Suite 1 No.9 Narabang Way Belrose NSW 2085 • acn 121 577 768
t (02) 9986 2535 • f (02) 99863050 • www.bbfplanners.com.au

Boston Blyth Fleming
Town Planners

24th November 2020

The General Manager
Hornsby Shire Council
Po Box 37
Hornsby NSW 1630

Attention: Thomas Dale – Town Planner

Dear Mr Dale,

Development Application DA/485/2020
Supplementary Statement of Environmental Effects/ Updated clause 4.6 variation request - Response to additional information request
Proposed Residential Care Facility
65 – 71 Burdett Street, Hornsby

Reference is made to Council's additional information request via email of 4th September 2020 and the minutes of the Design Excellence Panel Meeting of 12th August 2020. This submission represents a considered response to the issues raised and is to be read in conjunction with the following amended plans (Revision B) prepared by Gartner Trovato Architects:

No:	Drawing Name
DA-00	COVER SHEET
DA-01	EXISTING SITE + DEMOLITION PLAN
DA-02	SITE CONTEXT PLAN
DA-03	SITE ANALYSIS PLAN
DA-04	PLANNING CONTROLS DIAGRAM
DA-05	SITE / ROOF PLAN
DA-06	BASEMENT - SERVICE + CARPARK LEVEL
DA-07	LOWER GROUND FLOOR
DA-08	GROUND FLOOR [ENTRY LEVEL]
DA-09	FIRST FLOOR LEVEL
DA-10	ELEVATIONS [SHEET 01]
DA-11	ELEVATIONS [SHEET 02]
DA-12	SECTIONS [SHEET 01]
DA-13	SECTIONS [SHEET 02]
DA-14	SHADOW DIAGRAMS [22 JUNE]
DA-15	3D VIEWS
DA-16	3D VIEWS
DA-17	HEIGHT CONTROL VIEWS
DA-18	REAR 25% SETBACK AND EGRESS DIAGRAMS
DA-19	COURTYARD SUNLIGHT DIAGRAMS
DA-20	SMOKE COMPARTMENT PLANS
DA-21	VIEWS FROM ADJACENT PROPERTIES
DA-22	COURTYARD ELEVATIONS

The amendments made to the architectural detailing of the proposal can be summarised as follows:

- A general reduction in building height, bulk and scale towards the rear of the site with strict compliance achieved with the clause 40(4)(c) single storey rear 25% SEPP HSPD requirement,
- The reconfiguration of the central courtyard areas to improve amenity and solar access resulting in a reduction in bed numbers from 102 to 98,
- The reconfiguration of the proposed driveway to provide enhanced landscape opportunities along its length and reduce its visual presence as viewed from the street,
- The introduction of minibus parking to the basement and confirmation that Council's waste collection vehicles will be able to enter and exit the site in a forward direction,
- The modification of the garbage room and garden storage areas,
- Amendments required to satisfy the recommendations contained within the submitted BCA report, and
- The provision of additional spot/contour levels, sections and solar access diagrams as requested.

The amended submission also includes the following additional/ updated documentation:

- Amended landscape plans prepared by Trish Dobson Landscape Architecture,
- stormwater drainage plans prepared by ACOR,
- Arborist report prepared by Rain Tree Consulting,
- Acoustic report prepared by Acoustic Logic,
- Traffic report prepared by Varga Traffic Planning Pty Limited, and
- Demolition and Construction Waste Management Plan prepared by Waste Audit

We respond to the issues raised in Council's correspondence as follows:

Council staff assessment issues

Elevations and sections

Response: As requested, all elevations and sections now clearly nominate existing natural ground levels to enable an accurate assessment in terms of the level of excavation proposed.

Access Report

Response: On 14th December 2017, Hornsby Shire Council granted development consent to DA/532/2017 involving the demolition of the existing site structures and the construction of a seniors living development comprising 22 self-contained dwellings on the subject site.

At the time of determination, Council was satisfied that the proposal satisfied the access to services provisions contained at clause 26 of SEPPHSPD satisfied having regard to the accessibility report, dated 16th of May 2017, prepared by Philip Chun Building Compliance a copy of which is on Council's DA tracker. The commentary contained within this report as it relates to clause 26 of SEPPHSPD is reproduce over page.

