

APPENDIX

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CLAUSE 4.6 VARIATION STATEMENT – BUILDING HEIGHT



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1 Introduction

This report comprises a Clause 4.6 Variation Statement for the proposed two to three storey seniors living development to be located at 1 Arcadia Street, Warilla on two allotments referenced as Lots 201 and 203 DP 786257. In particular it considers non-compliance of the proposal with the 9m height control referenced in Clause 4.3 (Height of Buildings) and the 'Height of Buildings' Map of Shellharbour Local Environmental Plan (SLEP) 2013.

This 9m height control, as contained in Clause 4.3 of SLEP 2013 takes precedence over the non-discretionary height control contained in Clause 108 of State Environmental Planning Policy (Housing) 2021 (SEPP Housing), which specifies the following in respect of independent living units:

- a) *No building has a height of more than 9.5m, excluding servicing equipment on the roof of a building.*
- b) *servicing equipment on the roof of a building, which results in the building having a height of more than 9.5m—*
 - (i) is fully integrated into the design of the roof or contained and suitably screened from view from public places, and*
 - (ii) is limited to an area of no more than 20% of the surface area of the roof, and*
 - (iii) does not result in the building having a height of more than 11.5m*

The objective of Clause 108 as stated in SEPP (Housing) 2021 is to “*identify development standards for particular matters relating to development for the purposes of independent living units that, if complied with, prevent the consent authority from requiring more onerous standards for the matters*”. Therefore, as the non discretionary standards contained in clause 108 of the SEPP are not complied with, the 9m height control contained in Clause 4.3 of SLEP 2013 takes precedence. However, for the avoidance of doubt, this Clause 4.6 Report also seeks to vary the height controls for independent living units as contained in Clause 108(a) and (b) of SEPP (Housing) 2021.

2 Clause 4.6 of SLEP 2013

Clause 4.6 'Exceptions to Development Standards' of Shellharbour Local Environmental Plan 2013 provides the opportunity to contravene a development standard with approval of the consent authority and concurrence by the Director-General.

A development standard is defined by the Environmental Planning and Assessment Act, 1979 as:

“Provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development”.

The objectives of Clause 4.6 are as follows:

- a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

This statement is provided in order to justify a variation to Clause 4.3 'Height of Buildings' of SLEP 2013 and, for the avoidance of doubt, Clause 108(a) and (b) (Non discretionary development standards for independent living units - the Act, s4.15) of SEPP Housing 2021, as the application of these requirements is considered unreasonable or unnecessary for this particular development:

3 Objective of the Standard

The objectives of Clause 4.3 (Height of Buildings) of SLEP 2013 are:

- a) to ensure the height of buildings complements the streetscape, rural or natural scenic character of the area in which the buildings are located,
- b) to ensure the height of buildings protects the amenity of neighbouring properties in terms of visual bulk, access to sunlight, privacy and views,
- c) to protect areas of scenic or visual importance.

Clause 4.3(2) requires that “The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map”.

The SLEP 2013 ‘Height of Buildings’ map (as shown in **Figure 1-1**) specifies that a maximum building height of 9 metres applies to the subject land. ‘Building height (or height of building)’ is defined within SLEP 2013 as—

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

Clause 108 of SEPP (Housing) 2021 does not specify objectives in relation to the building height controls contained in this clause.

Figure 1-1 Extract of Building Height Map of SLEP 2013 showing 9m height applying to the Warrigal site



4 Discussion of Compliance with Building Height Controls

The proposed development comprises two to three storey development over six (6) buildings, referenced as Buildings A-F. The development has a maximum overall height of 13.5m, measured from the top of the lightwells in the roof of Buildings A and B.

Buildings within the development have the following maximum heights:

Building A – 13.5m	Building D – 12.2m
Building B – 13.5m	Building E – 11.8m
Building C – 13.1m	Building F – 11.9m

Accordingly, this Clause 4.6 Report seeks variation for the following:

- > Variation to the provisions of Clause 4.3(2) of SLEP 2013 to allow the building to exceed the 9m height requirement by up to 4.5m; and
- > For the avoidance of doubt, variation to the provisions of Clause 108 of SEPP Housing 2021 to allow the building to exceed the 9.5m building height requirement by up to 4.0m.

