



# CLAUSE 4.6 VARIATION TO HEIGHT OF BUILDINGS DEVELOPMENT STANDARDS IN THE SENIORS LIVING SEPP

**The Queenscliff Project**

GLN 11090: 13 May 2022

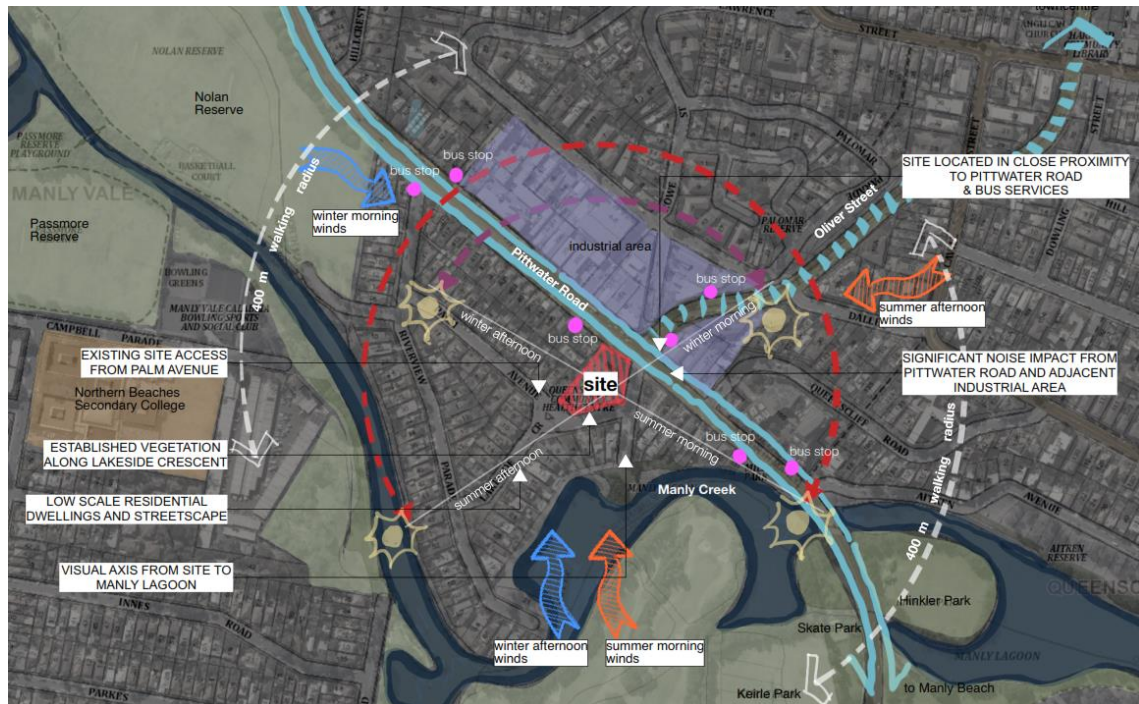


development is situated on surplus land owned by Landcom, and will be known as the Queenscliff Project, an innovative partnership between Link Wentworth Limited and Landcom.

### Location

The site is located within North Manly within the Northern Beaches Council LGA. The site is located approximately 11 kilometres north east from the Sydney CBD, 2 kilometres north west from Manly town centre, and 700 metres south west from Freshwater town centre. Within close proximity of the Site are Manly Creek, industrial lands, low density residential land uses, and a number of public reserves.

