notwithstanding the minor non-compliance, as well as the objectives of the R3 zone.

5.1.1 Assessment against the Housing SEPP Development Standard 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 purpose of the variation is to accommodate the GFA necessary to deliver affordable housing (15 new affordable dwellings) in a manner consistent with the principles in the Housing SEPP, which allows for a relaxation in the maximum FSR controls to incentivise delivery of affordable housing during a housing crisis.

As discussed in further detail in **Section 3.0** above, the proposed variation is a direct result of Council's interpretation of calculating GFA for the purposes of the 'affordable housing component', being the view that common areas and circulation spaces should be excluded from the allocated GFA. Notwithstanding, if these spaces are to be included within the GFA for the affordable housing component, which they consistently have been in precedent examples of other infill affordable housing development applications, the proposed development is entirely compliant with the maximum FSR control.

If the variation and proposal is not supported then it will result with a loss of no affordable housing, directly undermining the objective of the standard. Further the proposed development offers 2 apartments in perpetuity above the minimum requirement of 15 years. As a result, the proposal (including with its minor variation) will deliver more affordable housing for longer than a compliant proposal.

5.1.2 Assessment against the development standard objectives

The proposed variation ultimately relates to how affordable housing is calculated and equates to a 1.15% difference in the GFA compared to what would otherwise be available under the Housing SEPP, and as a result has no discernible additional change to the bulk and scale of the development, and no additional impacts. Notwithstanding this, we have outlined how the proposal will continue to achieve the objectives of the LEP FSR standard below.

Objective 4.4(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. As identified in the Design Statement, 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 mid-rise 4-6 storey buildings can successfully relate to 1-2 storey forms in the same street, particularly through the use of landscaped setbacks.

The proposed 4 storey building adopts appropriate setbacks and built form elements to ensure compatibility with the evolving character of the area as detailed above. The proposed GFA, despite the minor non-compliance based on Council's interpretation, is entirely suitable for the intended scale, density, and character of the locality, aligning with the area's future growth while maintaining the desired balance of low and mid-rise development.

Furthermore, this Amending DA does not change the fundamental aspects of the approved Detailed DA, which followed the Concept DA that 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 a 4 storey building form consistently across the site, which is a scale that is already approved for part of the site, still results in a development that is consistent with the existing scale and desired (and established) character of the precinct.
- The consolidation of the two northern buildings into one is consistent with the length of the buildings already approved on the site and in the Little Bay precinct.
- If common areas and circulation spaces were included within the GFA allocation for the "affordable housing component", the proposed FSR would be entirely compliant with the development standard, meaning that the proposed development comprises an appropriate scale and density for the site.

Therefore, this objective is still being achieved notwithstanding the minor variation proposed because the size and scale of development is compatible with the desired future character of the locality and does not change irrespective of the interpretation of the GFA calculation.

Objective 4.4(b) to ensure that buildings are well articulated and respond to environmental and energy needs

The Amending DA preserves the architectural theme and intent of the original DA, which placed a strong emphasis on both architectural expression and environmental sustainability.

The buildings' form, façade design, and setbacks have been carefully considered to create visual interest, reduce massing and ensure an exceptional urban outcome. Specifically, the building envelopes allow for an articulation zone, anticipating an architectural expression of well-scaled horizontals, offset by glazed living rooms at the outboard corners. Inset balconies are framed by projecting concrete slabs, which provide shading, modelling privacy and well-proportioned articulation. As such, the proposal creates an appropriate urban presence and coherent architectural expression to the primary street frontages.

With regard to environmental and energy efficiency, the development incorporates a range of ecologically sustainable development initiatives and goes well beyond BASIX to deliver a very high level of sustainability. In particular, the following elements are proposed:

- The substantial majority of apartments receive controlled solar access to living areas and their various balconies and terraces. All windows and sliding doors have projecting slabs and wide balcony overhangs. Winter sun will penetrate deep into many apartment plans with a considered depth to facade ratio. All windows on the exposed faces will be double glazed, with single glazing within the more protected inset balconies.
- The dwellings have been arranged to exploit good cross flow ventilation, and will enjoy the ability to manipulate differential air pressures through the careful selection of window types on opposing elevations. Most dwellings can be cooled via passive means through their open cross sections and corner positions, which can be assisted with air movement by ceiling fans.
- Through the detailed design, energy use is also to be reduced by:
 - Most kitchens are within 8 metres of operable windows, and a good percentage are on the façade with openable windows;
 - The careful selection of elements such as low energy bulbs in common areas, motion sensor lighting and the like;
 - All lobbies and common stairs on all levels are open to natural light and ventilation;
 - The roofs are fully insulated.
 - The gardens and associated planting aid the creation of a suitable micro-climate, especially in the courtyard spaces.

As such, the proposed development, despite the minor exceedance to the FSR standard by 1.15% has been designed to ensure that buildings are well articulated and respond to environmental and energy needs.

