

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

BostonBlythFleming
Town Planners

**STATEMENT OF
ENVIRONMENTAL EFFECTS**

Proposed Residential Care Facility

**65 - 71 Burdett Street
Hornsby**



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Statement of Environmental Effects

Proposed residential care facility

65 – 71 Burdett Street, Hornsby

Prepared under instructions from



Greg Boston

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

Boston Blyth Fleming Pty Limited
Town Planners
(ACN 121 577 768)

Suite 1/9 Narabang Way Belrose
NSW 2085

Tel: (02) 9986 2535
Email: greg@bbfplanners.com.au

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1.0 INTRODUCTION

This document forms a component of a development application proposing the demolition of the existing site structures and the construction of a 102 bed residential care facility pursuant to the provisions of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD). The architectural detailing is contained within the accompanying plan bundle prepared by Gartner Trovato Architects.

We note that DA/532/2017/C was approved by Council on 14th August 2018 for the construction of a seniors living development on No's 65 – 69 Burdett Street comprising 22 self-contained dwellings. This consent has not been taken up. The plan bundle contains a comparative analysis of the previously approved and proposed developments in terms of building forms and heights.

The proposed residential care facility will be owned and operated by Thompson Health Care, a family owned and operated company with over 40 years industry experience. The company is committed to excellence and owns and operates 12 residential care facilities located from Bowral in the Southern Highlands, throughout the Sydney Region and to Kempsey on the mid-north coast. The Thompson family believes each of their residents is entitled to the highest standards of professional care, a comfortable and secure environment, privacy, dignity and participation in daily decision making.

The architect has responded to the client brief and the minutes arising from formal pre-DA discussions with Council, including the Design Excellence Panel, to provide for a boutique residential care facility of exceptional design quality to meet a clear demand for such accommodation within the area. The built form and landscape outcomes achieved respond appropriately to the constraints and opportunities identified through detailed site analysis whilst maintaining appropriate levels of amenity to the adjoining and nearby residential properties.

The highly articulated and modulated building form has been designed to step down the site in response to topography and provide a generous deep soil landscaped curtilage to adjoining development. The landscaping proposed will ensure that the building is soften and screened as viewed in the round and sits within a relatively informal landscaped setting.

The resultant height, form, massing and setbacks are complimentary and compatible with those established by other development within the sites visual catchment and that reasonably anticipate for this form of development where form follows function. In the preparation of the document consideration has been given to the following statutory planning regime:

- Environmental Planning and Assessment Act, 1979 (the Act);
- State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD);
- State Environmental Planning Policy No. 55 (Remediation of Land) (SEPP 55);
- Hornsby Local Environmental Plan 2013 (HLEP); and
- Hornsby Development Control Plan 2013 (PDCP).

Architectural drawings including floor plans, elevations and sections have been prepared in relation to the development proposed. The application is also accompanied by a survey plan, traffic and parking assessment, landscape plans, arborist report, acoustic report, schedule of finishes, concept drainage plans, geotechnical report, acid sulfate soils report, access report, waste management plan, BCA report, QS report and photomontage.

The proposal is permissible and in conformity with the aims and implicit objectives of SEPP HSPD and consistent with the subordinate standards and controls applicable to this form of development on this particular site. This report will demonstrate that the density proposed is contextually appropriate with the development maintaining appropriate streetscape and residential amenity outcomes. This report also demonstrates that strict compliance with the height of building standards at clauses 40(4)(b) and 40(4)(c) of SEPPHSPD is unreasonable and unnecessary under the circumstances with sufficient environmental planning grounds to justify the variations proposed. The clause 4.6 variation requests are well founded.

The proposal succeeds when assessed against the Heads of Consideration pursuant to section 4.15C of the Act. It is considered that the application, the subject of this document succeeds on merit and is worthy of the granting of development consent.

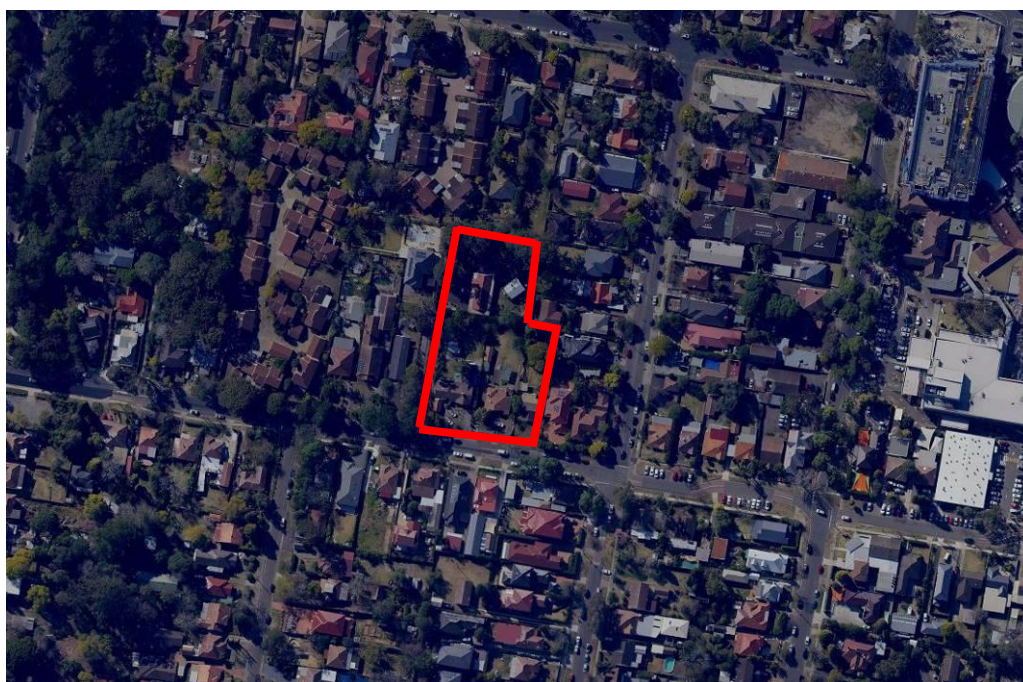
2.0 SITE DESCRIPTION AND LOCATION

The development site comprises the following properties:

- Lot 1, DP 379371, No. 65 Burdett Street;
- Lot 2, DP 379371, No. 67 Burdett Street;
- Lot 3, DP 379371, No. 69 Burdett Street; and
- Lot 1, DP 6345, No. 71 Burdett Street, Hornsby

The consolidated allotment is irregular in shape having frontage and address to Burdett Street of 66.34 metres, variable depth of between 60.96 and 105.855 metres and a total site area of 6105m². The property is located on the northern side of Burdett Street East approximately 500 metres east of the Hornsby Town Centre including Westfield Hornsby and 250 metres west of Hornsby Ku-ring-gai Hospital and a range of specialist medical practices.

A regularly serviced bus stop is located in Northcote Avenue approximately 320 metres accessible path of travel from the site. The property contains a number of trees none of which are considered significant in terms of form or species. The development site falls approximately 3 metres across its surface towards the rear of the property with a traffic calming device located adjacent to No. 69 Burdett Street. A location/ context photograph is at Figure 1 below.



Source: SIX Maps

Figure 1 – Aerial site location/ context photograph

The properties are currently occupied by single storey cottages with both attached and detached carparking accommodation. Fencing of varying height and design delineates the front boundary of the properties with the exception of No. 65 Burdett Street which is located on a battle-axe allotment. The built form characteristics of the existing properties are depicted on the site survey and photographs at Figures 2, 3 and 4 below and over page.

