

Amended Clause 4.6 Variation to Development Standard

Housing SEPP – Section 84(2)(c) Development Standard

59-67 Karne Street North, Narwee



'Gura Bulga'

Liz Belanjee Cameron

'Gura Bulga' – translates to Warm Green Country. Representing New South Wales.

By using the green and blue colours to represent NSW, this painting unites the contrasting landscapes. The use of green symbolises tranquillity and health. The colour cyan, a greenish-blue, sparks feelings of calmness and reminds us of the importance of nature, while various shades of blue hues denote emotions of new beginnings and growth. The use of emerald green in this image speaks of place as a fluid moving topography of rhythmical connection, echoed by densely layered patterning and symbolic shapes which project the hypnotic vibrations of the earth, waterways and skies.

Ethos Urban acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture.

We acknowledge the Gadigal people, of the Eora Nation, the Traditional Custodians of the land where this document was prepared, and all peoples and nations from lands affected.

We pay our respects to their Elders past, present and emerging.

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1.0 Introduction

This amended clause 4.6 variation request has been prepared by Ethos Urban on behalf of Opal Healthcare. It is submitted to the Department of Planning and Environment (DPE) in support of a State Significant Development Application (SSDA) for a new seniors housing development, comprising a residential care facility at 59-67 Karne Street North, Narwee.

This clause 4.6 has been prepared in response to the comments received from the DPE in their letter dated 24 March 2023 which requests additional assessment and analysis of the variation to the development standard. A meeting was held with the DPE on 10 August 2023 to discuss the matters raised.

This clause 4.6 variation request relates to Section 84(2)(c) of the *State Environmental Planning Policy (Housing) 2021* (Housing SEPP). Section 84 is located in Part 5, Division 3 of the Housing SEPP under the heading 'Division 3 Development standards'. This variation request specifically relates to the 9.5m maximum building height control and the 45 degree setback projection development standard under Section 84(2)(c)(i) and (iii).

This variation request should be read in conjunction with the submitted Environmental Impact Statement and the Response to Submissions Report prepared by Ethos Urban and dated 29 August 2023.

Clause 4.6 of the *Canterbury Local Environmental Plan 2012* (CLEP 2012) enables the consent authority to grant consent for development even though the development would contravene a development standard imposed by the CLEP 2012 or any other environmental planning instrument, such as in this case the Housing SEPP.

Clauses 4.6 (3) requires the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- That compliance with the development 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.

Clause 4.6(4)(a) and (b) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that:

- The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3),
- 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 Planning Secretary has been obtained.

The consent authority's satisfaction in respect of those matters must be informed by the objectives of clause 4.6, which are to provide an appropriate degree of flexibility in the application of the relevant development standards to particular development and to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

This clause 4.6 variation request demonstrates that notwithstanding the non-compliance with the development standard in section 84(2)(c) of the Housing SEPP:

- Compliance with the development standard is unreasonable and unnecessary in the circumstances, as the objectives of the standard and Principles of Policy are achieved notwithstanding the non-compliance;
- There are sufficient environmental planning grounds to justify the variation as the proposed building height is compatible with its context, given the topographical change, and the proposed variation is limited to the southern portion of the site and does not result in greater overall shadowing impact upon Richard Podmore Dog Park when compared to a compliant built form envelope;
- The proposal aligns with the feedback from the Government Architect State Design Review Panel in promoting design excellence and retaining significant trees on site;
- The site provides substantial public benefit through providing an increase in seniors housing that responds to modern day standards and requirements for aged care and the changing demographics and population growth; and

- The proposal is in the public interest since it is consistent with the objectives of the R3 Medium Density Residential zone and provides an appropriate built form and building articulation.

Therefore, the SSDA may be approved with the proposed variation to section 84 of the Housing SEPP in accordance with the flexibility allowed under clause 4.6 of the CLEP 2012.

2.0 Development Standard to be varied

The development standard that is sought to be varied as part of this application is section 84(2)(c) of the Housing SEPP. Section 84 is located within Part 5, Division 3 of the Housing SEPP under the heading 'Division 3 Development standards'.

Section 84(2)(c) relates to the maximum building height of development in residential zones where residential flat buildings are not permitted. The development standard controls the bulk and scale of buildings and their interface with adjoining development. Section 84(2)(c)(i) and 84(2)(c)(iii) are inter-related and are to be read in conjunction, however where necessary the impacts of each standard has been looked at individually.

Section 84(2) is reproduced in its entirety below (**emphasis added**).

- (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 1,000m², 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.***

Section 84 applies to the proposed development as the site is located in the R3 Medium Density Residential zone where residential flat buildings are not permitted. Therefore, it is subject to a maximum building height of 9.5m and a 45 degree setback development standard where the proposal results in a building of more than 2 storeys on side and rear boundaries.

3.0 Clause 4.6 variations

Clause 4.6 of the CLEP 2012 is the statutory mechanism that allows the consent authority to grant consent to development that contravenes a development standard imposed by an environmental planning instrument. The clause aims to provide an appropriate degree of flexibility in applying certain development standards, to achieve better outcomes for and from development. Clause 4.6(3) of the CLEP 2012 provides that:

4.6 Exceptions to development standards

- (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.*

RebelMH Neutral Bay Pty Ltd v North Sydney Council [2019] NSWCA 130 clarified the requirements to satisfy for clause 4.6(3):

“51... in order for a consent authority to be satisfied that an applicant’s written request has ‘adequately addressed’ the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).”

That is, in order to satisfy clause 4.6(3), it is not sufficient that the written requests simply seeks to address the matters in subclauses (a) and (b), but rather, the consent authority must form a view that the matters in subclauses (a) and (b) have been satisfied by the written request. Further, clause 4.6(4)(a) of the CLEP 2012 provides that:

- (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 [our emphasis] 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*
 - (b) *the concurrence of the Planning Secretary has been obtained.*

We underline the term “consistent” as the Court has clarified in *Moskovich v Waverley Council* [2016] NSWLEC 1015 at [53]:

53. *“The threshold of ‘consistency’ is different to that of ‘achievement’. The term ‘consistent’ has been considered in a judgements [sic] of the Court in relation to zone objectives and has been interpreted to mean ‘compatible’ or ‘capable of existing together in harmony’ (Dem Gillespies v Warringah Council (2002) 124 LGERA 147; Addenbrooke Pty Ltd v Woollahra Municipal Council [2008] NSWLEC 190) or ‘not being antipathetic’ (Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21). Whichever interpretation is adopted the test of ‘consistency’ is less onerous than that of ‘achievement’.”*

We highlight the final approach in that ‘consistency’ is less onerous than that of ‘achievement’. Below we demonstrate that the proposed development is consistent with the objectives of the R3 zoning and the underlying purpose of section 84.

Assistance on the approach to considering a contravention to a development standard has been taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827;

2. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009;
3. Moskovich v Waverley Council [2016] NSWLEC 1015; and
4. Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118.

Accordingly, development consent can be granted to the proposal despite the proposed variation of the development standard because, pursuant to clause 4.6(4)(a), the consent authority can be satisfied that:

- this written request has adequately addressed the matters required to be demonstrated by clause 4.6(3); and
- the proposed development will be in the public interest because it is consistent with the objectives of the standard in section 84(2)(i) and (iii) and the objectives of the R3 Zone.

4.0 Nature of Variation Sought

The site located at 59-67 Karne Street North, Narwee and comprises various allotments including 3 lots that have been previously cleared and 2 lots that comprise existing residential dwellings. The site is afforded a maximum building height of 8.5m in accordance with the CLEP 2012 as shown at **Figure 1** below.

However, in accordance with section 84 of the Housing SEPP, for development in residential zones (where residential flat buildings are not permitted) the maximum building height is 9.5m (refer to **Figure 2**) and where the proposal results in more than 2 storeys on side and rear setbacks the additional storeys are to be setback 45 degrees inwards from the boundaries of the site (refer to **Figure 3**).

The proposed development seeks to vary section 84(2)(c)(i) and (iii) in the southern portion of the site. As shown in **Figure 2** and **Figure 3**, the proposal results in a variation to the 9.5m height plane and 45 degree setback development standard where it results in a 1.1m non-compliance to the maximum building height (11.6% variation), and a protrusion into the 45 degree setback area at Level 3. This non-compliance is limited and localised to the southern portion of the development. The proposal fully complies with both development standards at all other boundary interfaces.