Objective 4.4(c) 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 Amending DA 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 minor variation proposed because the development is compatible with the scale and character of the nearby conservation areas.

Objective 4.4(d) 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 and the incorporation of building articulation features to reduce the perceived bulk and scale, 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 minor exceedance in floor space ratio is negligible and 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 Detailed 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.

5.1.3 Assessment against the zone objectives

The proposed development (inclusive of the proposed FSR exceedance) is consistent with the objectives of the R3 Medium Density Residential land use zone, as presented in **Table 4**.

Table 4 The proposed development's alignment with the objectives of the R3 zone

Objective	Alignment
<ul style="list-style-type: none"> To provide for the housing needs of the community within a medium density residential environment. 	This proposal with or without the minor variation results in the delivery of affordable housing within the project that would not otherwise be provided. The additional housing is provided in 4 storey buildings, typical of a medium density environment, and therefore, the proposal notwithstanding the minor variation will continue to provide for the housing needs of the community in a medium density environment. The minor variation has no bearing on the proposal's achievement of this objective.
<ul style="list-style-type: none"> To provide a variety of housing types within a medium density residential environment. 	The proposal irrespective of the minor variation delivers a diverse range of apartment types and sizes, and includes affordable housing, in a medium density residential environment. The minor variation has no bearing on the proposal's achievement of this objective.
<ul style="list-style-type: none"> To enable other land uses that provide facilities or services to meet the day to day needs of residents. 	N/A
<ul style="list-style-type: none"> 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. 	As demonstrated above the proposed variation does not result in any discernible change to the built form compared to a proposal which strictly complied, and for the reasons set out throughout this report, the proposal respects the desirable elements of the streetscape typical of the Little Bay area, including high quality architecture, a pleasant building scale, and views to the sea. The minor variation has no bearing on the proposal's achievement of this objective.
<ul style="list-style-type: none"> To protect the amenity of residents. 	As demonstrated above, the proposal irrespective of the variation protects the amenity of residents as it does not result in any discernible change to the buildings or its relationship to neighbouring properties. The minor variation has no bearing on the proposal's achievement of this objective.
<ul style="list-style-type: none"> To encourage housing affordability. 	The proposal irrespective of the minor variation is a direct application of the NSW Government's recent reforms to incentivise affordable housing and will make a significant contribution to encouraging housing affordability, through the provision of 15 affordable housing apartments, 13 of which will be managed by a CHP for 15 years and 2 of which will be . used as affordable housing and managed by a CHP in perpetuity. The minor variation has no bearing on the proposal's achievement of this objective.
<ul style="list-style-type: none"> To enable small-scale business uses in existing commercial buildings. 	N/A

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 sufficient environmental planning grounds to justify the contravention of the development standard is that of the proposed 15 affordable housing dwellings, 2 units are proposed to be used as affordable housing and managed by a CHP in perpetuity, instead of the minimum 15 years required by the Housing SEPP. As a result, the proposal including with the minor variation to the calculation of the affordable housing component will contribute to the long-term provision of affordable housing in the Randwick LGA, and deliver more affordable housing and for a longer period than would otherwise be the case with strict compliance with the control. This long-term commitment to affordable housing will have a positive impact, not only because it addresses the immediate needs of the local community but also because it helps to create a balanced and equitable neighbourhood in this future. Ultimately, this benefit far outweighs the theoretical shortfall in affordable housing based on Council's interpretation of the calculation.

Furthermore, if this variation is not supported, the applicant would proceed with the development of the existing approved DA, which does not include any affordable housing. By permitting the variation of the development standard, or accepting the more common interpretation of allowing a reasonable percentage of common areas and circulation spaces to be included within the GFA allocated for the affordable housing component, the development will be able to deliver affordable housing, which is directly aligned with several key NSW Government initiatives aimed at addressing the ongoing housing shortage and affordability crisis.

Therefore, despite the minor FSR variation resulting from Council's interpretation of GFA for the purposes of affordable housing, the proposed development provides affordable housing in perpetuity which will have a significant positive social and economic impact. The inclusion of these affordable housing dwellings will support lower-income residents who may otherwise be excluded from the local housing market in Little Bay, fostering a more diverse, inclusive and sustainable community. **As such, the environmental planning grounds related to affordable housing more than justify the minor contravention of the development standard, ensuring that the development delivers both immediate and long-term benefits.**



Clause 4.6 Variation – Height of Building

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

Prepared for Jennifer St Developments Pty Ltd

Beam Planning acknowledge that Aboriginal and Torres Strait Islander peoples are the First Peoples and Traditional Custodians of Australia. We pay respect to Elders past and present and commit to respecting the lands we walk on, and the communities we work with.

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Appendices

Appendix	Title
A.	Legal Advice from Addisons

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*.

