

**CLAUSE 4.6 VARIATION REQUEST TO BUILDING HEIGHT DEVELOPMENT
STANDARD PURSUANT TO CLAUSE 4.3 OF WARRINGAH LEP 2011**

12 THE STRAND DEE WHY

Demolition of the existing shop top housing development and construction of a four-storey shop top housing development with 2 ground floor retail tenancies, 6 apartments over Levels 1-3, plus 15 car parking spaces, and loading dock

PREPARED BY

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CLAUSE 4.6 VARIATION REQUEST TO BUILDING HEIGHT DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.3 OF WARRINGAH LEP 2011

This Clause 4.6 variation request has been prepared to accompany the Development Application that seeks demolition of the existing shop top housing development and construction of a four-storey shop top housing development comprising two (2) ground floor retail tenancies, six (6) residential apartments over Levels 1-3, plus 15 basement car parking spaces, at Lot 13 Section (8) in DP 6953, commonly known as No. 12 The Strand Dee Why.

The site is zoned E1 Local Centre land use zone in accordance with the *Warringah Local Environmental Plan 2011* (WLEP2011). Shop top housing is a permitted land use.

The proposal seeks demolition of the existing shop top housing development and construction of a four-storey shop top housing development.

The proposal, as described in the accompanying plans, comprises the following:

- Basement Level 2
 - 7 x car parking spaces, contained within 4 x garages
 - Waiting bay
 - 4 x bicycle storage lockers
 - Communications room
 - Stair and lift access
- Basement Level 1
 - 8 x car parking spaces, including 2 x residential, 2 x visitor spaces, and 4 x retail spaces including 1 x accessible AS2890.6 car parking space
 - 2 x vehicle waiting bays
 - 5 x bicycle storage lockers
 - Grease arrestor room
 - Services room
 - Stair and lift access
- Ground Floor Level
 - 83.5m² x Retail Tenancy 1
 - 98.16m² x Retail Tenancy 2
 - Vehicular access entranceway via the rear lane access (right of carriageway)
 - Loading dock with rear lane access (right of carriageway)
 - Waiting bay
 - Commercial bin storage
 - Residential bin storage
 - 2 x hydraulic lifts
 - Accessible toilet with basin, plus male and female amenities
 - 3 x Stair and lift access
- Level 1
 - 2 x three-bedroom units, each comprising:
 - Combined kitchen, dining and living room
 - Balcony overlooking the street, accessed off living room and bedroom 1
 - Bedroom 1 with ensuite
 - Bedroom 2 with ensuite and balcony
 - Bedroom, with separate balcony
 - Secondary living room

- Study room
 - Cellar
 - Bathroom, with bath basin and WC
 - Toilet, with basin and WC
 - Laundry room
 - Recessed planter with void above
- Stair and lift access
- Level 2
 - 2 x four-bedroom units, each comprising:
 - Combined kitchen, dining and living room
 - Balcony overlooking the street, accessed off living room and Bedroom 1
 - Bedroom 1 with ensuite
 - Bedroom 2 with ensuite and balcony to the rear
 - 2 x bedrooms, each with separate balcony to the rear
 - Secondary living room
 - Bathroom, with bath basin and WC
 - Toilet, with basin and WC
 - Laundry room
 - Study room
 - Recessed planter with lightwell and void above
 - Stair and lift access
- Level 3
 - 2 x four-bedroom units, each comprising:
 - Combined kitchen, dining and living room
 - Balcony overlooking the street, accessed off living room and Bedroom 1
 - Bedroom 1 with ensuite
 - Bedroom 2 with ensuite and balcony to the rear
 - 2 x bedrooms, each with separate balcony to the rear
 - Secondary living room
 - Bathroom, with bath basin and WC
 - Toilet, with basin and WC
 - Laundry room
 - Study room for Unit 302
 - Recessed planter with lightwell and void above
 - Stair and lift access.

The proposal results in a non-compliance with Clause 4.3 of the WLEP2011, which relates to height of buildings. As such, this Clause 4.6 variation request has been prepared in accordance with Clause 4.6 of the WLEP2011:

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 (3).

(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 contain Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU6 Transition or Zone R5 Large Lot Residential.

(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,

(ba) clause 4.4, to the extent that it applies to land identified on the [Key Sites Map](#) as Site F, Site G, Site H or Site I,

(c) clause 5.4,

(caa) clause 5.5.

(d) (Repealed)

(8A) Also, this clause does not allow development consent to be granted for development that would contravene a development standard for the maximum height of a building shown on the [Height of Buildings Map](#) on land shown on the [Centres Map](#) as the Dee Why Town Centre.

(8B) Despite subclause (8A), development on Site C or Site E may exceed the maximum height of building shown on the [Height of Buildings Map](#) if the maximum height is allowable under clause 7.14.

This Clause 4.6 variation has been prepared in accordance with the 'Guide to Varying Development Standards' prepared by the Department of Planning and Environment in 2023.