3.1 Location and access to facilities – SEPP Clause 26

A SEPP development must offer access to services such as shops, banks, retail services, commercial services, recreational facilities, community facilities and doctors. These facilities are to be located within 400m of the site via an accessway that provides an accessible path of travel. The path of travel is to have a maximum average gradient of 1:14 .

It is noted that the Land and Environment Court recently confirmed that the 400m provision in Clause 26 is a development standard amenable to variation in an appropriate case.

For development within the Sydney Statistical Division, these services must be located at a distance no greater than 400m from the site or access to a public transport network.

Location of the Site

The site is located within 400m of bus stops located on Northcote Road – approximately 320m form the site satisfying SEPP requirements. The path of travel to these bus stops is in keeping with SEPP requirements being relatively level – refer to Appendix D.

Bus services operate along Northcote Road between Hornsby and Macquarie University at regular intervals throughout the day – refer to Appendix E for timetable. These buses facilitate access to services including shops, banks, retail services, commercial services, recreational facilities, community facilities and doctors

Further, the site is located within 600m of Westfield and 1100m of Hornsby Station. While these distances exceed those required by SEPP we note that with regard to access to facilities, the site is well located. Hornsby Hospital is also located approximately 400m east of the site.

The proposed development meets the intent of this SEPP clause. It is located within 400m of a bus stop, providing access to facilities as listed.

Under such circumstances we consider that this issue is resolved.

Kitchen

Response: We confirm that the final design and layout of all kitchens will be finalised prior to issue of the Construction Certificate and to that extent we raise no objection to Council imposing appropriately worded conditions in relation to any specific design requirements.

Landscaping

Response: As previously indicated, the application has been amended to reduce the number of resident rooms from 102 to 98. In this regard, pursuant to clause 48(c) of SEPPHSPD, and the requirement for a minimum of 25m² of landscaped area per bed, the development generates a requirement for 2450m² of landscaped area as defined. Landscaped area is defined at clause 3 of SEPP HSPD as follows:

> *landscaped area means that part of the site area that is not occupied by any building and includes so much of that part as is used or to be used for rainwater tanks, swimming pools or open-air recreation facilities, but does not include so much of that part as is used or to be used for driveways or parking areas.*

This submission is accompanied by a landscaped area calculation plan on DA – 04(B) which confirms a landscaped area as defined of 1592m². This plan also identifies an additional 902m² of on slab landscaping bringing the total landscaped area of the site to 2494m² therefore satisfying the intent of the control.

We note that there are no stated objectives in relation to the clause 48(c) SEPPHSPD landscaped area control and that extent in undertaking a merit assessment of landscaped area assistance is obtained from the following documentation and case law:

- A guide for councils and applicants – Housing for seniors or people with a disability (SEPPHSPD Guide),

- Paragraphs 50 – 52 of the judgment in the matter of *Rasko Holdings Limited v Burwood Council [2005] NSWLEC 333*,

- Paragraphs 80 to 95 in the matter of *Nanevski Pty Limited v Rockdale City Council [2010] NSWLEC 1220*, and

- Paragraph 46 of the judgement in the matter of *Incoll Pty Limited v Warringah Council [2006] NSWLEC 714*

In particular, we note the commentary at page 10 of the SEPPHSPD Guide namely:

> A potential conflict arises in relation to landscaping. The re-development of many existing residential care facilities or even new residential care facilities in established areas will be on sites that would not allow much land to be set aside for landscaping while achieving a 1:1 fsr. The most important external issues for these sites are the impacts on streetscape and neighbours. High amenity for residents can be achieved within the building without meeting a high landscape area standard. The clause 70 *landscape standard of 25m^2* per bed, i.e. a standard that cannot be used to refuse consent, is not a minimum standard per se, that must be met. It is possible and reasonable for consent to be given to facilities that have less than 25m^2 per bed landscaped area it they take other issue such as streetscape and impact on neighbours into account.