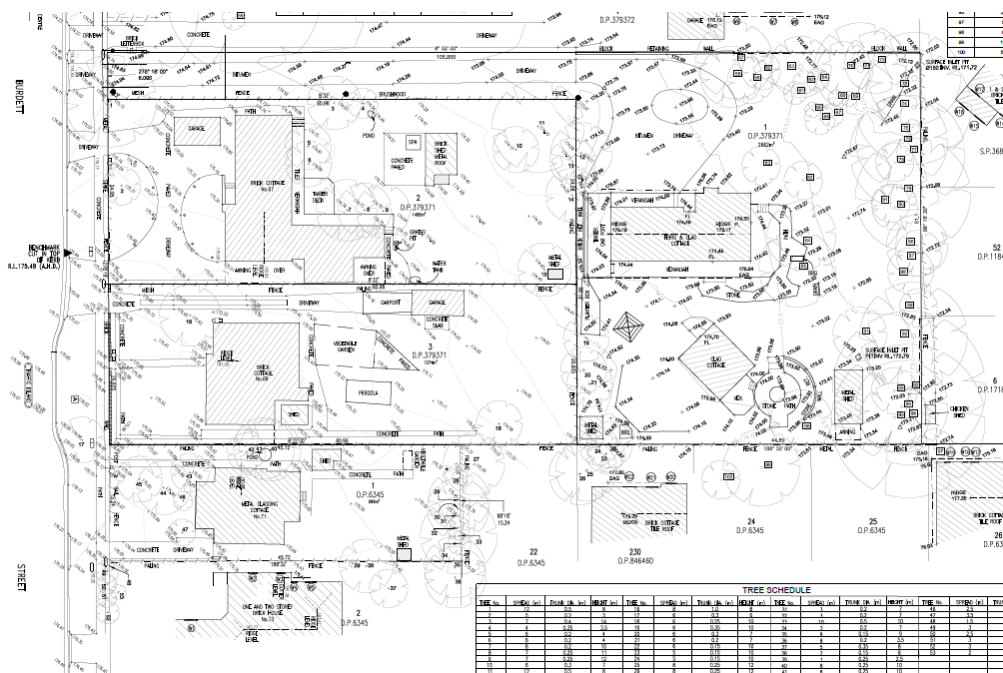
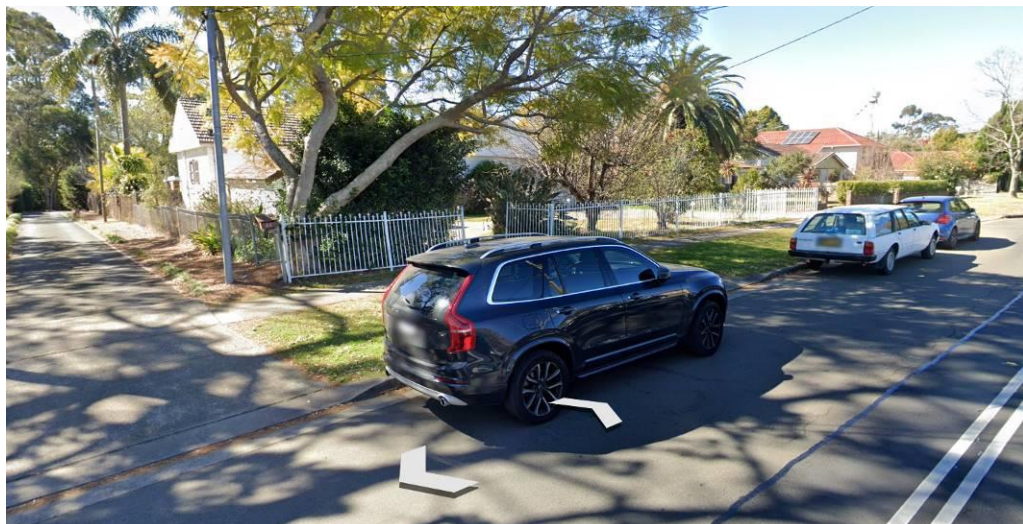


Figure 2 – Site survey extract



Source: Google Earth

Figure 3 – Subject properties as viewed from Burdett Street looking east



Source: Google Earth

Figure 4 – Subject properties as viewed from Burdett Street looking west

Surrounding development is characterised by 1 and 2 storey detached dwellings interspersed by seniors housing and childcare centres. The properties to the rear have frontage and address to Northcote Road whilst the properties to the east have frontage and address to Balmoral Street.



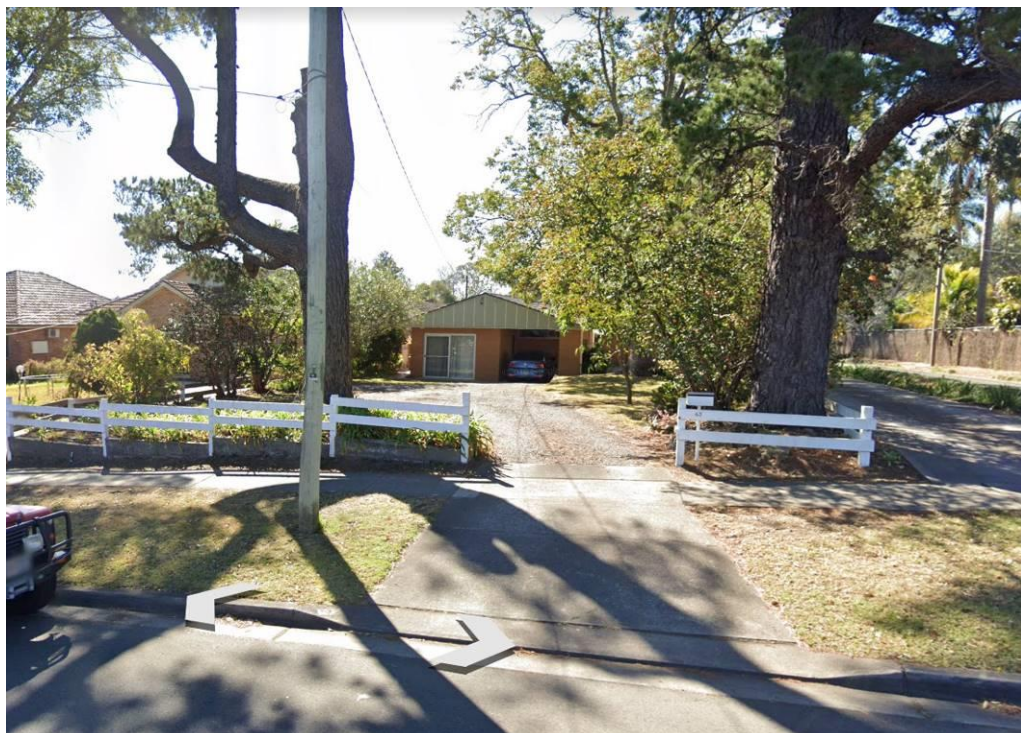
Source: Google Earth

Figure 5 – properties located on the southern side of Burdett Street directly opposite the subject site.



Source: Google Earth

Figure 6 – View of the 2 storey dwelling located to the east of the subject site No. 73 Burdett Street



Source: Google Earth

Figure 7 – View of property to the west of the subject site and access to the battle-axe property to the rear No's 63 and 63A Burdett Street

The relationship of the proposal to surrounding development is depicted in the plan extract at Figure 8 below.

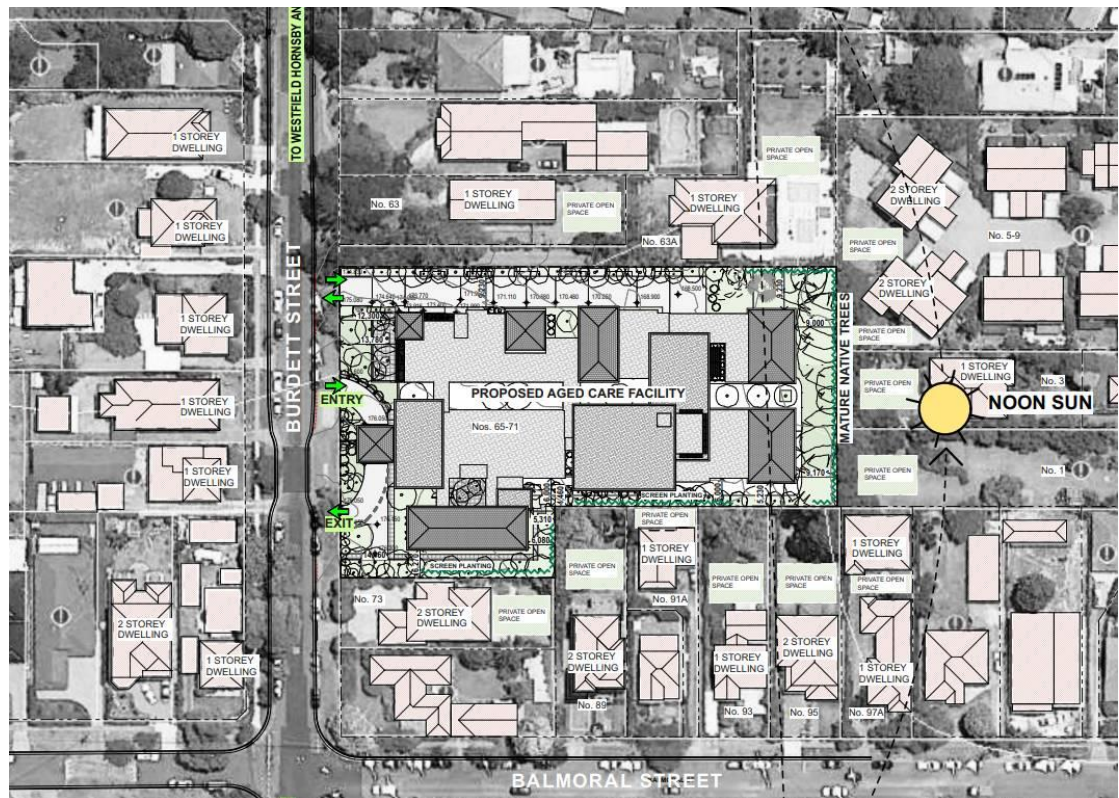


Figure 8 – The plan extract showing the relationship of the proposal to surrounding development

3.0 DEVELOPMENT PROPOSAL

This document forms a component of a development application that proposes the demolition of the existing site structures and the construction of a 102 bed residential care facility pursuant to the provisions of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD). The scope of works is depicted on the following architectural plans prepared by Gartner Trovato Architects:

DEVELOPMENT APPLICATION DRAWING LIST	
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

The highly articulated and modulated building form has been designed to address the street frontage, response to topography and provide a generous deep soil landscaped curtilage to adjoining development. The general form and massing is consistent with that established by medium density housing forms with the site's visual catchment with the building form not being perceived as inappropriate or jarring in such context. Specifically, the application provides for the following built form outcome:

Basement Service/ Carpark Level

This basement contains carparking for 50 vehicles accessed via a new driveway down the western boundary of the property from Burdett Street. A loading dock and turning area are also accessed via this driveway. Internal lift and stair access are provided from the carparking area to the levels above.

This floor plate also contains a kitchen with associated storage, waste storage area, garden store, general storage areas, laundry and linen storage facilities, plant rooms, staff toilet facilities and a workshop. An OSD tank is located in the north eastern corner of the basement.