This Clause 4.6 variation request outlines the nature of the exceedance to the building height development standard and provides an assessment of the relevant matters in Clause 4.6 of the WLEP2011.

This Clause 4.6 variation request demonstrates that compliance with the development standard relating to building height is unreasonable or unnecessary in the circumstances and establishes that there are sufficient environmental planning grounds to justify contravening the development standard, satisfying Clause 4.6(3) of the WLEP2011. This Clause 4.6 variation request also demonstrates that the proposed development will be consistent with the objectives of the height of buildings development standard and the zoning of the site.

Development Standard to be Varied

The proposal seeks a variation to the development standard contained within Clause 4.3 of the WLEP2011 and the associated building height map (**Figure 1**).

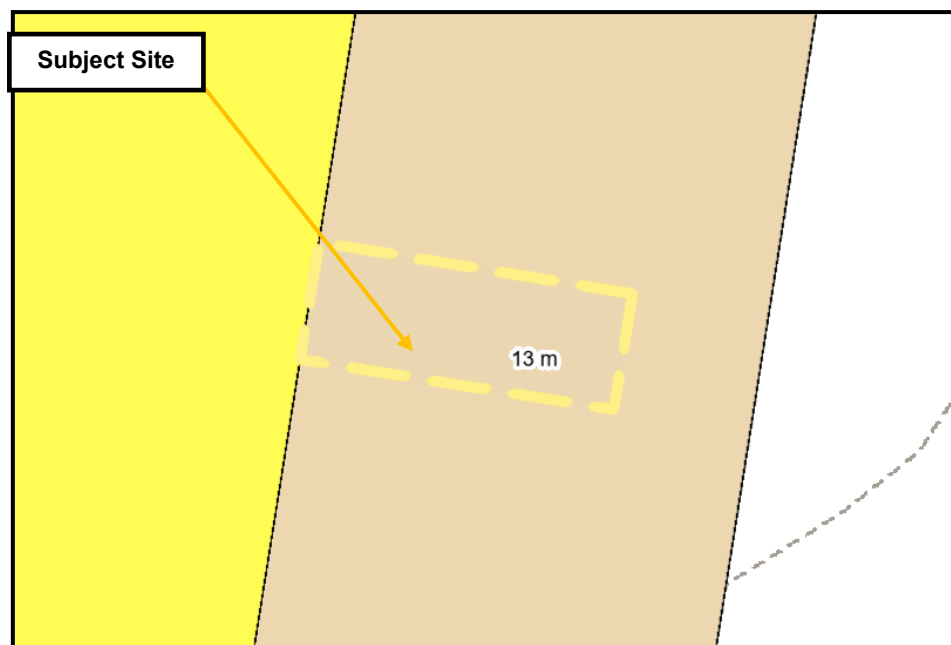
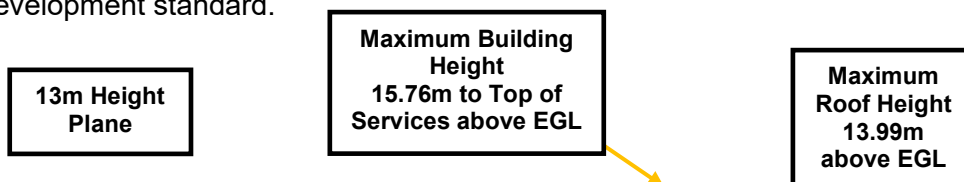


Figure 1: Building Height Map

Pursuant to Clause 4.3 of the WLEP2011, the site is subject to a maximum building height of 13m, with the proposal for a maximum roof height of 13.99m above EGL, with a maximum building height to the services (hot water plant) of 15.76m above EGL, being a 21.23% (2.76m) variation from the numerical development standard (**Figures 2 & 3**). It is noted that the proposed maximum roof height of 13.99m is a minor 7.62% (990mm) variation from the development standard.