Figure 1 CLEP 2012 HOB map – subject site outlined red

Source: NSW Legislation / Ethos Urban

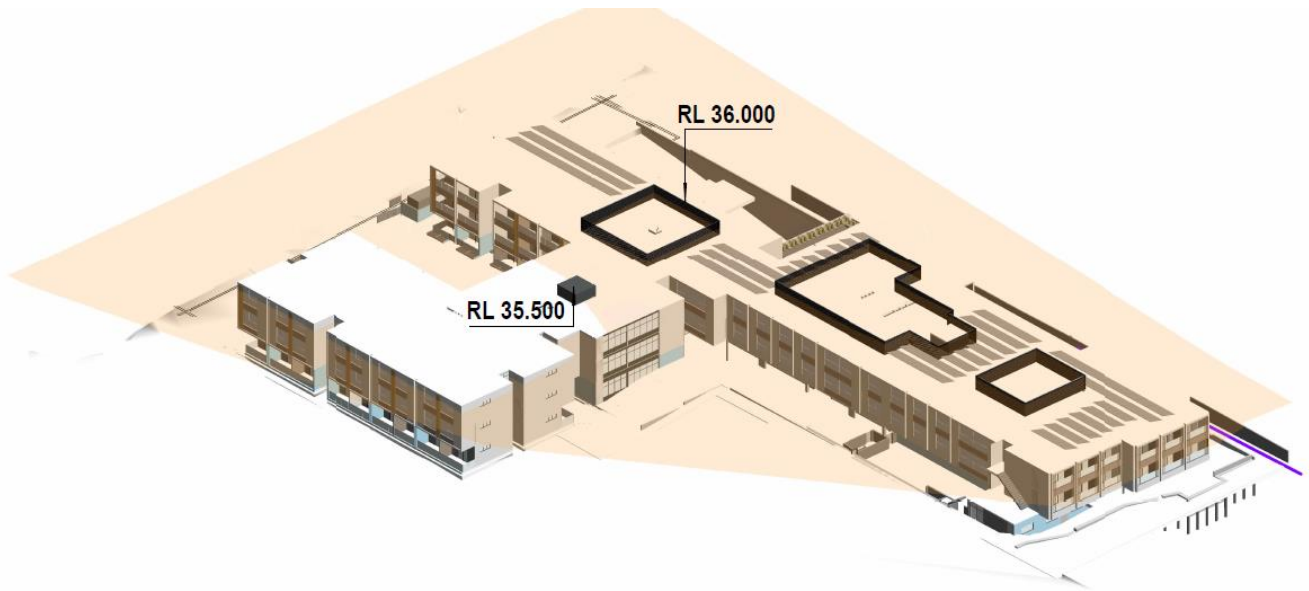


Figure 2 9.5 Housing SEPP height compliance diagram as viewed towards the northwest (grey illustrates the servicing equipment – compliant with the 11.5m Housing SEPP height plane)

Source: Group GSA

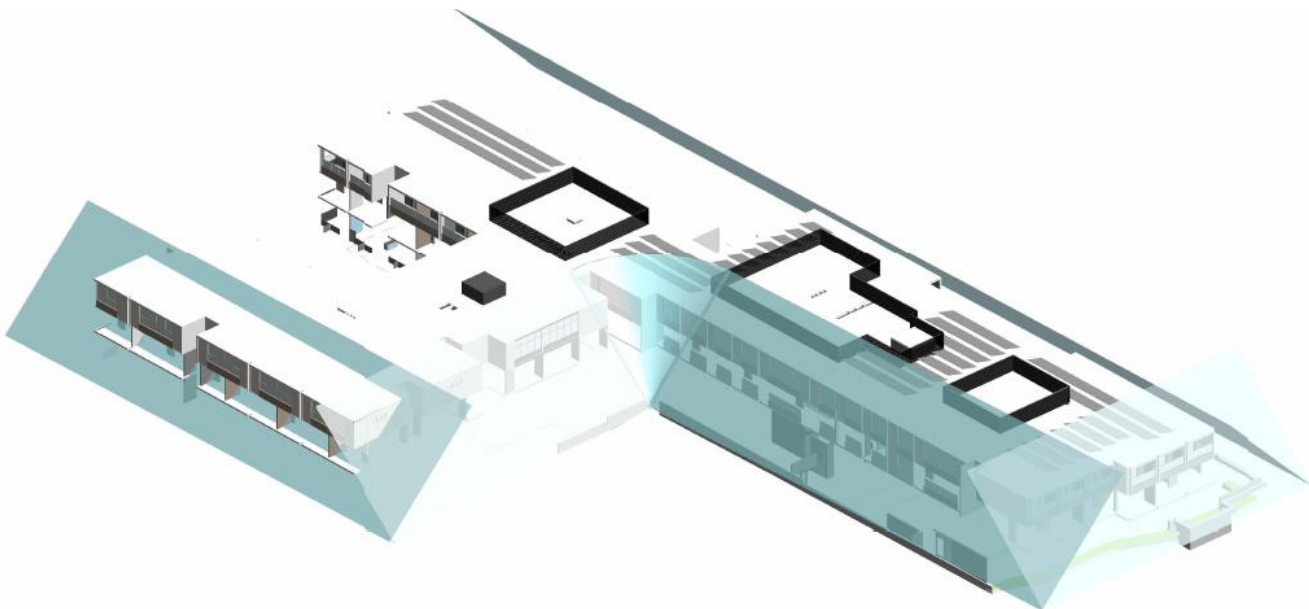


Figure 3 Housing SEPP 45-degree setback to the third storey as viewed towards the north west

Source: Group GSA

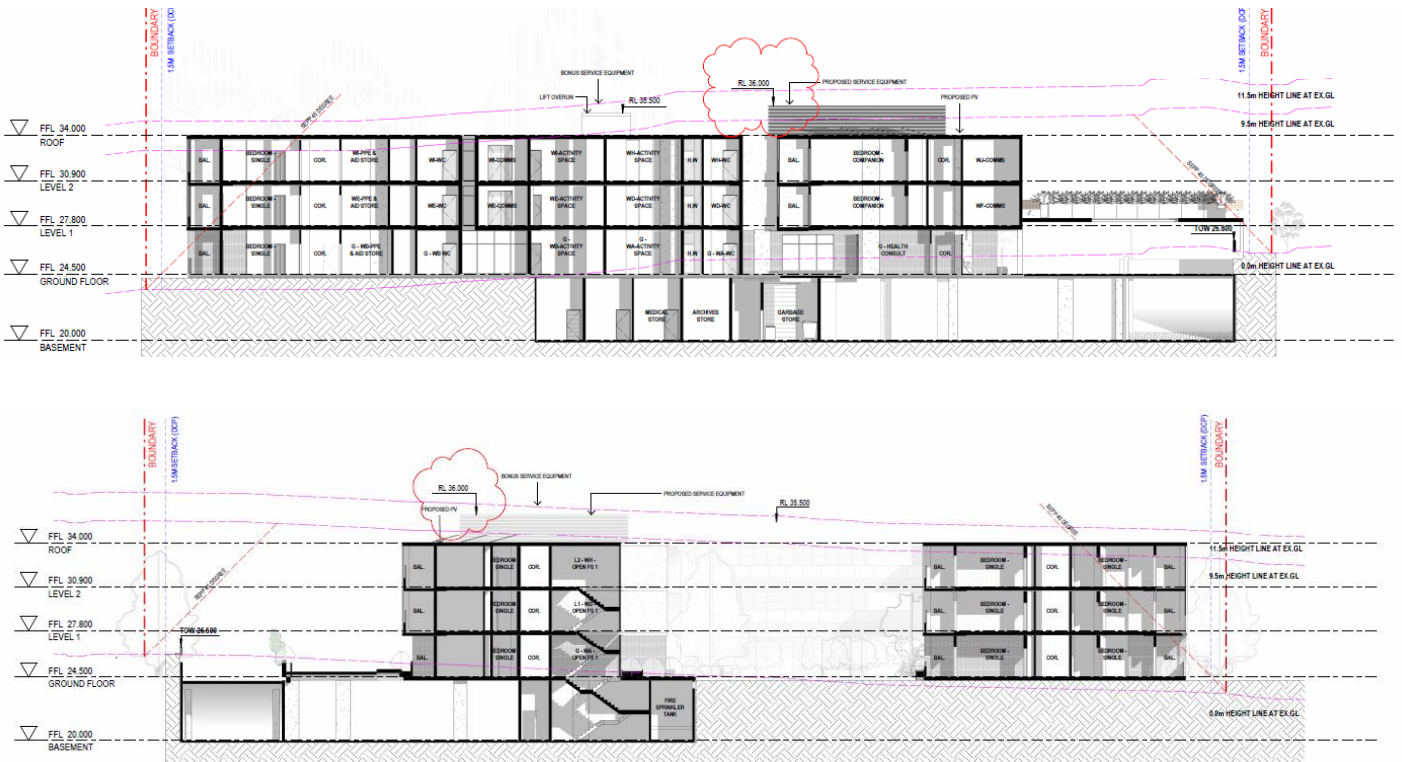


Figure 4 Sections illustrating 9.5m maximum building height limit and 45 degree setback control to Level 3 (eastern section top and western section bottom)

Source: Group GSA

5.0 Clause 4.6(3)(a): Compliance with the Development Standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five ways in which it could be shown that a variation to a development standard was unreasonable or unnecessary. However, His Honour in that case (and subsequently in *Initial Action*) confirmed that these five ways are not exhaustive; they are merely the most commonly invoked ways. Further, an applicant does not need to establish all of the ways.

While *Wehbe* related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis may be of assistance in applying clause 4.6 given that subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]; *Initial Action* at [16]).