Where is the development site?	11 Jennifer Street, Little Bay
What is the variation?	<p>The Detailed DA approval has a maximum building height of 4 storeys plus roof terrace at 14.85m, which varies 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 provision of 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 16.8m, which is a 4.6m variation (37.7%) above Section 16 of the Housing SEPP which provides for a 28.52% bonus height of up to 12.2m. For abundant caution this Clause 4.6 also seeks to vary Clause 4.3, which is a 7.3m 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 37.7%, 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 (4.6m) that is smaller than the approved variation above the LEP (5.35m).</p>
Why is compliance with the building height development standard is unreasonable and unnecessary in the circumstances of the case?	<p>The proposal achieves the objectives of the Height of Buildings standard, notwithstanding the non-compliance as:</p> <ul style="list-style-type: none"> • the size and scale of development is compatible with the desired future character of the locality, • the development is compatible with the scale and character of the nearby conservation areas, and • 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. <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>
What are the sufficient environmental planning grounds to justify contravention of the development standard?	<p>The environmental planning grounds to justify contravention of the Height of Buildings standard are:</p> <ul style="list-style-type: none"> • As part of the Concept DA 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"> – responds to the ecological constraints and allows for the retention of a significant area of vegetation whilst still achieving the desired density; – allows for the retention of the important public view corridor from Reservoir Street through the site to the sea; – enables the provision of rooftop communal space that provides supreme amenity for future occupants given the locational attributes of the site and area. • Having regards to the specific proposal, the variation provides the GFA necessary to deliver the development for affordable housing (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. <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

1.1 About the Site

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

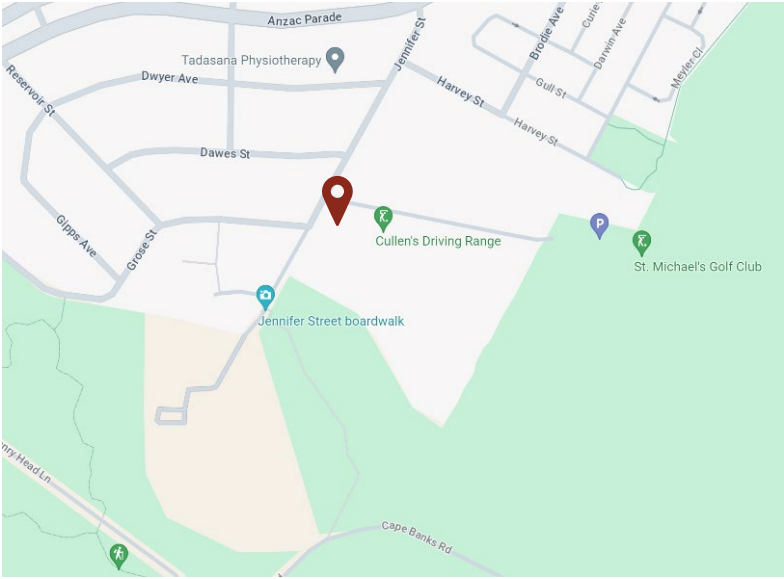


Figure 1 Location Plan



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 Detailed DA seeks to amend the approved residential flat building development (DA580/2022), through:

- Providing 15% affordable housing through increasing the total approved GFA from 8,131m² to 11,322m².
- 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.
- Expansion and refinement of the rooftop communal areas, including relocation of the communal room from ground level to the roof terrace.
- Minor amendments to the apartment layouts and mix to accommodate the above changes.
- Minor reconfiguration of the basement and the addition of a half basement level resulting in an additional 32 car spaces.

No change is proposed to the following key elements approved in the Detailed 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 5069.8m², located across the southern portion of the site;
- The approved tree removal, native vegetation maintenance, species relocation, landscaping and associated works through bushland management practice;
- The materiality and architectural expression of the buildings.

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 Detailed DA	Amending Detailed DA (RFI Amendments based on lodged DA)	Change from Approved (RFI Amendments based on lodged DA)
GFA	8,131m ²	11,322m ²	+ 3,191m ²
FSR	0.7:1	0.975:1	0.25:1 (30%)
Maximum Height	4 Storeys RL 63.2	4 Storeys RL 65.25	No change
Setbacks <ul style="list-style-type: none"> • North • South • East • West 	4m 43m 4m 3m	4m 43m 4m 3m	No change
Apartments	75 apartments	94 apartments (-4)	19 apartments (-4)
Affordable Apartments	0 apartments	15 apartments	+15 affordable apartments (including 2 in perpetuity)
Car Parking	98 resident + 19 visitor car spaces	130 resident + 25 visitor car spaces	+ 32 resident spaces + 6 visitor spaces
Landscaped Area	8,019.5m ² (69%)	7,729m ² (67%)	- 290m ²
Communal Open Space	2,951.9 (25%)	3,321.8 (28.6%)	+ 369.9m ²

3.0 Planning Context

3.1 Calculation of GFA for the purposes of affordable housing

Our interpretation of calculating GFA for the purpose of affordable housing

The subject Amending Detailed DA was lodged with Randwick City Council (Council) in June 2024, seeking consent for a 30% uplift in building height and floor space ratio to accommodate the provision of affordable housing at a rate of 15% of the gross floor area (GFA) of the whole development, equating to a GFA of 1,712m² allocated to the “affordable housing component” as defined under Section 15B of the Housing SEPP.