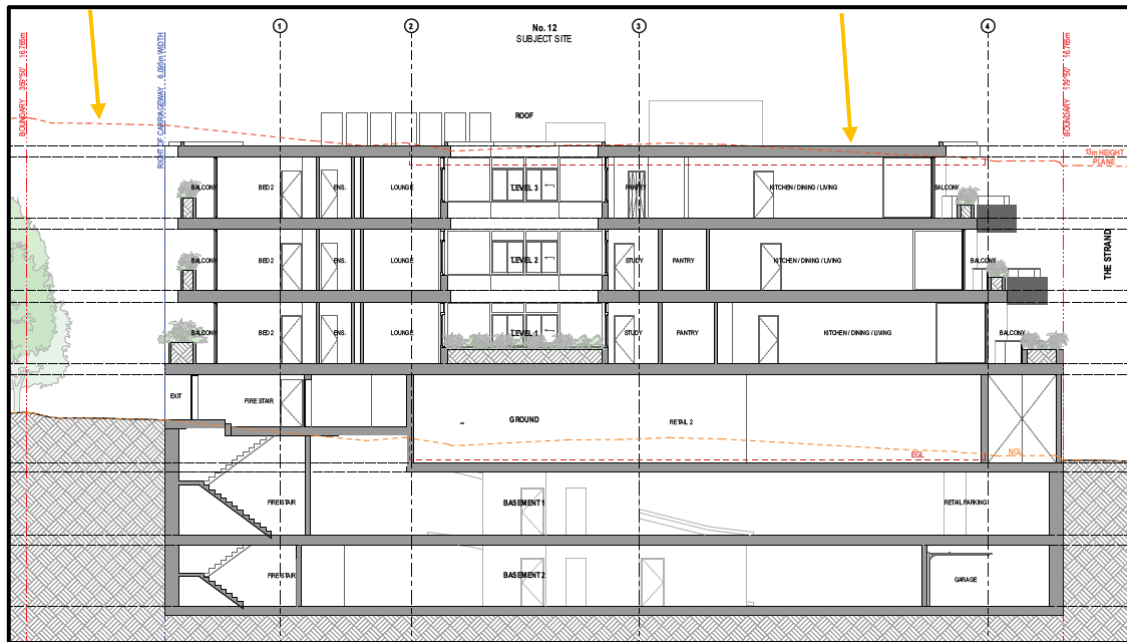


Figure 2: Extract of Section Plan, illustrating maximum building height above EGL

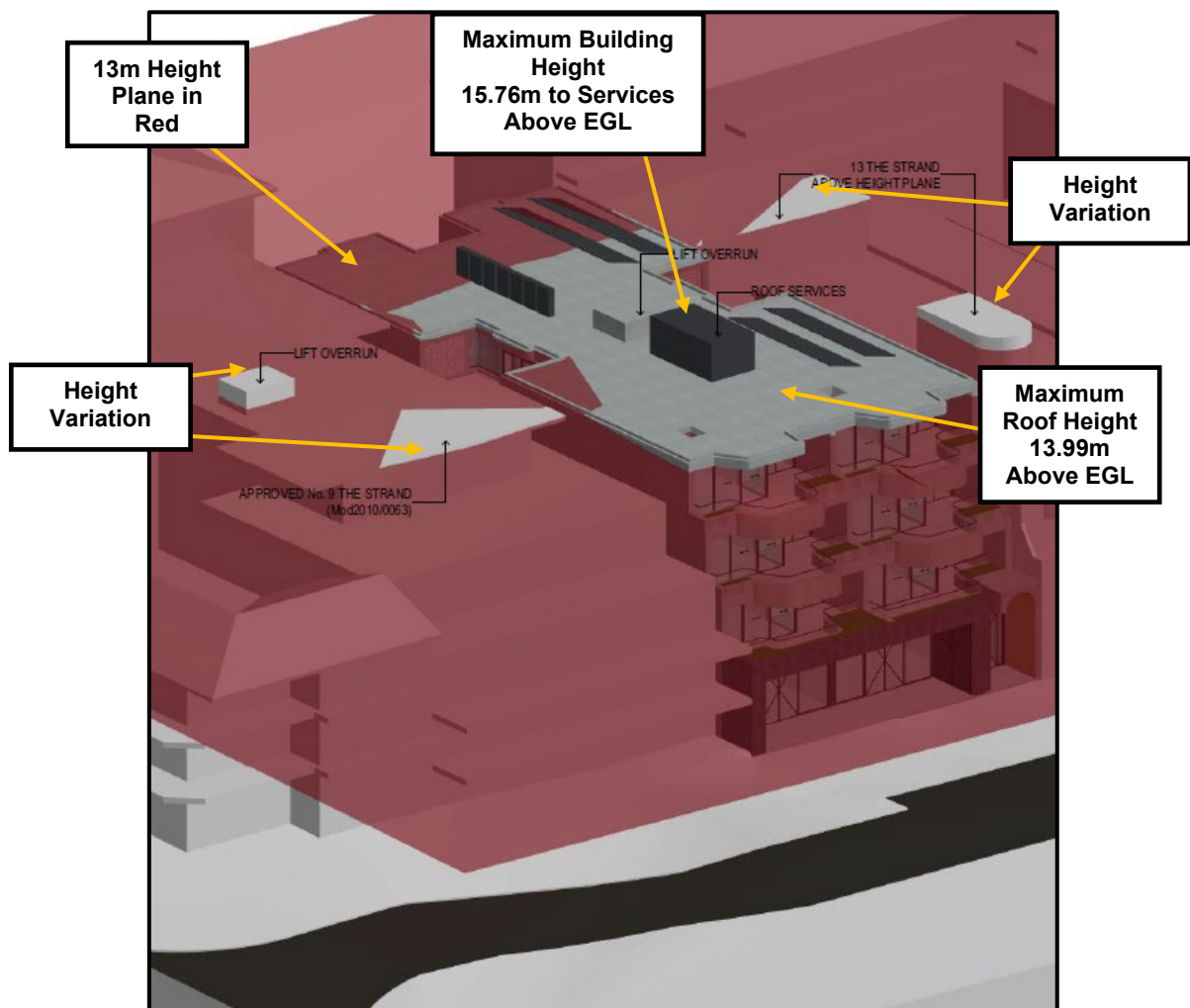


Figure 3: Excerpt 3D Height Plane Diagrams, illustrating height variation Justification for Contravention of the Development Standard