Figures 1-2 and 1-3 show the position of the maximum building height, when viewing the eastern façade of Building A and Building B respectively.

Figure 1-2 East Elevation/Part Section DD (Extract of Drawing A-203 prepared by ADM Architects) showing maximum height of Building A at 13.5m



Figure 1-3 East Elevation/Part Section EE (Extract of Drawing A-203 prepared by ADM Architects) showing maximum height of Building B at 13.5m



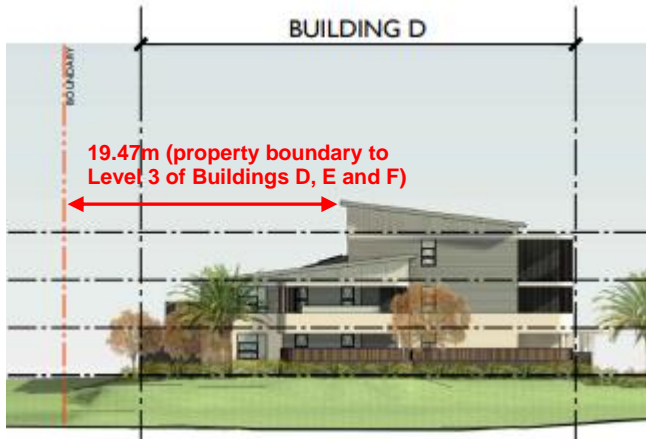
5 Clause 4.6 - Exceptions to Development Standards Report

Clause 4.3 of WLEP 2009 contains planning objectives which underpin the building height development standards. A written justification for the proposed variation is therefore required in accordance with Clause 4.6. **Table 1-1** below outlines the proposals relation to the provisions of Clause 4.6, as well as the contravened development standard in Clause 4.3 of SLEP 2013.

In preparing this statement, consideration has been given to Land and Environment Court Judgements *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (and appeal at NSWLEC 90)* and *Wehbe v Pittwater Council [2007] NSWLEC 827*, namely that the objection is well founded, that compliance with the standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

Table 1-1 Compliance with the Building Height Control of SLEP 2013

Clause 4.6 - Exceptions to Development Standards	Response/Justification
<p>(1) Objectives</p> <p>a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and</p> <p>b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</p>	<p>Flexibility is sought in relation to the application of the height control for the proposed development on the basis of the particular circumstances of the site and to achieve better outcomes for the development, which are as follows:</p> <ul style="list-style-type: none"> > The proposed development provides for 2-3 storey buildings positioned around a central village green and extending along the main driveway or riparian corridor. The use of 2-3 storey buildings, as opposed to single storey development or a greater number of 2 storey buildings allows for the vertical placement of building mass, which minimises the extent of site coverage. This subsequently enables a high proportion of the site to be utilised for open space and landscaping, with the quantity of deep soil planting equating to 33.8% of the site, which significantly exceeds the 15% requirement of SEPP (Housing) 2021 and the 7% requirement of the Apartment Design Guide (ADG). Of this, 1850m² of this deep soil area is located within the riparian corridor, which on its own exceeds the 7% requirement of the ADG (at 8.4%). The visual and amenity benefits of this extensive area of deep soil planting and landscaping are significant. This is a desirable outcome for a development which provides seniors housing where access and an outlook to high quality outdoor space is essential. > The use of 3 storey buildings and the resultant increase in open space also facilitates improved pedestrian movements through the site. Further, the reduction in the building site coverage achieves the desired outcomes of Council's Design Review Panel which seek to reduce the amount of hardstand area on the site and to provide ease of access through the site for residents. > The proposed development also seeks to reposition the building mass from the lower levels in a number of positions on the site to address overshadowing and street integration. This includes a reduction to a 2 storey height for the southern side of Buildings D, E and F to reduce the impact of overshadowing on the adjacent multi unit development at No. 3 Arcadia Street. Further, the development incorporates 'stepping back' of the upper level of Building A, which extends along the Arcadia Street frontage, to increase the Level 2 front setback generally to 10.23m and to reduce the visual dominance of the upper level of the building in the streetscape. > The repositioning of floor space to an upper level within the buildings will provide for an improved design outcome which places emphasis on the open space and landscaping throughout the site. Further, a reduction in height will be provided where required, including a compliant 9m height at along the southern elevation of Buildings D, E and F, where compliance is necessary to minimise amenity impacts on the adjacent residential development to the south. This height reduction is shown in Figure 1-4 below, noting that there is no exceedance in height for Buildings D, E and F at any point within 19.47m of the southern property boundary.