Lower Ground Floor Level

This floor plate contains 46 resident rooms accommodating a total of 49 beds. The rooms are located either side of a central landscaped courtyard containing informal seating and break out spaces for residents. A kitchenette, lounge and dining area are located in the north eastern corner of the floor plate with a staff room, staff courtyard, training room, cinema/ activities room, exercise/ physio room and staff amenities located at the southern end of the floor. A nurse station and various utility rooms also occupy this floor.

The lounge and dining areas break out onto north and east facing terrace areas with deep soil landscaping provided around the perimeter of the development at this level.

Ground Floor

This floor plate contains the formal entry lobby access via a circular drop off driveway and porte-cochere. This floor plate contains 34 resident rooms accommodating a total of 34 beds. The rooms are located either side of central landscaped courtyards containing informal seating and break out spaces for residents. A lounge with kitchenette, salon and function room are located at the southern end of the floor plate with the lounge breaking out onto a paved terrace located adjacent to the street frontage. A lounge and dining room with kitchenet are located at the northern end of the floor plate with access from the lounge area to a small terrace. A nurse station and various utility/ administration rooms also occupy this floor.

First Floor Level

This floor plate is located over the eastern portion of the floor plate below and contains 20 resident rooms accommodating a total of 21 beds. A lounge and dining room with kitchenette are located at the southern end of the floor plate with a library and sunroom at its northern end.

Landscaping works

The application proposes the removal of 33 prescribed trees as identified in the Arboricultural Impact Assessment prepared by Rain Tree Consulting of which 14 have a low retention value. The tree removal is appropriately compensated for through the implementation of an enhanced and integrated site landscape regime as depicted on plans prepared by Trish Dobson Landscape Architect. This landscape response, which incorporates screen tree plantings around the entire perimeter of the development together with courtyard and partial roof landscaping, will ensure that the development sits within a landscape setting and that the landscape quality of the immediate locality is maintained as a consequence of the development proposed.

The development will be gravity drained through the required OSD system to a proposed drainage easement at the rear of the site as detailed on the accompanying drainage plans prepared by Barrenjoey Consulting Engineers. We note that the proposed drainage easement follows the alignment of that previously negotiated in relation to DA/532/2017/C with negotiations ongoing to settle the terms of the easement with the adjoining property owner. The acceptability of the excavation proposed is assessed and determined to be appropriate as detailed in the accompanying geotechnical report prepared by Geo-Environmental Engineering. A schedule of colours and finishes accompanies the application.

Operational Characteristics

The residential care facility will operate 24/7 with a maximum of 28 staff on site during the main day shift and 40 staff on-site during the afternoon shift change.

The acceptability of the off-street parking and servicing characteristics of the development are addressed in the accompanying Traffic and Parking Assessment prepared by Varga Traffic Planning Pty Limited. The accompanying acoustic report by Acoustic Logic details the acoustic performance of the proposal.

4.0 STATUTORY PLANNING FRAMEWORK

4.1 Hornsby Local Environmental Plan 2013

4.1.1 Zone and 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.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

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.

HLEP 2013 also contains other provisions applicable to development on the land and although such provisions cannot derogate from SEPP HSPD consideration has been given as follows.

4.1.2 Height of buildings

The subject application is made pursuant to the provisions of SEPP HSPD which contains development standards in relation to building height. Whilst the SEPP HSPD building height provisions prevail over the clause 4.3 HLEP 2013 height standard an assessment against the latter numerical provision is considered appropriate. In this regard clause 4.3 of HLEP 2013 states that the height of a building on any land is not to exceed 8.5 metres. The stated objectives of such control are as follows:

- (a) *to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*

Building height (or **height of building**) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

We confirm that with the exception of minor roof and lift overrun projections that the development sits below the 8.5 metre height development standard as nominated on the height blanket diagram prepared by the project Architect at Figure 9 below.



Figure 9 – height blanket diagram showing minor breaches of the 8.5 metre height standard.

The streetscape and physical impacts of the development have been found to be acceptable with appropriate levels of residential amenity maintained to adjoining properties. The height proposed is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

As the proposal, notwithstanding the minor breaching roof elements, satisfy the objective of the standard strict compliance is both unreasonable and unnecessary.

4.1.3 Earthworks

The application requires excavation to accommodate basement parking for the development. Having regard to the clause 6.2(3) earthwork considerations, the application is accompanied by a geotechnical report prepared by Geo-Environmental Engineering. This report concludes that no geotechnical hazards will be created by the completion of the proposed development in accordance with the requirements of such report and good engineering and building practice.

We confirm that all excavated material will be disposed of to a suitable land fill area with excavation not having any adverse impact on the amenity or stability of adjoining properties. There are no exposed rock outcrops or waterways on the site so there is minimal likelihood of disturbing relics or, subject to appropriate erosion and sediment controls, impacting on waterways, drinking water catchments or environmentally sensitive areas.

In this regard, we have formed the considered opinion that the excavation satisfies the clause 6.2(3) considerations subject to appropriate conditions.

4.3 State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004

The following section of this report assesses the proposal against the relevant provisions of SEPP HSPD.

4.3.1 Aims of Policy

The stated aims of the SEPP are to encourage the provision of housing that will:

- (a) *increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and*
- (b) *make efficient use of existing infrastructure and services, and*
- (c) *be of good design.*

The policy indicates that these aims will be achieved by:

- (a) *setting aside local planning controls that would prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in the policy, and*
- (b) *setting out design principles that should be followed to achieve built form that responds to the characteristics of its site and form, and*
- (c) *ensuring that applicants provide support services for seniors or people with a disability for developments on land adjoining land zoned primarily for urban purposes.*

This report clearly and comprehensively demonstrates that the modified development is of good design and achieves the aims, development criteria and standards prescribed by the Policy and responds positively to the characteristics of the site through the design initiatives adopted including the breaking of the massing of the development and the maintenance of a generous landscaped curtilage.

4.3.2 Land to Which Policy Applies

Section 4 of the SEPP states that this policy applies to land within New South Wales that is land zoned primarily for urban purposes or land that adjoins land zoned primarily for urban purposes, but only if:

- (a) *development for the purpose of any of the following is permitted on the land:*
 - (i) *dwelling-houses,*
 - (ii) *residential flat buildings,*
 - (iii) *hospitals,*
 - (iv) *development of a kind identified in respect of land zoned special uses.*

The allotment, the subject of this application, is zoned primarily for urban purposes on which dwelling houses and residential flat buildings are permissible uses.

As the sites are not classified as environmentally sensitive land as identified in Schedule 1, or zoned for industrial purposes, the provisions of SEPP (Housing for Seniors or People with a Disability) 2004 apply.

4.3.3 Key Concepts

The development proposes the construction and use of a residential care facility providing accommodation for seniors or people with a disability. The proposed development satisfies the definition of a residential care facility as detailed at clause 11 of the SEPP.

4.3.4 Site Compatibility Criteria

The subject application is not one to which the application of a site compatibility certificate applies pursuant to clauses 24 and 25 of the SEPP.

4.3.5 Site-related Requirements

Location and access to facilities

Pursuant to clause 26 a consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have access to:

- (a) *shops, banks and other retail and commercial services that residents may reasonably require, and*
- (b) *community services and recreational facilities, and*
- (c) *the practice of a general medical practitioner.*

We confirm that a regularly serviced bus stop is located in Northcote Avenue approximately 320 metres accessible path of travel from the site. This bus stop meets the minimum servicing requirements of the SEPP and provide access to the necessary range of services and facilities located within the Hornsby Town Centre. Whilst this outcome satisfies the clause 26 provisions, we note that the property is located on the northern side of Burdett Street East approximately 500 metres east of the Hornsby Town Centre including Westfield Hornsby and 250 metres accessible path of travel west of Hornsby Ku-ring-gai Hospital and a range of specialist medical practices.

Bush fire prone land

Pursuant to Clause 27 a consent authority must not consent to a development application made pursuant to this Chapter to carry out development on land identified on a bush fire prone land map certified under section 146 of the Act as “Bush fire prone land – vegetation category 2” or “Bush fire prone land – vegetation buffer” unless the consent authority is satisfied that the development complies with the requirements of the document titled *Planning for Bushfire Protection*, dated December 2001.

The subject site is not identified as bushfire prone land.

Water and sewer

Pursuant to clause 28 a consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied, by written evidence, that the housing will be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage.

The subject site currently contains a residential care facility which is connected to reticulated water and sewage systems. The proposed development will connect to these existing systems. The proposal can comply with the water and sewer provision requirements as outlined.

Compatibility Criteria for Certain Development to which Clause 24 does not apply

Having regard to the compatibility consideration at clause 25(5)(b)(i),(iii) and (v) we have formed the following opinion.

25(5) The relevant panel must not issue a site compatibility certificate unless the relevant panel:

(b) is of the opinion that the proposed development is compatible with the surrounding land uses having regard to (at least) the following criteria:

(i) the natural environment (including known significant environmental values, resources or hazards) and the existing uses and approved uses of land in the vicinity of the proposed development,

Response: The subject site is not environmentally constrained in terms of identified environmental values or known hazards. The residential care facility use is compatible with the surrounding mixed low to medium density residential environment in which it is proposed.

The consent authority can be satisfied that the proposal is consistent with the natural environment and the existing uses and approved uses of land in the vicinity of the proposed development.

