

Clause 4.6

Variation Request

Floor Space Ratio – Clause 4.4

28 Marrickville Avenue, Marrickville

PREPARED FOR
NSW DEPARTMENT OF EDUCATION


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MECONE.COM.AU

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

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1 Introduction

This Clause 4.6 Written Request has been prepared on the behalf of The Maronite Sisters of the Holy Family Village to support a request for variation to the floor space ratio development standard under Clause. 4.4 of the *Inner West Local Environmental Plan 2022 (IWLEP 2022)*. This accompanies and supports the State Significant Development Application SSD-69377980 for the demolition and redevelopment of Village 1 to provide a four-storey, 99-bedroom (100-bed) facility with basement car parking located at 28 Marrickville Avenue, Marrickville.

The request has been prepared in accordance with the requirements of Clause. 4.6 of the IWLEP 2022 to vary the floor space ratio development standard. It is noted that section 107(2)(c) of the *State Environmental Planning Policy (Housing) 2021* provides for a non-discretionary standard that allows for a maximum floor space ratio of 1:1. However, the site is used for both residential care facilities and educational establishments. Following consultation with the Department of Planning, Housing and Infrastructure, it was agreed that for an abundance of caution, a Clause 4.6 variation request should be made based on the total site area with regard to Clause 4.4 of the IWLEP 2022. This approach ensures that an assessment of the density of the site as a whole is appropriately considered.

The subject site is legally described as Lot 101 in DP 1091233 and is known as 28 Marrickville Avenue, Marrickville (also known as 194-210 Wardell Road, Marrickville). This site has a total site area of 26,494m².



Figure 1: The Subject Site

Source: Mecone MOSAIC

2 Inner West Local Environmental Plan 2022

2.1 Clause 4.4 – Floor space ratio

2.1.1 Details of floor space ratio development standard

The relevant development standard sought to be varied under the Application is Clause 4.4 Floor space ratio (FSR) under Part 4 Principal Development Standards of the *Inner West Local Environmental Plan 2022 (IWLEP 2022)*. The development standard sought to be varied reads as follows.

(2) *The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.*

Note that Clause 4.4(2D) does not apply as a residential flat building does not form part of the proposal.

As such, this variation request is made in reference to Clause 4.4(2) for the FSR shown on land in the Floor Space Ratio map. This annotates that the site is subject to a maximum FSR of 0.6:1 – see **Figure 3**.

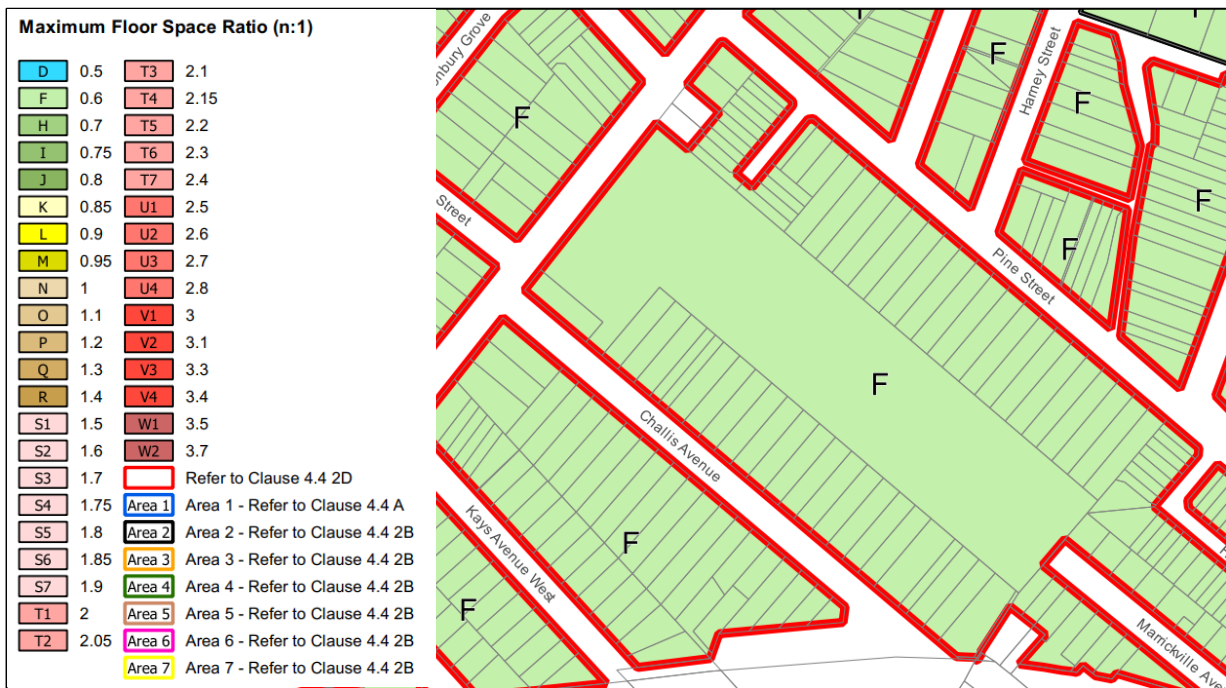


Figure 3: Extract of Floor Space Ratio Map – Sheet HOB_005

Source: IWLEP 2022

2.1.2 Details of development standard to be varied

The proposed development seeks to construct a new aged care facility with 6,749m² of GFA. This replaces the current 47 bed facility that has 1,624m². All other existing and retained Village 1 and educational buildings on the site have a total of 11,556m².

The cumulative of both the proposed new and retained buildings will result in a total GFA of 18,305m². This is illustrated in **Figure 4**.

Consequently, the total floor space for the site results in a FSR of 0.691:1. This is 0.09:1 or 15% or 2,409m² more than is permitted under Clause 4.4 of the LEP. This equivalent to approximately 40 aged care beds.

