

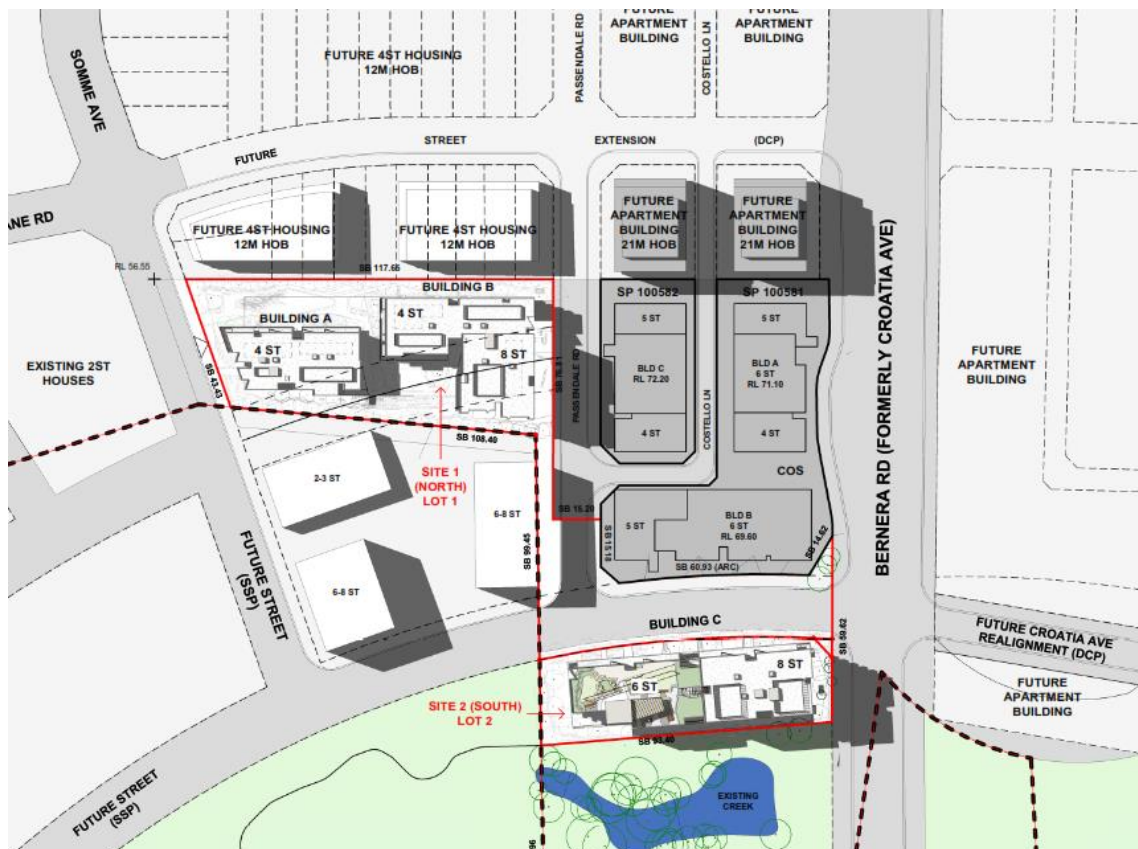


CLAUSE 4.6 VARIATION TO HEIGHT OF BUILDINGS DEVELOPMENT STANDARDS

**Multi Residential Apartment Development
Including Affordable Housing**

Somme Avenue, Edmonson Park

Summary Description	
Property	Lot 101 in Deposited Plan 1267563; Somme Avenue, Edmonson Park
Development	Amending DA to approved multi residential apartment development and associated subdivision, civil and landscaping works to include affordable housing.
Development Standard:	Clauses 16(3) of <i>State Environmental Planning Policy (Housing) 2021</i>
Development Plans	Architectural Plans – Stanisis Architects – Drawings DA0001 to DA9003, dated 29.02.2024



Source: Stanasic Architects, 2024

Figure 1. Site Plan of Proposed Development

1 Background and Summary

1.1 Summary of Clause 4.6 Request

This Clause 4.6 request seeks a variation to the maximum height of building development standards within Clause 16(3) of the *State Environmental Planning Policy (Housing) 2021* (**Housing SEPP**). Clause 16 (including Clause 16(3)) is a development standard in accordance with the definitions in the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) and is identified as such in the *In-fill affordable housing Practice Note, December 2023* (**Practice Note**). Clause 4.6 of the *Liverpool Local Environmental Plan 2008* (**LEP**) provides flexibility in the application of a development standard imposed under the LEP or any other environmental planning instrument (such as the Housing SEPP).

This request for the variation to the maximum height of building development standard should be read in conjunction with the request seeking variation to the maximum floor space ratio (**FSR**) development standard that has been submitted under a separate cover. The variations are inextricably linked as evidenced throughout this report.

An approval exists over the Site for three residential flat buildings (DA-1320/2021). The existing approved development exceeds the height and FSR controls under the LEP. The proposal the subject of this Development Application (**DA**) involves an additional 41 apartments of which 27 are affordable housing, resulting in a further increase of height and FSR of the approved building. The incorporation of 15% affordable housing component to the approved development makes a bonus height and FSR of 30% available under the Housing SEPP. The additional 30% height and FSR under the Housing SEPP is applied to the applicable controls under the LEP, however in the circumstances of this DA – the existing approval over the Site has established that the LEP height and FSR controls are unreasonable and unnecessary in the circumstances and the variation to the controls are justified on environmental planning grounds.