Clause 4.6 - Exceptions to Development Standards	Response/Justification
	<p>Figure 1-4 East Elevation of Building D (similar for Building E and F) showing a that the 3 storey non compliant section of the building does not occur until a distance of 19.47m from the southern property boundary.</p>  <p>While the buildings exceed the maximum the height it is considered that the unique site circumstances and the landscaped design outcome, achieved through repositioning of this building mass, warrants individual consideration of an appropriate height for the development.</p> <p>Justified</p>
<p>(2) Consent may, subject to this clause, be granted for development even though the development may 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.</p>	<p>Variation to the height control contained in SLEP 2013 (and SEPP Housing 2021) is not specifically excluded from the application of this clause.</p> <p>Satisfied</p>
<p>(3) 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:</p>	<p>This table comprises the written request seeking to justify the contravention of the building separation development standard.</p> <p>Provided</p>
<p>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</p>	<p><i>In Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009, para 61, Commissioner Person summarises the considerations from Wehbe v Pittwater Council [2007] NSWLEC 827 at [42] per Preston CJ, and notes in para 62 that clause 4.6 can be considered in a similar way to that of SEPP 1.</i></p> <p><i>In Wehbe at [44]-[48] Preston CJ identified other ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary, namely that the underlying objective or purpose is not relevant to the</i></p>

Clause 4.6 - Exceptions to Development Standards	Response/Justification
	<p><i>development; that the objective would be defeated or thwarted if compliance was required; that the development standard has been virtually abandoned or destroyed by the Council's own actions in departing from the standard; or that the zoning of the land is unreasonable or inappropriate.</i></p> <p>A response to each of these approaches is therefore provided as it relates to the current proposal:</p> <p><i>The underlying objective or purpose is not relevant to the development</i></p> <p>This is not applicable as the objective of the Development Standard is relevant to the development (and has been satisfied – see below in this table). It is the numerical standard itself that is not relevant to the development having regard to the particular site circumstances.</p> <p><i>That the objective would be defeated or thwarted if compliance was required.</i></p> <p>Objective (a) of Clause 4.3 of SLEP 2013 seeks to “<i>ensure the height of buildings complements the streetscape, rural or natural scenic character of the area in which the buildings are located</i>”. It is considered that this objective would be defeated or thwarted if compliance with the building height control was required. Namely, compliance would necessitate positioning of floor area to the lower levels of the building, potentially through the use of a greater quantity of 1 and 2 storey buildings, which would not achieve the desired outcomes with respect to open space, landscaping, reduction in hard stand area and pedestrian movements. Such outcomes are considered essential to ensure that the development complements the scenic character of the area in which the site is located, bordering Bensons Creek.</p> <p>The minimisation of building bulk adjacent to the George Street/Arcadia Street intersection and the use of a single storey design for the Multi Purpose and Community Hall further ensures that the height of buildings at this key corner location is compliant with the 9m height standard and is appropriate having regard to streetscape character.</p> <p><i>That the development standard has been virtually abandoned or destroyed by the Council's own actions in departing from the standard</i></p> <p>The standard has not been abandoned or destroyed.</p> <p><i>The zoning of the land is unreasonable or inappropriate.</i></p> <p>The zoning of the land is appropriate, however as mentioned above, the numerical development standard applicable by Clause 4.3 for building height is not. Further, it is considered that there is a 'disconnect' between the 0.7:1 FSR which is permitted in the R3 Medium Density Residential zone and the 9m height restriction. This height is also applied to the R2 Low density Residential zone, suggesting that an increased height would be reasonable in this higher density zone in which the site is located.</p> <p><u>Overall:</u></p> <p>Having regard to the above Wehbe categories, the only applicable criteria in demonstrating that compliance with the applicable 9m height standard is considered to be unreasonable and unnecessary in the circumstances of the case is <i>that the objective would be defeated or thwarted if compliance was required.</i></p> <p>Compliance with the standard would be contrary to the objective of the height control as the resultant design would not compliment scenic character, due to the likelihood that a redistribution of bulk to the lower levels of the building would be necessary to achieve the required number of units for seniors housing operational purposes.</p> <p>Provided and Justified</p>
(b) that there are sufficient environmental planning grounds to justify contravening the development standard.	<p><i>In Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009, Commissioner Person determined that it is necessary for applicants to show sufficient grounds <u>particular to the development</u> in the Clause 4.6 objection.</i></p> <p>The contravention of the building height standard is considered to be supportable having regard to environmental planning grounds, focusing on the provision of a high quantity of open space, to provide a desirable outlook for residents.</p>

