

# Clause 4.6 Variation to Development Standard

Housing SEPP – Section 84 Building Height and 45 degree projection 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 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 variation request relates to the building height development standard in section 84) 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 clause 4.6 variation request should be read in conjunction with the Environmental Impact Statement (EIS) prepared by Ethos Urban dated 7 December 2022.

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 building height and 45degree setback development standard in section 84((2)(c)(i) and (iii) of the Housing SEPP:

- Compliance with the development standard is unreasonable and unnecessary in the circumstances, as the objectives of the standard 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 roof form;
- 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)(i) and (iii) 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) 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 1,000m<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.***

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.

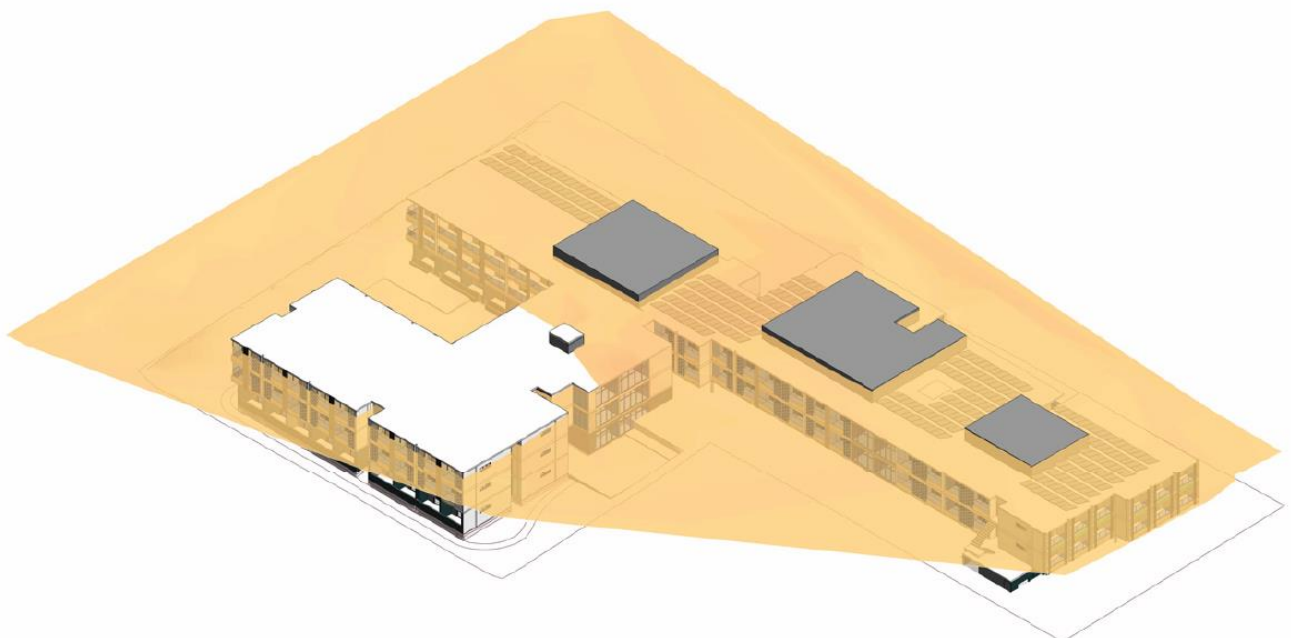
However, in accordance with section 84 of the Housing SEPP, development in residential zones (where residential flat buildings are not permitted) the maximum building height is 9.5m (refer to **Figure 2**) and where the proposal results in more than 2 storeys on side and rear setbacks the additional 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 results in 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 the northern and eastern interfaces.