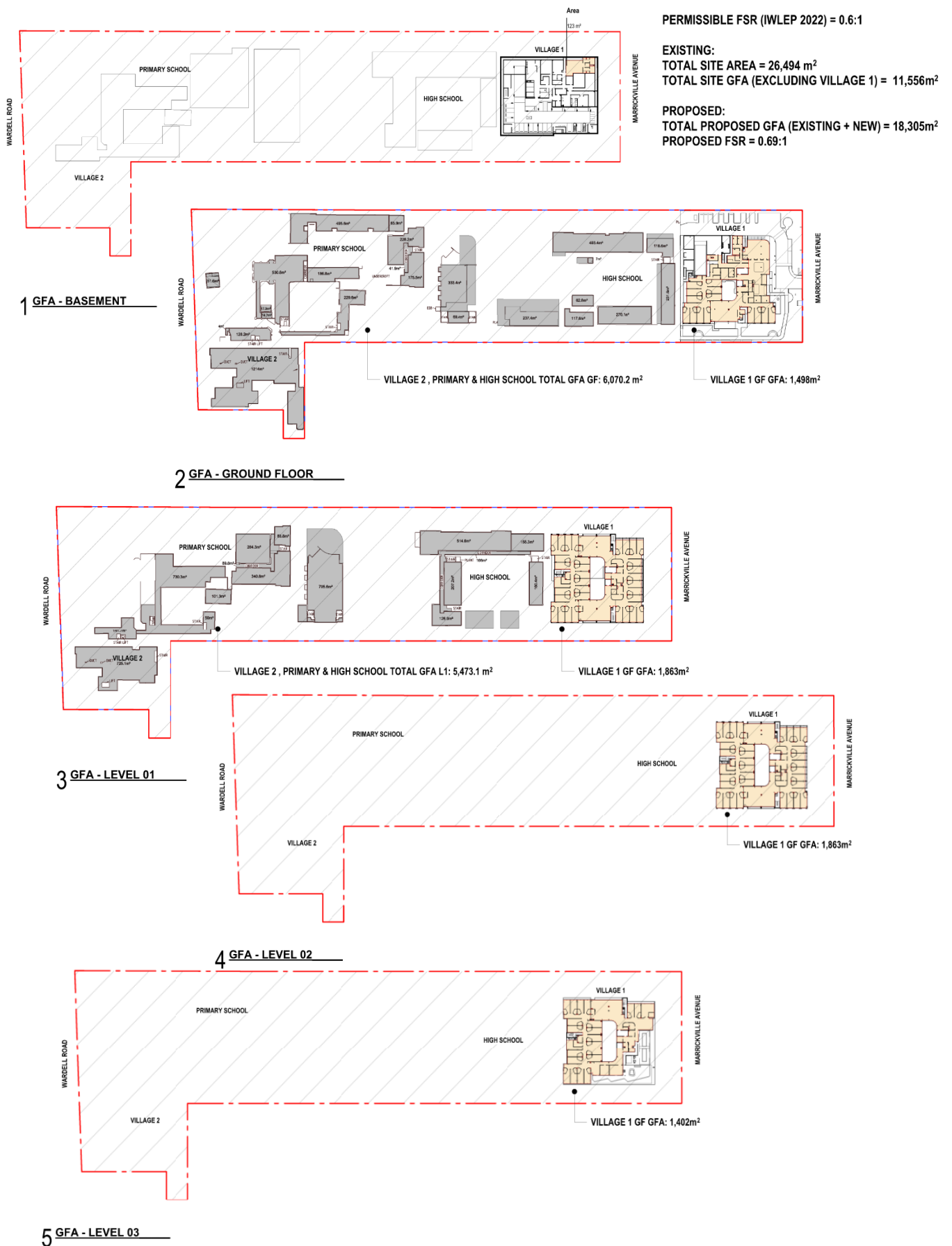


Figure 4: Gross Floor Area & FSR Calculations

Source: Jackson Teece

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of IWLEP 2022 provides the following:

- (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.*

The decision handed down by Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (Initial Action) provides guidance in respect of the operation of clause 4.6, subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130* at [1], [4] and [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to Section 56A of the *Land and Environment Court Act 1979* against the decision of a Commissioner.

At [90] of Initial Action, the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

The legal consequence of the decision in Initial Action is that Clause 4.6(1) is not an operational provision, and that the remaining clauses of Clause 4.6 constitute the operational provisions.

Clause 4.6(2) of IWLEP 2022 applies to Clause 4.4 of IWLEP 2022, and provides that:

- (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.*

Clause 4.4 is not excluded from the operation of this clause and can be varied as a consequence.

Clause 4.6(3) of IWLEP 2022 provides that:

- (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) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *there are sufficient environmental planning grounds to justify contravening the development standard.*

This application proposes contraventions to the FSR development standard pursuant to Clause 4.4(2) of IWLEP 2022. Clause 4.4(2) prescribes a maximum FSR for the site, however strict compliance is considered to be unreasonable or unnecessary in the specific circumstances of this case, and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

Relevant grounds establishing that compliance with the standard is unreasonable and unnecessary and environmental planning grounds are set out later within this written request.

Clause 4.6(4) of the IWLEP 2022 provides that:

- (4) *The consent authority must keep a record of its assessment carried out under subclause (3).*

This is a matter to be addressed by the consent authority at the time of assessment.

Clause 4.6(5) of the IWLEP 2022 is repealed.

Clause 4.6(6) of the IWLEP 2022 provides that:

- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—*
 - (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Given that the site is not situated in the RU1, RU2, RU3, RU4, RU6, R5, C2, C3, or C4 zones, and the application does not propose subdivision, this clause is of no relevance to this variation request.

Clause 4.6(7) of the IWLEP 2022 is repealed.

Clause 4.6(8) of the IWLEP 2022 provides that:

- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*
 - (a) *a development standard for complying development,*
 - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) *clause 5.4,*
 - (caa) *clause 5.5,*
 - (ca) *clause 6.27(4),*
 - (cb), (cc) *(Repealed)*
 - (cd) *clause 6.31.*

This variation request does not seek to contravene a development standard for complying development, nor a development standard that arises under the EP&A Regulations under the EP&A Act in connection to a BASIX certificate. As such, this clause is of no relevance to this variation request.

3 Relevant Case Law

In Initial Action, the Court summarised the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (*Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (known as the 'Wehbe tests') continue to apply as follows:

- 1) *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.*
- 2) *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
- 3) *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
- 4) *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable.*
- 5) *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
- 6) *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

It is noted that, despite changes to Clause 4.6 on the 1st of November 2023, the 'Wehbe tests' continue to apply as common ways in which an applicant may demonstrate that compliance with a development standard is 'unreasonable or unnecessary'. With regard to the *Guide to Varying Development Standards* (Department of Planning and Environment, November 2023), the relevant steps to assess a variation request under Clause 4.6 can be summarised as follows:

- 1) Is Clause 4.4 of IWLEP 2022 a development standard?
- 2) Is the consent authority satisfied that this written request adequately addresses the matters required by Clause 4.6(3) by demonstrating that:
 - a) compliance is unreasonable or unnecessary; and
 - b) there are sufficient environmental planning grounds to justify contravening the development standard

The necessary detail and justification for these steps to be satisfied are provided within **Section 4** of this request below.

