

APPENDIX C

CLAUSE 4.6 (NEWCASTLE LEP 2012) – REQUEST FOR CONTRAVENTION OF THE 10M MAXIMUM PERMISSIBLE BUILDING HEIGHT & 0.9:1 FLOOR SPACE RATIO DEVELOPMENT STANDARDS

INTRODUCTION

- (i) **Clause 4.6** of Newcastle Local Environmental Plan 2012 (LEP 2012) provides for an appropriate degree of flexibility in applying certain development standards to particular development and seeks to achieve better town planning outcomes by allowing flexibility in particular circumstances.
- (ii) **Clause 4.6 (3)** of LEP 2012 provides that 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.*
- (iii) **Clause 4.6 (4)** provides that 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 Secretary has been obtained.*
- (iv) **Request for Exceptions to development standards:** This request for approval of amended DA 2015/10349 in a manner which contravenes the maximum permissible building height and floor space ratio development standards applicable to development on the subject land addresses:
- the requirements of Clauses 4.6 (3) - (5) of LEP 2012; and
 - the considerations set out in *Wehbe v Pittwater Council (2007) NSWLEC 827* and *Four2FivePtyLtd v Ashfield Council (2015) NSWLEC90*.

This request demonstrates that in respect to amended DA 2015/10349 for proposed alterations and additions to Lingard Hospital on Lot 100 DP 1168197, No. 23 Merewether Street, Merewether, as described in section 4 of the accompanying Supplementary Statement of Environmental Effects (August 2016):

- contravention of the maximum permissible building height and floor space ratio development standards of Newcastle Local Environmental Plan 2012 applicable to the subject land and the proposed development, is reasonable having regard to the particular circumstances;
- that there are sufficient environmental planning grounds to justify contravening the development standard; and
- the proposed development is in the public interest because it is consistent with the objectives of the particular standards and the objectives for development within the *R3 Medium Density Residential* zone.

2 SUBJECT LAND & PROPOSED DEVELOPMENT

2.1 - Subject Land

The subject land is described as Lot 100 DP 1168197, No. 23 Merewether Street, Merewether, upon which the existing Lingard Private Hospital is located. The hospital site has an area of 1.03ha.

2.2 - Proposed Development

The proposed (amended) development is described in section 4 of the accompanying Statement of Environmental Effects (August 2016).

In summary, the proposed development involves:

- Removal of the existing doctors car park (26 spaces) for the construction of a two storey addition (1,700m²) at the western side of the existing hospital site to provide a new ground floor operating theatre suite containing 4 new operating theatres (overall + 3 theatres as 1 is lost in the internal alterations to the existing hospital) and a Level 1 Medical Ward providing 25 beds (overall + 24 additional beds as 1 bed is lost in the internal alterations to the existing hospital) and 3 new car spaces located at the rear of the proposed additions, accessed from Tye Street; and
- Part internal refurbishment of the existing hospital (existing theatres and administration/amenities - 455m²).

3 DEVELOPMENT STANDARDS PROPOSED TO BE VARIED

3.1 - Maximum Permissible Building Height Development Standard (10m)

Clause 4.3 (2) of LEP 2012 provides that development on the subject land shall not exceed the maximum building height shown on the "Height of Buildings Map".

The "Building Heights Map" shows that the maximum permissible building height indicated for the subject land on the Height of Building Map is 10m.

The proposed amended development complies with the 10m maximum permissible building height development standard under Clause 4.3 (2) of Newcastle LEP 2012, except for the roof plant enclosure screen which has a height of between 11.192m and 11.279m.

Clause 4.6 (2) of LEP 2012 allows the consent authority to exercise an appropriate degree of flexibility in applying certain development standards to particular development. This request addresses the matters required by Clauses 4.6 (3) and (4) in order to satisfy the Council that any requirement for the proposed development to strictly comply with the 10m maximum permissible building height development standard is unreasonable or unnecessary in the circumstances of the case.

Council is requested to agree to the proposed roof top enclosure screen's minor contravention of the 10m maximum permissible building height development standard having regard to the matters addressed in section 4 of this request.