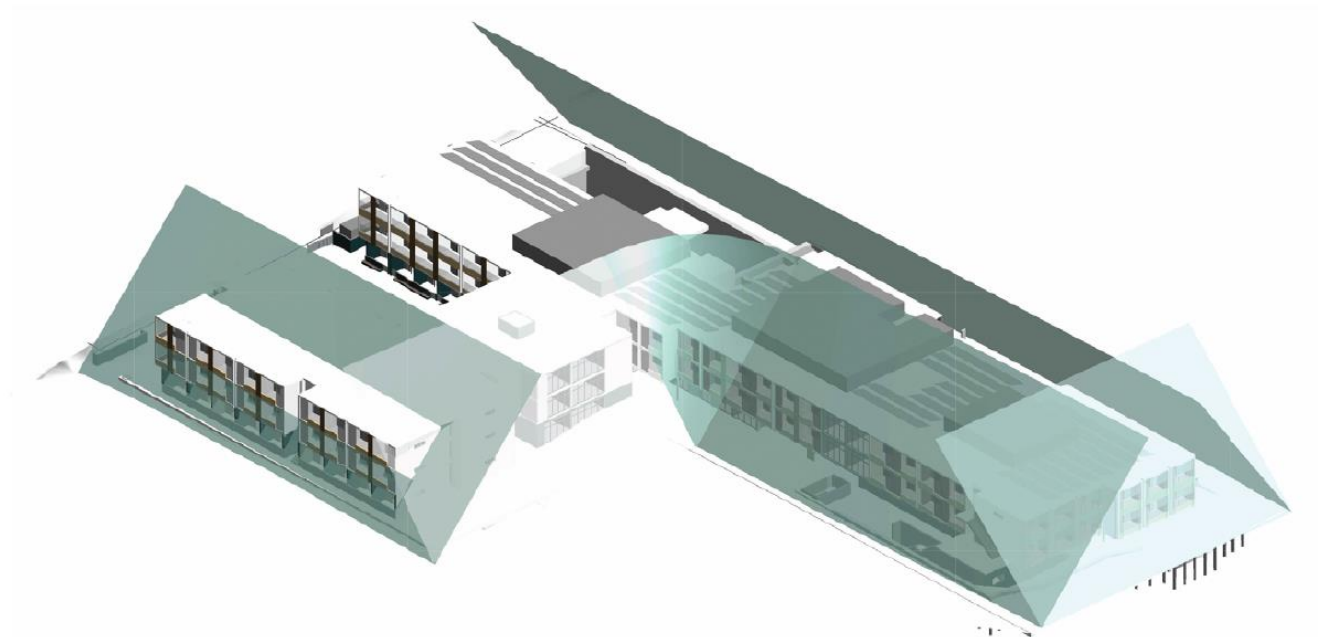
**Figure 1** CLEP 2012 HOB map – subject site outlined red

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** Section illustrating 9.5m maximum building height limit and 45 degree setback control to Level 3

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 intent of section 84(2)(c) is to control the built form and scale of development within the area and to adjoining development. The provision provides standards relating to the erection of a building and controls the building height and scale of development in zones where residential flat buildings are not permitted.

Section 84(2)(c)(i) and section 84(2)(c)(iii) should be read in conjunction. The purpose of section 84(2)(c)(i) is to control the maximum building height of development in low-medium density residential zones to ensure that any future development has regard to the built form, scale, and character of an area, thereby minimising adverse amenity impacts. In this way, clause 84(2)(c)(iii) is interrelated to the maximum building height development standard. However, in our opinion the purpose of the 45-degree setback development standard is more specific, and 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.

Importantly, section 3(b) and (d) Principles of Policy of the Housing SEPP that state:

- (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,*
- (d) *promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,*

The proposed development is considered to meet the purpose and underlying intent of Section 84(2)(c)(i) and 84(2)(c)(iii) and directly aligns with section 3(b) and (d) Principles of Policy as follows:

- The site is zoned R3 Medium Density Residential which anticipates medium density housing, and the proposal overwhelmingly 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 that which previously existed on the site and what would be considered under a compliant built form as shown at **Appendix B**;
- 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, 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. In turn, the development would not assist in meeting the forecast supply of beds by 2026 or 2031;

- 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 State Design Review Panel 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 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 a more than compliant setbacks for medium density townhouse development in the R3 zone; and
- The proposed development complies with the FSR development standard and is consistent with the purpose of the Policy.

## 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 28m AHD down to 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 5** and **Figure 6** below.

