



Clause 4.6 Variation

Upper-Level Setback

36-42 Cabbage Tree Road, Bayview

Prepared for Opal Healthcare Bayview

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Executive Summary

Clause 4.6 of the Pittwater LEP (PLEP) 2014 enables the consent authority to grant consent for development even though it contravenes a development standard. Its objectives are to provide an appropriate degree of flexibility in applying certain development standards and to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Clauses 4.6(3) requires that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances, and
- There are sufficient environmental planning grounds to justify the contravention of the development standard.

The table below provides a summary of the key matters required to be considered in a Clause 4.6 Variation, as set out in the Department of Planning, Housing and Infrastructure's *Guide to Varying Development Standards November 2023*.

Where is the development site?	The Opal HealthCare Bayview site comprises a 6,063m ² portion of the existing Aveo Bayview Gardens Retirement Living (BGRL) site, at 36-42 Cabbage Tree Road, Bayview.
What is proposed development?	This State Significant Development Application (SSDA) seeks approval for the redevelopment of a disused aged care building for a new Residential Care Facility (RCF) to be known as Opal Healthcare Bayview. The Opal Healthcare Bayview site will be split from the existing Aveo BGRL site via a Torrens title subdivision and will comprise a 3-4 storey RCF comprising 177 beds and basement parking.
What is the variation?	The proposal seeks a variation to Section 84 of the <i>State Environmental Planning Policy (Housing) 2021</i> (Housing SEPP), which prescribes development standards for housing for seniors housing in zones where residential flat buildings are not permitted. Specifically, Section 84(2)(c)(iii) requires that any storey above two, be set back within a 45-degree plane projected inwards from all side and rear boundaries. The proposed RCF exceeds this standard on all relevant boundaries. The non-compliance results primarily from the internal Torrens Title subdivision boundary between the Opal Healthcare site and the adjoining Aveo BGRL site, as well as the inclusion of rooftop planter boxes forming part of balustrades. Importantly, the exceedances are internal to the overall seniors housing village, and do not impact adjoining residential properties.
Why is compliance with the upper-level setback development standard is unreasonable and unnecessary in the circumstances of the case?	The proposal achieves the objectives of the Housing SEPP, notwithstanding the non-compliance as: • It facilitates the delivery of a purpose-built RCF providing a much-needed housing typology within the Northern Beaches LGA. The non-compliance with the upper-level setback allows for appropriately sized and functional floor plates that support the operational needs of contemporary aged care accommodation. • It maintains a high standard of residential amenity through design and articulation. The setback exceedances are minor, occur largely to the Aveo boundaries, and result in negligible visual or overshadowing impacts. The building form is softened by balconies, planter boxes, and roof stepping, ensuring a positive visual impact. • It makes effective use of existing infrastructure and services, being located within an established seniors living precinct with existing access, utilities, and support facilities. The variation enables the most efficient use of the constrained site. • The variation enables a functionally superior and more accessible residential care facility, directly supporting the objectives of the Housing SEPP and the delivery of high-quality seniors housing on a suitable, serviced site.

What are the sufficient environmental planning grounds to justify contravention of the development standard?

The environmental planning grounds to justify contravention of the upper-level setback standard are:

- The variation arises from the introduction of a new internal lot boundary, rather than from inappropriate bulk or scale. The boundary bisects a shared building interface between compatible uses, limiting the relevance of the setback standard in this context.
- The exceedance largely occurs along an internal boundary within the Aveo BGRL precinct, and any additional shadow cast by the non-compliance falls wholly within that already generated by a compliant building envelope.
- The exceedances are internal to the broader Aveo BGRL precinct and maintain generous separation to external property boundaries. Awnings and planter boxes incorporated along affected upper-level balconies enhance privacy and soften the building edge, providing an improved visual outcome compared to a compliant built form.
- Along the eastern boundary, where part of the non-compliance occurs, achieving full compliance would require shifting the building wing further inward. This would compromise the generous arrival area and reduce the separation between building wings, detracting from the overall site layout and functionality.
- The contravention does not cause additional adverse environmental impacts (such as overshadowing, visual intrusion, or loss of privacy).
- The variation accommodates the site's irregular shape and sloping topography, allowing the building to respond to the undulating topography of the site and maintain accessible floorplates.
- The non-compliance facilitates the delivery of 177 much-needed aged care beds, supporting housing diversity, downsizing, and freeing up family homes in the broader locality.
- The non-compliance occurs between two complementary seniors housing uses, meaning the setback standard's intent, to protect amenity between unrelated residential sites, has limited relevance. The building will read as part of the established village character and will not appear intrusive or overbearing from the public domain.
- The minor variation enables more efficient and legible upper-level layouts that support the household care model.
- The development continues to satisfy the objectives of the R2 Low Density Residential Zone, providing for housing diversity, community services, and compatible land uses.