Accordingly, we consider it appropriate to adopt the implicit objectives of the control as detailed at paragraph 83 of the judgment in the matter of *Nanevski Pty Limited v Rockdale City Council [2010] NSWLEC 1220* namely:

- To provide for a high level of amenity to residents,
- To maintain an attractive streetscape, and
- To minimise adverse impacts on neighbouring properties

In this regard, we have formed the considered opinion that, notwithstanding the non-compliance with the landscaped area provisions (as defined), the development provides appropriately for landscaping which will provide for a compatible landscaped streetscape presentation, appropriate perimeter landscape planting opportunity to accommodate plantings capable of softening and screening the building form as viewed from surrounding properties and sufficient functional landscaped area within the central courtyard to accommodate the active and passive recreational needs of residents.

Accordingly, strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Number of Storeys

Response: The accompanying plans have been amended in response to the concerns raised in relation to the number of storeys, the bulk of the development towards the rear of the site and the amenity of the lower level resident rooms. In this regard, the proposal is now fully compliant with the clause 40(4)(c) single storey rear 25% SEPP HSPD requirement with a clause 4.6 variation request no longer required in relation to this aspect of the development.

In relation to the amenity of the lower level resident rooms located in the excavated area adjacent to the eastern boundary of the property, this submission is accompanied by Section C on plan DA-13(B) which shows the relative height of the adjacent terraced landscaping and boundary fence treatments.

This section demonstrates that appropriate amenity will be afforded to rooms LG-05 and LG -07 in relation to visual amenity, daylight and privacy with these rooms looking out onto landscaping.

Finally, in relation to the number of storeys able to be viewed from surrounding properties, reference is made to plan DA – 21(B) which contains a number of 3D images demonstrating that the proposal will read as a predominantly 2 storey form as viewed from all surrounding properties. These images collectively demonstrate that the amended plans provide for a reduction in building bulk, particularly at the rear of the site, to achieve strict compliance with the clause 40(4)(c) single storey rear 25% SEPP HSPD requirement and in doing so achieve acceptable residential amenity outcomes relation to visual bulk.

In this regard, the application is accompanied by an updated clause 4.6 variation request addressing the applicable statutory requirements and demonstrating that given the ability of the development to satisfy the objectives of the standard that strict compliance is unreasonable and unnecessary and that there are sufficient environmental planning grounds to justify the variation sought. The updated clause 4.6 variation request is at Attachment 1.

In relation to solar access to the communal open space areas and the east facing resident rooms, the application is accompanied by additional sunlight diagrams plan DA-19(B) which demonstrate that the internalised courtyard is and east facing resident rooms will receive three hours of solar access between 9am and 21st June.

Rear 25% of Site

Response: As previously indicated, the plans have been amended to ensure strict compliance with the clause 40(4)(c) single storey rear 25% SEPP HSPD requirement with a clause 4.6 variation request no longer required in relation to this aspect of the development.

Building Code of Australia

Response: The plans have been amended to respond to the issues raised in the Philip Chun BCA report dated 18th October 2019 including confirmation as to the location of the required electrical kiosk. These issues have been addressed.

Land Contours and RL Levels

Response: The plans have been amended to provide additional spot and contour levels as requested to enable an accurate assessment as to the height of the proposed development relative to adjacent land.

Waste Management

Response: This application is accompanied by amended plans and a revised Traffic and Parking Assessment Report, dated 20th of November 2020, prepared by Varga Traffic Planning Pty Limited. This documentation confirms that the plans now provide the required turning paths for a heavy rigid waste collection vehicle as required by Council.

Stormwater Drainage

Response: These issues are addressed in detail in the accompanying amended stormwater drainage details prepared by ACOR.

Acoustic Assessment

Response: These issues are addressed in detail in the accompanying updated acoustic report prepared by Acoustic Logic.

Demolition and Construction Waste Management Plan

Response: The application is accompanied by an updated Demolition and Construction Waste Management Plan prepared by Waste Audit and Consultancy Services which clearly identifies the volume of excavated material being removed from the site.

Design Excellence Panel assessment issues

Desired Future Character

Response: As previously indicated, the proposal is now fully compliant with the clause 40(4)(c) single storey rear 25% SEPP HSPD requirement with a clause 4.6 variation request no longer required in relation to this aspect of the development. The plans have also been amended to provide additional landscape opportunity along the western boundary of the site as detailed on the accompanying amended plans prepared by Trish Dobson. We consider that the development will sit within a landscape setting and accordingly the development is consistent with the desired future character of the area.