This Clause 4.6 variation request is considered to justify the contravention of the development standard and addresses the matters required to be demonstrated by Clause 4.6(3), of which there are two aspects. Both aspects are addressed below:

4.6(3)(a) compliance with the development standard is unreasonable or unnecessary in the circumstances

5-Part test

As outlined in the 'Guide to Varying Development Standards' prepared by the Department of Planning and Environment in 2023, the common ways to establish whether compliance with the development standard is unreasonable or unnecessary is known as the '5-Part Test' (from the case of *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The 5-Part Test is summarised as follows:

Compliance with the development standard is unreasonable or unnecessary if the:

- 1. objectives of the development standard are achieved notwithstanding the non-compliance**
- 2. underlying objective or purpose is not relevant to the development*
- 3. underlying objective or purpose would be defeated or thwarted if compliance was required*
- 4. development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard**
- 5. zoning of the land on which the development is proposed was unreasonable or inappropriate.*

An applicant only needs to satisfy at least one part of the 5-Part Test, not all 5 parts.

Assessment: Despite the non-compliance with the building height control, the proposal achieves the objectives of the development standard and the zoning, as demonstrated in the following table:

Consistency with the Objectives of the Building Height Development Standard in the LEP	
Objectives	Assessment
<i>a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,</i>	<ul style="list-style-type: none"> Notwithstanding, the height variation, the proposal is consistent and compatible with surrounding existing and approved developments including Nos. 9-11 The Strand under Mod2010/0063, determined 01/07/2010; Nos. 13-14 The Strand, and Nos. 18–19 The Strand under (Mod2018/0193) determined 05/12/2018. The proposed flat roof that is associated with the height variation is compatible with existing built form with flat roofs along this part of The Strand, including the adjoining buildings to the north and south. The services atop the roof are recessed and will not be perceptible from the public domain and

	<p>therefore these elements over the height limit will not generate any adverse streetscape or amenity impacts.</p> <ul style="list-style-type: none"> The proposal has been designed to reduce bulk and scale, through the recessive nature of the built form as it presents to The Strand. Moreover, the proposed variety of architectural features are considered to be of a high standard which will enhance the character of The Strand, including indentation and recesses, deep set balconies to front and rear elevations, privacy screens, and steps in the floor levels, creating effective articulation to the built form and building façade. These measures assisting in breaking down the overall bulk and scale of the built form including the height variation. On this basis, the objective is satisfied despite the height variation.
<p><i>(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,</i></p>	<ul style="list-style-type: none"> Despite the height variation, the proposal has been designed to reduce the visual impact bulk and scale, with the four-storey presentation to the street frontage and proposed front setback compatible with the surrounding properties along The Strand, being not visually dominant in the streetscape. The proposed variety of architectural features are considered to be of a high standard which will enhance the character of The Strand, including indentation and recesses, deep set balconies to front and rear elevations, privacy screens, and steps in the floor levels, creating good articulation to the built form and building façade. Moreover, the proposed rear setback is consistent with the adjoining neighbour to the north and side setbacks are consistent with the existing provision northern adjoining neighbour, plus character of The Strand. In this regard, the proposed height variation will not present an adverse visual bulk and scale impact. Notwithstanding the proposed height variation, the orientation of lots, surrounding topography, building separation to the western neighbour, in addition to the modest flat roof, ensures that outlook to the coast is maintained for adjoining properties and the public domain. In this regard, the adjoining properties to the north and south retain views to the coast from east facing windows and balconies. Moreover, the adjoining property to the rear is addressed to Oaks Avenue. This three-storey residential flat building is orientated to the south and has a generous building separation from the subject site and existing and screen planting, demonstrating that existing views to the east are limited. The existing vegetation screens any