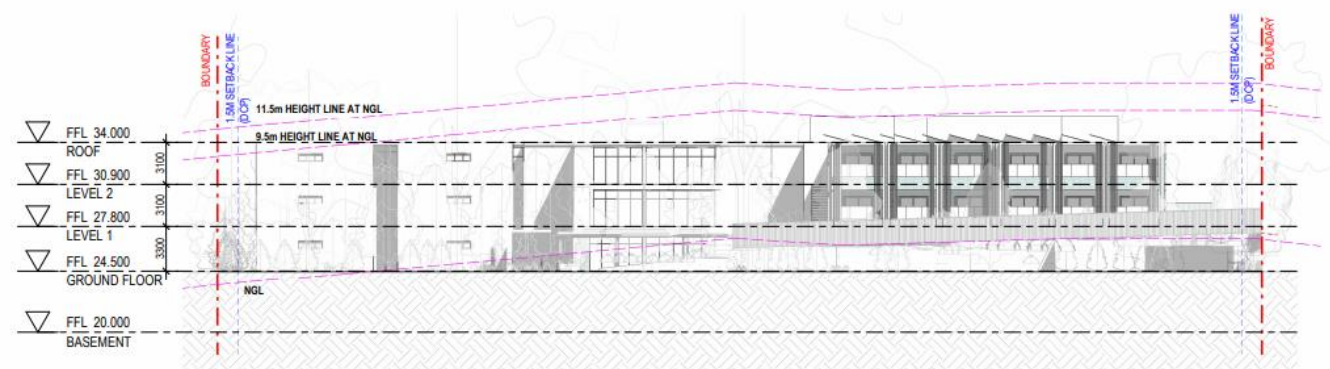
Importantly, the variation is likened to the operational requirements for the seniors housing land use and the need for level floor plates for RCF developments. The level changes across the site has therefore necessitated this minor variation in the southern portion. This means that almost all of the proposed development is below the 9.5m building height as the non-compliance at its maximum extent is 1.1m at the southern elevation on the Karne Street North facing component of the proposed RCF.

Through careful consideration of siting and design, 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. Therefore,

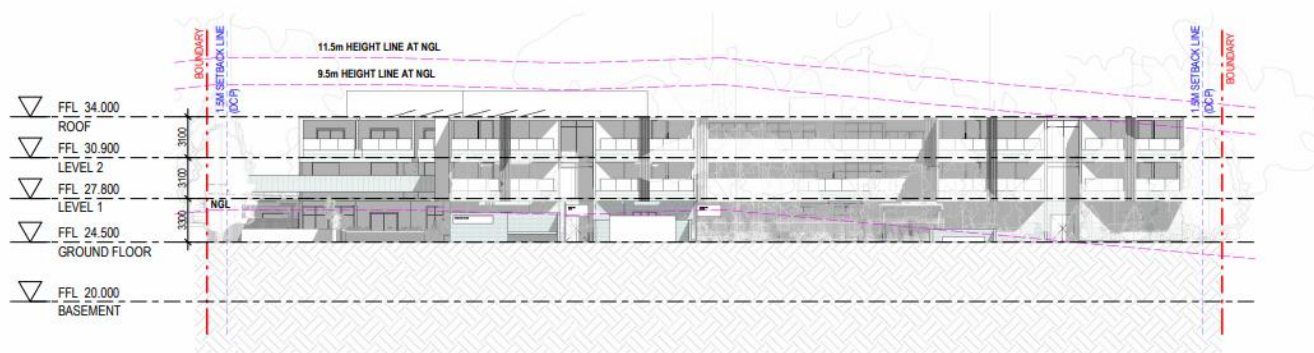
given the changing topography across the site, the proposal results in a variation to the 45 degree setback at the southern interface accounting for the operational requirements and site configuration.

As illustrated in **Figure 4** and **Figure 5** 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.

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 complies with the 11.5m maximum building height limit for these elements.



**2 SITE ELEVATION - EAST**  
1:300



**4 SITE ELEVATION - WEST**  
1:300

**Figure 5 Elevation (east top and west bottom) illustrating the 6m fall across the site**

Source: Group GSA



**2 Section BB**  
1:200

**Figure 6 Section indicating 9.5m building height and 45 degree setback development standard**

Source: Group GSA

## 6.1.2 Ground 2: Visual Impact and Built Form Transition

As shown in the Architectural Plans included in **Appendix A**, the proposal clearly responds to the form of adjoining development and the R3 zone objectives where the development is set back from adjoining sensitive interfaces to the north and east. Given the site is irregular in shape, the architectural design including building siting and massing has had regard to the adjoining development and specifically the interface with residential dwellings to the north and east.

This design is considered to align with the intent and purpose of the provision where it provides a fully compliant built form and allows for appropriate amenity and privacy to all dwellings to the north and east of the site. While the proposal results in a non-compliance in the southern portion where it fronts Richard Podmore Dog Park, this is considered appropriate, and the intent of the standard is achieved notwithstanding the non-compliance.

This is because the proposal remains fully compliant at the northern and eastern boundaries and does not result in an abrupt change in scale. Where it seeks to vary the control, the proposal does not adjoin any residential development and rather, sits adjacent to open space being Richard Podmore Dog Park and the South-Western Motorway beyond. Essentially, there is no built form transition at the end of the Karne Street North as it is the end of the street adjoining the entrance to the park and the motorway further south.