**Figure 1** illustrates the surrounding locality including public transport and urban amenities in the area.



Source: Integrated Design Studio, DA-002 REV C

Figure 2. Surrounding locality

### The Site

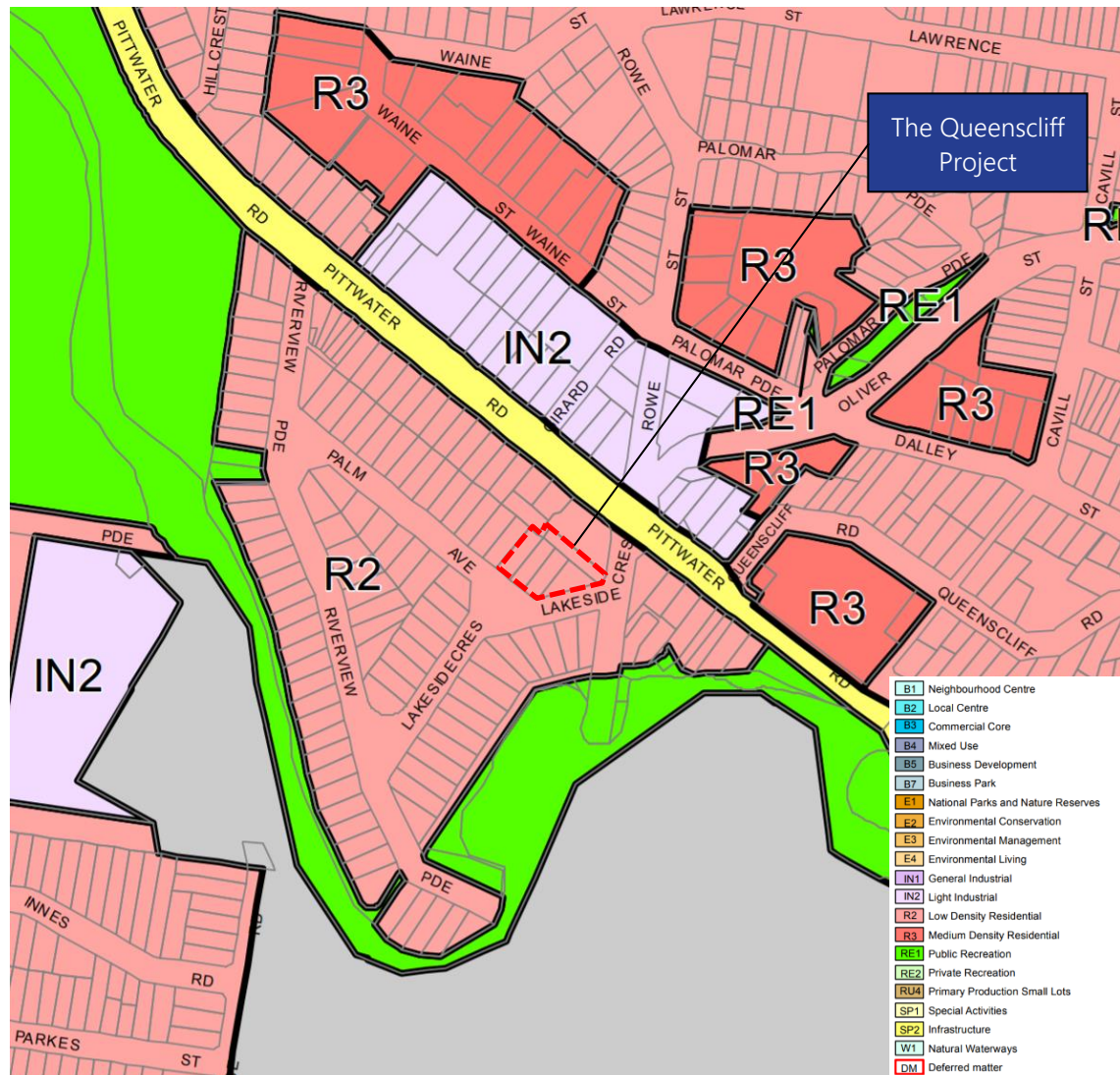
The site is part of 6 allotments of various sizes and is legally registered as Lot 22 DP 865211, 389 Pittwater Road; Lot 1 DP 544341 and Lot 46, 47 & 48 DP 12578; 2-4 Lakeside Crescent and Lot 45 DP 12578, 8 Palm Avenue, North Manly NSW 2100. The site is located on the corner of Lakeside Crescent and Palm Avenue. A separate Development Application (**DA**) has been lodged to consolidate and re-subdivide the site into 4 lots. The Site the subject of the DA is proposed Lot 1.

The site was formerly used as the Queenscliff Community Health Centre, with scattered trees and gardens located on the site, the majority of which have frontage towards Pittwater Road, which is a classified road. Vehicular access to the site is available from a driveway accessed from Palm Avenue.



