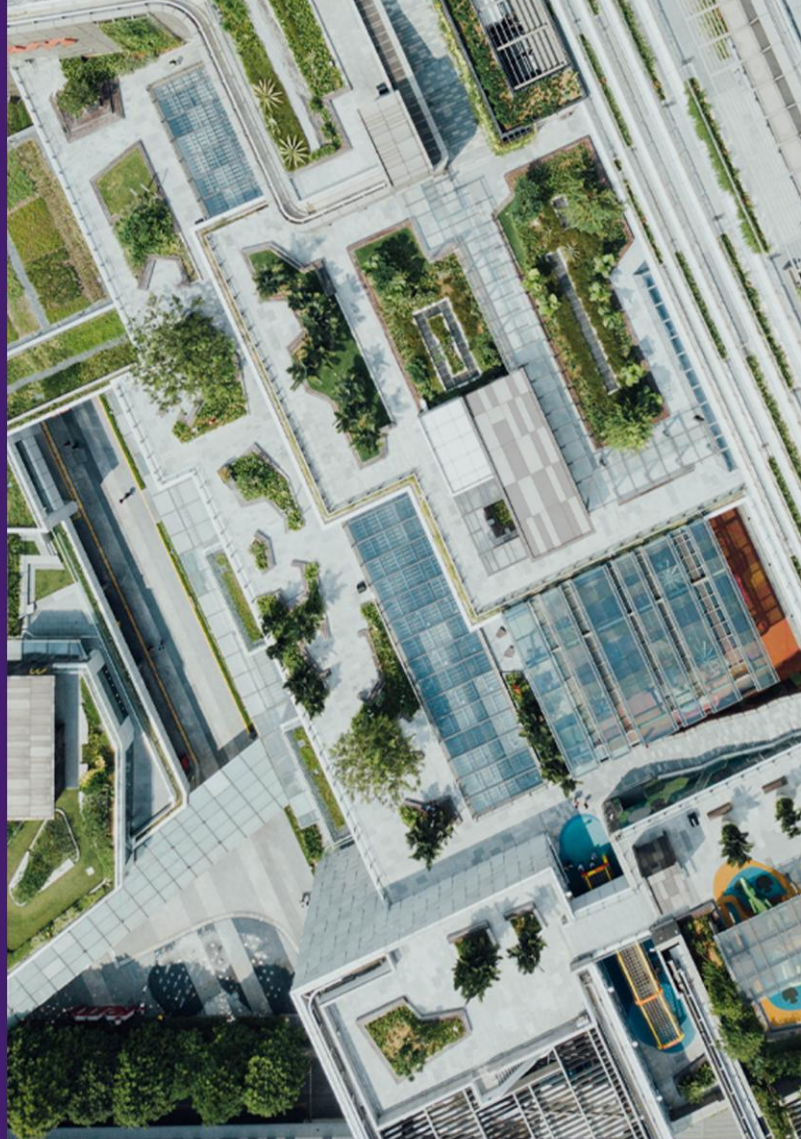




366 Jamison Road, Jamisontown NSW 2750

Clause 4.6 Variation Request – Building Height

On behalf of SummitCare Penrith

14 July 2025

The Planning Studio acknowledges the traditional custodians of the lands + waters of Australia, particularly the Gadigal People on whose traditional lands our office is located, and pay our respects to Elders past, present + emerging. We deeply respect the enduring Connection to Country + culture of Aboriginal and Torres Strait Islander peoples and are committed to walk alongside, listen + learn with community as we plan for equitable, sustainable, generous, and connected places. Always was, Always will be.