3.2 - Maximum Permissible Floor Space Ratio Development Standard (0.9:1)

Clause 4.4 (2) of LEP 2012 provides that development on the subject land shall not exceed the maximum permissible floor space ratio shown on the "Floor Space Ratio Map".

The "Floor Space Ratio Map" shows that the maximum permissible floor space ratio for any building on the subject land is 0.9:1.

The proposed hospital additions (1,700m²) will result in a total hospital GFA of 10,298m² (existing + proposed) and a floor space ratio of 0.997:1. This will result in a minor exceedence of the maximum 0.9:1 floor space ratio development standard applicable to development on the subject land.

Clause 4.6 (2) of LEP 2014 allows the consent authority to exercise an appropriate degree of flexibility in applying certain development standards to particular development. This request addresses the matters required by Clauses 4.6 (3) and (4) in order to satisfy the Council that any requirement for the proposed amended development application to strictly comply with the maximum permissible floor space ratio development standard is unreasonable or unnecessary in the circumstances of the case.

Council is requested to agree to the proposed development's contravention of the 0.9:1 maximum permissible floor space ratio development standard having regard to the matters addressed in section 5 this request.

4 CONSIDERATION AS TO WHETHER THE PROPOSED CONTRAVENTION OF THE APPLICABLE 10M MAXIMUM PERMISSIBLE BUILDING HEIGHT DEVELOPMENT STANDARD IS REASONABLE IN THE CIRCUMSTANCES AND SATISFIES THE REQUIREMENTS OF CLAUSE 4.6 OF NEWCASTLE LEP 2012.

4.1 - Objectives of Clause 4.6 of Newcastle LEP 2012

The objectives of Clause 4.6 (1) are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The proposed contravention of the 10m maximum permissible building height development standard complies with these objectives as the minor height exceedence in this case is confined to a relatively small part of the proposed hospital additions roof area occupied by the proposed roof plant and its screen enclosure and the proposed development otherwise complies with the 10m building height development standard.

4.2 - Clause 4.6 (3) (a) – Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

Clause 4.6 (3) (a) requires that 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 that *“compliance with the development standard is unreasonable or unnecessary in the circumstances of the case”*.

Any requirement for the proposed development to strictly comply with the maximum permissible building height development standard applicable to the subject land would be unreasonable or unnecessary in the circumstances of the case for the following reasons:

- the proposed contravention of the 10m maximum permissible building height development standard complies with these objectives as the minor height exceedence in this case is confined to a relatively small part of the proposed hospital additions roof area occupied by the proposed roof plant and its screen enclosure; and
- the proposed roof plant is located so that it has a substantial setback from the external walls of the proposed hospital addition which mitigates its visual impact and will not result in any significant amenity impacts on neighbouring properties.

As demonstrated in section 4.6 (i) of this request („Wehbe five part test), any requirement for strict compliance with the 10m building height development standard would be unreasonable or unnecessary in the particular circumstances because the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.

4.3 - Clause 4.6 (3) (b) – Environmental Planning Grounds to justify contravening the development standard

Clause 4.6 (3) (b) requires that the applicant to demonstrate that there *are sufficient environmental planning grounds to justify contravening the development standard*.

There are sufficient environmental planning grounds in this case to justify the proposed development's contravention of the maximum permissible height development standards applying to the subject land:

- the proposed contravention of the 10m maximum permissible building height development standard complies with these objectives as the minor height exceedence in this case is confined to a relatively small part of the proposed hospital additions roof area occupied by the proposed roof plant and its screen enclosure;
- the proposed roof plant is located so that it has a substantial setback from the external walls of the proposed hospital addition which mitigates its visual impact and will not result in any significant amenity impacts on neighbouring properties; and
- the proposed building height exceedence does not reduce the opportunity for neighbouring properties or public areas to receive satisfactory exposure to sunlight. The shadow diagrams provided in Figure 16 of the accompanying Supplementary Statement of Environmental Effects show that the proposed development does not have any adverse impacts on the public domain, or neighbouring residential properties.

