

Our Ref 82015091-1/Letter 002
Contact Lewis Westhoff/David Laing

12 November 2015

AE Design Partnership
23 Barr Street
CAMPERDOWN NSW 2050

Cardno (NSW/ACT) Pty Ltd
ABN 95 001 145 035

Level 1, 47 Burelli Street
Wollongong NSW 2500
Australia

Phone: 61 2 4228 4133
Fax: 61 2 4228 6811

www.cardno.com.au

Attention: Tristan Kell

Dear Tristan,

**RE: DA 10.2015.198.1 – KIAMA AGED CARE CENTRE OF EXCELLENCE ‘KACOE’,
14A BONAIRA STREET, KIAMA
Response to Additional Information Request, 22 October 2015**

This letter has been prepared in response to your letter dated 22 October 2015, seeking additional information related to the assessment of DA 10.2015.198.1 for the proposed Kiama Aged Care Centre of Excellence development at 14A Bonaira Street, Kiama.

This letter is in addition to the letter and package of information provided by Boffa Robertson Group, dated 10 November, 2015, which responded to the majority of comments in your additional information letter.

Consequently, this letter provides the remainder of information that was not submitted on 10 November, allowing you to progress with your assessment of the application.

Response to Matters Raised In Letter

(a) Legal Opinion on SEPP 1

- i. **Provide Legal Opinion on the use of SEPP 1 for the breach of development standards for the proposal**
- ii. **Provide legal precedence for justification of breach in height and merit of proposal**

Thomson Geer have provided legal advice regarding the correct mechanism to request a variation to the height standards listed within *State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004* (Seniors SEPP).

The legal advice is enclosed with this letter, which provided the following opinion regarding the correct legal mechanism (refer to Para 3 of advice):

3 Summary of Advice

By way of summary, we advise as follows:

- a) *On balance, in our opinion the better view is that a SEPP 1 objection is the correct mechanism to seek to vary the development standards contained in clauses 40(4)(a) and (b) of the Seniors SEPP.*

- b) *However, this view is not free from doubt, particularly in the absence of any clear authority on this point.*
- c) *The alternate view, which we consider is arguable, is that a variation made pursuant to clause 4.6 of the KLEP is the correct mechanism to seek to vary the development standards contained in clauses 40(4)(a) and (b) of the Seniors SEPP.*
- d) *Therefore, out of an abundance of caution, our opinion is that both a:*
 - i. *SEPP 1 objection; and*
 - ii. *Clause 4.6 variation under the KLEP,*

Addressing any variation from the height and storey development standards contained in clause 40(4)(a) and (b) of the Seniors SEPP, should form part of the DA to ensure that the jurisdiction to grant development consent is indisputably enlivened.

Consequently, a Clause 4.6 variation report a modified SEPP 1 Objection report have been prepared and enclosed with this letter. These two documents both demonstrate that the proposed variation to the Clause 40(4) (a) and (b) development standards within the Seniors SEPP is well founded.

Additionally, Thomson Geer cited relevant case law precedents where the Land and Environment Court has held that a variation to development standards contained in Clause 40 (4) (a) and (b) were well founded. Specifically, the Court has frequently utilised SEPP 1 to vary the height and storey development standards of Clause 40 (4) of the Seniors SEPP in:

- *Lim v Woollahra Municipal Council* [2010] NSWLEC 1252
- *Boston Blyth Fleming Pty Limited v Pittwater Council* [2010] NSWLEC 1203
- *DeStoop v Ku-ring-gai Council* [2010] NSWLEC 1019

The key justifications cited by the Court that were deemed to be well founded, and particularly relevant to the KACOE proposal included:

Clause 40 (4) (a) – 8m Height Standard

In *Lim* (paras 12-18), Brown C held that a SEPP 1 objection was well founded on the basis that the application achieved the objectives of the development standards, including overshadowing, views, privacy and character. The accompany SEPP 1 and Clause 4.6 reports demonstrate that the application is consistent with the objectives of the control by way of overshadowing, character, views and privacy.

In *DeStoop* (paras 53-63), Murrell C accepted a SEPP 1 objection was well founded on the basis that the retention of an item of heritage, the site's topography and the location of the largest non-compliance at the rear of the site to shield visual impacts to the streetscape were sound justifications.

Clause 40 (4) (b) – Two Storey Height Standard

In *Boston Blyth* (para 45) Hussey C agreed that due to the height of the seniors living development being consistent with the overall height of adjoining properties and the height under the local planning controls, the application achieved the objective to avoid an abrupt change in the scale of the development on the streetscape. As indicated in both the SEPP 1 Objection and Clause 4.6 Variation (and in **Figure 1** below), the ILU buildings are of a height that does not represent an abrupt change in the streetscape. Additionally, Hussey C held that incorporating details that minimise the visual impact of exposed basement levels (including landscaping) was well founded.

In *DeStoop* (paras 64-68) Murrell C identified that a well-founded variation to the two storey height standard is also required to consider impacts to neighbours including overlooking and overshadowing. As demonstrated in the SEPP 1 and Clause 4.6 reports, overshadowing impacts to adjoining properties comply with the requirements of *Seniors Living Policy – Urban Design Guidelines for Infill Development*. Further, the orientation of balconies, use of blade columns and louvers ensure a positive visual privacy outcomes is achieved.

Figure 1 – Height of the ILUs are Consistent with a Low Density Built Form



Source: Boffa Robertson

Importantly, Thomson Geer noted the following regarding relying on these precedents and associated justifications (at Para 5):

While some general guidance may be taken from legal precedents where the Court has upheld a SEPP 1 objection to vary the height and storey development standards in Clause 40(4) of the Seniors SEPP, some caution should be exercised in relying upon these along, as each matter necessarily turns on its own facts and merits. The same principle applies to those matters where the Court held that the relevant SEPP 1 objection was not 'well-founded'.

In this regard, the decision relating to whether the SEPP 1 objection and Clause 4.6 variation are well founded should be based on the site specific assessments and justifications drawn in the two supporting documents, rather than relying solely on the precedents of these cases. Both the SEPP 1 objection and Clause 4.6 variation demonstrate that the application of the height and storey development standards within the Clause 40(4) of the Seniors SEPP is unreasonable and unnecessary, citing a number of matters including:

- The objectives of the height controls are achieved by the development, ensuring overshadowing, visual privacy and amenity outcomes are attained.
- Noting the nature of the built form associated with the land use, the siting of the development, along with its palette of materials and finishes, ensures the proposal is compatible with the existing and future character of the site and area.
- Positive environmental planning outcomes are achieved by the proposal, including an appropriate response to the site specific characteristics and constraints (heritage, bushfire, landscape character of the site) and the co-location of services.

The legal advice, amended SEPP 1 Objection and Clause 4.6 Variation are enclose with this letter.

(b) Visual Analysis for site and local area

- i. **Provide an analysis of the visual impact of the proposal will have on the locality. Analysis is to identify key district views and how these will be impacted by the proposal**
- ii. **Demonstrate how proposal (especially ILU component) is compatible with existing character of locality**
- iii. **Address visual impact concerns identified in submissions, including visual impact of proposal on Whitten Place and Gwinganna Avenue.**

Following on from the photomontages and assessment prepared by Boffa Robertson in their response on 10 November, an analysis of the visual impact on the locality has been undertaken for the development. This analysis has considered visual impacts to visual catchment surrounding the site, primarily to the east along Whitten Place and Gwinganna Avenue (as identified in submissions).

The analysis also demonstrates how the ILU component is compatible with the existing character of the locality.

The analysis is enclosed with this letter and provided the following conclusion:

This visual analysis has identified the key district views within the visual catchment of the site and has identified how the proposed development will impact on these views. The main landscape features of the ocean and Saddleback Mountain (and the wider escarpment) are the vistas that are most valued in the residential areas surrounding the site. Views across the site from adjoining residential properties currently gain no direct vista of either of these landscape features, with development to the west of the site (Reid Street) obtaining views of the escarpment and development to the east of the site (Holden Avenue) obtaining views of the ocean.

Residential areas to the east of the site that are located on a similar elevation have unobstructed views of Saddleback Mountain. The photo montages prepared from Boffa Robertson identify that the development of the site will not cause any significant or detrimental impact to these established vistas. It was also demonstrated that the proposed development will retain the overall visual character of this hill, with all development appearing to be nestled into the hillside, accompanied by established native trees and vegetation. In this regard, while the development results in an increased visual presence on site, the use of colours, materials and landscaping treatments that are consistent with the locality, ensure that it will not have any significant impact on residential amenity.

The proposal is considered to be compatible with the existing character of the locality as it directly responds to the key built form elements of surrounding residential areas. These built form elements include the use of colours, finishes, materials and roof pitches that are common in surrounding dwellings. It is noted that the development, by definition, has a larger scale and mass than a detached single dwelling, however, it is considered to be consistent with principles cited in GPC No 5 (Wombarra) Pty Ltd v Wollongong City Council [2003] NSWLEC 268 at 14-18, that assist in the merit assessment of the proposal. Compatibility is further enhanced by providing adequate building separation and deep soil landscaping to maximise residential visual amenity.

(c) Setbacks – (I) Noise Barrier

These matters were all addressed in the package of information submitted by Boffa Robertson on 10 November.

Response to Submissions

A table responding to each of the submissions received during the public exhibition has been enclosed with this letter. This demonstrates that the concerns raised within each submission is resolvable through the additional information submitted in the package on 10 November, this package of information or through appropriate conditions of determination.

Conclusion

We trust that this additional information assists with your assessment, allowing DA 10.2015.198.1 to progress through the assessment and determination process.

Please contact me on (02) 4228 4133 if you have any questions.

Yours faithfully,



Lewis Westhoff
Town Planner
For **Cardno (NSW/ACT) Pty Ltd**

Enc:

Legal Advice from Thomson Geer, dated 11 November 2015

Amended SEPP 1 Objection

Clause 4.6 Variation

Visual Analysis

Response to Submissions Table

Level 25, 1 O'Connell Street
Sydney NSW 2000 Australia

GPO Box 3909 Sydney NSW 2001
DX 69 Sydney

T +61 2 8248 5800
F +61 2 8248 5899

Our ref CJT:ALO:3812956
Your ref DA10.2015.198.1

11 November 2015

BY EMAIL: lewis.westhoff@cardno.com.au

Mr Michael Forsyth
General Manager
Kiama Municipal Council
11 Manning Street
KIAMA NSW 2533

C/- Mr Lewis Westhoff
Planner
Cardno (NSW/ACT) Pty Ltd
Level 1, 47 Burelli Street
WOLLONGONG NSW 2500

Dear Sir

Advice on variations to development standards in clause 40(4) of the Seniors SEPP

1 Introduction

Cardno acts for the Kiama Municipal Council (**Council**) in this matter.

We refer to your email of 2 November 2015 and our discussions with Cardno (NSW/ACT) Pty Ltd (**Cardno**) on 2, 4 and 9 November about this matter. We are instructed by Cardno that the:

- (a) Council proposes to develop the Kiama Aged Care Centre of Excellence (**KACOE**) at 14a Bonaira Street, Kiama (**Site**), which is the current location of the Kiama Hospital;
- (b) Site is more particularly described as Lot 1 in Deposited Plan 596755;
- (c) Proposed development involves the demolition of all structures on the Site, with the exception of Barroul House (an item of local environmental heritage), and generally comprises the construction of a 134 bed residential aged care facility (**RACF**), 16 assisted living unit (**ALU**), 51 independent living units (**ILU**), a community activities centre, the restoration of Barroul House and the provision of associated infrastructure;
- (d) Site is zoned R2 Low Density Residential under the *Kiama Local Environmental Plan 2011* (**KLEP**) (**R2 Zone**);
- (e) 'Seniors living' is prohibited in the R2 Zone and approval for the proposed development is to be sought pursuant to the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (**Seniors SEPP**);

- (f) Council has subsequently made development application No. DA 10.2015.198.1 for *'development of an integrated seniors living and aged care facility known as the Kiama Aged Care Centre of Excellence (KACOE) at the existing Kiama Hospital Site' (DA)*;
- (g) Proposed development exceeds the height and storey development standards contained in clause 40(4)(a) and (b) of the Seniors SEPP because:
 - (i) [clause 40(4)(a)] the upper level of the ALU building exceeds the 8.0 metre height standard by 3.34 metres;
 - (ii) [clause 40(4)(a)] some parts of the northern ILU building and the southern part of the RACF exceed the 8.0 metre height standard to a lesser degree; and
 - (iii) [clause 40(4)(b)] each of the ILUs is three storeys, exceeding the 2 storey height standard adjacent to the Site boundary;
- (h) Clause 40(4)(c) is not relevant to the DA;
- (i) Listing of Burroul House in Schedule 5 of the KLEP as an item of local environmental heritage does not have any impact on the application of the Seniors SEPP;
- (j) Cardno has prepared and lodged an objection to the development standards in clause 40(4)(a) and (b) with the DA pursuant to *State Environmental Planning Policy No 1 – Development Standards (SEPP 1)*;
- (k) Council has appointed AE Partnership to independently assess the DA. By letter of 22 October 2015, AE Partnership requested
 - '(a) **Legal Opinion on SEPP 1**
 - i. *Provide legal opinion of the use of SEPP 1 for the breach in development standards for the proposal.*
 - ii. *Provide legal precedence for justification of breach in height and merit of the proposal.'*

We rely upon these instructions from Cardno for the purposes of this advice. We have not independently confirmed their accuracy nor reviewed any general DA materials. If our instructions or the proposed development changes this may alter our advice.

2 Request for Advice

You have asked for advice about the correct mechanism to vary the development standards contained in clause 40(4)(a) and (b) of the Seniors SEPP.

More specifically, you have asked for:

- (a) advice on whether or not the development standards contained in clauses 40(4)(a) and (b) of the Seniors SEPP should be varied by way of a clause 4.6 variation made under the KLEP or an objection made pursuant to SEPP 1; and
- (b) where relevant, any examples of legal precedents where a variation to the development standards contained in clause 40(a) and (b) of the Seniors SEPP was held to be 'well-founded'.

We have not been instructed to:

- (a) generally review the DA and associated plans;
- (b) provide any advice on the merits of the DA including the variation from any development standards in the KLEP or Seniors SEPP; or

- (c) provide any advice on the adequacy or content of the SEPP 1 objection or any clause 4.6 Variation which is to be prepared.

3 Summary of our advice

By way of summary, we advise as follows.