Project Director

Kate Bartlett

Contributors

Kate Bartlett (Director)

Harjeet Spence (Associate Director)

Revision	Revision Date	Status	Authorised	
			Name	Signature
V1	17 March 2025	Final Draft	Kate Bartlett	
V2	14 July 2025	Post ToA	Kate Bartlett	

* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

Contact

The Planning Studio
Suite 305, 84 Pitt Street
Sydney, NSW 2000
info@theplanningstudio.com.au

© The Planning Studio

All Rights Reserved. No part of this document may be reproduced, transmitted, stored in a retrieval system, or translated into any language in any form by any means without the written permission of The Planning Studio.

All Rights Reserved. All methods, processes, commercial proposals, and other contents described in this document are the confidential intellectual property of The Planning Studio and may not be used or disclosed to any party without the written permission of The Planning Studio.

Table of Contents

1	Introduction	4
2	Clause 4.6 Exceptions to Development Standards	5
3	The Development Standard to be varied	5
3.1.1	Clause 4.3 of Penrith LEP 2010	5
3.1.2	Clause 84 (2c) and (3) - Development Standards - General.....	6
3.1.3	Section 87 - Additional Floor Space Ratio.....	7
4	Extent of Variation to the Development Standard	7
5	Objectives of the Standard	10
6	Assessment	10
6.1	Clause 4.6(3)(a) – compliance with the development standard is unreasonable or unnecessary in the circumstances of the case	10
6.2	Objectives of the standard are achieved notwithstanding non-compliance with the standard (Wehbe#1)	11
6.2.1	Wehbe Test 1 – Objectives of the Standard are achieved	11
6.3	Clause 4.6(3)(b) - There are sufficient Environmental Planning Grounds to Justify Contravening the Development Standard	13
7	Conclusion	14

Schedule of Figures

Figure 1: Height of Buildings PLEP 2010 map extract (NSW Planning Spatial Viewer)	6
Figure 2: Proposed Building A Sections (Jackson Teece)	9
Figure 3: Proposed Building B Sections (Jackson Teece)	9
Figure 4: Proposed Building C Sections (Jackson Teece)	9

1 Introduction

This Clause 4.6 Variation Request seeks to allow a variation to the Height of Buildings development standard associated with the State Significant Development Application (SSDA) at 366 Jamison Road, Jamisontown NSW 2750 (the site).

The SSDA seeks approval for the redevelopment of an established, but dated, residential care facility, owned and operated by SummitCare Penrith, and its conversion into a new seniors housing development that also includes a residential care facility at the site. The proposal consists of:

- Demolition of the existing residential care facility (RCF) and construction of new seniors housing and RCF to be contained within 4 distinct buildings.
- A total of 93 ILUs and 5 RCR. The ILUs will contain a total of 16 x 3-bedroom apartments, 70 x 2-bedroom apartments and 7 x 1-bedroom apartments. The development will also include integrated administrative, communal facilities, service and care functions, integrated communal landscaped spaces, an ancillary café, outdoor seating and entry plaza and a swimming pool and gym designed to provide improved amenity for the residents.
- Basement car parking and the provision of basement services including plant rooms, switch room, rainwater tank, waste rooms, storage rooms / cages, laundry, staircase and lift cores and lobbies.
- Vehicular access from McNaughton Street for ambulance and a drop off / pick up area with 3 visitor car spaces (including 2 accessible spaces). An additional 2 vehicular access points are proposed from Harris Street which provides a service access to the ground floor loading/unloading area and access to the basement car parking level.
- Various pedestrian access points are provided with 1 access point from Harris Street, 2 access points from the existing Council car park fronting Jamison Road and 3 access points from McNaughton Street.
- New landscape design that will include the planting of new native trees with the retention of some significant trees and proposes amenities including lawns and gardens, a green roof, water features / sculptures, courtyards, pavements, outdoor seating, café terrace area, green roof and entry plaza.

The request seeks to vary the development standard for maximum Height of Buildings under Section 84 and Section 87 of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP). This Clause 4.6 Variation Request demonstrates that:

- Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded; and
- The variation allows for a development that represents the orderly and economic use of the land in a manner which is appropriate when considering the site's context, and as such, is justified on environmental planning grounds.