4.4 - Clause 4.6 (4) (a) (ii) – Consistency with the objectives of the standard and the objectives of the zone.

Clause 4.6 (4) (a) (ii) requires the consent authority to be satisfied that 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 within which the development is proposed to be carried out.

(i) Objectives of the Height of Buildings Development Standard.

The objectives of the height of buildings development standard applicable to the subject land and the proposed development are stated in Newcastle LEP 2012 - Clause 4.3 (1) (a) – (b):

(a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,

(b) to allow reasonable daylight access to all developments and the public domain.

The following assessment demonstrates that the proposed development will be consistent with the objectives of the height of buildings development standard of Newcastle LEP 2012:

- **"(a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,"**

Compliance: Whilst the subject land is not located within an established centre, the scale of the proposed hospital additions is consistent with the desired scale of development within the *R3 Medium Density Residential* zone and the existing hospital.

- **"(b) to allow reasonable daylight access to all developments and the public domain,"**

Compliance: The proposed contravention of the roof plant screen enclosure with the maximum permissible building height development standard does not reduce the opportunity for neighbouring properties or public areas to receive satisfactory exposure to sunlight. The shadow diagrams provided in Figure 16 of the accompanying Supplementary Statement of Environmental Effects show that the proposed development does not have any adverse impacts on the public domain, or neighbouring residential properties

(ii) Objectives for development within the R3 Medium Density Residential Zone

The objectives for development within the *R3 Medium Density Residential* zone are provided in Newcastle LEP 2012 – Clause 2.3 (Zone Objectives and Land Use Table):

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To allow some diversity of activities and densities if:*
 - (i) the scale and height of proposed buildings is compatible with the character of the locality, and*
 - (ii) there will be no significant adverse impact on the amenity of any existing nearby development.*
- *To encourage increased population levels in locations that will support the commercial*

viability of centres provided that the associated new development:
(i) has regard to the desired future character of residential streets, and
(ii) does not significantly detract from the amenity of any existing nearby development.

The following assessment demonstrates that the proposed development will be consistent with the objectives of the *R3 Medium Density Residential Zone*:

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

Not Applicable: The proposed development does not provide any residential accommodation.

- **“To provide a variety of housing types within a medium density residential environment.”**

Not Applicable: The proposed development does not provide any housing.

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

Consistent: The proposed additions to Lingard Private Hospital will provide health services to the community.

- **“To allow some diversity of activities and densities if:**

(i) the scale and height of proposed buildings is compatible with the character of the locality, and
(ii) there will be no significant adverse impact on the amenity of any existing nearby development.”

Consistent: The proposed development is compatible with the character of development in the locality and will not have an adverse impact on the amenity of neighbouring properties.

- **To encourage increased population levels in locations that will support the commercial viability of centres provided that the associated new development:**

(i) has regard to the desired future character of residential streets, and
(ii) does not significantly detract from the amenity of any existing nearby development.

Not Applicable: The proposed development does not provide any residential accommodation.

4.5 - Clause 4.6 (5) (a) – (c): Matters for consideration by the Secretary

Clause 4.6 (5) (a) – (c) requires that „the Secretary“, in deciding whether to grant concurrence under Clause 4.6 (4) (b) to the proposed contravention of the building height development standard, 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 Secretary before granting concurrence.

The following assessment demonstrates that the proposed minor contravention of the 10m building height development standard does not raise any matter of significance for State or regional planning:

- **"Whether contravention of the development standard raises any matter of significance for State or regional environmental planning".**

It is demonstrated in the accompanying Statement of Environmental Effects and in this request, that the amended development application is consistent with State and regional planning policies/strategic directions seeking to provide facilities and services to meet the health needs of the community.

Approval of the proposed development and the proposed contravention of the applicable maximum permissible building height development standard in this particular case would not raise any matter of significance for State or regional planning.