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 the standard is achieved notwithstanding the non-compliance as:

- 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 Dog Park, this is generally limited to the battle-axe handle where users will quickly move through to access the wider area of open space to the east of the site;
- To the south of the site, the overshadowing cast by the proposed development during the winter solstice is considered to be acceptable when considering the total area of the park and useability of the park as shown in **Figure 7**. The total area of Richard Podmore Dog Park is 4,262m<sup>2</sup>. During the winter solstice the proposal will result in some overshadowing to the battle-axe handle and northern portion of the park during the early morning period (29% of total area of the park overshadowed), at midday the shadow cast by the proposed development is 18% and by the late afternoon period (3pm) the total area overshadowed by the proposed development is 40%. It is noted that the pre-existing aged care facility on the site resulted in a similar shadow cast to the park: 31% at 9am, 20% at midday and 44% at 3pm and a similar shadow would be cast by a DCP compliant built form as illustrated in the Urban Design Report at **Appendix B**. It is also noted that the proposed development has had regard to the setbacks and form of the pre-existing facility on the site and what would be considered by a compliant residential development. Therefore, the proposal is not considered to be out of character for the area (refer to **Appendix B**);
- 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;
- 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 and therefore does not give rise to significant adverse impacts on surrounding buildings or public amenity; and
- 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.