As a result, the SSDA may be approved as proposed in accordance with the flexibility afforded under Clause 4.6 of the Penrith Local Environmental Plan (PLEP) 2010.



2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the PLEP 2010 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

PLEP 2010 Clause 4.6 Exceptions to development standards reads as follows:

1. The objectives of this clause are as follows—
 - a. to provide an appropriate degree of flexibility in applying certain development standards to particular development,
 - b. to achieve better outcomes for and from development by allowing flexibility in particular circumstances.
2. Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.
3. Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—
 - a. compliance with the development standard is unreasonable or unnecessary in the circumstances, and
 - b. there are sufficient environmental planning grounds to justify the contravention of the development standard.
4. The consent authority must keep a record of its assessment carried out under subclause (3).

It is noted that whilst the standard to be varied sits within SEPP (Housing) 2021, Clause 4.6 of the PLEP 2010 still applies to the development.

3 The Development Standard to be varied

This Clause 4.6 Variation Request has been prepared in a written format, seeking to justify the variation to the following height of building development standards of the Housing SEPP.

Under the Housing SEPP, ***“maximum permissible building height means the maximum building height permitted on the land under Chapter 5 or 6, where relevant, an environmental planning instrument, other than this Policy (emphasis added), or a development control plan.”***

3.1.1 Clause 4.3 of Penrith LEP 2010

The subject application is not seeking to utilise the provisions of Chapters 5 or 6 of the Housing SEPP, and therefore the initial building height control sits under Clause 4.3 (Height of Buildings) of the PLEP 2010.

Clause 4.3 permits a maximum Height of Buildings of 12m on the R3 Medium Density Residential zoned front portion of the site fronting Jamison Road, Harris Street and McNaughton Street and 8.5m on the R2 Low Density Residential zoned rear portion of the site. Refer to the Figure below.