- **"The public benefit of maintaining the development standard".**

The accompanying Statement of Environmental Effects demonstrates that the proposed contravention of the maximum building height development standard does not have any significant adverse scenic/visual impacts, or amenity impacts on either the public domain, or neighbouring properties; and will not undermine the maintaining of the maximum building height development standards applicable elsewhere within the R3 Medium Density Residential zone.

- **"Any other matters required to be taken into consideration by the Director-General before granting concurrence."**

There are no other matters currently specified to be taken into consideration by the Director-General before granting concurrence.

4.6 - Considerations arising from *Wehbe* and *Four2Five Pty Ltd*.

4.6.1 *Wehbe* five part test.

Preston CJ in *Wehbe v Pittwater Council* (2007) NSWLEC 827 identified five ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary in a particular case.

The proposed development invokes the first way to establish that compliance with the building height development standard is unreasonable or unnecessary in the particular circumstances:

- "The 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."**

Comment: As demonstrated in section 4.4 (i) above, the proposed development is compliant with the objectives of the building height development standard, notwithstanding non-compliance with the standard.

Having regard to the consistency of the proposed contravention of the building height development standard with both the objectives of the development standard and the objectives of the *R3 Medium Density Residential Zone* and in consideration of the environmental planning grounds addressed in section 4.3 above, it is established that compliance with the development standard is unreasonable or unnecessary in the particular circumstances.

(ii) “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.”

Comment: In relation to the subject land and the proposed development, the underlying objective or purpose of the development standard is considered to be relevant to the proposed development and consequently this second way to establish that compliance with the standard is unnecessary, is not invoked for this particular application.

(iii) “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.”

Comment: While the objectives of the building height development standard would not be thwarted if strict compliance with the development standard was required, the objectives of the *R3 Medium Density Residential zone* to provide for diversity of activities within the zone (such as Health Services Facilities) would not be achieved if the proposed contravention of the building height development standard was not approved. It is demonstrated elsewhere in this request that the proposed contravention of the building height development standard is required in this case to facilitate the provision of health services facilities on the subject land.

(iv) “A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.”

Comment: It is not proposed in this case to attempt to establish that the development standard has been virtually abandoned or destroyed by the Council's own actions.

(v) “ A fifth way is to establish that the zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in that case would also be unreasonable or unnecessary.”

Comment: In relation to the subject land, the *R3 Medium Density Residential zone* is considered to be inappropriate given its existing developed character. Lingard Hospital is a significant component of the community's health services infrastructure and it would be more appropriate for the subject land to be zoned *SP2 Infrastructure (Health Services)*. The development standards currently applied to the site are intended to control the bulk, scale and density of residential development and have the effect of restricting the future efficient use of the subject land for hospital/health services, which typically result in multi-level buildings exceeding 10m in height.

It is noted that John Hunter Hospital is zoned *SP2 Infrastructure (Health Services Facility)* under Newcastle LEP 2012 and has no applicable building height or floor space ratio development standards. A similar planning framework would be appropriate to the site of Lingard Private Hospital.

Consequently, the fifth way to establish that compliance with the standard was unreasonable or inappropriate could also be applicable to the particular circumstances of the subject land, but is not invoked for this particular application.

4.6.2 - Additional considerations arising from *Four2Five Pty Ltd*.

The following additional considerations arise from *Four2Five v Ashfield Council (2015) NSWLEC 90* in relation to the operation of Clause 4.6:

(i) Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP’.

Comment: It is demonstrated in sections 4.1 – 4.5 of this request for contravention of the building height development standard that the proposed variation to the standard satisfies the particular requirements of Clause 4.6 of Newcastle LEP 2014.

(ii) That there are sufficient environmental planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may occur to similar development on the site or in the locality).

Comment: It is demonstrated in section 4.3 of this request that there are sufficient environmental planning grounds in relation to the subject land and the proposed development to justify contravening the development standard in this case.

(iii) That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs.

Comment: Whilst it is demonstrated in this request that the design height of the proposed development is consistent with the objectives of the building height development standard and the *R3 Medium Density Residential Zone*, there are also sufficient planning grounds to support the proposed contravention of the standard. The proposed contravention in building height will not adversely impact neighbouring properties and will not be contrary to the public interest.

