

# GYDE

## Clause 4.6 Variation Request

Uniting Edinglassie - Construction of 147  
Independent Living Units

6 and 8 Troy Street and 1-3 Emerald Street, Emu Plains

Submitted to Penrith City Council and Sydney Western City Planning Panel  
On behalf of Uniting

**This report was prepared by:**

**Director:** David Ryan

**Senior Associate:** Belinda Barrie

**Project:** P21-224

**Report Version:** Final - Amended post lodgement

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## APPENDICES

The following plans and technical reports accompany the development application. GYDE has relied on the information in these reports, prepared by professionals in their field, for the preparation of this Clause 4.6 written request.

APPENDIX	DOCUMENT	PREPARED BY
A	Architectural Plans	Group GSA
B	Visual Impact Assessment	Group GSA
C	Heritage Impact Statement	John Oultram Heritage & Design

## EXECUTIVE SUMMARY

This is a request prepared in accordance with Clause 4.6 of the *Penrith Local Environmental Plan 2010* (PLEP). The purpose of the request is to justify a variation to the maximum height of building standards permitted within Section 84 and Section 108(b) of the *State Environmental Planning Policy (Housing) 2021* (the Housing SEPP) as part of a Development Application (DA) submitted to Penrith City Council for a proposed development of Seniors Housing at Uniting Edinglassie, at 1-3 Emerald Street, and 6 and 8 Troy Street Emu Plains (the site).

The DA proposes the demolition of the existing Independent Living Units on the site and the redevelopment of that area for 147 Independent Living Units (ILUs) located across five separate buildings.

The DA is being lodged and assessed against the provisions of the Housing SEPP. Section 84(2)(c)) states:

Development consent must not be granted for development to which this section applies unless -

(c) *for development on land in a residential zone where residential flat buildings are not permitted—*

*(i) the development will not result in a building with a height of more than 9.5m, excluding servicing equipment on the roof of the building, and*

*(ii) if the roof of the building contains servicing equipment resulting in the building having a height of more than 9.5m—the servicing equipment complies with subsection (3), and*

*(iii) if the development results in a building with more than 2 storeys—the additional storeys are set back within planes that project at an angle of 45 degrees inwards from all side and rear boundaries of the site.*

The provisions of this section are in effect replicated in Section 108(b) of the Housing SEPP, which is a non-discretionary development standard.

As such, this Clause 4.6 request is to vary the following development standards in the Housing SEPP:

- Section 84(2)(c)(i)
- Section 84(2)(c)(ii)
- Section 84(2)(c)(iii)
- Section 108(b)

The proposed heights of each building, and the extent of the variation for each building is as follows:

Table 1: Summary of building heights and proposed variations - Section 84(2)(c)(i) roof height of 9.5m

BUILDING IDENTIFIER	PROPOSED HEIGHT TO ROOF LEVEL	EXTENT OF VARIATION	EXTENT OF VARIATION
Building A	14.25m	4.75m	50%
Building B	13.77m	4.27m	44.9%
Building C	14.27m	4.77m	50%
Building D	14.48m	4.98m	52.4%

BUILDING IDENTIFIER	PROPOSED HEIGHT TO ROOF LEVEL	EXTENT OF VARIATION	EXTENT OF VARIATION
Building E	10.41m	0.91m	9.58%

Table 2: Summary of building heights and proposed variations - Section 84(2)(c)(ii) – total building height (including services) of 11.5m

BUILDING IDENTIFIER	PROPOSED MAXIMUM BUILDING HEIGHT (METRES)	EXTENT OF VARIATION (M)	EXTENT OF VARIATION (%)
Building A	15.88	4.38	38%
Building B	15.43	3.93	34%
Building C	15.97	4.47	39%
Building D	16.11	4.61	40 %
Building E	12.04	0.54	4%

In terms of the building envelope planes as prescribed in Section 84(2)(c)(iii), the proposal requires a variation in three locations on site:

- for Building A along the side boundary for Troy Street;
- for Building C along the rear boundary; and
- for Building D along the rear boundary.

The objective of the development is to provide additional housing opportunities within a high-quality aged care environment, whilst respecting the existing site constraints (such as flooding) and existing landscaping. A key design principle has been to facilitate a built form that maintains a 'taller and leaner' form which positively contributes to maximising open and green space on the site and also allows for the greater protection and retention of trees. A superior planting and design outcome and associated amenity benefits are achieved because of the variations.

The bulk and scale of the development is compatible with the character of the adjacent development and provides a transition of scale between the largely single storey residential area directly to the southwest as well as the school, to the taller commercial development on the north side of the Great Western Highway. The proposed heights of the building respond to this context, with the taller buildings being located at the north of the site alongside the existing Residential Aged Care Facility and transitioning the lowest heights and greater setbacks to the boundaries being proposed to the east and west.

The height of the development has also been informed by resolving flood matters on site and the need to raise the existing floor levels to exceed the flood level on site.

In providing for this design outcome, the portions of the buildings which contravene the height of buildings standards do not result in any detrimental impacts on the adjoining properties in terms of privacy, overshadowing or view loss,

and do not detract from the amenity enjoyed by these residences and school grounds. The overshadowing impacts caused by the additional height are limited in duration and an acceptable level of solar access will be provided to adjoining developments.

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 this request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the circumstances of this application.

This request demonstrates that compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the proposed development and that there are sufficient environmental planning grounds to justify the proposed variation.

The development, as a whole, satisfies the assumed objective of the height of building development standards within the Housing SEPP, as well as the objectives of the R3 Medium Density Residential Zone and is therefore in the public interest. Strict adherence to the height of building development standard in this instance is therefore considered unreasonable and unnecessary and the consent authority may be satisfied that the requirements of Clause 4.6 are met.

## 1. CLAUSE 4.6 WRITTEN VARIATION REQUEST

This is a formal request that has been prepared in accordance with Clause 4.6 of the *Penrith Local Environmental Plan 2010* to justify a variation to the height of buildings development standard as prescribed in the Housing SEPP. The development is shown in the architectural drawings that form part of the submitted Development Application and are referred to in this request.

The objectives of Clause 4.6 are to provide an appropriate level of flexibility in applying a certain development standard to particular development, and to achieve better outcomes for and from development, by allowing flexibility in particular circumstances.

This request has been prepared having regard to the Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011) and various recent decisions in the New South Wales (NSW) Land and Environmental Court (LEC) and the NSW Court of Appeals (Appeals Court).

Clause 4.6 requires that a consent authority be satisfied of three (3) matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245):

1. That the application has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the application has adequately demonstrated that there is sufficient environmental planning ground to justify contravening the development standard [clause 4.6(3)(b)], and
3. That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out [clause 4.6(4)].

This request considers each of the requirements.