## Zoning

The site is zoned R2 Low Density Residential under *Warringah Local Environmental Plan 2011* (the **LEP**) as shown in **Figure 3**. Boarding houses are permissible with consent in this zone, while seniors housing is prohibited in the zone. However, *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (**SL SEPP**) overrides the LEP in this instance and permits seniors housing on the site.



Source: NSW Planning Portal, 2021

Figure 3. Land zoning map

## Summary of Clause 4.6 Request

This DA proposes the adaptive re-use of the former Queenscliff Community Health Centre. The proposed development in part exceeds the maximum 8 metre maximum building height and 2 storeys height limit under the SL SEPP. A variation to the development standard is sought having regard to the site context, the circumstances where the proposal involves the adaptive reuse of an existing building, compliance with the objectives of the standard, and a site responsive design that

provides a high level of internal amenity and social interaction without adversely impacting the amenity of surrounding properties.

It is noted that the existing structure is 2-3 storeys in height, and therefore the additional height increase will result in an extension of the existing 3 storey structure, representing a minor increase to the scale of the development that is generally contained within the height plane of the existing building. The Affordable Rental Housing SEPP and other provisions in the Seniors SEPP (clause 50) also provide height related controls, although these cannot be used to refuse development consent. These are not understood to be development standards and therefore it is unclear whether those provisions prevail. Consequently, this clause 4.6 submission is made for abundant caution.

## **2. Authority to vary a development standard**

The objectives of clause 4.6 of the Warringah LEP seek to recognise that in particular circumstances strict application of development standards may be unreasonable or unnecessary. The clause provides objectives and a means by which a variation to the standard can be achieved as outlined below:

*(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 for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—*

*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

*(4) Development consent must not be granted for development that contravenes a development standard unless—*

*(a) the consent authority is satisfied that—*

*(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

*(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for*

*development within the zone in which the development is proposed to be carried out, and*

*(b) the concurrence of the Planning Secretary has been obtained.*

*(5) In deciding whether to grant concurrence, the Planning Secretary must consider—*

*(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

*(b) the public benefit of maintaining the development standard, and*

*(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

*(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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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.*

*Note—*

*When this Plan was made it did not contain Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU6 Transition or Zone R5 Large Lot Residential.*

*(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*

*(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.*

*(8A) Also, this clause does not allow development consent to be granted for development that would contravene a development standard for the maximum height of a building shown on the Height of Buildings Map on land shown on the Centres Map as the Dee Why Town Centre.*

*(8B) Despite subclause (8A), development on Site C or Site E may exceed the maximum height of building shown on the Height of Buildings Map if the maximum height is allowable under clause 7.14.*

Note, while the standard to be varied is to be found in the SL SEPP, subclause (2) provides that the provisions of clause 4.6 in WLEP can be applied to vary development standards in other environmental planning instruments.

### **3. Development standard to be varied**

A variation is requested to subclauses (4)(a) and (b) in Clause 40 *Development standards—minimum sizes and building height* in SL SEPP which require:

*(4) **Height in zones where residential flat buildings are not permitted** If the development is proposed in a residential zone where residential flat buildings are not permitted—*

*(a) the height of all buildings in the proposed development must be 8 metres or less, and*

...

*(b) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height,*

Clause 3 of the SL SPP dictionary provides the following relevant definitions:

**ground level** means the level of the site before development is carried out pursuant to this Policy.

**height** in relation to a building, means the distance measured vertically from any point on the ceiling of the topmost floor of the building to the ground level immediately below that point.