This Clause 4.6 request therefore contends that as the proposal represents an amendment to an approved development, to achieve the objectives of the Housing SEPP, the bonus height is more appropriately applied to the height of the approved development.

This Clause 4.6 request concludes that the proposal has sufficient environmental planning grounds and that strict compliance with the standard is unreasonable and unnecessary in this instance for the reasons set out throughout this report.

1.2 Introduction

This Clause 4.6 request supports the amendment to the approved development of Lot 101 in DP1267563 Somme Avenue, Edmondson Park (the **Site**). The Applicant has liaised with Liverpool City Council (**Council**), and been advised that Council does not support the proposed amendments being undertaken as a modification under Section 4.55 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).

Various judgements from the NSW Land and Environment Court have established that Clause 4.55 is beneficial and facultative, and an Applicant is still able to submit a DA to amend a Consent. The approval pathway for an 'Amending DA' limits the scope of the proposal to the elements of the proposal that seek to amend the original DA. In this instance the assessment relates to the additional 41 apartments, of which 27 are affordable housing dwellings and subsequent amendments to the

building height and GFA (and other amendments as detailed in the Statement of Environmental Effects).

The total Site area of the development is 10,111.5m² and is 'split zoned', being affected by a maximum floor space ratio of 0.75:1 and 1.5:1, and maximum building height of 12 metres and 21 metres under the LEP.

Development consent has been previously granted on the Site for a multi residential apartment development under DA-1320/2021 (**Original Consent**). The Original Consent was also supported by a single Clause 4.6 variation to the FSR and building height standards under LEP. This DA seeks to retain the approved development with an amendment to accommodate an additional 41 apartments including 27 affordable housing apartments. Subsequent amendments to the three approved buildings include:

- Increase in the gross floor area (GFA) by 30%
- Amendments to buildings including:
 - Building A – increase from 20 apartments over 3 storeys to 27 apartments (all affordable housing apartments) over 4 storeys,
 - Building B – increase from 46 apartments over 3/6 Storeys to 61 apartments 4/8 storeys, and
 - Building C – increase from 71 apartments over 5/6 storeys to 90 apartments over 6/8 storeys.
- Minor reconfiguration of apartments to accommodate additional lift and access arrangements in Building A, B and C,
- Floor level lowered to Basement 2 and Basement 1 to accommodate increased structural slabs, and
- Minor amendments to open space, service parking, waste and egress.

Additional 30% FSR and height are available under this amending development application utilising the bonuses facilitated through the provision of affordable housing under Clause 16 of the Housing SEPP. Notwithstanding this, many of the arguments presented for the Clause 4.6 and the accompanying Clause 4.6 for FSR were also relevant to the Original Consent.

The DA is to be determined as Regionally Significant Development by the Sydney Western City Planning Panel pursuant to Schedule 6 of *State Environmental Planning Policy (Planning Systems) 2021* (**Planning Systems SEPP**).

1.3 Location

The Site is located approximately a 450m walk from the Edmondson Park Station, located on the T2 Inner West and South rail line and immediately north of the Maxwells Creek Corridor. The Site has existing road frontage to Somme Ave, Passendale Road and Bernera Road (formerly Croatia Ave).

The built form anticipated in the Edmondson Park precinct dictates the highest densities around the station transitioning down to lower densities beyond walking distance of the station. This is achieved through height and FSR controls. The distribution of heights and FSR have been embedded in the planning controls consistent with a road pattern developed early in the planning of the precinct including transitions to different density outcomes based on the envisaged road pattern on the Site.

Lands to the east and north of the Site is known as 361-363 Bernera Road, and 120 Passendale Road, Edmondson Park, with these lands representing Stage 1 of the DA, and have been developed with three residential flat buildings between 4 to 6 storeys in height.

Land immediately to the north of the Site is known as 200 Croatia Avenue, Edmondson Park, which was granted Development Consent DA-141/2015 on 9 November 2015 for subdivision to "Create 25 Torrens Title Residential Lots and 4 Residual Lots with Demolition and Road Construction".

Land to the south and west of the Site is owned by Landcom which is being delivered consistent with the Edmondson Park Concept Approval. An amendment to the Concept Plan lodged by Landcom (MP 10_0118 MOD 5) shows the deletion of a minor access road which also traverses through the site. The AECOM report titled *Edmondson Park South – Concept Plan Mod 5 – Transport Management and Accessibility Plan (TMAP)* dated 14 August 2018 includes Figures 21, 22 and 23 which show the "local minor road (indicative only)" deleted from the Landcom land and northern part of the Site. A laneway between Somme Ave and Passendale Road through the middle of the Landcom land and a small part of the site has also been deleted.

The Landcom Concept Plan for its land immediately south west includes apartments and stacked terraces as shown in the *Edmondson Park Town Centre North Public Domain and Landscape Plan (Public Domain and Landscape Plan)* by Taylor Brammer Landscape Architects dated 16 November 2020. **Figure 2** is an extract from this document for land adjoining the site. The Landcom site also qualifies for additional height and FSR under the Housing SEPP.