Clause 4.6 - Exceptions to Development Standards	Response/Justification
	<p>Further, it is considered that the unique site characteristics warrant individual consideration of an appropriate height on the site evidenced by the following:</p> <ul style="list-style-type: none"> > The site is an 'island' site, were it not for the positioning of residential development of the immediate south. To the north the site is bounded by George Street; to the west by Arcadia Street; and to the east by Bensons Creek. The exceedance of the height limit, which effectively equates to one residential level, is a reasonable design solution on a site which is well removed from adjacent developed sites and which can provide significant spatial separation to surrounding buildings. A reduction in height to 2 storeys adjacent to the southern boundary of the site, where the site adjoins residential development, provides an appropriate design outcome. > The subject site is located on the cusp of commercial development in George Street Warilla, where building heights of 12m are permissible, with increased heights of 15m permissible on land at the north-western corner of Lake Entrance Rd and Shellharbour Rd. The proposed development, which has a maximum height of 13.5m will not be out of character with the scale of development on such land. > The site, which has a substantial site area of 22,027m², is capable of accommodating a development which exhibits an increased building height, without adversely impacting amenity of surrounding residents. > In addition, the foregoing SEE confirms there are no likely significant overshadowing impacts resulting from the proposed height exceedance as this is addressed by providing increased setbacks and a reduced building height provided on the southern elevation. <p>Variation to building height on this R3 zoned site, where residential flat buildings are permissible, is also supported by the intended outcomes of SEPP (Housing) 2021. Whilst a 4.5m variation is sought to the 9m height control of SLEP 2013, the level of variation sought would be significantly less in the event that the provisions of Clause 87 of SEPP (Housing) 2021 were utilised. Specifically, this clause which applies to sites of over 1500m² in zones where residential flat buildings are permissible, states:</p> <p><i>(2) Development consent may be granted for development to which this section applies if—</i></p> <ul style="list-style-type: none"> <i>(a) the site area of the development is at least 1,500m², and</i> <i>(b) the development will result in a building with the maximum permissible floor space ratio plus—</i> <ul style="list-style-type: none"> <i>(i) <u>for development involving independent living units—an additional 15% of the maximum permissible floor space ratio if the additional floor space is used only for the purposes of independent living units, or</u></i> <i>(ii) <u>for development involving a residential care facility—an additional 20% of the maximum permissible floor space ratio if the additional floor space is used only for the purposes of the residential care facility, or</u></i> <i>(iii) <u>for development involving independent living units and residential care facilities—an additional 25% of the maximum permissible floor space ratio if the additional floor space is used only for the purposes of independent living units or a residential care facility, or both, and</u></i> <i>(c) <u>the development will result in a building with a height of not more than 3.8m above the maximum permissible building height.</u></i> <p>This clause would allow an FSR increase of 15% over the maximum permitted FSR of 0.7:1, subject to the development not exceeding the maximum permitted building height by 3.8m. This would permit a development on the site with an FSR of up to 0.805:1 and a building height of 12.8m. Whilst the subject development exceeds this 12.8m height at a number of locations across the site, it is considered that the 0.7:1 FSR and max 13.5m height which is proposed would have no greater visual impact than a development with an 0.805 FSR and 12.8m height in compliance with clause 87 of SEPP (Housing) 2021.</p>