4 Written Request – Floor Space Ratio

4.1 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The ‘Wehbe tests’ include the following five ways in which a variation may be well-founded:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

It is generally understood that Clause 4.6(3)(a) can be satisfied if it is established that the proposal satisfies one or more of those five points. In this instance, point 1 is investigated and is considered to be well-founded for the proposed development.

DEVELOPMENT STANDARD OBJECTIVES

The objectives of the FSR development standard under Clause 4.4(1) of the IWLEP 2022 are provided below, with a response demonstrating how these objectives are satisfied notwithstanding the proposed non-compliance with the FSR standard.

(a) to establish a maximum floor space ratio to enable appropriate development density,

The proposed development aligns with the objective of ensuring the proposed FSR provide appropriate development density with the locality, despite the non-compliance with the FSR standard on the basis that:

- The proposed density of the site is appropriate for its ongoing and existing combined aged care and school uses that are unique to the local area, which is largely low-density residential allotments.
- Sufficient separation has been provided at the boundaries of the Village 1 site to retain the treed landscaped that is characteristic of the local area and reflected in adjoining and treed backyards of adjoining residential allotments and public streets.
- The significant size of the broader Maronite Sisters site (approximately 2.64ha) allows for development density to be appropriately distributed, while ensuring that suitable amenity is maintained on the site to serve new and existing residents and school children.
- The site's topography, sloping to the southeast, ensures that alongside the central school buildings the proposed development will not be visible from Wardell Road.
- The development will retain and seek to enhance the existing mature vegetation on the site despite the additional GFA sought for the proposal.
- The development increases and incorporates generous building to boundary setbacks of 14m to the northern boundary, 10m to the southern boundary, and 15m to Marrickville Avenue as shown in **Figure 5** – minimising impacts of loss of privacy, overshadowing, and visual bulk.

- The development will retain the heritage wall that screens the existing school from Marrickville Avenue, Challis Avenue, and Pine Street.
- The proposed development design is compatible with its uses and surrounds as it incorporates appropriate materials and articulation to ensure minimal visual and amenity impacts as outlined in the EIS, but also echoes the materiality of surrounding federation style double brick houses and demonstrates compatibility with the existing character of the area.
- The proposal is appropriate density as it provides new and much-needed additional high quality aged care services for the local community – noting that if the development was to comply with the maximum FSR it would result in approximately 40 less aged care beds – making the proposed development redundant.
- The scale of this proposal is needed to allow it to incorporate staff and premises that services both the existing Village 2 and proposed new Village with on-site services such as meal services, and whole of site staffing facilities.

Additionally, the FSR non-compliance (which partially impacts the third storey and is concentrated in the fourth storey) is mitigated by additional articulation, which has the effect of creating visual separation at the top level, as shown in **Figure 6**. This ensures the proposed density is contextually appropriate, with the FSR contravention facilitating the delivery of additional residential care facility beds to meet community needs without compromising the character or amenity of the locality.

