





# **Amended Clause 4.6 Variation Request**

Height of Buildings  
(Clause 4.3) ELEP 2012

Submitted to the Eurobodalla Shire Council  
On Behalf of Global Lifestyle Communities Pty Ltd

JUNE 2019

## REPORT REVISION HISTORY

Revision	Date Issued	Revision Description	
01 - DRAFT	14/06/19	Revision tracking notes	
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02 - FINAL	14/06/19	Revision tracking notes	
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### Certification

This report has been authorised by City Plan Strategy & Development P/L, with input from a number of other expert consultants. To the best of our knowledge the accuracy of the information contained herein is neither false nor misleading. The comments have been based upon information and facts that were correct at the time of writing.

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## TABLE OF CONTENTS

1. Introduction .....	3
2. Extent of variation .....	4
3. Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case. [cl.4.6 (3)(a)] .....	7
4. There are sufficient environmental planning grounds to justify contravening the standard. [cl. 4.6(3)(b)] .....	13
5. The Proposal will be in the public interest because it is consistent with the objectives of the standard and the objectives of the zone. [cl.4.6(4)(a)(ii)] .....	15
6. Contravention of the development standard does not raise any matter of significance for State or regional environmental planning. [cl. 4.6(5)(a)] .....	17
7. There is no public benefit of maintaining the standard. [cl. 4.6(5)(b)] .....	18
8. Conclusion .....	19

## FIGURES

Figure 1: Extract of Height of Building map (source: ELEP 2012) .....	4
Figure 2: Cross-section showing flood planning level (dotted blue line) and height plane (dotted red line) (Source: BHI Architects) .....	5
Figure 3: Revised height exceedance diagram showing non-compliant building height in pink (Source: BHI Architects) .....	6
Figure 4: Cross-section showing the flood planning level and redistribution of building height within the site (Source: BHI Architects) .....	8
Figure 5: View Analysis (Source: BHI Architects) .....	10
Figure 6: Shadow impact of proposed concept development during the winter-solstice, 9am (Source: BHI Architects) .....	11
Figure 7: Shadow impact of proposed concept development during the winter-solstice, 12pm (Source: BHI Architects) .....	11
Figure 8: Shadow impact of proposed concept development during the winter-solstice, 3pm (Source: BHI Architects) .....	12

## TABLES

Table 1: R3 and SP3 zone objectives from ELEP2012 .....	15
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## 1. INTRODUCTION

This is a formal written request prepared in accordance with Clause 4.6 of the *Eurobodalla Local Environmental Plan 2012* (ELEP 2012) to support an Amended Concept Development Application (DA) for a Seniors Housing and Residential Development Proposal at **No. 49 Beach Road, Batemans Bay** (the subject site). It has been prepared as a revision to the amended variation request (dated 1 March 2019), having regard to the matters raised by the Southern Joint Regional Planning Panel (the JRPP) following the public briefing meeting held on 9 March 2019 and the Additional Information Requests issued by Eurobodalla Shire Council on 6 April & 27 May 2019 in relation to the amended DA. Specifically, the request refers to the inclusion of the proposed publicly-accessible boardwalk along the site's water frontage.

The request seeks approval to vary the height of buildings development standard in Clause 4.3 of the ELEP 2012. For the avoidance of doubt, the development standard is not specifically excluded from the operation of Clause 4.6 of ELEP 2012.

Clause 4.3 provides a numerical building height limit of 11.5m over the subject site. The proposed exception to this standard relates to 12 of the 20 proposed buildings within the site which exceed the prescribed maximum height by between 0.1m (0.08%) and 3.4m (29.5%), previously 1m (8.7%) and 4.6m (40%).

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. As the following request demonstrates, by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application, compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the standard. This request also demonstrates that the proposal will be in the public interest, as the proposed development will be consistent with the objectives of the development standard and the zoning of the site.

This request has been prepared having regard to the NSW Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011) and relevant decisions in the New South Wales Land & Environment Court (L & E Court). Of particular recent relevance are the decisions of Dixon SC in *Brigham v Canterbury – Bankstown Council [2018] NSWLEC 1406* and of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, which both provide a clear outline of the matters required to be demonstrated by Clause 4.6, including the structure of such requests.