In light of the above that the consent authority can be satisfied that there are sufficient grounds to support the proposed variation.

1.0 The Development Site

 Address	36-42 Cabbage Tree Road, Bayview
 Legal Description	Lot 121 in DP789400
 Site Area	6,063m ²
 Owner	Aveo Group Ltd.

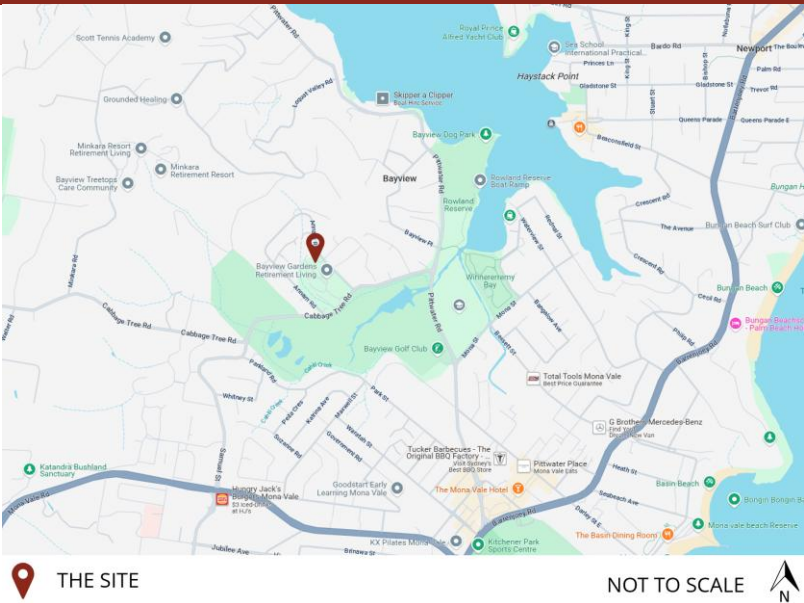


Figure 1 Location Plan



Figure 2 Aerial Photo

2.0 The Proposed Development

The Opal Healthcare Bayview development proposes the redevelopment of an existing, disused aged care building on the site for the construction of a new RCF.

Specifically, the development comprises:

- Demolition of the existing aged care building and driveway on the site;
- Construction of a three-storey building, accommodating:
 - 177 beds,
 - Basement parking,
 - Ground floor ancillary facilities;
- Construction of a 182m² community room, to be located on the Aveo BGRL site;
- Construction of a new driveway, to be located on the Aveo BGRL site;
- Torrens Title subdivision of the Opal Healthcare Bayview site from Aveo BGRL;
- Associated amenities and landscaping works;
- Augmentation of, and connection to, existing utilities as required.

Architectural drawings and a design report prepared by CalderFlower illustrating the proposed development are included with the SSDA. An artist Impression of the proposed development is shown at **Figure 3**.



Figure 3 Artist Impression

Source: Calderflower

3.0 The Proposed Variation

This section outlines the relevant environmental planning instrument (EPI), the development standard to be varied and proposed variation.