The five methods outlined in *Wehbe* are:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
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 (**Fourth Method**).
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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

Of particular assistance in this instance is the **First Method** in establishing that compliance with a development standard is unreasonable or unnecessary.

5.1 The objectives of the development standard are achieved notwithstanding the non-compliance (First Method)

Section 84 of the Housing SEPP is within Division 3 – Development Standards of “Part 5 Housing for seniors or people with a disability” of the Housing SEPP. While Part 5 or section 84 of the Housing SEPP do not provide specific objectives, the underlying purpose of section 84(2)(c) is considered to control the built form and scale of development within the area and to minimise adverse amenity impacts on adjoining development and the streetscape. The provision provides standards relating to the erection of a building and controls the building height and scale of development specifically in zones where residential flat buildings are not permitted.

5.1.1 Planning Purpose of Development Standards

Building Height

The purpose of Section 84(2)(c)(i) is to establish the maximum building height of seniors housing development in low and medium density residential zones and to ensure that any future development has regard to the built form, scale, and character of an area, thereby minimising adverse amenity impacts. The standard recognises the servicing requirements for this form of development and explicitly excludes servicing equipment on the roof from the maximum building height control of 9.5m and allows servicing equipment up to 11.5m for 20% of the roof area.

45 degree setback

The purpose of Section 84(2)(c)(iii) is inter-related to the maximum building height standard, however, is considered to be more specific. That is to ensure that additional storeys above 2 storeys are sufficiently set back from side and rear boundaries to avoid an abrupt change in built form to adjoining development and to minimise adverse amenity impacts upon the sensitive interfaces to adjoining low density residential development. A guide to the intent of this development standard is found within the repealed *State Environmental Planning Policy (Housing for seniors and*

people with a disability) 2004 (Seniors SEPP). The Seniors SEPP provided development standards (i.e. clause 40(4)(b) and 40(4)(c)) relating to development adjacent to boundaries not being more than 2 storeys and the rear 25% of the site not exceeding 1 storey:

(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.

The intent of (b) is as its note describes, i.e. "to avoid an abrupt change in scale from adjoining development in the streetscape", whilst the intent of (c) is considered to be to minimise adverse amenity impacts to the sensitive interfaces of adjoining low density residential development.

Therefore, the 45 degree setback standard is considered to be an evolution of these former development standards of the Seniors SEPP, taking the planning purpose of both – which is to avoid abrupt change in the streetscape and to minimise adverse amenity impacts to the sensitive interfaces of adjoining low density development.

How this purpose is achieved

The proposed development is considered to achieve the purpose of Section 84(2)(c) as:

- *Building height:*

- The exceedance to the maximum building height standard is limited to the southern interface and constitutes a relatively minor 1.1m variation at its maximum point that is largely attributable to a localised dip in the topography coupled with a 6m fall from north to south across the site. It is important to note that due to the functional requirements of a residential care facility, floorplates must be level and therefore they do not have the same design flexibility that other residential development has in terms of stepping down a site to match local topography. This is contemplated in section 99(a) of the Housing SEPP where it states that RCFs are designed to suit the operational and functional requirements, where they are typically more akin to a hospital-like design rather than an ILU or residential flat building:

Seniors housing should be designed to—

(a) recognise the operational, functional and economic requirements of residential care facilities, which typically require a different building shape from other residential accommodation, and

The exceedance does not result in adverse impacts to any adjoining residential development and given its relatively minor nature and "end of street" location, the exceedance is considered to respect the character of the area. Furthermore, the overwhelming majority of the proposed development remains compliant with the 9.5m and 11.5m (for servicing equipment) building height standards under Section 84(2)(c)(i) and 84(3) respectively. Therefore, the purpose of Section 84(2)(c)(i) is considered to be achieved;

- *45 degree setback development standard:*

- The exceedance to the 45 degree setback development standard is limited to Level 2 of the southern most component of the proposed development and does not result in an abrupt change in scale from adjoining development. This is considered acceptable as the site's southern boundary directly fronts on to the access handle of the Richard Podmore Dog Park and is also located at the end of the street, with only the acoustic wall of the M5 Motorway located further beyond. As the exceedance does not interface with low density residential development, it will not result in adverse amenity impacts upon residential properties, noting that the intent of the control is considered to be to protect the amenity of adjoining development.
- At the site's most sensitive interfaces to the north and east, the proposal entirely complies with the 45 degree setback development standard therefore, the proposal does not result in an abrupt change in scale and adequate amenity to these properties is achieved.
- As illustrated in **Figure 5**, if the proposal were to comply with the 45 degree control this would result in the loss of 9 rooms of a 15 room household on Level 2 of the southern wing. Strict compliance would therefore require the deletion of an entire household as Opal's RCFs adopt a 15 bed household to suit the operational and functional needs. This is generally in line with the findings of the Royal Commission where it was identified as the optimum neighbourhood size for 'small scale domestic living models' of care. If strict compliance were required, this scheme would exacerbate the challenge of meeting the required demand of aged care beds in the Canterbury-

Bankstown LGA for little to no benefit (as discussed in the Economic Impact Assessment at **Appendix L** of the EIS) and would not align with the Principles of Policy of the Housing SEPP.

- If the design were to be entirely compliant and retain the household (i.e. the first SDRP design shown in **Figure 6**), this would result in the removal of significant trees including Tree 6 which is located in the central courtyard of the development as well as various trees located along the front boundary of the site, nearby to the park entrance. This scheme would also shift the built form closer to the northern and eastern boundaries, resulting in adverse privacy and amenity impacts to adjoining properties. This scheme also goes against the recommendations of the SDRP in terms of design excellence and built form where the Panel specifically noted that:

- Retention of more existing trees on the site should be explored including trees 6 and 7;
- The impact of the building height on houses to the north should be reviewed, including amenity and privacy and consider redistributing the mass from the north to south to improve relationships with the surrounding development; and
- Prioritising height to the south to help shield the proposal from the M5, reduce overshadowing to the internal courtyard and provide a marker at the end of the street.

This proposal has therefore sought to address the comments received from the SDRP including the retention of Tree 6 and revisiting the building massing, to protect privacy to properties to the north and east. Further, when compared to a compliant Housing SEPP building envelope (as discussed in **Section 6.1.3**) the overshadowing impact is generally comparable. The purpose of section 84(2)(c)(iii) is therefore considered to be achieved.

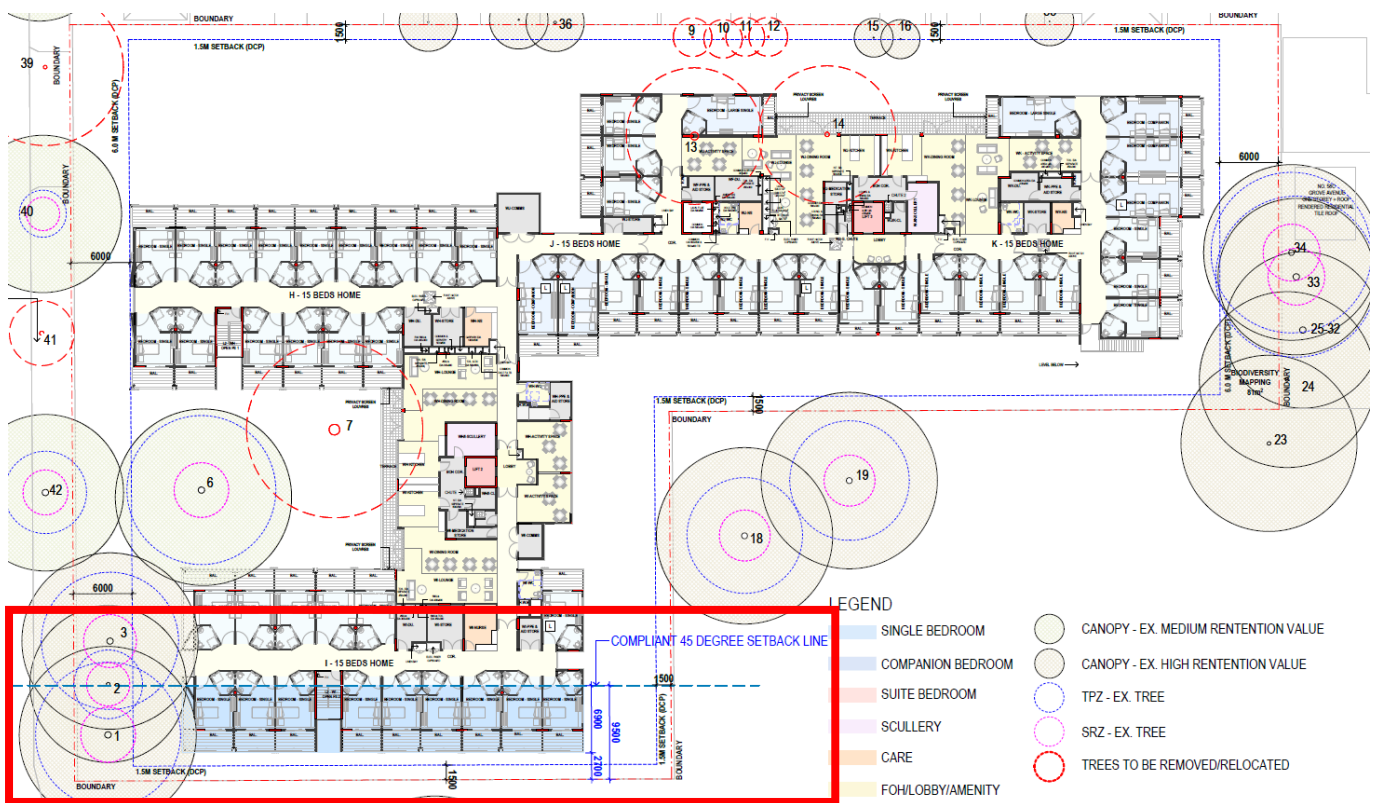


Figure 5 Level 2 floor plan illustrating the 45 degree setback line (dashed blue) and the removal of 9 rooms