(iii) the services and infrastructure that are or will be available to meet the demands arising from the proposed development (particularly, retail, community, medical and transport services having regard to the location and access requirements set out in clause 26) and any proposed financial arrangements for infrastructure provision,

Response: The subject properties currently contain dwelling houses which are connected to reticulated water and sewage systems. The proposed development will connect to these existing systems. The proposal can comply with the water and sewer provision requirements as outlined.

As previously indicated, a regularly serviced bus stop is located in Northcote Avenue approximately 320 metres accessible path of travel from the site. This bus stop meets the minimum servicing requirements of the SEPP and provide access to the necessary range of services and facilities located within the Hornsby Town Centre. Whilst this outcome satisfies the clause 26 provisions, we note that the property is located on the northern side of Burdett Street East approximately 500 metres east of the Hornsby Town Centre including Westfield Hornsby and 250 metres accessible path of travel west of Hornsby Ku-ring-gai Hospital and a range of specialist medical practices.

The consent authority can be satisfied that the proposal is compatible having regard to these considerations.

- (v) *without limiting any other criteria, the impact that the bulk, scale, built form and character of the proposed development is likely to have on the existing uses, approved uses and future uses of land in the vicinity of the development,*

Response: The resultant height, scale and predominantly 2 storey stepped form are consistent with that established by development within proximity of the site with the 2 storey streetscape presentation ensuring that the building will be complimentary and compatible in a streetscape context.

The highly articulated and modulated building form has been designed to address the street frontage, response to topography and provide a generous deep soil landscaped curtilage to adjoining development. The proposed access driveway aligns with the driveways providing access to the western adjoining properties and to that extent will not give rise to any unacceptable amenity impacts in terms of acoustics and headlight spill. The building form will not be perceived as inappropriate or jarring in a streetscape context.

In terms of physical impacts, the accompanying shadow diagrams demonstrate that at least 3 hours of solar access will be maintained to the living room windows and adjacent open space areas of all adjoining residential properties between 9am and 3pm on 21st June with the design and orientation of communal areas within the development, and the use of fixed privacy screen treatments to bedroom areas where considered necessary, ensuring the maintenance of appropriate privacy between properties.

Having inspected the site and its surrounds to identify available view lines we have formed the considered opinion that a view sharing scenario is maintained between adjoining properties in accordance with the principles established in *Tenacity Consulting Pty Ltd v Warringah Council* [2004] NSWLEC140 and *Davies v Penrith City Council* [2013] NSWLEC 1141. The physical impacts of the development have been found to be acceptable with appropriate levels of residential amenity maintained to adjoining residential properties. To that extent it can be reasonably concluded that the proposal is compatible with its surroundings.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the proposed development by virtue of its form, massing or scale, offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment.

Finally, the proposed development by virtue of its height, bulk, scale and setbacks will not compromise the reasonable development potential of any adjoining land.

The consent authority can be satisfied that the proposal is compatible having regard to the clause 25(5)(b)(i),(iii) and (v) considerations.

4.3.6 Design Requirements

Site analysis

Pursuant to clause 30 of the SEPP a site analysis plan DA03 accompanies this application. An aerial photograph of the subject site and its immediate surrounds is contained in Section 2.0 of this report. The relevant issues are discussed as follows:

The Site

(a) Site Dimensions

Comment: These have been detailed in Section 2.0 of this report.

(b) Topography

Comment: The development site falls approximately 3 metres across its surface towards the rear of the property as detailed on the accompanying site survey.

(c) Services

Comment: The attached survey shows the location of existing services.

(d) Existing vegetation

Comment: The application is accompanied by a site survey and arborist report prepared by Rain Tree Consulting which collectively depict the location of existing trees relative to property boundaries.

(e) Micro climates

Comment: The site has good solar orientation and has exposure to prevailing breezes.

(f) Location of site features

Comment: The existing site structures and features are depicted on the accompanying survey plan. The sites do not contain any heritage items.

(g) Views:

Comment: There are currently no scenic views available from the site.

(h) Overshadowing

Comment: The sites obtain good levels of solar access throughout the day due to their orientation.

Surrounds of the site

(a) Neighbouring buildings

Comment: The neighbouring buildings are shown on the accompanying survey plan and aerial photograph. The built form characteristics of adjoining development are described in section 2.0 of this statement.

(b) Privacy

Comment: Good levels of privacy are currently afforded to the immediately adjoining residential properties through a combination of building height, design and location.

(c) Walls built to the site's boundaries

Comment: No walls are currently built to the site boundaries.

(d) Difference in levels

Comment: The associated levels are shown on the site survey. There is currently minimal change in levels between properties.

(e) Views and solar access

Comment: Given the topography of the immediate area surrounding properties do not currently obtain scenic views. All adjoining properties receive good levels of solar access throughout the day to living and private open space areas.

(f) Major trees

Comment: Trees located on adjoining properties and within proximity of the allotment boundaries are identified and detailed with the accompanying arborist report and aerial photograph at Figure 1.

(g) Street frontage features

Comment: The site has frontage to Burdett Street with the general streetscape urban in character.

(h) Built form and character of adjoining development

Comment: The built form characteristics of adjoining development are described in section 2.0 of this statement. The locality benefits from nearby open space recreational areas.

(i) Heritage features

Comment: No surrounding properties are heritage listed or located within a heritage conservation area

(j) Direction and distance to local facilities

Comment: The property is located on the northern side of Burdett Street East approximately 500 metres east of the Hornsby Town Centre including Westfield Hornsby and 250 metres west of Hornsby Ku-ring-gai Hospital and a range of specialist medical practices.

(k) Public open space

Comment: The site is located within short walking distance of James Park to the north east, Edgeworth David Garden to the north west and PCYC Hornsby/ Ku-ring-gai and adjacent oval to the south.

(l) Adjoining bushland and environmentally sensitive land

Comment: There is no adjoining bushland or environmentally sensitive land.

(m) Sources of nuisance

Comment: Other than potential traffic noise associated with the adjacent road network there are no immediate sources of nuisance.

The proposed development has been developed having regard to the above site analysis and accompanying plan.

Neighbourhood amenity and streetscape

Pursuant to clause 33 the proposed development should:

(a) recognise the desirable elements of the location's current character so that new buildings contribute to the quality and identity of the area, and

Comment: As previously indicated, the highly articulated and modulated predominantly 2 storey stepped building form has been designed to address the street frontage, respond to topography and provide a generous deep soil landscaped curtilage to adjoining development. The general form and massing, and adoption of both flat and pitched roof forms, is consistent with that established by medium density housing forms on surrounding sites and with the site's visual catchment generally. The building form will not be perceived as inappropriate or jarring in such context.

The proposal maintains complimentary and compatible side and rear boundary setbacks and appropriate residential amenity in terms of solar access, privacy and views.

The implementation of the integrated site landscape regime will ensure that the development sits within a landscape setting and maintains a distinctive residential character and a harmonious and sympathetic relationship with adjoining development.

The proposal will meet a housing need for seniors and people with a disability within the LGA.

The physical impacts of the development have been found to be acceptable with appropriate levels of residential amenity maintained to adjoining residential properties. To that extent it can be reasonably concluded that the proposal is compatible with its surroundings.

Consistent with the conclusions reached by the Senior Commissioner in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191, we have formed the considered opinion that most observers would not find the proposed development offensive, jarring or unsympathetic to the Darley Street East streetscape.

(b) retain, compliment and sensitively harmonise with any heritage conservation areas in the vicinity and any relevant heritage items that are identified in the local environmental plan, and

Comment: The subject property is not heritage listed, located within a heritage conservation or located within proximity of any heritage items.

(c) maintain reasonable neighbourhood amenity and appropriate residential character by:

(i) providing building setbacks to reduce bulk and overshadowing, and

Comment: The application proposes variable setbacks to the western boundary of between 9 and 10 metres, the eastern boundary of between 5 and 6 metres and to the rear boundary of between 7.572 and 8.5 metres to the building facade. The primary front facade of the dwelling is setback between 12 and 13.876 metres from the front boundary with the open porte cochere extending to within 4 metres of the front boundary. We note that all setback areas, with the exception of the western driveway, are available for deep soil landscape treatments.

These setbacks are contextually appropriate and well in excess of those prescribed by the “*Seniors Living Policy: Urban Design Guidelines for Infill Development*”. The setbacks proposed provide for a compliant building envelope circumstance, appropriate spatial separation between properties and well dimensioned deep soil landscape opportunities around the majority of the perimeter of the development.

The setbacks proposed, coupled with the sensitive design and orientation of internal living and outdoor open space areas will ensure that appropriate levels of aural and visual privacy are maintained to adjoining properties. Further, the shadow diagrams clearly demonstrate that well in excess of 3 hours of solar access will be maintained to the principal living and outdoor open space/play areas of neighbouring properties between 9:00am and 3:00pm on 21st June.

The building setbacks proposed reduce bulk and overshadowing and maintain appropriate amenity to surrounding development.

- (ii) *using building form and siting that relates to the site’s land form, and*

Comment: The highly articulated and modulated building form has been designed to limit excavation to that necessary to provide basement style off-street parking and servicing and maintain a generous deep soil landscaped curtilage to adjoining development.

- (iii) *adopting building heights at the street frontage that are compatible in scale with adjacent development, and*

Comment: The resultant height, scale and articulated form are consistent with that of surrounding medium density housing forms and that reasonably anticipated for a residential care facility building, compliant with the applicable FSR threshold and where form follows function.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the proposed development by virtue of its form, massing or scale, offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment.