Further, existing ground levels an additional spot and contour levels have been provided to the architectural plans set to enable accurate assessment in terms of heights, excavation and amenity.

Height

Response: Having reviewed the panel's commentary we confirm that the development does in fact comply with the maximum 8 metre to the underside of the ceiling height standard a clause 40(4)(a) of SEPPHSPD. Further, the proposal is now fully compliant with the clause 40(4)(c) single storey rear 25% SEPP HSPD requirement with a clause 4.6 variation request no longer required in relation to this aspect of the development.

The internal communal open space courtyards have been reconfigured to enhance their geometry and associated amenity with solar gain diagrams demonstrating that these spaces will receive at least 3 hours of solar access between 9am and 3pm on 21 June.

The accompanying architectural plans also demonstrate that the propose development will present as promptly two story building form as viewed from all surrounding properties and in a streetscape context and to that extent the accompanying clause 4.6 variation request in support of the clause 40(4)(b) SEPPHSPD storeys standard building height breach is well-founded.

Setbacks

Response: As previously indicated, the proposal is now fully compliant with the clause 40(4)(c) single storey rear 25% SEPP HSPD requirement with a clause 4.6 variation request no longer required in relation to this aspect of the development. The plans have also been amended to provide additional landscape opportunity along the western boundary of the site as detailed on the accompanying amended plans prepared by Trish Dobson. We consider that the development will sit within a landscape setting and accordingly the development is consistent with the desired future character of the area.

Building form and separation

Response: In response to the concerns raised in relation to the institutional feel created by the long corridors we note that the development will be owned and operated by Thompson Health Care, a family owned and operated company with over 40 years industry experience. The internal design and functionality of the facility has been settled in close consultation with Thompson Health Care noting that form generally follows function in this type of facility.

Whilst long corridors are to be avoided in residential development, they are beneficial in residential care facilities in that they afford casual surveillance along the entire length of the corridor between staff and residents.

The internal communal open space courtyards have been reconfigured to enhance their geometry and associated amenity with solar gain diagrams demonstrating that these spaces will receive at least 3 hours of solar access between 9am and 3pm on 21 June.

The plans have also been amended to provide additional landscape opportunity along the western boundary which will provide enhanced amenity for residents whose rooms are orientated towards the western boundary of the property. Finally, whilst the west facing rooms do not have externally mounted sun protection, being a preference of the operator, no objection would be raised to an appropriately worded condition should Council consider such shading devices to be of critical importance.

Landscaping

Response: This submission is accompanied by an amended landscape plan which reflects the amended architectural outcomes including enhanced residential amenity to the reconfigured internalised courtyards and accessibility/ wayfinding through the landscape setbacks around the perimeter of the site. The landscape open space areas will contribute significantly to the amenity of the facilities residents.

Open spaces

Response: As above.

Privacy and security

Response: Careful consideration has been given to identifying potential privacy issues tween the proposed development and adjoining residential properties and to that extent the east facing upper level windows, we located within proximity of the adjoining residential properties, been provided with fixed louvred privacy screens to prevent direct overlooking into the rear yards of these adjoining properties. These privacy measures, coupled with the spatial separation afforded and intervening landscape treatments proposed, will ensure that reasonable residential amenity is maintained to surrounding development in relation previously indicated to privacy and security.

Sunlight and ventilation

Response: as previously indicated, the internal communal open space courtyards have been reconfigured to enhance their geometry and associated amenity with solar gain diagrams demonstrating that these spaces will receive at least 3 hours of solar access between 9am and 3pm on 21 June.

Housing choice

Response: We confirm that the application provides for a reduction in bed numbers from 102 to 98 that for the reasons previously outlined, the owner and operator of the facility does not propose to make any additional arrangements in relation to dementia management.

Vehicular access and parking

Response: We rely on our responses in response to the previous concerns raised noting that the concerns previously expressed in regards to the impact of the long driveway ramp in relation to noise and poor visual outlook from several resident rooms have been addressed through the amendments proposed.