## 2. STANDARDS TO BE VARIED

The standards proposed to be varied is the height of buildings development standard which is set out in Section 84 and Section 108 of the Housing SEPP as follows, with the full section replicated here for context and relevant subsections highlighted in bold:

### **84 Development standards—general**

- (1) This section applies to development for the purposes of seniors housing involving the erection of a building.*
- (2) Development consent must not be granted for development to which this section applies unless—*
  - (a) the site area of the development is at least 1,000m<sup>2</sup>, and*
  - (b) the frontage of the site area of the development is at least 20m measured at the building line, and*
  - (c) for development on land in a residential zone where residential flat buildings are not permitted—*
    - (i) the development will not result in a building with a height of more than 9.5m, excluding servicing equipment on the roof of the building, and***
    - (ii) if the roof of the building contains servicing equipment resulting in the building having a height of more than 9.5m—the servicing equipment complies with subsection (3), and***
    - (iii) if the development results in a building with more than 2 storeys—the additional storeys are set back within planes that project at an angle of 45 degrees inwards from all side and rear boundaries of the site.***
- (3) The servicing equipment must—*
  - (a) be fully integrated into the design of the roof or contained and suitably screened from view from public places, and*
  - (b) be limited to an area of no more than 20% of the surface area of the roof, and*
  - (c) not result in the building having a height of more than 11.5m.*
- (4) Subsection (2)(a) and (b) do not apply to development the subject of a development application made by the following—*
  - (a) the Aboriginal Housing Office or the Land and Housing Corporation,*
  - (b) another social housing provider.*

### **Clause 108 – Non discretionary development standards for independent living units**

- (1) The object of this section 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.*

***(2) The following are non-discretionary development standards in relation to development for the purposes 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,***

It is noted that the Housing SEPP provisions override those of the *Penrith Local Environmental Plan 2010* (the Penrith LEP) which has a maximum height of building prescribed on this site under the relevant mapping of 8.5m.

The development standard to be varied is not excluded from the operation of Clause 4.6 of the PLEP.

### 3. EXTENT OF VARIATION

The definition of the height of buildings is established in Clause 4.3(2) of the Penrith LEP 2010 which provides the following:

**building height** (or **height of building**) means—

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

(b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

*including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

For the purpose of measuring the building height for the proposed development, this request takes the 'existing ground level' as the pre-development levels ascertained by the submitted survey to the maximum height of the building. The maximum building height standard (to roof level) is 9.5 metres.

There are five buildings proposed with this development. The proposed building height (including the height of the building to the roof level and the overall maximum height), as well as the extent of variation is shown in the tables below:

Table 3: Summary of building heights and proposed variations - Section 84(2)(c)(i) roof height of 9.5m

BUILDING IDENTIFIER	PROPOSED HEIGHT TO ROOF LEVEL	EXTENT OF VARIATION	EXTENT OF VARIATION
Building A	14.25m	4.75m	50%
Building B	13.77m	4.27m	44.9%
Building C	14.27m	4.77m	50%
Building D	14.48m	4.98m	52.4%
Building E	10.41m	0.91m	9.58%

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Table 4: Summary of building heights and proposed variations Section 84(2)(c)(ii) – total building height (including services) of 11.5m

BUILDING IDENTIFIER	PROPOSED MAXIMUM BUILDING HEIGHT (METRES)	EXTENT OF VARIATION (M)	EXTENT OF VARIATION (%)
Building A	15.88	4.38	38%
Building B	15.43	3.93	34%
Building C	15.97	4.47	39%
Building D	16.11	4.61	40 %
Building E	12.04	0.54	4%

The following figures demonstrate the extent of the variation to the height of buildings development standard under Section 84(2)(c):



Figure 1: Sections for Building A and B (Source: Group GSA Architects)

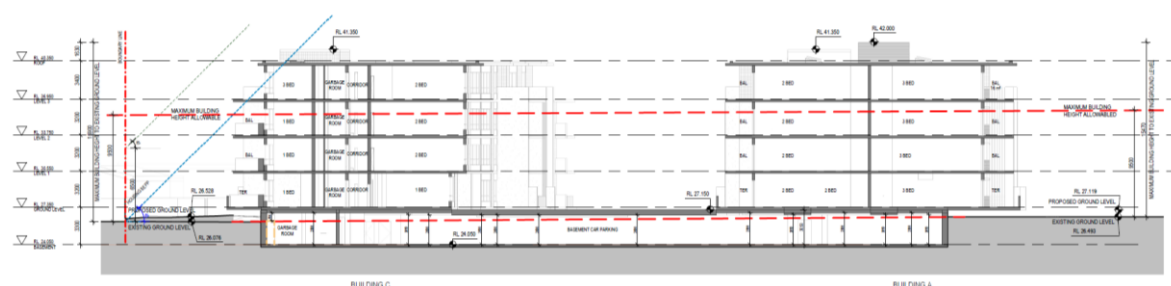


Figure 2: Sections for Building A and C (Source: Group GSA Architects)

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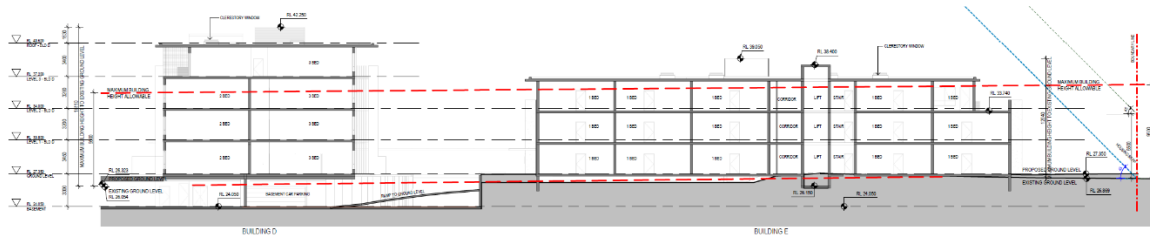


Figure 3: Sections for Buildings D and E (Source: Group GSA Architects)



Figure 4: Section Building C (Source: Group GSA Architects)



Figure 5: Section Building D (Source: Group GSA Architects)

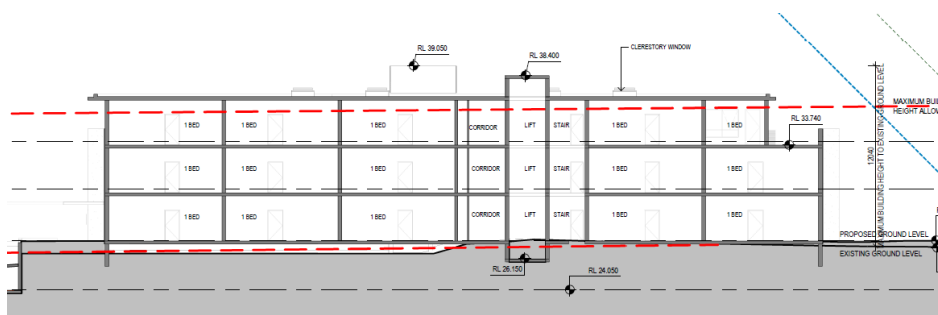


Figure 6: Section Building E (Source: Group GSA Architects)

The Building Height Planes are provided with the architectural plans and are replicated below for each building.