To that extent it can be reasonably concluded that the proposed heights at the street frontage are compatible in scale with adjacent development with development able to coexist in harmony in a streetscape context.

- (iv) *considering, where buildings are located on the boundary, the impact of the boundary walls on neighbours, and*

Comment: No buildings are to be located on the boundary.

- (d) *be designed so that the front building of the development is set back in sympathy with, but not necessarily the same as, the existing building line, and*

Comment: The proposed development maintains a front setback consistent with/ in sympathy with, the setbacks established by development along this section of Burdett Street as depicted on plan DA03. A sympathetic front building line setback and streetscape outcome is achieved.

- (e) *embody planting that is in sympathy with, but not necessarily the same as, other planting in the streetscape, and*

Comment: The application proposes the implementation of an enhanced and integrated site landscape regime as depicted on plans prepared by Trish Dobson Landscape Architect. This landscape response, which incorporates screen tree plantings around the entire perimeter of the development together with courtyard and partial roof top landscaping, will ensure that the development sits within a landscape setting and that the landscape quality of the immediate locality is maintained as a consequence of the development proposed.

- (f) *retain, wherever reasonable, major existing trees, and*

Comment: The application proposes the removal of a number of trees as identified in the Arboricultural Impact Assessment prepared by Rain Tree Consultants. The tree removal is appropriately compensated for through the implementation of an enhanced and integrated site landscape regime as depicted on plans prepared by Trish Dobson Landscape Architect.

This landscape response, which incorporates screen tree plantings around the entire perimeter of the development together with courtyard and partial roof top landscaping, will ensure that the development sits within a landscape setting and that the landscape quality of the immediate locality is maintained as a consequence of the development proposed.

- (g) *be designed so that no building is constructed in a riparian zone.*

Comment: N/A.

Visual and acoustic privacy

Pursuant to clause 34 the proposed development should consider the visual and acoustic privacy of neighbours in the vicinity and residents by:

- (a) *appropriate site planning, the location and design of windows and balconies, the use of screening devices and landscaping, and*

Comment: The proposal maintains appropriate levels of both aural and visual privacy through appropriate building design and orientation of internal living and elevated open space areas relative to adjoining living and open space areas. Integrated privacy attenuation measures have been implemented to side boundary facing fenestration, where necessary, to prevent direct overlooking opportunities between properties.

- (b) *ensuring acceptable noise levels in bedrooms of new dwellings by locating them away from driveways, parking areas and paths.*

Comment: Appropriate aural privacy will be maintained to all bedrooms through the driveway location which limits exposure of bedrooms to driveway noise.

Solar access and design for climate

Pursuant to clause 35 the proposed development should:

- (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*

Comment: The shadow diagrams clearly demonstrate that the orientation of the site, location of proposed built form elements, spatial separation maintained between adjoining properties and topography will ensure that the development will not unreasonably shadow any adjoining properties at any time during the day.

- (b) *involving 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.*

Comment: The majority of bedrooms and all north facing lounge areas have access to at least 3 hours of solar access and cross ventilation. These design principles have been considered and incorporated in conjunction with detailed site analysis into the design of the proposed development.

Stormwater

Pursuant to clause 36 the proposed development should:

- (a) *control and minimise the disturbance and impacts of stormwater runoff on adjoining properties and receiving waters by finishing driveways surfaces with semi impervious material, minimising the width of paths and minimising paved areas, and*

Comment: The development will be gravity drained through the required OSD system to a proposed drainage easement at the rear of the site as detailed on the accompanying drainage plans prepared by Barrenjoey Consulting Engineers. We note that the proposed drainage easement follows the alignment of that previously negotiated in relation to DA/532/2017/C with negotiations ongoing to settle the terms of the easement with the adjoining property owner.

- (b) *include, where practicable, on-site stormwater detention or re-use for second quality water uses.*

Comment: The proposal incorporates the on-site detention of stormwater as depicted on the accompanying drainage plans prepared by Barrenjoey Consulting Engineers.

Crime prevention

These design principles have been considered and detailed with the development application. Appropriate levels of casual surveillance are achieved to publicly accessible areas of the site from internal bedroom and living areas. All basement car parking and public accessible areas will be appropriately lit night with the and landscape designs minimising potential concealment and entrapment opportunities.

- (a) *site planning that allows, from inside each dwelling, general observation of the street, the site and approaches to the dwellings entry, and*

Comment: These design principles have been considered and adopted into the design. Good levels of casual surveillance are achieved to all communal spaces within the development relatively divorced from the public domain. The car parking area will be appropriately lit at night with the development staffed 24/7.

- (b) *where shared entries are required, providing shared entries that serve a small number of dwellings and that are able to be locked, and*

Comment: N/A

- (c) *Providing dwellings designed to allow residents to see who approaches their dwelling without the need to open the front door.*

Comment: N/A

Accessibility

Pursuant to clause 38 the proposed development should:

- (a) *have obvious and safe pedestrian links from the site that provide access to public transport services or local facilities, and*

Comment: We confirm that a regularly serviced bus stop is located in Northcote Avenue approximately 320 metres accessible path of travel from the site. This bus stop meets the minimum servicing requirements of the SEPP and provide access to the necessary range of services and facilities located within the Hornsby Town Centre.

Whilst this outcome satisfies the clause 26 provisions, we note that the property is located on the northern side of Burdett Street East approximately 500 metres east of the Hornsby Town Centre including Westfield Hornsby and 250 metres accessible path of travel west of Hornsby Ku-ring-gai Hospital and a range of specialist medical practices.

The proposed development meets the location and access to facilities requirements as outlined within the accompanying access report.

- (b) *provide attractive, yet safe, environments for pedestrians and motorists with convenient access and parking for residents and visitors.*

Comment: These matters have been addressed in detail in the Traffic and Parking Assessment prepared by Varga Traffic Planning Pty Limited. This report contains the following commentary:

Application of the above SEPP car parking requirements under Item (d) to the 102 beds and 40 staff outlined in the development proposal yields an off-street car parking requirement of 31 spaces as set out in the table below:

*Residential aged care facility (102 beds): 10.2 spaces
Staff (40 staff): 20.0 spaces
Ambulance: 1.0 space*

TOTAL: 31.2 spaces

The proposed development makes provision for a total of 50 off-street car parking spaces, plus a dedicated at-grade ambulance parking space, thereby comfortably satisfying the SEPP requirements.

An overhead clearance of 3.5m is provided, clear of structures/services, throughout the ambulance circulation areas in accordance with NSW Ambulance service vehicle requirements.

The geometric design layout of the proposed car parking facilities has been designed to comply with the relevant requirements specified in the Standards Australia publications Parking Facilities Part 1 - Off-Street Car Parking AS/NZS2890.1:2004 and Parking Facilities Part 6 – Off-Street Parking for People with Disabilities AS2890.6 in respect of parking bay dimensions, ramp gradients and aisle widths.

Waste management

Pursuant to clause 39 the proposed development should be provided with waste facilities that maximise recycling by the provision of appropriate facilities.

Comment: The development incorporates appropriately sized and conveniently accessed garbage storage facilities within a dedicated garbage room. Waste will be collected by a private contractor.

4.3.7 Development standards to be complied with

Minimum sizes and building height

Pursuant to clause 40 a consent authority must not consent to a development application unless the proposed development complies with the standards specified in this clause:

Site size

The size of the site is at least 1,000 square metres, and

Comment: The area of the entire development site is 6105m² and as such complies with this development standard.

Site frontage

The site frontage is at least 20 metres wide measured at the building line, and

Comment: The site has a width of 66.34 metres measured at the building alignment and therefore compliant with the standard.

Height in zones where residential flat buildings are not permitted

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

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

Comment: The proposal is fully compliant with this standard as depicted on the 8 metre height blanket diagram prepared by the project Architect at Figure 10 below.



Figure 10 – Height blanket diagram showing strict compliance with the 8 metre ceiling height standard.

- (b) *a building that is adjacent to a boundary of the site must be not more than 2 storeys in height, and*

Comment: 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 clause 4.6 variation request prepared in support of this variation is at Attachment 1.

- (c) *a building located in the rear 25% area of the site must not exceed 1 storey in height.*

Comment: A minor portion of the development breaches the rear 25% standard as depicted in Figure 11 over page.

The clause 4.6 variation request prepared in support of this variation is at Attachment 1.