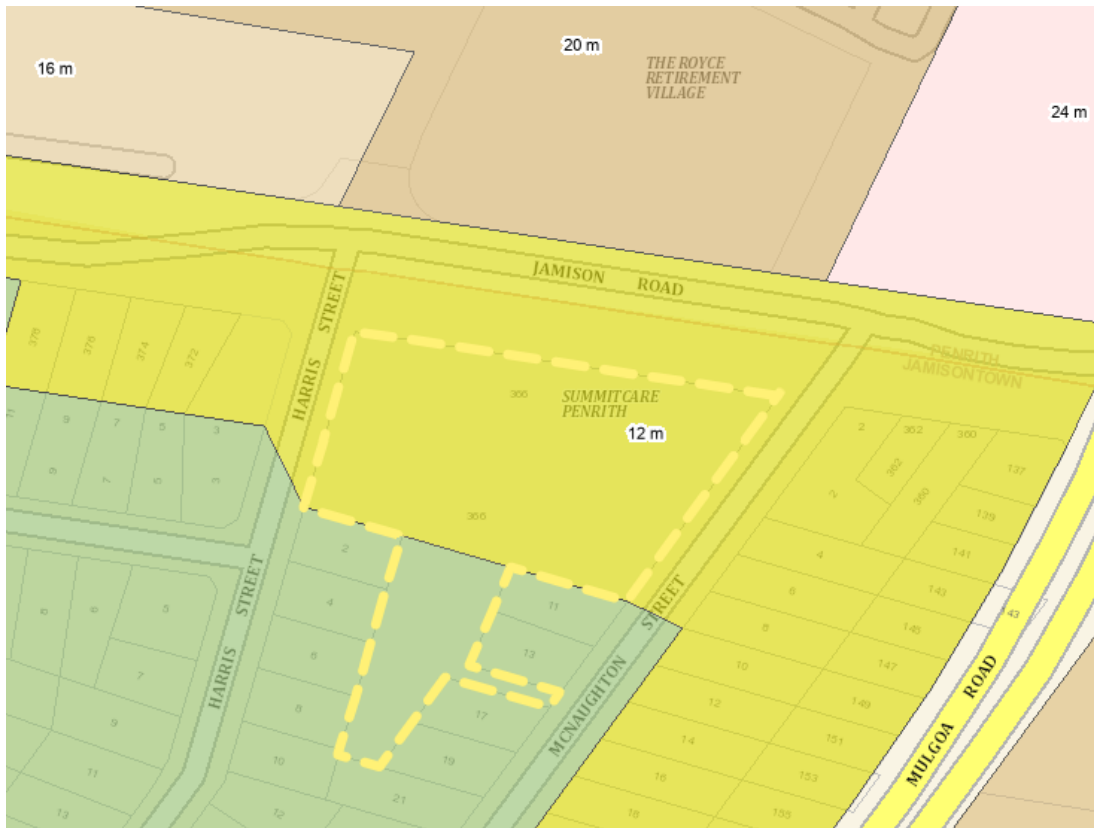


Figure 1: Height of Buildings PLEP 2010 map extract (NSW Planning Spatial Viewer)

However, the development is also guided by the provisions under Part 5 (Housing for seniors and people with a disability) of Chapter 3 of the Housing SEPP, which provides additional building height controls as described below.

3.1.2 Clause 84 (2c) and (3) - Development Standards - General

(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 (emphasis added), and

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

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

3. The servicing equipment must—

- a. be fully integrated into the design of the roof or contained and suitably screened from view from public places, and
- b. be limited to an area of no more than 20% of the surface area of the roof, and
- c. not result in the building having a height of more than 11.5m.

3.1.3 Section 87 - Additional Floor Space Ratio

1. This section applies to development for the purposes of seniors housing on land to which this Part applies if—
 - a. development for the purposes of a residential flat building or shop top housing is permitted on the land under Chapter 5, Chapter 6 or another environmental planning instrument, or
 - b. the development is carried out on land in Zone E2 Commercial Centre or Zone B3 Commercial Core.
2. Development consent may be granted for development to which this section applies if—
 - a. the site area of the development is at least 1,500m², and
 - b. the development will result in a building with the maximum permissible floor space ratio plus—
 - (i) for development involving independent living units—an additional 15% of the maximum permissible floor space ratio if the additional floor space is used only for the purposes of independent living units, or
 - (ii) for development involving a residential care facility—an additional 20% of the maximum permissible floor space ratio if the additional floor space is used only for the purposes of the residential care facility, or
 - (iii) for development involving independent living units and residential care facilities—an additional 25% of the maximum permissible floor space ratio if the additional floor space is used only for the purposes of independent living units or a residential care facility, or both, and
 - c. **the development will result in a building with a height of not more than 3.8m above the maximum permissible building height (emphasis added).**

4 Extent of Variation to the Development Standard

The subject application proposes the following building heights and extent of variation:

Table 1 – Proposed Building Height and Extent of Variation			
Building	Required	Proposed	Variation
Building A	Building Height: 13.3m (9.5m + 3.8m) Service Equipment: 11.5m	Building Height: 16.8m Service Equipment Height: 1.4m above topmost roof level Total Height: 18.2m	3.5m or 26.3% departure from the building height
Building B	Building Height: 13.3m (9.5m + 3.8m)	Building Height: 16.3m	3m or 22.5% departure from the building height



Table 1 – Proposed Building Height and Extent of Variation

Building	Required	Proposed	Variation
	Service Equipment: 11.5m	Service Equipment Height: 1.4m above topmost roof level Total Height: 17.7m	
Building C	Building Height: 13.3m (9.5m + 3.8m) Service Equipment: 11.5m	Building Height: 17.4m Service Equipment Height: 1.4m above topmost roof level Total Height: 18.8m	4.1m or 30.8% departure from the building height
Building D	Building: 13.3m (9.5m + 3.8m) Service Equipment: 11.5m	7m No service equipment located on roof of Building D.	Nil

The building height non-compliance primarily relates to the upper storeys of Buildings A, B and C located within the R3 Medium Density Residential zoned front portion of the site.