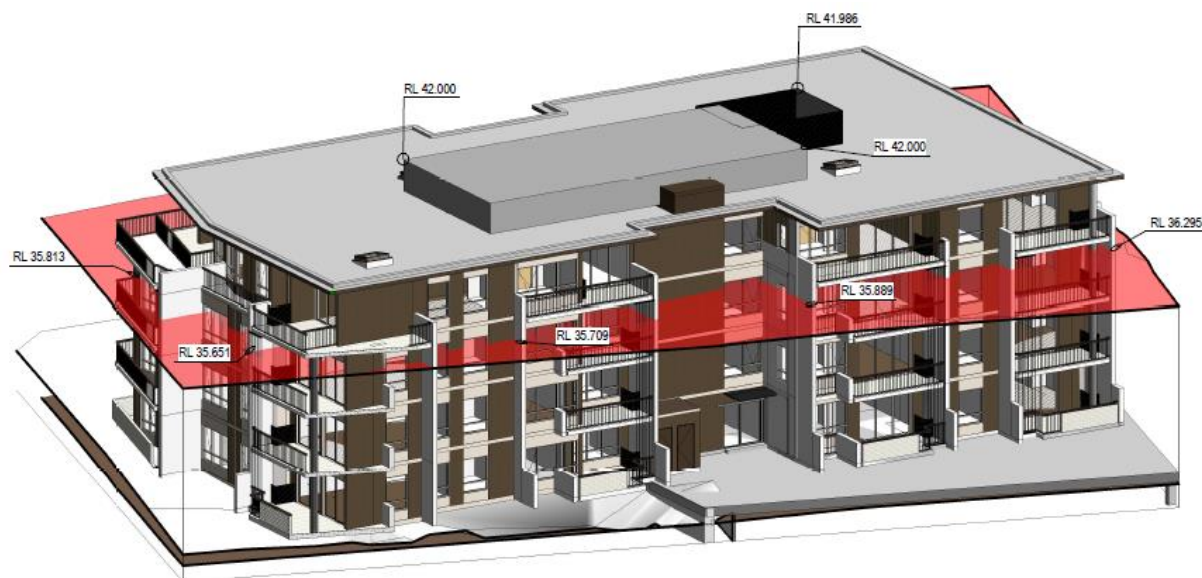


Figure 7: Building Height Plane for Building A (Source: Group GSA)



Figure 8: Building Height Plane for Building B (Source: Group GSA)



Figure 9: Building Height Plane for Building C (Source: Group GSA)



Figure 10: Building Height Plane for Building D (Source: Group GSA)

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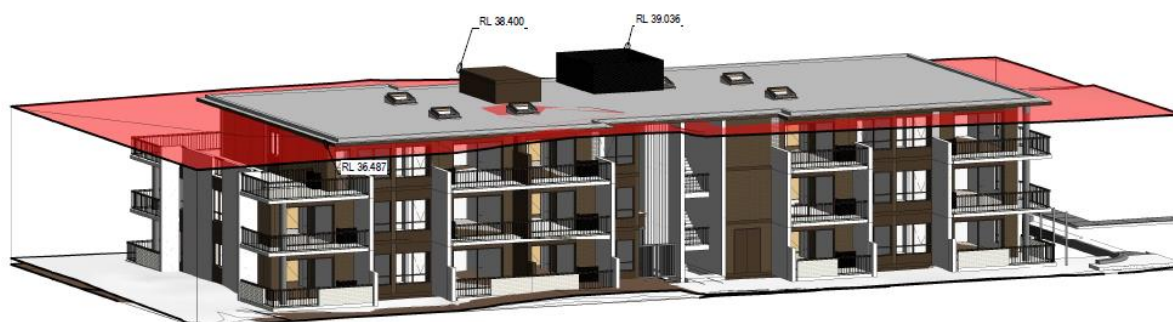


Figure 11: Building Height Plane for Building E (Source: Group GSA)

In relation Section 84(2)(c)(ii) of the Housing SEPP, the extent of the variation relates only to the overall building heights being more than 11.5m. The roof top services are otherwise *fully integrated into the design of the roof or contained and suitably screened from view from public places and are limited to an area of no more than 20% of the surface area of the roof* in accordance with Section 84(3)(a) and (b).

Section 84(2)(c)(iii) of the Housing SEPP also requires the following to be measured when considering the height of the building.

*(iii) if the development results in a building with more than 2 storeys—the additional storeys are set back within planes that project at an angle of 45 degrees inwards from all side and rear boundaries of the site.*

The proposal breaches this building envelope in the following three locations:

- 1) for Building A along the side boundary for Troy Street;

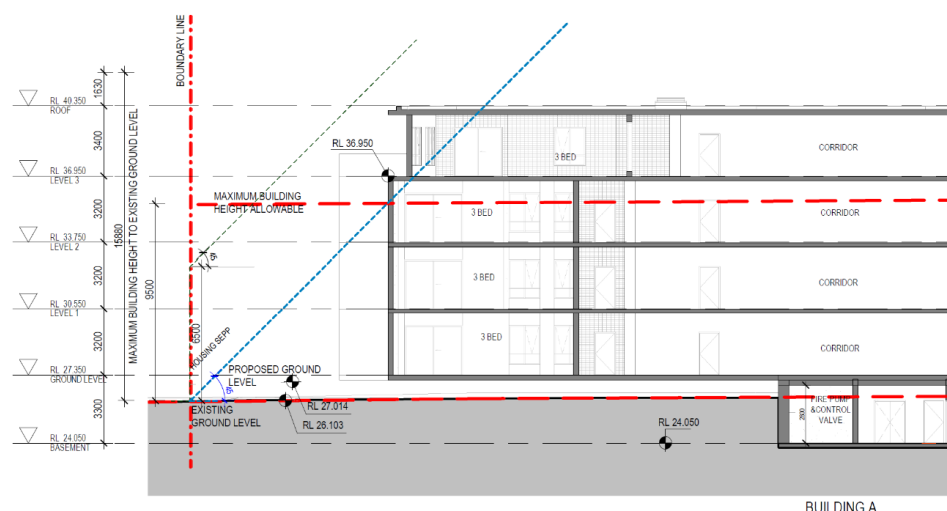


Figure 12: Section of Building A showing Housing SEPP building envelope plane in blue from Troy Street side boundary (Source: Group GSA)

- 2) for Building C along the rear boundary

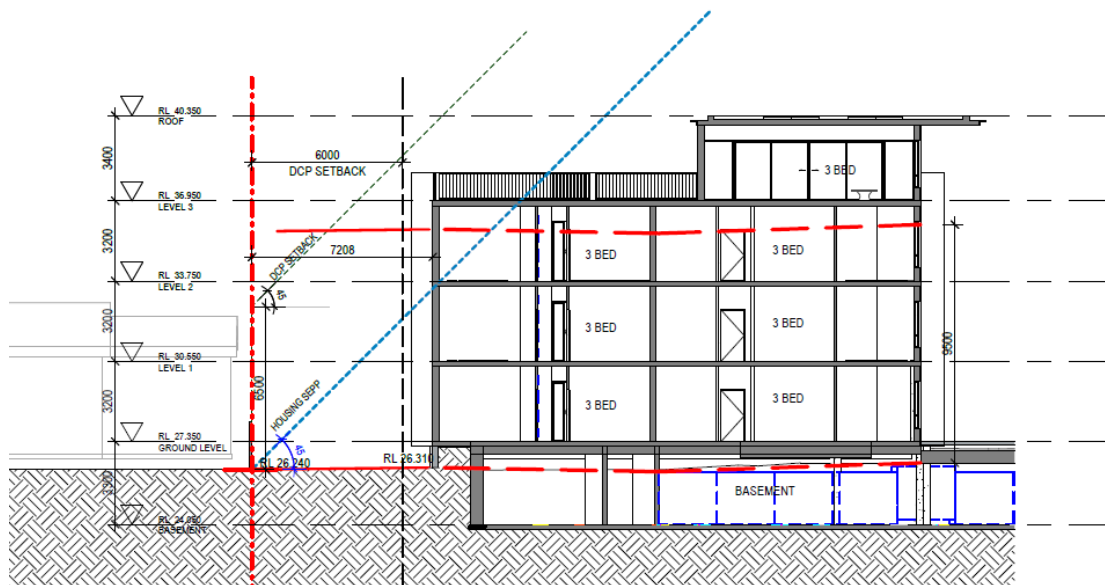


Figure 13: Section of Building showing Housing SEPP building envelope plane in blue from rear boundary (Source: Group GSA)

- 3) for Building D along the rear boundary.

