CLAUSE 4.6 VARIATION TO MAXIMUM ROOM SIZE DEVELOPMENT STANDARD

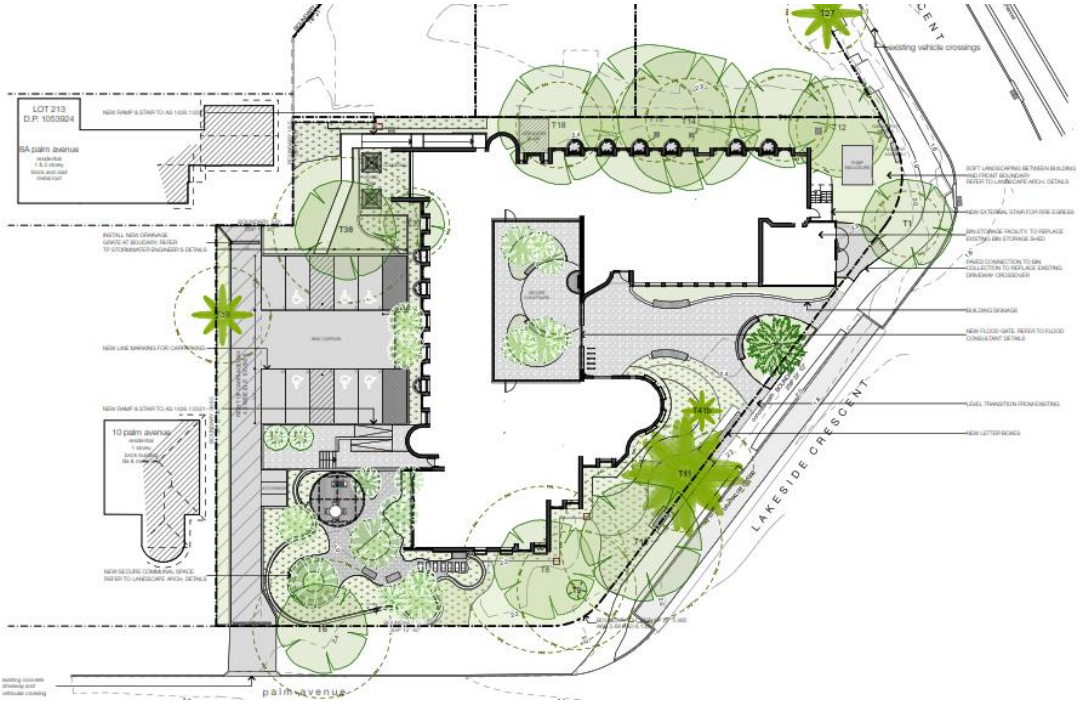
The Queenscliff Project

GLN 11090

7 October 2021

ABN 39 585 269 237
A Level 10, 70 Pitt Street, Sydney NSW 2000 P GPO Box 5013, Sydney NSW 2001
T (02) 9249 4100 F (02) 9249 4111 E info@glnplanning.com.au
glnplanning.com.au

Summary Description	
Property:	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
Development:	Adaptive re-use of former Queenscliff Community Health Centre to become a mixed housing development comprising a boarding house containing 12 rooms and seniors housing containing 25 self-contained rooms
Development Standard:	Clause 30(1)(b) (Maximum size per boarding room) of *State Environmental Planning Policy (Affordable Rental Housing) 2009*
Development Plans:	Architectural Plans prepared by Integrated Design Group, dated 30/9/2021, Issue E