Public domain

Response: We consider that the development frontage does integrate appropriately with the public domain noting that the outdoor alfresco lounge area extends towards the street with the landscape treatments along the front boundary contributing significantly to the landscape quality of the streetscape.

ESD

Response: In response to this concern the application now nominates the location of the proposed solar panels with the proposal otherwise satisfying the applicable statutory requirements as they relate to energy efficiency and sustainability.

The accompanying documentation comprehensively addresses the issues raised by Council and the Design Excellence Panel. Having given due consideration to the matters pursuant to Section 4.15(1) of the Environmental Planning and assessment Act, 1979 as amended, it is considered that there are no matters which would prevent Council from granting consent to this proposal in this instance.

Yours faithfully

Boston Blyth Fleming Town Planners

Greg Boston

B Urb & Reg Plan (UNE) MPIA
B Env Hlth (UWS)
Director

Attachment 1 Updated clause 4.6 variation request

Attachment 1

Updated Clause 4.6 variation request

Clause 40(4)(b) SEPP HSPD

Pursuant to clause 40(4)(b) of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD) 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.

The note to this clause identifies the associated purpose of object namely:

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

It has been determined that although the proposed development presents to all boundaries, relative to existing ground levels, as either a 1 or 2 storey form, the central part of the development, where the floor plates step down the site in response to topography, is 3 storeys as defined and therefore breaches this standard. The general area of the breach is depicted in Figure 1 below.

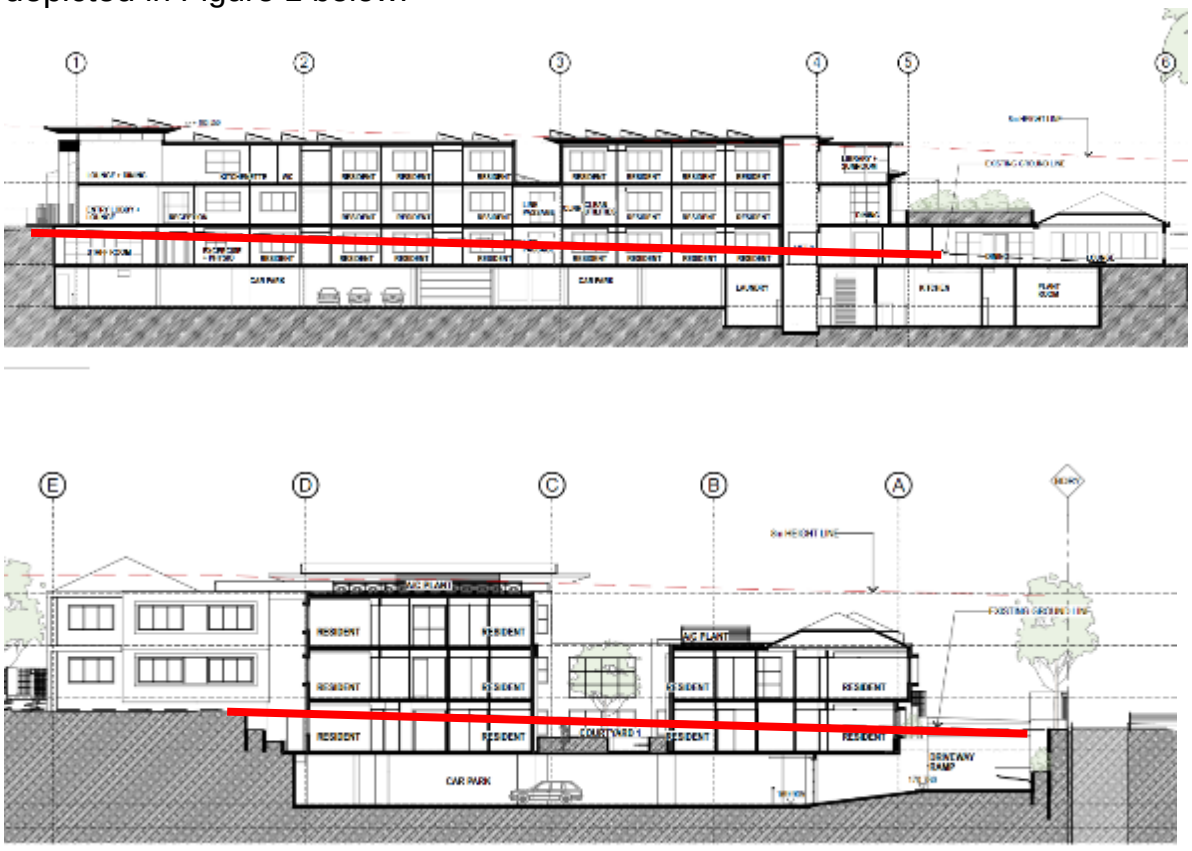

Figure 1 – Section showing the 3 storey elements located through the central portion of the development with the red line representing existing ground level