Table 1 Planning instrument, development standard and proposed variation

Matter	Comment
Environmental planning instrument (EPI) sought to be varied	State Environmental Planning Policy (Housing) 2021
The site's zoning	Zone R2 Low Density Residential The objectives of this land use zone are: (a) <i>To provide for the housing needs of the community within a low density residential environment.</i> (b) <i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i> (c) <i>To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.</i>
Development standard sought to be varied	Section 84 Development Standards - General Section 84 of the Housing SEPP is contained within Division 3 Development Standards under Part 5, which applies to housing for seniors or people with a disability. Although neither Part 5 or Section 84 includes specific objectives, the intent of Section 84(2)(c) is to regulate the form and scale of development to ensure it is appropriate to its context and adjoining properties. This clause sets standards for building height and scale in zones where residential flat buildings are not permitted. Importantly, the Principles of the Policy as outlined in Chapter 1, Section 3 are: (a) <i>enabling the development of diverse housing types, including purpose-built rental housing,</i> (b) <i>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,</i> (c) <i>ensuring new housing development provides residents with a reasonable level of amenity,</i> (d) <i>promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,</i> (e) <i>minimising adverse climate and environmental impacts of new housing development,</i> (f) <i>reinforcing the importance of designing housing in a way that reflects and enhances its locality,</i> (g) <i>supporting short-term rental accommodation as a home-sharing activity and contributor to local economies, while managing the social and environmental impacts from this use,</i> (h) <i>mitigating the loss of existing affordable rental housing.</i> Section 84 stipulates: (2) <i>Development consent must not be granted for development to which this section applies unless—</i> (iii) <i>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.</i>
The proposed Variation	The proposed development exceeds the upper-level setback on all boundaries. Figure 4 illustrates the proposed variation to the upper-level setback development standard. The exceedance is largely due to the location of the upper level in relation to the nominal internal boundary between the Opal site and the adjoining Aveo land. Whilst this is a legal property boundary, separating the Opal Bayview site from the Aveo BGRL site, the two sites will contextually form part of a single integrated seniors housing precinct. It is noted that the building footprint extends over this boundary into the portion of the community centre located in the Aveo site, preventing the proposal from complying with this standard. All exceedances are internal to the village and will not result in any significant impacts on the streetscape or adjoining residential properties.



Figure 4 Proposed Variation

Source: Calderflower

4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Pittwater LEP 2014 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) 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.*

These key considerations are considered in their respective sections below.

4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary

This Clause 4.6 Variation request establishes that non-compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved. Accordingly, the variation to the upper-level setback control is justified pursuant to the 'First Method' outlined in Wehbe.

The discussion under the following subheadings demonstrates how the proposed development, inclusive of the upper-level setback variation, achieves the objectives of the Housing SEPP and the R2 Zone notwithstanding the non-compliance.

4.1.1 Assessment Against the Housing SEPP Objectives

Objective 3(a) enabling the development of diverse housing types, including purpose-built rental housing

The proposal delivers a purpose-built RCF comprising 177 beds, specifically designed to meet contemporary aged care standards and in response to the significant and growing demand for this typology. This contributes to housing diversity within the Northern Beaches LGA by providing accommodation distinct from ILUs and standard residential housing. The development incorporates specialised facilities, communal areas, and care services tailored to the needs of seniors requiring high-level support, broadening housing choice. The proposal also delivers 16 dementia-care beds responding to a growing demand in the area.

The non-compliance with the upper-level setback control will facilitate this outcome by ensuring appropriate floor plates to meet the functional requirements of the facility.

Objective 3(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

The RCF will exclusively accommodate seniors and people with a disability, addressing an identified demographic with limited housing options. It will provide accessible design, specialist care services, and on-site support for residents with high-care needs. By enabling older residents to move from underutilised family homes into supported accommodation, the proposal indirectly benefits moderate- and low-income households by increasing housing turnover in the broader market.

The minor encroachments beyond the upper-level setback plane are necessary to maintain functional floor plates for the care households and to facilitate usable outdoor areas attached to these households. This design ensures accessible and efficient movement throughout the building and the delivery of high-quality care, directly meeting the needs of senior residents.