At the time of lodgement, the calculation of GFA for the 15% affordable housing component, included the following:

- A pro-rated 15% of all common area GFA (such as circulation areas that provide access to the affordable housing dwellings); and
- A pro-rated 15% of the areas of the communal spaces which constitute GFA (e.g. rooftop amenities such as the common room, gym, sauna and bathrooms.

During the assessment period, Council raised issues with the pro-rata approach and the proponent updated the affordable housing plan to ensure the affordable housing component was made up of GFA within affordable housing apartments and common areas (specifically circulation corridors) directly associated with accessing the affordable apartments rather than the pro-rata measure, noting both methods have been used and accepted in other projects.

Based on this approach, the proposed development allocates 15.1% of the total GFA to the affordable housing component. This equates to an affordable housing GFA of 1,712m², inclusive of 97m² of corridor and lobby space directly accessed by affordable housing units. As this exceeds the required 15%, the project is entitled to a 30% bonus in building height and FSR under Section 16 of the Housing SEPP, bringing the maximum allowable building height to 12.35m.

Council's interpretation of calculating GFA for the purpose of affordable housing

During the assessment of the proposed development, Council raised concerns with the approach to calculating GFA and formed the opinion that common areas and circulation spaces should be excluded from the GFA dedicated to the affordable housing component.

Based on Council's interpretation, the affordable housing component has a total GFA of 1,614m² (excluding the 97m² of corridor and lobby spaces), which equates to 14.26% of the total development. As such, the development is to be granted a building height and FSR bonus of 28.52% instead of 30%, resulting in a maximum permissible building height of 12.2m.

It is acknowledged that a variation to the development standard would be required irrespective of the interpretation adopted, which is demonstrated in **Table 1** below and in **Section 4.0** of this report. Notwithstanding and although we disagree, this Clause 4.6 Variation Request has been prepared on the basis of Council's interpretation for abundant caution, should the Sydney Eastern City Planning Panel agree with Council.

Table 1 Comparison between our interpretation and Council's Interpretation

Development Standards	Proposed Height	Difference	Variation
12.2m 28.52% Affordable Housing Bonus (Council's Interpretation)	16.8m	4.6m	37.7%
12.35m 30% Affordable Housing Bonus (Our Interpretation)		4.45m	36.03%
9.5m Randwick LEP 2012		7.3m	76.84%
14.85m Approved Height		1.95m	13.13%

3.2 Reasons supporting our interpretation of GFA for the purposes of affordable housing

In response to the feedback received from Council, the Applicant has sought advice from the Department of Planning, Housing and Infrastructure (the Department), obtained independent legal advice from Addisons, and undertook a thorough review of precedent infill affordable housing development applications approved by both the Minister of Planning and regional planning panels, which all support Beam Planning's interpretation, which is to include common areas and circulation spaces within the GFA allocated to the "affordable housing component".

Department and Legal Advice

The Department confirmed via email on 13 November 2024 that both a pro-rated approach and proportional approach to counting corridors as part of the affordable housing component, is being applied to several projects using the infill affordable housing bonus under Chapter 2 of the Housing SEPP. This approach is based on the principle that all residential uses require circulation areas, which are counted as GFA under the Standard Instrument LEP. Accordingly, circulation areas and common spaces servicing affordable housing should be included in the 15% GFA allocation for affordable housing.

Additionally, legal advice has been obtained from Addisons (**Attachment A**), which supports our interpretation and the Departments position on GFA calculation. Key points from the legal advice are summarised below:

- Section 15(e) of the Housing SEPP requires the Consent Authority to ensure that land provided for affordable housing must be used for the **purposes** of the provision of affordable housing (in other words, supporting floor space should 'serve' the affordable housing apartments).
- Section 15B defines the affordable housing component as "the percentage of GFA used for affordable housing".
- Planning law focuses on the purpose of development, not the specific activity or uses. The affordable housing common areas (i.e. corridors), serve the purpose of providing affordable housing and therefore, must be included in the "affordable housing component" under Section 15B(1) of the Housing SEPP. This is in the same way that all other corridors and 'common area' GFA directly services the market dwellings in the development, and is counted as GFA for that 'purpose'.
- Recent decisions by the Sydney North Planning Panel and the Sydney Eastern City Planning Panel have confirmed this approach, including in projects at 13-19 Canberra Avenue, St Leonards and 25 George Street, North Strathfield, have consistently supported this interpretation that common spaces should be included.