- (a) On balance, in our opinion the better view is that a SEPP 1 objection is the correct mechanism to seek to vary the development standards contained in clauses 40(4)(a) and (b) of the Seniors SEPP.
- (b) However, this view is not free from doubt, particularly in the absence of any clear authority on this point.
- (c) The alternate view, which we consider is arguable, is that a variation made pursuant to clause 4.6 of the KLEP is the correct mechanism to seek to vary the development standards contained in clauses 40(4)(a) and (b) of the Seniors SEPP.
- (d) Therefore, out of an abundance of caution, our opinion is that both a:
 - (i) SEPP 1 objection; and
 - (ii) Clause 4.6 variation under the KLEP,

addressing any variation from the height and storey development standards contained in clause 40(4)(a) and (b) of the Seniors SEPP, should form part of the DA to ensure that the jurisdiction to grant development consent is indisputably enlivened.

This summary should be read with the below reasons for our advice. For brevity, acronyms used in this summary are set out elsewhere in this advice.

4 Reasons for our advice

4.1 SEPP 1 Objection

Whether or not a SEPP 1 objection or a clause 4.6 variation is the correct mechanism to vary the development standards contained in clauses 40(4)(a) and (b) of the Seniors SEPP depends largely on the effect of clause 1.9 of the KLEP and whether or not SEPP 1 is inconsistent with clause 4.6 of the KLEP.

Relevantly, clause 1.9 of the KLEP provides:

'1.9 Application of SEPPs

- (1) *This Plan is subject to the provisions of any State environmental planning policy that prevails over this Plan as provided by section 36 of the Act.*
- (2) *The following State environmental planning policies (or provisions) do not apply to the land to which this Plan applies:*

State Environmental Planning Policy No 1—Development Standards'

(our underlining for emphasis)

The KLEP applies to the Site, even though the DA is to be made pursuant to the Seniors SEPP.

On one view, the intent of clause 1.9 of the KLEP is to bring affect to section 36 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*, which addresses inconsistencies between environmental planning instruments (including LEPs and SEPPs).

Relevantly, section 36 provides:

'36 Inconsistency between instruments

- (1) In the event of an inconsistency between environmental planning instruments and unless otherwise provided:
 - (a) there is a general presumption that a State environmental planning policy prevails over a local environmental plan or other instrument made before or after that State environmental planning policy, and
 - (b) (Repealed)
 - (c) the general presumptions of the law as to when an Act prevails over another Act apply to when one kind of environmental planning instrument prevails over another environmental planning instrument of the same kind.
- (2), (3) (Repealed)

(our underlining for emphasis)

Section 36(1) of the EP&A Act sets out the general presumption that a state environmental planning policy prevails over a local environmental plan. However, section 36(4) provides the following:

- '(4) Nothing in this section prevents an environmental planning instrument from being expressly amended by a later environmental planning instrument, of the same or a different kind, to provide for the way in which an inconsistency between them is to be resolved.'

(our underlining for emphasis)

Relevantly, clause 4.6 of the KLEP provides:

'4.6 Exceptions to development standards

- (1) The objectives of this clause 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.
- (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.
- (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.

- (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 Secretary has been obtained.
- (5) In deciding whether to grant concurrence, the Secretary 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.
- ...
- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).'
- (our underlining for emphasis)

Briefly stated, clause 4.6 of the KLEP contains a formula for the grant of development consent, notwithstanding the contravention of a "development standard imposed by this or any other environmental planning instrument".

On one view, that formula is inconsistent with the requirements of SEPP 1 (we note that the recent cases of *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 did not provide clarity on this specific issue). In our view, this is the better reason as to why clause 1.9 was inserted into the KLEP. Put simply, it provides primacy to clause 4.6 of the KLEP (ie. for development applications made pursuant to it).

It follows, that the principal question is whether or not:

- (a) clause 1.9(2) of the KLEP has the effect that SEPP 1 cannot be relied upon to support an objection to clause 40(4) of the Seniors SEPP, where the subject land is land to which the KLEP applies; or
- (b) the operation of clause 1.9(2) is confined to development applications made pursuant to the KLEP only.

In considering the true effect of clause 1.9 of the KLEP, it is relevant to have regard to the wording of clause 4.6 of the KLEP and to whether or not it should be regarded as having been intended to be a mechanism to dispense compliance with a standard imposed by another environmental planning instrument, where the relevant development application cannot be made under the KLEP because, as is the circumstances in this matter, the relevant kind of development is prohibited.

In our opinion, the better view is that the operation of clause 1.9(2) is confined to development applications made pursuant to the KLEP; with the result that clause 1.9(2) does not oust SEPP 1 as a dispensing mechanism in respect of a development applications made pursuant to the Seniors SEPP.

While there is no case law directly on point, the decision of Biscoe J in *Amalgamated Holdings Ltd v North Sydney Council* [2012] NSWLEC 138 provides some support for this view.

In *Amalgamated Holdings*, his Honour considered whether or not the consent authority was required to take into consideration the design provisions of the Seniors SEPP in its consideration of a high rise aged care housing development which was permissible under the North Sydney Local Environmental Plan. Having made reference to section 79C(1)(a)(i) of the EP&A Act, his Honour refused to uphold a challenge to the consent on a number of grounds, which included the following:

'[34] Secondly, in any event, in my opinion, the Seniors SEPP was inapplicable because the development application was not made pursuant to the Seniors SEPP and was permissible with consent under a local environmental plan. Therefore, the design principles in the Seniors SEPP were not mandatory considerations under s 79C(1)(a)(i) of the EPA Act (it does not follow that they could not be taken into account as relevant, even though not mandatory) The predecessor of the Seniors SEPP was State Environmental Planning Policy No 5 — Housing for Older People or People with a Disability (SEPP 5). SEPP 5 has been held not to apply where an applicant for development consent has not invoked it in its development application and the development was permissible with consent under a relevant local environmental plan: Central Coast Care v Wyong Shire Council [2003] NSWLEC 17 ; 124 LGERA 320 at [21]–[29] per Lloyd J.'

(our underlining for emphasis)

In this matter, by analogy, the KLEP is inapplicable because the DA has been made pursuant to the Seniors SEPP and is permissible with consent under that SEPP, with the result that the provisions of the KLEP are not mandatory considerations under s79C(1)(a)(i).

With regard to the wording of clause 4.6, we note that subclause (2) refers to "development standard imposed by this or any other environmental planning instrument". In our opinion, the better view is that this is to operate only in circumstances where the development application is made pursuant to the KLEP and where the development application is required to address a development standard imposed by another environmental planning instrument.

We also observe that clause 4.6(4) requires the consent authority to be satisfied that the proposed development will be consistent with "the objectives for development within the zone in which the development is proposed to be carried out". This intimates that clause 4.6 is intended to apply to development applications made pursuant to the KLEP only.

On balance, in our opinion the better view is that a SEPP 1 objection is the correct mechanism to seek to vary the development standards contained in clauses 40(4)(a) and (b) of the Seniors SEPP.

However, this view is not free from doubt and is untested. Accordingly, we recommend that a prudent and cautious approach be taken by the Council in relation to this matter, particularly in the absence of any clear authority on this point and for the further reasons which follow.

4.2 Clause 4.6 Variation

Contrary to the opinion expressed above, there is an alternate view, which may have some merit although it also is untested. Namely, that a variation made pursuant to clause 4.6 of the KLEP is the correct mechanism to seek to vary the development standards contained in clauses 40(4)(a) and (b) of the Seniors SEPP.

In the present matter, the Council is to make the DA under the Seniors SEPP. That election has the consequence, for example, that the height and storey development standard under clause 40(4)(a) and (b) prevails over the height of buildings development standard under clause 4.3 of the KLEP, because we are instructed that they are inconsistent.

This is because the Seniors SEPP provides at clause 5(3) that:

'5 Relationship to other environmental planning instruments

...

- (3) *If this Policy is inconsistent with any other environmental planning instrument, made before or after this Policy, this Policy prevails to the extent of the inconsistency.*

However, clause 1.9 of the KLEP expressly provides that:

'1.9 Application of SEPPs

...

- (2) *The following State environmental planning policies (or provisions) do not apply to the land to which this Plan applies:*

State Environmental Planning Policy No 1—Development Standards'

The alternate view, is that the KLEP seeks to prevent SEPP 1 from being applicable throughout the whole of the Kiama local government area (There appears to be some support for this position in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [24]). A respectable argument could be put that if clause 4.6 of the KLEP is inconsistent with the provisions of the Seniors SEPP or SEPP 1, then those state environmental planning policies would prevail by virtue of clause 5(3) of the Seniors SEPP.

The Courts have held that the meaning of 'inconsistency' is to be "incompatibility, contrariety or opposition". In addition, there is a general reluctance by the Courts to determine that there is inconsistency between two statutory provisions if both provisions can be given effect, unless such an intention is clearly expressed (see: *G W Rothwell & Associates v North Sydney Council* (2000) 108 LGERA 361).

In the present matter, it is open to argue that there is no inconsistency between the KLEP and the Seniors SEPP, because the KLEP does not prohibit any variation to the development standards contained the Seniors SEPP. Rather, the KLEP expressly makes provision for the approval of development that vary from the development standards through clause 4.6 of the KLEP (that said, we note that the recent cases of *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 touched on this issue generally but did not provide clarity on this specific issue).

In the alternate view (to that expressed above), it is open to be argued that clause 4.6 of the KLEP is not inconsistent with SEPP 1 in circumstances where it serves a similar purpose, namely, to enable flexibility in terms of compliance with development standards, in appropriate circumstance. In this respect, the Courts have held that provisions are not inconsistent where they serve the same underlying purpose or objective.

For example, in *Mete v Warringah Council* [2004] NSWLEC 273 the Court stated:

- '[26] The intent and purpose of both sets of provisions appear on their face to be consistent with each other by seeking to obtain a common objective, namely to ensure that housing for the particular target group is designed in a manner particularly suited to that group. I agree with the submissions made by Mr Ayling that the provisions in WLEP can*

be regarded as a slightly different means of dealing with what is perceived to be the same problem.'

Further, it can be observed that there is nothing in the Seniors SEPP which expressly states that SEPP 1 applies to all of the land to which the Seniors SEPP applies. Thus, it could be argued that the exclusion of SEPP 1 by clause 1.9 of the KLEP is not expressly inconsistent with the Seniors SEPP because it does not expressly provide that SEPP 1 is to be applicable to all development applications (on any land) made pursuant to the Seniors SEPP. This kind of argument was acknowledged by the Court in *Mete*:

'[16] There is, therefore, a debate between the parties as to whether cl 5(1) of WLEP (which provides that SEPP 1 does not apply to land to which WLEP applies) has the effect that SEPP 1 cannot be relied upon to support an objection made in respect of the development standards in cl 38 of SEPP(SL) where the land is subject to the provisions of WLEP. As will become apparent, it is not necessary to resolve the debate in these proceedings. However, as SEPP(SL) makes no reference to SEPP 1 and cl 5(1) of WLEP expressly provides that SEPP 1 does not apply to land to which WLEP applies, there is clearly an argument to support the proposition that SEPP 1 cannot be applied to support an objection made to application of a development standard in SEPP(SL) where the subject land is in Warringah.'

Put another way, it is open to argue that where the Seniors SEPP is silent on whether or not SEPP 1 applies, it is open to the Minister to make another environmental planning instrument (in this case the KLEP) which excludes the application of SEPP 1 in certain areas, and no 'inconsistency' will necessarily arise.

In this respect, the Court had cause to consider a similar issue in *Marchese & Partners Architects Pty Ltd v Warringah Council* [2002] NSWLEC 41, where it was argued that the *Warringah Local Environmental Plan 2000 (WLEP)* was inconsistent with, and overridden by, SEPP 1 because that WLEP stated that SEPP 1 did not apply to it.

Relevantly, the Court held that this was not an inconsistency, but rather a decision by the Minister (in making the WLEP) to prevent SEPP 1 from applying:

'[28] Cl5(1) of the WLEP clearly has the effect of an amendment to SEPP 1 by negating its application to land in the Warringah areas. The provisions of the WLEP cannot be discordant or incompatible with, that is, inconsistent, with SEPP 1, as contemplated by cl5 of SEPP1, if in fact SEPP 1 has no application to land to which the WLEP applies.'

[29] The Court accepts that the relevant prescriptions found in the respective Locality Statements are development standards.'

[30] In the Court's opinion, cl5(1) of the WLEP amends SEPP 1 insofar as it no longer applies to Warringah. In the light of s70 of the EP&A Act, which vests power to make a local environmental planning instrument in the Minister as found in Pt2 Div 2, and the role of the Minister in making State environmental planning policies it cannot be suggested that the Minister, when making the WLEP, did not understand the effect of cl5(1) on the application of SEPP 1.'

[31] It follows, therefore, that dispensing power in respect of the development standards can only be found within the WLEP itself.'

Applying the same principle to the KLEP, it is open to be argued that clause 4.6 has been deliberately chosen to replace SEPP 1 for all development applications in the Kiama local government area, including those made under the Seniors SEPP.

Where such an argument was accepted by the Court, only a variation made pursuant to clause 4.6 of the KLEP could be the correct mechanism to seek to vary the development standards contained in clauses 40(4)(a) and (b) of the Seniors SEPP.

However, this alternate view is not free from doubt and is untested also. Accordingly, as stated above, we recommend that a prudent and cautious approach be taken by the Council in relation to this matter, particularly in the absence of any clear authority.

4.3 Conclusion

For the reasons stated above, out of an abundance of caution, our opinion is that both a:

- (a) SEPP 1 objection; and
- (b) Clause 4.6 variation made pursuant to the KLEP,

addressing any variation from the height and storey development standards contained in clause 40(4)(a) and (b) of the Seniors SEPP, should form part of the DA to ensure that the jurisdiction to grant development consent is indisputably enlivened.

There is no general reason why the consent authority could not consider both a SEPP 1 objection and a Clause 4.6 variation for abundant caution.

In our opinion, without each of these, there is a risk that a decision by the consent authority could be the subject of successful legal challenge for want of jurisdiction.

5 Case law precedents

With regard to any examples of legal precedents, where a variation to the development standards contained in clause 40(a) and (b) of the Seniors SEPP was held to be 'well-founded', we advise as follows.