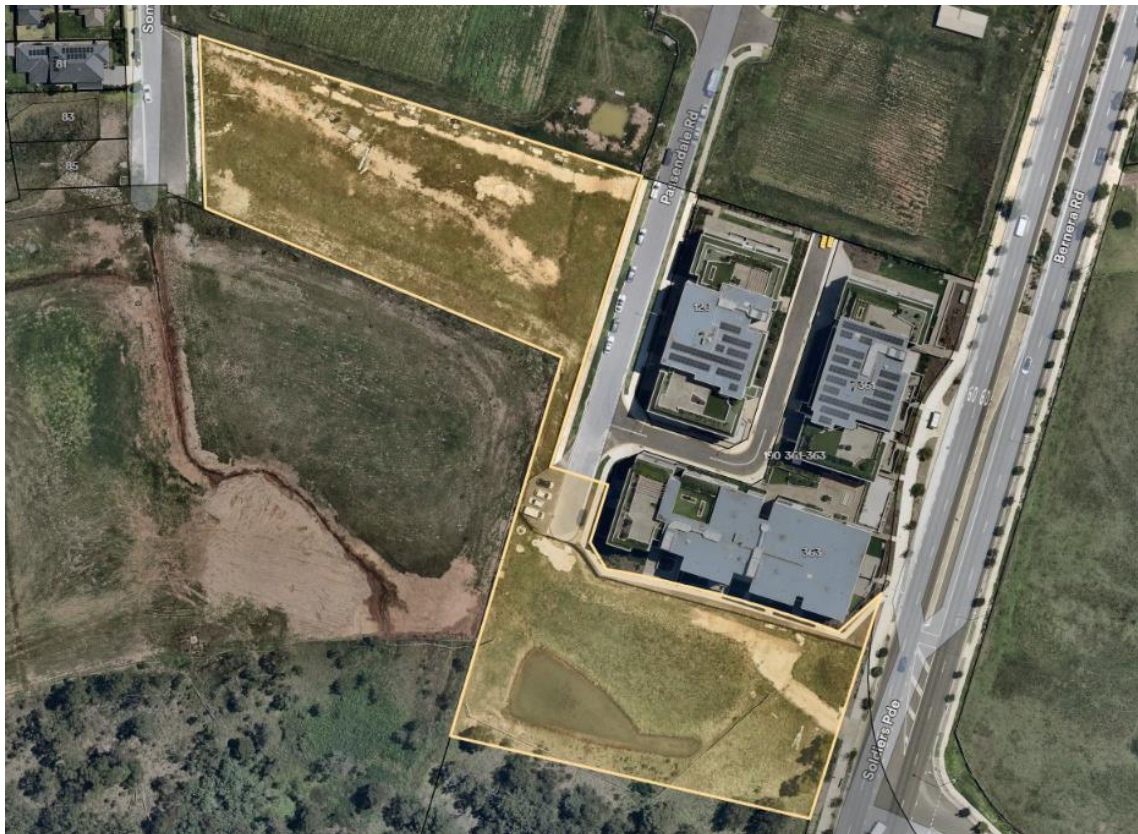
Source: Landcom

Figure 2. Edmondson Park Town Centre North Public Domain and Landscape Plan

1.4 The Site

The legal description of the property is 101 DP1267563; Somme Avenue, Edmondson Park. The 'Z' shaped allotment has resulted from the construction of the three residential flat buildings along Bernera Road, leaving Lot 101 DP1267563 as a residual lot that presents two larger rectangular areas in the northwest and southeast. The northwest area has frontage to Somme Avenue in the west and Passendale Road in the east while the south east development area has frontage to Bernera Road in the east and a future road which will form its new northern boundary. An aerial view of the Site is shown at **Figure 3**.

The Site is generally cleared of vegetation. The north of the site has a 4.88m fall from the north west corner on Somme Ave to the Passendale Road frontage adjacent to the corner of lands owned by Landcom, whilst the southern section of the site has a more gentle slope falling toward Maxwell Creek. A sewer line traverses through part of the Site adjacent to Road 1. The part of the site adjacent to Maxwells Creek contains a temporary detention basin serving the three residential flat buildings already approved and constructed on the land to the north.