5 CONSIDERATION AS TO WHETHER CONTRAVENTION OF THE APPLICABLE 0.9:1 MAXIMUM PERMISSIBLE FLOOR SPACE RATIO DEVELOPMENT STANDARD IS REASONABLE IN THE CIRCUMSTANCES AND SATISFIES THE REQUIREMENTS OF CLAUSE 4.6 OF NEWCASTLE LEP 2012.

5.1 - Objectives of Clause 4.6 of Newcastle LEP 2012.

The objectives of Clause 4.6 (1) are:

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

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

The proposed development's contravention of the maximum permissible 0.9:1 floor space ratio development standard (i.e. resulting in a FSR of 0.997:1) complies with these objectives for the following reason:

- the 0.9:1 maximum floor space ratio development standard is principally aimed to control residential density/amenity generally within the *R3 Medium Density Residential* zone and does not have any particular relevance to the „institutional“ character of hospital development on the subject land or the specific built form and building requirements for hospital construction; and
- in view of the limited capacity of the site to provide additional health services for the community, it is necessary to make the most efficient use of the land currently available for hospital expansion, by providing multiple level hospital facilities in a manner consistent with the built form of hospital facilities located elsewhere in the City.

The particular nature of hospital development therefore warrants an appropriate degree of flexibility in applying the 0.9:1 maximum permitted floor space ratio development standard in this particular case.

5.2 - Clause 4.6 (3) (a) – Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

Clause 4.6 (3) (a) requires that 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 that *“compliance with the development standard is unreasonable or unnecessary in the circumstances of the case”*.

Any requirement for the proposed development to strictly comply with the maximum permissible 0.9:1 floor space ratio development standard applicable to the subject land would be unreasonable or unnecessary in the particular circumstances of the proposed development for the following reasons:

- the 0.9:1 maximum floor space ratio development standard is principally aimed to control residential density/amenity generally within the *R3 Medium Density Residential* zone and does not have any particular relevance to the „institutional“ character of hospital development on the subject land or the specific built form and building requirements for hospital construction;
- in view of the limited capacity of the site to provide additional health services for the community, it is necessary to make the most efficient use of the land currently available for hospital expansion, by providing multiple level hospital facilities in a manner consistent with the built form of hospital facilities located elsewhere in the City; and
- as indicated in the accompanying Statement of Environmental Effects the proposed exceedence of the maximum permissible floor space ratio development standard in this case does not result in any adverse impacts on the public domain generally, or the residential amenity of neighbouring properties.

As demonstrated in section 5.6 of this request („Wehbe five part test), any requirement for strict compliance with the 0.9:1 floor space ratio development standard is unreasonable or unnecessary in the particular circumstances because the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.

5.3 - Clause 4.6 (3 (b) – Environmental Planning Grounds to justify contravening the development standard.

Clause 4.6 (3) (b) requires that the applicant to demonstrate that *there are sufficient environmental planning grounds to justify contravening the development standard.*

There are sufficient environmental planning grounds in this case to justify the proposed development's contravention of the 0.9:1 maximum permissible floor space ratio development standards applying to the subject land:

- as indicated in the accompanying Statement of Environmental Effects the proposed exceedence of the 0.9:1 maximum permissible floor space ratio development standard does not result in any adverse impacts on the public domain generally, or the residential amenity of neighbouring properties;
- the visual presentation of the proposed development to Lingard Street reflects the architectural themes and established bulk and scale of the existing hospital;
- other than for the minor exceedence of the roof top plant screen enclosure, the proposed hospital additions are compliant with the applicable 10m maximum permissible building height development standard;
- the bulk and scale of the proposed development does not have any significant amenity impacts on neighbouring properties:
 - there are no scenic or landmark views available from neighbouring properties that would be impacted by the proposed development;
 - there are no direct views from a window within the proposed development to a living area/habitable area window within a neighbouring residence; and
 - the proposed development will have no unreasonable acoustic impacts on neighbouring residences.
- as demonstrated in the accompanying Statement of Environmental Effects the provision of hospital car parking will comply with the provision for car parking required by Newcastle DCP 2012 and the minor increase in traffic generated by the proposed development will not adversely impact the performance, capacity or safety of the surrounding road network; and
- it is considered that the scale and architectural presentation of the proposed hospital additions will make a positive contribution to the built character of the locality and will not result in any adverse visual or amenity impacts. It is in the public interest for the proposed development to be approved in order to provide additional specialist medical facilities/services to the community.