- (a) The Court has frequently utilised SEPP 1 to vary the height and story development standards in clause 40(4) of the Seniors SEPP. For example see:
 - (i) *Lim v Woollahra Municipal Council* [2010] NSWLEC 1252;
 - (ii) *Boston Blyth Fleming Pty Limited v Pittwater Council* [2010] NSWLEC 1203; and
 - (iii) *DeStoop v Ku-ring-gai Council* [2010] NSWLEC 1019.
- (b) We are not aware of a decision by the Court in relation to a clause 4.6 variation which specifically relates to clause 40(4)(a) and (b) of the Seniors SEPP.
- (c) However, some general assistance on the preparation of clause 4.6 variations is to be found in the decisions of:
 - (i) *Wehbe v Pittwater Council* [2007] NSWLEC 827 (to the extent still applicable);
 - (ii) *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
 - (iii) *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90;
 - (iv) *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248; and
 - (v) *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386.
- (d) By contrast, in the following cases, the Court held that the relevant SEPP 1 objection was not 'well-founded':
 - (i) *Manderrah Pty Ltd v Woollahra Municipal Council* [2013] NSWLEC 1196; and
 - (ii) *Nanevski Pty Limited v Rockdale City Council* [2010] NSWLEC 1220.

While some general guidance may be taken from legal precedents where the Court has upheld a SEPP 1 objection to vary the height and story development standards in clause 40(4) of the Seniors SEPP, some caution should be exercised in relying upon these alone, as each matter necessarily turns on its own facts and merits. The same principle applies to those matters where the Court held that the relevant SEPP 1 objection was not 'well-founded'.

If you have any questions, please contact me.

Yours faithfully
THOMSON GEER



Craig Tidemann
Partner – Planning & Environment
T +61 2 8248 3404
M 0407 197 325
E ctidemann@tglaw.com.au

SEPP 1 Objection – Kiama Aged Care Centre of Excellence

This SEPP 1 Objection Request has been prepared in support of the proposed integrated seniors living and aged care facility known as the Kiama Aged Care Centre of Excellence (KACOE) at the existing Kiama Hospital Site, Lot 1 DP 596755, 14A Bonaira Street, Kiama. The KACOE development involves the development of a 134 residential aged care facility (RACF), 16 assisted living units (ALUs), 51 independent living units (ILUs), a community activities centre and the heritage restoration of Barroul House.

Background

The proposed development uses the provisions of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (Seniors SEPP) to permit the development on site. Part 4 of the Seniors SEPP contains a number of development standards to be complied with, including site size, site frontage and height in zones where residential flat buildings are not permitted. The subject site meets the site size and site frontage requirements, however (due to the site being located in area zoned R2 Low Density Residential by the *Kiama Local Environmental Plan 2011* (LEP), residential flat buildings are not permitted) it exceeds the height limits at Clause 40 (4) of the Seniors SEPP.

Clause 40 (4) of the Seniors SEPP provides three height provisions that are applicable to the development, namely:

- a) All buildings must be 8m or less
- b) A building that is adjacent to the boundary of the site must not be more than 2 storeys
- c) A building in the rear 25% of the site must not exceed 1 storey in height

Two areas of the proposal result in non-compliances with the above standards, including:

- > The upper level of the ALU building, which exceeds the 8m height limit by 3.34m at its highest point
- > Minor portions of the upper level of the northern ILU building and southern portions of the RACF building, primarily due to the topography of the site.
- > Each ILU building is three storeys in height, exceeding the 2 storey limit for buildings adjacent to a boundary.

Consequently, the application is seeking a formal variation to the above height limit standards as part of the development application (DA). This variation is sought pursuant to *State Environmental Planning Policy No 1 – Development Standards* (SEPP 1), which allows flexibility in the application of planning controls operating in another environmental planning instrument.

Pursuant to Clause 6 of SEPP 1, a written objection is required to seek a variation, with this objection requiring to demonstrate that compliance with the development standard is unreasonable and unnecessary. This report forms the formal written objection, with supporting justifications provided in the below sections.

SEPP 1 Requirements

SEPP 1 provides the mechanism to seek variations to development standards within other environmental planning instruments. In this instance, the provisions of SEPP 1 are being used to seek an exemption to the height development standards at Clause 40 (4) (a) and (b) of the Seniors SEPP, an environmental planning instrument within the meaning of Part 3 of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

The aims and objectives of SEPP 1 are as follows:

SEPP 1 Objection – Kiama Aged Care Centre of Excellence

3 Aims, objectives etc

This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.

This report satisfies the objectives of SEPP 1 by providing appropriate justifications that demonstrate that strict compliance with the Clause 40 (4) (a) and (b) height standards in the Seniors SEPP are unreasonable and unnecessary. The granting of the variation will not hinder the attainment of the objectives at Section 5 (a) (i) and (ii) of the EP&A Act. Specifically, the development will promote the social and economic welfare of the community through the provision of an integrated seniors living and aged care development to cater for the ageing population and demographic characteristics of the Kiama LGA and the wider Illawarra region. Further, the development promotes the orderly and economic use of land as the site is located on a large parcel of land within the southern portion of Kiama, located near a range of existing services and infrastructure, with the site being identified in the Kiama Urban Strategy as being suitable for this type of development.

Clause 6 of SEPP 1 provides the requirements of a formal SEPP 1 objection:

6 Making of applications

Where development could, but for any development standard, be carried out under the Act (either with or without the necessity for consent under the Act being obtained therefor) the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case, and specifying the grounds of that objection.

The following sections detail the control and the extent of the departure, and provides justifications and the grounds of the objection based on the Department of Planning and Environment's (DPE) Five Part Test, the objectives of the control, urban design outcomes, town planning grounds, the public interest and why enforcing the control is both unreasonable and unnecessary in this instance.

Extent of Variation to Clause 40 (4) (a) and (b) of the Seniors SEPP

Clause 40 (4) provides the following height development standards within zones where residential flat buildings are not permitted:

(4) Height in zones where residential flat buildings are not permitted

If the development is proposed in a residential zone where residential flat buildings are not permitted:

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

Note. Development consent for development for the purposes of seniors housing cannot be refused on the ground of the height of the housing if all of the proposed buildings are 8 metres or less in height. See clauses 48 (a), 49 (a) and 50 (a).

SEPP 1 Objection – Kiama Aged Care Centre of Excellence

(b) 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, and

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

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

The proposal exceeds the 8m height of buildings control at Clause 40 (4) (a) in a portion of the northern ILU and the ALU building, with the three storey ILUs on the eastern boundary of the site exceeding the two storey control at Clause 40 (4) (b). The rear 25% of the site does not contain any buildings as this area forms the Bushfire Asset Protection Zone (APZ).

With respect to Clause 40 (4) (a), height of buildings is defined by the Seniors SEPP as “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”. Therefore, the height limit is measured from the natural ground level to the top of the ceiling, with the roof not counted in height calculations.

The extent of the numerical height exceedances on site include:

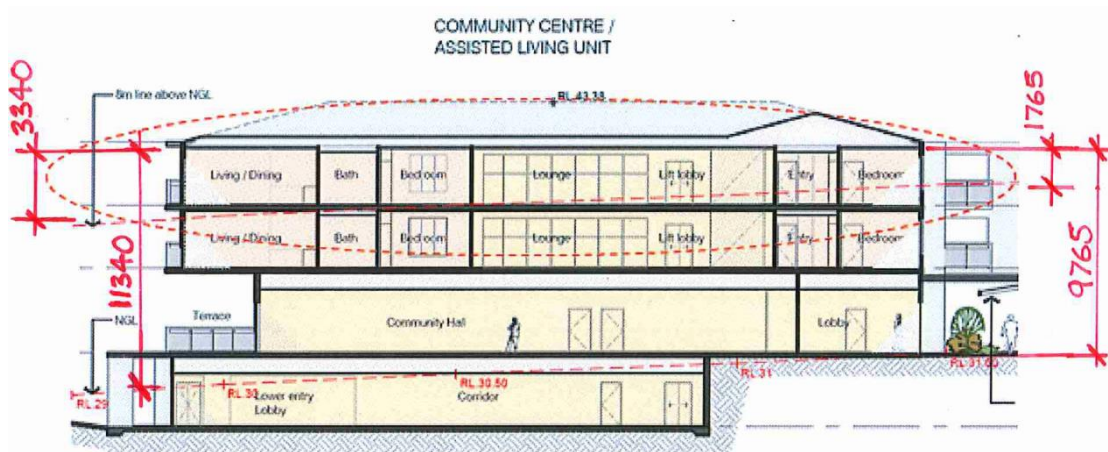
- > ALU – a maximum height exceedance of 3.34m at the southern end of the building. This results in the height of the building from natural ground level to the top of the ceiling to be 11.34m. Refer to **Figure 1** for a detailed section of this exceedance.
- > Northern ILU and Southern portions of the RACF – the topography of the site results in minor height exceedance where portions of the upper level extend above the height plane.

Therefore, the maximum extent of variation to the 8m development standard of Clause 40 (4) (a) is 3.34m. In overall height terms, the proposed 3.34m height breach (at its highest point) represents 41.75% of the 8m standard. The RACF and ILU exceedances are comparatively minor, representing a breaches of approximately 200mm.

The Height Plane diagrams prepared by Boffa Robertson (enclosed to this report) illustrate the areas of the development where the top of the ceiling extends above the 8m height limit. **Figure 2** and **Figure 3** are excerpts from these

With respect to Clause 40 (4) (b), the three storey ILUs exceed this storey limit by a total of one storey.

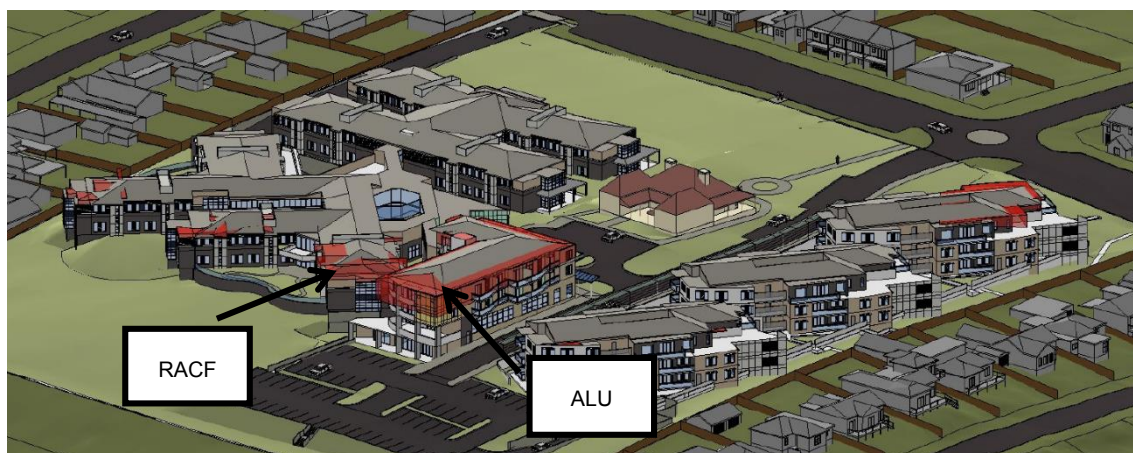
Figure 1 – ALU Height Exceedance Section



Source: Boffa Robertson, 2015

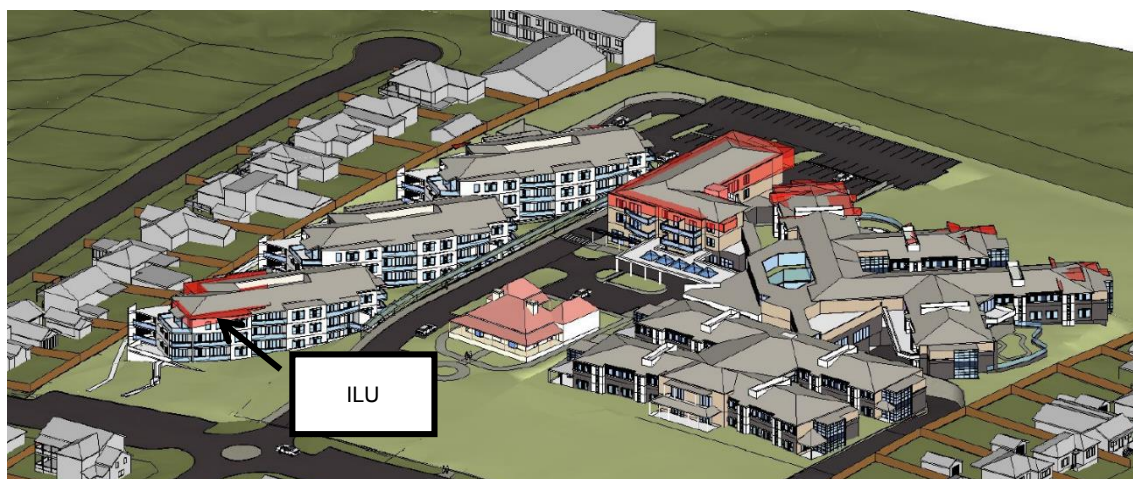
SEPP 1 Objection – Kiama Aged Care Centre of Excellence

Figure 2 – Height Plane South East View



Source: Boffa Robertson, 2015

Figure 3 – Height Plane North West View



Source: Boffa Robertson, 2015

Justifications

Pursuant to Clause 6 of SEPP 1, a written justification is required as part of any request to vary a development standards. These justifications are to demonstrate that the compliance with the development standard is unreasonable and unnecessary in the circumstances of the case, along with specifying the grounds of that objection. The making of SEPP 1 Objections and specifying the grounds of the objection has been identified in *Wehbe v Pittwater Council* [2007] NSWLEC 827, where Pearson CJ stated the following:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. 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.”

The *Wehbe* case identified four additional tests that can be used to demonstrate that a variation request can be well founded. These included:

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- 2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary*
- 3. the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable*
- 4. 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*
- 5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

These grounds for a well-founded SEPP 1 Objection have been formalised within a Five Part Test, which is provided by the Department of Planning and Environment (DPE) to assist in the preparation of a SEPP 1 Objection. Accordingly, the following sections assess the proposed height variation against each of the Five Tests developed from the *Wehbe* case, along with providing a detailed assessment against the objectives of the control, town planning grounds, the public interest and that the strict enforcement of the control is unreasonable and unnecessary in this instance.

Five Part Test

The DPE uses the Five Part Test to assist in the preparation and assessment of SEPP 1 variations. This test draws upon reasons cited in the *Wehbe* case to determine whether any proposed variation to a development standard is well-founded. It is considered that a variation is well-founded if it meets any of the five tests, providing suitable grounds for the variation.