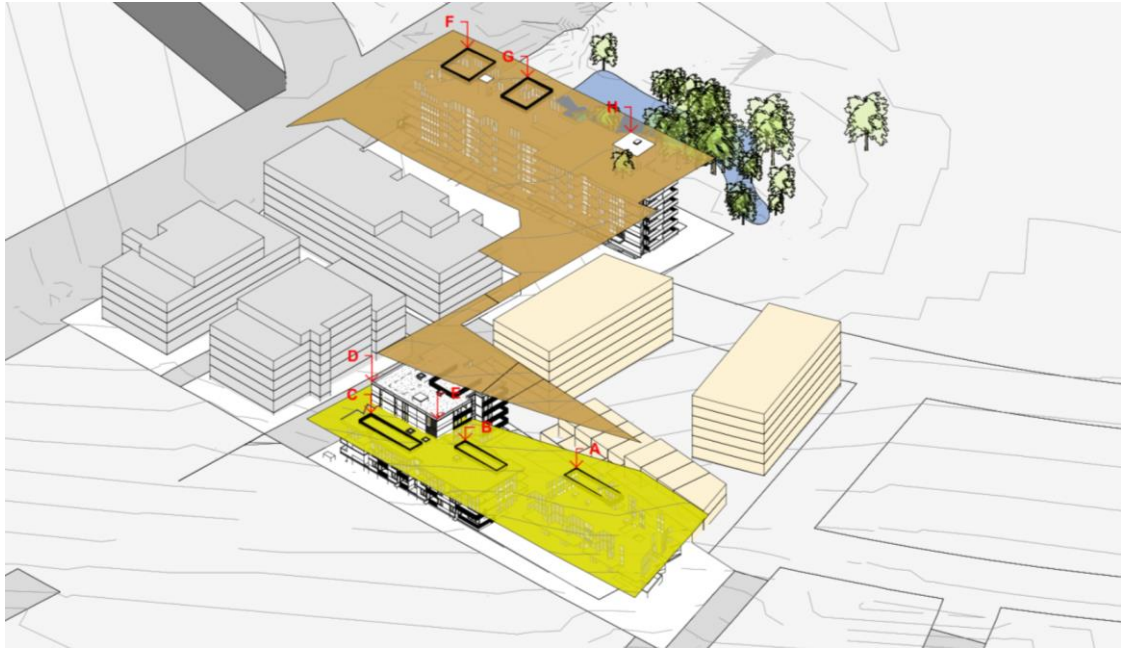
Source: Nearmap, 2024

Figure 3. Aerial View of Site

1.5 The Original Consent

The Original Consent was approved under DA-1320/2021 and included the construction of 137 apartments in three residential flat buildings. Buildings A and B were approved over the north western portion of the Site. Building C was approved over the eastern portion of the Site.

The total gross floor area (**GFA**) approved under the Original Consent is 12,106.46m². Technically the proposal included a departure from the FSR control of 45% for the portion of the Site to which the 0.75:1 FSR control applies. Similarly, the Original Consent included a departure from the 12m maximum height of building standard by 6.64m in part. The request to vary the departure from these standards was supported as the proposal did not exceed the overall FSR that could otherwise be achieved across the Site, whilst the exceedances to the height standard were acceptable as they resulted from a split height control that followed a former road anticipated by Landcom Master Plan, which has since been removed. Other minor exceedances to the maximum height of building development standard were limited to services, lift overruns etc.

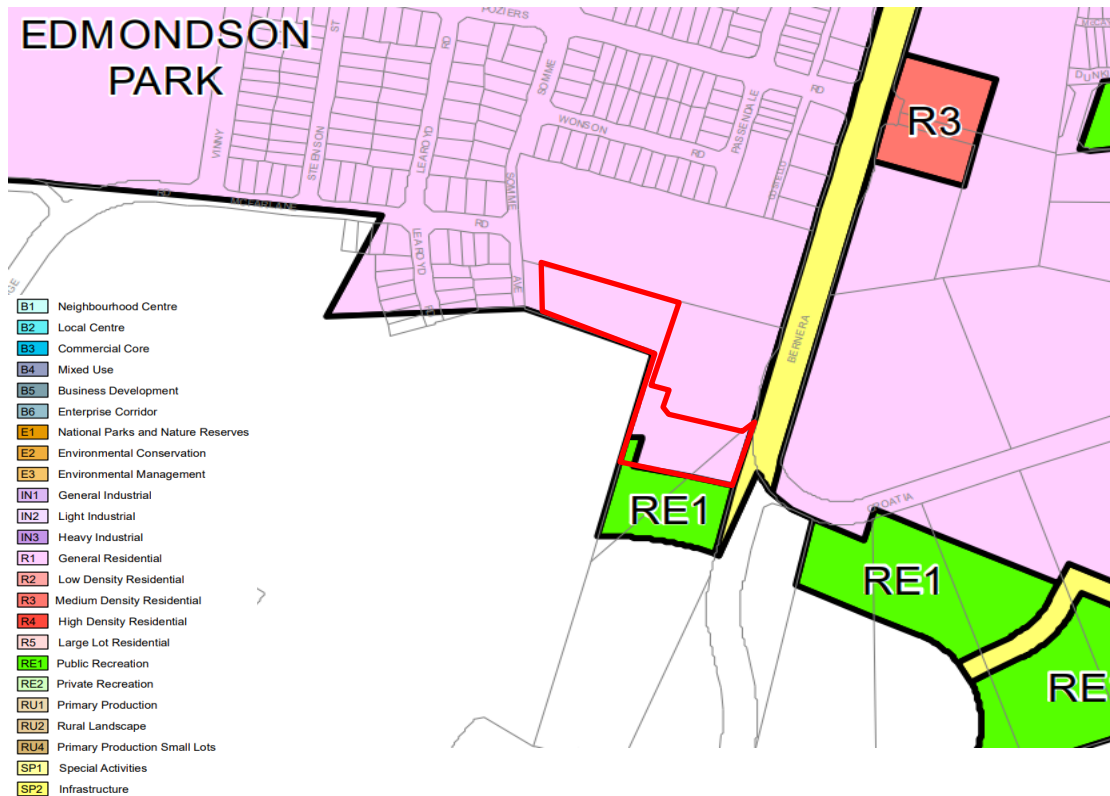


Source: Stanisis Architects

Figure 4. Extract of Original Consent - Maximum Height of Building Plane Heights (North West View)

1.6 Zoning and Development Standards

The Site is primarily zoned R1 General Residential under the LEP as shown in **Figure 5**. The proposed development is contained to the land zoned R1 General Residential.