For these reasons set out above and further detailed within **Attachment A**, it is strongly argued that our interpretation of the calculation of gross floor area for the purposes of the "affordable housing component" is correct in that it should include a proportionate amount of common areas.

Precedent Infill Affordable Housing Applications

A thorough review of several development applications has been undertaken to further understand how consent authorities are interpreting the calculation of GFA for affordable housing. The findings are summarised in **Table 2** below.

Table 2 Precedent Infill Affordable Housing Development Applications

Ref.	Project	Description	Status
DA33/2024 Link to application	13-19 Canberra Avenue, St Leonards	The development provided a total of 1,866m ² GFA as affordable housing, which is 15% of the total GFA as required under the Housing SEPP. This area included 23 apartments equating to a total of 1,582m ² as well as 284m ² of circulation space, which services the affordable apartments.	Approved by the Sydney North Planning Panel
DA2024/0064 Link to application	25 George Street, North Strathfield	The proposal allowed a total GFA of 2,335.85m ² as affordable housing, being 15% of the total GFA. This is made up of 24 apartments equating to 2,126m ² and 209.85m ² of circulation space serving the affordable apartments. It is noted that a total circulation space of 1,399m ² is provided, and 15% of this space equates to 209.85m ² , which will be allocated to affordable housing.	Approved by the Sydney Eastern City Planning Panel
SSD-68230714 Link to application	4 Delmar Parade and 812 Pittwater Road, Dee Why	This project provides a dedicated area per level exclusively used for affordable housing. In this case, the Department has counted all areas of a corridor within this dedicated area used for the "affordable housing component", including corridor spaces.	Recommended for approval by DPHI

Ref.	Project	Description	Status
SSD-68067459 Link to application	6-20 Hinkler Avenue and 319-333 Teren Point Road, Caringbah	This project implements a 'salt and pepper' approach to the delivery of affordable housing, where the affordable housing apartments are distributed throughout the development. Whilst this project is still under assessment, the Department has confirmed that they are taking a 'proportional' approach on the SSDA, where common areas, including corridors, are counted as affordable housing GFA as long as the amount is proportionate to the number of affordable housing apartments accessible from the common area/corridor.	Under assessment
SSD-67895459 Link to application	106 and 120-122 Smith Street And 3a Charlotte Street, Wollongong	The project seeks approval for the construction and use of two residential apartment buildings, comprising a total of 145 residential apartments, including 25 affordable housing dwellings, which is 15% of the total GFA. Within this GFA calculation for affordable housing, circulation areas are included.	Response to Submissions
SSD-71999463 Link to application	1-9 Marquet Street, Rhodes	The project is for the construction of a 42-storey mixed use development, comprising affordable housing at a rate of 12.9% of the total GFA. Within the affordable housing component, circulation areas (i.e. corridors) are included, while communal areas are not.	Response to Submissions
SSD-68298726 Link to application	138-152 Victoria Road, Rozelle	The project is for the construction of a 16 storey mixed-use development with 227 dwellings (inclusive of 59 affordable housing dwellings, equating to 15% of the total GFA), commercial and retail uses, a registered club, public open space and site preparation, earthworks, and landscaping. Neither circulation areas or communal areas were included in the calculation of GFA for affordable housing in this application.	Response to Submissions
SSD-70617459 Link to application	378-398 Pacific Highway, Crows Nest	The project involved the construction of a 31 storey mixed use residential tower, comprising a total of 114 apartments, including 30 affordable housing dwellings, equating to 15% of the total GFA. Within the affordable housing component, both circulation and common areas were included within the GFA calculation.	On Exhibition
SSD-67175465 Link to application	173-179 Walker Street and 11-17 Hampden Street, North Sydney	The project is for the construction of two residential flat buildings with a shared five storey basement. It comprises a total of 239 dwellings, including 161 market dwellings and 78 affordable housing dwellings (inclusive of 15% under the Housing SEPP and an additional 11 required under a Voluntary Planning Agreement). All affordable housing dwellings are located in one building and therefore, circulation areas have been included within the GFA calculation for the affordable housing component.	On Exhibition
SSD-72600478 Link to application	178-186 Willarong Road, 41-47 President Avenue, and 51 President Avenue, Caringbah	The project is for an Amending SSDA and seeks approval for a shop top housing development comprising 188 residential apartments, including 42 apartments dedicated to affordable housing. More than 15% of the total GFA is allocated to affordable housing, meaning that the development is granted a 30% bonus in height and uplift. Within the GFA calculations for the affordable housing component, circulation areas are included, while common areas are not.	On Exhibition

Based on the above and attached documents, we believe there is clear support for our interpretation to calculating GFA for the purposes of affordable housing and therefore, the proposed development should seek to vary the building height development standard based on a 30% bonus uplift. Notwithstanding, this Clause 4.6 Variation Request, while we believe is unnecessary, has been prepared on the basis of a 28.52% uplift in accordance with Council's interpretation for abundant caution to address Council's concerns and enable the development application to proceed to determination.