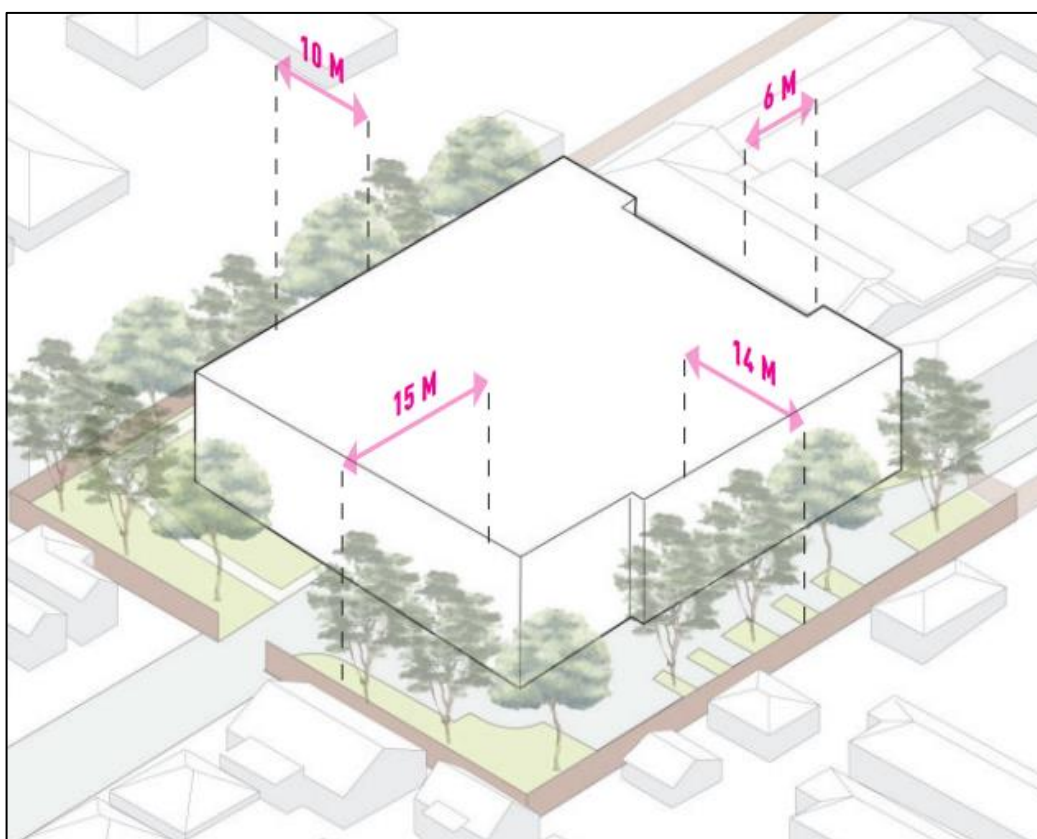


Figure 5: Representation of the Setbacks Proposed with Unrefined Massing

Source: Jackson Teece

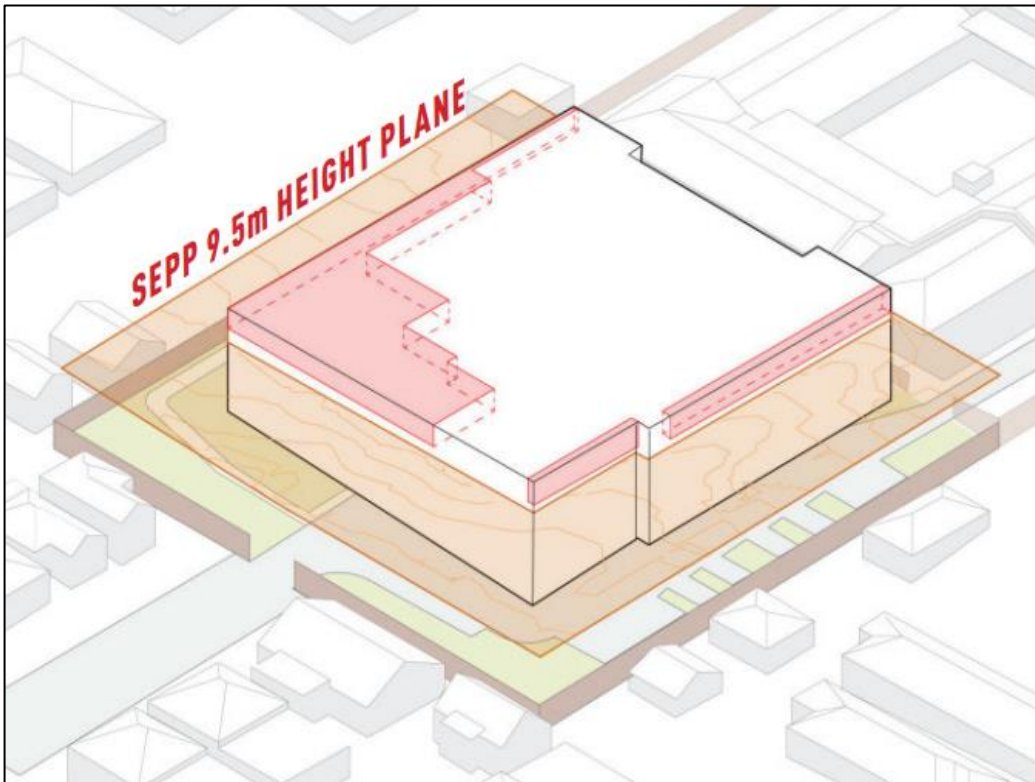


Figure 6: Representation of Upper-Level Articulation with Unrefined Massing

Source: Jackson Teece

(b) to ensure development density reflects its locality,

As detailed at objective (a) the site's substantial size and physical and visual buffers created by its sloping topography, mature vegetation, and the heritage wall allow for increased density to be appropriately integrated without adversely affecting the locality. The central school buildings and Village 1 are screened from Wardell Road, Marrickville Avenue, Challis Avenue, and Pine Street, ensuring the density remains visually unobtrusive and maintains harmony with the surrounding residential character.

The proposed development is compatible with and reinforces the existing uses of the site for aged care and educational premises. These uses have been operating at the site for a long time and the proposed development seeks to enable renewal of these facilities that better reflects new and higher aged care standards. This includes the need for more floor space that not only accommodates more much needed beds, but also additional floor space for new staff and care facilities and amenity for residents.

The development density reflects its locality by concentrating the additional floor space centrally within the site, away from sensitive residential interfaces, and utilising high-quality design to integrate seamlessly with the heritage character of the area. The use of compatible materials, such as brick and masonry, reflects the traditional built form of the locality, while setbacks and landscaping ensure the increased density does not impose on adjacent properties. The design respects the established character of the neighbourhood by preserving visual and spatial separation, ensuring that the development density enhances rather than detracts from the locality's identity and built environment.

(c) *to provide an appropriate transition between development of different densities,*

The existing density concentrated in the school is largely screened by the heritage wall, mature vegetation, and the site's sloping topography, minimising the perception of density of the development when viewed from outside the site. These attributes help to provide physical and visual buffer to adjoining premises.

Additionally, the use of high-quality materials and architectural elements, such as brick and masonry, aligns the design with the area's heritage context and reinforces compatibility with the surrounding built form. This careful design ensures that the development integrates seamlessly with the locality, providing a balanced and appropriate transition between densities while respecting the character and amenity of the locality.

(d) *to minimise adverse impacts on local amenity,*

The proposed development aligns with the objective of minimising adverse impacts on the local amenity, despite the non-compliance with the FSR standard, primarily through the provision of significant setbacks and the retention of significant and mature on-site trees and vegetation. The potential amenity impacts resulting from the non-compliance with the FSR control relate to bulk and scale and include visual impacts, overshadowing, and privacy.

With regard to visual impact, the Visual Impact Assessment (VIA) at **Appendix G** confirms that the overall visibility of the development from surrounding streets, including the non-compliant gross floor area situated on part of the third storey and the entirety of the fourth storey, will be limited as a result of:

- The building's height is concentrated toward the school portion of the site, transitioning toward the main entry on Marrickville Avenue.
- The top setback, finished with dark metal cladding, reduces the overall bulk of the building, and emphasizes on a three- story building volume.
- The façade treatment reflects the masonry character of the neighbourhood, with articulated details and grid patterns that highlights a residential scale.
- The existing high heritage wall is retained which would continue to prevent views of the lower building from the rear of adjoining residential properties.
The planned removal of two Brush Box trees is in a location that is closest to the rear of 36 Pine Street, owned by the applicant, thereby reducing the effect of that loss to other nearby residents as far as possible.
- The front gate to Marrickville Avenue although slightly wider than the existing gate would be of a solid appearance and thereby reduce views into the site and the new building

A range of public and private viewpoints have been considered in the VIA, summarised below.


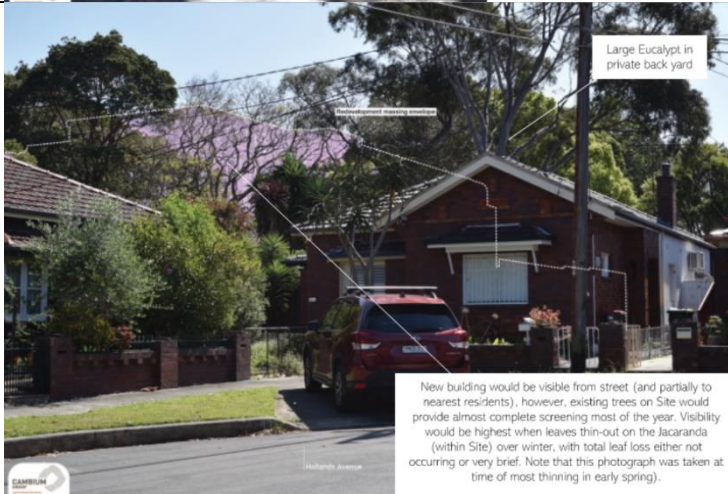

In summary, the visual impact resulting from the non-compliance is largely mitigated by the screening provided by the retained mature trees on site and through the moderated use of height over portions of the site away from the site's boundaries.