Source: NSW Legislation

Figure 5. Land zoning map extract

The Development Standard being varied is that which is applied under Clause 16(3) of the Housing SEPP. Division 1 of the Housing SEPP applies as residential flat buildings are permitted in the R1 General Residential zone of the LEP, the amended DA delivers an affordable housing component of 15% of the total GFA of the development and the Site is in an accessible area.

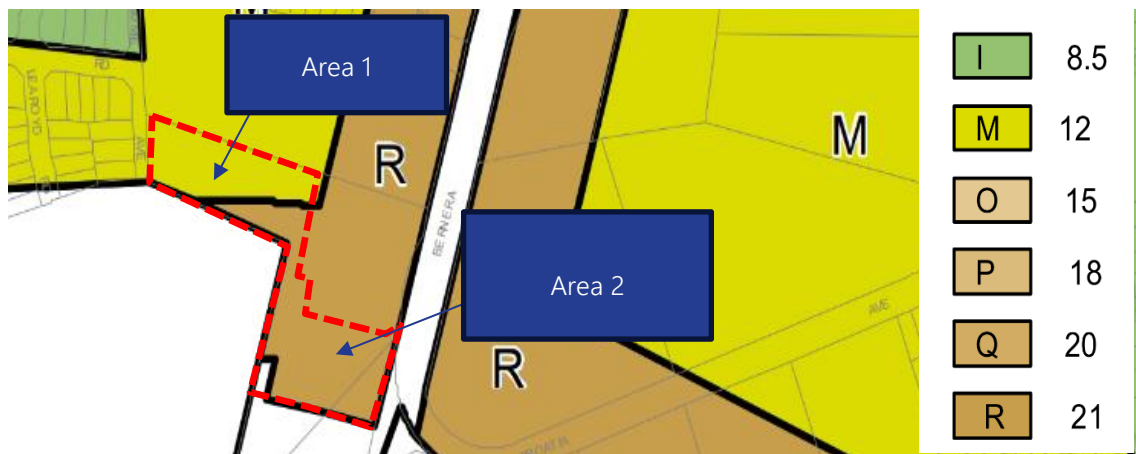
The “In-fill affordable housing – Practice note” prepared by the Department of Planning and Environment dated December 2023 specifically identifies Clause 16 of the Housing SEPP as a ‘development standard’. In accordance with Clause 16 of the Housing SEPP; for residential development that involves a residential flat building that includes an affordable housing component of 15%, a height and FSR of 130% of the maximum FSR under the LEP can be achieved.

The FSR and height of building controls that apply to the land under the LEP vary across the Site, with two maximum building height controls and two FSR controls. In regard to height of building and FSR controls, the site can be divided into two areas:

- **Area 1** –a maximum height of building of 12m.
- **Area 2** –a maximum height of building of 21m.

As previously outlined, the Original Consent included an exceedance of the height of building standard.

Extracts from the Height of Building in the LEP are shown at **Figure 6**



Source: Liverpool LEP 2008

Figure 6. Extract from Permissible Height of Buildings Map

Under Clause 16(3) of the housing SEPP, the maximum permissible height of building for the land is that under the LEP plus an additional height that is the same percentage as the additional FSR. Therefore, where 30% additional FSR is applied under Clause 16(1), and additional 30% height of building can be achieved.

In accordance with the Development Standards under Clause 16(3) of the Housing SEPP, where an additional 30% FSR is applied the maximum height attainable across the Site includes:

- **Area 1 + 30%** –maximum height of building of 15.6m
- **Area 2 + 30%** – maximum height of building of 27.3m

2 Authority to vary a development standard

In September 2023, the NSW Government published amendments to Clause 4.6 of the Standard Instrument which change the operation of the clause across all local environmental plans, including the Liverpool LEP. The changes came into force on 1 November 2023.

The principal change is the omission of subclauses 4.6(3)-(5) and (7) in the Standard Instrument – Principal Local Environmental Plan. The following changes have been made as a result of this:

- Clause 4.6(3) was amended such that the requirement to 'consider' a written request has been changed with an express requirement that the consent authority 'be satisfied that the applicant has demonstrated' that compliance with the development standard is unreasonable or unnecessary.
- Clause 4.6(4)(a)(ii) was amended such that the requirement that the consent authority must be satisfied that the proposed development in the public interest has been removed.
- Clause 4.6(4)(b) & 5 amended such that the requirement for concurrence from the Planning Secretary has been removed.