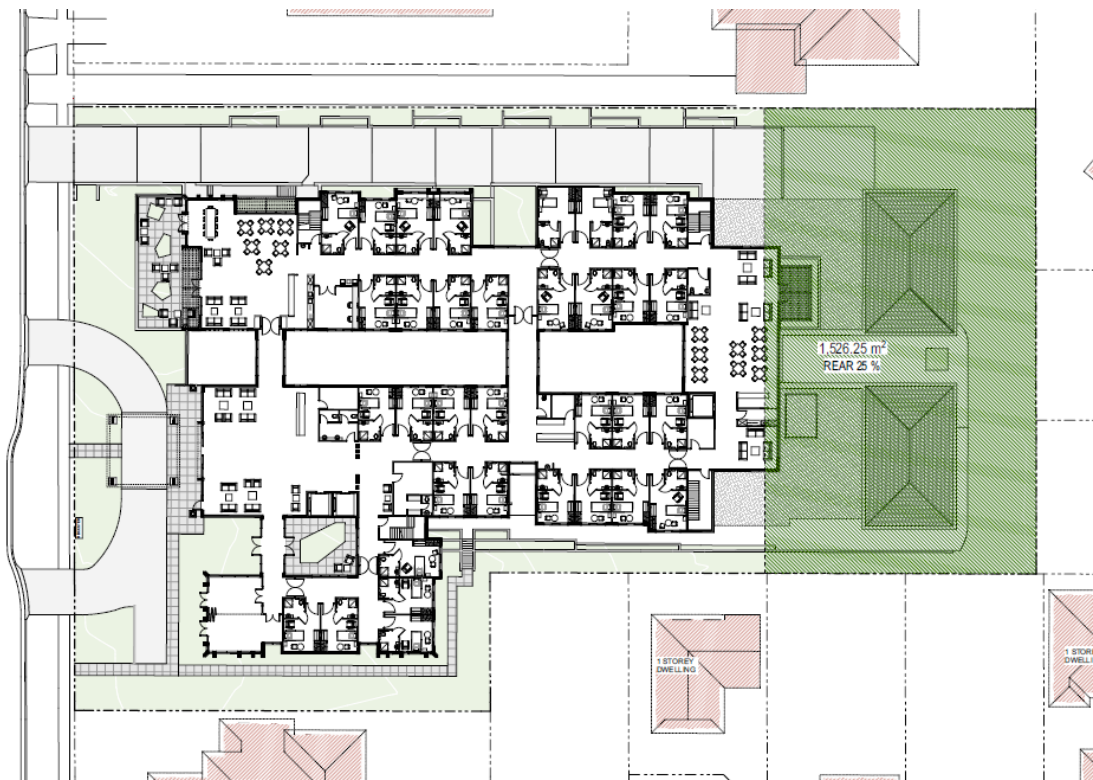


Figure 11 – Diagram showing the minor breach of the rear 25% site area single storey standard

4.3.8 Standards that cannot be used to refuse development consent for residential care facilities.

Pursuant to clause 48 of SEPP HSPD a consent authority must not refuse consent to a development application made pursuant to this Chapter for the carrying out of development for the purpose of a residential care facility on any of the following grounds:

- (a) **building height:** if all proposed buildings are 8 metres or less in height,

Comment: As previously identified, the proposed development has a maximum height measured to the underside of the upper most ceiling of 8 metres in strict accordance with this standard.

- (b) **density and scale:** if the density and scale of the buildings when expressed as a floor space ratio is 1:1 or less,

Comment: The proposal has a gross floor area of 5499m² calculated in accordance with the gross floor area definition contained within SEPP HSPD representing an FSR of 0.9:1.

We consider that the GFA/FSR has been appropriately distributed across the site have regard to the relationship of the proposal to the established built form arrangement on adjoining properties and the maintenance of appropriate streetscape and residential amenity outcomes.

- (c) **landscaped area:** *if a minimum of 25 square metres of landscaped area per residential care facility bed is provided,*

Comment: Based on the 102 beds proposed, a landscaped area of 2550 square metres is required. The application provides for a total ground level landscaped area, as defined, of 1584 square metres representing 26% of the developable area of the site. When the area of the internal courtyards is added the proposal provides for an accessible landscaped area/ recreational area for patients of 2238 square metres.

The quantum of landscaping is acceptable given that the internalised courtyards will form the primary area of open space for residents to recreate within with a generous deep soil landscaped curtilage afforded to the perimeter of the development.

- (d) **parking for residents and visitors:** *if at least the following is provided:*

- (i) *1 parking space for each 10 beds in the residential care facility (or 1 parking space for each 15 beds if the facility provides care only for persons with dementia), and*
- (ii) *1 parking space for each 2 persons to be employed in connection with the development and on duty at any one time, and*
- (iii) *1 parking space suitable for an ambulance.*

Comment: The application provides for the required quantum of car parking as detailed in the Traffic and Parking Assessment prepared by Varga Traffic Planning.

4.4 COMPLIANCE TABLES

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

The table below 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 both north and south bound bus services along Barrenjoey Road	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 Minor 2 storey breach in rear 25%	Yes No – Clause 4.6 variation No – Clause 4.6 variation
FSR (Clause 48(b) SEPPHSPD)	Threshold of 1:1	0.9:1	Yes
Landscaped Area (Clause 48(c) SEPPHSPD)	Minimum 25 square metres per bed (2550sqm required)	2238sqm	No Acceptable on merit
Parking (Clause 48(d) SEPPHSPD)	31 spaces	50 spaces	Yes
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		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

4.5 State Environmental Planning Policy No.55 – Remediation of Land

State Environmental Planning Policy No. 55 - Remediation of Land applies to all land and aims to provide for a State-wide planning approach to the remediation of contaminated land.

Clause 7 of SEPP 55 requires Council to consider whether land is contaminated prior to granting consent to carrying out of any development on that land. In this regard, the likelihood of encountering contaminated soils on the subject site is extremely low given the following:

- Council's records indicate that site has only been used for residential/ residential care facility uses.
- The subject site and surrounding land are not currently zoned to allow for any uses or activities listed in Table 1 of the contaminated land planning guidelines of SEPP 55.
- The subject site does not constitute land declared to be an investigation area by a declaration of force under Division 2 of Part 3 of the Contaminated Land Management Act 1997.

Given the above factors no further investigation of land contamination is warranted. The site is suitable in its present state for the proposed residential development. Therefore, pursuant to the provisions of SEPP 55, Council can consent to the carrying out of development on the land.

4.6 Matters for Consideration Pursuant to Section 4.15(1) of the Environmental Planning and Assessment Act 1979 as amended

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15(1) of the Environmental Planning and Assessment Act 1979 (as amended). Guidelines (*in italic*) to help identify the issues to be considered have been prepared by the Department of Urban Affairs and Planning. The relevant issues are:

4.6.1 The provision of any planning instrument, draft environmental planning instrument, development control plan or regulations.

This report clearly and comprehensively addresses the statutory regime applicable to the application and demonstrates that the proposed land use and associated built form outcome are complimentary and compatible with the character of the immediate area. The development provides appropriate streetscape and residential amenity outcomes.

The development is permissible in the zone and generally compliant with the relevant statutory planning regime as detailed within this report.

4.6.2 The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

Context and Setting

- i) *What is the relationship to the region and local context on terms of:*
- *the scenic qualities and features of the landscape?*
 - *the character and amenity of the locality and streetscape?*
 - *the scale, bulk, height, mass, form, character, density and design of development in the locality?*
 - *the previous and existing land uses and activities in the locality?*

These matters have been discussed in detail in the body of the report with the development found to be acceptable in this regard.

ii) *What are the potential impacts on adjacent properties in terms of:*

- *relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)?*
- *visual and acoustic privacy?*
- *views and vistas?*
- *edge conditions such as boundary treatments and fencing?*

These matters have been discussed in detail earlier in this report. The potential impacts are considered to be acceptable and within the scope of the built form controls.

Access, transport and traffic

Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:

- *travel demand?*
- *dependency on motor vehicles?*
- *traffic generation and the capacity of the local and arterial road network?*
- *public transport availability and use (including freight rail where relevant)?*
- *conflicts within and between transport modes?*
- *traffic management schemes?*
- *vehicular parking spaces?*

These issues have been discussed in detail in the report. It has been determined that the development provides adequate carparking facilities and will not significantly increase traffic generation as detailed in the accompanying report prepared by Varga Traffic Planning

Public domain

The proposed development will have no unacceptable impact on the public domain (ie roads, parks etc.).

Utilities

The development is adequately serviced.

Flora and fauna

These issues have been discussed in detail in the body of the report. The landscape concept plan accompanying this application proposes additional planting and landscaping treatments which will enhance the landscape quality of the site.

Waste

Commercial waste collection applies to this development.

Natural hazards

The property is not identified as being affected by hazards.

Economic impact in the locality

The proposed development will not have any significant impact on economic factors within the area other than short term employment opportunities during construction.

Site design and internal design

i) *Is the development design sensitive to environmental conditions and site attributes including:*

- *size, shape and design of allotments?*
- *the proportion of site covered by buildings?*
- *the position of buildings?*
- *the size (bulk, height, mass), form, appearance and design of buildings?*
- *the amount, location, design, use and management of private and communal open space?*
- *landscaping?*

These matters have been discussed in detail earlier in this report. The potential impacts are considered to be minimal and within the scope of the policy controls.

ii) *How would the development affect the health and safety of the occupants in terms of:*

- *lighting, ventilation and insulation?*
- *building fire risk – prevention and suppression/*
- *building materials and finishes?*
- *a common wall structure and design?*
- *access and facilities for the disabled?*
- *likely compliance with the Building Code of Australia?*

The proposed development can comply with the provisions of the Building Code of Australia as detailed within the accompanying report prepared by Philip Chun. The proposal complies with the relevant standards pertaining to health and safety.

Construction

i) *What would be the impacts of construction activities in terms of:*

- *the environmental planning issues listed above?*
- *site safety?*

Normal site safety measures and procedures will ensure that no safety or environmental impacts will arise during construction.

4.6.3 The suitability of the site for the development.

Does the proposal fit in the locality?

- *are the constraints posed by adjacent developments prohibitive?*
- *would development lead to unmanageable transport demands and are there adequate transport facilities in the area?*
- *are utilities and services available to the site adequate for the development?*

The adjacent development does not impose any unusual or impossible development constraints. The site is well located with regards to public transport and utility services. The development will not cause excessive or unmanageable levels of transport demand.

