

13th August 2021

DJ Thompson Family Trust ats Hornsby Shire Council
Case number 2021/00077065
Addendum Statement of Environmental Effects/
Updated clause 4.6 variation request
Proposed Residential Care Facility
65 – 71 Burdett Street, Hornsby

This Addendum Statement of Environmental Effects has been prepared in support of amended Architectural plans DA-00 to DA-35, Revision E, prepared by Gartner Trovato Architects. A schedule of amendments prepared by the Architect is at Attachment 1. This submission is also accompanied by an updated clause 4.6 variation request in support of a variation to the clause 40(4)(b) building height standard contained within State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD).

The following table provides a summary of details in respect to compliance with standards that apply to this development proposal.

SUMMARY OF COMPLIANCE WITH STANDARDS			
Standard	Required	Provided	Complies
Location, Facilities and Support Services (Clause 26 SEPPHSPD)	Site within 400m of transport that can provide access to Facilities and Support Services	Property located within 400m of bus services as detailed in the access report.	Yes
Building Frontage (Clause 40(3) SEPPHSPD)	Minimum street frontage of 20 metres wide at building line.	>20 metre width at building line	Yes
Wheelchair Access Requirements (Schedule 3)	100% access to road or internal driveway; 10% access to adjoining road; 100% access to common areas and facilities; 100% adaptable to disabled persons requirements	100% access to road or internal driveway; greater than 10% access to adjoining road; 100% access to common areas and facilities; 100% adaptable to disabled persons requirement	Yes
Height (Clause 40(4) SEPPHSPD)	<8.0m 2 storeys at boundary. Single storey in rear 25% of site.	<8m 3 storeys in part Single storey rear 25% area of site	Yes No – Refer to updated clause 4.6 variation request Yes

FSR (Clause 48(b) SEPPHSPD)	Threshold of 1:1	0.88:1	Yes
Landscaped Area (Clause 48(c) SEPPHSPD)	Minimum 25 square metres per bed. Based on 96 beds (2400sqm required)	Deep soil (1787sqm) On slab courtyards and planters (715sqm) Total 2502sqm	Not strictly in accordance with definition. Acceptable on merit
Parking (Clause 48(d) SEPPHSPD)		39 spaces	Yes Refer to traffic and parking report
Neighbour amenity and streetscape (Clause 33 SEPPHSPD)	Attractive residential environment		Satisfactory
Visual and Acoustic Privacy (Clause 34 SEPPHSPD)	Appropriate site planning and acceptable noise levels		Satisfactory
Solar Access (Clause 35 SEPPHSPD)	Adequate daylight to living areas of neighbours and sun to POS	These provisions are satisfied as discussed in detail below.	Satisfactory
Stormwater (Clause 36)	Minimise stormwater run-off.		Satisfactory
Crime Prevention (Clause 37 SEPPHSPD)	Personal property security for residents and visitors and encourage crime prevention.		Satisfactory
Accessibility (Clause 38 SEPPHSPD)	Access to public transport, parking and disabled access to all aspects of the development.		Satisfactory
Waste Management (Clause 39 SEPPHSPD)	Waste facilities that maximise recycling.		Satisfactory

Clause 35 – Solar access and design for climate

An assessment against these provisions is as follows:

- (a) *ensure adequate daylight to the main living areas of neighbours in the vicinity and residents and adequate sunlight to substantial areas of private open space, and*

Response: The shadow diagrams (DA-14) and views from the sun solar gain diagrams (DA-31 – DA-35) prepared by the project Architect demonstrate that at least 3 hours of solar access will be maintained to the principal living areas and private open space of neighbouring properties in the vicinity of the site and well in excess of 3 hours of solar access afforded to the main living areas of the development for the use and enjoyment of residents on 21st of June. These plans also demonstrate that substantial areas of communal open space within the proposed development will obtain in excess of 3 hours solar access on 21st of June.

On the basis of the above analysis, we are satisfied that adequate daylight is maintained to the main living areas of neighbours in the vicinity and residents and adequate sunlight to substantial areas of private open space in accordance with this control.

- (b) *involve site planning, dwelling design and landscaping that reduces energy use and makes the best practicable use of natural ventilation solar heating and lighting by locating the windows of living and dining areas in a northerly direction.*

Response: We note that the development proposes the construction of a residential care facility which does not contain dwellings as defined. It is therefore arguable that this particular provision does not apply to a residential care facility. That said, the residential care facility has been designed through detailed site and context analysis with the communal living areas and communal open space areas orientated to the north to maximise solar access throughout the year. Landscaping has also been designed as an integral part of the application with canopy trees appropriately located to provide shade in summer whilst maintaining adequate daylight access to substantial areas of communal open space in midwinter.

The central courtyard design provides good opportunity for natural cross ventilation throughout the development with individual resident rooms fitted with operable windows and individually operated heating and cooling systems to reduce energy use/ inefficiencies across the entire development.

The design of the development and associated landscaping reduces energy use and makes the best practicable use of natural ventilation, solar heating and lighting by locating the windows of living and dining areas in a northerly direction. These provisions are satisfied.