The objectives of clause 4.6 of the LEP, as amended, seek to recognise that in particular circumstances strict application of development standards may be unreasonable or unnecessary. The clause provides objectives and a means by which a variation to the development standard can be achieved as outlined below:

Clause 4.6 Exceptions to development standards

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

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(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, and

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

Note—

The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

(4) The consent authority must keep a record of its assessment carried out under subclause

(5) (Repealed)

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note—

When this Plan was made it did not include all of these zones.

(7) (Repealed)

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(caa) clause 5.5,

(ca) clause 6.5, 6.6, 7.5A, 7.22, 7.23, 7.24, 7.25, 7.26, 7.26A, 7.27, 7.28, 7.29 or 7.30.

As noted in Clause 4.6(2), a development standard of the LEP, or the standard within another environmental planning instrument (the Housing SEPP) may be varied. Whilst an incentive bonus, Clauses 16(1) and 16(3) satisfy the definition of a development standard.

Development standards are defined under Section 1.4 of the Environmental Planning and Assessment Act 1979 as:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under

which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of—

(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,

(b) the proportion or percentage of the area of a site which a building or work may occupy,

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

(d) the cubic content or floor space of a building,

(e) the intensity or density of the use of any land, building or work,

(f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,

(g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,

(h) the volume, nature and type of traffic generated by the development,

(i) road patterns,

(j) drainage,

(k) the carrying out of earthworks,

(l) the effects of development on patterns of wind, sunlight, daylight or shadows,

(m) the provision of services, facilities and amenities demanded by development,

(n) the emission of pollution and means for its prevention or control or mitigation, and

(o) such other matters as may be prescribed.

In accordance with (c) above, the standards within Clause 16 of the Housing SEPP apply a FSR and height of building provision where the character of the development includes an affordable housing component. Further, under the former Department of Planning and Environment's 2023 *In-Fill Affordable Housing Practice Note*, Clause 16 of the Housing SEPP is specifically identified as a "development standard". Clause 4.6 of the LEP therefore provides authority to vary the standard under Clause 16 of the Housing SEPP.

3 Development standards to be varied

A variation is sought to Division 1, Clauses 16(3) of the Housing SEPP, which are shown below as:

16 Affordable housing requirements for additional floor space ratio

(3) If the development includes residential flat buildings or shop top housing, the maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).

Example—

Development that is eligible for 20% additional floor space ratio because the development includes a 10% affordable housing component, as calculated under subsection (2), is also eligible for 20% additional building height if the development involves residential flat buildings or shop top housing.

(4) This section does not apply to development on land for which there is no maximum permissible floor space ratio.

The objective of the clause is presented in Clause 15A:

15A Objective of Division

The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

4 Extent of variation

Extent of variation to Height of Buildings Standard

The LEP dictionary provides the following relevant definitions that inform building height:

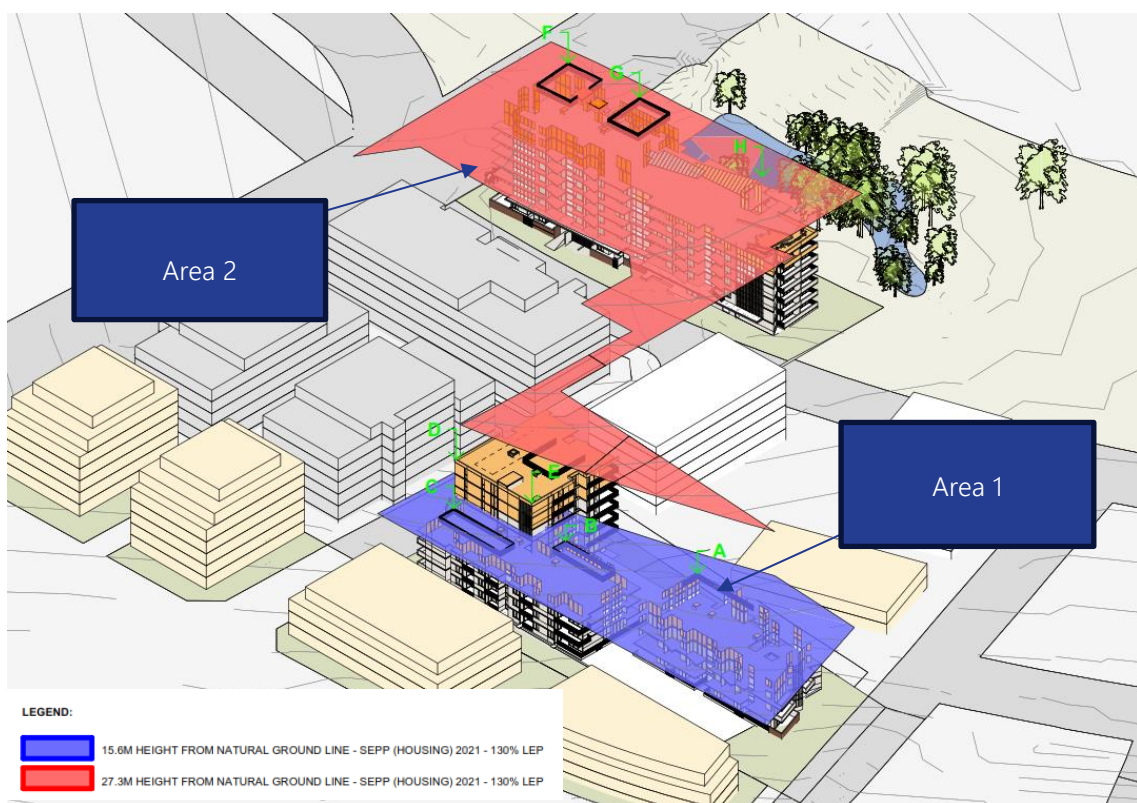
ground level (existing) means the existing level of a site at any point

building height (or height of building) means—

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

As noted above, the Site has a maximum building height of 12 metres in Area 1 and 21 metres in Area 2 under the LEP. Applying the 30% height bonuses under Clause 16(3), the maximum permissible building heights increase to 15.6 metres in Area 1 and 27.3 metres in Area 2.