Sections 3 and 4 of this request explain how flexibility is justified in this case in terms of the matters explicitly required to be addressed in a written request from the applicant. Sections 5, 6 and 7 address additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 or the assumed concurrence of the Secretary.

## 2. EXTENT OF VARIATION

As shown in Figure 1 below, the ELEP 2012 prescribes a maximum building height for the subject site of 11.5m.

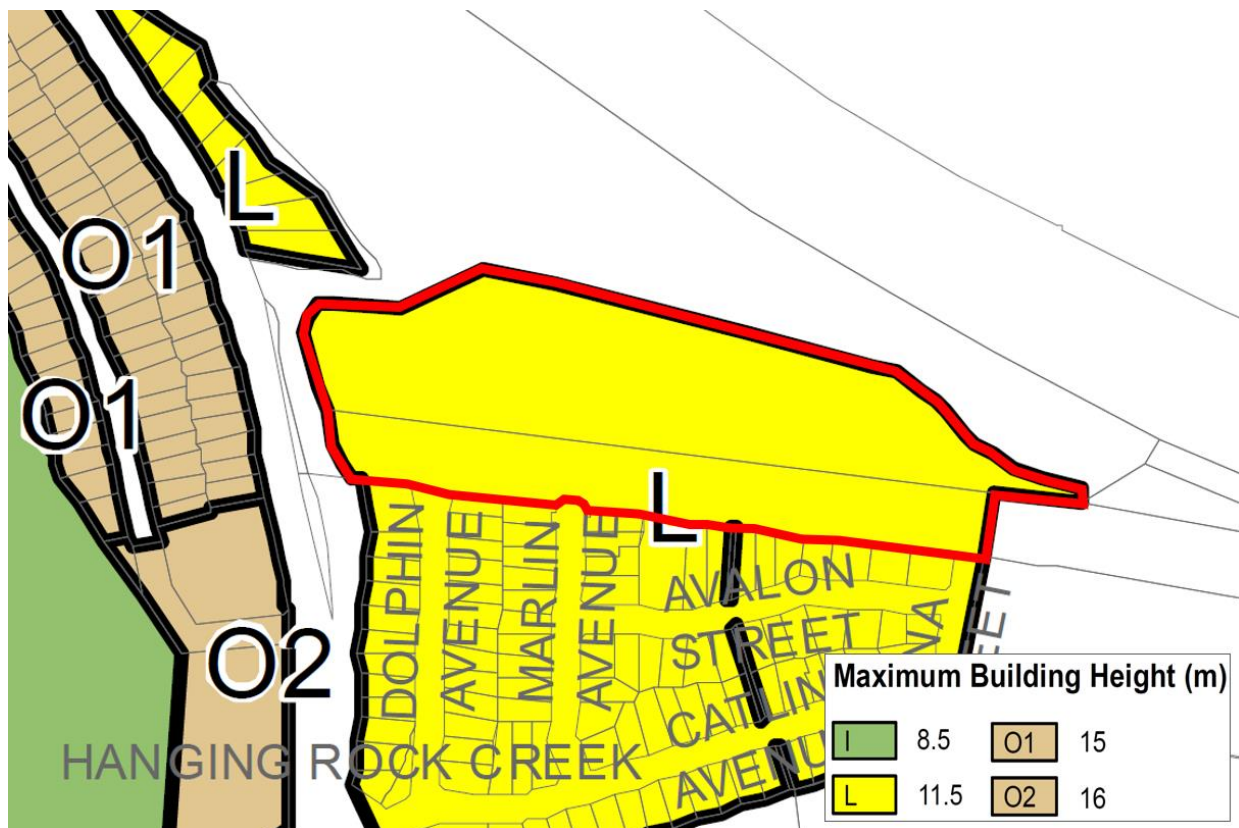


Figure 1: Extract of Height of Building map (source: ELEP 2012)

The proposed concept development, as amended, will involve the construction of 20 separate buildings within 3 distinct 'zones' over the site, comprising:

- 9 x residential flat buildings comprising 128 apartments (Zone A);
- a retirement village comprising 210 self-contained dwellings in the form of 'serviced self-care housing', within 8 separate buildings (Zone B);
- a 3-storey residential care facility, accommodating 150 beds (previously 4 storeys with 159 beds) (Zone C); and
- ancillary facilities in the form of a 2-storey community centre with a ground floor café and restaurant (Zone B), and a 1-storey wellness consulting centre (previously 3 storeys) (Zone C);

As discussed in the following sections, the proposed concept development has been sited and designed to respond to a number of key considerations including the site's waterfront location, adjoining residential development to the south and the site's flooding constraints. As a result, the proposed buildings are to be

elevated above the flood planning level via a raised podium throughout the site, which is to comprise basement carparking and raised landscaping (refer to Figure 2). The raised podium enables carparking to be predominantly concealed below ground, with the majority of the unbuilt-upon area dedicated to landscaping and communal areas. In addition, the buildings will be provided in a range of typologies, ranging in height between 2 storeys and 4 storeys. The variable building heights have been arranged within the site to appropriately respect amenity and visual considerations in the locality.

The exception to the building height development standard concerns a departure from the 11.5m standard applicable to the subject site. Specifically, 12 of the 20 proposed buildings reach a maximum building height of ranging between 11.51m and 14.9m as measured from ground level (existing), exceeding the prescribed maximum height by between 0.1m (0.08%) and 3.4m (29.5%). As demonstrated in Figure 3, the tallest proposed buildings have been concentrated centrally within the site. Three of the non-compliant buildings remain less than 0.5m above the prescribed maximum height limit (between 0.1m and 0.4m). In addition, the larger departures predominantly result from lift overruns.

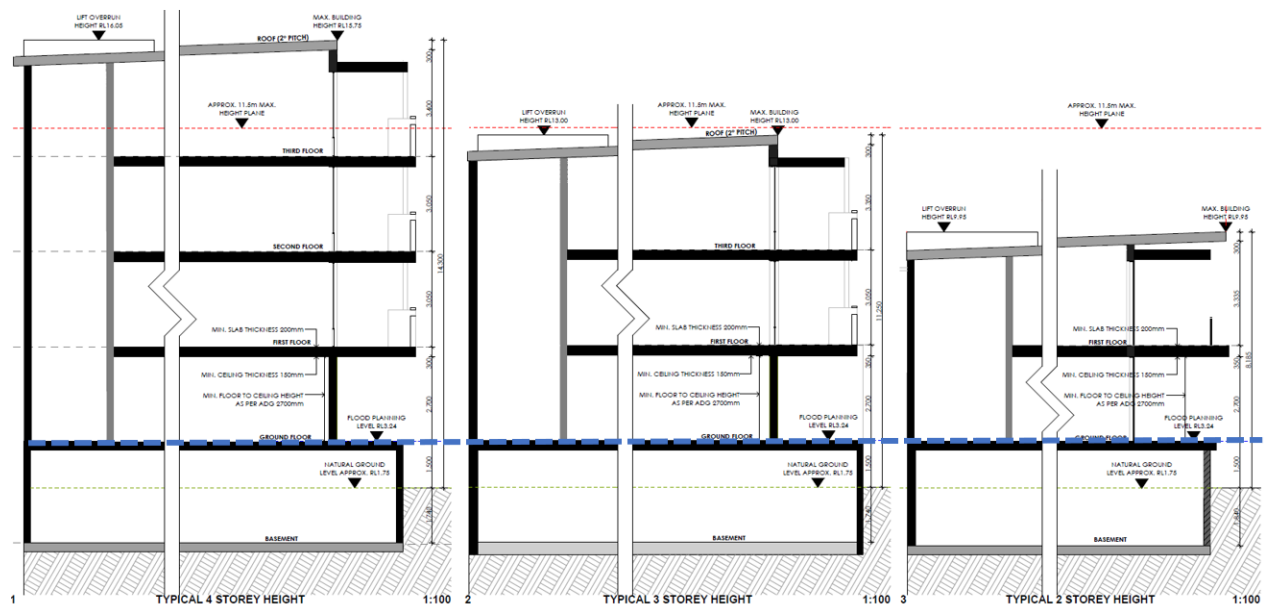


Figure 2: Cross-section showing flood planning level (dotted blue line) and height plane (dotted red line) (Source: BHI Architects)



Figure 3: Revised height exceedance diagram showing non-compliant building height in pink (Source: BHI Architects)

### **3. COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THIS CASE. [cl.4.6 (3)(a)]**

The L & E Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary was whether the proposal satisfied the objectives of the standard notwithstanding the non-compliance (the first 'test').