### **4. Extent of variation**

#### Height

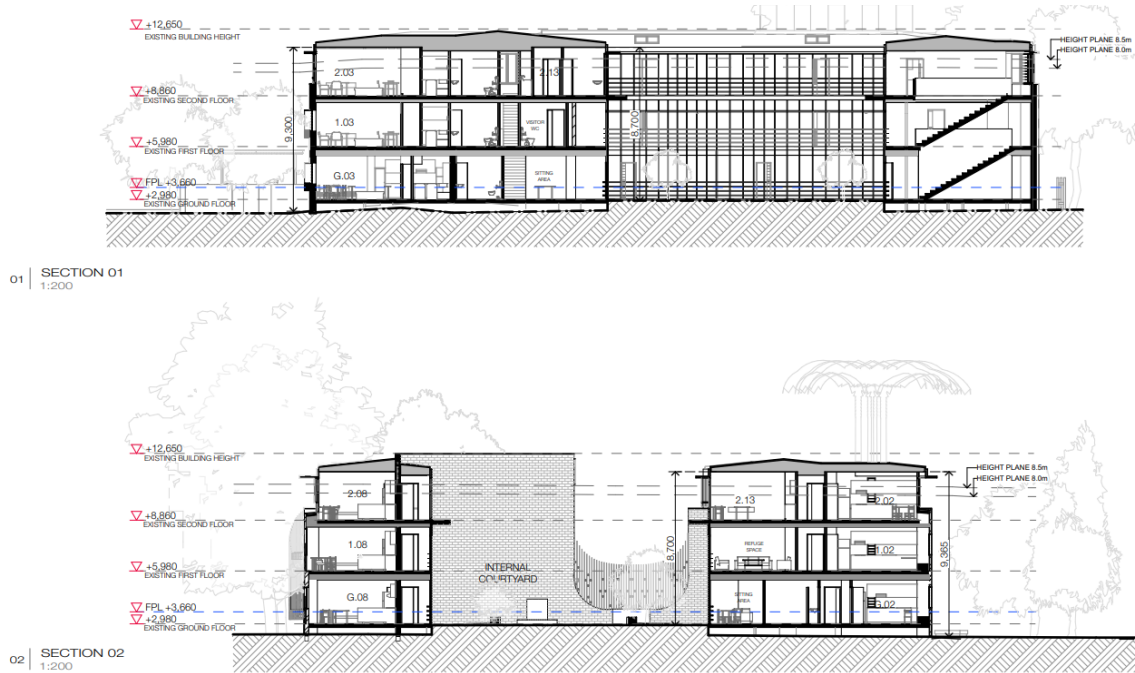
The site has variable levels associated with the slope of the site, with a maximum height of 9.39m proposed, and a variation of between 8.7 metres (8.8%) to 9.39 metres (17.4%) from the development standard.

The sections provided as **Figures 4** and **5** below have been prepared by the project architects to illustrate the existing and proposed height of the development as defined by SL SEPP. Full versions of the plans are provided with the Architectural Plans submitted with the amended DA.

#### Number of Storeys

All of the existing part 2 and part 3 storey building will become a wholly 3 Storey building. The SL SEPP is not clear as to how to determine what part of the building would be considered to be "...adjacent to a boundary of the site." For example, the building is located almost 20 metres from the western boundary of the site and in that respect may not be considered to be "adjacent" the

boundary. However, for abundant caution it is assumed for the purposes of this submission that the building is considered to be adjacent all of the site boundaries. Accordingly, the variation sought relates to one additional storey, for part of the building, beyond the two storey height limit.



Source: Integrated Design Group – DA 3000

Figure 4. Section Plans 1 & 2



Source: Integrated Design Group, - DA 3001

Figure 5. Section Plans 3 & 4



## 5. Objectives of Clause 4.3 Height of building

The SL SEPP does not provide explicit objectives in regard to the relevant height standards. However the following is provided as a note to subclause 40(4)(b):

*Note—*

*The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.*

While contained within a separate environmental planning instrument, the objectives of Clause 4.3 of WLEP, relating to building height, are outlined below:

*(1) The objectives of this clause are as follows—*

*(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

*(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*

*(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

*(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

While the above WLEP objectives are more extensive than the note to subclause 40(4)(b), they are relied on for the purposes of understanding the implicit objectives of the height provisions in SL SEPP, to the fullest extent.

## 6. Assessment

### **Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (Clause 4.3 (3)(a))**

Clause 4.6(3)(a) requires the applicant to provide justification that strict compliance with the maximum building height requirement is unreasonable or unnecessary in the circumstances of the case.