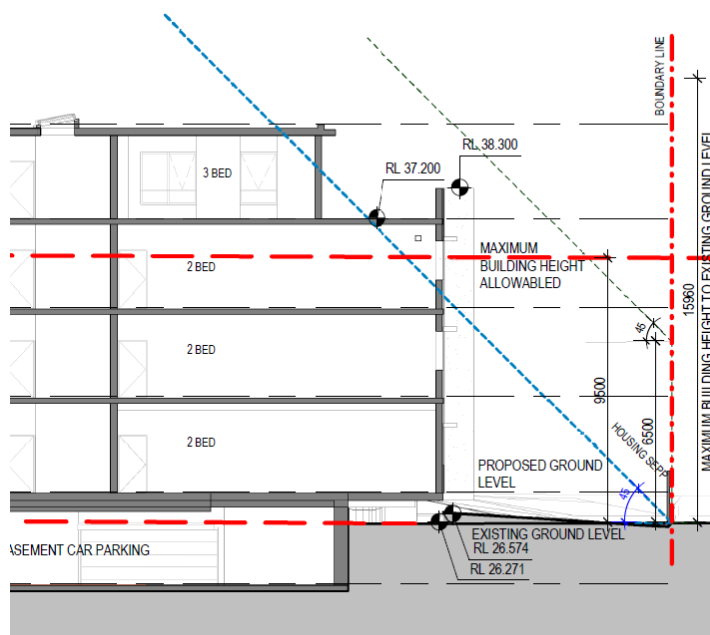


Figure 14: Section of Building D showing Housing SEPP building envelope plane in blue from rear boundary (Source: Group GSA)

## 4. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by Sections 84 and 108 of the Housing SEPP.

The Court has held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The five (5) ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated, thwarted or undermined (*Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]) if compliance was required with the consequence that 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 the standard is unreasonable and unnecessary; and
5. The zoning of the land is unreasonable or inappropriate.

It is sufficient to demonstrate only one (1) of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]).

In this case, it is demonstrated that Test 1 has been satisfied.

Nonetheless, we have considered each of the ways as follows.

### 4.1. The objectives of the development standard are achieved notwithstanding the non-compliance with the standard

Table 5 below considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (First test under *Wehbe*).

In Table 5 and Table 6 we have considered whether the elements which contravene the development standard prevent the objectives of the development standard being achieved. The Housing SEPP provides no instruction on the intent of the height controls in Sections 84 and 108 and does not otherwise nominate any objectives to underpin the intent of this control.

Given the provision relates to issues concerning where a residential flat building is not permitted, it is therefore necessary to assume what the purpose of the standard might be, then evaluate whether a variation to the control would be consistent with these objectives.

A review of Land and Environment Court cases has been undertaken specifically relating to the height objectives of the now repealed Seniors SEPP and the equivalent clauses, however, are still relevant given the context of this case:

In *Pathways Property Group Pty Ltd v Ku-ring-gai Council* [2017] NSWLEC 1486 a Commissioner of the Land and Environment Court (at [61] and [78]-[81]) accepted that the objective was as follows:

- *To ensure that the development provides an appropriate relationship in storeys/scale to adjoining side boundaries and to streetscape to avoid an abrupt change in the scale.*

This interpretation was appealed and was upheld on appeal (by a judge): *Ku-ring-gai Council v Pathways Property Group Pty Ltd* [2018] NSWLEC 73 at [180]-[182].

The variation sought will be tested against this assumed objective.

Table 5: Achievement of Assumed Objective

ASSUMED OBJECTIVE	RESPONSE
To ensure that the development provides an appropriate relationship in storeys/scale to adjoining side boundaries and to streetscape to avoid an abrupt change in scale.	<p>The subject site is located in a key area in terms of this section of Emu Plains. To the north, on the opposite side of the Great Western Highway, is the Lennox Village Shopping Centre. This shopping centre is a typical commercial scale with higher roof forms and building and has a maximum height of building development standard of 15 metres.</p> <p>On the site itself, there is an existing RACF located in the north-east quadrant of the site. The RACF is three storeys fronting the Great Western Highway. The RACF was approved by Council in 2018 and was the first service on the site to be redeveloped and modernised. The RACF also establishes an existing context for the second stage redevelopment of these ILUs.</p> <p>To the south-east of the site is the Emu Plains Public School. The site is very large, and the majority of the buildings are located along Emerald Street (<b>Figure 15</b>). The school buildings are located approximately 40 metres from the shared boundary with the subject site.</p>

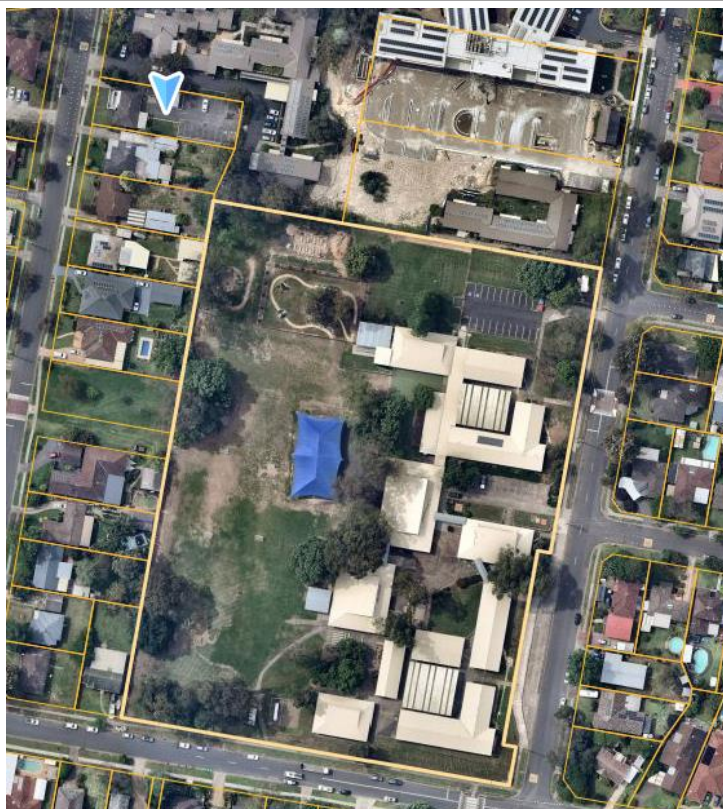


Figure 15: Aerial photo of Emu Plains Primary School outlined in light yellow  
(Source: Nearmap)

While the school site is mapped as having a maximum height of building development standard of 8.5 metres under the PLEP, the provisions of Schedule 6 of Chapter 3: Educational Establishments and Child Care Facilities of the *State Environmental Planning Policy (Transport and Infrastructure) 2021* means that a 4 storey building with a 22m height limit from ground level is permitted as Complying Development on the site. That gives an effective maximum height limit of the school at 22 metres.

