



## CLAUSE 4.6 VARIATION STATEMENT

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Alterations and additions to an existing residential aged care facility

St Columba's  
15 Fig Tree Street, Lane Cove

Prepared for: Uniting

REF: M170496  
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# Clause 4.6 Variation Statement – Height of Buildings: Clause 40(4)(a)

## 1. INTRODUCTION

This Variation Statement has been prepared in accordance with Clause 4.6 of Lane Cove Local Environmental Plan 2012 (LCLEP 2009) to accompany a development application to Lane Cove Council in respect of Nos.106 – 114 Centennial Avenue and Nos. 7 – 13 Fig Tree Street, Lane Cove. The subject application seeks consent to alterations and additions to an existing Residential Aged Care Facility (RACF), pursuant to *SEPP (Housing For Seniors or People with a Disability) 2004*.

## 2. PROPOSED VARIATION

### Clause 40(4) of SEPP Seniors Housing

Clause 40(4) of SEPP (Seniors Housing) provides height controls in zones where residential flat buildings are not permitted. The site is within Zone R2 – *Low Density Residential* under the provisions of The *Lane Cove Local Environmental Plan 2009* (LCLEP 2009). Residential flat buildings are not permitted in the R2 zone under LCLEP 2009 and thus the provisions of Clause 40(4) are relevant to the proposed development.

Clause 40(4) provides:

*“(4) **Height in zones where residential flat buildings are not permitted** If the development is proposed in a residential zone where residential flat buildings are not permitted—*

*(a) the height of all buildings in the proposed development must be 8 metres or less, and*

***Note.** Development consent for development for the purposes of seniors housing cannot be refused on the ground of the height of the housing if all of the proposed buildings are 8 metres or less in height. See clauses 48 (a), 49 (a) and 50 (a).*

*(b) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height, and*

***Note.** The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.*

*(c) a building located in the rear 25% area of the site must not exceed 1 storey in height.”*

SEPP (Seniors Housing) contains the following definitions of building height and ground level in Clause 3:

*“**height** in relation to a building, means the distance measured vertically from any point on the ceiling of the topmost floor of the building to the ground level immediately below that point.”*

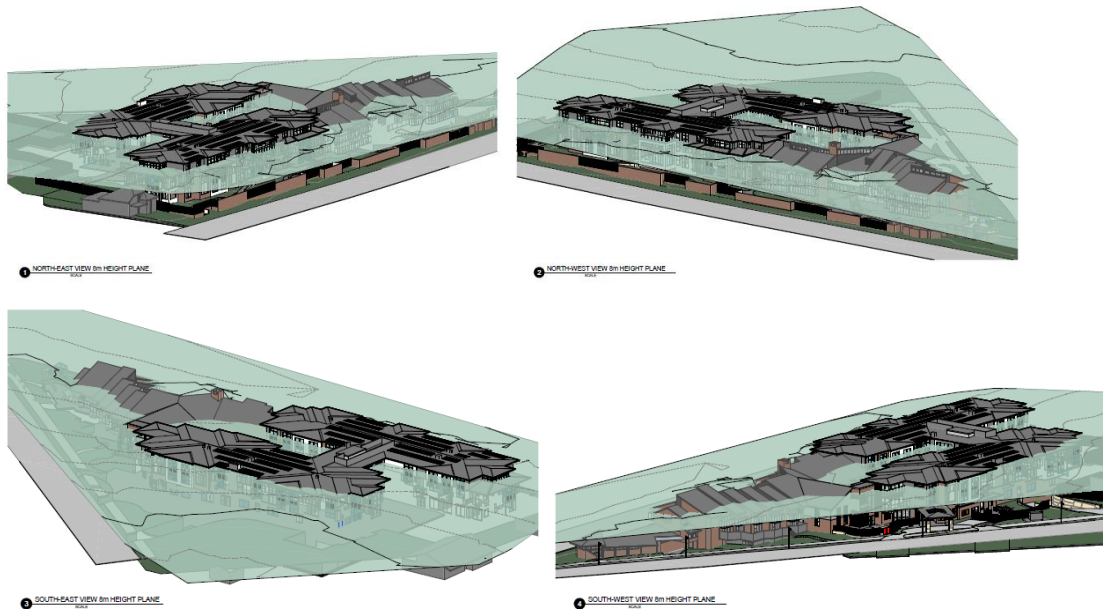
*“**ground level** means the level of the site before development is carried out pursuant to this Policy.”*