	<p>coastal views whilst the units are sited below the permitted height limit, thereby confirming that the components of the built form over the height limit will not generate any adverse view impacts.</p> <ul style="list-style-type: none"> • No adverse shadow impacts to the adjoining building to the south or to the public domain are generated by the elements over the height limit. The minor nature of the height variation along the southern side is limited to the roof slab. • No privacy impacts are generated by the components over the height limit as such elements are limited to the roof slab and service equipment. • On this basis, the objective is satisfied despite the height variation.
<i>(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,</i>	<ul style="list-style-type: none"> • The height variation does not generate any impacts upon any bush environment as the site is not located in the vicinity of any bushland areas. • When viewed from surrounding coastal areas, the proposed height variation will not generate any adverse visual impacts due to the minor and recessed nature of the elements over the height limit. Overall, the proposal has been designed to reduce the visual impact bulk and scale, with the four-storey presentation to the street frontage and proposed front setback compatible with the surrounding properties along The Strand, being not visually dominant in the streetscape. • The proposed variety of architectural features are considered to be of a high standard which will enhance the character of The Strand and the foreshore setting, including indentation and recesses, deep set balconies to front and rear elevations, privacy screens, and steps in the floor levels, creating good articulation to the built form and building façade. • New landscaping to the front and rear balconies, plus side elevation recessed cut outs is proposed including palms, shrubs, grasses and groundcovers. Landscape plantings soften the built form and will have a positive visual impact on the streetscape over time, when viewed from coastal areas. • On this basis, the objective is satisfied despite the height variation.
<i>(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.</i>	<ul style="list-style-type: none"> • Removal of significant trees and vegetation does not form a part of this proposal, while the sensitive siting and articulation of the proposed development preserves the amenity of neighbouring properties and the foreshore public domain, despite the height variation.

	<ul style="list-style-type: none"> The recessive and minor elements over the height limit, combined with the stepped form of built form as perceived from the public domain and coastal areas opposite ensure that the components over the height standard will not generate any adverse visual impacts. On this basis, the objective is satisfied despite the height variation.
Consistency with the Objectives of the E1 Local Centre Zone	
Objectives	Assessment
<ul style="list-style-type: none"> To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area. To encourage investment in local commercial development that generates employment opportunities and economic growth. To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area. To encourage business, retail, community and other non-residential land uses on the ground floor of buildings. To ensure new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces. To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment. 	<p>Complies</p> <ul style="list-style-type: none"> The site is within the E1 Local Centre land use zone under the provisions of WLEP2011. The height variation is associated with the provision of a shop top housing development that allows for achievement of the zone objectives. The proposed building height variation does not raise any inconsistency with the ability of the proposal to achieve the objectives of the E1 Local Centre Zone, as follows: <ul style="list-style-type: none"> The proposal is considered to satisfy the zone objectives by providing for ground floor retail with active frontage, plus upper level residential development, that contributes to a vibrant and active local centre. The proposal includes 2 x ground floor retail tenancies which will generate employment opportunities and contribute to economic growth. The proposed ground floor retail will contribute to a diverse and active street frontage. The proposal includes 6 x residential units, that will contribute to a vibrant and active local centre. The proposed four-storey height is consistent with the adjoining neighbour at Nos. 13-14 The Strand being a five-storey shop top housing development, while the adjoining neighbour at Nos. 9-11 The Strand has approval for a four/ five-storey shop top housing development under Mod2010/0063, determined 01/07/2010. Furthermore, Nos. 18-19 The Strand has approval for a four-storey shop top housing development Mod2018/0193, determined 05/12/2018. The proposed colours, materials and finishes enhance the architectural design of the dwellings and are suitable for the contemporary design and foreshore setting. The mix of materials which include concrete finish, off form

	<p>concrete, rendered brick, anodised aluminium windows, glass balustrade, tiles, and breeze blocks, provide an interesting presentation and variation contributing to the streetscape character.</p> <ul style="list-style-type: none"> ○ New landscaping to the front and rear balconies, plus side elevation recessed cut outs is proposed including palms, shrubs, grasses and groundcovers. Landscape plantings soften the built form and will have a positive visual impact on the streetscape over time.
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Compliance with the development standard is unreasonable and unnecessary as the proposed building height and bulk is of an appropriate form and scale and is compatible with surrounding development and the desired future character for the locality and meets the objectives of the development standard.

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

As outlined in the 'Guide to Varying Development Standards' prepared by the Department of Planning and Environment in 2023, the term 'environmental planning grounds', while not defined in the EP&A Act or the Standard Instrument, refer to grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the EP&A Act. The scope of environmental planning grounds is wide as exemplified by the court cases (Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [10]).

Assessment: Environmental planning grounds justifying the contravention of the building height development standard include:

Visual impacts from bulk and scale

The proposed height variation is associated with a minor portion of the flat roof, plus the services (hot water plant and air-conditioning condensers), and lift overrun which are recessed within the centre of the roof and will be indiscernible from the adjoining neighbours and the public domain.

Notwithstanding the minor 7.62% variation of the proposed flat roof, the height, bulk and scale of the development will be perceptible in a modest and discreet manner from the street, is not considered to be visually dominant in the streetscape, and does not introduce a significant impact to neighbours, with it considered that the siting and scale of development is appropriate for the site and surrounding context, and will preserve the amenity of neighbouring properties.

Notwithstanding, the height variation, the proposal is consistent and compatible with surrounding existing and approved developments including Nos. 9-11 The Strand under **Mod2010/0063**, determined 01/07/2010; Nos. 13-14 The Strand, and Nos. 18-19 The Strand under **Mod2018/0193** determined 05/12/2018 (**Figures 4 & 5**).