4.0 The Proposed Variation

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

Table 3 Planning instrument, development standard and the proposed variation

Matter	Comment
Environmental planning instrument sought to be varied	State Environmental Planning Policy (Housing) 2021 & Randwick Local Environmental Plan 2012 (LEP 2012)
The site's zoning	<p>R3 Medium Density Residential</p> <p>The objectives of this land use zone are:</p> <ul style="list-style-type: none"> • To provide for the housing needs of the community within a medium density residential environment. • To provide a variety of housing types within a medium density residential environment. • To enable other land uses that provide facilities or services to meet the day to day needs of residents. • 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. • To protect the amenity of residents. • To encourage housing affordability. • To enable small-scale business uses in existing commercial buildings.
SEPP Development standard sought to be varied	<p>Section 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 28.52%, being 12.2m.</p>
LEP Development standard sought to be varied	<p>Clause 4.3 Height of Buildings</p> <p>The objectives of this clause are:</p> <ol style="list-style-type: none"> to ensure that the size and scale of development is compatible with the desired future character of the locality, to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item, 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. <p>The maximum height of buildings standard is 9.5m (refer to Figure 5).</p>

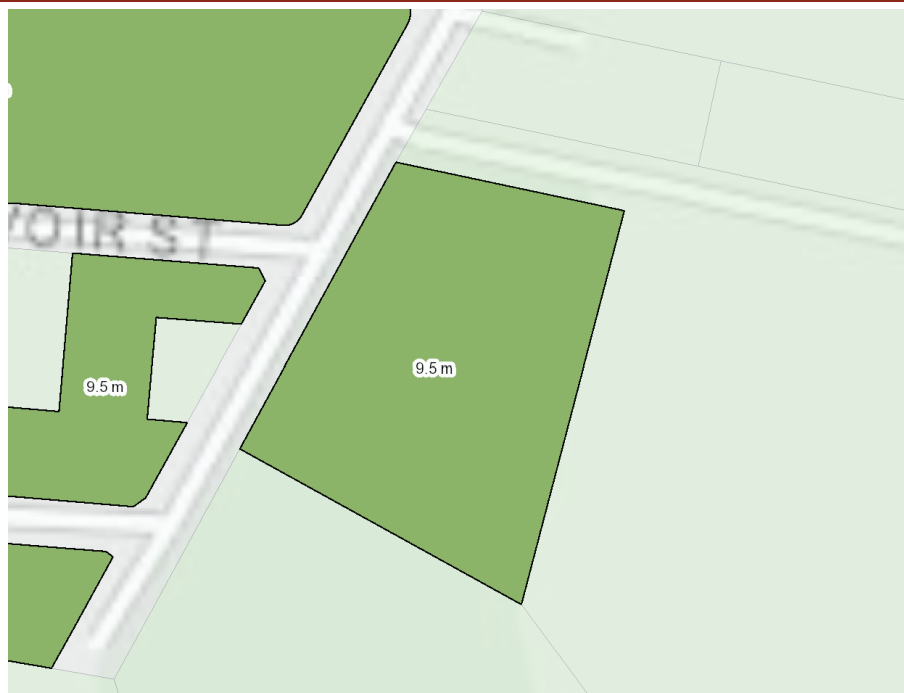


Figure 5 Height of Buildings Map

The proposed Variation

The proposed development has a maximum height of 16.8m, which is a **4.6m** variation to the Housing SEPP development standard (based on Councils interpretation) and **7.3m 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 1.95m variation to the existing approval. This results in a variation above the Housing SEPP 28.52% bonus height of 4.6m, which is smaller than the approved variation of 5.35m.