An assessment of the proposal against the five tests is provided in the **Table 1** below.

Table 1 – Assessment Against the DPE's Five Part Test

Test	Comment
1. the objectives of the standard are achieved notwithstanding noncompliance with the standard	<p>There is no specific objective for the Clause 40 (4) controls, with the Kiama LEP objective relevant for this purpose. The objectives of the height control in the Kiama LEP are to ensure the development is in character with the desired scale and character of the street and local area and to allow reasonable daylight access to all developments and the public domain.</p> <p>It is also noted that Clause 40 (4) (b) is clarified by a note stating that the purpose of the two storey control is avoid an abrupt change in the scale of development on the streetscape.</p> <p>Therefore, the underlying objective of the height control (both in metres and storeys), in this instance, is to ensure development is managed to mitigate any adverse impacts to the character and amenity of the area, and the solar access of adjoining properties.</p> <p>The proposal achieves these objectives in the following ways:</p> <ul style="list-style-type: none"> > The SEE has provided a detailed character assessment of the area, with the development using a range of key desirable elements in its design to ensure it is compatibility with the local area and streetscape

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Test	Comment
	<ul style="list-style-type: none"> > Overshadowing impacts are reasonable, with appropriate solar access to properties to the east and west provided on June 21. > Generous side setbacks in accordance with the Seniors Living Policy and the Apartment Design Guide ensure an appropriate transition between the site and surrounding developments. <p>Further information is provided in Table 2 and Table 3.</p>
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary	This test is not relevant to this proposal.
3. the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable	<p>This test is not relevant to this proposal.</p> <p>However, it is noted that a reduction in height to ensure the building meets the 8m height limit would compromise the architectural style of the building and would result in the ALU floor space being placed elsewhere on site, resulting in poorer operational efficiency of the development.</p>
4. 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	<p>While this test is not particularly relevant to the application, it is worth noting that data received from the DPE has revealed that Kiama Council has varied the LEP height control on 10 occasions between 2012 and 2014 via Clause 4.6 of the LEP. The extent of these variations was generally less than 20%, with justifications of no impact and steep and sloping sites accepted.</p> <p>It is considered that the proposal's exceedances at the ILU and RACF buildings due to the topography of the site place it in the same category of developments that have received approval via the granting of a Clause 4.6 variation.</p>
5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.	The large parcel is not typical to a traditional low density parcel, with the site's historical institutional use suggesting that a different zoning could better serve the site.

As demonstrated by the assessment above, the height exceedance variation request is well-founded in the first test, and is also consistent with the approved variation requests for height exceedances in similar applications in the Kiama LGA. Further, a case can also be made for the site's zoning, with the institutional use of the site since the late 1800s demonstrating that a low density zoning may not be suitable. Overall, the first test, in this instance, provides suitable grounds for the variation, as detailed below.

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Objectives of the Control and Urban Design Outcomes

Table 1 identified that there is no specific objective behind the Clause 40 (4) (a) height limit, with the objectives of the Kiama LEP useful to assess against for the numerical controls. The note added to the Clause 40 (4) (b) control provides an objective for the two storey height control. An assessment against these objectives is provided below.

Clause 40 (4) (a) – 8m height limit

Table 2 below demonstrates that the proposal is in accordance with the objectives of the development standard, with the proposal meeting the desired future character of the local area, with no unreasonable overshadowing impacts to adjoining properties.

Table 2 – Assessment Against the Objectives of the 8m Height Control

Objective	Justification
Clause 4.3 – Kiama LEP (in lieu of an objective for Clause 40 (4) (a))	
(a) to ensure future development is in keeping with the desired scale and character of the street and local area	<p>As part of the SEE, a design study was performed to determine the existing character of the locality surrounding the subject site. This study identified a range of built form elements, setbacks, landscape provision and orientation. This existing character is likely to change in the future due to the medium density zoning immediately to the north of the site resulting in a number of newer developments under construction.</p> <p>Additionally, it was determined that the dominant characteristic of the subject site was its tree lined frontage, which allows the bulk of the existing development to be shielded behind vegetation.</p> <p>This has resulted in the development aligning with the desired scale and character of the street and local area objective in the following ways:</p> <ul style="list-style-type: none"> > The retention of the tree lined frontage of Bonaira Street, to ensure this identifying feature of the site is retained. > The use of pitched roofs, weatherboard and face brick responds to the predominant built form features of low density housing surrounding the development > The increased height of the ALU is located in the middle of the site, with all buildings adjoining the boundary of the site providing appropriate setbacks and overall heights that are in accordance with the surrounding properties. > The development has been identifying as complying with the planning principle for seniors living developments within a low density residential zone, which specifically provides principles relating to compatibility with the streetscape. Refer to Section 4.7 of the SEE. > The proposal is in accordance with the design guidance of the Seniors Living Policy (refer to Section 5.1 of the SEE), which provides a number of rules of thumb to ensure development has a positive relationship to existing developments surrounding the site.

SEPP 1 Objection – Kiama Aged Care Centre of Excellence

Objective	Justification
	Overall, is considered that the proposal accords with the objectives of the desired scale and character of the area.
(b) to allow reasonable daylight access to all developments and the public domain.	<p>The proposal will not have any unreasonable solar access impacts to adjoining developments. The overshadowing diagrams prepared by Boffa Robertson (refer to Figure 4 and 5), demonstrate that, at worst, the rear private open space of dwellings on Holden Avenue to the east, will receive 5 hours of direct sunlight on June 21. This exceeds the minimum requirement listed in the DCP, the Apartment Design Guide and the Seniors Living Policy.</p> <p>Internal solar access is maximized through the siting and design of the development to ensure residents receive adequate solar access during winter months. In terms of the impacts from the ALU to the RACF, the design of the RACF in wings allows generous solar access into each wing. Morning and afternoon sun is available to the south eastern wing of the RACF that is adjoining the ALU. This is further enhanced through the setback of 6m between these two buildings (refer to Figure 6).</p> <p>This is enhanced through the landscaping design, which incorporates deciduous trees in the ILU courtyards to further maximize solar access during winter months.</p> <p>Overall, it is considered that the development meets the solar access objectives of this control, both to external properties and to internal users of the development.</p>

Figure 4 – Overshadowing Impacts to Holden Avenue Properties at 3pm, June 21



Source: Boffa Robertson, 2015

SEPP 1 Objection – Kiama Aged Care Centre of Excellence

Figure 5 – Overshadowing Impacts 2pm and 3pm, June 21



2pm Overshadowing Diagram

3pm Overshadowing Diagram

Figure 6 – Setback Between the ALU and South Eastern RACF Wing



Source: Boffa Robertson, 2015

Clause 40 (4) (b) – Two Storeys Adjoining Property Boundary

Table 3 below demonstrates that the proposal is in accordance with the objectives of the development standard, with the proposal ensuring an appropriate transition is provided between the development and adjoining properties.

Table 3 – Assessment Against the Objectives of the Two Storey Height Control

Objective	Justification
Clause 40 (4) (b) – Seniors SEPP	
Note. The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape	The proposed ILUs have been sited in a way that provides for a logical and appropriate transition between the development and properties on Holden Avenue. This ensures the development is able to avoid an abrupt change in the scale of the development along the streetscape.

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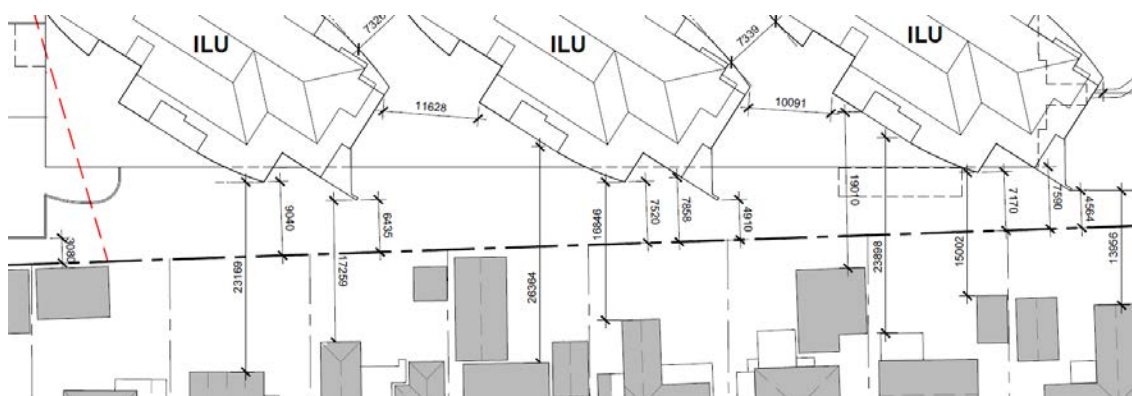
The key elements behind the ILU that achieve this objective include:

- > Provision of ILU side setbacks of 7.1m to 9m (refer to **Figure 7**), ensuring appropriate separation to promote visual privacy and deep soil landscaping. This is in accordance with the Apartment Design Guide requirement of 6m and the DCP requirement of 3m.
- > The stepping back of the upper level of the ILUs to ensure the development's perceived bulk is reduced, fostering a positive visual relationship between the rear private open space of properties along Holden Avenue.
- > The provision of a minimum distance of 16m between a living space of the ILU to the rear building line of the closest dwelling to the east (refer to **Figure 7**).
- > The sinking of the development in the hillside to reduce the overall height of the development. **Figure 8** identifies how the overall height of the ILU and traditional detached dwelling would be similar in terms of its relationship along this boundary.
- > Creation of an overall development that results in the highest point on site to be located in the middle of the site, to create a defined height transition across the development (refer to **Figure 9**).

Additionally, the assessment against the planning principle for seniors living developments within the low density zone at Section 4.7 of the SEE has determined that the proposal aligns with the key principles to ensure it is compatible with the surrounding area.

For the above reasons, it is considered that the proposal meets the objective of not causing an abrupt change in the scale of development along the streetscape.

Figure 7 – Setbacks to Holden Avenue Boundary



Source: Boffa Robertson, 2015

SEPP 1 Objection – Kiama Aged Care Centre of Excellence

Figure 8 – Overall Height of the ILU Development Compared with a Low Density Detached House



Figure 9 – Bonaira Street Streetscape



Source: Boffa Robertson

Town Planning Grounds

The proposal will have the following positive benefits from a town planning perspective:

- > The development provides a positive contribution and improvement to the site that has been identified as a strategic site for future seniors living in the Kiama Urban Strategy.
- > The development appropriately responds to the inherent site constraints, including the APZ, heritage and tree retention on the front boundary. This ensures a positive planning outcome is achieved, with the alternative to remove trees at the front of the site and impact on the heritage significance of Barroul House.
- > The development is a regionally significant development, with the Height Plane diagrams (enclosed) demonstrating that the impact can be considered minor
- > The increased population density the development provides aligns with sustainable town planning principles by providing housing close to existing services and public transport.
- > The contravention of the standard for the ILU and RACF are minor and will not raise any matters of state or regional planning significance
- > The contravention of the standard for the ALU is internalised within the development, with appropriate setbacks ensuring there will be no adverse amenity impact

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- > The height of the ALU will not impact on Barroul House, as appropriate siting of the development allows deep soil planting to be provided to minimise visual impact to this item of heritage significance.
- > The proposal contributes to the demand for increased seniors and aged residential accommodation
- > The increased height of the ALU allows for the co-location of services, which is beneficial from an operational outcome
- > The proposal complies with the floor space ratio provisions
- > The proposal complies with the relevant setback controls, car parking controls and landscaped area requirements under the Seniors SEPP, Apartment Design Guide and the DCP.

Overall, the proposal represents an appropriate development for the site, with the design of the building complementing similar developments within the context of the locality.

The Public Interest

The proposal is in the public interest for the following reasons:

- > The proposal provides an integrated seniors living and aged care development in an accessible location, adjacent to existing services, which is in the public interest
- > The impacts from the height exceedance are negligible, with the major exceedance located within the site. This will have no impact on the surrounding properties or the public realm and thus will be in the public interest.
- > The proposal restores an ageing development site with a modern, aesthetically pleasing development that continues the continued usage of the site for health related purposes.
- > The proposal is in the public interest as it will have a number of social and economic benefits for the Kiama community and the Illawarra Region.

Why enforcing the control is both unreasonable and unnecessary

Overall, it is considered that the enforcement of the Clause 40 (4) (a) and (b) height controls of 8m and two storeys to the side boundary in this instance is unreasonable and unnecessary for the following reasons:

- > It is unreasonable and unnecessary to comply with the standard when the proposal is in accordance with objectives of the height control, by way of desired streetscape character and overshadowing. This results in no abrupt change to the streetscape.
- > It is unreasonable and unnecessary to comply with the standard when this objection report has demonstrated that the development will have no impact on adjoining developments and internal uses of the site. Further, the comparison between the ILU and a traditional low density house demonstrating the overall height is similar.
- > It is unreasonable and unnecessary to comply with the standard when it relates to an overall minor portion of the entire site, with the maximum exceedance of 3.34m permitting co-location of services, contributing to the centre of excellence outcomes.
- > It is unreasonable and unnecessary to comply with the standard when the development complies with all other planning controls and objectives on site.
- > It is unreasonable and unnecessary to comply with this standard when the alternative would be to impact upon the heritage significance of Barroul House and remove the key defining tree lined character of the site.

SEPP 1 Objection – Kiama Aged Care Centre of Excellence

- > It is unreasonable and unnecessary to comply with this standard as the development is in the public interest by providing additional aged care and seniors housing to the Kiama LGA and the surrounding region.

Conclusion

This SEPP 1 Objection has addressed the requirements of SEPP 1 to formally seek an exception to the Clause 40 (4) (a) and (b) height controls within the Seniors SEPP. It has been demonstrated that the variation to the control is well grounded when assessed against the DPE's Five Part Test, the development achieves the objectives of the control, will provide no external or internal amenity impacts, will contribute to positive town planning outcomes and will be in the public interest. It is therefore requested that the consent authority, on merit, consider this development standard to be unreasonable and unnecessary in this instance, and is worthy of their support.