Are the site attributes conducive to development?

The site being of moderate grade, adequate area, and having no special physical or engineering constraints is suitable for the proposed development.

4.6.4 Any submissions received in accordance with this Act or the regulations.

It is envisaged that the consent authority will appropriate consider any submissions made in relation to the proposed development.

4.6.5 The public interest.

It is considered that the development is sensitive both to the natural and built environments and will cater for a clear demand for this form of accommodation within the Hornsby Council area given its aging population. Approval is in the public interest.

5.0 CONCLUSIONS

The proposal is permissible and in conformity with the aims and implicit objectives of SEPP HSPD and consistent with the subordinate standards and controls applicable to this form of development on this particular site. This report will demonstrate that the density proposed is contextually appropriate with the development maintaining appropriate streetscape and residential amenity outcomes.

This report also demonstrates that strict compliance with the height of building standards at clauses 40(4)(b) and 40(4)(c) of SEPPHSPD is unreasonable and unnecessary under the circumstances with sufficient environmental planning grounds to justify the variations proposed. The clause 4.6 variation requests are well founded.

The architect has responded to the client brief and the minutes arising from formal pre-DA discussions with Council, including the Design Excellence Panel, to provide for a boutique residential care facility of exceptional design quality to meet a clear demand for such accommodation within the area. The built form and landscape outcomes achieved respond appropriately to the constraints and opportunities identified through detailed site analysis whilst maintaining appropriate levels of amenity to the adjoining and nearby residential properties.

The highly articulated and modulated building form has been designed to step down the site in response to topography and provide a generous deep soil landscaped curtilage to adjoining development. The landscaping proposed will ensure that the building is soften and screened as viewed in the round and sits within a relatively informal landscaped setting. The resultant height, form, massing and setbacks are consistent with those established by other development within the sites visual catchment and that reasonably anticipate for this form of development where form follows function.

Having given due consideration to the matters pursuant to Section 4.15(1) of the Act 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

A handwritten signature in black ink, appearing to read 'Greg Boston', with a stylized flourish at the end.

Greg Boston

B Urb & Reg Plan (UNE) MPIA

B Env Hlth (UWS)

Director

Attachment 1

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.

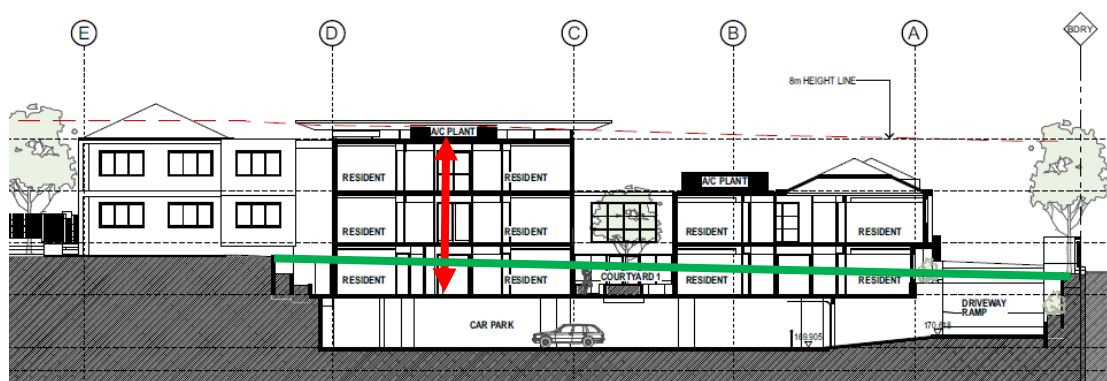


Figure 1 – Section showing the 3 storey element located through central portion of the development with the green line representing existing ground level

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 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 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, 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 and 3 below and over page.

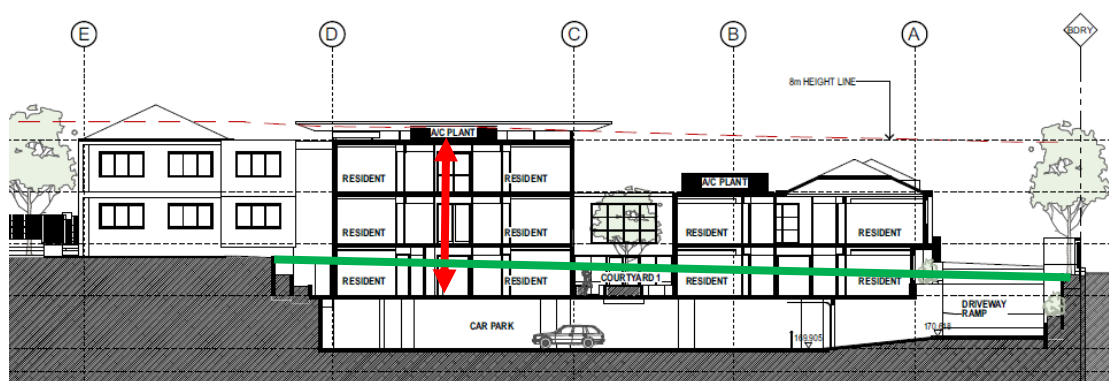


Figure 2 – Section showing the 3 storey element located through central portion of the development with the green line representing existing ground level



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

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 of 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 21st February 2018, 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.

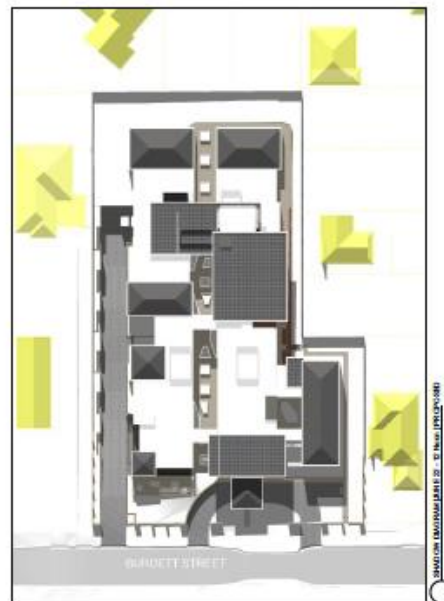
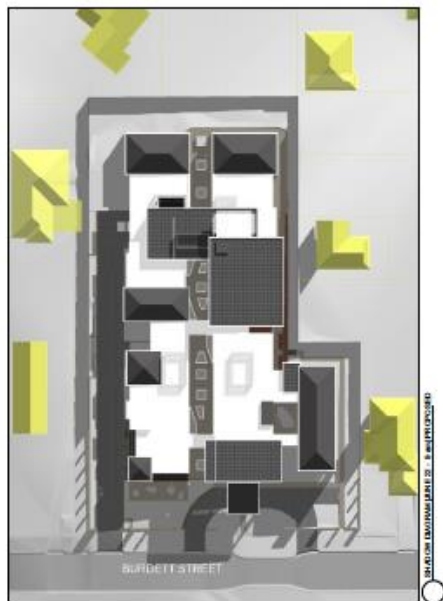
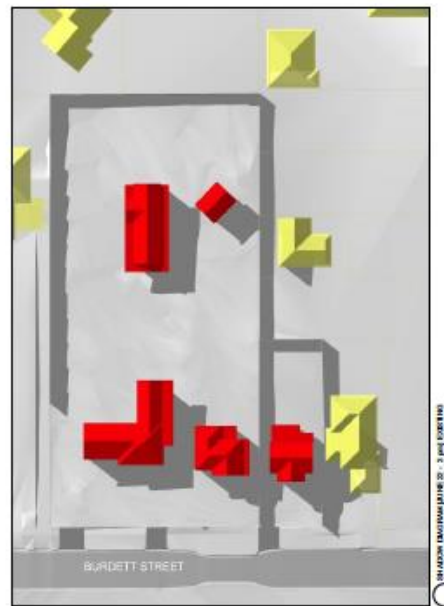
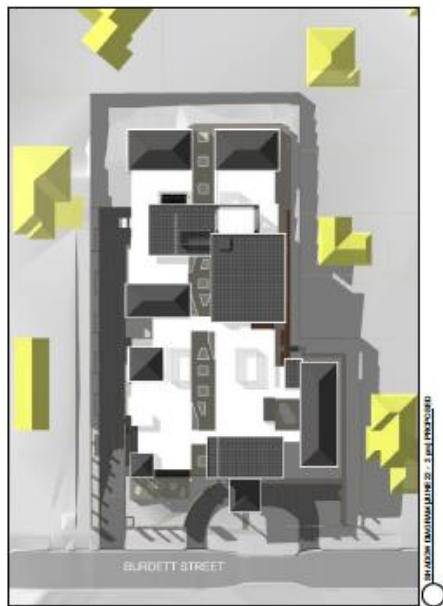
Boston Blyth Fleming Pty Limited



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

Attachment 1

Shadow diagrams



Attachment 2

Clause 4.6 variation request

Clause 40(4)(c) SEPP HSPD

Pursuant to clause 40(4)(c) of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD) a building located in the rear 25% area of the site must not exceed 1 storey in height.

Clause 40(4) of SEPP HSPD does not contain any associate objectives. The implicit objective was considered by the Court in the matter of 'Manderrah Pty Ltd v Woollahra Municipal Council and Anor [2013] NSWLEC 1196 where the implicit objectives were considered by Tuor C. In considering the objective of the development standard, Tuor C concluded (at [70]) the following:

70 The primary objective of cl 40(4)(c) is to limit the bulk and scale of a building to protect the amenity of the rear of adjoining properties. Placing built form into the rear of a property which generally forms part of its open space and adjoins the open space of other properties to the side and rear can have significant impacts on amenity not only from loss of solar access, privacy and views but also from the presence of increased or new building bulk and the removal of landscaping.'