Source: Integrated Design Group, Drawing No. DA-0102 Rev E

Figure 1. Site Plan

1. Background and Summary

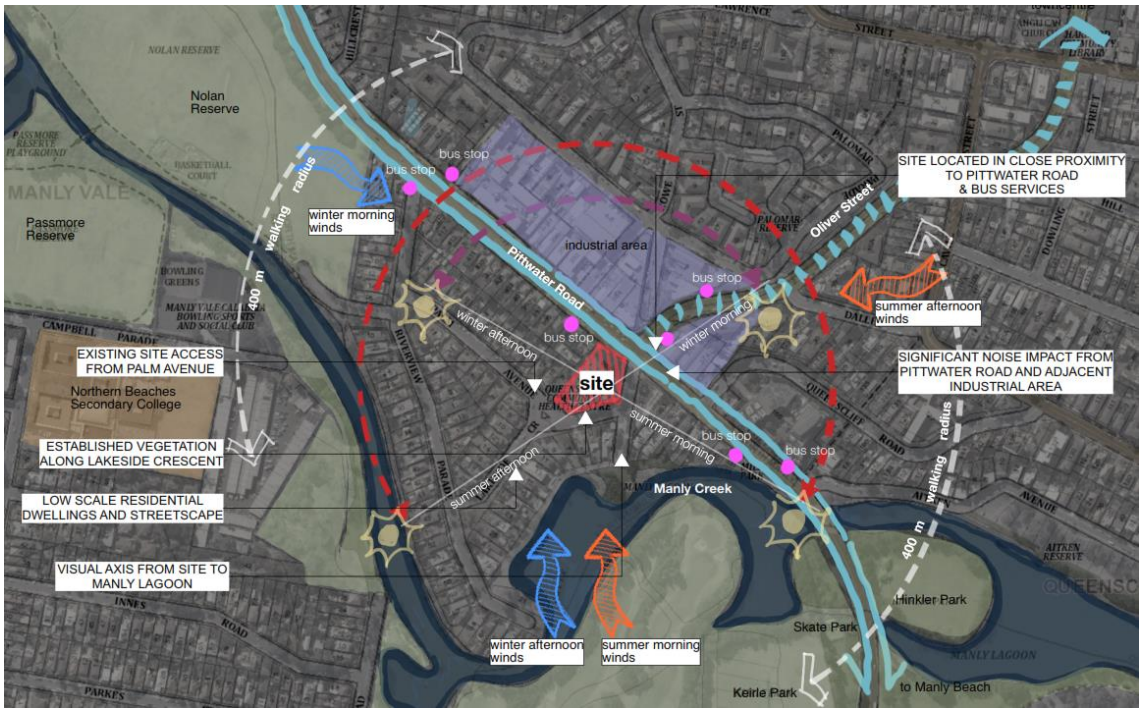
Introduction

The proposed development involves the adaptive re-use of the former Queenscliff Community Health Centre to become a mixed housing development comprising a boarding house and seniors housing. The boarding house will comprise 12 rooms and will be located on the ground floor, while seniors housing will comprise 25 self-contained dwellings across the second and third storeys. The