Prepared by:



Lewis Westhoff
Planner
For **Cardno (NSW/ACT) Pty Ltd**
Ph: (02) 4228 4133

Reviewed by:



David Laing
Senior Principal

Enc: Height Plane Diagrams – Boffa Robertson

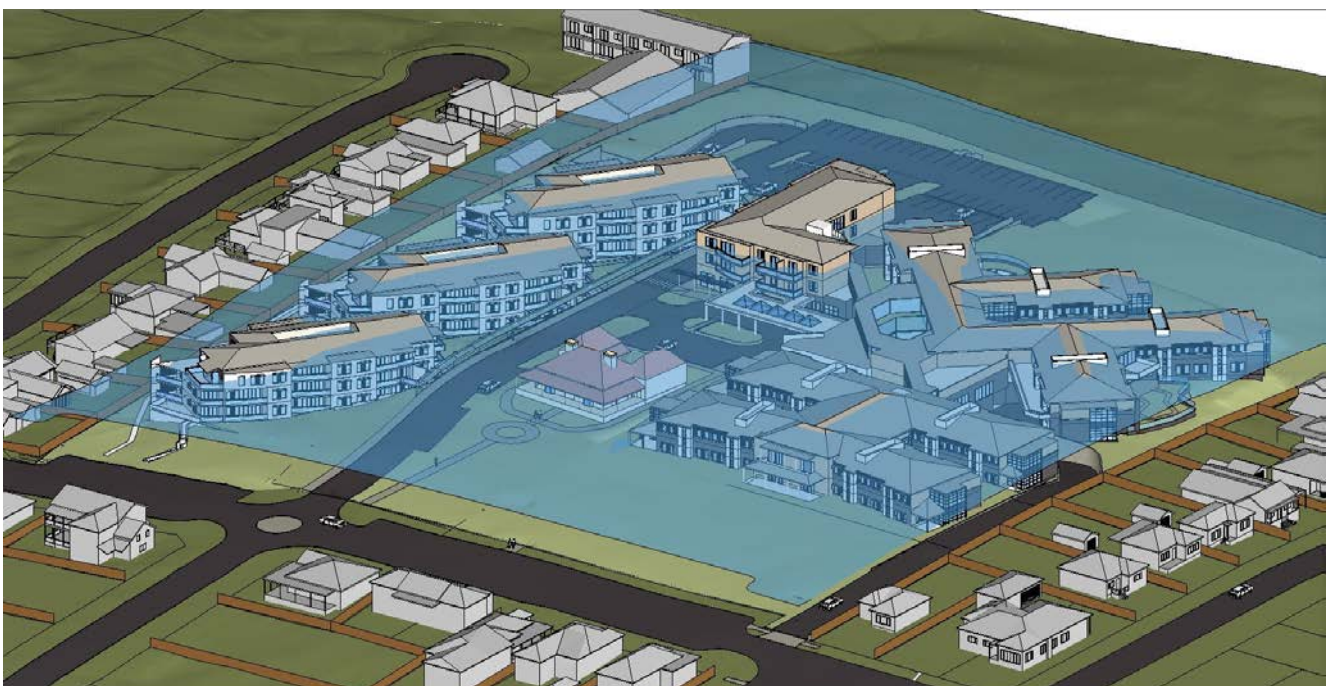
PROPOSED KACOE DEVELOPMENT
14a Bonaira Street, KIAMA

HEIGHT EXCEEDANCE

SEPP Housing for Seniors and People With a Disability requires building heights to be limited to 8 metres from any point of the ground vertically above, measured to the ceiling of the topmost floor, whereby in complying with this (and other requirements) a consent authority must not refuse consent. With the proposed KACOE development there are a few instances where this height has been exceeded, primarily due to exaggerated land slopes in certain areas, thereby triggering non-compliance. These are illustrated in the following 3-D view examples:



Extent of SEPP exceedance (to ceiling of topmost floor) viewed from North-West



Extent of overall building exceedance of SEPP requirements, viewed from North-West



Extent of SEPP exceedance (to ceiling of topmost floor) viewed from South-East



Extent of overall building exceedance of SEPP requirements, viewed from South-East

As can be seen in the above, the extent of non-compliance is minimal, the main part being to the topmost floor of the Assisted Living component located in the centre of the site, and not impacting adjoining property owners. These non-compliances are the subject of a SEPP1 objection accompanying the Statement of Environmental Effects.

Clause 4.6 Variation Request – Kiama Aged Care Centre of Excellence

This Clause 4.6 Variation Request has been prepared in support of the proposed integrated seniors living and aged care facility known as the Kiama Aged Care Centre of Excellence (KACOE) at the existing Kiama Hospital Site, Lot 1 DP 596755, 14A Bonaira Street, Kiama. The KACOE development involves the demolition of existing structures, with exception to the heritage listed Barroul House, and the development of a 134 residential aged care facility (RACF), 16 assisted living units (ALUs), 51 independent living units (ILUs), a community activities centre and the heritage restoration of Barroul House.

Background

The proposed development uses the provisions of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (Seniors SEPP) to permit the development on site. Part 4 of the Seniors SEPP contains a number of development standards to be complied with, including site size, site frontage and height in zones where residential flat buildings are not permitted. The subject site meets the site size and site frontage requirements, however (due to the site being located in area zoned R2 Low Density Residential by the *Kiama Local Environmental Plan 2011* (KLEP), residential flat buildings are not permitted) it exceeds the height limits at Clause 40 (4) of the Seniors SEPP.

Clause 40 (4) of the Seniors SEPP provides three height provisions that are applicable to the development, namely:

- a) All buildings must be 8m or less
- b) A building that is adjacent to the boundary of the site must not be more than 2 storeys
- c) A building in the rear 25% of the site must not exceed 1 storey in height

Two areas of the proposal result in non-compliances with the above standards, including:

- > The upper level of the ALU building, which exceeds the 8m height limit by 3.34m at its highest point
- > Minor portions of the upper level of the northern ILU building and southern portions of the RACF building, primarily due to the topography of the site.
- > Each ILU building is three storeys in height, exceeding the 2 storey limit for buildings adjacent to a boundary.

Consequently, the application is requesting a formal variation to the above height limit standards as part of the development application (DA). This variation is sought pursuant to Clause 4.6 of the KLEP, which facilitates the flexibility in the application of certain development standards to achieve better outcomes for and from development in particular circumstances.

Pursuant to Clause 4.6 (3) of the KLEP, a written objection is required to request a variation, with this objection requiring to demonstrate that the proposal is consistent with the objectives of the development standard and the zone, identify sufficient environmental planning grounds to justify the variation to the standard, and that strict compliance with the development standard is unreasonable and unnecessary. This report forms the formal written objection, with supporting justifications provided in the below sections.

Clause 4.6 Requirements

Clause 4.6 of the KLEP provides the mechanism to seek variations to development standards to any environmental planning instrument for developments within the Kiama LGA.

The objectives and provisions of Clause 4.6 are as follows:

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4.6 Exceptions to development standards

(1) *The objectives of this clause 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.*

(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.*

(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.*

(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 Secretary has been obtained.*

(5) *In deciding whether to grant concurrence, the Secretary 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.*

(6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*

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(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note. When this Plan was made, it did not include Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition and Zone E4 Environmental Living.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4.

The development standards at Clause 40 (4) (a) and (b) of the Seniors SEPP are development standards within an environmental planning instrument and are not expressly excluded as per the requirements of Clause 4.6 (2). This submission will demonstrate that the variation request is well founded by addressing the requirements of Clause 4.6 (3) and (4). It is also noted that the extent of variation afforded by Clause 4.6(2) is not numerically limited.

Accordingly, the following sections of this report detail the control and the extent of the departure and specifically address the following requirements of Clause 4.6:

- > That the proposal is in the public interest by demonstrating consistency with the development standard objectives and the zone objections (Clause 4.6 (4) (a) (ii)).
- > Identification of sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6 (3) (b))
- > That compliance with the development standard is unreasonable and unnecessary in the circumstances of the case (Clause 4.6 (3) (a)).

Extent of Variation to Clause 40 (4) (a) and (b) of the Seniors SEPP

Clause 40 (4) provides the following height development standards within zones where residential flat buildings are not permitted:

(4) Height in zones where residential flat buildings are not permitted

If the development is proposed in a residential zone where residential flat buildings are not permitted:

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

Note. Development consent for development for the purposes of seniors housing cannot be refused on the ground of the height of the housing if all of the proposed buildings are 8 metres or less in height. See clauses 48 (a), 49 (a) and 50 (a).

(b) 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, and

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

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

The proposal exceeds the 8m height of buildings control at Clause 40 (4) (a) in a portion of the northern ILU and the ALU building, with the three storey ILUs on the eastern boundary of the site exceeding the two storey control at Clause 40 (4) (b). The rear 25% of the site does not contain any buildings as this area forms the Bushfire Asset Protection Zone (APZ).

With respect to Clause 40 (4) (a), height of buildings is defined by the Seniors SEPP as “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”. Therefore, the height limit is measured from the existing ground level to the top of the ceiling, with the roof not counted in height calculations.

The extent of the numerical height exceedances on site include:

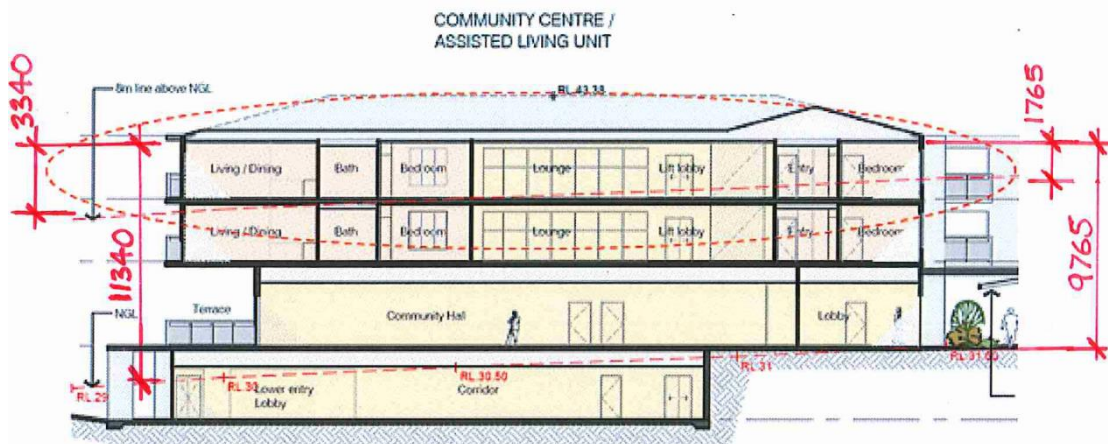
- > ALU – a maximum height exceedance of 3.34m at the southern end of the building. This results in the height of the building from natural ground level to the top of the ceiling to be 11.34m. Refer to **Figure 1** for a detailed section of this exceedance.
- > Northern ILU and Southern portions of the RACF – the topography of the site results in minor height exceedance where portions of the upper level extend above the height plane.

Therefore, the maximum extent of variation to the 8m development standard of Clause 40 (4) (a) is 3.34m. In overall height terms, the proposed 3.34m height breach (at its highest point) represents 41.75% of the 8m standard. The RACF and ILU exceedances are comparatively minor, representing a breaches of approximately 200mm.

The Height Plane diagrams prepared by Boffa Robertson (enclosed to this report) illustrate the areas of the development where the top of the ceiling extends above the 8m height limit. **Figure 2** and **Figure 3** are excerpts from these

With respect to Clause 40 (4) (b), the three storey ILUs exceed this storey limit by a total of one storey.

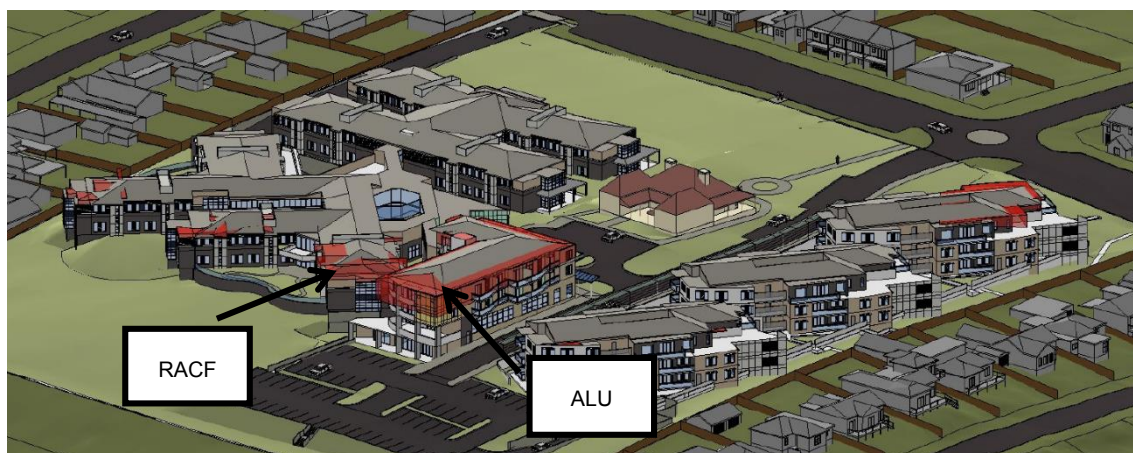
Figure 1 – ALU Height Exceedance Section



Source: Boffa Robertson, 2015

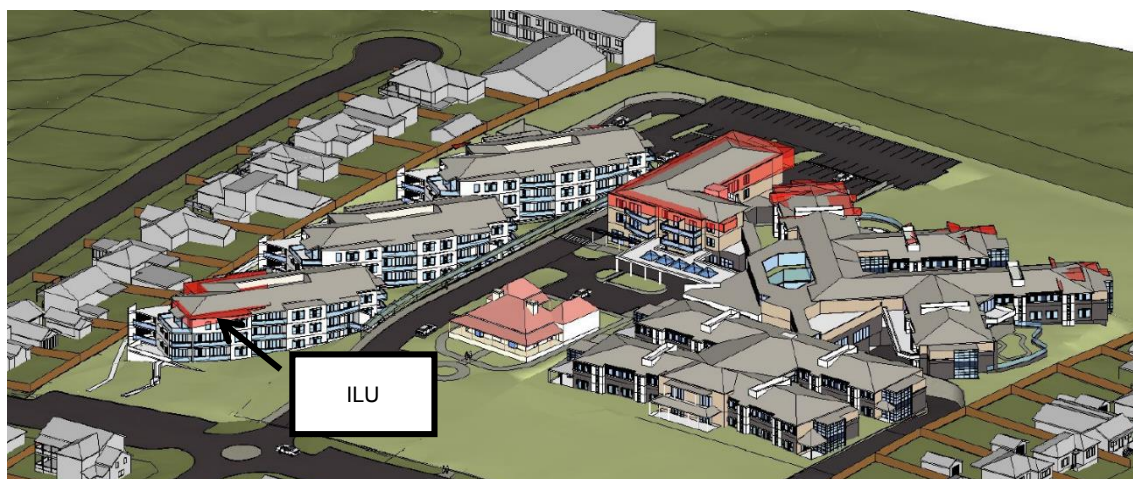
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Figure 2 – Height Plane South East View



Source: Boffa Robertson, 2015

Figure 3 – Height Plane North West View



Source: Boffa Robertson, 2015

Public Interest – Consistency with the development standard objectives and the zone objectives

Development Standard Objectives

There is no specific objective for the Clause 40 (4) height controls within the Seniors SEPP. Consequently, the relevant height objectives for consideration in this circumstance are the height objectives listed at Clause 4.3 of the KLEP. These height standards are as follows:

4.3 Height of buildings

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

- (a) *to ensure future development is in keeping with the desired scale and character of the street and local area,*
- (b) *to allow reasonable daylight access to all developments and the public domain.*

In addition, Clause 40 (4) (b) of the Seniors SEPP is clarified by a note stating that:

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

Therefore, the underlying objective of the height control (both in metres and storeys), in this instance, is to ensure development is managed to mitigate any adverse impacts to the character of the area and the solar access of adjoining properties, along with precluding any abrupt change in scale of development along the streetscape.

