

31 October 2025

Janett Milligan
Panel Chair
NSW Independent Planning Commission

Dear Madam,

Public Submission – State Significant Development Application No. SSD-47105958 at 24A Kingscliff Street, Kingscliff

This submission is made on behalf of concerned members of the local community. The submission relates to the proposed state significant development application (SSD-47105958 – *the Application*) for “seniors housing development providing for 120 bed residential care facility , 199 independent living units, ancillary amenities and landscaping” at 24A Kingscliff Street, Kingscliff (*the Subject Site*).

This letter provides points of contention for the Independent Planning Commission (*the Commission*) to consider as the consent authority for the Application.

The main points of contention raised in this letter are as follows.

- Earthworks & Adjoining Owner's Consent
- Visual Privacy Impacts
- Traffic Impacts

The matters detailed in this letter are submitted for the Panel's consideration under s. 4.15(1)(d) and (e) of the *Environmental Planning & Assessment Act 1979*.

Earthworks & Adjoining Owner's Consent

The proposed development incorporates a single basement level with nil boundary setbacks to No. 6 Beach Street (see figure below). This design necessitates substantial subterranean excavation along the site's shared property boundaries.

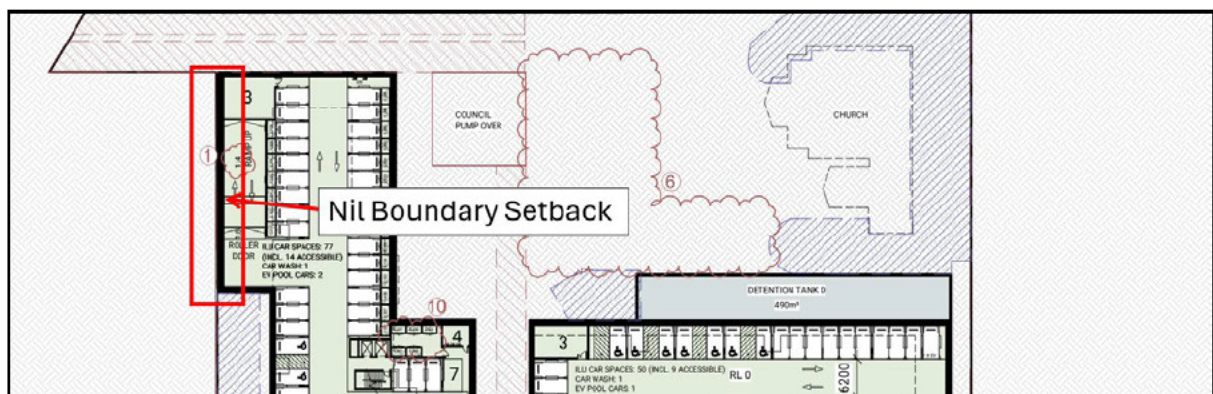


Figure 1 Basement Level 1

The Geotechnical Report accompanying the Application (Pacific Geotech Pty Ltd, dated 15 March 2024) identifies a secant pile shoring wall as the primary support system for the basement level adjacent to the northern boundary (p. 12, Figure 1 – see extract below).

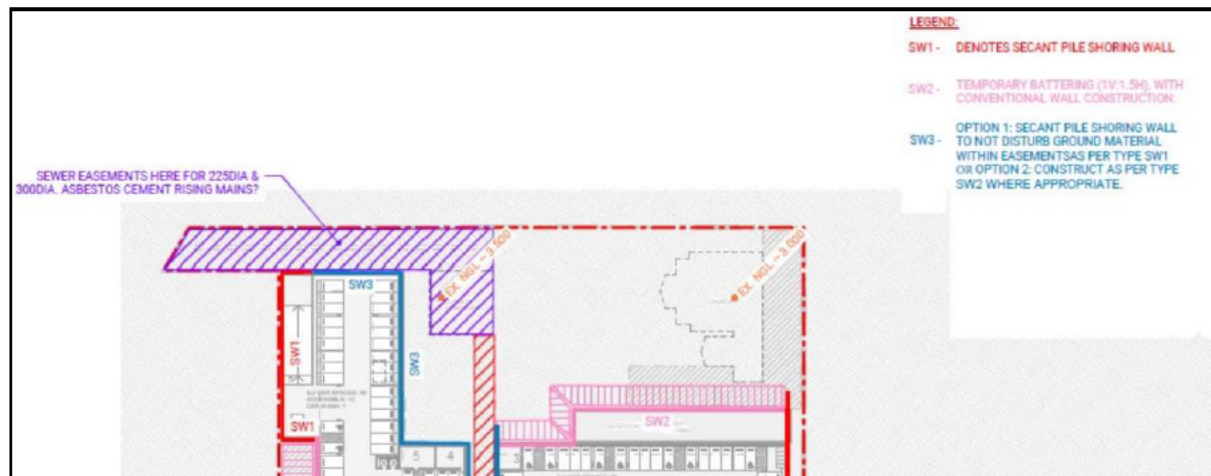


Figure 2 Basement Construction Method (Geotechnical Report Extract)