When considered as a whole, the development (both complaint and non-compliant components), results only in a low-moderate impact from certain public and private viewpoints, as summarised in

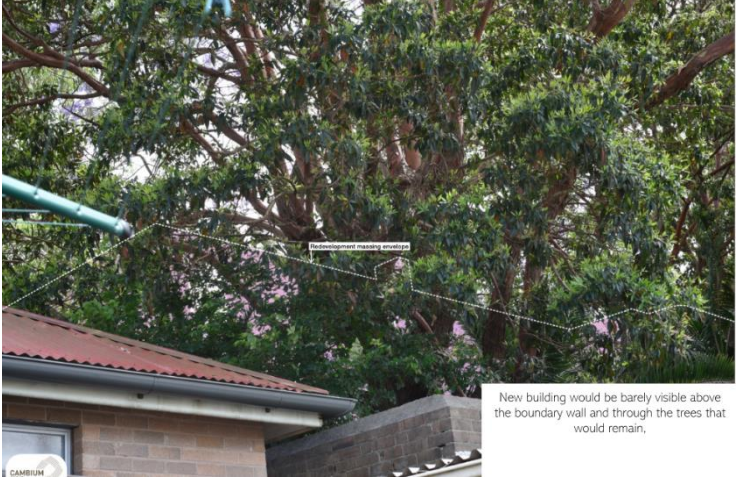
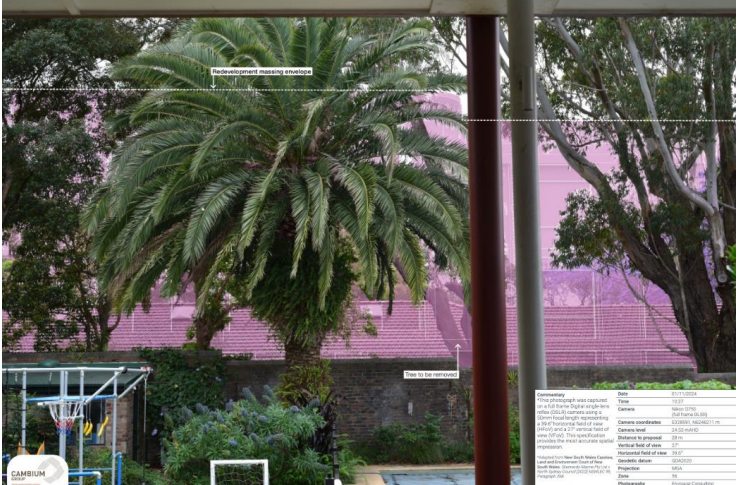

Table 1. As such, with regard to the impact of the non-compliance, the effects are effectively mitigated.


Table 1: Summary of Visual Impact from Assessed Viewpoints

Source: Envisage

View Point	Impact	Photomontage
Public Representative Viewpoints		
VP 1 – Marrickville Avenue	Low-Moderate	 <p>New building would be partly visible behind the solid gateway, however, would be largely screened by existing street trees and trees within the Site (around its boundary). NB the gateway slightly changed (being higher) after this photomontage was prepared), yet that change makes little difference.</p>
VP 2 – Hollands Avenue	Low-Moderate	 <p>Large Eucalypt in private back yard</p> <p>New building would be visible from street (and partially to nearest residents), however, existing trees on Site would provide almost complete screening most of the year. Visibility would be highest when leaves thin-out on the Jacaranda (within Site) over winter, with total leaf loss either not occurring or very brief. Note that this photograph was taken at time of most thinning in early spring.</p>
VP 3 – Pine Street	Low-Moderate	 <p>No existing Site trees shown in this image are to be removed</p> <p>New building would be partially visible from street and nearest residents (through existing gaps in trees, although of note no Site trees are to be removed in this vicinity). Existing trees on Site would largely screen with Jacaranda contributing more to screening from late spring</p>

View Point	Impact	Photomontage
VP 4 – Challis Avenue	Low-Moderate	 <p data-bbox="1145 640 1337 741">As shown the new building would not be seen from this nearest part of Challis Avenue (see outline). The building maintains a generous setback from the rear of residential properties, which are also separated by the Site boundary wall.</p>
VP 5 – Challis Avenue	Low-Moderate	 <p data-bbox="1145 1133 1337 1234">As shown the new building would not be seen from this southern part of Challis Avenue (see outline). The building maintains a generous setback from the rear of residential properties, which are also separated by the Site boundary wall.</p>
Private Viewpoints		
VP 6 – 15 Marrickville Avenue	Low	 <p data-bbox="1059 1644 1337 1753">New building would be partly visible through gateway only when open. There would be no views from private open space of the house. Gate would be visible; however, a substantial separation would remain in front of property. (NB the gateway slightly changed (being higher) after this photomontage was prepared), yet that change makes little difference.</p>

View Point	Impact	Photomontage																						
VP 7 – 26 Marrickville Avenue	Low	 <p data-bbox="1093 645 1332 696">New building would be barely visible above the boundary wall and through the trees that would remain.</p>																						
VP 8 – 35-37 Challis Avenue	Low-moderate	 <p data-bbox="1129 1126 1332 1223"> <table border="1"> <thead> <tr> <th>Item</th> <th>Value</th> </tr> </thead> <tbody> <tr> <td>Date</td> <td>10/01/2024</td> </tr> <tr> <td>Time</td> <td>10:00</td> </tr> <tr> <td>Camera</td> <td>Canon EOS R5</td> </tr> <tr> <td>Camera orientation</td> <td>Vertical (Portrait)</td> </tr> <tr> <td>Distance to proposed</td> <td>20m</td> </tr> <tr> <td>Horizontal field of view</td> <td>30°</td> </tr> <tr> <td>Horizontal field of view</td> <td>30°</td> </tr> <tr> <td>Projector</td> <td>5000</td> </tr> <tr> <td>Scale</td> <td>1:100</td> </tr> <tr> <td>Photographer</td> <td>Robyn Campbell</td> </tr> </tbody> </table> </p>	Item	Value	Date	10/01/2024	Time	10:00	Camera	Canon EOS R5	Camera orientation	Vertical (Portrait)	Distance to proposed	20m	Horizontal field of view	30°	Horizontal field of view	30°	Projector	5000	Scale	1:100	Photographer	Robyn Campbell
Item	Value																							
Date	10/01/2024																							
Time	10:00																							
Camera	Canon EOS R5																							
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Horizontal field of view	30°																							
Horizontal field of view	30°																							
Projector	5000																							
Scale	1:100																							
Photographer	Robyn Campbell																							
VP 9 – 32 Pine Street	Low	 <p data-bbox="738 1339 882 1368">Indicative extent of two trees to be removed</p> <p data-bbox="1093 1585 1332 1711">Very limited views of the new building through the dense site trees that would remain. The loss of the two Brush Box trees would have little effect from this angle. The building would be substantially lower than the remaining site trees and not protrude into the clear sky component.</p>																						

View Point	Impact	Photomontage
VP 10 – 36 Pine Street	Not applicable (Owned by Applicant)	

The additional and non-compliant gross floor area has been deliberately and significantly setback from the boundary which results in the preservation of mature trees located on the northeast, southeast, and southwest boundaries of the site. Additionally, the top level has been further setback to minimise overshadowing to the surrounding properties as shown in **Figure 7**.