## 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

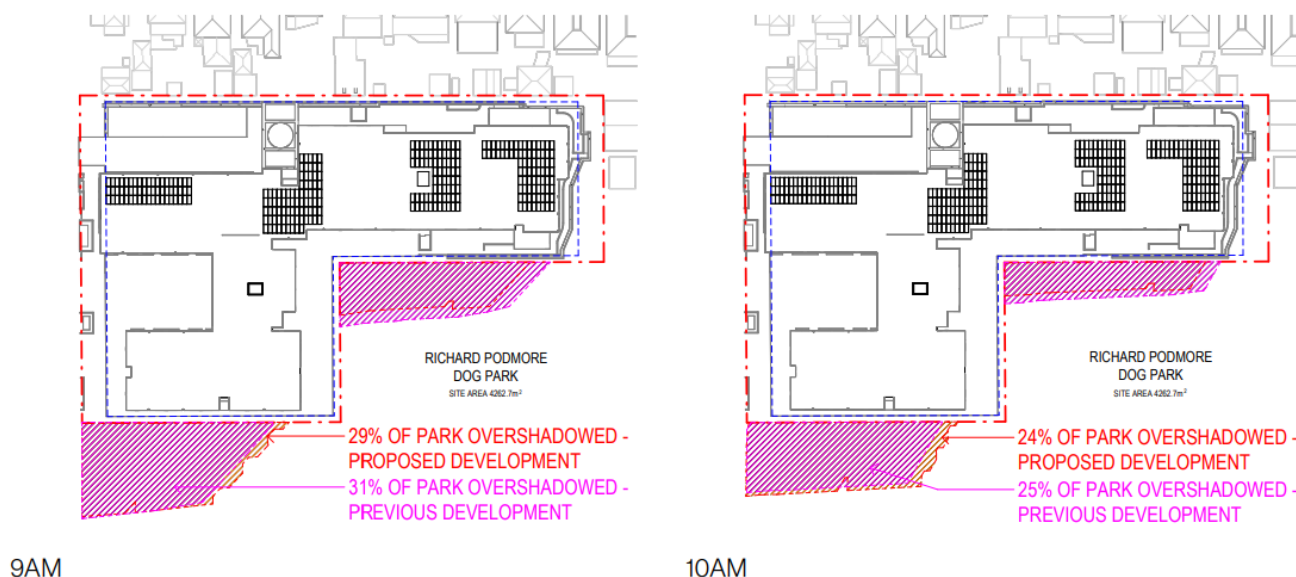


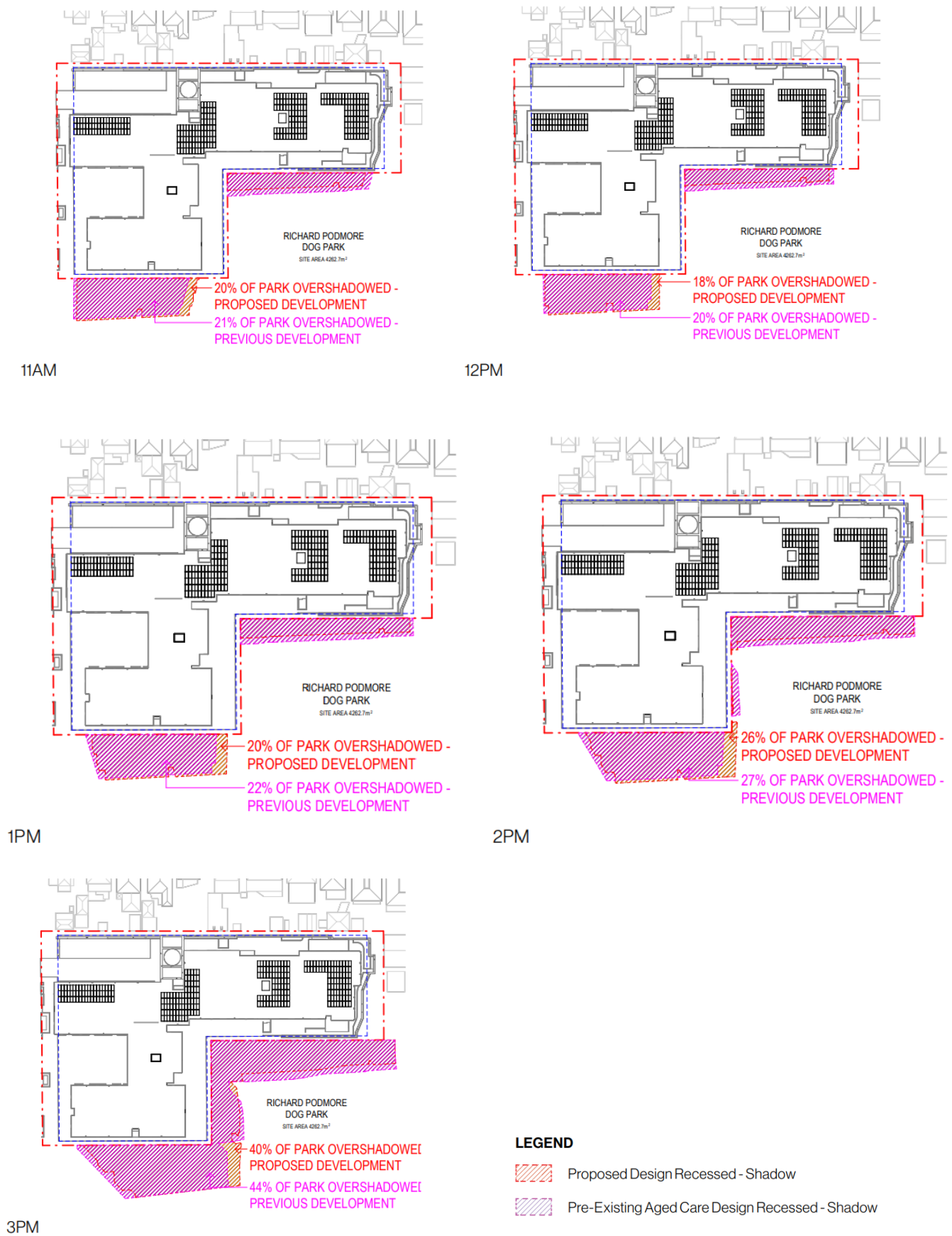
cast by the proposal falls onto Richard Podmore Dog Park to the immediate south of the site. This is considered acceptable given the shadow cast from the exceedance falls onto the battle-axe handle of the park between 9am and 1pm and not the open recreation or vegetated area to the east during this time 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 8** and **Figure 9**).

The shadow impacts are considered appropriate as:

- The analysis demonstrates the potential impacts of the proposed development on adjoining properties at one-hour intervals between 9am and 3pm for the 21 June (winter solstice), 21 December (summer solstice), 21 March (autumn equinox) and 23 September (spring equinox);
- Outside of the site at 9am, the shadows fall across Karne Street North, the battle-axe handle of the dog park and a small portion of the eastern portion of the dog park along its northern boundary. The extent of the shadowing reduces at 10am and 11am to smaller portions of these areas and the smallest extent of shadowing is achieved at 12pm where the northern boundary of the park is overshadowed;
- No additional significant overshadowing of the northern boundary of the park occurs until after 2pm and the southern portion of the eastern boundary is not overshadowed until 2pm. Whilst portions of the park remain in shadow throughout the day such as a portion of the access handle south of the park, this area is mainly used for access to the park and does not comprise a significant useable area of the dog park, noting that most visitors utilise the larger area south east of the site as it is more expansive for recreational purposes;
- The eastern residential neighbours are not overshadowed until after 2pm, ensuring that in excess of 2 hours of solar access is provided to these properties; and
- The shadow impacts of the previous BUPA aged care facility on the site demonstrates that the proposal presents similar or marginally improved shadow impacts when compared to the previous development, particularly to the south and eastern boundaries fronting onto the dog park.