The conclusion reached by Tuor C has been adopted more recently by Dickson C in 'Jigari Pty Ltd v City of Parramatta Council [2018] NSWLEC 1568'. In this regard, given the consistency in the approach adopted by the Court to determining the objectives for the development standard, the primary objective adopted by Tuor C and Dickson C in the above matters has been adopted.

It has been determined that the northern end of the ground floor/ entry level lounge and dining room and northern end of the first floor library and sun room extend into the rear 25% area of the subject site by 1.8 metres with the extent of such encroachment detailed in Figure 1 and 2 over page.

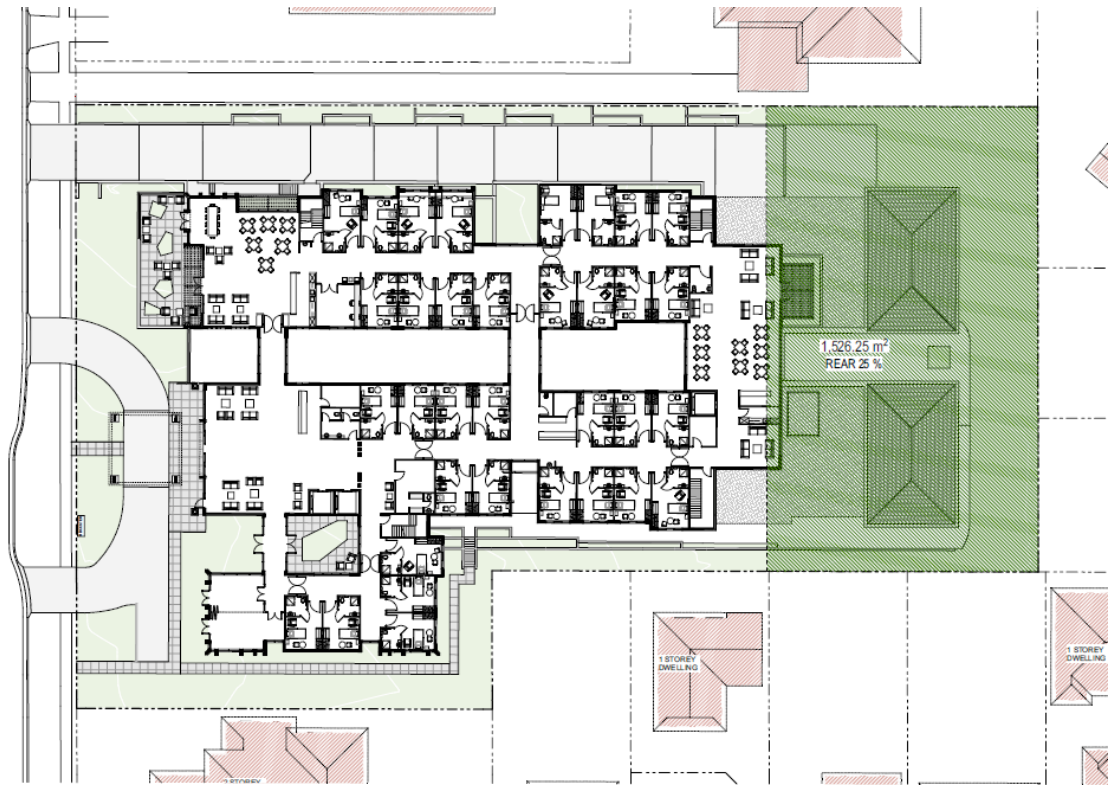


Figure 1 – Diagram showing the minor breach of the rear 25% site area single storey standard at ground floor/ entry level

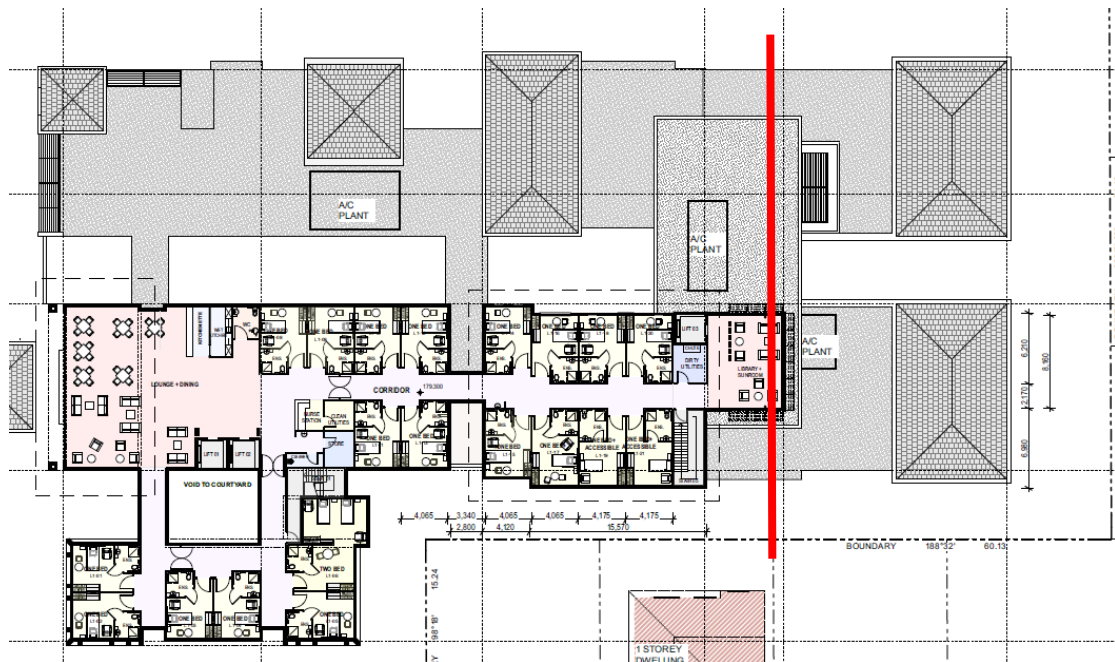


Figure 2 – Diagram showing the minor breach of the rear 25% site area single storey standard at first floor level

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of HLEP provides:

(1) *The objectives of this clause are:*

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

(d) 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)(c) 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)(c) 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:*
 - (ii) *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 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, 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)(c) 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:

2. Is clause 40(4)(c) 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:
 - (b) 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)(c) 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)(c) of SEPP HSPD?

4.0 Request for variation

4.1 Is clause 40(4)(c) 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)(c) of SEPP HSPD prescribes a height provision that relates to certain development. Accordingly, clause 40(4)(c) 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 primary objective of cl 40(4)(c) is to limit the bulk and scale of a building to protect the amenity of the rear of adjoining properties. Placing built form into the rear of a property which generally forms part of its open space and adjoins the open space of other properties to the side and rear can have significant impacts on amenity not only from loss of solar access, privacy and views but also from the presence of increased or new building bulk and the removal of landscaping.

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

- The Law Insider Dictionary defines Adjoining Properties as follows:

*Adjoining Properties means **any real property or properties the border of which is (are) shared in part or in whole with that of the Property**, or that would be shared in part or in whole with that of the Property but for a street, road, or other public thoroughfare separating the properties.*

- The surrounding subdivision pattern is irregular in terms of allotment geometry and the relationship of the rear open spaces of adjoining properties. There is no consistent established rear open space alignment.
- The minor breaching elements at ground floor level maintain a setback to the rear boundary of over 18 metres and setbacks to the eastern and western side boundaries of approximately 11 and 14 metres respectively. The minor breaching elements at first floor level maintain a setback to the rear boundary of over 18 metres and setbacks to the eastern and western side boundaries of approximately 11 and 30 metres respectively. Such separation distances far exceeds the 9 metre separation normally considered appropriate between living rooms and private open space areas on adjoining properties.
- The spatial separation proposed, coupled with the intervening perimeter landscaping will ensure that the minor breaching rear 25% 2 storey elements will not give rise to unacceptable visual privacy impacts.
- The rear 25% site area encroaching 2 storey built form element will not give rise to any unacceptable loss of solar access between 9am and 3pm on 21st June as depicted on the shadow diagrams at Attachment 1.

- Having identified potential view corridors from the rear areas of adjoining properties I have formed the considered opinion that the non-compliant second storey building elements proposed will not give rise to any scenic view impacts or adverse visual impacts in terms of building bulk.

Having regard to the above analysis, I am satisfied that the distribution of building height and floor space on this particular site achieves the implicit objective of the standard in that the design of the breaching 2 storey building element protects the amenity of the rear of the adjoining properties.

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 the reduction in the size of the ground floor/ entry level lounge/ dining room or the elongation of this floor space towards the side boundaries.

In this regard, I consider the increased side boundary setbacks proposed to the non-compliant portions of the development, provide for a better amenity outcome in terms of spatial separation, visual privacy and visual bulk than a full compliant scheme where the floorspace was redistributed towards the side boundaries and outside the rear 25% area of the site.

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 portions of the building are of good design as they provide for a better amenity outcome to surrounding properties in terms of spatial separation, visual privacy and visual bulk than a full compliant scheme where the floorspace was redistributed towards the side boundaries and outside the rear 25% area of the site.

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 of 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 21st February 2018, 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