Objective 3(c) ensuring new housing development provides residents with a reasonable level of amenity

The proposed development has been designed to provide all dwellings with high quality internal amenity and outlook. A detailed assessment against the Seniors Housing Design Guide is provided at **Appendix K** of the EIS, which confirms the development is consistent with the design criteria. Specifically:

- The exceedance largely occurs along an internal boundary within the Aveo precinct, and any additional shadow cast by the non-compliance falls largely within that already generated by a compliant building envelope and/or does not impact other dwellings or open space.
- The portions of the building that exceed the 45-degree plane are relatively minor and well-articulated through roof stepping, balconies, and planter boxes. These elements reduce perceived mass and contribute positively to façade modulation.
- The exceedances are internal to the broader seniors living precinct and maintain generous separation to external property boundaries. Planter boxes incorporated along affected upper-level balconies enhance privacy and soften the building edge, providing an improved visual outcome compared to a compliant built form.
- The variation accommodates the site's irregular shape and sloping topography, allowing the building to respond to the undulating topography of the site and maintain accessible floorplates.
- The minor variation enables more efficient and legible upper-level layouts that support the household care model. The resulting floorplates provide logical circulation, greater access to daylight and views, and improved operational outcomes for residents requiring mobility or cognitive support.
- The non-compliance occurs between two complementary seniors housing uses, meaning the setback standard's intent, to protect amenity between unrelated residential sites, has limited relevance. The building will read as part of the established village character and will not appear intrusive or overbearing from the public domain.

Overall, the non-compliance with the upper level setback control does not reduce the amenity available to future residents nor residents of the surrounding Aveo development.

Objective 3(d) promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services

The site forms part of the established Aveo BGRL site, benefitting from existing road access, utility connections, and proximity to local services and transport. On-site facilities will be supplemented by operational transport services for residents, enabling access to off-site amenities. The location leverages existing infrastructure capacity, avoiding the need for significant new public investment.

The upper-level setback variation facilitates the most efficient and appropriate use of the constrained site within the existing Aveo BGRL precinct. By allowing a functional building form within the constrained site, the variation ensures that the redevelopment optimises existing infrastructure and services.

Objective 3(e) minimising adverse climate and environmental impacts of new housing development

A range of Ecologically Sustainable Development (ESD) initiatives have been implemented to allow the development to achieve the relevant performance targets. These aim to reduce environmental impacts associated with the development and ensure industry benchmarks are achieved. Specifically, the development will be an all-electric building, supported by on-site renewable energy generation, capable of complying with the NCC Section J. This is further discussed within the EIS, as well as the ESD and Section J Reports, provided at **Appendix X** and **Appendix Y** of the EIS respectively.

The setback variation does not increase environmental impacts or affect compliance with sustainability initiatives, as discussed at **Section 4.2.3**.

Objective 3(f) reinforcing the importance of designing housing in a way that reflects and enhances its locality

The proposal responds appropriately to the established character and environmental qualities of Bayview. The built form has been designed to follow the site's natural topography and integrate with existing vegetation. Materials are low-maintenance and suited to the coastal environment, ensuring compatibility with the surrounding built form and long-term resilience.

The non-compliance occurs between two complementary seniors housing uses and the building will read as part of the established village character and will not appear intrusive or overbearing from the public domain. The development retains existing trees where possible and introduces new landscaping consistent with the local planting palette, reinforcing the landscape character of the area. The building's scale, setbacks and articulation reduce visual bulk and ensure compatibility with adjoining residential development and the broader Aveo BGRL precinct. Passive design

measures, including orientation for solar access and provision for natural ventilation, further improve environmental performance and residential amenity.

The non-compliance is largely internal to the broader Aveo BGRL site and screened from the public domain. It allows the built form to respond to the undulating topography of the site, avoiding step downs and maintaining accessible floor plates, consistent with the Seniors Housing Design Guide.

Objective 3(g) supporting short-term rental accommodation as a home-sharing activity and contributor to local economies, while managing the social and environmental impacts from this use

As the proposal does not involve short-term rental accommodation, the objective is not directly applicable. However, it will contribute to the local economy through job creation and local spending, with social and environmental impacts managed through design and operation.