Apart from these areas, Buildings A, B and C sit within the 13.3m height limit prescribed by the SEPP. Building D complies with the maximum permitted building height under both the SEPP and Council LEP controls.

Whilst it is noted that the SSDA process is utilising the Housing SEPP controls, and therefore the maximum building height restriction of 9.5m under Clause 84, the variation to the development standard would be less if only the PLEP2010 12m building height control was applied to the site.

The 12m height limit within the R3 Medium Density Residential zoned portion of the site (and 8m height limit within the R2 Low Density Residential zoned portion of the site) under PLEP 2010 combined with the additional 3.8m building height been utilised under Clause 87(2)(c) would permit a maximum building height of 15.8m, which would reduce the associated building height variations to:

- Building A: 1m or 6.3%
- Building B: 500mm or 3.2%
- Building C: 1.6m or 10%

The Figures below show the building elements that sit above the 13.3m height plane.



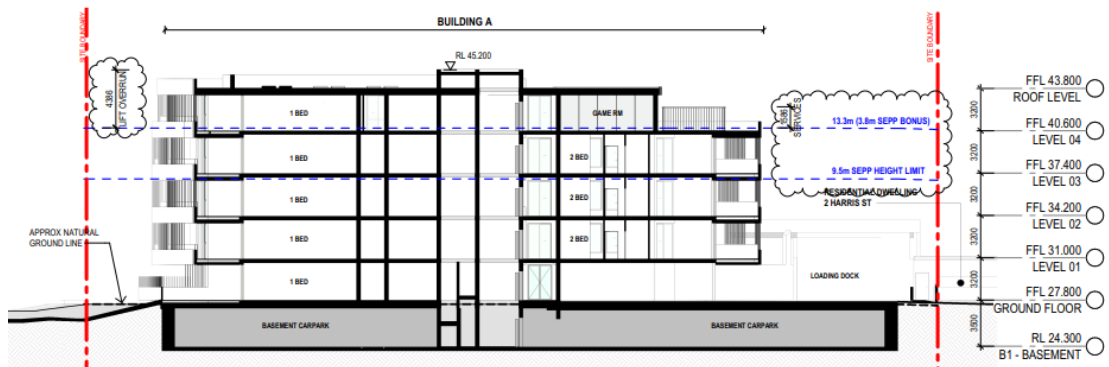


Figure 2: Proposed Building A Sections (Jackson Teece)

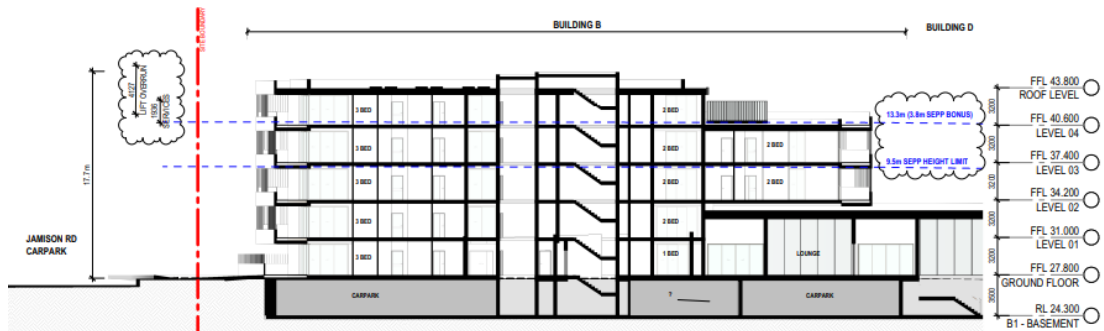


Figure 3: Proposed Building B Sections (Jackson Teece)