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

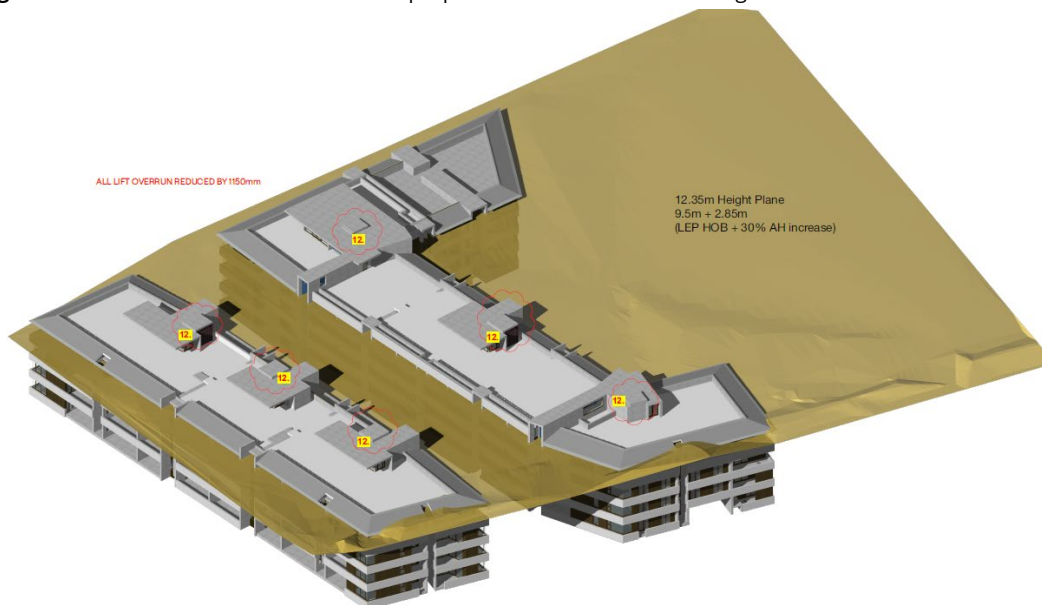


Figure 6 The proposal compared to the 12.35m height plane

5.0 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.

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 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 Detailed Da which followed the Concept DA that 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 7**).

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.

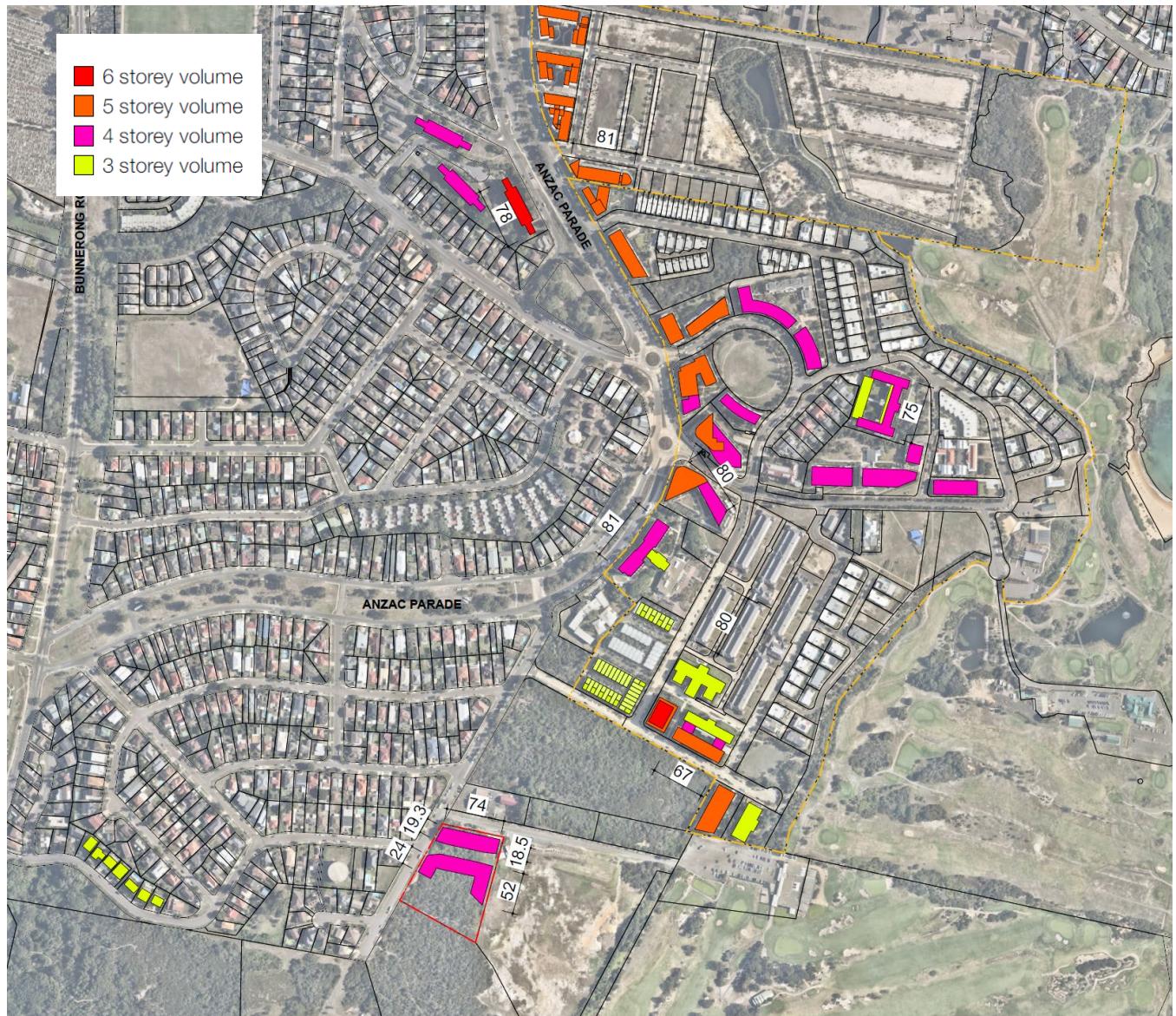


Figure 7 Built Form Footprint and Height Analysis

Source: Hill Thalix



Figure 8 Interface Analysis

Source: Hill Thalix

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 Detailed 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 4 The proposed development's alignment with the objectives of the R3 zone