Source: Group GSA



Figure 6 SDRP 1 Compliant scheme (exceeding setbacks, however, removes trees within the centre of the site)

Source: Group GSA

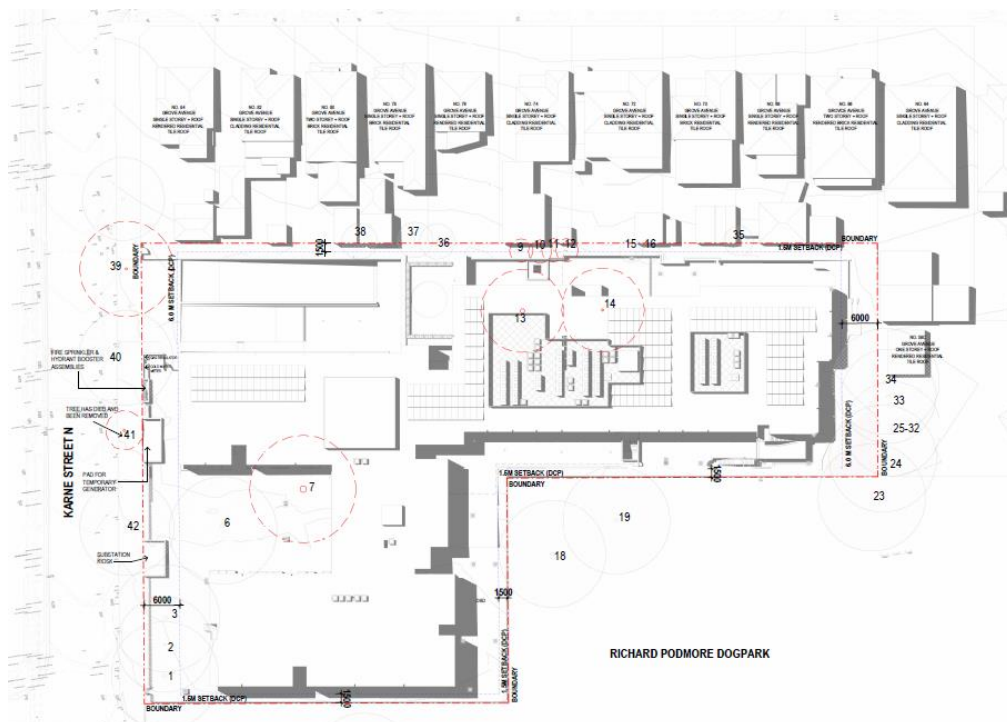


Figure 7 Proposed development – minor exceedance to section 84, however, retains trees where possible and shifts built form away from sensitive interfaces at the northern and eastern boundaries

Source: Group GSA

5.1.2 Principles of the Housing SEPP

The Principles of Policy contained in Chapter 1 Section 3 of the Housing SEPP relates to different forms of residential development, including affordable housing, boarding houses, build-to-rent, co-living etc. The Principles of Policy are not limited to development for the purposes of seniors housing. The Principles of Policy of relevance to seniors housing are considered to be:

- (a) *enabling the development of diverse housing types, including purpose-built rental housing,*
- (b) *encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability,*
- (c) *ensuring new housing development provides residents with a reasonable level of amenity,*
- (d) *promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,*
- (e) *minimising adverse climate and environmental impacts of new housing development,*
- (f) *reinforcing the importance of designing housing in a way that reflects and enhances its locality,*
- (g) *supporting short-term rental accommodation as a home-sharing activity and contributor to local economies, while managing the social and environmental impacts from this use,*
- (h) *mitigating the loss of existing affordable rental housing.*

The proposed development is considered to meet the underlying purpose of Section 84(2)(c)(i) and 84(2)(c)(iii) and directly aligns with the relevant Principles of Policy as follows:

- The site is zoned R3 Medium Density Residential which anticipates medium density housing, and the proposal meets the objectives of the zone of “providing a variety of housing types” “in a medium density residential environment” and does not result in an abrupt change in scale form compared to a compliant built form as shown at **Appendix B**;
- The proposal will deliver 163 aged care beds to support the growing population and ageing demographic in the Canterbury-Bankstown LGA and wider area. This will allow the existing community to age in place and will meet the expected market penetration for seniors housing where there is expected to be a significant undersupply of residential aged care beds in the LGA from 2022-2031. As identified in the Economic Impact Assessment (**Appendix L** of the EIS), even with the beds provided by the proposal, the LGA is forecast to have an undersupply of 810 aged care beds in 2031 (compared to an existing undersupply of 260 and 500 beds in 2022 and 2026 respectively). This indicates that the provision of the proposed 163 aged care beds would meet a significant portion of the future demand for RCF housing in the area. And, importantly, the South City District Plan where it identifies that 82% of residents move into a new home within 15km of their former residences.

Therefore, strict compliance would lead to either the loss of a household or a revised design that reduces the size of multiple households within the proposed development and results in the removal of significant trees. Either option would not assist in the provision of aged care beds in the Canterbury-Bankstown LGA and would not result in an optimal design outcome as advised by the GANSW SDRP. The purpose and Principles of Policy of the Housing SEPP would not be met, and the provision of aged care beds in the LGA would further fall behind the projected demand.

- The proposed development has been designed to ensure appropriate amenity for all residents. While some rooms do have a southern orientation, this is balanced by the fact that these rooms have an outlook to open space and trees within Richard Podmore Reserve. Importantly, communal areas including courtyards, terraces and internal communal lounge / dining rooms have been located to ensure they receive 2 hours sunlight during the winter solstice as shown in the Design Report at **Appendix B**. It is important to note that a RCF operates very differently to other forms of residential development and is driven by the care requirements of its residents (as contemplated in section 99(a) of the Housing SEPP). As such, rather than achieving an arbitrary solar access minimums for rooms, it is most important in RCF design that communal open space areas receive sufficient solar access. In this regard, external and internal communal areas have been oriented to receive and maximise solar access (i.e., in excess of 2 hours on 21 June). For these reasons, Part 5 of the Housing SEPP deliberately does not provide non-discretionary standards for solar access to the rooms of residential care facilities, like it does for independent living units.
- Strict compliance would result in a redesign to a previously compliant scheme that results in smaller courtyard areas and the removal of existing trees within the site which is contrary to the advice received from the GA NSW SDRP (refer to **Appendix C**);
- The proposed development has been designed with regard to Environmentally Sustainable Development principles, incorporating various principles to ensure energy efficiency across the site and to minimise impact to the climate. The ESD report by JHA and submitted with the EIS includes a Climate Adaptation Plan which provides a Risk

Assessment of any impact to surrounding natural and urban hazards. JHA confirm the proposal will not cause significant impact on the environment and rather, will provide a wider community benefit;

- As a result of the unique shape of the site and nature of adjoining properties and land uses, the proposal has sought to protect the side and rear amenity of properties facing Karne Street North and Grove Avenue. The proposed development has been designed with regard to the location of private open space and habitable rooms so as to ensure it does not result in an abrupt change in scale. Importantly, the proposal entirely complies with the height and 45 degree projection in areas of the site that adjoin residential properties;
- While the proposal seeks to vary the development standards at the southern interface, this does not result in an abrupt change in scale as there is no existing development located to the south of the site and the proposal provides 'a marker at the end of the street' in accordance with the SDRP feedback;
- The proposal generally complies with the maximum building height development standard and only result in a maximum 1.1m non-compliance at the southern elevation of the RCF adjacent to Karne Street North. The remainder of the development entirely complies with the 9.5m building height and 11.5m height for roof plant and services;
- The proposed development is considered to maintain an appropriate visual relationship between new development in the area and the existing character of the area. In that, the proposed development has regard to the compatibility of its bulk and scale with the neighbourhood, and provides an appropriate transition with existing development in the streetscape and the desired future character where it adopts more than compliant setbacks for medium density townhouse development in the R3 zone;
- The proposed development complies with the FSR non-discretionary development standard of 1:1 at section 107(2)(c) of the Housing SEPP and is therefore consistent with density intended for RCFs - despite the localised exceedance to section 84(2); and

Principles of Policy (3) (g) and (h) are not applicable to the proposed development as they relate to development for the purposes of build to rent, short term accommodation and affordable rental housing. Therefore, the proposed development is consistent with the relevant Principles of Policy of the Housing SEPP without needing to achieve all principles.