In *Wehbe v Pittwater Council (2007) NSWLEC 827*, Preston CJ established five potential ways for determining whether a development standard could be considered to be unreasonable or unnecessary. These include:

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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

We note that whilst *Wehbe* was a decision of the Court dealing with SEPP 1, it has been also found to be applicable in the consideration and assessment of Clause 4.6. Regard is also had to the Court's decision in *Four2Five Pty Limited v Ashfield Council [2015] NSWLEC 90* and *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7*, which elaborated on how these five ways ought to be applied, requiring justification beyond compliance with the objectives of the development standard and the zone.

In addition to the above, Preston CJ further clarified the appropriate tests for a consideration of a request to vary a development standard in accordance with clause 4.6 in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*. This decision clarifies a number of matters including that:

- the five ways to be satisfied about whether to invoke clause 4.6 as outlined in *Wehbe* are not exhaustive (merely the most commonly invoked ways);
- it may be sufficient to establish only one way;
- the written request must be "sufficient" to justify contravening the development standard; and
- it is not necessary for a non-compliant development to have a neutral or beneficial effect relative to a compliant development.

It is our opinion that the proposal satisfies at least one of the five ways established in *Wehbe* that demonstrate that the development standard is unreasonable and unnecessary in this instance, for the reasons set out below.

#### **1st Way – The objectives of the standard are achieved notwithstanding non-compliance with the standard**

The proposal satisfies the objectives of the standard to the extent relevant to the current proposal, and compliance with the maximum building height standard in the circumstances is considered both unreasonable and unnecessary for the following reasons.

##### Objective (a) - to ensure that buildings are compatible with the height and scale of surrounding and nearby development

The proposal is for adaptive re-use of an existing 2-3 storey building to a 3-storey mixed housing development. The architect has skilfully incorporated the floorspace of the proposed housing substantially within the existing building envelope. Consequently, no unacceptable amenity impacts are generated.

The higher building form is responsive to the site context and will continue to be setback significantly from the western boundaries to ensure that there are no unacceptable adverse solar

or privacy impacts. The design has also been part of an iterative process with the design of the proposed 3 lots along Pittwater Road to ensure that there would be no unacceptable amenity impacts to future residential development on those properties.

The exceedance of the height standard is a consequence of the architectural form of the existing building and roof and lift overrun which provides enhanced amenity to the proposed residential accommodation and improved stormwater management. The new roof form is integral to overall architectural renewed expression for the building which will provide a positive contribution to the existing character of the area.

Objective (b) - to minimise visual impact, disruption of views, loss of privacy and loss of solar access.

The proposed increase in height is minor relative to the existing building height and will and not result in unacceptable view, privacy or overshadowing impacts and consequently none will arise as a consequence of the proposed variation. As evidenced by the solar access diagrams (discussed further below) the proposal does not impact the solar access of residences on adjoining properties at midwinter due to the orientation and position of the site.

The proposal provides more than the required quantum of common open space, and the internal courtyard in addition to the new communal space at the western corner of the site, will provide a high level of amenity and encourage desirable social interaction.

Objective (c) - to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments

The proposed increase in height is minor, and the maintenance and addition of generous landscaping arrangements will ensure that the proposed mixed housing developed will not impede the scenic coastal nature quality of the site. The proposal is wholly compliant with the objective in addition to the requirements of the Coastal Management SEPP.

Objective (d) - to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

The proposed development will not have a negative visual impact on the surrounding locality when viewed from any public place, and presents as an improvement of the built form's visual presentation to the streetscape through being a sensitively designed adaptive re-use project that is compatible with the surrounding residential character of the site. The proposed height increase is not substantial in relation to the existing built form on the site, and offers a range of textures and visual façade treatments. Notably, there will not be any impacts from overshadowing on public places such as parks and reserves or community facilities.

Accordingly, the variation to the maximum height of building standard will not compromise achievement of the objectives of the standard.

**2nd Way - The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.**

This consideration is not relevant in this case. It is noted that this development standard is inconsistent with the Affordable Rental Housing SEPP and other provisions of the Seniors SEPP, and that this Clause 4.6 Variation request has been prepared out of an abundance of caution.