The proposal achieves these objectives in the following ways:

- > The SEE has provided a detailed character assessment of the area, with the development using a range of key desirable elements in its design to ensure it is compatibility with the local area and streetscape
- > Overshadowing impacts are reasonable, with appropriate solar access to properties to the east and west provided on June 21.
- > The development has been appropriately sited and designed to ensure the overall scale of development of the streetscape does not result in any abrupt changes.

Consequently, the development satisfies the objectives of the height standards, ensuring the development is in the public interest.

A more detailed assessment of the relevant objectives for Clause 40 (4) (a) and (b) are provided below.

Clause 40 (4) (a) – 8m height limit

Table 1 below demonstrates that the proposal is in accordance with the objectives of the development standard, with the proposal meeting the desired future character of the local area, with no unreasonable overshadowing impacts to adjoining properties.

Table 1 – Assessment Against the Objectives of the 8m Height Control

Objective	Justification
Clause 4.3 – Kiama LEP (in lieu of an objective for Clause 40 (4) (a))	
(a) to ensure future development is in keeping with the desired scale and character of the street and local area	<p>As part of the SEE, a design study was performed to determine the existing character of the locality surrounding the subject site. This study identified a range of built form elements, setbacks, landscape provision and orientation. This existing character is likely to change in the future due to the medium density zoning immediately to the north of the site resulting in a number of newer developments under construction.</p> <p>Additionally, it was determined that the dominant characteristic of the subject site was its tree lined frontage, which allows the bulk of the existing development to be shielded behind vegetation.</p> <p>This has resulted in the development aligning with the desired scale and character of the street and local area objective in the following ways:</p> <ul style="list-style-type: none"> > The retention of the tree lined frontage of Bonaira Street, to ensure this identifying feature of the site is retained. > The use of pitched roofs, weatherboard and face brick responds to the predominant built form features of low density housing surrounding the development

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Objective	Justification
	<ul style="list-style-type: none"> > The increased height of the ALU is located in the middle of the site, with all buildings adjoining the boundary of the site providing appropriate setbacks and overall heights that are in accordance with the surrounding properties. > The development has been identifying as complying with the planning principle for seniors living developments within a low density residential zone, which specifically provides principles relating to compatibility with the streetscape. Refer to Section 4.7 of the SEE. > The proposal is in accordance with the design guidance of the Seniors Living Policy (refer to Section 5.1 of the SEE), which provides a number of rules of thumb to ensure development has a positive relationship to existing developments surrounding the site. <p>Overall, is considered that the proposal accords with the objectives of the desired scale and character of the area.</p>
<p>(b) to allow reasonable daylight access to all developments and the public domain.</p>	<p>The proposal will not have any unreasonable solar access impacts to adjoining developments. The overshadowing diagrams prepared by Boffa Robertson (refer to Figure 4 and 5), demonstrate that, at worst, the rear private open space of dwellings on Holden Avenue to the east, will receive 5 hours of direct sunlight on June 21. This exceeds the minimum requirement listed in the DCP, the Apartment Design Guide and the Seniors Living Policy.</p> <p>Internal solar access is maximized through the siting and design of the development to ensure residents receive adequate solar access during winter months. In terms of the impacts from the ALU to the RACF, the design of the RACF in wings allows generous solar access into each wing. Morning and afternoon sun is available to the south eastern wing of the RACF that is adjoining the ALU. This is further enhanced through the setback of 6m between these two buildings (refer to Figure 6).</p> <p>This is enhanced through the landscaping design, which incorporates deciduous trees in the ILU courtyards to further maximize solar access during winter months.</p> <p>Overall, it is considered that the development meets the solar access objectives of this control, both to external properties and to internal users of the development.</p>

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Figure 4 – Overshadowing Impacts to Holden Avenue Properties at 3pm, June 21



Source: Boffa Robertson, 2015

Figure 5 – Overshadowing Impacts 2pm and 3pm, June 21



2pm Overshadowing Diagram

3pm Overshadowing Diagram

Figure 6 – Setback Between the ALU and South Eastern RACF Wing



Source: Boffa Robertson, 2015

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Clause 40 (4) (b) – Two Storeys Adjoining Property Boundary

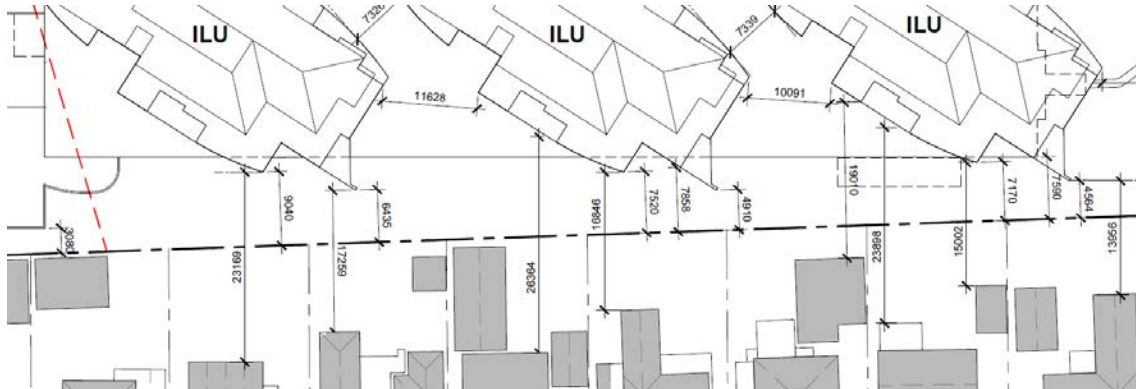
Table 3 below demonstrates that the proposal is in accordance with the objectives of the development standard, with the proposal ensuring an appropriate transition is provided between the development and adjoining properties.

Table 3 – Assessment Against the Objectives of the Two Storey Height Control

Objective	Justification
Clause 40 (4) (b) – Seniors SEPP	
<p>Note. The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape</p>	<p>The proposed ILUs have been sited in a way that provides for a logical and appropriate transition between the development and properties on Holden Avenue. This ensures the development is able to avoid an abrupt change in the scale of the development along the streetscape.</p> <p>The key elements behind the ILU that achieve this objective include:</p> <ul style="list-style-type: none"> > Provision of ILU side setbacks of 7.1m to 9m (refer to Figure 7), ensuring appropriate separation to promote visual privacy and deep soil landscaping. This is in accordance with the Apartment Design Guide requirement of 6m and the DCP requirement of 3m. It is noted that minor encroachments less than 6m are located on ILU A and B associated with the balcony. However, this non-compliance is minor and will have no detrimental impacts associated with overshadowing or visual privacy. > The stepping back of the upper level of the ILUs to ensure the development's perceived bulk is reduced, fostering a positive visual relationship between the rear private open space of properties along Holden Avenue. > The provision of a minimum distance of 16m between a living space of the ILU to the rear building line of the closest dwelling to the east (refer to Figure 7). > The sinking of the development in the hillside to reduce the overall height of the development. Figure 8 identifies how the overall height of the ILU and traditional detached dwelling would be similar in terms of its relationship along this boundary. > Creation of an overall development that results in the highest point on site to be located in the middle of the site, to create a defined height transition across the development (refer to Figure 9). <p>Additionally, the assessment against the planning principle for seniors living developments within the low density zone at Section 4.7 of the SEE has determined that the proposal aligns with the key principles to ensure it is compatible with the surrounding area.</p> <p>For the above reasons, it is considered that the proposal meets the objective of not causing an abrupt change in the scale of development along the streetscape.</p>

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Figure 7 – Setbacks to Holden Avenue Boundary



Source: Boffa Robertson, 2015

Figure 8 – Overall Height of the ILU Development Compared with a Low Density Detached House



Figure 9 – Bonaira Street Streetscape



Source: Boffa Robertson

R2 – Low Density Residential Zone Objectives

Under the KLEP, the site is zoned as R2 – Low Density Residential, which allows for a range of development within a low density environment. The objectives of the R2 zone are:

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Zone R2 Low Density Residential

1 Objectives of zone

- *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.*
- *To increase the supply of secondary dwellings for affordable rental housing stock.*
- *To provide economic and employment opportunities for people who conduct business activities from their homes where these will not adversely affect the amenity of neighbours or the neighbourhood.*

The proposed development aligns with the above objectives in the following ways:

- > The development provides specific housing needs for the elderly through independent self-care apartments, assisted living apartments and through a dedicated aged care facility. This is provided in a low density environment with the siting and built form of the development sympathetic with its surrounds.
- > The development is specifically designed for people over the age of 55 years, providing services specific to the day-to-day needs of this growing demographic in the Kiama LGA. Additionally, the ancillary community facilities and café associated with the development will ensure the development provides for additional services for the surrounding community.
- > The development does not provide any secondary dwellings, however the increased provision of a range of seniors living housing types will help to improve the overall affordability and diversity of this type of housing.
- > The development does not provide for home based businesses. However, its development will not preclude others from conducting these activities.

Overall, the development is deemed to be consistent with the zoning objectives, with the development providing important housing for the growing ageing population in the Kiama LGA in a form that is sympathetic with surrounding areas.

Summary – Consistency with the Development Standard Objectives and Zoning Objectives

Overall, this section has demonstrated that the proposal is consistent with both the objectives of the two height controls within the Seniors SEPP (including the height objectives under the KLEP), along with the objectives of the R2 zoning. As such, with the objectives of the standard and the zone met, the development is considered to be in the public interest.

Environmental Planning Grounds to Justify Contravening the Development Standard

The proposal is considered to have sufficient environmental planning grounds to justify the variation to the height standards within the Seniors SEPP. These grounds are associated with a number of environmental and planning matters, including:

- > Appropriate response to site specific constraints and features, including the preservation of heritage significance of Barroul House
- > Co-location of services to improve the functioning and operation of the facility
- > No (or negligible) impacts to the amenity of adjoining developments and internal facilities

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Responding to Site Specific Constraints and Features

In siting the development, the maximum floor space ratio controls (as required by the Seniors SEPP) have been complied with. However, more importantly from an environmental planning perspective, the design of the development is a direct response to an iterative design evolution process that spanned an 18 month period, informed by an understanding of the site specific constraints and features. The main site constraints and features that have influenced the site of the development include:

- > The heritage listed Barroul House
- > The existing tree lined street frontage along Bonaira Street
- > The APZ requirement associated with the bushfire threat to south
- > The need to provide appropriate space for the Illawarra Shoalhaven Local Health District (ISLHD)

The above constraints have all resulted in the development to be located towards the middle of the site, in order to response to these constraints and also to provide positive environmental planning outcomes.

The need to restore and retain the heritage significance of Barroul House resulted in the need for the development to provide curtilage around the heritage item (which is currently not provided under the existing site scenario), along with the provision of a 45 degree no build corridor extending to the north of the site. This has resulted in the development to be sited with respect to these heritage considerations.

The existing tree lined street frontage along Bonaira Street is a strong distinguishing feature of the site in the locality. The vegetation ensures that the current bulk of the hospital development on site is shielded from the streetscape. The proposal has retained this tree lined frontage of the site by retaining the majority of major trees along this frontage. This has resulted in the development to be positioned behind this existing vegetation, accompanying by additional landscaping to further enhance this feature.

The APZ requirement associated with the bushfire threat to the south of the site has resulted in no development to occur in this portion of the site.

Finally, the requirement to provide a 2,000m² portion of the site for the ISLHD to provide for a future health facility has precluded any development to occur in the north western portion of the site.

Overall, these four major requirements for the development to respond to has resulted in the development to be located within the middle of the site, precluding development to be placed in other areas of the site. This has resulted in positive environmental planning outcomes by ensuring the development preserves the existing character of the site and streetscape, it responds to the bushfire threat to the south, provides an improved heritage preservation outcomes compared to present and ensuring the future development of the ISLHD facility can occur.

Co-location of services

The positive environmental planning outcomes outlined above, however, have resulted in the proposal to exceed the numerical height limit and storey height limit in minor portions on site.

The numerical height non-compliance (Clause 40 (4) (a)) at its worst, is associated with the upper level of the ALU development. As identified above, responding to the site specific constraints, there are no further opportunities to provide the ALU component anywhere else on site. However, this height exceedance also ensures a positive environmental planning outcome is achieved through the co-location of services.

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The co-location of the ALU development with the RACF provides for a range of efficiencies in terms of staffing, care and meal provision. More importantly, it allows the residents of the ALU facility to obtain care and assistance quickly, along with allowing residents to access the café, GP, hairdresser and community transport bus services via a dedicated walkway and lift. This would not be able to occur if the ALU was provided separately to the RACF building in order to meet the height control. Further, this would also result in one of the other environmental planning outcomes to not be met.

No (or negligible) impacts to the amenity of surrounding developments and internal facilities

The height exceedance (in terms of numerical and storeys) has no (or negligible) impacts to the amenity of surrounding developments and internal facilities. In terms of the ILU developments, the minor exceedance of the 8m height control (Clause 40 (4) (a)) is a direct consequence of the topography of the site, with the slope of the site resulting in the eastern most portion of the northern ILU to exceed the 8m height. As identified previously, this exceedance will have no impact in terms of amenity to adjoining developments, with overshadowing and privacy impacts within the acceptable parameters listed by the Seniors Living Policy and the Apartment Design Guide. The ILUs also align with the objectives for the height controls under the KLEP and the Seniors SEPP.