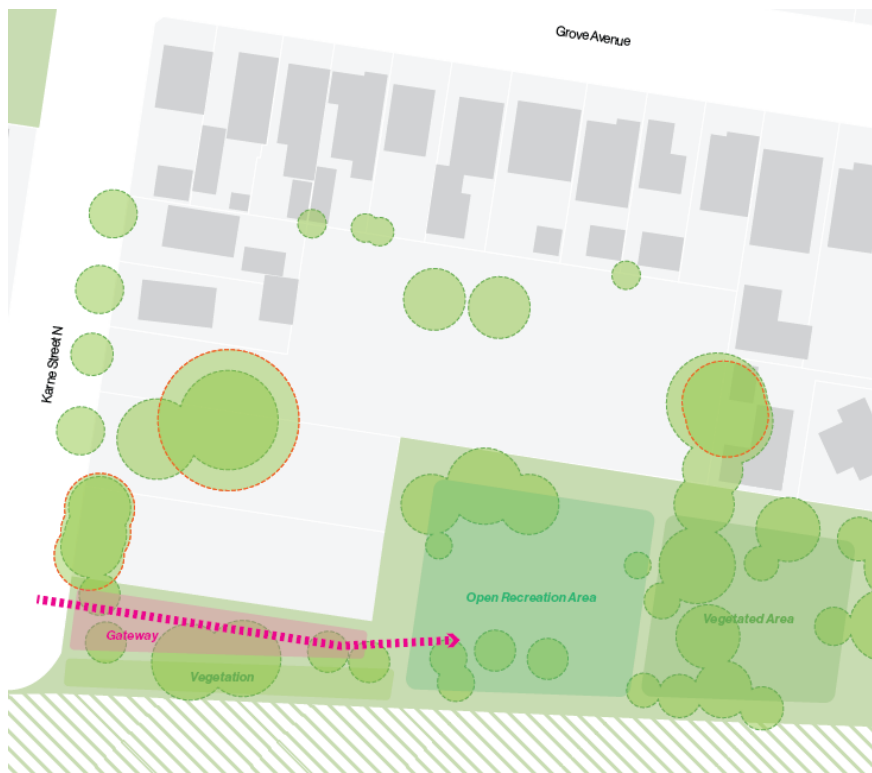
Accordingly, the proposed works will not give rise to any unacceptable overshadowing impacts, ensuring appropriate amenity to surrounding properties and open space can still be achieved. The shadow cast during the winter solstice is shown in **Figure 7** below.





**Figure 7** Overshadowing analysis at the winter solstice (9am to 3pm)

Source: Group GSA



**Figure 8** Richard Podmore Dog Park useability analysis

Source: Group GSA



**Figure 9** Richard Podmore Dog Park entrance as viewed from Karne Street North

Source: Google Maps

## 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 1** we consider how the proposed development is consistent with each object, notwithstanding the proposed variation of the height development standard.



**Table 1**      **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 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.</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 165 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 <b>Appendix L</b> 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 height 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 <b>Appendix L</b>).</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 <b>Appendix G</b> of the EIS.</p>
(f) to promote the sustainable management of built and cultural	<p>The site is not identified as a heritage item, nor is it located in a heritage conservation area. The proposed development has been respectfully designed to respond to the existing and future character of the area,</p>



Object	Comment
heritage (including Aboriginal cultural heritage),	incorporating substantial setbacks along each interface and high quality landscaping and architectural design to provide an appropriate transition in built form.
(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, Connecting with Country has been an integral part of the design process as detailed at <b>Appendix B</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 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(b) and (d) Principles of Policy of the Housing SEPP that states:

- (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,*
- (d) *promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,*

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(b) and (d) 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 165 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 the maximum building height and 45 degree projection standard as provided under section 84(2)(c)(i) and (iii) 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 Principles of Policy section 3(b) and (d) 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;
- Results in some overshadowing as a consequence of the variation however, majority of this falls onto the battle-axe handle of the dog park and results in a similar impact when compared to the previous BUPA RCF development;
- 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.