The remaining four 'tests' in *Wehbe* are as follows:

- *The underlying objective or purpose is not relevant, or*
- *The objective would be defeated if compliance was required resulting in compliance being unreasonable, or*
- *The development standard has been abandoned, or*
- *The zoning is unreasonable or inappropriate.*

These remaining four 'tests' are not considered relevant to the current proposal and therefore this request seeks to rely on the first 'test' in *Wehbe*, only. This approach is consistent with the findings of Dixon SC in *Brigham v Canterbury – Bankstown Council* [2018] NSWLEC 1406 who notes 'you do not need to list all five tests from *Wehbe* if the first test is relied upon and said to be satisfied'.

Pursuant to the first 'test' in *Wehbe*, compliance with the height of buildings development standard is considered to be unreasonable and unnecessary in the circumstances of this case because, as demonstrated below, the objectives of the development standard contained in Clause 4.3 of the ELEG 2012 are satisfied, notwithstanding non-compliance with the standard.

#### **Clause 4.3 height of buildings objectives**

##### ***(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality***

As outlined in the amended Statement of Environmental Effects (SEE) accompanying this DA, the subject site is currently adjoined by low density residential development to the south, principally comprising detached single and two storey dwelling houses and tourist accommodation/holiday units. Zoned R3 Medium Density Residential and subject to a maximum permissible building height of 11.5m, desired future development within this adjoining area is likely to continue to be generally residential in character, but in a medium density urban form in accordance with the zone's objectives and height limit.

Other surrounding development is visually and physically separated from the subject site by Beach Road and Hanging Rock Creek. Notwithstanding, it is noted that land to the immediate north-west fronting the water is also subject to an 11.5m height of buildings limit, while land beyond is subject to a 15m height of buildings limit. The shoreline between the town centre and Corrigan's Beach to the south-east is developed and armoured.

To respect the adjoining built form setting to the south, the scale of the proposed concept development is broken up into a series of buildings that are separated by extensive areas of landscaping and communal open space. Variable building heights have been distributed throughout the site, with the taller proposed buildings that contravene the development standard being concentrated centrally within the site. Importantly, the proposed buildings along the southern boundary will generally be limited to 2-storeys in

It is noteworthy that any future redevelopment of land to the south of the site will need to be elevated above flood level. Accordingly, while the requirement to raise proposed buildings approximately 1.5m above existing ground level has increased the perceived scale of the proposed built form, the raised ground level is likely to be perceived as the 'natural' ground level of development in the area in the future. In addition, since the adjoining land to the south is subject to an 11.5m building height limit, future development on sites to the south is likely to consist of built forms of a height, bulk and scale that will be in harmony with the more distant taller, centrally located buildings proposed on the subject site.



Overall, the height of those portions of the proposed concept development exceeding the building height development standard are not considered incompatible with the height, bulk and scale of the existing and desired future character of the locality, particularly in the R3 zone.

Page | 8

The amended SEE prepared to support this DA provides a detailed response to the residential amenity components of this zone objective. A summary response is provided below in relation to the non-complaint aspects of the proposed development.

Overall, it is submitted that the non-compliant components of the development will not result in any unreasonable visual impact, disruption of views, loss of privacy or loss of solar access to existing development in the locality, as discussed below.

#### Visual Impact

Numerous elements have been incorporated into the design to maximise the visual amenity of the development when viewed from adjoining development. In particular, the lower, compliant built forms towards the site's southern boundary will assist in limiting the visibility of the taller, buildings when viewed from adjoining development to the south. In addition, the amended increased landscaped setbacks now proposed along the site's southern boundary will further serve to screen and soften the visual presence of the proposed taller buildings that contravene the building height development standard.