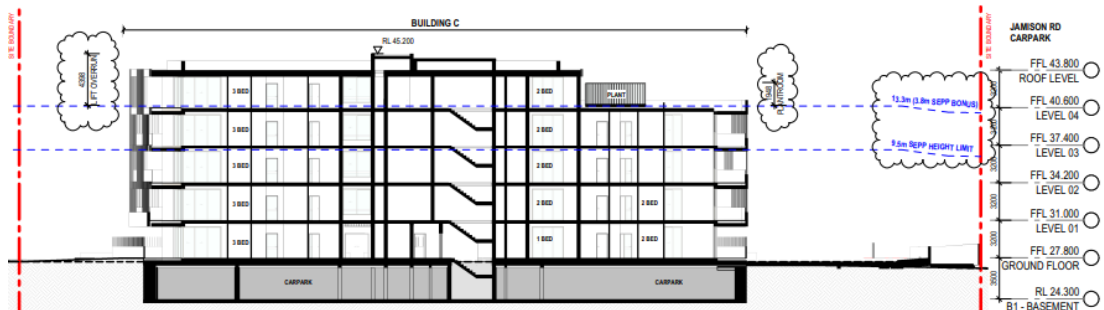


Figure 4: Proposed Building C Sections (Jackson Teece)

5 Objectives of the Standard

The Objectives of the Standard under Clause 4.3 of the PLEP 2010 are as follows:

- a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,
- b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,
- c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,
- d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.

Clauses 84 and 87 of the SEPP do not have any Objectives.

6 Assessment

6.1 Clause 4.6(3)(a) – compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

Compliance with the height standard is unreasonable and unnecessary as the objectives of the Height of Buildings development standard are achieved notwithstanding non-compliance with the numerical standard (Wehbe 1# test):

As detailed in *Williams v Ku-ring-gai Municipal Council* [2017] NSWLEC 1098, *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [44]–[48], a number of approaches could be used to establish that compliance with a development standard is unreasonable or unnecessary.

Furthermore, *Preston CJ in Wehbe v Pittwater Council* (2007) 156 LGERA 446 [42]–[51] outlined five common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable and unnecessary which are summarised below:

- Test 1: The objectives of the standard are achieved notwithstanding non-compliance with the standard;
- Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- Test 3: The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- Test 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; or
- Test 5: The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

These five ways to demonstrate that compliance is unreasonable or unnecessary are not exhaustive, and it may be sufficient to establish only one way.

With respect to the subject application, we consider that the proposed development meets the requirements of Wehbe Test #1 and therefore compliance with the development



standard is unreasonable and unnecessary when considered holistically with the development outcome being sought.

6.2 Objectives of the standard are achieved notwithstanding non-compliance with the standard (Wehbe#1)

6.2.1 Wehbe Test 1 – Objectives of the Standard are achieved

The proposal will be in the public interest as it meets the objectives of the building height development standard under Clause 4.3 of the PLEP2010 as follows:

Objective (a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,

There are two zonings applicable to the site, R3 Medium Density Residential fronting Jamison Road, Harris Street and McNaughton Street and R2 Low Density to the rear of the site. The immediate surroundings properties are located within the R2 Low Density Residential and R3 Medium Density Residential zones and consistent of 1 and 2-storey built forms with the properties on the opposite side of Jamison Road, to the north, located within SP3 Tourist zone and have a 6-storey built form.

The proposed building height and bulk is of an appropriate form and scale and is compatible with the site and surrounding context.

The building height non-compliance primarily relates to the upper storeys of Buildings A, B and C located within the within the R3 Medium Density Residential zoned front portion of the site and opposite a 6-storey building – The Royce. Apart from these areas, Buildings A, B and C sit within the 13.3m height limit and Building D complies with the height limit as prescribed by the height of development standard under the Housing SEPP.