I note that the majority of the 3rd storey element is located below the natural surface level of the adjoining land and as such the building does in fact present as a 2 storey element as viewed from the immediately adjoining properties.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of HLEP provides:

(1) The objectives of this clause are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

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

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

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

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

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.
Clause 4.6(2) of HLEP provides:

(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.

This clause applies to the clause 40(4)(b) height development standard contained within SEPP HSPD.

Clause 4.6(3) of HLEP provides:

(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.

The proposed development does not comply with the height of buildings standard at clause 40(4)(b) of SEPP HSPD which specifies a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of HLEP provides:

(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 Director-General has been obtained.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 5th May 2020, attached to the Planning Circular PS 18-003 issued on 5th May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of HLEP provides:

(5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 40(4)(b) SEPP HSPD from the operation of clause 4.6.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 40(4)(b) SEPP HSPD a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

   (a) compliance is unreasonable or unnecessary; and

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

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 40(4)(b) SEPP HSPD and the objectives for development for in the zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 40(4)(b) of SEPP HSPD?

4.0 Request for variation

4.1 Is clause 40(4)(b) of SEPP HSPD a development standard?

The definition of "development standard" at clause 1.4 of the EP&A Act includes:

> *(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 40(4)(b) of SEPP HSPD prescribes a height provision that relates to certain development. Accordingly, clause 40(4)(b) of SEPP HSPD is a development standard.

4.2A Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in Wehbe v Pittwater Council [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

<u>Consistency with objectives of the height of buildings standard</u>

An assessment as to the consistency of the proposal when assessed against the implicit objective of the standard is as follows:

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

Response: Having regard to the stated objective of the clause 40(4)(b) SEPP HSPD standard we make the following observations:

- The building presents a maximum of 2 storeys to the street and achieves the objective in this regard.

- The majority of the 3rd storey element is located below the natural surface level of the adjoining land and as such the building does in fact present as a 2 storey element as viewed from the immediately adjoining properties as depicted in Figure 2, 3 and 4 over page.