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

Clause 4.6(3)(b) of the CLEP 2012 requires the consent authority to be satisfied that the applicant's written request has adequately addressed clause 4.6(3)(b), by demonstrating:

That there are sufficient environmental planning grounds to justify contravening the development standard.

The environmental planning grounds relied on in the written request under clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (Initial Action v Woollahra Municipal Council [24] and Turland v Wingecarribee Shire Council [42]).

There are sufficient environmental planning grounds to justify a flexible approach to the application of the building height standard as it applies to the site. In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. The applicable circumstances that relate to the site are discussed below.

6.1.1 Ground 1: Falling Topography of Site

The site has a fall from north to south of approximately 6m, from RL 28m AHD down to RL 22m AHD. Given the unique shape of the site and the varied ground levels, this has resulted in a variation to the 9.5m building height and 45-degree setback control in the southern portion. The fall across the site is illustrated in **Figure 8** and **Figure 9** below.

Importantly, the variation is likened to the operational requirements for the seniors housing land use and the need for level floor plates for RCF developments. This is clearly noted in Section 99(a) where the Housing SEPP provides that:

Seniors housing should be designed to—

(a) recognise the operational, functional and economic requirements of residential care facilities, which typically require a different building shape from other residential accommodation, and

Grounds specific to the 9.5m height variation

As noted in section 99(a), RCFs are different from other forms of residential development and are required to adopt flat floor plates to support the operational and functional needs required for each household. The 6m level change from north to south across the site has therefore necessitated a maximum 1.1m building height exceedance only to the southern portion facing Karne Street North of the proposed development. This means that almost all of the proposed development is below or compliant with the 9.5m building height standard. It is important to note that the proposed development complies with the non-discretionary maximum FSR development standard of 1:1, and therefore aligns with the base line density expectations for RCFs.

It is noted that section 84 of the Housing SEPP contemplates an additional 2m of building height above the 9.5m building height development standard for servicing equipment where it is limited to 20% of the surface area of the roof. While the topography across the site changes, the servicing equipment on the roof plan entirely complies with the 11.5m maximum building height limit for these elements.

Grounds specific to the 45 degree setback variation

As above, RCFs are different from other forms of residential development and are required to adopt flat floor plates to support the operational and functional needs required for each household. This is coupled with the household model of RCFs where each household are of the same size for an efficiency of care and operational perspective.

Therefore, the 6m fall in the topography exacerbates the exceedance to the 45 degree setback standard to the southern elevation and strict compliance would render the household that is the subject of the exceedance, significantly deficient in the number of beds (a loss of 9 rooms, resulting in the loss of an entire household due to the functionality and operational requirements to services each household). Given the location of the exceedance (i.e. removed from all adjoining residential development to the north and east), there is considered to be little benefit in achieving strict compliance.

In this regard, the proposal has sought to avoid an abrupt change in scale at the northern and eastern interfaces which adjoin neighbouring residential properties and allows for appropriate landscaping embellishment including the retention of existing trees and provision of additional deep soil.

As illustrated in **Figure 8** and **Figure 9** below, the proposal adopts a built form that appropriately responds to the site and the architectural design allows for the proposal to be appropriately nestled into the context responding to the nature of adjoining development including private open space and habitable rooms to the north and east.

Further, in response to the feedback received from the Government Architect NSW State Design Review Panel (GA NSW SDRP), the proposal has sought to retain trees within the centre and along the northern boundary of the site and specifically it meets the recommendation of “*prioritising height to the south of the site to help shield the proposal from the M5, reduce overshadowing to the internal courtyard, and provide a marker for the end of the street*” refer to **Appendix C**).

As there are no prescribed setback controls relating to the seniors housing use on the site, the site planning has been designed with consideration of the existing constraints and opportunities. In particular, the proposal will provide a positive impact on the streetscape and is considered to provide an appropriate built form in the context of the surrounding development.

Therefore, the intent of both height and 45 degree setback standards are achieved notwithstanding the non-compliance as per the below:

Grounds specific to both standards

- The site is irregular in shape and the proposal recognises the most sensitive interfaces where the rear of adjoining properties and private open space is located. While some overshadowing is cast onto Richard Podmore Reserve, this is generally limited to the battle-axe access handle where users will quickly move through to access the wider area of open space to the east of the site;
- The proposed high quality architectural design, materiality and configuration of the site provides an improved urban design outcome from the pre-existing aged care facility and current presentation.

Grounds specific to the 9.5m height variation

- The proposal is not considered to be out of character for the area; it is located in an R3 Medium Density Residential zone and is surrounded by townhouse development and large single storey dwellings. It is also located at the cul-de-sac of Karne Street North and directly responds to the advice from the GANSW SDRP where a recommendation was made to ‘provide a marker for the end of the street’. This is achieved by the height, bulk and massing of the southern wing of the proposal; and
- The height variation is limited to the southern wing of the development, fronting the access handle to Richard Podmore Dog Park. This is due to the 6m fall across the site and with the variation comprising only 1.1m it will not result in any adverse visual impact, particularly as it does not interface with residential dwellings to the north and east.

Grounds specific to the 45 degree setback variation

- The proposal has been designed with a largely uniform pattern of massing in mind and has considered the SDRP feedback to the proposal. This has been guided by the operational requirements of RCFs that are required to adopt flat floor plates to support the operational and functional needs required for each household. This is coupled with the household model of RCFs where each household are of the same size for an efficiency of care and operations. To respond to this need, generous setbacks have been provided to each boundary that exceed the requirements of the Housing SEPP. Therefore, the operational and design needs of the RCF have resulted in the variation, that is limited to only one location on the site that does not overlook residential neighbours;
- Further to the above, strict compliance with the 45 degree plane setback would result in a loss in rooms on upper levels. As discussed previously and as identified in the Economic Impact Assessment (**Appendix L** of the EIS), even with the beds provided by the proposal, the LGA is forecast to have an undersupply of 810 aged care beds in 2031. This indicates that the provision of the proposed 163 aged care beds (including those on upper floors which vary this 45 degree setback standard) would meet a significant portion of the future demand for RCF housing in the area.

Therefore, strict compliance with this standard would result in the amendment of the built form of the proposal resulting in either the loss of a household or a revised design to the whole development that reduces the size of multiple households. Noting the current deficiency in supply of RCF beds, either option would result in fewer beds being delivered by the proposal and would not assist in the provision of aged care beds in the Canterbury-Bankstown LGA. The purpose and Principles of Policy of the Housing SEPP would not be met, and the provision of aged care beds in the LGA would further fall behind the projected demand.

- The households and communal areas have been designed to ensure appropriate amenity for residents and adjoining neighbours. A substantial landscaped setback has been provided to the functional area of the dog park to the south east to reduce visual impact and mitigate noise to the adjacent park. This creates a visual barrier when viewed from the public domain as well as providing landscaped amenity for residents. The layout of communal

activity areas on Level 1 and 2 have also been revised to further reduce the possibility for overlooking to adjacent properties to the north.

- The built form has been appropriately modulated through the adoption of varied setbacks and recessed facade lines to accommodate balconies, terraces and windows to all elevation. This presents a fine grain residential character to the north and east in particular, and serves to visually break down the mass of the development into smaller clusters;
- The proposal allows for retention of trees and landscaping embellishments including substantial deep soil zones along each boundary so as to avoid an abrupt change in scale and provide additional amenity and privacy to all adjoining dwellings and adjoining open space where possible; and
- The proposal provides for significant setbacks to the western, northern and eastern boundaries and is oriented to protect amenity for all adjoining residents, only results in some overshadowing to the park to the south (refer to **Section 6.1.3**) and therefore does not give rise to significant adverse impacts on surrounding buildings or public amenity.

6.1.3 Ground 3: Overshadowing

The overshadowing analysis clearly illustrates that all adjoining properties will receive the required minimum of 2 hours solar access during the winter solstice.

As illustrated at **Appendix B**, all adjoining properties to the north and east will not be affected by the proposed development during the winter solstice and will continue to receive the required solar access. While the overshadowing cast by the proposal falls onto Richard Podmore Dog Park to the immediate south of the site. This is considered acceptable given the shadow cast from the exceedance falls onto the battle-axe handle of the park between 9am and 1pm and not the open recreation or vegetated area to the east during this time period. The access handle or gateway is located to the immediate south of the site and is a relatively narrow thoroughfare that is used as the entry point to the wider open space area (refer to **Figure 10** and **Figure 11**).