To the direct south-west of the site along Troy Street are residential dwellings with a typical single storey form. This is also consistent along Emerald Street. The location of these is highlighted in **Figure 16**:

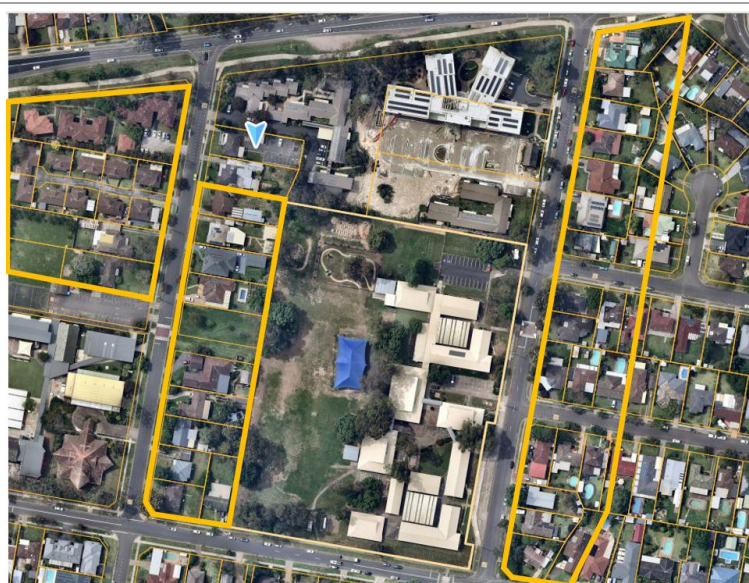


Figure 16: Locations of residential development in the vicinity of the site highlighted in yellow (Source: Nearmap)

One of the other key existing characteristics is the streetscape. As identified in the Visual Impact Assessment prepared for the Development Application, the large lots common to the area are accompanied by wide, landscaped verges and mature street canopy, which are generally larger eucalyptus trees within front setbacks and smaller species within the public domain.

When taking this context into account, the site acts as a visual transition between the commercial development of Lennox Village on the north side of the Great Western Highway, and the proposed scale will gradually reduce on this site moving from north to south. The lower buildings are located on the southern boundary of the property as it transitions in scale to both the school and other residential development surrounding the subject site. The larger setbacks and the landscaped streetscapes, along with wide road reserves further soften the impact.

The proposed development provides a significant setback to its boundaries which has allowed for both the retention of a number of significant trees on site and to utilise this area for deep soil landscaping, which will help in reducing its perceived bulk and scale.

The elements that contravene the height of buildings standard are set well back from the site's boundaries to ensure the height is compatible with the character of the adjacent development and offers a transition of


ASSUMED OBJECTIVE	RESPONSE
	<p>scale of development from the existing dwellings to the east, west and southwest of the site to the shopping centre on the north side of the Great Western Highway.</p> <p>A height compliant scheme with similar FSR would take up more site area and reduce the extent of setbacks and associated landscaping (which in the non-compliant scheme) assists in reducing the apparent bulk and scale of the building.</p>


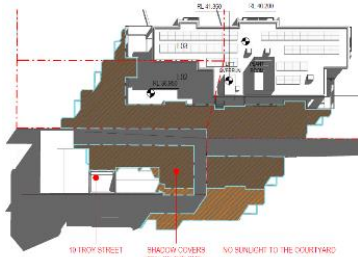
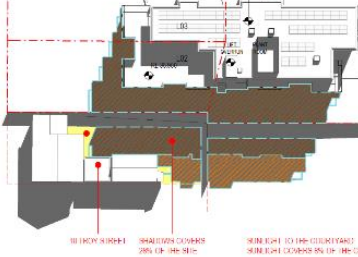
As demonstrated in Table 5 above, the inferred objective of the building height development standard is achieved notwithstanding the proposed variation.

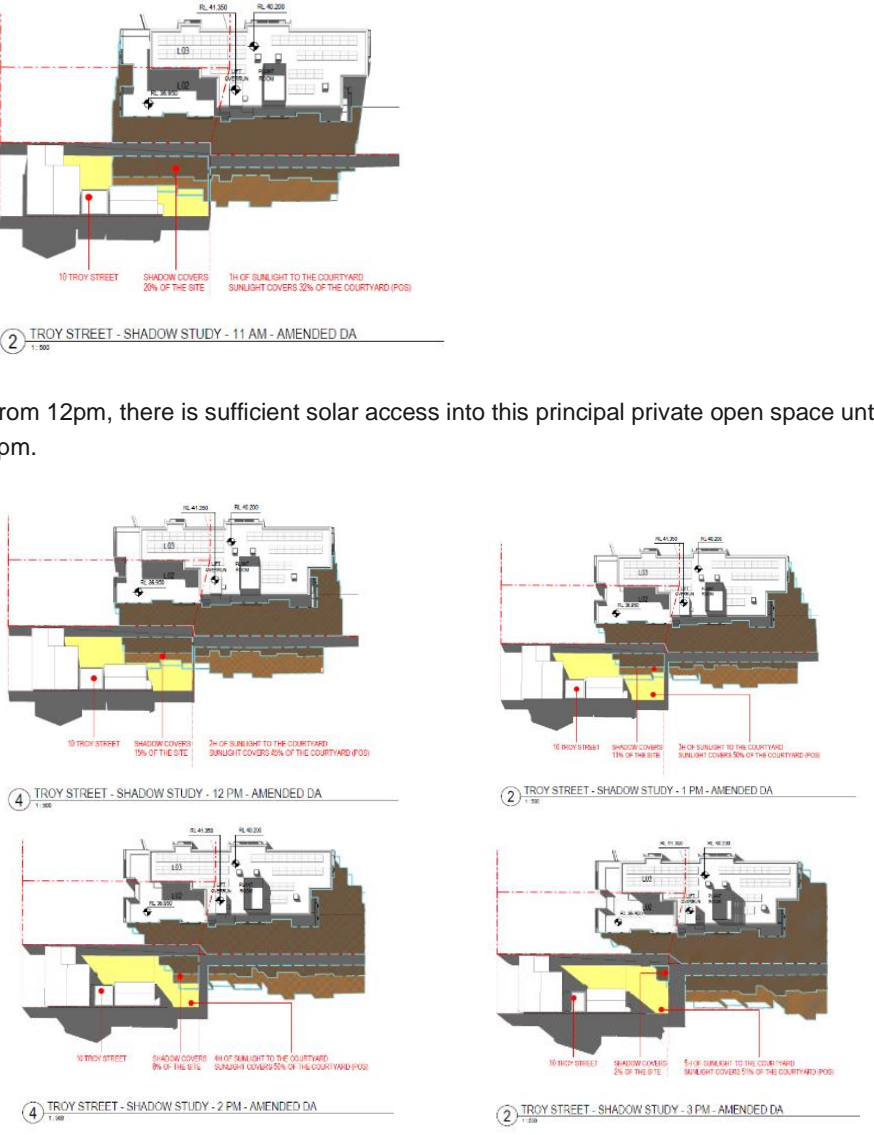
In the absence of specific objectives for the standard in the Housing SEPP, we consider that, despite not strictly applying to this development, it is appropriate to undertake an assessment against the objectives of the Height of Buildings Standard in the PLEP:

Table 6: Achievement of objectives of Clause 4.3 of the PLEP

OBJECTIVE	DISCUSSION
<b>4.3 Height of Buildings</b>	
(1) The objectives of this clause are as follows—	
<i>(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality</i>	<p>The response to the inferred objective of the Housing SEPP described above, equally applies to this objective.</p> <p>The elements that contravene the height of buildings standard are set well back from the site's boundaries to ensure the height is compatible with the character of the adjacent development and offers a transition of scale of development from the existing dwellings to the east, west and south of the site along both Troy Street and Emerald Street to the shopping centre on the north side of the Great Western Highway.</p>
<i>(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes</i>	<p><b>Views</b></p> <p>Views from surrounding properties will not be affected as a consequence of the contravention of the development standard. Views in the surrounding area are generally limited to street level views, sky and some canopy trees.</p> <p>The proposed development will be setback from the adjoining boundaries by a</p>

OBJECTIVE	DISCUSSION
	<p>minimum of 6 metres to the southern boundary (to the façade of the building), which faces the school playground. The setbacks to both Emerald Street and Troy Street are at minimum of 7 metres.</p> <p>The closest adjoining dwelling to the area of contravention is at 10 Troy Street. The dwelling at 10 Troy Street is orientated east/west, with principal views towards the east and the west. The proposed development is located to the north of this dwelling and will not impact the views currently enjoyed from the dwelling.</p> <p>The subject site also shares a boundary with Emu Plains Primary School. The closest setback to the school site is 7.9m, and extensive landscaping is also provided along this boundary.</p> <p><b>Overshadowing</b></p> <p>Group GSA has prepared shadow diagrams to demonstrate the shadow impacts of the proposed development.</p> <p><i>10 Troy Street</i></p> <p>Currently 8 Troy Street contains a single storey brick roof residence located in line with the existing dwelling at No. 10. As such there is no building located directly adjacent to the private open space for No. 10.</p> <p>Proposed Building C is located 32.3m from Troy Street (when measured from the building façade), with balconies overhanging into this setback. This is seen in the below plan extract:</p>  <p>Figure 17: Ground Floor Plan extract for building C (Source: Group GSA)</p> <p>No. 10 Troy Street also has a fenced area at the rear of the property, which can be seen in the aerial photography. As such, the principal private open space is located directly adjacent to the dwelling up to the fence, as seen in the extract below:</p>

OBJECTIVE	DISCUSSION
	<div></div> <p>Figure 18: Aerial picture of No. 10 Troy Street with principal private open space highlighted (Source: Group GSA)</p> <p>The development does have an impact on the principal private open space for No. 10 Troy Street, but only in the morning. As indicated in the shadow diagrams below (taken from the mid winter), the shadows begin to recede around 11am. The shadow diagrams differentiate the part of the building above the height standard in rust.</p> <div><div><p>2 TROY STREET - SHADOW STUDY - 9 AM - AMENDED DA 1:100</p></div><div><p>4 TROY STREET - SHADOW STUDY - 10 AM - AMENDED DA 1:100</p></div></div>

OBJECTIVE	DISCUSSION
	 <p>① TROY STREET - SHADOW STUDY - 11 AM - AMENDED DA 1:100</p> <p>From 12pm, there is sufficient solar access into this principal private open space until 3pm.</p> <p>③ TROY STREET - SHADOW STUDY - 12 PM - AMENDED DA 1:100</p> <p>② TROY STREET - SHADOW STUDY - 1 PM - AMENDED DA 1:100</p> <p>④ TROY STREET - SHADOW STUDY - 2 PM - AMENDED DA 1:100</p> <p>⑤ TROY STREET - SHADOW STUDY - 3 PM - AMENDED DA 1:100</p> <p><i>Figure 19: Shadow diagram extracts showing solar access to No. 10 Troy Street (Source: Group GSA)</i></p> <p>In summary, while there are shadow impacts on the site, the site maintains 5 hours of sunlight in the midwinter, and the percentage of sunlight available to the private open space significantly increases from 8% at 10am to 32% at 11am, and continues to increase to a maximum of 50% at 1pm where it is maintained until mid afternoon.</p>

OBJECTIVE	DISCUSSION
	<p>The overshadowing to 10 Troy Street is mitigated by way of the building's significant setback to Troy Street. This in turn creates the majority of the shadows towards the rear of the site away from the principal primary open space.</p> <p>By way of comparison, a test model was created for a two storey dwelling house with a compliant building envelope that would be permitted for construction on 8 Troy Street given that this is a separate parcel of land within the development.</p> <p>The shadow diagrams for this test model are outlined below. While a two storey dwelling house is lower in height and likely compliant with the height standard applying to the land, the shadow impacts onto both the private open space and neighbouring windows are greater. Unlike the proposed ILU building, the shadow impacts would be greater on the principal open space of this dwelling where the greatest amenity for the residents is provided, and the impact stretches over a greater part of the day.</p> <div data-bbox="595 1108 1444 1715"> <p>① TROY STREET - SHADOW STUDY - 9 AM - DCP SINGLE HOUSE 1:500</p> <p>② TROY STREET - SHADOW STUDY - 10 AM - DCP SINGLE HOUSE 1:500</p> <p>③ TROY STREET - SHADOW STUDY - 11 AM - DCP SINGLE HOUSE 1:500</p> <p>④ TROY STREET - SHADOW STUDY - 12 PM - DCP SINGLE HOUSE 1:500</p> </div>

OBJECTIVE	DISCUSSION
	<div data-bbox="606 560 1468 1209"> <p>1 TROY STREET - SHADOW STUDY - 1 PM - DCP SINGLE HOUSE 1:500</p> <p>2 TROY STREET - SHADOW STUDY - 2 PM - DCP SINGLE HOUSE 1:500</p> <p>3 TROY STREET - SHADOW STUDY - 3 PM - DCP SINGLE HOUSE 1:500</p> </div> <p>While it is noted that there are shadows along the northern boundary, this is created by a fence, not by the proposed development.</p> <p>Overall, it is considered that the additional height of the building does not create an adverse impact by overshadowing to the neighbouring dwelling at No. 10 Troy Street and sufficient solar access to the dwelling is maintained.</p> <p><i>Emu Plains Primary School</i></p> <p>The other neighbour to the south is the Emu Plains Public School. The development directly abuts areas of open space as well as a carpark. The nearest building from the northern boundary is approximately 35m setback from that boundary.</p> <p>The development will not affect solar access into any existing building on site. It will not significantly affect the solar access available to the existing play areas on site, noting that these areas have already been shaded due to the existing trees. The shared boundary can be seen in the figure below:</p>



Figure 20: Aerial photograph showing common boundary between the subject site and Emu Plains Primary School (Source: Nearmaps)

Overall, it is considered that the proposed development will ensure adequate solar access for the future residents while demonstrating that there will not be a significant adverse impact on the southern neighbours.