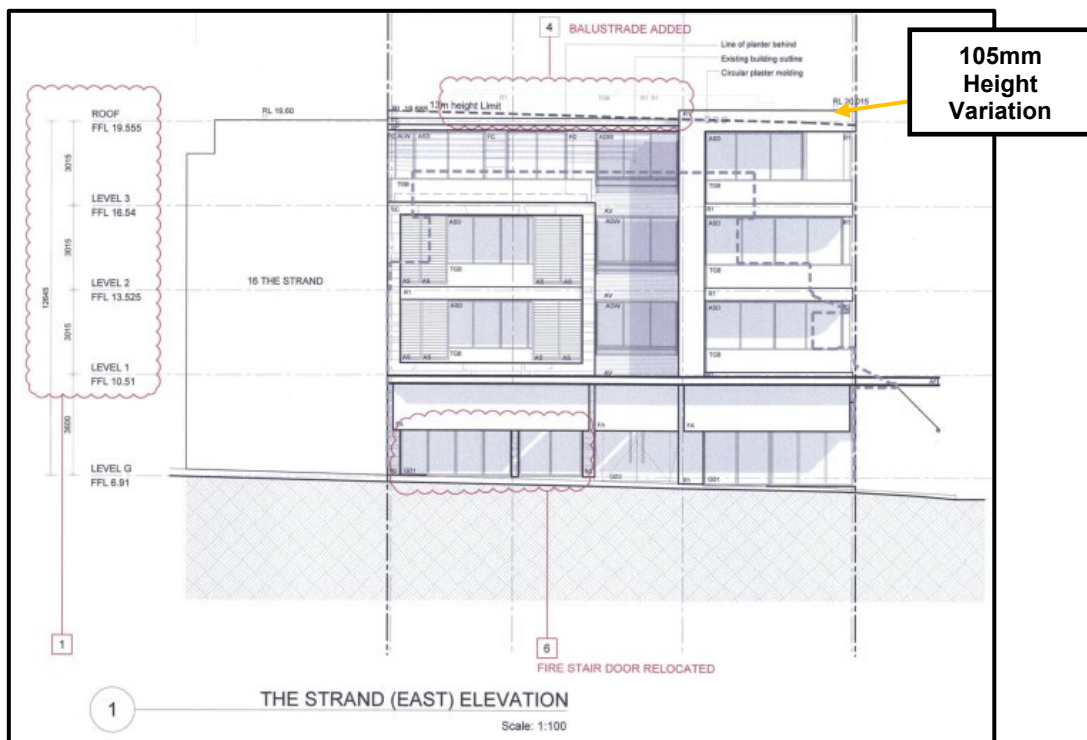


Figure 4: Extract East/street-facing Elevation Plan of Nos. 18-19 The Strand, illustrating minor height variation (Mod2018/0193), being compatible with proposed height variation

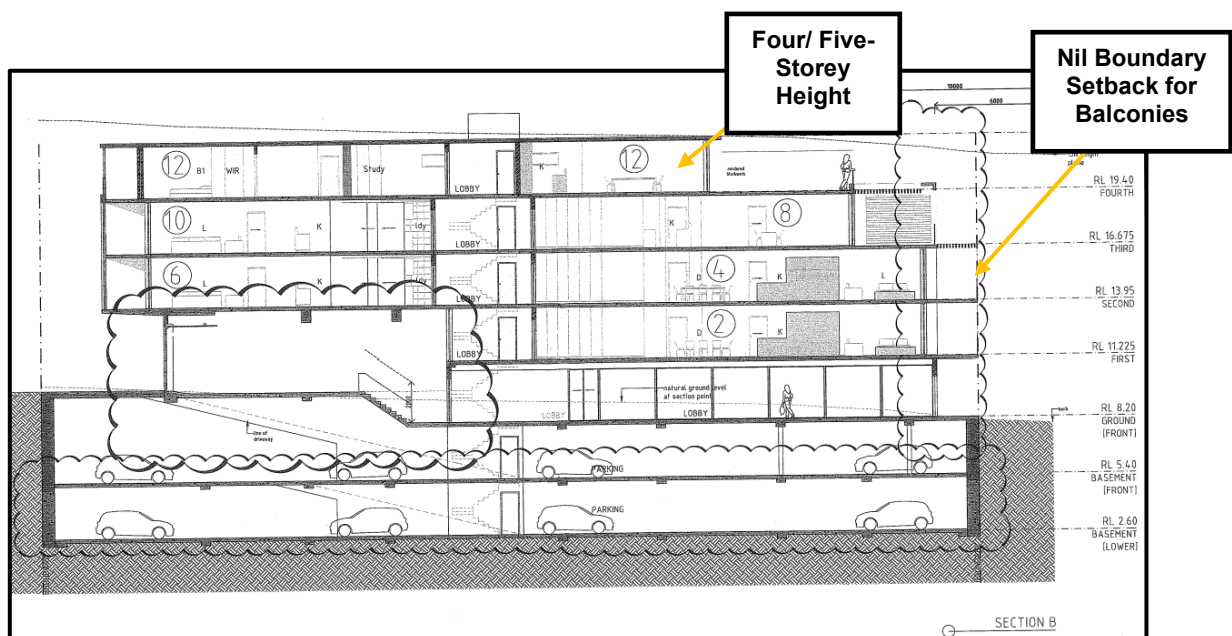


Figure 5: Approved four/ five-storey development, with nil upper level balcony setbacks adjoining the site at Nos. 9-11 The Strand (Mod2010/0063)