**3rd Way - The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required.**

The exceedance is a consequence of a carefully considered design approach that is site responsive, and that seeks to provide essential housing of an appropriate scale and density that is more consistent with the objectives of the R2 Low Density Residential zone than the previous use.

**4th Way - The development standard has been virtually abandoned or destroyed by the Council's own decisions**

This consideration is not relevant in this case.

**5th Way – The zoning of the site is unreasonable or inappropriate and consequently so is the development standard.**

This consideration is not relevant in this case.

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

There are three primary environmental planning grounds which support the contravention to the height of building standard. These relate to the fact that equitable and lawful access is enabled throughout the site, that the existing structure is non-compliant with the maximum building height, and that there will be no impacts to surrounding properties in terms of view loss, overshadowing or privacy impacts.

The need to extend the existing third storey of the building is in part a consequence of the need to rationalise the upper level to incorporate lift access required by the SL SEPP and is a response to existing arrangements that result in the poor and outdated ability of the building to manage stormwater.

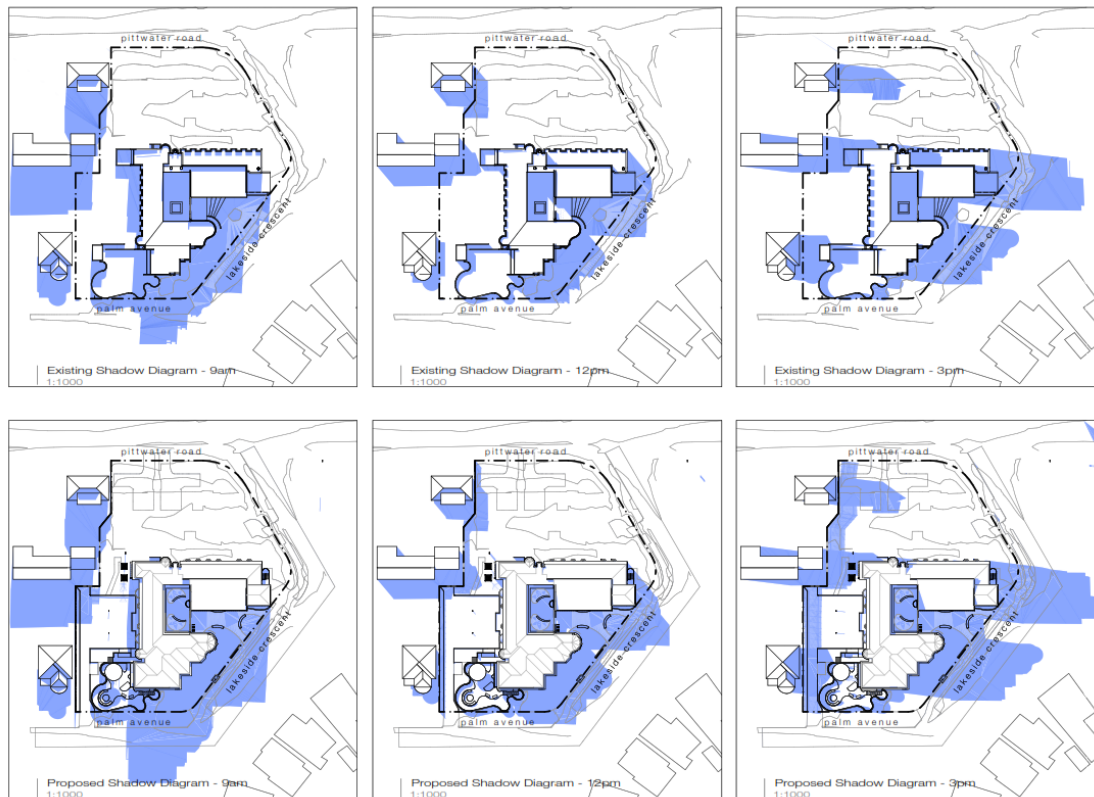
The proposed development has been designed as an adaptive reuse of an existing building which has effectively dictated its height. The reuse of the existing building has the benefit of maintaining and updating a building that has been a part of the character of the area, and contributed to the wellbeing of the community, for decades. The importance and value of pursuing an adaptive reuse development option is explained in detail within the statement of environmental effects accompanying the subject DA. The reuse of the building also has substantial waste minimisation savings.