Clause 4.6 - Exceptions to Development Standards	Response/Justification
	<p>On this basis it is considered that there are sufficient environmental planning grounds to justify the design outcome which is facilitated by the height exceedance.</p> <p>Justified</p>
<p>(4) Consent must not be granted for development that contravenes a development standard unless:</p> <p>(a) the consent authority is satisfied that:</p>	
<p>(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</p>	<p>This Variation Statement provides a discussion in support of the justification for varying the development standards as indicated in (3) above. In our opinion, there is sufficient justification provided to support a variation to the building height requirements.</p> <p>Satisfied</p>
<p>(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</p> <p>Shellharbour LEP 2013:</p> <p><u>Objectives of the Standard (Clause 4.3)</u></p> <p>" (a) to ensure the height of buildings complements the streetscape, rural or natural scenic character of the area in which the buildings are located,</p> <p>(b) to ensure the height of buildings protects the amenity of neighbouring properties in terms of visual bulk, access to sunlight, privacy and views,</p> <p>(c) to protect areas of scenic or visual importance.</p> <p><u>Objectives of the R3 Zone</u></p> <ul style="list-style-type: none"> To provide for the housing needs of the community within a medium density residential environment. To provide a variety of housing types within a medium density residential environment. 	<p>Despite the exceedance of the allowable 9m height, the proposed development is in the public interest as it meets the objectives of the height development standard as:</p> <ul style="list-style-type: none"> The development will integrate effectively within the locality, where a 12m to 15m maximum height limit is applied to the west of the site within the Warilla commercial area extending along George Street. The development is to be located on a substantial sized landholding which is unique in the locality and which affords opportunity for an alternate design solution, focusing on delivery of a building within a landscaped setting. Streetscape and Scenic Character: Despite the height variation the development will continue to achieve objective (a) by complimenting the scenic character of the Bensons Creek corridor through the provision of a deep soil riparian buffer extending along the creek. Further, the design addresses streetscape integration by providing a single storey design (Op Shop, Neighbourhood Shop and Community Hall on George Street) and modulation of the upper non-compliant level on the Arcadia Street frontage. Overshadowing and Privacy: The Shadow Analysis prepared by ADM Architects confirms that overshadowing of the multi dwelling to the south is comparable under the pre and post development scenarios, due to the 19.47m setback from the southern boundary to the non height compliant upper floor level. Similarly, this increased upper level separation will minimise potential overlooking of adjacent dwellings in the 2 storey development to the south. Additionally, it is unlikely the overshadowing impact would change were the upper level to be removed to provide a compliant height. Visual Appearance: The significant setback of Building A to the George Street frontage and the minimisation of site coverage adjacent to this intersection addresses the visual prominence of this corner location. The initial view from this location will be a of landscaped space leading to the central village green, with perimeter buildings. <p>Hence the proposed development achieves the objectives of the building height development standard.</p> <p>The proposed development is also consistent with the objectives of the R3 Medium Density Residential zone as it will:</p> <ul style="list-style-type: none"> Provide a purpose built senior's development meeting modern housing requirements in a medium density setting. Provide increased availability and housing choice in the senior's housing sector, where increasing demands are evident to provide for an aging population. <p>Overall, the development of the site as proposed will clearly facilitate the ongoing senior's residential needs in the Shellharbour LGA and hence is in the public interest.</p> <p>Furthermore, it is considered that the proposed development meets the majority of the Aims of SLEP 2013 [Clause 1.2(2)] as it will:</p>