Visual and acoustic privacy

The proposed maximum 2.76m height variation is associated with a minor portion of the flat roof, plus the services (hot water plant and air-conditioning condensers), and lift overrun which are recessed within the centre of the roof. In this regard, no privacy impacts are generated by the components over the height limit as such elements are limited to the roof slab and service equipment.

Overshadowing

An adverse shadowing impact to the adjoining building to the south or to the public domain is not generated by the built form elements over the height limit, given the minor nature of the height variation along the southern side is limited to the roof slab.

Given the east-west site orientation, and the proposed height variation being associated with a minor portion of the flat roof, plus the recessed nature of the building services and lift overrun within the centre of the roof, the shadowing associated with the height variation falls predominantly onto the roof of the adjoining development to the south. Moreover, shadows falling to the public domain to the east are consistent with a compliant building height, with minor additional overshadowing to Ted Jackson Reserve from the height variation being indiscernible.

In this regard, despite the proposed building height variation, shadow diagrams accompanying this application indicate that the shadowing associated with the height variation will not have an unreasonable impact, with at least 2 x hours of sunlight between 9am and 3pm during midwinter is maintained to east facing living areas of apartments to the south at Nos. 9-11 The Strand. Moreover, there is no unreasonable additional overshadowing of Nos. 110–112 Oaks Avenue associated with the proposal, with only minor indiscernible additional overshadowing to Ted Jackson Reserve from the height variation (**Figures 8 & 9**).

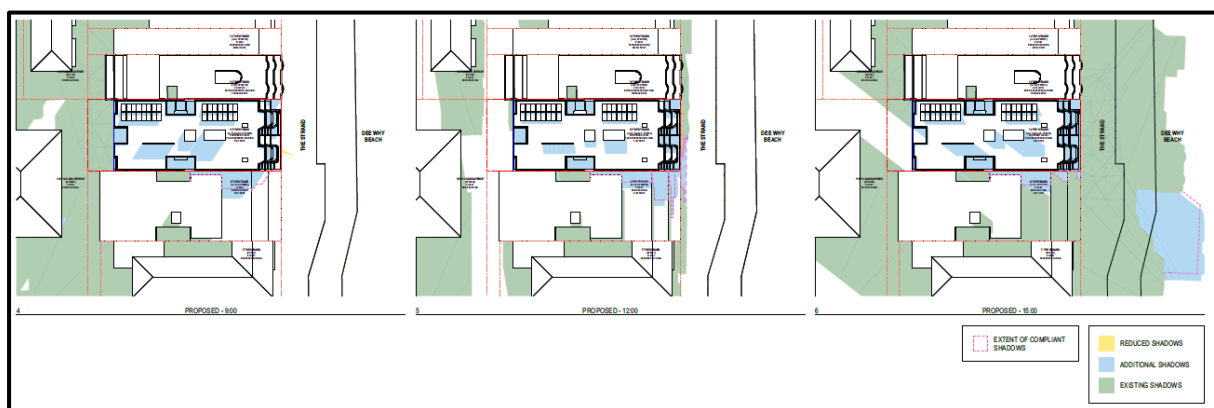


Figure 6: Extract of Shadow Diagrams, illustrating solar access to neighbouring developments is maintained, with minor shadowing to the public domain from the height variation