5.4 - Clause 4.6 (4) (a) (ii) – Consistency with the objectives of the standard and the objectives of the zone.

Clause 4.6 (4) (a) (ii) requires the consent authority to be satisfied that 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 within which the development is proposed to be carried out.

(i) Objectives of the Floor Space Ratio Development Standard.

The objectives of the floor space ratio development standard applicable to the subject land and the proposed development are stated in Newcastle LEP 2012 - Clause 4.4 (1) (a) – (b):

- (a) to provide an appropriate density of development consistent with the established centres hierarchy,*
- (b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.*

The following assessment demonstrates that the proposed development's contravention of the 0.9:1 floor space ratio development standard in this particular case will be consistent with the objectives of the floor space ratio development standards of Newcastle LEP 2012:

- **"(a) to provide an appropriate density of development consistent with the established centres hierarchy,"**

Response: The subject land is not located within a centre.

The 0.9:1 maximum floor space ratio development standard is principally aimed to control residential density generally within the *R3 Medium Density Residential* zone and does not have any particular relevance to the „institutional“ character of hospital development on the subject land or the specific built form and building requirements relevant to hospital construction.

As indicated in the accompanying Statement of Environmental Effects the proposed exceedence of the maximum permissible floor space ratio development standard does not result in any adverse impacts on the public domain generally, or the residential amenity of neighbouring properties.

- **"(b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy"**

Response: In view of the limited capacity of the site to provide additional health services for the community, it is necessary to make the most efficient use of the land currently available for hospital expansion (i.e. the current doctors car park at the north-western corner of the site) and provide for the construction of a building of two levels, comprising ground floor theatre suites and Level 1 Medical Ward above.

The visual presentation of the proposed development to Lingard Street reflects the architectural themes and bulk and scale of the existing hospital.

The bulk and scale of the proposed development does not have any significant amenity impacts on neighbouring properties:

- there are no scenic or landmark views available from neighbouring properties that would be impacted by the proposed development;
- there are no direct views from a window within the proposed development to a

living area/habitable area window within a neighbouring residence; and

- the proposed development will have no unreasonable acoustic impacts on neighbouring residences.

It is considered that the scale and architectural presentation of the proposed hospital additions make a positive contribution to the built character of the locality and do not result in any adverse visual or amenity impacts. It is in the public interest for the proposed development to be approved in order to provide additional specialist medical facilities/services to the community.

(ii) Objectives for development within the R3 Medium Density Residential Zone.

The objectives for development within the *R3 Medium Density Residential* zone are provided in Newcastle LEP 2012 – Clause 2.3 (Zone Objectives and Land Use Table):

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To allow some diversity of activities and densities if:*
 - (i) the scale and height of proposed buildings is compatible with the character of the locality, and*
 - (ii) there will be no significant adverse impact on the amenity of any existing nearby development.*
- *To encourage increased population levels in locations that will support the commercial viability of centres provided that the associated new development:*
 - (i) has regard to the desired future character of residential streets, and*
 - (ii) does not significantly detract from the amenity of any existing nearby development.*

The following assessment demonstrates that the proposed development will be consistent with the objectives of the *R3 Medium Density Residential Zone*:

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

Not Applicable: The proposed development does not provide any residential accommodation.

- **“To provide a variety of housing types within a medium density residential environment.”**

Not Applicable: The proposed development does not provide any housing.

- **“To enable other land uses that provide facilities or services to meet the day to**

day needs of residents.”

Consistent: The proposed additions to Lingard Private Hospital will provide health services to the community.