The proposed development delivers a much-needed upgrade to the existing residential aged care facility occupying the site, resulting in an improved outcome for the land use. A thoughtful and careful design approach to the existing and desired future character of the locality has been implemented, including:

- A lower-density single storey building (Building D), which complies with its height control, is proposed within the R2 Low Density zoned rear portion of the site adjacent to surrounding lower density 1 and 2 storey dwellings with appropriate setbacks to manage bulk, scale and amenity impacts the on surrounding properties;
- Part four, part five storey buildings (Buildings A, B and C) are proposed within the R3 Medium Density zoned front portion of the site fronting Jamison Road, consistent with the 6 storey built form located to the north of the site along Jamison Road (The Royce Aged Care);
- The buildings have been designed to provide an effective transition, with a 5-storey form located fronting Jamison Road and the buildings stepping down to a 4-storey form then single storey form adjacent to the surrounding low density residential properties. This transition combined with the ample building setbacks manage bulk, scale and amenity impacts the on surrounding properties;
- The buildings are designed to be articulated in parts so that the appearance is of a series of smaller structures sitting next to each other. Each component is then visually broken up in smaller parts to reduce the scale. The facades have been treated with balconies and screens in a playful and elegant way to create a visual interest. The use



of high-quality materials highlights key elements of the building, breaking up the mass to obtain a more vertical and slender forms; and

- Significant new landscaping and deep soil is proposed in the recesses between the buildings and along the site boundaries will create a major improvement to the landscaping and canopy on site. This ensures the development enhances the landscaping setting of the site and achieves a compatible design approach within the locality.

Objective (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,

Buildings A, B and C propose a part 4, part 5-storey form within the R3 Medium Density zoned front portion of the site fronting Jamison Road, and Building D proposes a single storey form within the R2 Low Density zoned rear portion

Whilst Buildings A, B and C sit above the predominate 1 and 2 storey forms occupying the neighbouring properties immediately surrounding the site, the development has been designed with a respectable scale taking into consideration the existing and desired future character of the area, as discussed above within Objective (a).

The design of the development has been driven to ensure that surrounding developments are not impacted. This includes a design that ensures the development achieves compliance with solar access provisions of the Apartment Design Guide (ADG) and minimises the loss of solar access to the adjoining properties. Mitigation measures have been implemented to minimise privacy impacts such as appropriate vertical screens and compliance with the building orientation and separation requirements of the ADG.

There are no significant views that exist within the area and as such there will be no impact on view corridors from the surrounding properties.

Despite the height non-compliance, the development has been designed with a suitable scale that protects the local amenity. The design elements identified above in Objective (a) ensures the development minimises amenity and visual impacts within the surrounding locality. A comprehensive assessment of environmental amenity and visual impacts is provided within **Section 8.3** and **Section 8.4** of the EIS.

Objective (c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,

The site is not identified as heritage item or located within a heritage conservation area under PLEP 2010. In addition, the site is not located in the immediate vicinity of heritage item or a heritage conservation area. As such this objective is not considered applicable.

Objective (d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.

Despite the height non-compliance, the development will deliver a high quality urban form, and a transition in built form and land use intensity as discussed in Objective (a) above. The development has been designed:

- In accordance with the design principles in Schedule 8 and 9 of the State Environmental Planning Policy (Housing) 2021, Seniors Housing Design Guide and the ADG;
- To satisfy the objectives for good design in the GANSW Better Placed 'objectives for good design';



- To benefit the local community and future residential occupants; and
- To exhibit a high-quality design outcome that will deliver a well-rounded range of benefits to the local community and future residential occupants.

This is addressed in detail in **Section 8.1** and **Section 8.2** of the EIS and **Appendix 2: Architectural Urban Design Report**.

6.3 Clause 4.6(3)(b) - There are sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

Clause 4.6(3)(b) of the WLEP 2014 requires that the consent authority be satisfied that the applicant's written request has adequately demonstrated 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 (*Turland v Wingecarribee Shire Council [2018] NSWLEC 1511 and Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*), also 'Rebel MH' and 'Baron' (2019).