Objective	Alignment
<ul style="list-style-type: none">To provide for the housing needs of the community within a medium density residential environment.	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">To provide a variety of housing types within a medium density residential environment.	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">To enable other land uses that provide facilities or services to meet the day to day needs of residents.	N/A
<ul style="list-style-type: none">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.	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">To protect the amenity of residents.	As demonstrated above the proposed variation protects the amenity of residents.
<ul style="list-style-type: none">To encourage housing affordability.	The proposed variation is a direct application of the NSW Government's recent reforms to incentivise affordable housing.
<ul style="list-style-type: none">To enable small-scale business uses in existing commercial buildings.	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 affordable housing (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.

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. 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 associated with the Concept DA 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.

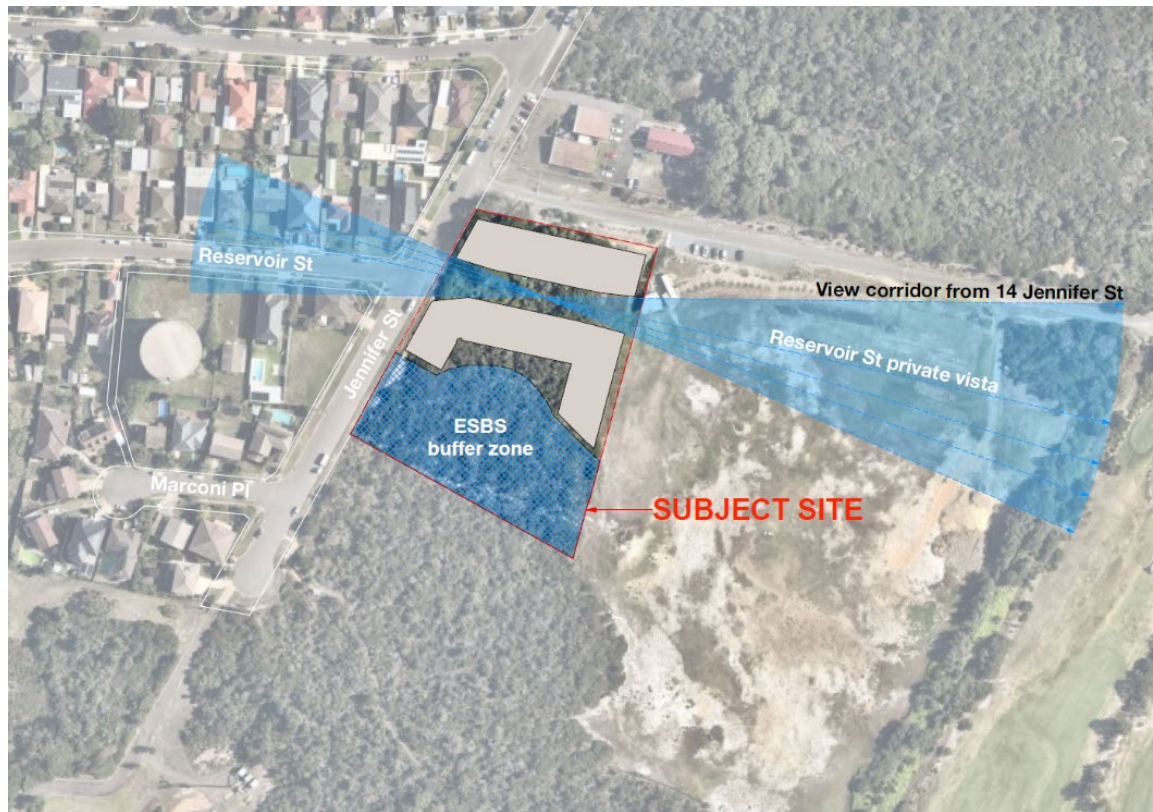


Figure 9 View Analysis

The 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 28.52% height bonus allows 12.2m. The Detailed 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 provision of 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 16.8m, which is a 1.95m increase in the overall height variation compared to what is approved. As illustrated in **Figures 6** illustrates the variation above the 12.2m 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 12.2m 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 37.7%, 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 (4.6m) 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 the development for affordable housing (15 new affordable dwellings, including 2 in perpetuity) in a manner consistent with and goes beyond 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.

Finally, it is noted that the additional variation has limited environmental impacts in relation to streetscape, bulk and scale, visual and acoustic privacy, views and overshadowing as discussed under Section 4.1 above.

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.