The increased height of the upper level of the ALU has the potential to impact upon the amenity of a number of internal facilities, in particular, the south eastern portion of the RACF building. However, as noted in Section 5.1 of the SEE and the overshadowing drawings prepared by Boffa Robertson, the 6m setback between the ALU and the RACF building ensures adequate solar access is provided to the living areas of the south eastern RACF wing.

In terms of the exceedance of the storey controls (Clause 40 (4) (b)) of the ILU developments, there will no adverse impacts to adjoining developments associated with overshadowing and privacy (as identified previously). The provision of sufficient setbacks also results in an improved privacy outcome for residents along this boundary by providing adequate space for deep soil planting.

The perceived height of the extra storey of the ILUs has been reduced through the stepping back of the upper level, with the sections provided through the ILU through to the Holden Avenue properties (refer to **Figure 8**) shows that the overall height of the building is similar to a detached double storey dwelling.

Therefore, with no impacts associated with the increased height, the proposal meets key environmental planning outcomes including overshadowing and privacy requirements listed in various documents including the Seniors Living Policy and the Apartment Design Guide.

Summary – Environmental Planning Grounds

Overall, it can be concluded that the proposal results in a number of positive environmental planning outcomes through its responses to site specific constraints and features, its co-location of services and the negligible impacts associated with the numerical and storey height exceedances. Therefore, the proposal is deemed to have sufficient environmental planning grounds to justify contravening the Clause (40) (4) (a) and (b) height standards of the Seniors SEPP, satisfying the requirements of Clause 4.6 (3) (b) of the KLEP.

These environmental planning grounds are summarised as follows:

- > The development appropriately responds to the inherent site constraints and features, including the APZ requirements, improved heritage outcomes and the tree retention on the front boundary to retain the existing character of the site. This ensures a positive planning outcome is achieved, with the alternative to provide allowable floor space elsewhere on site likely to impact upon these features and constraints that have been respected by the design.

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- > The increased height of the ALU allows for the co-location of services, which is beneficial from an operational outcome
- > The proposal complies with the floor space ratio provisions of the Seniors SEPP
- > The contravention of the numerical standard for the ILU and RACF are minor and will not raise any matters of state or regional planning significance
- > The contravention of the standard for the ALU is internalised within the development, with appropriate setbacks ensuring there will be no adverse amenity impact
- > The height of the ALU will not impact on Barroul House, as appropriate siting of the development allows deep soil planting to be provided to minimise visual impact to this item of heritage significance.
- > The following additional planning grounds are also noted:
 - The development provides a positive contribution and improvement to the site that has been identified as a strategic site for future seniors living in the Kiama Urban Strategy.
 - The increased population density the development provides aligns with sustainable town planning principles by providing housing close to existing services and public transport.
 - The proposal contributes to the demand for increased seniors and aged residential accommodation
 - The proposal complies with the relevant setback controls, car parking controls and landscaped area requirements under the Seniors SEPP, Apartment Design Guide and the DCP.

Compliance is Unreasonable and Unnecessary in the Circumstances of the Case

Establishing whether compliance with a development standard is unreasonable and unnecessary was previously identified in *Wehbe v Pittwater Council* [2007] NSWLEC 827, where Preston CJ stated that the following:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. 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.”

The *Wehbe* case identified four additional tests that can be used to demonstrate that a variation request can be well founded. These included:

- 2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary*
- 3. the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable*
- 4. 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*

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5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

The recent case of *Four2Five v Ashfield Council* [2015] NSWLEC 90 identified that demonstrating that a variation to a development standard is unreasonable and unnecessary can no longer solely rely on whether the objective of the development standard is met. All Clause 4.6 variation requests, as a result of this case, are now required to state additional reasons in addition to compliance with the objective of the control. This Clause 4.6 variation request meets the requirements of the *Four2Five* case, by identifying a number of additional reasons as to why the application of the Clause (40) (4) (a) and (b) controls of the Seniors SEPP are unreasonable and unnecessary in this circumstance.

As such, with reference to the above, it is deemed that strict compliance with the 8m height control of Clause 40 (4) (a) and two storey height control of Clause 40 (4) (b) are unreasonable and unnecessary in the circumstances of the case for the following reasons:

- > Strict compliance with the 8m height control (Clause 40 (4) (a)) will have one or more of the following consequences:
 - Re distribution of the ALU component of the development elsewhere on site, which would result in the removal of the tree lined nature of the existing street frontage to be retained, or the compromise of the heritage restoration of Barroul House
 - The re distribution of the ALU would also result in the co-location of services with the RACF building to be removed, creating poorer operational efficiency and poorer outcomes for residents
 - Altering minor portions of the RACF and ILU buildings to comply with the 8m height control where the topography results in a non-compliance will compromise the architectural quality and appearance of the building.
 - Sinking the ILU and RACF buildings deeper into the site causing additional cut and fill on site, resulting in excess cut that will need to be disposed of, off site.
 - The removal or reduction of the ALU or ILU components of the development, having the direct impact of reduced housing for a growing section of the Kiama locality and wider Illawarra region.
- > Strict compliance with the two storey height control (Clause 40 (4) (b)) will have one or more of the following consequences:
 - Re distribution of ILU dwellings on other locations on site, which would result in the removal of additional trees, the removal of the existing tree lined streetscape and the potential impact to the heritage significance of Barroul House
 - The provision of additional two storey ILUs across the site would see the ILUs to not be defined as apartment buildings, resulting in reduced setbacks to Holden Avenue properties, in accordance with the smaller setback requirements under the Kiama DCP. This would result in poorer amenity, overshadowing and privacy concerns
 - The provision of the parking for the ILU dwellings in an additional on grade parking spaces, resulting in further walking distances for residents, accessibility issues, increased pervious areas on site and visual impacts

Clause 4.6 Variation Request – Kiama Aged Care Centre of Excellence

- > Strict compliance with both controls would result in the aims of the Seniors SEPP to be met in an inferior way to the proposal, for the following reasons:
 - A lower supply and diversity of seniors residences (Clause 2 (1) (a))
 - Less efficient use of existing infrastructure and services through additional dwellings, requiring additional servicing infrastructure and additional stormwater infrastructure (Clause 2 (1) (b))
 - Poorer design outcomes by altering the appearance and modulation of buildings to address the minor height exceedances associated with the topography of the site (Clause 2 (1) (c))
 - Poorer building form that has a poorer response to the characteristics of the site and its form compared to the proposal (Clause 2 (2) (b))
- > Strict compliance with both controls would result in poorer outcomes when assessed against the objectives of the KLEP, including:
 - Reduction of the existing character of the site by removing additional trees on the street frontage to accommodate the allowable floor space. This would impact on the liveability and identity of the site and the surrounding locality (objective (e) of the KLEP)
 - Lowered provision of housing near shops and public transport (objective (f) of the KLEP)
 - Lowered provision of increased housing choice for the aged and independent seniors (objective (g) of the KLEP)
 - Unorderly and uneconomic use and development of the site through additional cut and fill, additional utility service provision, additional pervious areas on site and increased tree removal (objective (i) of the KLEP)
 - Poorer preservation of Kiama's cultural heritage by impacting on the significance of Barroul House (objective (k) of the KLEP)
- > Strict compliance with the controls by providing a lower development yield would create an unreasonable burden on the applicant, future occupants and the community. This burden would be disproportionate compared to the benefits of the current proposal, in the following ways:
 - The applicant (Kiama Council) would see lower development revenue and lower provision of aged care and seniors living contrary to its aims and objectives for the development of the site
 - The future occupants of the development would incur greater cost, with a lower amount of units sharing the cost of providing services and facilities including utility and drainage infrastructure, the community facility and activities centre, the community transport bus and the restoration of Barroul House. This would have direct impacts on the affordability of the future residences
 - The community would suffer through a lower amount of seniors living facilities, resulting in current and future demand levels to not be met.

Overall, each of the above outcomes would result in poor environmental planning outcomes (in comparison to the benefits identified earlier), and would come at a social, environmental and economic cost to the locality and region. These additional reasons demonstrate that the

Clause 4.6 Variation Request – Kiama Aged Care Centre of Excellence

proposed variation to the height standards are justified, with compliance with the controls being unreasonable and unnecessary.

Conclusion

This Clause 4.6 Variation Request has addressed the requirements of Clause 4.6 of the KLEP to formally seek an exception to Clause 40 (4) (a) and (b) development standards within the Seniors SEPP. It has been demonstrated that the proposal is within the public interest by meeting the objectives of the development standards and the land use zoning, results in a number of positive environmental planning outcomes, and has identified that strict compliance with the standards would result in poorer development outcomes that would result in poorer obtainment of the aims and objectives of the Seniors SEPP and the KLEP.


It is therefore requested that the consent authority, on merit, consider this development standard to be unreasonable and unnecessary in this instance, and is worthy of their support.

Prepared by:



Lewis Westhoff
Planner
For **Cardno (NSW/ACT) Pty Ltd**
Ph: (02) 4228 4133

Reviewed by:



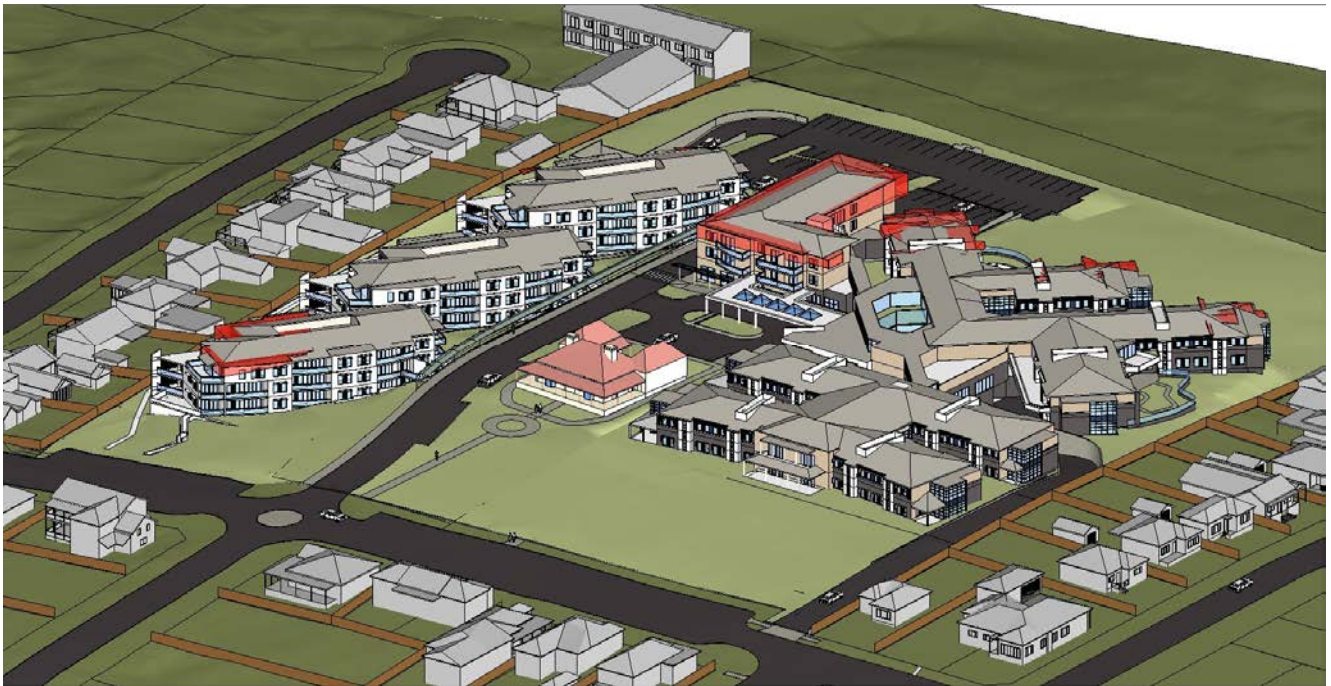
David Laing
Senior Principal

Enc: Height Plane Diagrams – Boffa Robertson

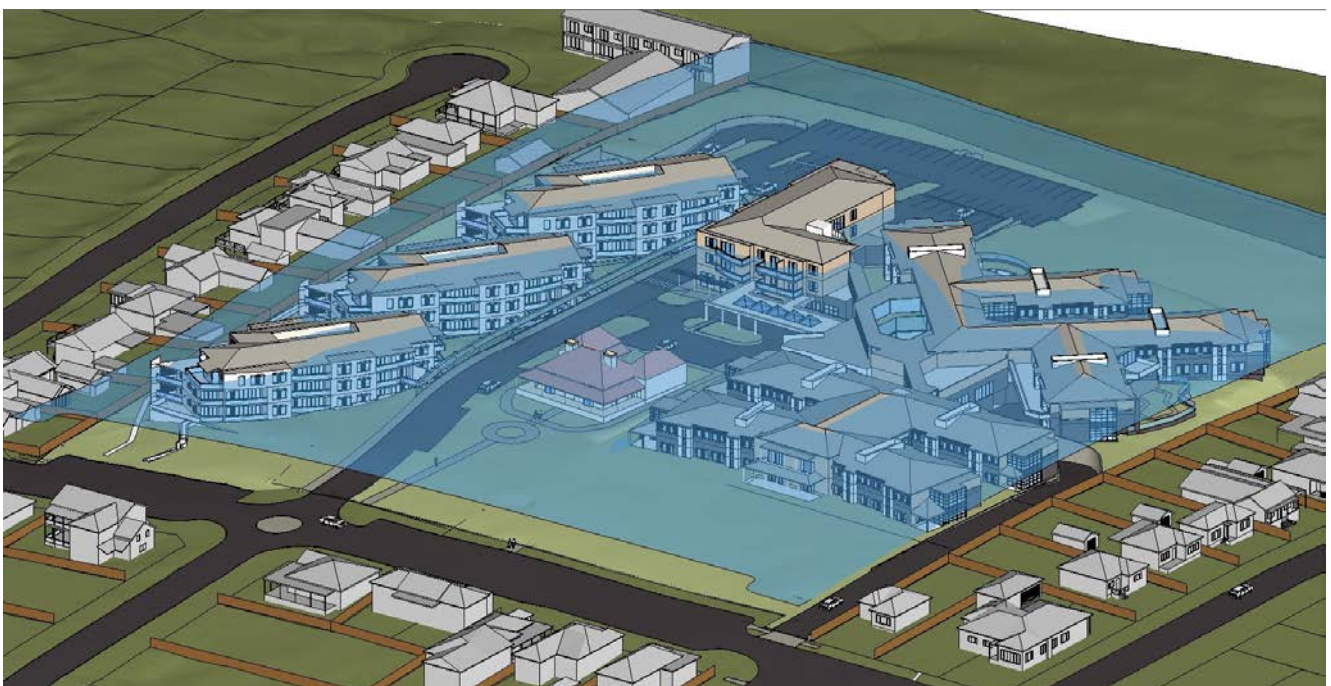
PROPOSED KACOE DEVELOPMENT
14a Bonaira Street, KIAMA

HEIGHT EXCEEDANCE

SEPP Housing for Seniors and People With a Disability requires building heights to be limited to 8 metres from any point of the ground vertically above, measured to the ceiling of the topmost floor, whereby in complying with this (and other requirements) a consent authority must not refuse consent. With the proposed KACOE development there are a few instances where this height has been exceeded, primarily due to exaggerated land slopes in certain areas, thereby triggering non-compliance. These are illustrated in the following 3-D view examples:



Extent of SEPP exceedance (to ceiling of topmost floor) viewed from North-West



Extent of overall building exceedance of SEPP requirements, viewed from North-West



Extent of SEPP exceedance (to ceiling of topmost floor) viewed from South-East



Extent of overall building exceedance of SEPP requirements, viewed from South-East

As can be seen in the above, the extent of non-compliance is minimal, the main part being to the topmost floor of the Assisted Living component located in the centre of the site, and not impacting adjoining property owners. These non-compliances are the subject of a SEPP1 objection accompanying the Statement of Environmental Effects.