Clause 3(2) of SEPP (Seniors Housing) relevantly states:

*“In calculating the number of storeys in a development for the purposes of this Policy, a car park that does not extend above ground level by more than 1 metre is not to be counted as a storey.”*

As indicated in the height blanket in Figures 1 and 2 below, there will be a breach of the prescribed SEPP (Seniors Housing) building height for sections of the proposed building additions. The maximum exceedance in relation to the height prescribed under the SEPP (Seniors Housing), i.e from ground level to the ceiling of the topmost floor, will be 2.85m or 35.6%. Figure 1 below provides a height blanket showing the exceedance over the 8m. Notably, the lighter grey roof is the existing building to which the proposal provides a cohesive addition. Figure 2 shows an east –west section through the site and demonstrates the location of the built form across the site. Specifically that the built form

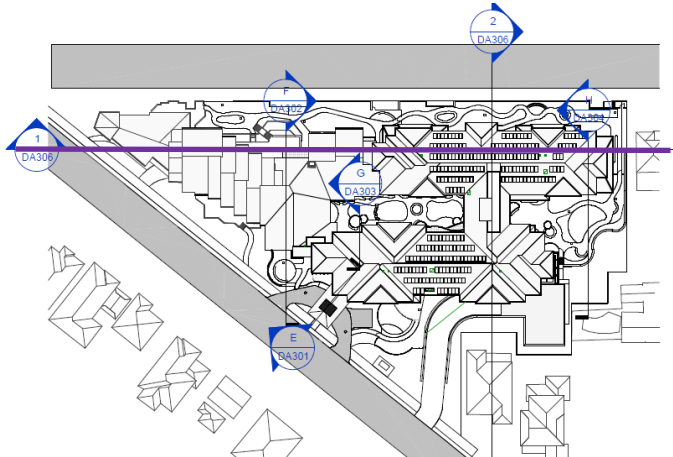
is broken up into various components across the site, with some portions of the site containing built form below the 8m height limit and the centrally located courtyard being void of any built form.



**Figure 1:** Height blankets showing areas of exceedance in grey



**Figure 2:** EW Section showing 8m height limit (purple)



**Figure 3:** Location of Section shown in Figure 2

The prescribed building height under Clause 40(4)(a) of SEPP (Seniors Housing) is a “development standard” to which exceptions can be granted pursuant to Clause 4.6 of LCLEP 2009.

In regards to Clause 40(4)(b), buildings adjacent to the boundary of the site are not in excess of 2 storeys. The three storey section along the northern boundary with Centennial Avenue, does not adjoin a boundary of the site.

In regards to Clause 40(4)(c), this clause does not apply to social housing providers.

### 3. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

The objectives and provisions of Clause 4.6 are as follows:

*“(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 for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

*(4) Development consent must not be granted for development that contravenes a development standard unless:*

*(a) the consent authority is satisfied that:*

*(i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

*(ii) 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, and*

*the concurrence of the Secretary has been obtained.*

*(5) In deciding whether to grant concurrence, the Secretary must consider:*

*(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

*(b) the public benefit of maintaining the development standard, and*

*(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

*(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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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 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 E3 Environmental Management or Zone E4 Environmental Living.*

*(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*

*(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."*

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

#### **4. COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(a))**

In *Wehbe V Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

*"An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."*

The judgement goes on to state that:

*"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)."*



Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

*...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.*

Compliance with the building height development standard is considered to be unreasonable and unnecessary as the objectives of that standard are achieved for the reasons set out in this Statement.

Notably, under Clause 4.6(4)(a)(ii) a consent authority must now be satisfied that the contravention of a development standard 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. Clause 4.6(4)(a)(ii) is addressed in Section 6 below.

## **5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS (CLAUSE 4.6(3)(b))**

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standards, the following planning grounds are submitted to justify contravening the prescribed maximum building heights:

- a. The building height breach relates in part to site topography which falls from south east to north and north west. The development has been designed to provide an efficient floorplate with minimal level change, which is a requirement due to the elderly nature of the residents, and has been designed to limit any adverse impact on the amenity of neighbours or the streetscape. The majority of the variation is situated toward Centennial Avenue, which is a busy road with limited amenity value and the design of the building seeks to enhance the visual appearance of the street.
- b. The proposed building, incorporates significant façade and roof articulation to Centennial Avenue and provides generous setbacks to Fig Tree Street and the side setback. The additional height is to the north so that there is no overshadowing on the opposite side of the Centennial Avenue. This ensures there is no adverse impact on any adjoining residential property, to require strict compliance with the height control would have no

perceptible planning benefit. However, it would significantly impact on the quality of the development in terms of design, its ability to provide much needed aged care beds, and on the wellbeing and quality of life of future occupants.