While the proposed built form overshadows a large portion of private open space of 33, 35-37, and 39 Challis Avenue at 9:00am on the 21st of June, this overshadowing recedes significantly by 10:00am allowing for more than 50% of the private open space to receive solar access. This overshadowing to these properties ceases by 1:00pm.

Additionally, while there is some overshadowing to 26 Marrickville Avenue at 2:00pm, and 24 and 26 Marrickville Avenue at 3:00pm; these properties will retain solar access to their properties at all other hours of the day. This overshadowing doesn't account for the existing overshadowing already generated by the existing trees on the site or on adjoining sites.

Importantly, a proposal that was built to a compliant FSR (which could be built up to three storeys) with likely reduced and compliant setbacks would result in a similar or worse overshadowing impact to adjoining dwellings, given there is less separation between the proposed building and the adjoining residential dwellings. This would also likely mean removal of the existing trees on the site also. Therefore, through effective design, the resulting non-compliance with FSR with regard to overshadowing is effectively acceptable and compatible with the local area.

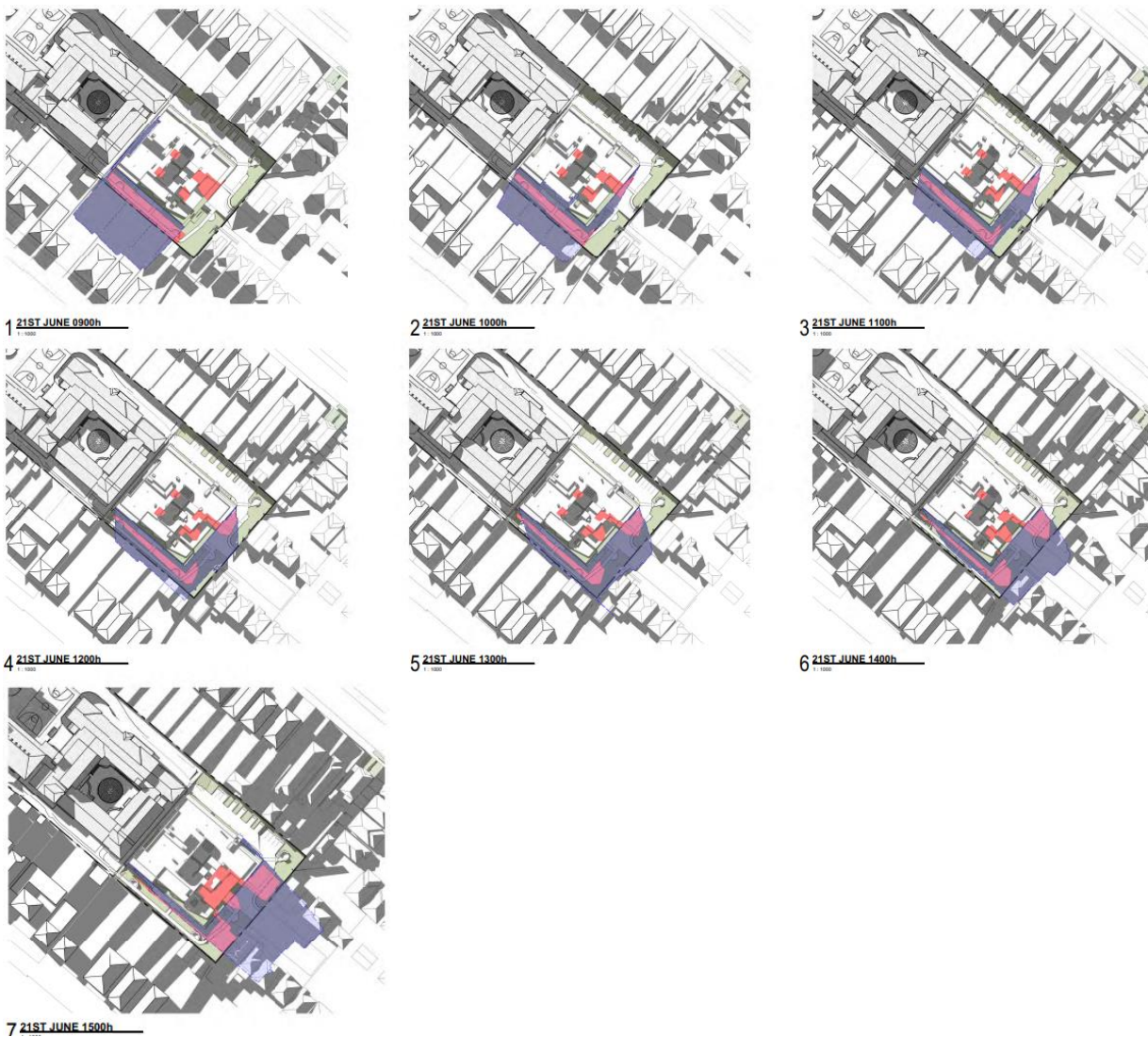


Figure 7: Shadow Diagrams on the 21st of June (Existing Impact in Red and Proposed in Blue)

Source: Jackson Teece

The proposal has been designed to maximise privacy and protect resident amenity for Village 1 as well as adjoining residences through the provision of significant setbacks as well as retaining mature trees that screen views. The non-compliant portion of the development has been significantly set back from the site's boundaries to enhance privacy and amenity for both the Village 1 residents and the neighbours.

Buffer planting along the façade in communal spaces and on the rooftop maximises privacy and creates a highly treed filtered outlook to neighbouring properties. Additionally, generous landscaping on the ground floor increases visual privacy for the Village 1 rooms on this level. Refer to **Figure 8** which demonstrates that sightlines between Village 1 and neighbours to Challis Avenue and Pine Street will ensure that appropriate visual privacy will be maintained to and from adjoining sites.