The exceedance is a consequence of a carefully considered design approach that is site responsive and comprises an adaptive re-use of the existing building that maximises the inherent strengths of the site while modernising the built form to ensure compliance the ARH SEPP and Seniors Housing SEPP to result in a liveable and sustainable development.

The higher building form allows for the concentration of floorspace at the at the eastern end of the site, away from existing residences to the west. Furthermore, as indicated at **Figure 6** over the page, the position and orientation of the site ensures that there will be no additional shadow impacts to the living areas or private open space of surrounding properties, while the use of screening, orientation to the street and generous setbacks will ensure that privacy impacts can be mitigated.



In addition to the above, there are negligible material negative impacts resulting from the proposed variation from the height of building standard.



Source: Integrated Design Group, Drawing No. DA-9100 REV C

**Figure 6 Shadow diagrams**

Consequently, the proposal would be consistent with the following objectives of the EP&A Act at section 1.3:

- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (g) to promote good design and amenity of the built environment,*

#### **Is the proposed development in the public interest? (Clause 4.6(4)(a)(ii))**

The proposed development is in the public interest because it:

- Facilitates a development that is not inconsistent with the objectives of the standard and the intent of the R2 Low Density Residential zoning of the site. Consistency, with the objectives of the standard has been addressed previously under Wehbe methods.
- Provides additional and varied affordable housing choice within the Sydney metropolitan region and Northern Beaches LGA, in the form of boarding house rooms and seniors

housing including for low income women, as the population ages and the number of single-women households increases.

- Affordable housing will support the economic vitality of the local area by ensuring local residents and those in housing need are not displaced from their communities as a result of the increasing cost of housing.

In regard to the first point, the relevant objectives of the R2 High Density Residential zoning of the site area are:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

The proposed housing will contribute to the delivery of 12 boarding house rooms and 25 self-contained seniors dwellings that will substantially contribute to meeting the need for diverse and affordable housing in the Northern Beaches LGA. The proposal provides a mix of housing options and room sizes, and will positively contribute to the housing mix to be achieved across the LGA within each of the R2, R3 and R4 residential zones. The proposal, as an adaptive re-use of an existing building, will be of an appropriate density and scale that will be compatible with the planned intent for the R2 zoning of the area.

#### **Consideration of concurrence by Director-General (Clause 4.6(4)(b) & (5))**

Concurrence to the proposed variation is not required by the Secretary pursuant to clause 4.6(4)(b), as we understand that Council has necessary delegation as set out in the Assumed Concurrence Notice issued by the Secretary of the Department of Planning and Environment dated 21 February 2018 (attached to DPIE Planning Circular PS 18-003). If necessary, consent authority may be granted on behalf of Council by the Local Planning Panel as they are enabled by the Planning Circular to assume the Secretary's concurrence.

Despite this, the proposed variation to the maximum height of building standard is not considered to be detrimental to any matter of significance for state or regional environmental planning.

In the circumstances of the application, there is no public benefit, if not a significant loss to the local community, in maintaining the development standard. To the contrary and consistent with the objectives of clause 4.6, allowing the variation will facilitate a development that achieves better and appropriate outcomes and represents an appropriate degree of flexibility in applying a development standard.

In relation to clause 4.6(5)(c), we note that no other matters have been nominated by the Secretary for considerations.

## **7. Conclusion**

A variation to the strict application of height related standards in SL SEPP is considered appropriate for the proposed Queenscliff Project development.

The proposed height results in an optimum outcome for the site given the intended use of the site and its adaptive re-use, with a roof form that has been skilfully designed to be responsive to the site context and will provide high levels of amenity for future residents. There are negligible impacts resulting compared to those cause by a compliant height, noting that this Clause 4.6 has been prepared out of an abundance of caution given conflicting provisions in the Affordable Rental Housing SEPP and clause 50 of the Seniors SEPP.

The proposal meets the intent of the height related standards and in accordance with clause 4.6 of the WLEP, demonstrates that the development standard is unreasonable and unnecessary in this case and that the variation is justified.