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

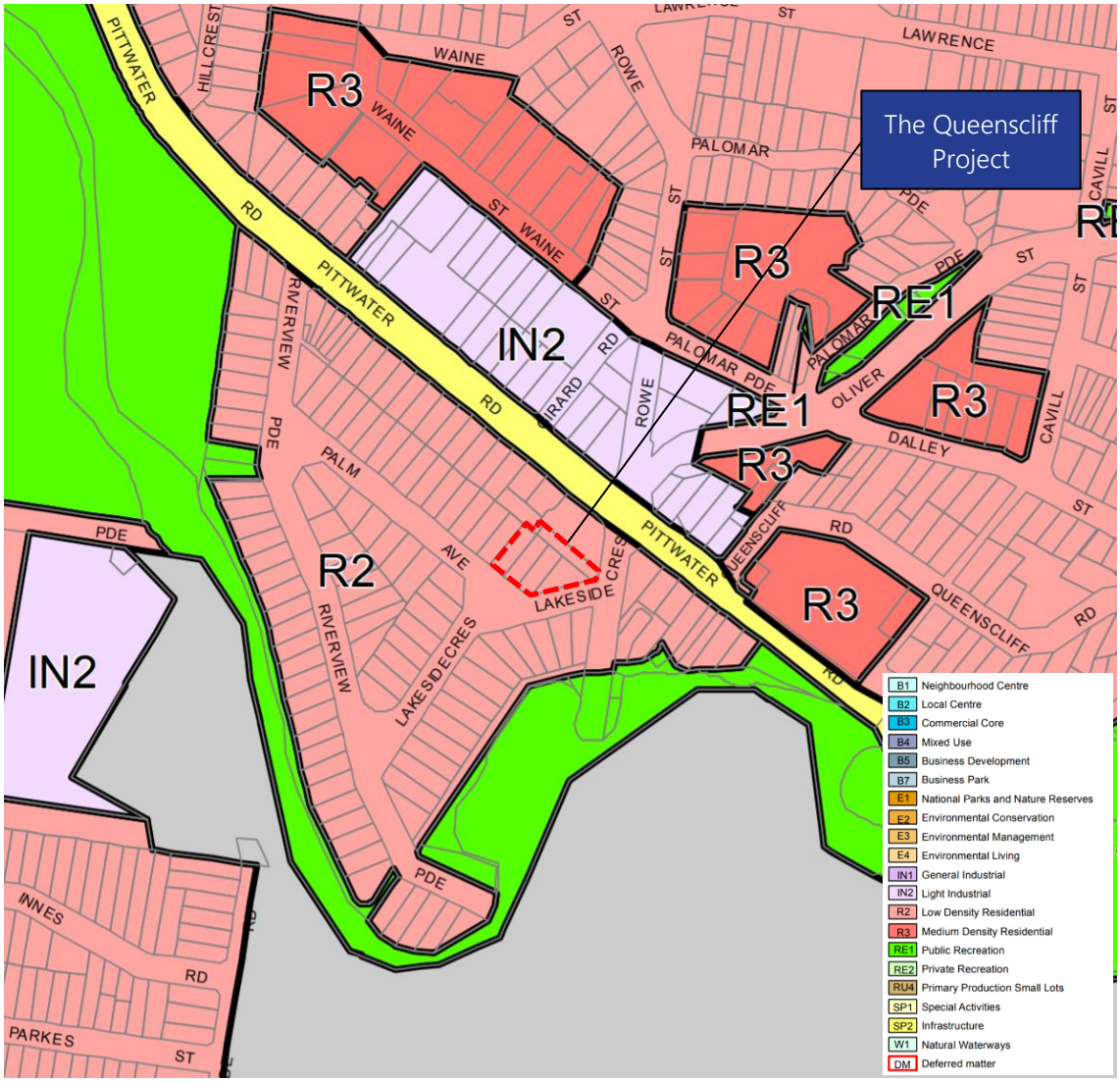
The Site

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**) is to be 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* (**Seniors 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 25 square metres gross floor area (GFA) per boarding house room under the Affordable Rental Housing SEPP (ARH SEPP).

A variation to the development standard is sought having regard to the site context, compliance with the objectives of the standard, and a site responsive design that provides a high level of internal

amenity and social interaction without impeding the amenity of surrounding properties. The variation is substantially a consequence of the adaptive reuse of an existing building.

It is noted the non-compliance is limited to two rooms at G.05 and G.06, which have a proposed GFA of 27.6m^2 and 28.2m^2 respectively. Clause 30(1)(b) of the ARH SEPP is understood to be a development standard.

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.

3. Development standard to be varied

A variation is requested to Clause 30(1)(b) of ARH SEPP which requires:

(b) no boarding room will have a gross floor area (excluding any area used for the purposes of private kitchen or bathroom facilities) of more than 25 square metres

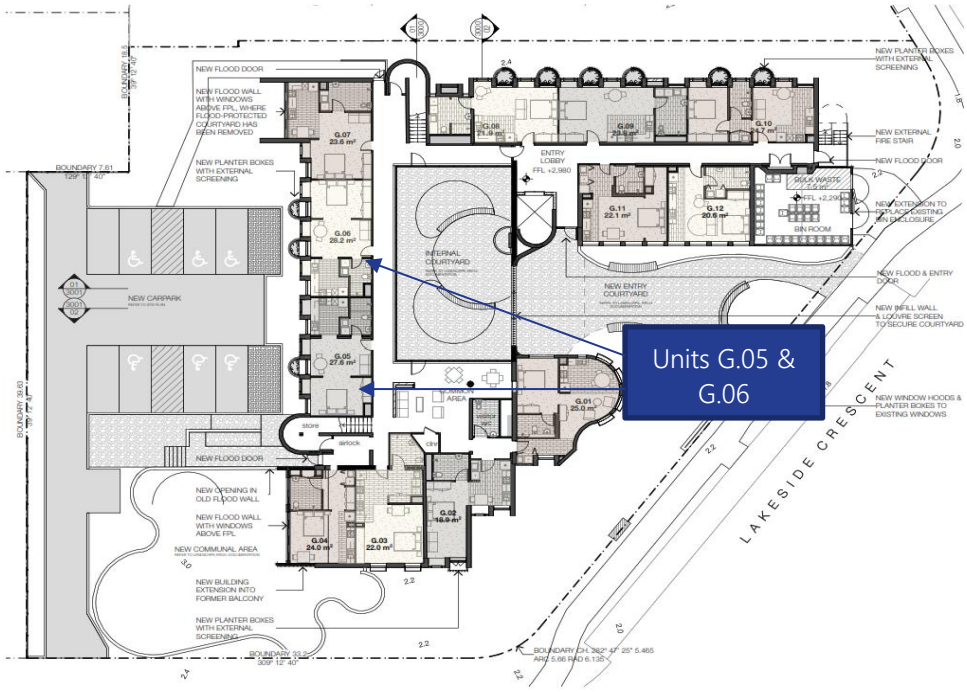
The GFA within rooms to be provided are generally compliant with the standard, except for a minor variation at two rooms.