Please do not hesitate to contact me to discuss any aspect of this correspondence.

Yours sincerely

BOSTON BLYTH FLEMING PTY LIMITED



Greg Boston

B Urb & Reg Plan (UNE) MPIA

B Env Hlth (UWS)

Director

Attachment 1 Schedule of amendments

Attcahment 2 Updated clause 4.6 variation request

Attachment 1 Schedule of amendments



12th August 2021

Thomas Dales
Hornsby Council
PO Box 37
Hornsby, NSW 1630

Architectural drawings – Schedule of Amendments – DA/485/2020 65-71 Burdett Street, Hornsby

DA-00 [E]	COVER SHEET <ul style="list-style-type: none">Development Application drawing list updated3D Rendering updated to reflect proposed amendments.
DA-01 [E]	EXISTING SITE + DEMOLITION PLAN <ul style="list-style-type: none">Unchanged
DA-02 [E]	EXISTING SITE ANALYSIS <ul style="list-style-type: none">Subject site plan changed to reflect proposed amendments.
DA-03 [E]	SITE CONTEXT PLAN <ul style="list-style-type: none">Subject site plan changed to reflect proposed amendments.
DA-04 [E]	PLANNING CONTROLS DIAGRAM <ul style="list-style-type: none">Subject site plan changed to reflect proposed amendments.Landscape area recalculatedDevelopment Schedule Table updated
DA-05 [CE]	SITE PLAN + ROOF PLAN <ul style="list-style-type: none">External landscape walls and paths updated + coordinated with Landscape drawing (Landscaping)Revised driveway (shortened) with increased landscaped areasCourtyards increased to reflect proposed amendments
DA-06 [E]	BASEMENT + SERVICE + CARPARK LEVEL <ul style="list-style-type: none">Extensive redesign of Driveway and Basement Parking<ul style="list-style-type: none">Driveway length shortenedCarpark amended to have a single entryMini Bus Parking relocatedLoading Dock redesignedLandscaped area increasedDeep soil area increasedRetention of additional trees proposed



Gartner Trovato Architects
nominated architects

L1, Suite 13, 10 Park Street, Mona Vale, NSW
sean.gartner . 6072 luke.trovato . 7094

po box 1122, mona vale, nsw 1660
p +612 9979 4411 e-gta@g-t.com.au

- DA-07 [E] LOWER GROUND FLOOR
- Driveway amended to reflect new design
 - External landscape walls and paths updated + coordinated with Landscape drawing (Landscaping)
 - Eastern boundary terraced gardens amended for better amenity to rooms LG-05+LG-07
 - Central West lounge area increased in width for better internal amenity
 - Internal furniture layouts updated
 - Ward design updated
 - Cinema + Activity Areas redesigned
 - Ward numbers amended to suit revised layouts
 - Grids amended to suit revised layout
- DA-08 [E] GROUND FLOOR LEVEL
- Terrace removed from South West corner to increase landscape at Streetfront
 - North West Lounge Increased in width for better internal amenity
 - North East Lounge Increased in width for better internal amenity
 - Central West lounge area increased in width for better internal amenity
 - Central East lounge area increased in width for better internal amenity
 - Courtyard 5 replaced with Salon. Additional storage proposed in original Salon area.
 - Fencing removed along street front to increase landscape at Streetfront
 - Entry path relocated to increase landscape at Streetfront
 - Egress path relocated to increase landscape at Streetfront
 - Substation rotated at South East Corner to increase landscape at Streetfront
 - Internal furniture layouts updated
 - Ward design updated
 - Eastern Wards window treatments revised.
 - External landscape walls and paths updated + coordinated with Landscape drawing (Landscaping)
- DA-09 [E] FIRST FLOOR LEVEL
- Subject site plan changed to reflect proposed amendments.
 - 4 Wards removed at Northern end of First Floor
 - Wards relocated away from eastern boundary to increase side setback from neighbours, and reduce bulk and scale and improve privacy.
 - Internal furniture layouts updated
 - Courtyard above relocated Salon on Ground Floor introduced for additional amenity on the first floor.
 - 2 Wards added L1-08, L1-07
 - Eastern Wards window treatments revised.
 - External landscape walls and paths updated + coordinated with Landscape drawing (Landscaping)
 - Ward numbers amended to suit revised layouts
 - Grids amended to suit revised layout
- DA-10 [E] ELEVATIONS SHEET 01
- Amended to reflect the plan changes
 - Sub station rotated 90degrees
 - South Elevation
 - Eaves added to pitched roofs on Entry Pavillion
 - SE Pavillion
 - Juliette Balcony Addes
 - Eaves added to roof
 - Façade treatment amended