- c. The building form is such that it responds to the site topography and references the surrounding residential character and will therefore have no adverse impacts on the streetscape.
- d. The proposed floor to ceiling heights have been reduced following discussion with Council and coffered ceilings will be provided in communal areas. Whilst reduced ceiling heights are proposed of the development ensures high quality internal amenity of living spaces and rooms and allow for large windows and bright spaces, which is a critically important factor in relation to quality of life of the elderly residents who spend a large portion of their time indoors. Lowering the ceiling heights further would reduce the internal amenity of the facility with no material benefit for any adjoining property.
- e. From a practical point of view, the floor to ceiling heights are necessary to allow for services plant and equipment and, while it may ordinarily be possible to alter floor levels where services, plant and equipment are not required, this is not feasible in a development where changes in level are undesirable. In fact, the floor levels proposed have been adopted to avoid transitions in level and enhance access to and through the facility.
- f. It has been demonstrated that the proposed development will be compatible with the character of the streetscape and locality, including the prevailing building heights along Lane Cove Road and Figtree Street, despite the exceedance of the prescribed building heights under the SEPP (Seniors Housing).
- g. The proposed development meets the objectives of the development standards and meets the objectives of the R2 Low Density Residential zone (as further detailed in Section 7 below).
- h. Shadows are predominantly cast over the site itself and Fig Tree Street to the south west. Where it does touch upon residential dwellings or gardens the shadow is fast moving and does not cause any significant adverse overshadowing impact. The neighbouring dwelling maintain solar compliance with the DCP. Notably, this portion of the building is compliant with the building height. As such, lowering the height of the building would have no perceptible planning benefit in regard to solar access.
- i. The proposed development achieves the objects in Section 1.3 of the EP&A Act, specifically:
  - The development facilitates ecologically sustainable development by providing much needed, well-designed Seniors Housing in an appropriate and accessible location. Furthermore, the development will have a positive economic and environmental impact on the locality (1.3b);
  - The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for an appropriate residential use (1.3c);
  - The development has been designed to be compatible with the surrounding built form and despite the height non-compliance, will not adversely impact neighbouring amenity. The development will provide excellent levels of amenity for prospective occupants and exhibits design excellence (1.3g).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development. The additional height will facilitate a high quality development with excellent levels of internal amenity that does not prejudice the character or appearance of the local streetscape or levels of residential amenity enjoyed by neighbouring properties.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome. Despite this finding, the development will achieve "a better outcome for and from development". It is considered that the proposal provides for a more effective and appropriate massing of the allowable building density



so as to minimise impacts on neighbouring properties. That is, solar access is improved, views and outlooks are improved and perceived streetscape bulk is lessened. As indicated, the proposal provides for a floor space ratio which complies with the maximum permitted and accordingly, the height breach is not associated with additional density beyond what is expected by the controls. Whilst it would be possible to provide additional building mass that complied with the height controls through the addition of building mass in the centre of the site and edges of the site, such an approach would increase shadow impacts on adjoining properties and increase the mass of development adjacent to the adjoining dwellings. It is considered to be a significantly better planning outcome to place the additional mass along the two street frontages, away from adjoining dwellings. Notably, a development proposal under the controls of the LCLEP and LCDCP (i.e. 9.5m height limit and 3m set-back) would create additional overshadowing than what is created by the proposed development. Therefore, on balance, the proposal is considered to achieve a planning purpose of enhancing the amenity of the adjoining dwellings in the absence of any additional adverse impacts.