Importantly and in contrast, a compliant FSR and height proposal (which could be built up to three storeys) with reduced and compliant setbacks would result in a similar or worse overshadowing impact to adjoining dwellings, given there would likely be less separation between the proposed building and the adjoining residential dwellings. As such, with regard to the impact of the non-compliance on privacy, the effects are effectively mitigated through design.

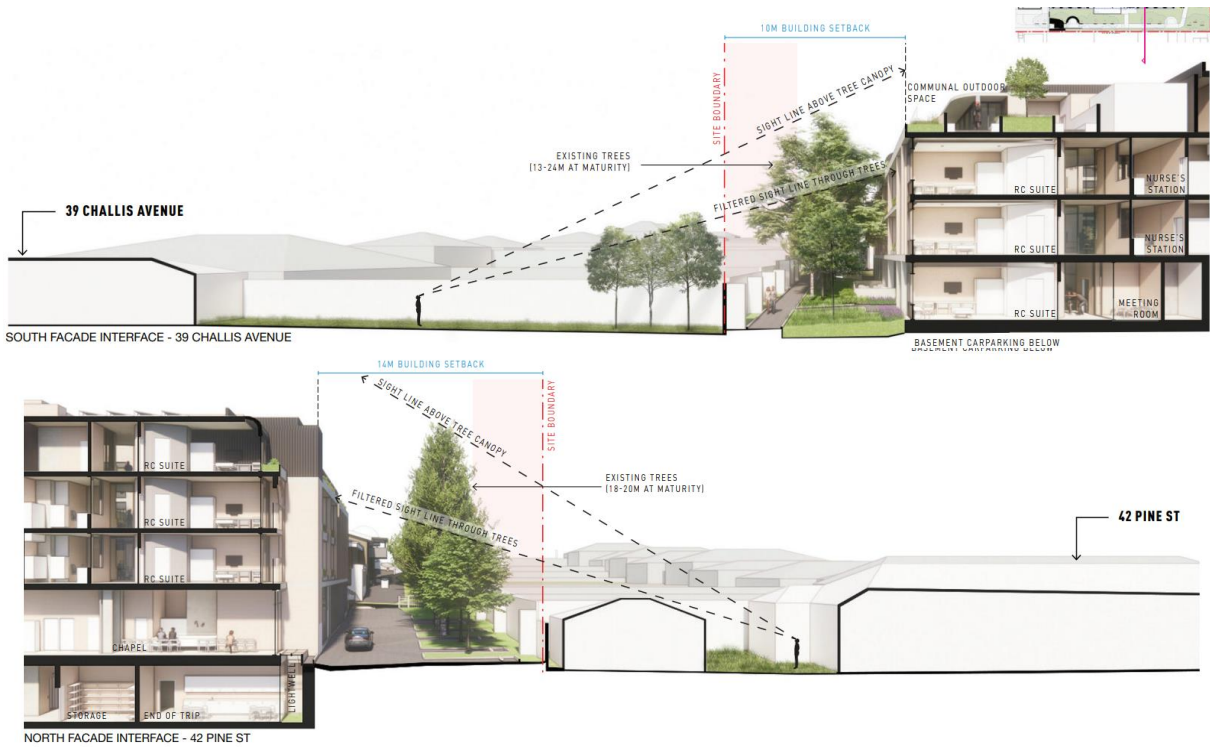


Figure 8: Proposed Sightlines

Source: Jackson Teece

(e) to increase the tree canopy and to protect the use and enjoyment of private properties and the public domain.

The additional GFA sought over and above the permitted 0.6:1 FSR does not result in the loss of significant tree canopy compared to a building height and FSR compliant proposal, which may require tree loss due to reduced boundary setbacks. Instead, the building footprint has been reduced from the existing building footprint, and greater setbacks have been provided, with the additional FSR incorporated within this compact footprint.

As outlined under objective (d), the reduced footprint and increased setbacks enhance the enjoyment of private properties by creating greater building separation, thereby improving privacy and minimising visual impact. Furthermore, the FSR non-compliance does not adversely impact the public domain, as the design ensures the development integrates with the surrounding context while maintaining public amenity and character.

Based on the above detailed assessment and application of the first Wehbe Test, it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the development application.

4.2 Clause 4.6(3)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018, assists in defining “sufficient environmental planning grounds” for the purposes of cl. 4.6(3)(b). Preston J observed:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*

24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

25. *The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

As per the findings of *Initial Action Pty Ltd v Woollahra Council*, a two-limb test applies in the circumstance of satisfying cl. 4.6(3)(b).

1. Are the environmental planning grounds advanced in the written request sufficient to justify contravening the development standard?
2. Does the written request demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied that the written request has adequately addressed this matter?

Avoiding adverse impacts constitutes sufficient environmental planning grounds as it promotes ‘good design and amenity of the built environment’ – one of the objects of the EP&A Act.

When considering the avoidance of impacts and the compatibility with surrounding residential environments, reference is made to the planning principles within *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191; such principles determined that compatibility is not about ‘sameness’ but rather about a proposal’s ability to exist in harmony with its surroundings.

Compatibility also relates to the acceptability of a proposal’s physical impacts on surrounding development. When considering the proposal’s compatibility with the surrounding area, the two tests used in Senior Commissioner Roseth’s findings are as follows:

Test 1 - Is the proposal’s appearance in harmony with the buildings around it and the character of the street?

The proposed development demonstrates compatibility with its surroundings and ensures visual harmony with the character of the street on the basis that:

- The proposal’s design incorporates materials and architectural elements consistent with the federation-style double-brick houses in the area, using brick and dark metal cladding to complement the existing built form. Despite the non-compliance this consistency ensures that the

proposal is compatible with the surrounding built form character while also ensuring that it is signaling the site's uses for aged care premises.

- The proposed built form development is compatible with and reinforces the longstanding use and institutional character of the site for both aged care and educational uses.
- The development continues to enhance and retain much of the existing mature vegetation the heritage wall, which will ensure that these elements are maintained as key characteristics of the site as seen from within and external to the site.

Moreover, it would be expected that given the site's unique uses and larger site that a 15% increase in additional floor space would not be out of context given these differences when compared to the surrounding low density residential character. The modest additional floor space allows these uses of the site to be retained that have been characteristic of the locality for a long time.

By adopting a sensitive and contextually appropriate design and landscape approach, the proposal meets the requirements of Test 1, establishing its ability to coexist harmoniously within its setting and justifying the proposed variation to the FSR development standard.

Test 2 - Are the proposal's physical impacts on surrounding development acceptable? The physical impacts include constraints on the development potential of surrounding sites.

The physical impacts of the proposal on surrounding development are acceptable, with the FSR non-compliance introducing no significant additional impacts to neighbouring properties – as outlined in this report and in the EIS.