### Privacy

The proposal has been designed to maximise visual privacy both within the development as well as to the neighbours to the south. All of the buildings have a large setback from the southern boundary, which enables the retention of many of the significant trees. This, along with the new plantings will provide visual screening between the uses.

There will be boundary fencing located with the neighbouring property to maintain their private open space at 10 Troy Street.

### Visual Impact

The additional height which forms the contravention will have some visual impact, but this will not be detrimental. As discussed above, the additional height is centrally located within the site and is setback sufficiently to limit the building's visual presence. The additional height as a result of the contravention does not cause the building to appear overly dominant or bulky because of the design features including setbacks, articulation, materials and associated landscaping.

The proposed development as a whole will be visually consistent in terms of design and materials in that it represents a fine grain urban form, with large, landscaped setbacks to the site's boundaries, responding to the existing lower residential

OBJECTIVE	DISCUSSION
	<p>character of the adjoining properties. The development provides considerable separation between the proposed building and the adjoining low-density residential development.</p>
<p><i>(c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance</i></p>	<p>The subject site contains a listed heritage item of local significance, that being the Former Methodist Church. A Heritage Impact Statement (HIS) has been prepared and submitted with the Development Application.</p> <p>As outlined in the HIS, the proposed development is well separated from the existing church which assists in the retention and maintaining of its setting and curtilage. The retention of the existing trees and the additional landscaping will also assist in providing visual separation between Building E and the church, given that Building E is the closest.</p> <p>The summary of recommendations from the HIS are as follows:</p> <p><i>Overall, we consider that the proposed development is a very well-considered approach to replacing some of the residential aged care facilities at the site with the new RACF buildings carefully sited and designed to minimise their impact on the significant element on the site.</i></p> <p><i>The development is set sufficiently away from the heritage component on the site to allow its retention and maintain its setting while retaining its proximity to the facility that it now serves.</i></p> <p><i>We consider that the development will have a limited and acceptable impact on the heritage significance of the place and will assist in the long-term viability of the site and the associated heritage building by providing an ongoing use for the site and allowing an appreciation of the site by residents and visitors.</i></p> <p>Overall, it is considered that the development has been appropriately designed to address heritage matters and the additional height will not provide an adverse impact on the listed heritage item on site.</p>
<p><i>(d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity</i></p>	<p>As mentioned previously, this site is strategically located between the existing predominately single storey residential development to the east, west and south west of the site and the commercial shopping centre on the north side of the Great Western Highway. The proposed height transition between these uses is considered to be appropriate, given the location. The development uses the retention of the significant trees around the property boundary to form a landscape based scale for the buildings. The building height across the site reduces as it moves south, with</p>

OBJECTIVE	DISCUSSION
	<p>Building E being the shortest building proposed.</p> <p>The proposed buildings are of a high-quality architectural standard, and along with the existing Residential Aged Care Facility, will present a better-quality urban form in such a highly visible location than currently exists. The proposed higher density form is also considered appropriate given the location of the site and the transition in height as outlined in above.</p>

As demonstrated, the inferred objectives of the height of buildings development standard (including those in clause 4.3(1) of the PLEP, although not strictly applicable to this application), are achieved notwithstanding the proposed contravention.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], compliance with the height development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

4.2. Comparison underlying objective or purpose is not relevant to the development with the consequence that compliance is necessary

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

4.3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable

The objective would not be defeated or thwarted if compliance was required. This reason is not relied upon.

4.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary

The standard has not been abandoned by Council actions in this case and so this reason is not relied upon.

4.5. The zoning of land is unreasonable or inappropriate

The zoning of the land is reasonable and appropriate and therefore is not relied upon.

## 5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

A compliant development would result in a lesser built form, but in this case, the parts of the building that contravene the standard do not cause any adverse impacts to surrounding residential properties and are appropriately setback. Therefore, it can be concluded that the proposal does not result in any unreasonable environmental impacts and it is considered there are sufficient environmental planning grounds to justify the contravention.

Some additional specific environmental grounds to justify the contravention of the standard are summarised as follows:

- The proposed height of buildings was derived from careful consideration of the site's constraints and opportunities and in discussion with Council. It was considered that a better outcome is achieved by increasing the height of buildings to increase and enhance the space around buildings and the resultant amenity for their residents. As shown indicatively below, consideration was given to a development compliant with the maximum LEP height of 8.5m, setbacks etc, but which only provides 71 dwellings on site, reducing the social and housing benefits derived from its development. Even with this lower yield, the building separation is not as expansive as the proposed development, which affects the ground plane experience for the residents. While it retains the same trees as per the current development proposal, the opportunity to provide for the landscaped gardens, further vegetation and shared and other outdoor areas is reduced.

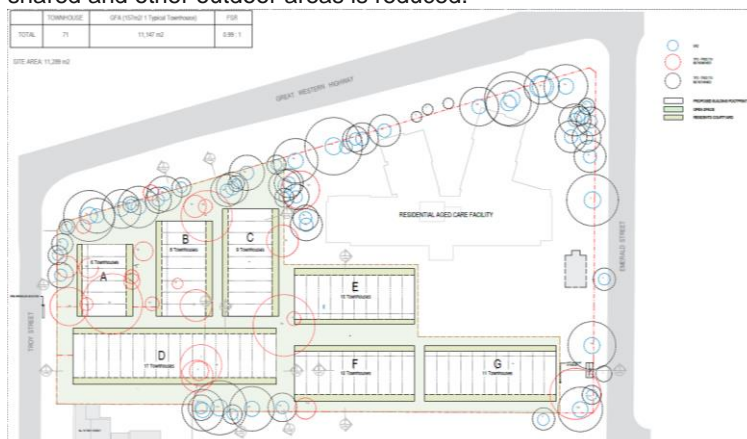


Figure 21: Example of multi dwelling housing proposal and massing (Source: Group GSA)

A superior natural and built-form design outcome is achieved as a result of the variation;

- The proposed finished floor level is required to be higher than the existing ground level due to the need to achieve and exceed flood levels for the site.
- The design of the proposal incorporates generous setbacks and extensive landscape planting to complement the built form and assist in reducing the scale of the development when viewed from the adjoining property boundaries and the public domain. This will ensure the proposal results in minimal amenity impacts and is compatible with the surrounding area in terms of bulk and scale.
- Further to the above, the nature of the generous setbacks means that the encroachment into the 45 degree building envelope required under the Housing SEPP is only minor. We note that whilst the building envelope control in the DCP does not apply to the subject development, it does establish the built form character of other development in the surrounding area to which the envelope does apply. We observe that the subject development would be consistent with the DCP envelope, if it applied, and therefore demonstrates its consistency with this element of the surrounding context.
- The proposed development is compatible with adjoining residential development, featuring a mix of materials, colours and landscaping which make it visually sympathetic to neighbouring buildings. The upper storeys of the buildings are highly articulated and carefully massed, to break up the building's bulk and scale.
- There are no adverse environmental impacts such as unacceptable additional overshadowing or overlooking as a result of the contravention of the standard.
- The proposed buildings provide a higher level of amenity for the future residents due to the proposed internal floor to floor heights that are more than the standard height prescribed under the Apartment Design Guide.
- Strict compliance with the height standard would either involve an increase in the site coverage of the development to maintain the same yield, or a reduction in the number of modern, purpose-built ILUs to assist in addressing the increasing demand for such housing within the Penrith local government area.