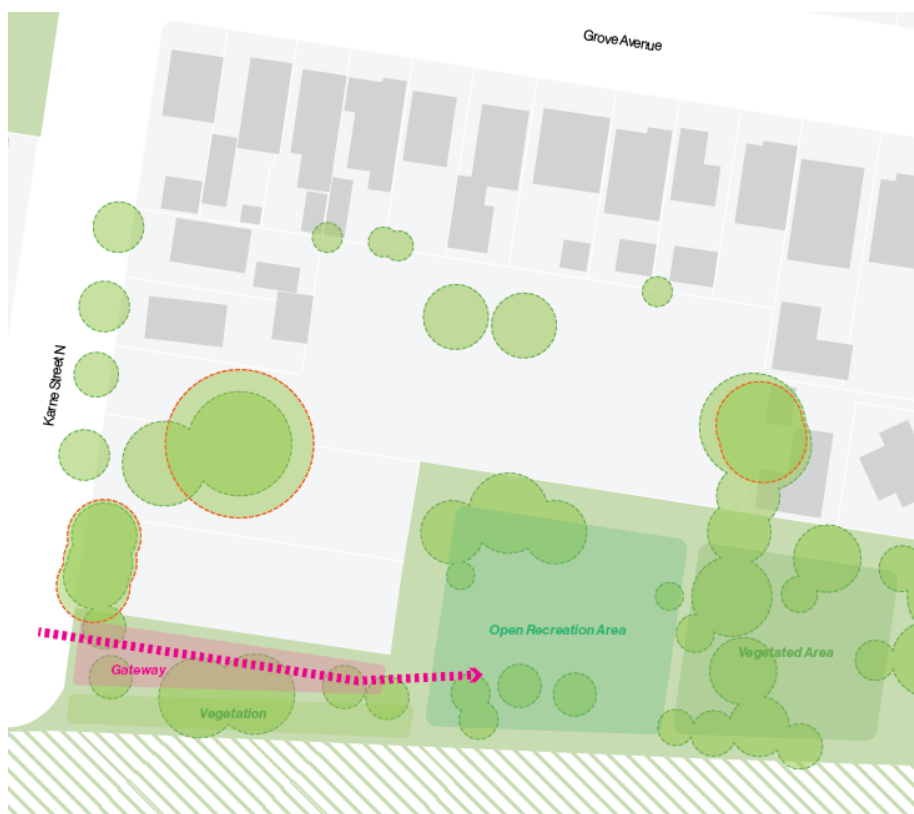


Figure 10 Richard Podmore Dog Park useability analysis

Source: Group GSA



Figure 11 Richard Podmore Dog Park entrance as viewed from Karne Street North

Source: Google Maps

A shadow analysis was undertaken for a Housing SEPP compliant built form and compared to the proposed development for the June 21 winter solstice. The Housing SEPP envelope has been modelled to adopt the following (compliant) built form parameters:

- 9.5m height excluding servicing equipment;
- Assumed 1:1 FSR compliance;
- Full compliance with the 45 degree upper level setback standard;
- 6m front setbacks;
- 6m rear setbacks; and
- 1.5m side setbacks.

Tables 1-3 provide a comparison between the shadow cast by a compliant building envelope and the proposed development and **Figure 12** and **Figure 13** further illustrate this. The analysis is also included in **Appendix A**.

The shadow impacts are considered appropriate as:

- The analysis demonstrates that the proposal will not result in adverse impacts adjoining residential development to the immediate north and east during 21 June (winter solstice and these properties will continue to receive adequate solar access;
- During the 21 June winter solstice, majority of the shadows fall across the road reserve of Karne Street North, the battle-axe handle of the Richard Podmore Dog Park and a small area of the active space along its northern boundary (the site's southern boundary);
- The extent of the shadow cast onto the dog park during the winter solstice is shown in **Figure 12**. As shown, the shadow cast onto the useable area of the dog park during the winter solstice ranges from 11% in the early morning period, decreases in the mid-morning / lunch time period to 7% and increases to 12-24% in the later afternoon period. Shadows are generally limited to the battle-axe handle of the dog park and is not cast onto the wider more useable area or to residential development. The resultant overshadowing is considered appropriate and the frequented areas of the park will continue to receive adequate sunlight even during the winter solstice;
- While the resultant overshadowing to the battle-axe handle of the dog park is slightly worse during the winter solstice, it is largely comparable to a Housing SEPP compliant building envelope where it falls on the remaining area of the park also comparable to a Housing SEPP compliant building envelope as detailed in **Table 1-4** below.
- This analysis demonstrates that the proposal presents comparable or marginally improved shadow impacts from a quantitative standpoint when compared to the proposed development, particularly to the south and eastern boundaries fronting onto the Richard Podmore Reserve as shown in **Table 1** to Error! Reference source not found. below and in **Figure 12**. The red text in the shadow diagrams indicate overshadowing to the primary useable area to the Richard Podmore Reserve and the purple text indicates overshadowing to the access handle. **Appendix A** demonstrates that the proposed shadow impacts during the autumn equinox result in a similar shadow impact when compared to a Housing SEPP compliant scheme.

Table 1 Shadow impact comparison on useable area of the Richard Podmore Reserve on 21 June

June 21 st intervals	Proposed Development	Housing SEPP compliant envelope	Difference
9am	11%	13%	Housing SEPP +2%
10am	8%	10%	Housing SEPP +2%
11am	7%	9%	Housing SEPP +2%
12pm	7%	9%	Housing SEPP +2%
1pm	8%	10%	Housing SEPP +2%
2pm	12%	13%	Housing SEPP + 1%
3pm	23%	24%	Proposed development -1%

Table 2 Shadow impact comparison on access handle of the Richard Podmore Reserve on 21 June

June 21 st intervals	Proposed Development	Housing SEPP compliant envelope	Difference
9am	19%	17%	Proposed development +2%
10am	17%	15%	Proposed development +2%
11am	15%	13%	Proposed development +2%
12pm	13%	12%	Proposed development +1%
1pm	14%	13%	Proposed development +1%
2pm	16%	14%	Proposed development +2%
3pm	20%	19%	Proposed development +1%

Table 3 Total shadow impact to Richard Podmore Dog Park on 21 June

June 21	Proposed development	Housing SEPP Compliant Envelope	Difference
9am	30%	30%	No difference
10am	25%	25%	No difference
11am	22%	22%	No difference
12pm	20%	21%	Housing SEPP + 1%
1pm	22%	23%	Housing SEPP + 1%
2pm	28%	27%	Proposal + 1%
3pm	43%	43%	No difference

- As illustrated in **Table 1**, the proposed development would not result in an increase in overshadowing to the useable area of the Richard Podmore Reserve compared to that which may be cast by a Housing SEPP compliant building envelope (i.e. establishing full compliance with the 45 degree setback and building height). This is on account of the site setbacks and the built form configuration of the proposal. Through modulated design and façade articulation, the proposed development is able to reduce the overshadowing impact to the dog park, particularly to the eastern portion which is the useable space of the park. The proposed scheme results in a total of 11% more sunlight to this area throughout the day on June 21 when compared to a scheme that is fully compliant with the Housing SEPP;
- The above analysis in **Table 2** demonstrates that the proposed development concentrates associated shadow impacts onto the access handle. This is considered acceptable as the access handle will be primarily utilised for pedestrian access to the dog park and reserve which will have a reduced impact on amenity when compared to shadow impacts within the useable area of the dog park. On 21 June, the shadow impact to the access handle is 11% more than what would be cast by a Housing SEPP compliant building envelope; and
- However, on balance the proposal results in only 1% more overshadowing to the overall area of the park in the winter solstice when compared to a Housing SEPP compliant built form. Importantly, while the proposal will result in some additional overshadowing to the access handle, as noted in **Table 3**, a Housing SEPP compliant built form results in more shadow impact to the useable area of Richard Podmore Dog Park compared to the proposed development. sunlight to the whole Richard Podmore Reserve when compared to a Housing SEPP compliant scheme.

Therefore, the proposed development, with its associated variation of the 45 degree setback development standard in the Housing SEPP, does not result in unreasonable adverse solar access impacts to the Richard Podmore Reserve when compared to a development scheme that is fully compliant with the Housing SEPP and it is important to note the following:

- Council have not raised overshadowing to the Richard Podmore Reserve in its submission. As Richard Podmore Reserve is Council owned land, this indicates that Council holds the position that shadow impacts to its land are acceptable;
- While the shadow impact to the park will increase in the late afternoon period, the primary useable area of the park towards to east, will continue to receive solar access throughout the 21 June winter solstice. As such, the overshadowing to the dog park is considered to be acceptable on account of the area where shadow is cast and with consideration of a Housing SEPP compliant building envelope; and
- The eastern residential dwellings are not overshadowed until after 2pm on 21 June, and therefore these properties will continue to receive in excess of 2 hours of solar access during the winter solstice.

Accordingly, it is considered that the proposed development will not give rise to any unacceptable overshadowing impacts, ensuring appropriate amenity to surrounding properties and open space can still be achieved.

In considering the above and the analysis included in Error! Reference source not found., it is considered that the proposed non-compliance will not result in adverse overshadowing and Richard Podmore Dog Park will continue to receive adequate solar access during the winter solstice.