Clause 4.6 - Exceptions to Development Standards	Response/Justification
<ul style="list-style-type: none"> <i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i> 	<p><i>(b) encourage a range of development, including diversity of housing types, employment, services and recreational opportunities that meet the needs of existing and future residents, visitors, business owners and workers of Shellharbour,</i></p> <p><i>(c) enhance the amenity and characteristics of established residential areas,</i></p> <p><i>(d) retain affordable housing opportunities as a way of ensuring a sustainable and inclusive community,</i></p> <p><i>(e) encourage development that has considered safer by design principles so that potential impacts to life and property from crime is minimised,</i></p> <p><i>(k) conserve the scenic and environmental resources of the land, including the protection of environmental assets such as native vegetation, waterways and wetlands and habitats for threatened species, populations and endangered ecological communities.</i></p>
<p><i>(c) the concurrence of the Director-General has been obtained.</i></p>	<p>Council will need to consult with the Department of Planning and Infrastructure as to whether the concurrence of the DG can be assumed in accordance with Planning Circular PS 08-003-Variations to Development Standards (Department of Planning, May 2008).</p> <p>Addressed</p>
<p><i>(5) In deciding whether to grant concurrence, the Director-General must consider:</i></p>	
<p><i>(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and</i></p>	<p>The contravention of this development standard does not raise any matter of significance for state or regional environmental planning. Refer to further discussion below in this table.</p> <p>Addressed</p>
<p><i>(b) the public benefit of maintaining the development standard, and</i></p>	<p>There is no public benefit by maintaining the development standard, as there are no identifiable adverse impacts to approval being granted to the submitted design. If the maximum allowable height of 32m were met, the desired heritage and streetscape outcomes would not be achieved or a loss of valuable commercial floor space at the upper level would be required with no measurable visual, environmental or public benefit.</p> <p>Justified</p>
<p><i>(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.</i></p>	<p>It is considered that there are no environmental planning considerations that would hinder the Director-General from providing concurrence.</p> <p>Addressed</p>

6 Conclusion

This Statement has addressed the provisions of Clause 4.6 of Shellharbour LEP 2013 and demonstrates that the variation sought to the 9m development standard contained in Clause 4.3 (Height of Buildings) and the non-discretionary standards contained in Clause 108 of State Environmental Planning Policy (Housing) 2021 is justified and should be given concurrence to.

The proposed development principally contains 2-3 storey buildings which allows for the vertical placement of building mass, thereby minimising the extent of site coverage and maximising the open space and landscaped areas on the site. This is a desirable outcome for a development which provides seniors housing, where access and an outlook to high quality outdoor space is an essential element of design.

The site, which has a substantial site area of 22,027m², is capable of accommodating a development which exhibits an increased building height without adversely impacting amenity of surrounding residents. The subject site is effectively an 'island' site, bounded by roads to the north and west, open space and the riparian corridor to the east, with only the southern boundary adjoining residential development. The exceedance of the height limit is a reasonable design solution on a site which is well removed from adjacent developed sites and which can provide significant spatial separation to surrounding buildings. This increased spatial separation is particularly evident on the southern boundary where 'stepping back' of the upper levels of Buildings D, E and F from the southern boundary reduces overshadowing and privacy impacts and maintains residential amenity.

Further, the proposed building height at up to 13.5m will not be out of character with development in the nearby Warilla commercial precinct, where heights of up to 12-15m are permitted. Similarly, the development, despite its height exceedance will have no greater visual impact than a development which seeks to benefit from the 15% FSR bonus and increased heights allowed by clause 87 of SEPP (Housing) 2021.

Whilst the buildings exceed the maximum height, this statement has demonstrated that the unique site circumstances and the landscaped design outcome, achieved through repositioning of this building mass, warrants individual consideration of an appropriate height for the development. Variation to the 9m height limit to achieve this optimal design outcome will allow for more effective achievement of the zone objectives, will facilitate the provision of much needed senior's housing and will result in an appropriate environmental and amenity outcome. On this basis support for the variation to the building height standard is sought.