For completeness we note that the size of the variation (up to 50% for one the five buildings) is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6: *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85].

Some examples that illustrate the wide range of commonplace numerical variation to development standards under clause 4.6 (as it appears in the Standard Instrument) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003 the Land and Environment Court granted a development consent for a three storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187 per cent.
- In *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583 the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75 per cent (2.63:1 compared to the permitted 1.5:1).
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 the Court granted development consent to a six-storey shop top housing development with a floor space ratio exceedance of 42 per cent (3.54:1 compared to the permitted 2.5:1).
- In *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555 the Court granted development consent for a three-storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27 per cent (1.27:1 compared to the permitted 1.0:1).

- In *Stellar Hurstville Pty Ltd v Georges River Council* [2019] NSWLEC 1143 the Land and Environment Court granted development consent for 12-storey residential tower, on the basis of a clause 4.6 request, with a floor space ratio exceedance of 8.3 per cent.
- In *88 Bay Street Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1369 the Land and Environment Court granted development consent for a new dwelling house, swimming pool and landscaping at 6 Bayview Hill Road, Rose Bay with a height exceedance of 49 per cent (14.16m compared to the permitted 9.5m).

In short, clause 4.6 is a performance-based control, so it is possible (and not uncommon) for large variations to be approved in appropriate circumstances.

## 6. PUBLIC INTEREST

In this section it is explained how 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. This is required by clause 4.6(4)(a)(ii) of the Penrith LEP 2010.

In Section 4 it was demonstrated that the proposed development achieves the objectives of the development standard notwithstanding the contravention of the development standard.

It is demonstrated in Table 9 below that the proposed development achieves the objectives of the R3: Medium Density Residential zone, notwithstanding the variation of the development standard.

Table 9: Assessment against the objectives of R3 – Medium Density Residential Zone of the PLEP

OBJECTIVES OF THE R3: MEDIUM DENSITY RESIDENTIAL	DISCUSSION
<i>To provide for the housing needs of the community within a medium density residential environment.</i>	<p>The proposal contributes to the medium density residential housing stock through the provision of 147 independent living units in purpose built, 'vertically integrated' seniors housing community in a highly accessible area of Emu Plains.</p> <p>It also assists in addressing the demand generated for Seniors Housing in this area. The contravention to the standard does not affect the consistency with this objective.</p>
<i>To provide a variety of housing types within a medium density residential environment.</i>	<p>The development proposes 147 modern independent living units immediately adjacent to a residential aged care facility (operated by Uniting), which is a total net gain of 102 additional dwellings for the site.</p> <p>The proposed development is within an Emu Plains neighbourhood that consists predominately of single storey detached dwelling houses. The proposal will contribute to providing a mix in the typology of housing within the Emu Plains neighbourhood.</p> <p>The contravention to the standard does not affect the consistency of the development with this objective.</p>
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	<p>The proposal maintains the existing use of the site for Seniors Housing and establishes 147 modern independent living units in Emu Plains, all of which will provide a positive contribution to the site through a high-quality built form.</p> <p>The contravention to the standard does not affect the consistency of the development with this objective.</p>
<i>To provide for a concentration</i>	The proposal provides a sufficient concentration of housing within proximity to a

OBJECTIVES OF THE R3: MEDIUM DENSITY RESIDENTIAL	DISCUSSION
<i>of housing with access to services and facilities.</i>	<p>range of services and necessities. The site is within 100 metres from Lennox Village, consisting of a major supermarket and supporting services and facilities, whilst it is immediately south of the Great Western Highway which provides bus services to Penrith and Emu Plains Station.</p> <p>The contravention to the standard does not affect the consistency of the development with this objective.</p>
<i>To enhance the essential character and identity of established residential areas.</i>	<p>The subject site currently consists of old 1970's designed villa-type housing, which is dated and does not positively contribute to the essential character of the Emu Plains locality. The proposal provides a positive contribution to the existing built form via the provision of well-designed ILUs that enhance the site and its surrounding locality.</p> <p>The contravention to the standard does not affect the consistency of the development with this objective.</p>
<i>To ensure that a high level of residential amenity is achieved and maintained.</i>	<p>The design intent of this development was to improve the amenity for residents on the site by opening up its ground plan for a range of active and passive spaces, achieved by increasing the height of buildings to reduce their footprints.</p> <p>As demonstrated in the response to amenity within the assessment against the R3 – Medium Density Residential Zone objectives, the proposed contravention to the building height standard still maintains a high level of amenity for surrounding properties, as well as for the future residents on site.</p> <p>The contravention to the standard does not affect the consistency of the development with this objective.</p>
<i>To ensure that development reflects the desired future character and dwelling densities of the area.</i>	<p>The proposed development provides an appropriate dwelling density, consistent with that achievable on the site under a height compliant scheme. Whilst higher in density than current residential development to its east and west, it is nonetheless appropriate because of the social benefits delivered by high quality seniors housing on a purpose-built site in an area with significant growing demands for such housing. The proposed height is offset through the maintaining of open green space across the site. In addition, density along the western side is stepped down to ensure the overshadowing and overlooking impacts to surrounding properties to the direct south are minimised.</p>

OBJECTIVES OF THE R3: MEDIUM DENSITY RESIDENTIAL	DISCUSSION
	The contravention to the standard does not affect the consistency of the development with this objective.

As demonstrated in Table 9 above, the proposal is consistent with the objectives of the zone and in **Section 4.1** it was demonstrated that the proposal is consistent with the assumed objectives of the development standard. The development is therefore considered to be in the public interest.

## 7. STATE OR REGIONAL ENVIRONMENTAL PLANNING AND ASSUMED CONCURRENCE

This section considers whether the contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome which would be prejudicial to planning matters of State or regional significance resulting from the contravention of the development standard as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit in maintaining the development standard in the circumstances of this application.

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 20–002 ‘Variations to development standards’, dated 5 May 2020. This circular is a notice under section 55(1) of the *Environmental Planning and Assessment Regulation 2021*.

## 8. CONCLUSION

This submission requests a variation, under clause 4.6 of the Penrith LEP 2010, to Section 84 and Section 108 of the Housing SEPP, and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case;
- There are sufficient environmental planning grounds to justify the contravention.

The consent authority can be satisfied to the above and that the development is consistent with the objectives of the development standard and the objectives of R3: Medium Density Residential zone and is therefore in the public interest.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 20-002.

On this basis it is appropriate to exercise the flexibility provided by Clause 4.6 to vary the development standards in the circumstances of this application.