The reasons for this are that the development maintains substantial setbacks of 10m to the southern boundary, 14m to the northern boundary, and 15m to Marrickville Avenue, and largely preserves the privacy, solar access, and outlook of adjacent properties. Overshadowing impacts are minimal and limited to early or late hours of the day, with no additional impact compared to a compliant scheme, ensuring that neighbouring properties experience no unreasonable adverse effects.

The FSR non-compliance does not necessitate the removal of additional mature trees beyond those required for a compliant proposal. This ensures the existing tree canopy and natural screening are maintained, preserving the visual and environmental amenity of adjoining sites. Furthermore, the centralised distribution of additional floor space avoids encroachment on neighbouring properties and ensures the development provides appropriate transition between the proposed density and that of the surrounding built form.

By increasing building setbacks, mitigating visual impacts, and preserving the existing trees that provide physical buffers, the proposal satisfies Test 2 as it demonstrates that adverse impacts promote the "good design and amenity of the built environment".

However, this is not sufficient to satisfy Clause 4.6(3)(b) on environmental planning grounds. This is because there is also a further and separate Clause 4.6 variation to building height. The combined and additional environmental planning grounds are relied upon are below:

- The proposed non-compliances still ensures that the combined bulk and scale of development is compatible with the existing streetscape character, thereby promoting the good design and amenity of the built environment,
- The proposal provides high-quality architectural design that complements heritage character of the area,
- The non-compliance still ensures most significant trees are retained when compared to a compliant proposal.

- The proposed non-compliance will facilitate the orderly and economic development of the site for the purposes of a 'seniors housing', especially as it will be providing additional beds and facilities for the local community.
- The proposed contraventions in height and floor space allow for greater and improved public benefit by facilitating the provision of additional essential social infrastructure in the form of a high-quality residential care facility for seniors.

This proposal allows for a charitable organisation not only to continue to support the community but also increase that support. More specifically the development directly addresses a critical community need for accessible aged care services, contributing to the well-being of vulnerable populations. By utilising the increased floor space allows the Maronite Sisters to provide additional residential care facility beds, by optimising the site's potential and enhancing its capacity to deliver meaningful social outcomes.

In addition to the above environmental planning grounds, the proposed non-compliance is justified through adherence to the relevant objectives under s.1.3 of the *Environmental Planning & Assessment Act 1979* as demonstrated below.

Table 2: EPA Act Section 1.3 Assessment

SECTION 1.3	OBJECT	ASSESSMENT
(a)	<i>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,</i>	The proposed non-compliance does not adversely impact the proper management, development, and conservation of the State's natural and other resources.
(b)	<i>To facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,</i>	Economically, the proposal addresses local demand for seniors' housing while optimising land use and supporting job creation. Environmentally, it minimises impacts by not requiring the removal of additional vegetation when compared to a compliant proposal. Socially, it promotes community well-being by providing additional high-quality residential care with modern amenities while maintaining privacy, solar access, and compatibility with the local character.
(c)	<i>To promote the orderly and economic use and development of land,</i>	The proposed development promotes the orderly and economic use and development of land by optimising the site's potential for seniors' housing while maintaining compatibility with the surrounding area. The design achieves a high yield through efficient use of space, allowing for necessary amenities, landscaped areas, and parking facilities without compromising local character or amenity. The proposal's compact footprint and retention of the majority of the mature vegetation balance development needs with tree preservation, ensuring sustainable land use that meets current and future community demands.
(d)	<i>To promote the delivery and maintenance of affordable housing,</i>	The proposed non-compliance promotes the delivery and maintenance of affordable housing by providing additional high-quality seniors' housing, which enables older residents to transition from their existing homes. This transition increases the availability of housing stock in the local area, contributing to improved housing supply and affordability as a secondary impact.
(e)	<i>To protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,</i>	The proposed development protects the environment by not requiring additional tree removal when compared to a compliant proposal.

SECTION 1.3	OBJECT	ASSESSMENT
(f)	<i>To promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),</i>	The proposed development promotes the sustainable management of built and cultural heritage, including Aboriginal cultural heritage, by minimising site disturbance through the FSR non-compliance, as it provides for additional residential care facility beds within the existing compliant development footprint, reducing excavation. An Aboriginal Cultural Heritage Assessment Report (ACHAR) at Appendix AA confirmed no registered Aboriginal sites within the boundaries but identified potential for sub-surface archaeological resources, with mitigation measures such as test excavations and heritage interpretation to manage impacts. The design respects the non-Aboriginal heritage character of the area through sensitive architectural cues, reuse of boundary wall bricks, and maintaining the site's religious and cultural significance under the Maronite Sisters' stewardship.
(g)	<i>To promote good design and amenity of the built environment</i>	The proposal promotes good design and amenity through its high-quality materials, articulated facades, and generous setbacks, ensuring compatibility with the local character. The FSR non-compliance does not adversely impact tree retention, landscaping, and effectively mitigates privacy, solar access, and streetscape integration through the provision of substantial setbacks in order to deliver good design and preserve the amenity of the built environment.
(h)	<i>To promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,</i>	The non-compliance does not result in any adverse impacts relating to the construction and maintenance of buildings.
(i)	<i>To promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,</i>	The non-compliance does not hinder the sharing of responsibility for environmental planning and assessment between different levels of government in the State.
(j)	<i>To provide increased opportunity for community participation in environmental planning and assessment.</i>	The non-compliance does not hinder the opportunities available for public participation in the environmental planning and assessment process.

5 Conclusion

Having regard to the clause 4.6 contravention provisions we have formed the considered opinion:

- that the contextually responsive development is consistent with the objectives of Clause 4.4 of the IWLEP 2022, and
- that there are sufficient environmental planning grounds to justify contravening the development standard, and
- that having regard to (a) and (b) above, compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of the case.

The consent authority can be satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3), being:

- 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.*

In conclusion, the proposed FSR contravention, facilitated through a carefully considered design, balances site constraints with superior planning and environmental outcomes. The proposal maintains compatibility with the surrounding context, and delivers sustainable, high-quality design outcomes that are comparable or exceed those of compliant alternatives.

Furthermore, if the development were to comply with the maximum FSR for the site, it would result in approximately 40 less aged care beds for the community. This outcome is not acceptable at time when the aged population is growing and residential accommodation of all types, including aged care premises, is very much in need.

We are therefore of the opinion that there are no statutory or environmental planning impediments to the granting of the FSR contravention, and therefore, the proposed development should be approved for the reasons outlined above.