Although the report does not explicitly confirm whether rock anchors or other horizontal drilling techniques will be employed to implement this support system, it does indicate that such methods are required for other support systems on the site, including those involving sheet piles (p. 11, Section 11). Accordingly, it is reasonable to infer that rock anchors may be used during excavation and construction of the secant pile shoring wall. If so, the development would require penetration into neighbouring land, triggering the need for adjoining landowners' consent to accompany the application.

The issue of subterranean works and adjoining owner's consent has been explored extensively in the NSW Land and Environment Court and Court of Appeal – see *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 at paragraph 94 and 95.

If the accompanying documents reveal that part of the proposed development extends to land other than the land whose address and formal particulars of title are shown in the development application form, that other land is also the subject of the development application: see Owners – Strata Plan 37762 v Pham [2005] NSWLEC 500 at [32]. Conversely, the description of the land on which the development is to be carried out in the accompanying documents (such as the statement of environmental effects) **can also confine the land to which the development application relates** to be a lesser parcel of land than is described in the development application form: see *Rose Bay Afloat Pty Ltd v Woollahra Council* (2002) 126 LGERA 36; [2002] NSWLEC 208 at [60]–[63].

The giving of owner's consent to the making of a development application with respect to the owner's land for the purpose of cl 49 of the Regulation is an essential prerequisite to, and part of the process of, a consent authority's determination of the application. That is to say, the giving of owner's consent is necessary to enable the consent authority to exercise its function to grant development consent to the application if it be minded to do so. On an appeal from a determination of the consent authority, **the Land and Environment Court cannot uphold the appeal and**

grant development consent to the development application unless the owner's consent to the making of the application has been given: *Sydney City Council v Ipoh Pty Ltd* (2006) 68 NSWLR 411; [2006] NSWCA 300 at [34(c) and (e)]. [emphasis added in **bold**].

In light of the findings in *Al Maha Pty Ltd v Huajun Investments Pty Ltd*, the proposed development cannot lawfully be determined other than by refusal in the absence of owner's consent from adjoining landowners.

It is further noted that the Department of Planning, Housing, and Infrastructure (DPHI) has recommended the inclusion of Condition B3 in the event that the Application is approved. This condition requires the submission of the following documentation to the principal certifying authority:

Details of written approvals that have been obtained from the owners of the adjoining land to install any ground or rock anchors underneath the adjoining premises (including any public roadway or public place). (Condition B3(f))

However, as established in *Al Maha Pty Ltd v Huajun Investments Pty Ltd*, written owner's consent is a threshold requirement that must accompany the application prior to its determination. The imposition of the above condition post-approval would therefore render any consent unlawful and subject to judicial review in the Land and Environment Court of New South Wales.

Accordingly, the Application should be refused on the basis that it fails to satisfy a fundamental legal prerequisite for determination – namely, the provision of written consent from affected adjoining landowners.

Visual Privacy Impacts

Significant visual privacy impacts are anticipated for adjoining properties in the surrounding area including properties to the north, west, and east of the site (see figure below).



Figure 3 Overlooking opportunities (view corridors identified with red arrows)

Whilst the majority of buildings at the site incorporate setbacks that are compliant with the Apartment Design Guide, little to no design measures are incorporated to obscure direct sightlines into neighbouring properties. Landscaping is the primary means by which the applicant seeks to provide visual privacy relief, as acknowledged by the Department of Planning, Housing, and Infrastructure in their assessment report (p. 35-36).

In response to concerns raised in submissions, the Applicant:

- *Increased the Building A rear setback to 35 and 37 Lorient Way semi-detached dwellings from 4.35m to 6m.*
- *Revised and increased the density of proposed screen planting located within the setbacks shared with all adjoining properties.*
- *Stated the generous building setbacks and balcony planters soften the building interfaces and provide adequate visual buffers.*

Based on the above refinements to the development, the Department is satisfied the proposal meets or exceeds the ADG recommended boundary separation distances, includes appropriate screening and therefore would maintain an appropriate level of visual privacy.