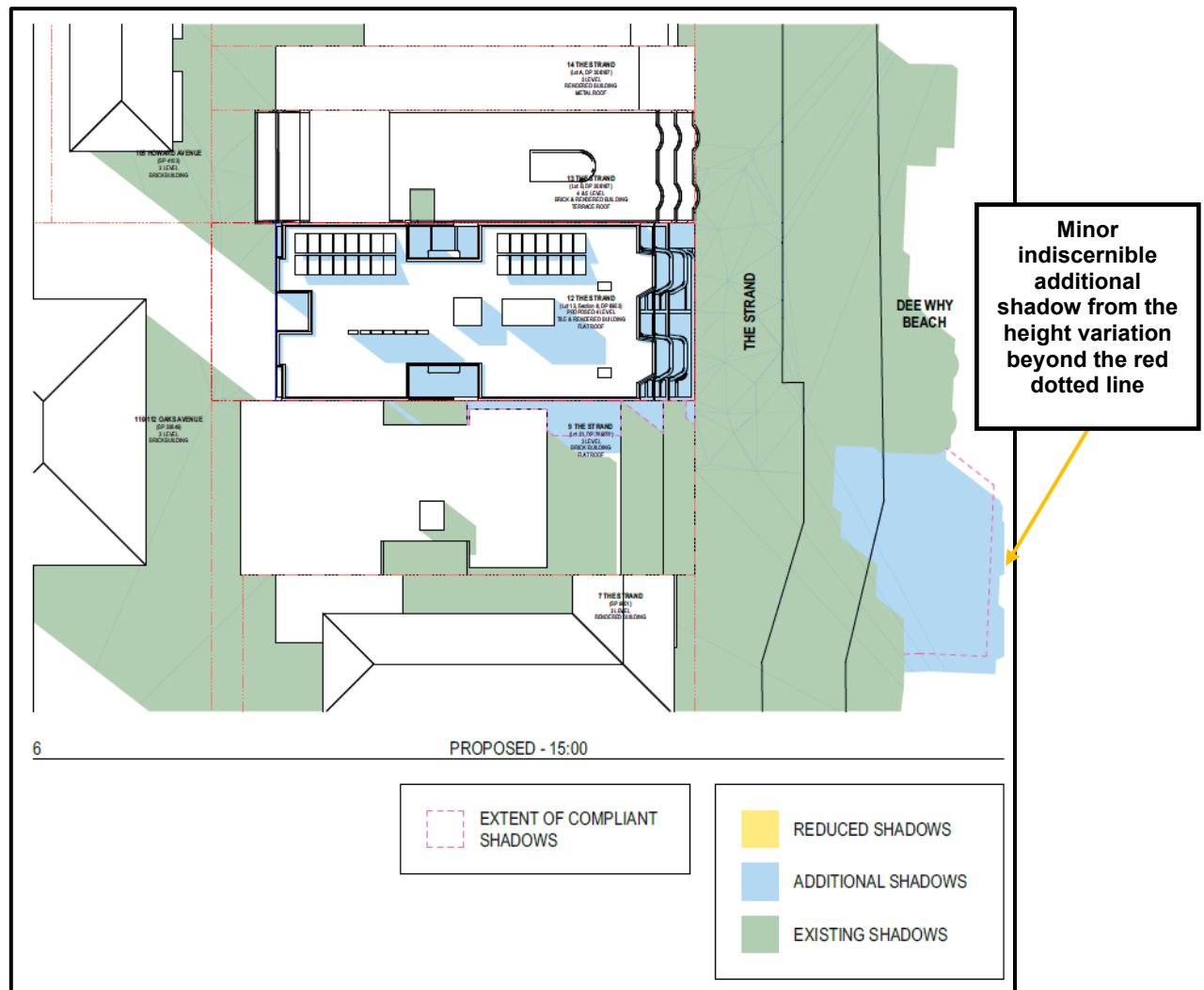


Figure 7: Extract of Proposed Shadow Diagrams, illustrating the minor shadowing to the public domain from the height variation

Impact to views

Notwithstanding the proposed height variation the orientation of lots, surrounding topography, building separation to the western neighbour, in addition to the modest flat roof, ensures that outlook to the coast is maintained for adjoining properties and the public domain. In this regard, the adjoining properties to the north and south retain views to the coast from east facing windows and balconies. Moreover, the adjoining property to the rear is addressed to Oaks Avenue. This three-storey residential flat building is orientated to the south and has a generous building separation from the subject site and existing and screen planting, demonstrating that existing views to the east are limited. The existing vegetation screens any coastal views whilst the units are sited below the permitted height limit, thereby confirming that the components of the built form over the height limit will not generate any adverse view impacts.

The proposal will provide a suitable design and amenity in terms of the built environment and represents the orderly and economic use and development of land, which are identified as objects of the Act (Section 1.3 of the EP&A Act) and the building envelope and design of the

proposal responds appropriately to the unique opportunities and constraints of the site. On the above basis, it is considered that there are sufficient environmental grounds to permit the building height variation in this instance.

Conclusion

This Clause 4.6 variation request is considered to adequately address the relevant matters under Clause 4.6 and demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances (Clause 4.6(3)(a)) and that there are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b)).

The proposal is consistent with the objects of Section 1.3 of the EP&A Act by promoting the following:

- economic welfare of the community and a better environment (Section 1.3(a))
- orderly and economic use and development of land (Section 1.3(c))
- delivery and maintenance of affordable housing (Section 1.3(d))
- protect the environment (Section 1.3(e))
- sustainable management of built heritage (Section 1.3(f))
- good design and amenity of the built environment (Section 1.3 (g))
- proper construction and maintenance of buildings, including the protection of the health and safety of their occupants (Section 1.3(h))

The proposed development will be in the public interest because it is consistent with the objectives of the height of buildings development standard under the Manly LEP 2013.

For reasons mentioned herein, this Clause 4.6 variation request is forwarded in support of the development proposal at No. 12 The Strand Dee Why and is requested to be looked upon favourably by the consent authority.