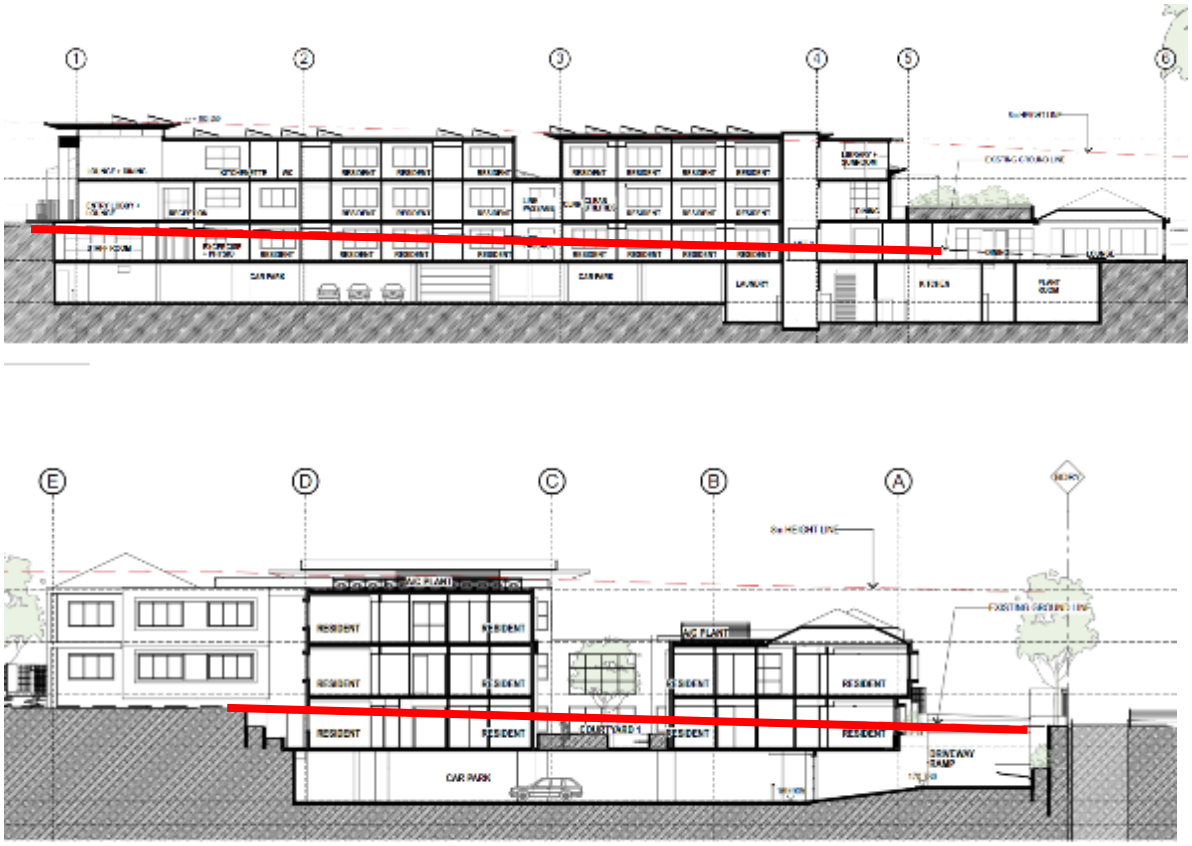

Figure 2 – Section showing the 3 storey elements located through the central portion of the development with the red line representing existing ground level

Figure 3 – Eastern elevation showing 2 storey presentation to the neighbouring properties.

Figure 4 – Plan extract DA-21 showing predominantly 2 storey building presentation as viewed from surrounding development

In this regard, I am satisfied that the height of the proposal does avoid an abrupt change in the scale of development in the streetscape particularly in circumstances where the proposal is compliant with the 2 storey height standard as viewed from the street.

The proposal achieves this objective.

Consistency with zone objectives

The subject property is zoned Residential R2 Low Density Residential pursuant to Hornsby Local Environmental Plan 2013 (HLEP 2013). Seniors housing is not permissible with consent in the zone however is permissible pursuant to the provisions of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD). The stated zone objectives are as follows:

- *To provide for the housing needs of the community within a low density residential environment.*

Response: The proposal provides housing which will meet the needs of seniors or people with a disability within 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.*

Response: Not applicable.

The proposed development meets the relevant zone objectives by providing housing which will meet the needs of seniors or people with a disability within the community within a low-density residential environment.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the R2 Low Density Residential zone and the height of building standard objective. Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be is unreasonable and unnecessary.

4.2B Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

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

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

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

Sufficient environmental planning grounds exist to justify the variation to the height of buildings standard. Those grounds are as follows:

Ground 1

Objective 1.3(c) of the Environmental Planning and Assessment Act 1979 is:

> *"to promote the orderly and economic use and development of land,"*

Compliance with the height of buildings standard would necessitate a significant reduction in what is already a compliant level of floor space.

Under such circumstances strict compliance would not promote the orderly development of land.

Ground 2

Objective 1.3(g) of the EP&A Act is:

> *"to promote good design and amenity of the built environment,"*

The non-compliant portion of the building is of good design as it maintains a 2 storey presentation to the street and neighbouring properties.

For the above reasons there are sufficient environmental planning grounds to justify contravening the development standard.

4.3 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3A and the objectives of the R2 Low Density Residential zone

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

> *"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.*

If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).”

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development in the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the implicit objectives of the standard and the objectives of the zone.

4.4 Secretary’s concurrence

By Planning Circular dated 5th May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

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

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

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of building variation in this instance.

Boston Blyth Fleming Pty Limited

Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

Attachment 1 Shadow diagrams

BURDETT STREET

BURDETT STREET

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