Despite these adjustments, the absence of physical privacy screening measures—such as privacy screens, fencing, or angled louvres—and the sole reliance on distance and landscaping will result in direct visual privacy impacts on neighbouring residents from the outset.

It is important to note that most, if not all, surrounding residents currently enjoy full visual privacy of their private open space and internal habitable areas due to the prevailing low-density character of the locality. The introduction of large-scale, multi-storey buildings without adequate physical screening will fundamentally alter this condition. As a result, the loss of visual privacy for these residents will range from severe to devastating, representing a significant and unacceptable impact that has not been properly addressed by the proposal.

Overlooking and visual privacy impacts have been explored extensively in the Land and Environment Court of NSW, with most judgements drawing on the relevant planning principles established in *Meriton v Sydney City Council [2004] NSWLEC 313*. Roseth SC in *Meriton v Sydney City Council* at paragraph 46 prescribes several principles to be taken into consideration when matters relating to overlooking, density, separation, use and design are in contention. The relevant principles are set out below, with an assessment provided for each.

- *The ease with which privacy can be protected is inversely proportional to the density of development. At low densities there is a reasonable expectation that a dwelling and some of its private open space will remain private. At high densities it is more difficult to protect privacy.*

The residential area immediately surrounding the site is zoned R1 General Residential and R2 Low Density Residential. There is a reasonable expectation that visual privacy for dwellings and their associated private open space would be achieved. The area is not considered to be characterised as high density in any way.

The significant overlooking and visual privacy impacts arise as a result of the significant uplift in height at the subject site, beyond that envisioned under the *Tweed Local Environmental Plan 2014*. In this regard, these impacts are considered to be unreasonable and unacceptable.

- *Overlooking of neighbours that arises out of poor design is not acceptable. A poor design is demonstrated where an alternative design, that provides the same amenity to the applicant at no additional cost, has a reduced impact on privacy.*

No alternative design that affords the same amenity to residents in the surrounding locality has been prepared by the applicant to demonstrate that the proposal would achieve the best amenity outcome for existing residents. The proponent's claims that three storey buildings at the site would be economically unfeasible remain untested and unsubstantiated, and do not address whether the lower built form could reasonably ameliorate some of the visual privacy impacts.

In this regard, the proposal is considered to be of poor design.

- *Apart from adequate separation, the most effective way to protect privacy is by the skewed arrangement of windows and use of devices such as fixed louvres, high and/or deep sills and planter boxes. The use of obscure glass and privacy screens, while sometimes being the only solution, is less desirable.*

As identified above, no physical screening measures have been incorporated into the design of the proposed development. In this regard, it is considered that there are no effective privacy protection measures proposed within the Application.

- *Landscaping should not be relied on as the sole protection against overlooking. While existing dense vegetation within a development is valuable, planting proposed in a landscaping plan should be given little weight.*

As noted above, landscaping is the principal means by which the applicant proposes to ameliorate visual privacy impacts on neighbouring residents. The sole reliance on landscaping is unacceptable and inconsistent with the above principle.

This principle was further expanded upon by Roseth SC in *Super Studio v Waverley Council* [2004] NSWLEC 91. In that case, the Commissioner made it clear that landscaping should be given only limited weight when used as the main safeguard against overlooking as the effectiveness of landscaping depends on ongoing maintenance, favourable weather, and "good luck". Roseth SC also noted in *Super Studio v Waverley Council* that landscaping conditions are rarely enforced to the extent needed to ensure it performs as intended over time.

In this regard, it is considered that there are no effective privacy protection measures proposed within the Application.

- *In areas undergoing change, the impact on what is likely to be built on adjoining sites, as well as the existing development, should be considered.*

The surrounding area is not considered to be undergoing significant change.

Based on the above assessment, it is evident that the proposal is inconsistent with the planning principle established in *Meriton v Sydney City Council*. Significant design changes are required to address the identified overlooking and visual privacy impacts that would arise from the development.

Height, Bulk and Scale

The proposed development's excessive height, bulk, and scale are fundamentally inconsistent with both the planning controls and the established low-density character of the locality. The Application seeks approval for a building height of 17.05m, representing a 25.36% variation above the 13.6m maximum prescribed by the Tweed Local Environmental Plan 2014. This significant non-compliance would intensify privacy, and amenity impacts for surrounding residents.