Objective 3(h) mitigating the loss of existing affordable rental housing

Not applicable. The site is currently occupied by a disused aged care facility and does not contain any affordable rental housing stock. Notwithstanding, as noted above, the development will contribute to broader housing affordability objectives by facilitating 'right-sizing', enabling older residents to transition into more suitable accommodation and, in turn, freeing up existing housing stock for younger families.

4.1.2 Assessment Against the R2 Zone Objectives

The proposed development (inclusive of the proposed upper-level setback exceedance) is consistent with the objectives of the R2 land use zone, as presented in **Table 2**.

Table 2 The proposed development's alignment with the objectives of the R2 zone

Objective	Alignment
<i>To provide for the housing needs of the community within a low density residential environment.</i>	The RCF delivers much-needed residential aged care accommodation, addressing the housing needs of the community within a predominantly low-density setting. The upper-level setback exceedance largely results from the site topography, irregular lot shape and functional RCF requirements, allowing the development to better meet the needs of residents through the provision of accessible floor plates, efficient internal circulation, and integrated communal spaces, while still presenting a built form that is consistent in scale with the surrounding residential character.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	The RCF provides 24/7 care, health services, and communal facilities to meet the daily living, health, and social needs of older residents. These services are accessible to residents on-site and are compatible with the surrounding residential context.
<i>To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.</i>	The RCF is a low-intensity residential use, with operational hours and resident activities that are compatible with adjoining dwellings and the broader seniors living precinct. The built form is sensitively designed to integrate with surrounding two- and three-storey developments.

4.2 Clause 4.6(3)(b): Sufficient environmental planning grounds to justify the contravention of the development standard

Clause 4.6(3)(b) of the LEP requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. 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 at [24]*). 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 at [60].

In this instance, the relevant aspect of the development is the proposed exceedance of upper-level setback. There are sufficient environmental planning grounds to justify this contravention, as described below.

4.2.1 New Lot Boundary

The proposal's setback exceedance is predominantly due to the creation of a new Torrens Title boundary within a broader, already developed seniors housing precinct. This irregularity results in situations where, when applying the 45-degree setback plane from the new boundary, small portions of the building's upper levels intersect the plane despite the overall bulk and scale being appropriate to context.

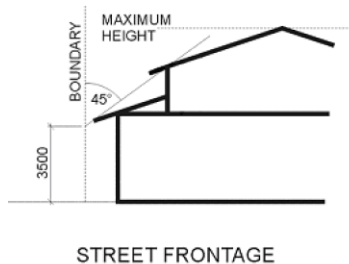
The boundary itself is not reflective of a typical stand-alone residential site, rather, it is an internal boundary between two complementary land uses within an integrated precinct. In this context, the upper-level setback standard has less relevance in terms of managing amenity impacts between unrelated properties, as both sides of the boundary are developed and operating as compatible seniors housing uses. The resulting non-compliance is therefore technical in nature and does not create adverse environmental or residential outcomes.

The existing serviced apartment building proposed for demolition is physically connected to a community centre located to the east on the Avea BGRL site. While the community centre itself will be maintained, the proposed demolition works will necessitate make good and minor alterations and additions to ensure the centres ongoing functionality and compliance with relevant standards. As such, it is emphasised that the proposed lot boundary effectively bisects this building, reinforcing the point that the non-compliance arises as a by-product of the subdivision, rather than an issue of built form or amenity.

4.2.2 Development Control Plan Standard

Section D2.7 of the Pittwater Development Control Plan 2021 (PDCP) prescribes a building envelope that has a similar intent to Section 84(2)(ii) of the Housing SEPP but is measures from 3.5 above the boundary, rather than at the natural ground level. This difference in measurement point means the DCP control results in a more generous envelope.

Specifically, Section D2.7 Building Envelope of the PDCP stipulates that *buildings are to be sited within the following envelope*:



As demonstrated in **Figure 5** below, the proposed building sits within the DCP envelope for the majority of the boundary, with minor encroachments at some roof edges, balconies and corners. These minor exceedances are a result of the site's irregular slope and shape. Despite this, the overall built form remains consistent with the surrounding character and sites, many of which will not be subject to the Section 84 standards due to land uses.