The environmental planning grounds relied upon to justify the exceedance of the development standard in the circumstances of the proposal are considered sufficient and specific to the site and the proposed contravention.

As confirmed by supporting consultant reports and addressed throughout this variation request, the non-compliance with the development standard does not result in any adverse environmental planning impacts. There will be no loss, significant or iconic views; no adverse privacy impacts; no adverse visual impacts or overshadowing to residential properties, particularly related to the building elements that sit above the building height control.

The building height above the Housing SEPP control primarily relates to the upper storeys of Buildings A, B and C located within the within the R3 Medium Density Residential zoned front portion of the site. Apart from these areas Buildings A, B and C sit within the 13.3m height limit and Building D complies with the height limit as prescribed by the height of development standard under Housing SEPP.

The stepped built form moving from 5 storeys facing Jamison Road, down to four storeys and then 1 storey to the rear more appropriately responds to the sites surrounds, including an appropriate response to the 6-storey aged care Royce development on the northern side of Jamison Road. The elements above the building height control are intended to broadly 'match' the higher density Royce development, and then step down towards the low-density residential zone, a particular environmental planning response to site conditions.

Whilst it is noted that the SSDA process is utilising the Housing SEPP controls, and therefore the maximum building height restriction of 9.5m under Clause 84, the variation to the development standard would be less if only the PLEP2010 12m building height control was applied to the site.



The 12m height limit within the R3 Medium Density Residential zoned portion of the site (and 8m height limit within the R2 Low Density Residential zoned portion of the site) under PLEP 2010 combined with the additional 3.8m building height been utilised under Clause 87(2)(c) would permit a maximum building height of 15.8m, which would reduce the associated building height variations to:

- Building A: 1m or 6.3%
- Building B: 500mm or 3.2%
- Building C: 1.6m or 10%

The subject site's R3 Medium Density Residential zoning does not permit residential flat buildings and therefore Clause 84 of the SEPP applies to the land. However, it does permit shop top housing, and therefore envisages a built form environment where apartment typology housing is permitted. Whilst Clause 84 of the SEPP does not contain development Objectives, it is anticipated the Clause was intended to enable greater density and building height for seniors housing in low density zones that do not permit any sort of apartment housing typology. However, in the circumstances of this site, the Clause in the SEPP forces a reduction in maximum building height to 9.5m compared to the specific LEP height control of 12m.

Had the maximum building height been 12m under the LEP, combined with had the additional 3.8m building height permitted under Clause 87(2)(c) of the Housing SEPP, the additional storey sitting above the 12m height control would be compliant, with remaining variations reduced to rooftop structures, plant and lift overruns. This is a particular environmental planning ground relevant to the development.

This proposal will deliver the redevelopment of an established, but dated, RCF and its conversion into a new seniors housing development that also includes an RCF. This will provide an opportunity for more senior residents to 'age in place' within the socially cohesive and diverse community of Penrith.

For the reasons discussed above, it is contended that there are sufficient environmental planning grounds to justify the contravention to the development standard in the circumstances of the case, particularly given that the design provides a tailored and well considered response to the site's constraints and articulation.

7 Conclusion

The assessment above confirms that compliance with the maximum Height of Buildings development standard contained in Clause 84 and Clause 87 of the Housing SEPP is unreasonable and unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify the contravention to the development standard. This Clause 4.6 variation request demonstrates that notwithstanding the non-compliance with the Height of Buildings development standard, the proposal:

- The development achieves the objectives of the development standard in Clause 4.3 of PLEP 2010 in accordance with the Wehbe #1 test;
- Delivers a development that is appropriate for its context despite the breaches to development standards and therefore has sufficient environmental planning grounds to permit the variation; and
- Therefore, compliance with the development standard is unreasonable or unnecessary in the circumstances of this proposal.