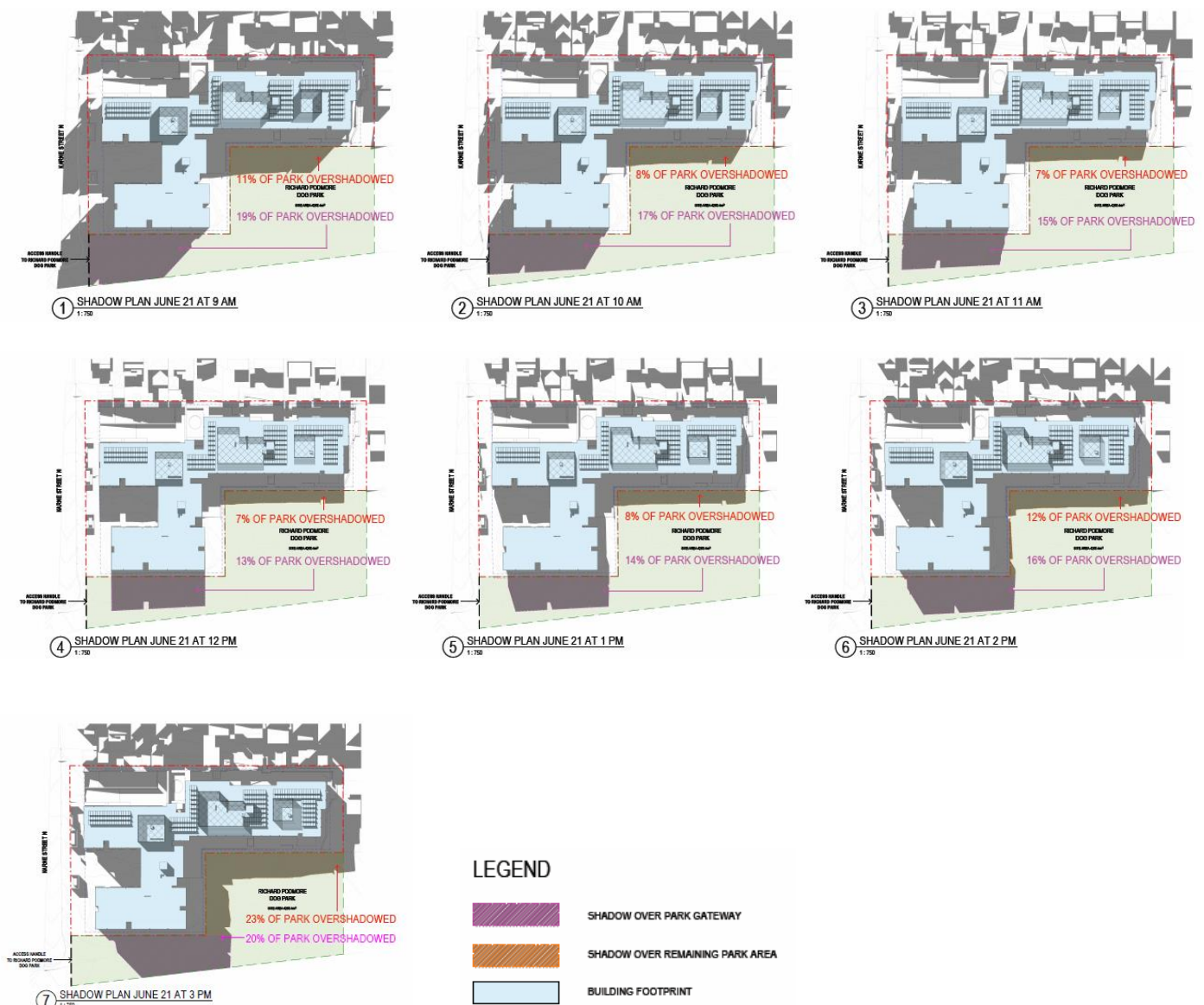


Figure 12 Overshadowing analysis of the proposed development at the winter solstice (9am to 3pm)

Source: Group GSA

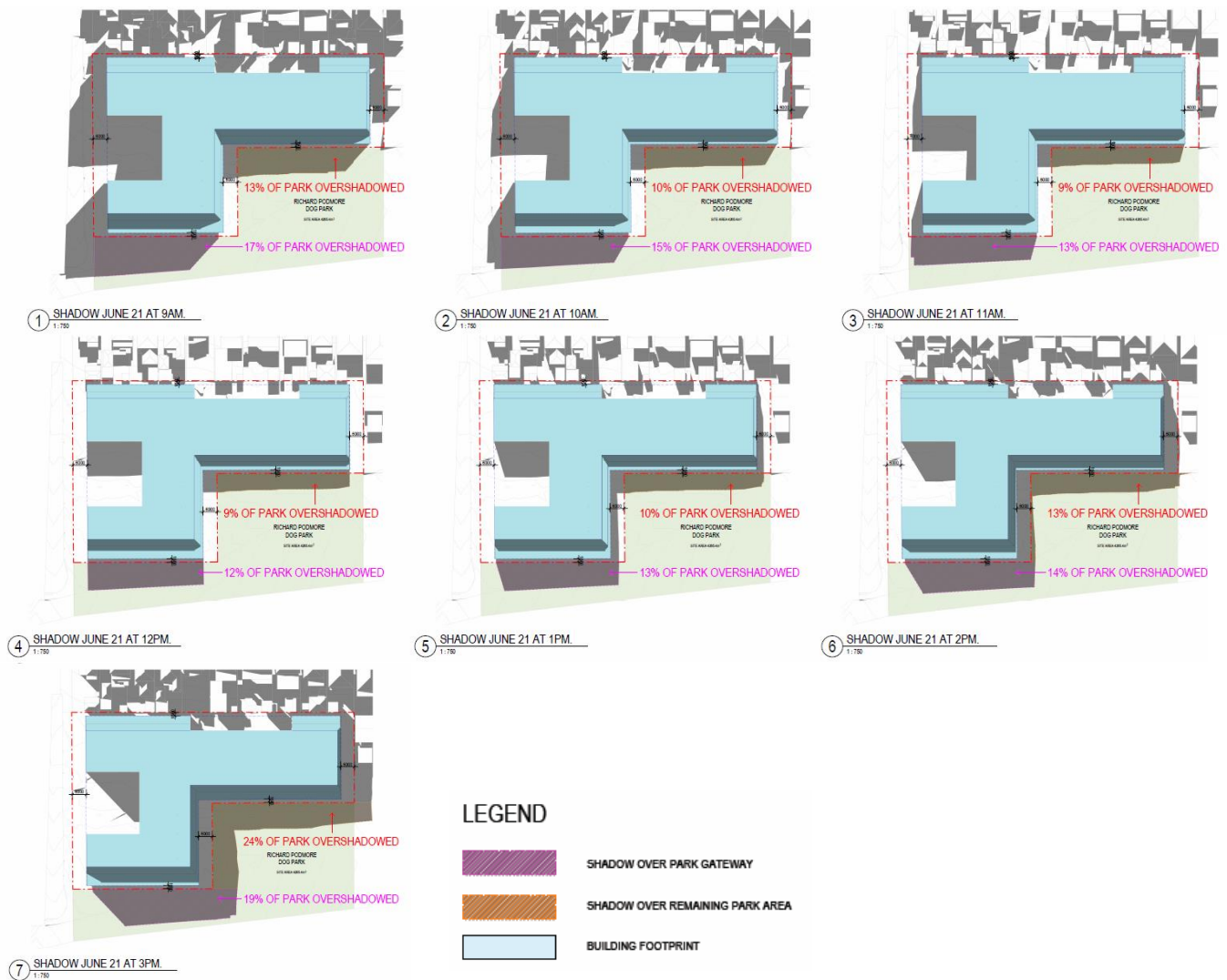


Figure 13 Overshadowing analysis for a Housing SEPP compliant built form at the winter solstice (9am to 3pm)

Source: Group GSA

6.2 Consistency with Objects of the Environmental Planning and Assessment Act 1979

In *Initial Action*, the Court stated that the phrase “environmental planning grounds” is not defined, but would refer grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the Act. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, in **Table 4** we consider how the proposed development is consistent with each object, notwithstanding the proposed variation of the height development standard.