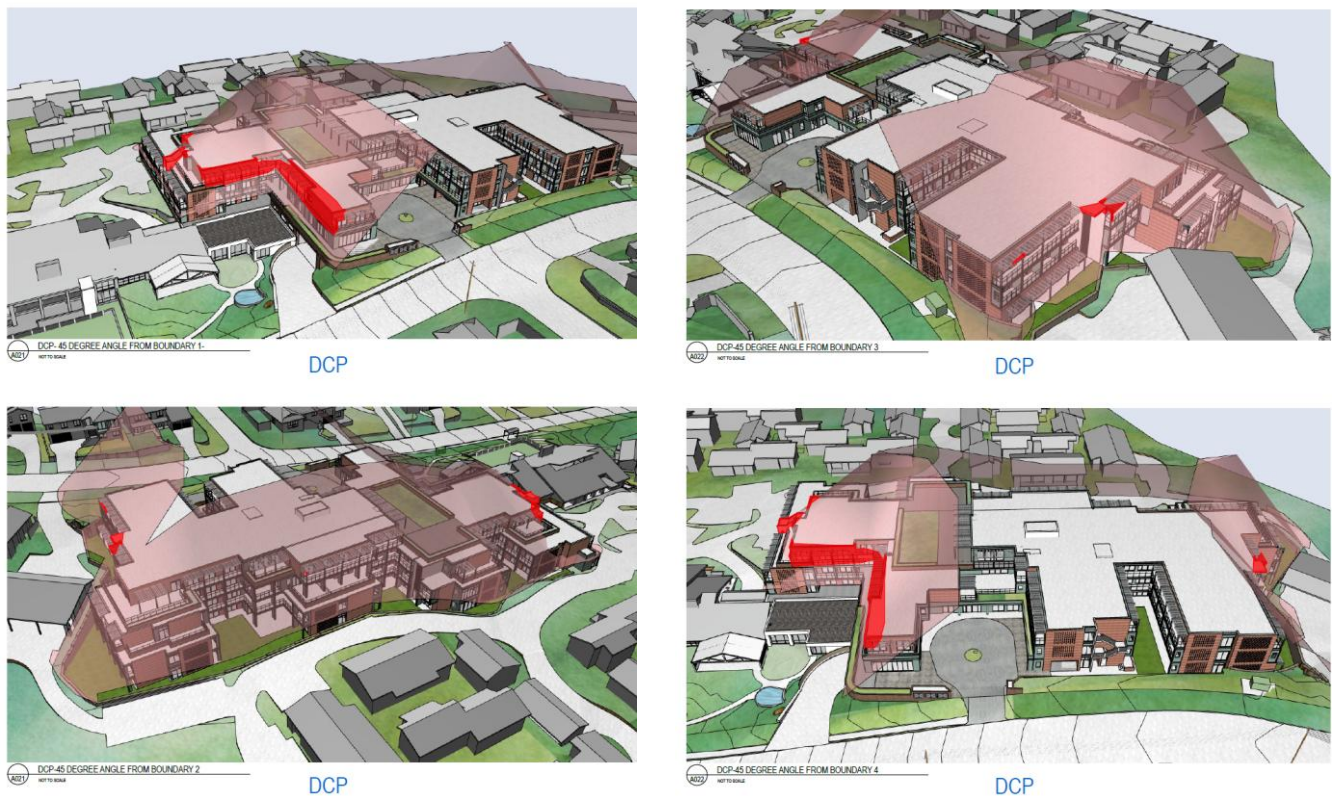


Figure 5 Proposed Variation to the DCP Standard
Source: Calderflower

4.2.3 Environmental Impacts

The proposed upper-level setback exceedance will not generate any adverse environmental impacts such as overshadowing, privacy or visual impacts. As illustrated within the shadow diagrams (**Figure 6**), the proposed development, inclusive of the proposed variations, will not result in any unreasonable overshadowing impacts.