- **“To allow some diversity of activities and densities if:**
 - (i) the scale and height of proposed buildings is compatible with the character of the locality, and*
 - (ii) there will be no significant adverse impact on the amenity of any existing nearby development.”*

Consistent: The proposed development is compatible with the character of development in the locality and will not have an adverse impact on the amenity of neighbouring properties.

- **To encourage increased population levels in locations that will support the commercial viability of centres provided that the associated new development:**
 - (i) has regard to the desired future character of residential streets, and*
 - (ii) does not significantly detract from the amenity of any existing nearby development.*

Not Applicable: The proposed development does not provide any residential accommodation.

5.5 - Clause 4.6 (5) (a) – (c): Matters for consideration by the Secretary.

Clause 4.6 (5) (a) – (c) requires that „the Secretary“, in deciding whether to grant concurrence under Clause 4.6 (4) (b) to the proposed contravention of the floor space ratio development standard, 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 Secretary before granting concurrence.*

The following assessment demonstrates that the proposed contravention of the 0.9:1 floor space ratio development standard does not raise any matter of significance for State or regional planning:

- **"Whether contravention of the development standard raises any matter of significance for State or regional environmental planning".**

It is demonstrated in the accompanying Statement of Environmental Effects and in this request, that the amended development application is consistent with State and regional planning policies/strategic directions seeking to provide facilities and services to meet the health needs of the community.

Approval of the proposed development and the proposed contravention of the applicable maximum permissible floor space ratio development standard in this particular case would not raise any matter of significance for State or regional planning.

- **"The public benefit of maintaining the development standard".**

The accompanying Statement of Environmental Effects demonstrates that the proposed contravention of the maximum permissible floor space ratio development standard does not have any significant adverse scenic/visual impacts, or amenity impacts on either the public domain, or neighbouring properties; and will not undermine the maintaining of the floor space ratio development standard applicable elsewhere within the R3 Medium Density Residential zone throughout the City, in view of the unique circumstances applying to the existing hospital and the proposed development.

- **"Any other matters required to be taken into consideration by the Director-General before granting concurrence."**

There are no other matters currently specified to be taken into consideration by the Director-General before granting concurrence.

5.6 - Considerations arising from Wehbe and Four2Five Pty Ltd.

5.6.1 Wehbe five part test.

Preston CJ in *Wehbe v Pittwater Council (2007) NSWLEC 827* identified five ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary in a particular case.

The proposed development invokes the first way to establish that compliance with the building height development standard is unreasonable or unnecessary in the particular circumstances:

- (i) "The 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."**

Comment: As demonstrated in section 4.4 (i) above, the proposed development is compliant with the objectives of the floor space ratio development standard, notwithstanding non-compliance with the standard.

Having regard to the consistency of the proposed contravention of the floor space ratio development standard with both the objectives of the development standard and the objectives of the *R3 Medium Density Residential Zone* and in consideration of the environmental planning grounds addressed in section 5.3 above, it is established that any requirement for compliance with the floor space ratio development standard in this case would be unreasonable or unnecessary in the particular circumstances.

- (ii) "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."**

Comment: In relation to the subject land and the proposed development, the underlying objective or purpose of the development standard is considered to be relevant to the proposed development and consequently this second way to establish that compliance with the standard is unnecessary, is not invoked for this particular application.

(iii) “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.”

Comment: While the objectives of the floor space ratio development standard would not be thwarted if strict compliance with the development standard was required, the objectives of the *R3 Medium Density Residential* zone to provide for diversity of activities within the zone (such as Health Services Facilities) would not be achieved if the proposed contravention of the floor space ratio development standard was not approved. It is demonstrated elsewhere in this request that the proposed contravention of the floor space ratio development standard is required in this case to facilitate the provision of health services facilities on the subject land.

(iv) “A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.”

Comment: It is not proposed in this case to attempt to establish that the development standard has been virtually abandoned or destroyed by the Council's own actions.

(v) “ A fifth way is to establish that the zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in that case would also be unreasonable or unnecessary.”