Table 4 Assessment of proposed development against the objects of the EP&A Act

Object	Comment
(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources,	<p>The proposed development will promote the economic and social welfare of the community through the introduction of a tangible improvement in building form and public benefits that will respond to the site’s context, while delivering additional seniors housing in the City of Canterbury-Bankstown LGA.</p> <p>The non-compliance with the maximum building height and 45 degree development standard is restricted to the southern portion of the site and is necessary due to the topographical change across the site and the requirement for level floor plates for the operation of the RCF. Strict</p>

Object	Comment
	<p>compliance with the development standard would not result in an improved design outcome and when compared to a compliant building envelope, the environmental impacts associated with the proposed development a minimal.</p> <p>By 2026, the City of Canterbury-Bankstown LGA is expected to have an undersupply of -330 RCF beds and by 2031 this will increase to -980. In the wider catchment area, the undersupply of aged care beds will be -300 by 2026 increasing to -1,170 by 2031. Through the delivery of 163 aged care beds, the proposal will support the demand for aged living by providing a modern and high quality RCF that will enable residents to age in place – within their local community. Further discussion is provided in the Economic Impact Assessment at Appendix L of the EIS.</p>
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,	<p>The proposal has been designed to incorporate ecologically sustainable design principles by allowing an appropriate development on an existing site and in a location that will have no negative impact on environmental and social considerations and will support the economic health of the City of Canterbury-Bankstown. The height exceedance will not impact the ecologically sustainable principles of development and is limited to the southern portion of the site.</p>
(c) to promote the orderly and economic use and development of land,	<p>The proposed development will promote the orderly and economic use of the land by allowing the redevelopment of the site to suit the operational requirements and modern standards for residential care; providing support and care in line with Opal's mission and vision for the site. The proposed exceedance is limited to the southern portion of the site only and will not adversely impact the orderly and economic use and development of the land.</p> <p>If the proposal adopted strict compliance with the 9.5m height and 45-degree setback control to the upper level on the southern portion, this would result in a significant redesign of the development contrary to the recommendations of the GANSW SDRP. Importantly, the proposed development will assist in meeting a forecast under supply of beds by 2026 and increasing in 2031 in the City of Canterbury-Bankstown LGA as well as the wider catchment area. It will also provide housing choices to meet the contemporary needs of aged care residents (refer to the Economic Impact Analysis at Appendix L of the EIS).</p>
(d) to promote the delivery and maintenance of affordable housing,	<p>While the proposal is not defined as affordable housing under the environmental planning instrument, it will contribute to the diversity and capacity of housing within the City of Canterbury-Bankstown LGA and specifically provide additional seniors housing in line with population growth and demographics.</p>
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	<p>The proposed development will have no impact on threatened species or ecological communities. The non-compliance with the maximum building height standard is limited to the southern portion of the development and is necessary due to the topographical change across the site. A BDAR Waiver has been issued by the DPE and is included at Appendix G of the EIS.</p>
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	<p>The site is not identified as a heritage item, nor is it located in a heritage conversation area. The proposed development has been respectfully designed to respond to the existing and future character of the area, incorporating substantial setbacks along each interface and high quality landscaping and architectural design to provide an appropriate transition in built form.</p>
(g) to promote good design and amenity of the built environment,	<p>The proposed development has been designed by renowned architects who have specifically worked in the seniors housing sector with the design informed by consultation with the State Design Review Panel, DPE and the City of Canterbury-Bankstown Council. Furthermore,</p>

Object	Comment
	<p>Connecting with Country has been an integral part of the design process as detailed at Appendix B of the EIS.</p> <p>The proposed development will provide for a high-quality facility on a previously used aged care site. The proposed development will also improve pedestrian amenity along Karne Street North and the site's boundary interfaces through substantial landscaping including deep soil zones. The amenity of the surrounding public domain has been prioritised through the incorporation of substantial setbacks. Therefore, the non-compliance with the maximum building height standard will be largely imperceptible, particularly when compared to that which previously existed on the site and a fully compliant building envelope and the proposal will continue to promote good design and amenity for the surrounding environment.</p>
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,	The proposed development will comply with all relevant construction codes and standards and will promote the health and safety of occupants.
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,	The proposed development is SSD and therefore will be assessed by DPE with the consent authority being the Minister (or delegate of) or the Independent Planning Commission. Relevant government authorities will be notified of the proposed development and invited to comment, including the City of Canterbury-Bankstown.
(j) to provide increased opportunity for community participation in environmental planning and assessment.	The proposed development will be publicly notified.

7.0 Clause 4.6(4)(a)(ii) the proposed development will be in the public interest because it is consistent with the objectives of the standard and the zone

7.1 Consistency with the objectives of the development standard

There are no specific objectives contained within Part 5 or section 84 of the Housing SEPP. Section 3 Principles of Policy of the Housing SEPP that states:

- (a) *enabling the development of diverse housing types, including purpose-built rental housing,*
- (b) *encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability,*
- (c) *ensuring new housing development provides residents with a reasonable level of amenity,*
- (d) *promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,*
- (e) *minimising adverse climate and environmental impacts of new housing development,*
- (f) *reinforcing the importance of designing housing in a way that reflects and enhances its locality,*
- (g) *supporting short-term rental accommodation as a home-sharing activity and contributor to local economies, while managing the social and environmental impacts from this use,*
- (h) *mitigating the loss of existing affordable rental housing.*

Refer to section 5.1. and 5.2 of this request for the assessment regarding consistency with the underlying purpose of the development standard and section 3 Principles of Policy of the Housing SEPP.

7.2 Consistency with the objectives of the zone

The site the subject of this clause 4.6 variation request is zoned R3 Medium Density Residential. Development for the purposes of seniors housing is permissible in the R3 zone.

The objectives of the R3 zone are as follows:

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

The proposal is consistent with the zone objectives as:

- The proposed development will directly assist in meeting the current and growing need for modern seniors housing that will allow residents to age in place in Narwee and the wider City of Canterbury-Bankstown LGA and NSW generally;
- The proposal will increase the diversity of housing typologies in the City of Canterbury-Bankstown LGA and wider area, consistent with the residential environment and the existing and future character of the area. In this respect, the proposed seniors housing development will provide 163 residential care facility rooms for people 60 years and over;
- The proposal is for seniors housing that will allow for existing and future residents to age in place with services and facilities on site to meet the needs of the community; and
- The proposed seniors housing development utilises the R3 zoning for the site for a medium density seniors housing development that is well serviced by the existing road network.

8.0 Secretary's Concurrence

Under clause 4.6(4)(b) of CLEP 2012, the Secretary's concurrence is required prior to any variation being granted. Under clause 55 of the *Environmental Planning and Assessment Regulation 2021*, the Secretary has given written notice dated 21 February 2018 to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under clause 4.6, subject to the conditions in the table in the notice.

The concurrence of the Secretary of DPE can be assumed under clause 4.6(4)(b). This is because:

- a. Under clause 55(1) of the *Environmental Planning and Assessment Regulation 2021* (NSW), the Planning Secretary (as a concurrence authority) may, by written notice given to the consent authority, inform the consent authority that occurrence may be assumed subject to such qualifications or conditions as are specified in the notice.
- b. Such written notice was given by means of planning circular PS 18-003 "Variations to development standards" dated 21 February 2018. Under the planning circular, consent authorities for SSD may assume the Secretary's concurrence where development standards will be contravened. Any matters arising from contravening development standards will be dealt with in Departmental assessment reports.

In any event (when considering the factors set out in clause 4.6(5)):

- a. the contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and
- b. there is public benefit in the additional building height, which outweighs the benefit of maintaining the development standard.

9.0 Conclusion

This clause 4.6 variation request to vary Section 84(2)(c) of the Housing SEPP comprehensively demonstrates that the building heights proposed for the RCF across the site are appropriate and the exceedances are minor in nature.

The assessment above demonstrates that compliance with the building height and 45 degree projection development standard is unreasonable and unnecessary in the circumstances of the case, that there are sufficient environmental

planning grounds and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allowing for a better outcome in planning terms.

This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the building height and 45 degree setback development standard of section 84(2)(c)(i) and (iii), the proposed development:

- Is in the public interest as the proposal is consistent with the applicable land use zone, the purpose of the development standard and the relevant Principles of Policy section 3 of the Housing SEPP;
- Strict compliance would result in a redesign of the development resulting in smaller courtyard areas and the removal of existing trees within the site which is contrary to the advice received from the GA NSW SDRP (refer to **Appendix C**). It would also result in a development that would not assist in meeting the forecast demand for aged care beds into the future specifically within the City of Canterbury-Bankstown LGA or wider catchment area by 2026, with the under-supply increase by 2031;
- Variation relates only to a localised area of the southern portion of the site, and therefore ensures that adjoining residential development achieves appropriate amenity in terms of overshadowing and privacy;
- Has been designed in response to the feedback received from the GA NSW SDRP, the proposal has sought to retain trees within the centre and along the northern boundary of the site and specifically it meets the recommendation of locating height towards the south, to assist in shielding the M5 Motorway and providing a marker at the end of the street;
- Responds to the intent of the 45 degree projection development standard, in that it does not result in an abrupt change in scale as the proposed variation is at the end of the street and the proposal entirely complies with the height and 45 degree projection in areas of the site that adjoin residential properties;
- It would not result in an increase in overshadowing compared to that which may be cast by a DCP compliant dwelling or Housing SEPP compliant building envelope;
- The non-compliance with the development standard does not raise any matters of State and regional planning significance; and
- There is no public benefit in maintaining the building height development standard adopted by the environmental planning instrument for this site given the particular circumstances described in this request.

This clause 4.6 variation demonstrates that the proposed development is overwhelmingly in the public interest and optimises the opportunity to provide additional seniors housing in a strategic location. Indeed, strict compliance is likely to result in a significant redesign of the proposal; resulting in the loss of trees and decreased amenity on site and to adjoining properties. Importantly, the proposal will support the provision of residential care beds in the catchment and LGA.

For reasons set out in this written request, the proposed SSDA should be approved with the minor variation as proposed in accordance with the flexibility allowed under clause 4.6 of the CLEP 2012.