The proposal generally improves solar access to the Annam Road street frontage by reducing shadowing in this area compared to the existing built form. Most of the additional shadow generated will fall within the site boundary, ensuring minimal impact on neighbouring properties. A small amount of additional shadow will extend onto the adjoining Aveo BGRL site to the west, although this represents only a very slight change from existing conditions. The building has been carefully designed and orientated to mitigate overshadowing impacts, with an articulated and stepped form that follows the natural topography. Substantial landscaping and generous setbacks further assist in softening the built form and maintaining sunlight access to surrounding residential properties.

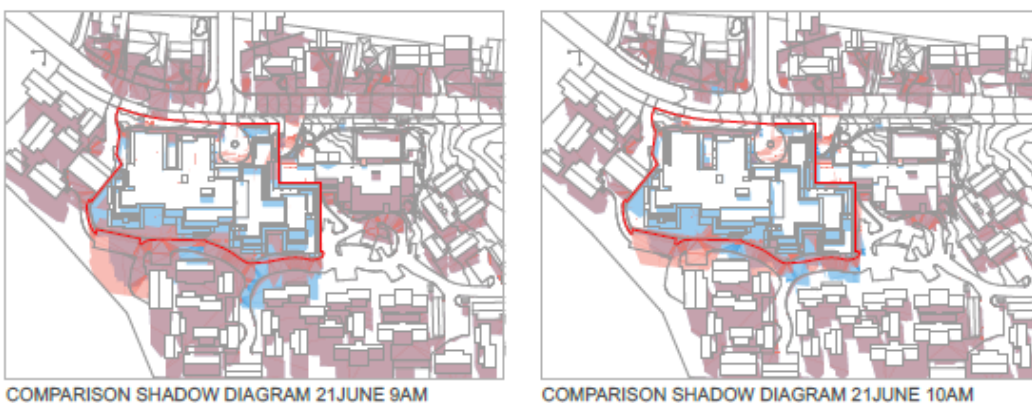




Figure 6 Shadow Diagrams

Source: Calderflower

In terms of visual impact, the proposed development, including the exceedance, has been designed to minimise impacts on the surrounding area and neighbouring properties. The building is located within the established Aveo BGRL precinct and will be perceived as part of the existing village character rather than a standalone element in the streetscape. Existing vegetation along Annam Road, supplemented by new landscaping, provides effective screening and softens views from the public domain. The built form is appropriately scaled relative to existing village buildings and steps with the topography to reduce bulk and scale. Articulation, varied roof forms and material treatments further break down the massing so that the building does not present as monolithic or intrusive.

It is noted that a large portion of the exceedance comprises floor space along the eastern boundary. In this location, achieving full compliance would require shifting the building wing further inward. This would compromise the generous arrival area and reduce the separation between building wings, detaching from the overall site layout and functionality. Additional setback of the upper levels is not possible due to the absence of floor space behind the wings. Importantly, the proposed building form, with wings stemming from the building core, is consistent with the Seniors Housing Design Guide.

Rooftop planter boxes, constitute part of the exceedance when viewing the building from Boundary 1 and Boundary 4 (**Figure 4**). These planter boxes form part of the balustrade and have been included to provide visual screening and enhance privacy. Accordingly, the exceedance in this location can be considered to deliver a positive outcome, as the additional landscaping and treatment reduce potential overlooking.

4.2.4 Delivery of Seniors Housing

The proposed development comprises 177 beds within a purpose-built RCF. This significant provision of beds will enable the delivery of residential aged care accommodation, foster social connection, and provide essential support services for older residents, thereby directly meeting identified community needs. The proposal will replace a vacant and disused building on the site, optimising the use of underutilised land and improving the visual and functional contribution of the site to the locality.

The proposed development, including the minor upper-level setback exceedance, is inherently linked to the broader goal of optimising the use of an underutilised site for the delivery of much needed aged care beds to address current and future demand. This helps alleviate pressure on the public health care system and supports housing availability through 'right-sizing'.

In light of the above, it is clear that the site's topography, and the minimal environmental impacts posed, together with the delivery of much-needed seniors housing, provides sufficient environmental planning grounds to justify the contravention to the upper-level setback of building development standard.