The ARH SEPP provides the following relevant definitions:

boarding room means a room or suite of rooms within a boarding house occupied or so constructed or adapted as to be capable of being occupied by one or more lodgers.

4. Extent of variation

The variation sought is 2.6m^2 (10.4%) at Unit G.05 and 3.2m^2 (12.8%) at Unit G.06, as indicated on the plans at Figure 5 below.



Source: Integrated Design Group, Drawing No. DA-1100 Rev E

Figure 4. Ground floor plan

5. Aims of Affordable Rental Housing SEPP

The aims of the ARH SEPP are:

(a) to provide a consistent planning regime for the provision of affordable rental housing,

(b) to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards,

(c) to facilitate the retention and mitigate the loss of existing affordable rental housing,

(d) to employ a balanced approach between obligations for retaining and mitigating the loss of existing affordable rental housing, and incentives for the development of new affordable rental housing,

(e) to facilitate an expanded role for not-for-profit-providers of affordable rental housing,

(f) to support local business centres by providing affordable rental housing for workers close to places of work,

(g) to facilitate the development of housing for the homeless and other disadvantaged people who may require support services, including group homes and supportive accommodation.

Most of these objectives are of specific relevance to the site and the proposed development, with the exception of objectives (c) and (d) which relates to existing affordable housing.

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 gross floor area per boarding room 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 intent of the standard to the extent relevant to the current proposal, and compliance with the maximum gross floor area per boarding room in the circumstances is considered both unreasonable and unnecessary for the following reasons.

There are no explicit objectives to the standard. Implicitly the purpose of the standard is to provide for efficiently sized accommodation that retains the characterisation of a boarding house and remains affordable. This would contribute to satisfying the aims of the SEPP.

The proposal makes for efficient use of the space as an adaptive re-use project. The design skillfully uses space to within the existing building envelope to integrate the 12 proposed boarding house rooms. The ARH SEPP does not allow for more than 12 rooms and more than 12 could compromise the livability of the boarding house rooms. The boarding house is to be operated by a Community Housing provider which specifically to provide affordable accommodation and there is clearly not intention to operate a use other than a boarding house.

Accordingly, the proposal will satisfy the underlying objectives of the standard and the aims of the ARH SEPP, despite the non-compliance with the standard. Further, there are no negative externalities arising as a consequence of the variation.

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.

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

The underlying objective to make for the efficient use of space would not necessarily be met in in this instance if strict compliance was made. If rooms G.05 and G.06 were each reduced to 25m^2 or less, then the additional space would likely be left as residue storage space, as opposed to liveable gross floor area. Furthermore, these reductions are minor would not enable any additional boarding rooms to be located within the ground floor based on the current configuration.

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 at least two main environmental planning grounds to support the contravention to the development standard. These relate to the fact that the development is an adaptive re-use project and secondly that there will be no impacts to boarders or surrounding properties as a result of the variation.

As an adaptive re-use project, the boarding rooms are constrained in the way that they can be configured. 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 with the statement of environmental effects accompanying the subject development application. The reuse of the building also has substantial waste minimisation savings.

Alternative solutions that achieved compliance with the development standard would likely leave surplus unused or tokenistic non-boarding room space, given the unique orientation and design of the built form. The exceedance is not associated with an attempt to exceed the permitted floor space of the site or provide for additional accommodation.

There will also be no negative environmental impacts to tenants or surrounding properties, given that the increased GFA will not increase the density or number of tenants within the boarding house. Non-compliance with the standard is considered a positive outcome in this instance as it enables tenants within the subject rooms to have additional liveable area.

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,

In addition to the above, there are negligible material negative impacts resulting from the proposed variation from the maximum gross floor area standard.

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 consistent with the intent of the standard and the aims of the ARH SEPP and the R2 Low Density Residential zone. 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 essential affordable and seniors housing as the population ages.
- Affordable housing will support the economic vitality of the local area by ensuring that local residents and those in essential in housing need are not displaced from their communities as a result of the increased 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 gross floor area per room 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 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 the maximum gross floor area per room pursuant the ARH SEPP is considered appropriate for the proposed Queenscliff Project development.

The proposed variation in an optimum outcome for the site given the intended use of the site and its adaptive re-use, will not affect the surrounding locality and will provide high levels of amenity for future residents. There are no impacts resulting compared to those caused by strict compliance, and the proposal is otherwise wholly compliant with the mandatory development standards of the SEPP.

The proposal meets the intent of the standard 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.