*86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*

*87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

As outlined above, (whilst case law has found it does not need to be demonstrated) it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

## **6. CLAUSE 4.6(4)(a)**

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard this is addressed in 7a below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the



consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

## **7. 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 (CLAUSE 4.6(4)(a)(ii))**

### **7a. Objectives of Development Standard**

There are no specific objectives in SEPP (Seniors Housing) listed in Clause 40(4)(a) and no objectives elsewhere in the relevant sections of SEPP (Seniors Housing) relating to building height. Notwithstanding, the Land and Environment Court in the case of *Winten Group Architects Pty Ltd v Kuringai Council* [2005] NSWLEC 546 has identified objectives for building height standards as:

*"To control impacts on neighbours and to ensure that the proposed development is not overbearing in terms of bulk, scale and height and also in terms of overshadowing impacts and privacy concerns."*

The note to Clause 40(4) states that the purpose of the development standard is to "avoid an abrupt change in the scale of development in the streetscape".

It is considered that these are the appropriate objectives of the development standards and are therefore adopted for the purposes of this objection.

They are addressed as follows:

- *To ensure that the proposed development is not overbearing in terms of bulk, scale and height:* The development is consistent with setback controls to all boundaries and exceeds the controls at the most sensitive boundary (being the north eastern corner) and provides a high level of façade articulation to break up any perceived bulk or scale. When viewed from Centennial Avenue the top storey (and non-compliant portion of the building) has been setback behind projecting two storey elements to ensure it appears recessive on the streetscape. Due to site topography the building is predominantly below the height limit when viewed from Fig Tree Street, as such will maintain any portions of the non-compliant form will be imperceptible to the casual observer and will be as a result of the site topography itself.. In addition, the height is broadly similar to that of the existing aged care facility, which has come to be part of the established character of the area and is residential in appearance. The variation is therefore consistent with the established residential character of the street.
- *To ensure that the proposed development is not overbearing in terms of overshadowing impacts and privacy concerns:* As has been noted, the variation in itself does not introduce any adverse amenity impacts in terms of overshadowing or loss of privacy. The shadow cast by the development falls predominantly over Fig Tree Street to the south and south west. It is cast from the portion of the building which is compliant with the height control. Elements above the height limit have been designed so that any windows only overlook streets or are a sufficient distance from any boundary to not result in adverse levels of overlooking

The proposal is therefore consistent with the assumed objectives of the control.

## 7b. Objectives of the Zone

Clause 4.6(4)(a)(ii) also requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of Zone R2 are as follows:

- *To provide for the housing needs of the community within a low density residential environment.*

The proposed development will provide for an extended high quality aged care facility in an appropriate accessible location. There is a clear need for additional seniors housing in the locality and the proposed development will be surrounded by similar appropriate uses.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposal will not prejudice any land uses that provide facilities or services to meet the day to day needs of residents in the zone or wider locality. The development will give rise to positive social, economic and community outcomes by providing high quality housing to meet a demonstrated need in the locality.

- *To retain, and where appropriate improve, the existing residential amenity of a detached single family dwelling area.*

The proposal includes the retention of the dwellings on No.7 and No.9 Fig Tree Street. The proposed boundary realignments which form part of the proposal will meet the minimum lot size and retain internal and external amenity to these dwellings.

- *To encourage new dwelling houses or extensions of existing dwelling houses that are not highly visible when viewed from the Lane Cove River or Parramatta River.*

This objective is not applicable to the proposed development.

- *To ensure that landscaping is maintained and enhanced as a major element in the residential environment.*

The proposal includes significant landscaping including deep soil landscaping along the boundaries of the site and in about two-thirds of the central courtyard. The landscape plan includes the retention of a number of high quality trees and enhancement with new plantings.

The proposed development is consistent with the objectives of Zone R2 in that it will result in the development of a residential use in an accessible area. The use will be compatible with the mix of uses in the zone and will be compatible with the existing environmental and built character of the locality.

The building height variation is not antipathetic to the objectives for the zone and for that reason the proposed variation is acceptable

## 8. THE CONCURRENCE OF THE SECRETARY HAS BEEN OBTAINED (CLAUSE 4.6(4)(b))

The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.



## **9. WHETHER CONTRAVENTION OF THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING (CLAUSE 4.6(5)(a))**

Contravention of the building height development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

## **10. THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD (CLAUSE 4.6(5)(b))**

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the building height. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed building height exceeds the maximum permitted on the site by 2.85m pursuant to Clause 40(4)(A) of SEPP (Seniors Housing), the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standards and the objectives of the zone that make the proposed development in the public interest.

## **11. CONCLUSION**

Having regard to all of the above, it is our opinion that compliance with the building height development standards is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standards would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation is supported.