With regard to the potential visual impacts upon existing dwelling houses to the west of the site, it is noteworthy that the concept proposal maintains the site's existing Hanging Rock Creek frontage, inclusive of the vegetated riparian corridor. In addition, the proposed 3 storey Residential Care Facility (RCF), although now a maximum of 2.1m above the permissible building height limit, adopts a similar setback from Hanging Rock Creek to that of existing site development. This setback, coupled with significant landscaping, is consistent with adjoining development to the south along Beach Road and will ensure compatibility of the proposal with the streetscape in a form that appropriately reduces its visual impact.

Furthermore, the proposal's raised podium design with below ground car parking will create an attractive landscaped setting throughout the site, enhancing the visual amenity of the locality.

#### Disruption of Views

A *View Analysis* (VA) has been undertaken for the proposed concept development and is included in the amended Architectural Plans submitted with this DA.

The existing dwelling houses to the north-west of the site (photo 6) have clear views to the water due to their elevated position. As demonstrated in Figure 5, these views will not be disrupted by the proposed development. Views to the water from existing dwelling houses to the south and south-west of the site (photos 1-4) are currently obscured by existing trees and vegetation within and near the site.

The only potential disruption to views resulting from the proposed development relates to the partial views to the water that are currently available from existing dwelling houses to the west of the site fronting Beach Road (Photo 5). Due to the generous 12m wide foreshore setback adopted by the proposed development, any additional loss of views to the water would be minimal if at all and, in any case, would not result from any the non-compliant building height.

While objective (b) of Clause 4.3 relates to impacts on existing development, only, it is noteworthy that the non-complaint building height would not result in any additional view loss impacts across the site from future development to the south compared to a fully compliant development. This is due to the subject site and adjoining land to the south having a generally flat topography and being subject to a consistent building height limit of 11.5m.



Figure 5: View Analysis (Source: BHI Architects)

### Loss of Privacy

Due to the orientation of all apartments to the north, the non-compliant height will not result in any privacy impacts upon existing residential development to the south. In any event, any potential overlooking from the non-compliant building levels would be prevented by the compliant apartment buildings positioned adjacent to the southern boundary and the extensive landscaping proposed in the generous setback areas.

### Solar access

Amended shadow diagrams have been prepared for the concept proposal by BHI Architects and are included in the Architectural Plans. Figures 6-8, below, has been extracted from the Amended Architectural Plans. These extracted figures demonstrate that shadows cast by the non-compliant building heights during the winter solstice do not extend beyond the site's southern boundary to the adjoining residential development.



1 9AM JUNE 21 - OVERSHADOWING

Figure 6: Shadow impact of proposed concept development during the winter-solstice, 9am (Source: BHI Architects)



1 12PM JUNE 21 - OVERSHADOWING

Figure 7: Shadow impact of proposed concept development during the winter-solstice, 12pm (Source: BHI Architects)



Figure 8: Shadow impact of proposed concept development during the winter-solstice, 3pm (Source: BHI Architects)

#### **4. THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE STANDARD. [cl. 4.6(3)(b)]**

The Amended SEE prepared to support this Amended DA provides a comprehensive environmental planning assessment of the proposed development and concludes that there are sufficient environmental planning grounds to support the development.

Specific environmental planning grounds to justify the proposed departure from the building height development standard are summarised as follows:

- The proposed concept development strongly aligns with state and local government strategic planning objectives for the area by promoting increased housing diversity, particularly in the form of seniors housing, in an accessible and well-served location supported by the nearby Batemans Bay town centre. The additional proposed height is important in facilitating these strategic planning objectives.
- The raised podium enables carparking to be almost entirely concealed below ground, with the majority of the unbuilt-upon area able to be dedicated to landscaping and communal areas. This positioning of car parking underground facilitates the provision of residential apartments, seniors housing and ancillary facilities across the site in a landscaped setting largely free of exposed parking areas. It is submitted that the raised podium design, although contributing to the building height exceedances, results in a significantly enhanced visual amenity for the site compared with the provision of at-grade car parking across the site and therefore justifies contravention of the development standard..
- The 11.5m LEP building height limit generally suggests a building height of 3-storeys plus ground level parking, which would tend to visually present as a 4-storey built form. In keeping with this scale of building, 12 of the 20 proposed buildings are either 1, 2 or 3 storey built forms. However, the 4-storey buildings exceed the 11.5m building height limit as a result of the raised podium design. On environmental planning grounds this design approach is preferable to eliminating the upper-most storey in each instance and redistributing this floorspace throughout the site's unbuilt-upon areas and/or by creating taller compliant buildings along the site's southern boundary.
- As noted earlier in this submission, the ELEP 2012 does not prescribe any statutory floor space ratios in the LGA, and therefore does not seek to quantitatively control building bulk and scale. In this respect the proposed development has an overall FSR of approximately 0.81:1. On environmental planning grounds such a density of development in a medium density housing zone is considered appropriate and could not be regarded as representing excessive development of the site. To enable this density in a generously landscaped setting respectful of the locality's existing and desired future medium density character, a stepped built form is favoured on environmental planning grounds and one supportive of the proposed departure from the building height development standard in this instance.
- The tallest non-compliant buildings will be located centrally within the site, separated from the residential development to the south and from the waterfront to the north of the site. Such a design approach is an appropriate environmental planning response to medium density housing development on a large site of this nature. Importantly, the proposed buildings along the southern boundary will be limited to 1 or 2-storeys in height, between approximately 5.5m and 2.5m below the 11.5m building height limit (from the top of the lift overrun), sympathetic in height with existing adjoining residential development to the south.
- On environmental planning grounds, stepping the building height up from the waterfront will enable an increased number of apartments to benefit from views to the water, compared with maintaining a

consistent height across the development. In addition, the upper-most apartments would achieve excellent solar access and cross ventilation, affording future residents a high level of amenity and reflecting good environmental planning practice.

- The additional height does not present any unreasonable view loss, overshadowing or amenity impacts upon nearby residential development, nor any unreasonable visual impacts upon the public domain.

It is submitted that the above factors are sufficient environmental planning grounds to justify the departure from the building height development standard. The grounds are not "generic" but rather specific to the site and the circumstances of the case.

## 5. THE PROPOSAL WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE STANDARD AND THE OBJECTIVES OF THE ZONE. [cl.4.6(4)(a)(ii)]

Clause 4.6(4)(a)(ii) provides that development consent must not be granted for development that contravenes a development standard unless the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

In Section 3 of this request, it was demonstrated that the proposal is consistent with the objectives of the development standard. The proposal, inclusive of its non-compliance, is also consistent with the objectives of the R3 Medium Density Residential and SP3 Tourist zones as explained in Table 1 below:

*Table 1: R3 and SP3 zone objectives from ELEP2012*

Objective	Discussion
<b>Zone R3 Medium Density Residential</b>	
To provide for the housing needs of the community within a medium density residential environment.	The proposed residential development provides medium density housing in a well-serviced location in proximity to the Batemans Bay town centre. Such forms of housing are needed in response to the LGA's ageing demographic structure.
To provide a variety of housing types within a medium density residential environment.	The proposal will provide approximately 128 x 1, 2 and 3-bedroom apartments within 9 x 2-4 storey residential flat buildings to cater for a variety of household needs.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	N/A. The proposed café and restaurant will be located within the SP3 portion of the site.
To encourage tourist and visitor accommodation in areas of demand subject to controls to ensure the adequate protection of a permanent residential housing supply and amenity.	The proposed residential development will encourage tourist and visitor accommodation, with approximately 50% of the residential apartments expected to ultimately be used for such purposes. Council could consider measures as part of the future DAs for Stages 7A-10A to help ensure the adequate provision of permanent residential housing supply and amenity within the site if so desired.
To encourage walking, cycling and the use of public transport.	The proposed residential development encourages walking, cycling and public transport use by positioning medium density residential development in a well-serviced location, as well as