The prevailing character of the area—bounded by Beach Street, Lorien Way, Blue Jay Circuit, Drift Court, and Kingscliff Street—is defined by one- and two-storey dwellings, with only a single three-storey building at the intersection of Kingscliff and Beach Streets (see density analysis below). The proposed development would introduce a dramatic and abrupt increase in height, out of step with its context.

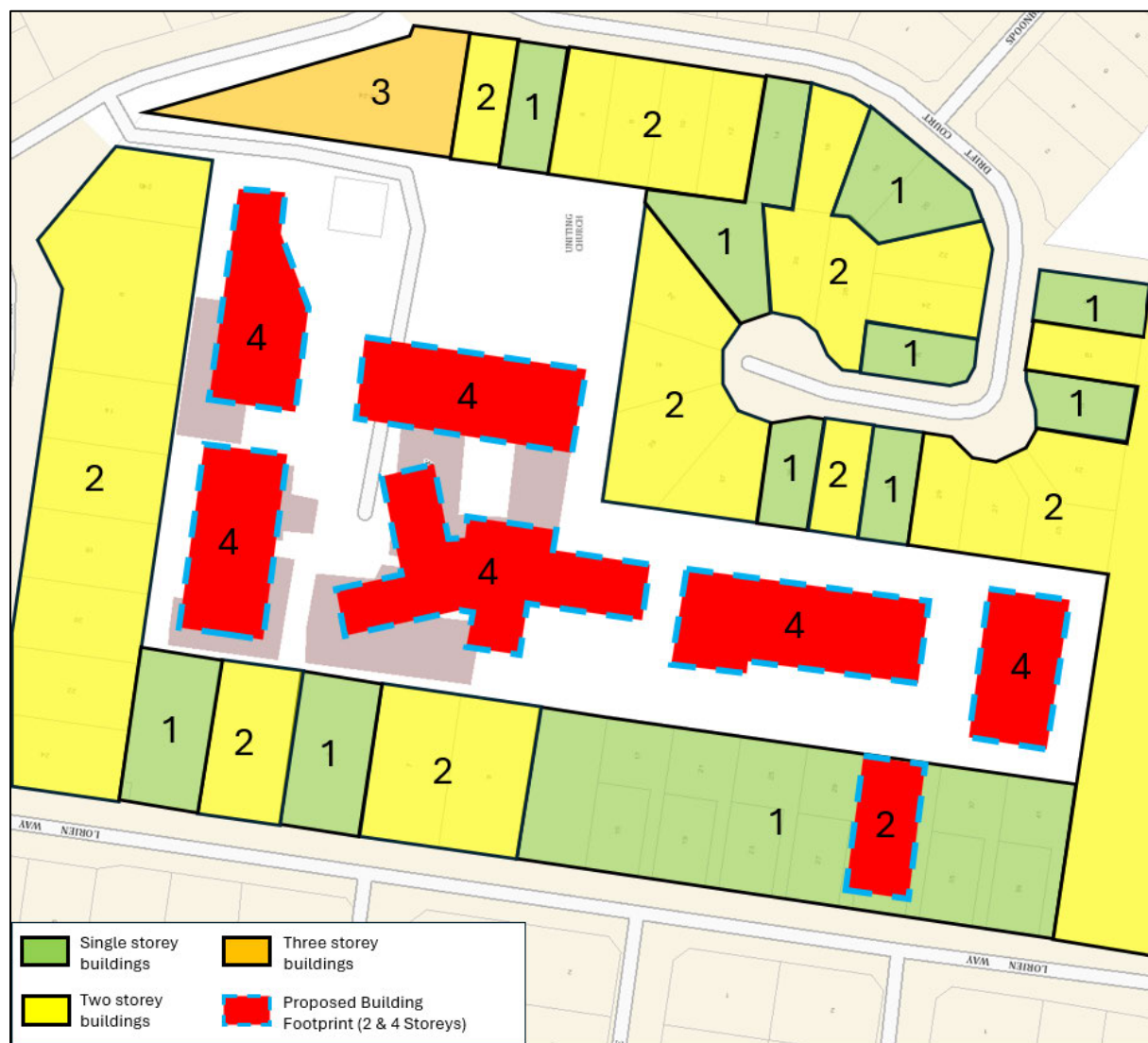


Figure 4 Density Analysis

The proponent justifies this variation primarily on the basis of alleged impacts on development feasibility and the need to realise the site's "full development potential." However, these claims are not substantiated by any economic modelling or evidence. As stated in their Clause 4.6 variation request:

*Pursuing 3 storey buildings **would significantly underdeliver on the allowable floor space** and compromise the reasonable development of the land. That is, pursuing a lower built form to account for the amount of ground floor raising required, **would result in a significant loss of development potential** inconsistent to the application of the 13.6m height limit and its objectives under Clause 4.3 of the LEP. [p. 23, Request to Vary Clause 4.3 Height of Buildings in Tweed Local Environmental Plan 2014 prepared by Planit Consultants Pty Ltd] [Emphasis added in **bold**]*

Despite these assertions, the application achieves a floor space ratio of just 0.98:1—well below the maximum permissible 2.8:1. This demonstrates that the height breach is not necessary to achieve the site's allowable floor space, and suggests that the proponent's preference for four storeys is driven more by the desire to maximise views than by genuine feasibility constraints.

This lack of substantiation is particularly concerning in light of established planning principles. As Roseth SC observed in *Veloshin v Randwick Council* [2007] NSWLEC 428, planning controls reflect the considered preferences of the local community and should be given greater weight than the subjective preferences of individual developers:

*The debate about height and bulk can be meaningful only against the background of local planning controls, such as maximum building height, floor space ratio, site coverage and setbacks. While these controls are usually also based on subjective judgement, they have been through a statutory process involving exhibition and the consideration of public comment. **They therefore express the subjective preferences of a local community and should be given greater weight than the subjective preferences of individuals.** [Emphasis added in **bold**]*

Roseth SC further sets out key questions for assessing height variation requests, including whether the impacts are consistent with those reasonably expected under the controls, how the proposal's height and bulk relate to the desired outcomes, and whether the proposal is appropriate in its context. In this case, the proponent has not demonstrated the difference between the impacts of a complying and non-complying development, nor shown that the proposal is appropriate for its setting.

Moreover, the proposal would result in unreasonable visual privacy impacts on surrounding low-density development due to inadequate screening and would require adjoining owners' consent for penetrative works to provide basement parking and services—further compounding adverse impacts on neighbours.

The objectives of Clause 4.3 of the *Tweed Local Environmental Plan 2014* are clear: to enable a transition in building heights between areas of different character. The proposed development, however, introduces a stark and unjustified departure from the established scale of the locality.

In summary, the proposed variation to the building height standard is not supported by evidence or planning merit. It is inconsistent with the objectives of the *Tweed Local Environmental Plan 2014*, fails to respect the established character of the area, and would result in unreasonable impacts on neighbouring properties. Approval of this variation would undermine the integrity of the planning framework and set an undesirable precedent for future development in the locality.

Traffic Impacts

Concern is raised over the significant underestimation of traffic generated by the proposed development. The Application's accompanying Transport Impact Assessment (TIA) (PTC Consultants, 13 March 2024) utilises the following vehicle trip rates for the Independent Living Units to estimate the likely number of trips generated during AM and PM peaks at the site.

Component	Network Period	Vehicle Trip Rate	No. Dwellings	Generated Trips
Apartments (ILU)	AM Peak	0.23 trips/dwelling	199	46
	PM Peak			46

The vehicle trip rate used in the Transport Impact Assessment is based on rates provided in the RMS Guide to Traffic Generating Development for seniors housing development. However, these rates have since been superseded by the Guide to Transport Impact Assessment published by Transport for NSW (TfNSW), which provides more robust and contemporary survey data for seniors housing developments.

The TfNSW Guide, drawing on 2009 survey data from regional seniors housing sites, identifies a site peak hour vehicle trip rate of 0.44 trips per dwelling (see Table 5.16, Guide to Transport Impact Assessment, p. 5-25). In contrast, the TIA for this proposal adopts a significantly lower rate of 0.23 trips per dwelling per peak hour (TIA, p. 22), which is the PM peak rate and not the higher site peak hour rate recommended by TfNSW. This methodological choice is not justified by any site-specific evidence and results in a substantial underestimation of the likely traffic impacts. When the vehicle trip rates recommended in the Guide are applied, the projected number of trips generated by the proposed Independent Living Units nearly doubles compared to the figures presented in the TIA (see table below).

Component	Network Period	Vehicle Trip Rate	No. Dwellings	Generated Trips
Apartments (ILU)	AM Peak	0.44 trips/dwelling	199	88
	PM Peak			88

The implications of the revised trip generation estimate for intersection capacity and local road function have not been tested or quantified in the TIA, leaving potential impacts unidentified.