Comment: In relation to the subject land, the *R3 Medium Density Residential* zone is considered to be inappropriate given its existing developed character. Lingard Hospital is a significant component of the community's health services infrastructure and it would be more appropriate for the subject land to be zoned *SP2 Infrastructure (Health Services)*. The development standards currently applied to the site are principally intended to control the bulk, scale and density of residential development and have the effect of restricting the future efficient use of the subject land for hospital/health services, which typically result in much higher floor space ratios.

It is noted that John Hunter Hospital is zoned *SP2 Infrastructure (Health Services Facility)* under Newcastle LEP 2012 and has no applicable building height or floor space ratio development standards. A similar planning framework would be appropriate to the site of Lingard Private Hospital.

Consequently, the fifth way to establish that compliance with the standard was unreasonable or inappropriate could also be applicable to the particular circumstances of the subject land, but is not invoked for this particular application.

5.6.2 - Additional considerations arising from *Four2Five Pty Ltd*.

The following additional considerations arise from *Four2Five v Ashfield Council (2015) NSWLEC 90* in relation to the operation of Clause 4.6:

(i) Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP’.

Comment: It is demonstrated in sections 5.1 – 5.5 of this request for contravention of the 0.9:1 floor space ratio development standard that the proposed variation to the standard satisfies the particular requirements of Clause 4.6 of Newcastle LEP 2012.

- (ii) That there are sufficient environmental planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may occur to similar development on the site or in the locality).**

Comment: It is demonstrated in section 5.3 of this request that there are sufficient environmental planning grounds in relation to the subject land and the proposed development to justify contravening the 0.9:1 floor space ratio development standard in this case.

- (iii) That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs.**

Comment: Whilst it is demonstrated in this request that the design of the proposed development is consistent with the objectives of the floor space ratio development standard and the *R3 Medium Density Residential Zone*, there are also sufficient planning grounds to support the proposed contravention of the standard. The proposed contravention in the floor space ratio development standard will not adversely impact the amenity of neighbouring properties and will not be contrary to the public interest.

6 CONCLUSION.

Amended DA 2015/10349 proposes to:

- include a roof top plant enclosure screen having a height of between 11.192m and 11.279m, thereby contravening the 10m maximum permissible building height development standard applicable to the subject land. The proposed development otherwise complies with the 10m building height development standard; and
- contravene the 0.9:1 maximum floor space ratio development standard applying to the subject land, resulting in the proposed and existing hospital development having a floor space ratio of 0.997:1.

Newcastle City Council is requested to exercise its discretion under Clause 4.6 (2) of Newcastle Local Environmental Plan 2012 for development consent to be granted to amended DA 2015/10349 for proposed alterations and additions to Lingard Private Hospital on Lot 100 DP 1168197, No. 23 Merewether Street, Merewether, as described in section 4 of the accompanying Supplementary Statement of Environmental Effects (August 2016), even though the proposed development would contravene the applicable 10m maximum permissible building height development standard and the 0.9:1 maximum permissible floor space ratio development standard applying to the subject land.

This request addresses the matters required by Clauses 4.6 (3) – (5) of Newcastle Local Environmental Plan 2012 and demonstrates that any requirement for the proposed development to strictly comply with the applicable building height and floor space ratio development standards is unreasonable or unnecessary in the circumstances of the site and the proposed development because:

- the objectives of the building height and floor space ratio development standards and the

objectives of the *R3 Medium Density Residential Zone* are achieved by the proposed development, notwithstanding non-compliance with the development standards; and

- there are sufficient environmental planning grounds to justify the proposed development contravening the building height and floor space ratio development standards.

This request for contravention of the applicable maximum permissible building height and floor space ratio development standards is well founded and the requested variations to the particular development standards are considered appropriate in the circumstances.

There is no public benefit to be derived or planning purpose to be served, in requiring the proposed development to strictly comply with the applicable maximum permissible building height and floor space ratio development standards of Newcastle LEP 2012.

Doug Sneddon

15 August 2016.