Source: Stanisis Architects, 2024

Figure 7. Extract of Maximum Building Height Plane

As shown, the maximum variation to the building height is at Building B, where 8 storeys are proposed, and where the building height is 24.84 metres above the existing ground level, which is

9.24 metres (59%) above the development standard of 15.6 metres calculated as per the LEP. It is noted that under DA-1320/2021, that a maximum building height of 18.64 metres (55.3% variation to the LEP standard) has already been approved at Building B.

Table 1 below summarises the maximum height of the top most element above each point of the existing ground level in the amended DA.

Table 1. Building Height Element Schedule

PROPOSED BUILDING ELEMENT HEIGHT SCHEDULE					
ITEM	ELEMENT	PROPOSED RL AT GROUND	PROPOSED RL AT TOP	PROPOSED HEIGHT OF ELEMENT (m)	PROPOSED HEIGHT ABOVE MAX HOB + 130% (m)
A	PLANT SCREEN	53.24	68.74	15.50	-0.10
B	PLANT SCREEN	52.97	71.84	18.87	+3.27
C	PLANT SCREEN	52.58	68.74	16.16	+0.56
D	PARAPET	52.30	77.14	24.84	+9.24
E	PARAPET	52.90	77.14	24.24	+8.64
F	PLANT SCREEN	49.56	77.40	27.84	+0.54
G	PLANT SCREEN	49.42	77.40	27.98	+0.98
H	LIFT OVERRUN	49.49	73.70	24.21	+3.09

The height of the proposed buildings is discussed in more detail below:

Building A

Building A is 4 storeys and situated within the 15.6 metre height standard that applies, and is therefore compliant with the bonus provisions under the Housing SEPP.

Building B

Building B is 4 to 8 storeys in height. Minor variations to the height standard above the bonus provisions under the Housing SEPP are present on the 4th floor roof, comprising screens to shield plant equipment. The more substantial variation above the bonus provisions under the Housing SEPP is located at the parapets of the 8th floor, which is partly affected by the 15.6 metre height standard. Approximately one third of the eight storey structure encroaches into this zone.

Building C

Building C is 6 to 8 storeys in height. More minor variations to the height standard are proposed above the bonus provisions under the Housing SEPP being limited to plant screening and a lift overrun, with no liveable floor space situated above the 27.3 metre height limit.

5 Assessment

The following sections discuss the grounds for the variation against the relevant provisions.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (Clause 4.6 (3)(a))

Clause 4.6(3)(a) requires the applicant to provide justification that strict compliance with the FSR and building height requirement is unreasonable or unnecessary in the circumstances of the case.

In ***Wehbe v Pittwater Council (2007) NSWLEC 827***, Preston CJ established five potential ways for determining whether a development standard could be considered to be unreasonable or unnecessary. These include:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

We note that whilst *Wehbe* was a decision of the Court dealing with SEPP 1, it has been also found to be applicable in the consideration and assessment of Clause 4.6. Regard is also had to the Court's decision in *Four2Five Pty Limited v Ashfield Council [2015] NSWLEC 90* and *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7*, which elaborated on how these five ways ought to be applied, requiring justification beyond compliance with the objectives of the development standard and the zone.

In addition to the above, Preston CJ further clarified the appropriate tests for a consideration of a request to vary a development standard in accordance with clause 4.6 in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*. This decision clarifies a number of matters including that:

- the five ways to be satisfied about whether to invoke clause 4.6 as outlined in *Wehbe* are not exhaustive (merely the most commonly invoked ways);
- it may be sufficient to establish only one way;
- the written request must be "sufficient" to justify contravening the development standard; and
- it is not necessary for a non-compliant development to have a neutral or beneficial effect relative to a compliant development.

It is our opinion that the proposal satisfies at least two of the five ways established in *Wehbe* that demonstrate that the development standard is unreasonable and unnecessary in this instance, for the reasons set out below.

1st Way – The objectives of the standard are achieved notwithstanding non-compliance with the standard

Preston CJ at paragraph 43 in *Wehbe v Pittwater Council* stated:

"The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."

The variation to the floor space ratio standard will not compromise achievement of the objectives of the standard and offers an alternative way of achieving the below objectives:

In-fill affordable housing

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

Comment: This objective is wholly achieved, as a total of 27 units and 15% of the total GFA will be delivered as affordable rental housing, to be rented to very low, low and/or moderate income households, with these units managed by a Community Housing Provider.