Moreover, the TIA assumes that the existing residential aged care facility (RACF) generates a similar level of traffic to the proposed facility and therefore deducts these trips from the net increase (TIA, p. 23). This fails to account for the substantial intensification of use, the addition of 199 independent living units, and the expanded range of services and amenities that will attract more staff, visitors, and service

vehicles than the current operation. The TIA also assumes that only a fixed number of visitors (12 vehicles per peak hour) will attend the site, based solely on the number of visitor parking spaces provided (TIA, p. 22), rather than on observed demand or the potential for higher visitation during events or peak periods.

Furthermore, the Guide makes clear that car travel is overwhelmingly the dominant mode for seniors housing in regional areas, accounting for over 90% of all trips (Table 5.18, Guide to Transport Impact Assessment, p. 5-25). The TIA's suggestion that public and active transport will meaningfully reduce private vehicle demand is not supported by the available data, particularly given the limited public transport options in the locality as noted in the TIA (p. 14-16).

It is also noted that the Guide cautions against aligning seniors housing trip generation with the AM network peak, as peak travel for this land use typically occurs outside standard commuter periods. The TIA nonetheless applies the PM peak rate to both AM and PM peaks, further compounding the risk of underestimating actual traffic volumes.

The TIA's reliance on outdated and lower trip generation rates, and its optimistic assumptions regarding mode share, are inconsistent with the current TfNSW guidance and the observed travel behaviour of seniors housing residents in regional NSW. The likely result is a significant understatement of the development's impact on the local road network and parking demand. The assessment should be revised to adopt the higher site peak hour rate of 0.44 trips per dwelling and a car-dominant mode share, in accordance with the Guide to Transport Impact Assessment.

In the absence of an accurate traffic generation & impact analysis, the extent of traffic impacts associated with the proposal remains unquantified.

Recommendations & Conclusion

Upon detailed review of the Application and accompanying documentation, it is evident that the Application is not in a form that can be approved by the Commission due to the absence of adjoining landowner's consent for penetrative works into neighbouring land. Beyond this procedural issue, the proposal in its current form would result in inappropriate and unacceptable impacts on the surrounding area. The development represents a clear overdevelopment of the site, as evidenced by the likely need for adjoining owner's consent for earthworks, significant visual privacy impacts, and adverse traffic implications for the local road network.

To reduce the overall level of impact and bring the proposal closer to compliance with applicable planning controls and principles, the following amendments should be considered.

- Increase basement level setbacks from the common property boundary.
- Incorporate visual privacy screening measures (such as screens, fencing, angled louvres etc.) for upper-level windows and outdoor terraces for all buildings with direct sightlines onto neighbouring properties.
- Reduction in bulk and scale through the deletion of fourth storey from buildings B-G to enhance compatibility with surrounding low-density context.

- Additional traffic modelling to be undertaken utilising up to date vehicle trip rates under the *Guide to Transport Impact Assessment*.

Should the applicant fail to sufficiently amend the Application, the Application should be determined by way of refusal on the following grounds.

1. *Environmental Planning & Assessment Regulation 2021*

The Application is unacceptable as it is not accompanied by the written consent of all landowner's as required under section 23 of the *Environmental Planning & Assessment Regulation 2021*.

2. *State Environmental Planning Policy (Housing) 2021 – Chapter 1*

The Application is unacceptable because it is inconsistent with the following principles of the *State Environmental Planning Policy (Housing) 2021*.

- Cl. 3(c): ensuring new housing development provides residents with a reasonable level of amenity.
- Cl. 3(f): reinforcing the importance of designing housing in a way that reflects and enhances its locality.

3. *Tweed Local Environmental Plan 2014 – Part 4*

The proposed clause 4.6 variation request is not well founded and not supported.

The proposed development is unacceptable because it is inconsistent with the following objectives and development standard.

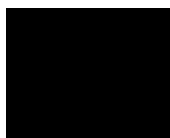
- Clause 4.3 Height of Buildings: The proposal includes a breach of the maximum height of buildings limit and is inconsistent with the following objectives of the development standard:
 - Cl. 4.3(e): to enable a transition in building heights between urban areas comprised of different characteristics.
 - Cl. 4.3(f): to limit the impact of the height of a building on the existing natural and built environment.

4. *Public Interest*

The proposal is not in the public interest.

We trust that the above information is sufficient for the purposes of assessing the Application. Should you have any questions or wish to discuss any of the matters in this letter, please contact the author.

Yours Sincerely,



Douglas Bennett
Town Planner - SydNIMBY