Gartner Trovato Architects
nominated architects

L1, Suite 13, 10 Park Street, Mona Vale, NSW
sean gartner . 6072 luke trovato . 7094

po box 1122, mona vale, nsw 1660
p +612 9979 4411 e-gta@g-t.com.au

	<ul style="list-style-type: none"> ○ Revised Character of Entry Pavillion to reflect more residential suburban scale ○ Lowered roof pitch to Porte Cochere ○ Revised Fence locations ○ Pergola Added to SW Pavillion • North Elevation <ul style="list-style-type: none"> ○ Eaves added to pitch roofs ○ Amended to reflect the plan changes • Material + Finishes Updated
DA-11 [E]	<p>ELEVATIONS SHEET 02</p> <ul style="list-style-type: none"> • Amended to reflect the plan changes • West Elevation <ul style="list-style-type: none"> ○ Eaves added to pitched roofs ○ Amended to reflect the plan changes ○ Window treatments made thinner • East Elevation <ul style="list-style-type: none"> ○ Eaves added to pitched roofs ○ Amended to reflect the plan changes ○ Window treatments made thinner • Material + Finishes Updated
DA-12 [E]	<p>SECTIONS SHEET 01</p> <ul style="list-style-type: none"> • Sections amended to reflect plan changes
DA-13 [E]	<p>SECTIONS SHEET 02</p> <ul style="list-style-type: none"> • Sections amended to reflect plan changes • Section DD Added to drawing.
DA-14 [E]	<p>SHADOW DIAGRAMS</p> <ul style="list-style-type: none"> • Amended to reflect the plan changes
DA-15 [E]	<p>3D VIEWS</p> <ul style="list-style-type: none"> • Amended to reflect the plan changes
DA-16 [E]	<p>3D VIEWS</p> <ul style="list-style-type: none"> • Amended to reflect the plan changes
DA-17 [E]	<p>HEIGHT CONTROL VIEWS</p> <ul style="list-style-type: none"> • Amended to reflect the plan changes
DA-18 [E]	<p>REAR 25% SETBACK AND EGRESS</p> <ul style="list-style-type: none"> • Amended to reflect the plan changes
DA-19 [E]	<p>SMOKE COMPARTMENTS</p> <ul style="list-style-type: none"> • Amended to reflect the plan changes
DA-20 [E]	<p>VIEWS FROM ADJACENT PROPERTIES</p> <ul style="list-style-type: none"> • Amended to reflect the plan changes
DA-21 [E]	<p>LOWER GROUND WEST – ROOM VIEW AMENITY</p> <ul style="list-style-type: none"> • Amended to reflect the plan changes
DA-22 [E]	<p>LOWER GROUND EAST– ROOM VIEW AMENITY</p> <ul style="list-style-type: none"> • Amended to reflect the plan changes
DA-23 [E]	<p>SUNLIGHT WINTER – COURTYARD 01</p>



	<ul style="list-style-type: none"> Amended to reflect the plan changes
DA-24 [E]	SUNLIGHT WINTER – COURTYARD 02 <ul style="list-style-type: none"> Amended to reflect the plan changes
DA-25 [E]	SUNLIGHT WINTER – COURTYARD 03 <ul style="list-style-type: none"> Amended to reflect the plan changes
DA-26 [E]	SUNLIGHT WINTER – COURTYARD EAST <ul style="list-style-type: none"> Amended to reflect the plan changes
DA-27 [E]	SUNLIGHT EQUINOX – COURTYARD 01 <ul style="list-style-type: none"> Amended to reflect the plan changes
DA-28 [E]	SUNLIGHT EQUINOX – COURTYARD 02 <ul style="list-style-type: none"> Amended to reflect the plan changes
DA-29 [E]	SUNLIGHT EQUINOX – COURTYARD 03 <ul style="list-style-type: none"> Amended to reflect the plan changes
DA-30 [E]	SUNLIGHT EQUINOX – COURTYARD EAST <ul style="list-style-type: none"> Amended to reflect the plan changes
DA-31 [E]	VIEW FROM THE SUN 9.00AM-10.30PM <ul style="list-style-type: none"> New Drawing
DA-32 [E]	VIEW FROM THE SUN 11.00AM-12.30PM <ul style="list-style-type: none"> New Drawing
DA-33 [E]	VIEW FROM THE SUN 1.00PM-2.30PM <ul style="list-style-type: none"> New Drawing
DA-34 [E]	VIEW FROM THE SUN 3.00PM <ul style="list-style-type: none"> New Drawing
DA-35 [E]	COMMON ROOM SOLAR ACCESS <ul style="list-style-type: none"> New Drawing



1.0 Introduction

This updated clause 4.6 variation request has been prepared having regard to amended Architectural plans DA-00 to DA-35, Revision E, prepared by Gartner Trovato Architects.

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD)

2.1 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 predominantly presents to all boundaries, relative to existing ground levels, as either a 1 or 2 storey form, the central part of the eastern pavilion, where the floor plate steps down over the basement carpark, 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 eastern pavilion 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 predomently presents as a 2 storey structure 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 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.

Consistency with objectives of the height of buildings standard

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 below and over page.



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



Figure 3 – Eastern elevation showing predominant 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 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 level of floor space significantly below the “cannot refuse” standard of 1:1. An FSR of 0.88:1 is proposed.

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 with the overall building height compliant with the maximum 8 metre to ceiling and single storey rear 25% site area standards. The development takes advantage of the topographical characteristics of the site which facilitates the location of floor space below the established ground levels where it will not be readily discernible as viewed from outside the site and certainly not in a streetscape context.

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

Shadow diagrams