	providing a publicly-accessible pedestrian and cycle path along the site's water frontage.
<b>Zone SP3 Tourist</b>	
To provide for a variety of tourist-oriented development and related uses.	<p>While the proposed seniors housing will not provide tourist accommodation, it is submitted that the proposal is not significantly inconsistent with the relevant objectives of the SP3 zone. In particular, the restaurant and cafe, while predominantly serving the needs of the site's future residents and employees, will also be open to the local community, including visitors to the area. The proposed publicly-accessible pedestrian pathway along the site's water frontage will provide access to the café and restaurant within the proposed community centre.</p> <p>In addition, the overall concept proposal will continue tourism-related uses on the site, with approximately 50% of the residential apartments proposed within the R3 zoned portion of the site anticipated to ultimately be used for such purposes. These apartments will be sold with a short-term accommodation letting scheme option, allowing owners to rent their properties to tourists visiting the Shire. As outlined in the SEE, this arrangement alone is envisaged to provide the per sqm accommodation utilisation of the current site operations (due to current low occupancy rates).</p> <p>It is noted that a SCC has been issued in relation to the seniors housing proposal by the NSW DP&amp;E, certifying that the subject site is suitable to accommodate seniors housing, including associated community facilities and spaces.</p>

This Clause 4.6 submission at Section 3 has sought to demonstrate that the proposed departures from the building height development standard are consistent with the objectives of the development standard. As outlined in Table 1 it is also submitted that the proposal incorporating the departures from the building height development standard is consistent with the objectives of the R3 and SP3 zones. Accordingly, the proposal is considered to be in the public interest.

**6. CONTRAVENTION OF THE DEVELOPMENT STANDARD DOES NOT RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING. [cl. 4.6(5)(a)]**

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

## **7. THERE IS NO PUBLIC BENEFIT OF MAINTAINING THE STANDARD. [cl. 4.6(5)(b)]**

Pursuant to case law in *Ex Gratia P/L v Dungog Council (NSWLEC 148)*, the question that needs to be answered is '*whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development*'.

There is no public benefit in maintaining strict compliance with the development standard in this instance given there are no unreasonable impacts that will result from the proposed departure from the maximum height of buildings development standard. Rather, the redevelopment of the site incorporating the proposed departure from the standard will help meet an increasing and significant demand for seniors housing and medium density residential development in Batemans Bay. The demographic diversity inherent in the proposal and the generous landscaped communal spaces, shared facilities and publicly-accessible boardwalk will transform the site into a vibrant resort-style residential community, providing economic and social benefits to Batemans Bay generally. Importantly, the additional building height will not present any unreasonable impacts upon development in the locality or the public domain.

Overall, the proposal incorporating the departures from the building height development standard aligns with state and local government strategic objectives for the area by promoting increased housing diversity, particularly seniors housing, in an accessible and well-served location supported by the nearby Batemans Bay town centre. It is anticipated that the delivery of the proposed development will significantly improve the amenity of the locality for local residents through improved access to the waterfront, a greater mixture of housing opportunities (both in type and price point), and through the provision of a unique multigenerational community.

Accordingly, there is no public benefit in maintaining strict compliance with the height of buildings development standard applying to the subject land given that there will be no unreasonable impacts resulting from the variation to the standard.

## 8. CONCLUSION

It is submitted that this Clause 4.6 request has adequately addressed the matters required to be demonstrated by Clause 4.6(3) of the ELEP 2012 and that the consent authority can be satisfied the proposed development will be in the public interest. Specifically, it is submitted that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances;
- There are sufficient environmental planning grounds to justify the contravention of the development standard;
- The development is consistent with the objectives of the development standard and is consistent with the relevant objectives of the R3 and SP3 zones, notwithstanding the contravention of the development standard;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard in this instance, notwithstanding the proposed contravention of the development standard; and
- The proposed contravention of the development standard does not raise any matter of State or Regional Significance.

Accordingly, it is considered appropriate for the consent authority to exercise the flexibility afforded by Clause 4.6 in the circumstances and grant consent to the proposed development notwithstanding the contravention of the development standard.