For completeness, an assessment against the objectives of the standards for height of buildings under the Liverpool LEP are provided below, noting that the Planning Circular PS 23-003 promotes the flexible application of local provisions in light of the public benefit relating to the delivery of affordable housing.

Height of Buildings

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

(a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved,

Comment: This objective primarily has a descriptive administrative purpose as opposed to a required environmental outcome.

(b) to permit building heights that encourage high quality urban form,

Comment: The approved design under the Original Consent was considered to be of a high quality urban form that is consistent with the pattern of adjoining developments. It was considered at the time that strict compliance with the building heights per the requirements of the LEP would lead to an adverse built form outcome, as the boundary of the height limits do not align neatly with the 'Z' shaped nature of the Site, which strict compliance would potentially lead to the delivery of an irregular shaped structure at Building B, with irregular

floor plates, which would be difficult, if not impossible to achieve to design principles of the ADG. The same principles apply to the proposal the subject of the amending DA. The proposal maintains the same envelope and just applies an additional 30% height.

- (c) *to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,*

Comment: The additional building height is just an extension to that approved under the Original Consent, which was designed to concentrate height to the north, preventing additional overshadowing impacts on the public domain, and any impact on adjoining site's ability to achieve compliant solar access.

Notably, Landcom land adjoining the Site is also afforded bonuses under the Housing SEPP. Landcom is listed as a "relevant authority" which automatically qualifies the development of this land for additional height. The relative impact of the proposal is therefore negated by the proportionate additional development opportunity that is afforded to Landcom under the Housing SEPP.

- (d) *to nominate heights that will provide an appropriate transition in built form and land use intensity.*

Comment: As per objective (a) above, this objective primarily has an administrative purpose as opposed to a required environmental outcome. Notwithstanding this, the proposal continues to deliver a transition throughout the development being for 4 to 8 storeys as per the LEP and DCP requirements for the Site.

2nd Way - The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.

This consideration is not relevant in this case, as the objective of the standard, principally to deliver affordable housing, is relevant to the proposal.

3rd Way – The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required

This consideration is not relevant in this case.

4th Way – The development standard has been virtually abandoned or destroyed by the Council's own decisions

Although the development standard may not have been virtually abandoned or destroyed, the application of the standard under Clause 16 of the Housing SEPP is affected by the existing decision under made under the Original Consent.

In the Original Consent it was determined that the proposed height and FSR standards under the LEP were unreasonable and unnecessary. This resulted in an approved development that included exceedances to the height and FSR standards in the LEP, with the most dramatic departure from the standards evident in Building B. These exceedances resulted predominantly from the deletion of a road previously anticipated in a Master Plan and associated split FSR and height controls across the Site.

Clause 16 of the Housing SEPP applies an additional 30% height and FSR in certain circumstances. It is reasonable for the additional 30% to be applied to the existing controls under the LEP, however in the case of the Site, it has already been established in the Original Consent that the standards under the LEP are unreasonable and unnecessary. It is therefore reasonable for the additional height and FSR to be applied to the approved development.

5th Way – The zoning of the site is unreasonable or inappropriate and consequently so is the development standard

This consideration is not relevant in this case.

Are there sufficient environmental planning grounds to justify contravening the development standard? (Clause 4.6(3)(b))

The environmental planning grounds that support the contravention to Clauses 16(1) and 16(3) of the Housing SEPP are as follows:

- The proposal achieves the intent of the Housing SEPP to deliver increased affordable housing which has been made feasible through the additional incentive clauses delivering increased height and FSR.
- The proposal under the amending DA is consistent with the previously approved design approach which responds to the site-specific constraints.
- The previously approved design demonstrated that the existing height and FSR standards under the LEP are unreasonable and unnecessary.
- The Housing SEPP allows for additional height and FSR to be applied where affordable housing component is delivered by the development.
- As the Original Consent approved a development that reconsidered the height and FSR standards in the LEP, it would be unreasonable to assume that an amending DA to apply an affordable housing component would apply the additional height and FSR the standards in the LEP. The additional height and FSR should be applied to the approved development which has demonstrated that the application of the standards under the LEP are unreasonable and unnecessary.
- The proposal maintains an appropriate transition in built form to adjoining development and generally follows the intent of the height and FSR controls in promoting increased density as the Site gets closer towards the Edmonson Park town centre.
- There is an absence of material negative impacts in terms of overshadowing, or acoustic or visual privacy impacts resulting from non-compliance with the standards.

6 Conclusion

This clause 4.6 variation request adequately addresses the matters in clause 4.6(3) by demonstrating compliance with Clause 16 of *State Environmental Planning Policy (Housing) 2021* in relation to Height is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the contravention.

Consequently, the proposed variation under this application is considered to be acceptable in this instance. Despite the resultant variations, the development on this part of the Site is consistent with the planning controls that seek to achieve a transition in built form in this part of the release area and the intention of the bonus' under the Housing SEPP. Other minor encroachments to the height control for lift overruns and screens for rooftop plant equipment will not be apparent from the public domain and do not contribute to FSR.

We consider that the proposal meets the intent and objectives of the development standard and in accordance with clause 4.6, demonstrates that strict compliance with the standard is unreasonable and unnecessary in this case and that the variation is warranted.