Visual Analysis – Kiama Aged Care Centre of Excellence

This Visual Analysis has been prepared in response to the items raised in AE Design Partnership's letter dated 22 October 2015, which required the preparation of an analysis of the visual impact of the proposal on the locality. Specifically, the assessment is to identify key district views and how they will be impacted by the proposal, along with demonstrating the compatibility of the proposal with the existing character of the area and the assessment of the visual impact concerns associated with Whitton Place and Gwinganna Avenue. These requirements form the structure of this analysis.

Key District Views

The visual catchment of the proposal is primarily defined by its topography. The site is located atop a natural hill, with land to the west of the site generally flat. Land to the east and south of the site slopes down towards the Bonaira Playing Fields and the Bonaira Native Gardens, before sloping up to residential areas to the east and south east. Consequently, the site is considered to be located on the eastern side of a prominent hill, with existing development on the site visible from a range of residential properties to the south east and east.

With regard to the key district views, this can be interpreted as the main landscape features within the visual catchment which residents of Kiama value highly. Due to the Kiama's location between the ocean and the escarpment, these two features are readily visible from many areas in the locality. Therefore, views of the ocean and the escarpment (more particularly, Saddleback Mountain) are the main landscape features that are highly valued in the visual catchment.

Residential areas to the east of the site that are located at a similar elevation to the site enjoy uninterrupted views of the lower slopes of Saddleback Mountain (refer to **Figure 1**). In comparison, residential areas to the south east of the site can see additional residential development along higher elevations on Belvedere Street (refer to **Figure 2**). Due to the undulating topography to the south of the site, there are no views across the site to the ocean from Reid Street, with the established vegetation on site and the Bonaira Native Garden only visible (refer to **Figure 3**). In this regard, the development has the potential to impact on key district views from elevated areas to the east of the site.

However, as demonstrated in a below section, the development does not cause any detrimental or significant impacts to this vista. The increased development on site responds to the existing development pattern on the eastern slope of the hill by providing a development that nestles into the hill surrounding by generous landscaping.

Figure 1 – Uninterrupted Views of Saddleback Mountain from Gwinganna Avenue



Visual Analysis – Kiama Aged Care Centre of Excellence

Figure 2 – Views to Residential Development on Belvedere Street from Whitten Place



Figure 3 – View of the Site from Reid Street to the South West



Compatibility of Development with the Existing Character of the Locality

In terms of compatibility, the proposed development results in a land use and associated built form that is dissimilar to traditional low density detached housing that surrounds the site. As a result, the siting, modulation and finish of the development has aimed to ensure compatibility of the development with the surrounding character of the locality.

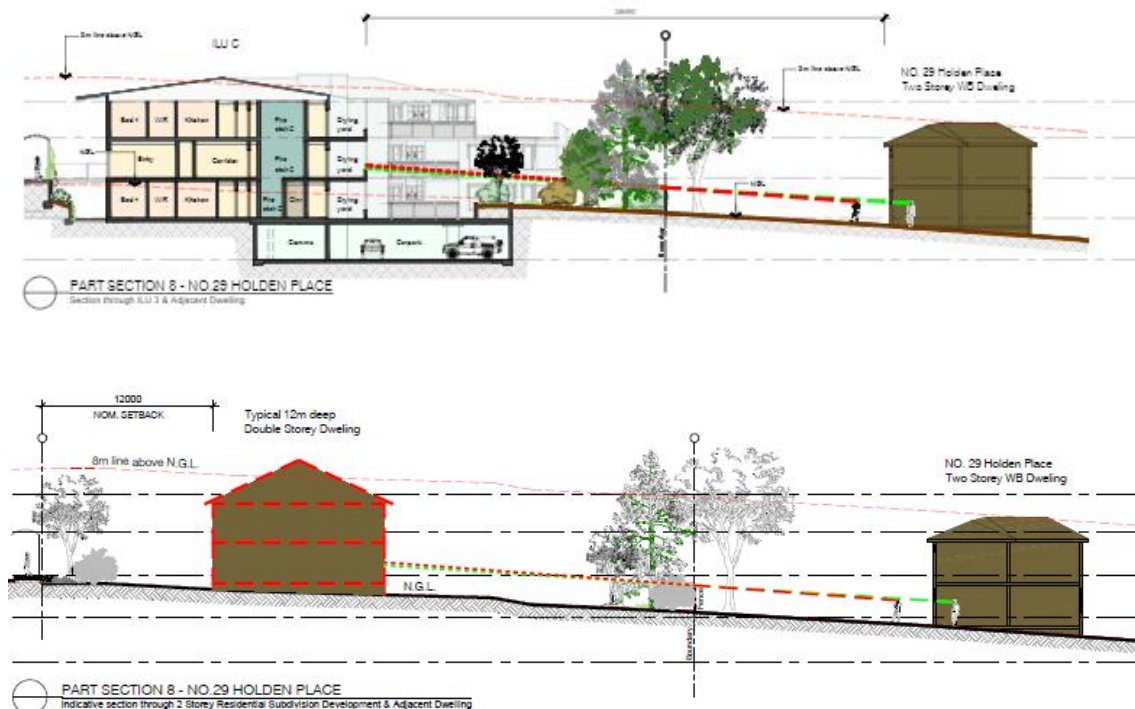
The Court uses a planning principle to provide guidance on the question of the compatibility of a seniors living development within a low density zone. The planning principle in *GPC No 5 (Wombarra) Pty Ltd v Wollongong City Council* [2003] NSWLEC 268 at 14-18 notes four principles to consider. An assessment against this planning principle was provided in the SEE submitted with the DA, with its key findings further developed below.

1. The first principle states that for a seniors living development to be compatible, it does not need to be single storey even where most existing buildings are single storey. In this

Visual Analysis – Kiama Aged Care Centre of Excellence

regard, surrounding developments include single and double storey dwellings that rise to a height of a maximum of 8.5m in accordance with the height controls within the LEP. While the ILUs on the eastern boundary are three storeys in height, they have been designed with a setback upper level, so the actual height of the development when viewed from adjoining properties appears as a two storey development. Additionally, the overall height of the ILUs correlates with the height of a two storey development, as indicated by the section through 29 Holden Avenue at **Figure 4** below.

Figure 4 – Comparison between ILU and Two Storey Detached Dwelling at 29 Holden Avenue



2. The second principle states that where the size of a seniors living development is much larger than other buildings in the street, it should be visually broken up so that it does not appear as one building. With specific reference to the ILUs, they have been broken up into three separate buildings, with the space between these buildings provides appropriate space for landscaping to emphasise their separation. The use of a pitched roof on each building further defines each building. The elliptical floor plate of each ILU results in a larger separation closer to the side boundary. This area allows for increased landscaping to make the buildings appear softer when viewed from the side boundary. The ILU buildings have also been complemented with podium tree planting and deep soil planting along the side boundary. This ensures each building is complemented by planting that defines the detached buildings surrounding the site, including Holden Avenue.
3. The third principle is that where a site has existing characteristics that assist in reducing the visual dominance of development, these characteristics should be preserved. The tree lined street frontage along Bonaira Street is characteristic of the site and partly acts as a visual shield to the existing bulk of development on site. This has been retained by the development, with compensatory planting in the east of the site enhancing this visual shield.

Visual Analysis – Kiama Aged Care Centre of Excellence

4. The fourth principle is that a seniors living development should aim to reflect the materials and building forms of other buildings in the street. An urban form analysis and assessment of existing character was undertaken as part of the site analysis for the DA submission. These investigations sought to identify the predominant style, finishes, materials and building forms of surrounding development. The investigation found that pitched roofs, weatherboard, brick and generous deep soil landscaping between buildings is common in surrounding developments. In this regard, the ILU developments have directly responded to these key design elements by using weatherboard, coloured panels, pitched roofs and generous landscaping along the common boundaries.

Overall, as this assessment has shown, the development aligns with the principles to determine whether a development is compatible within a low density environment. Specifically, the ILU component of the development, while not detached dwellings, is demonstrated to be compatible due to the overall height of the building being similar to a two level detached dwelling, the use of landscaped breaks between each ILU to ensure the building does not appear as one single building, the retention and enhancement of existing streetscape and side boundary vegetation and the use of a range of materials, finishes, roof pitches and landscaping that is common in surrounding streets, including Holden Avenue.

Assess Visual Impacts in Submissions, including Whitton Place Gwinganna Avenue

As identified above, the major views of the site within the, in addition to properties that immediately adjoin the site, are to the south east and east of the site. One submission noted the potential visual impacts to residential areas along Whitton Place and Gwinganna Avenue. Consequently, photomontages to illustrate the visual impact of the development were prepared from views from 37 Gwinganna Avenue and from Whitton Place (refer to **Figure 5**).

Figure 5 – Key Views from Residential Areas to the East and South East of the Site



Visual Analysis – Kiama Aged Care Centre of Excellence

The results of the photomontage are shown on the enclosed photomontages prepared by Boffa Robertson. The key findings and conclusions relating to these photomontages include:

> **Gwinganna Avenue:**

- The existing vista to and across the site is defined by a number of single and double storey detached dwellings along the eastern slope of the hill. These dwellings have a range of colours and materials and are clearly broken up through landscaping between each building. This results in development to be nestled into the hill, surrounded by vegetation and landscaping.
- Views to the lower slopes of Saddleback Mountain over the site are prominent and represent a vista that is a key district view.
- The photomontage demonstrates that the development will increase the visual presence of buildings on site. However, retaining vegetation along the side boundary, along the frontage of the site and introducing landscaping between buildings, ensures the development appears to be broken up and retains the existing visual character of development in this location.
- The key views to the lower slopes of Saddleback Mountain are not impacted by the development.

> **Whitton Place:**

- The existing vistas to and across the site are similar to the view from Gwinganna Avenue. Where existing detached dwellings appear to be nestled into the hill, surrounded by landscaping. The existing Hospital and Nurses home facilities are also noticeable from this view, noting how they are situated amongst the existing vegetation on site.
- Views across the site are to residential development along Belvedere Street and do not represent a key district view as it does not represent the key landscape feature.
- The photomontage demonstrates that the existing vegetation on the Bonaira Street frontage remains, with the vegetation along the side boundary helping to soften the overall appearance of the buildings on site. The pitched roofs and orientation of the buildings on site help to create a sense of architectural diversity on site, evident of the pattern of development on the lower slopes of the hill.

Overall, this analysis has shown that while the development will result in additional visual impacts by way of additional buildings on site, the use of building materials, finishes and roof pitches, along with generous landscaping between buildings, the overall appearance of the eastern slope of the hill as buildings nestled into the hill and surrounded by landscaping, remains. It is therefore our opinion that the development does not result in any detrimental or substantial visual impact from these locations.

Conclusion

This visual analysis has identified the key district views within the visual catchment of the site and has identified how the proposed development will impact on these views. The main landscape features of the ocean and Saddleback Mountain (and the wider escarpment) are the vistas that are most valued in the residential areas surrounding the site. Views across the site from adjoining residential properties currently gain no direct vista of either of these landscape features, with development to the west of the site (Reid Street) obtaining views of the

Visual Analysis – Kiama Aged Care Centre of Excellence



escarpment and development to the east of the site (Holden Avenue) obtaining views of the ocean.

Residential areas to the east of the site that are located on a similar elevation have unobstructed views of the lower slopes of Saddleback Mountain. The photo montages prepared from Boffa Roberston identify that the development of the site will not cause any significant or detrimental impact to these established vistas. It was also demonstrated that the proposed development will retain the overall visual character of this hill, with all development appearing to be nestled into the hillside, accompanied by established native trees and vegetation. In this regard, while the development results in an increased visual presence on site, the use of colours, materials and landscaping treatments that are consistent with the locality, ensure that it will not have any significant impact on residential amenity.

The proposal is considered to be compatible with the existing character of the locality as it directly responds to the key built form elements of surrounding residential areas. These built form elements include the use of colours, finishes, materials and roof pitches that are common in surrounding dwellings. It is noted that the development, by definition, has a larger scale and mass than a detached single dwelling, however, it is considered to be consistent with principles cited in *GPC No 5 (Wombarra) Pty Ltd v Wollongong City Council* [2003] NSWLEC 268 at 14-18, that assist in the merit assessment of the proposal. Compatibility is further enhanced by providing adequate building separation and deep soil landscaping to maximise residential visual amenity.

Overall, this visual analysis demonstrates that the proposal will not have any detrimental visual impacts on the key district views in the surrounding locality. The development on site (noting that the nature of the land use and associated built form are different to surrounding detached dwellings) is considered to be compatible with the existing character of the site through the use of colours, materials, finishes, roof pitches, building separation and landscaping.

Prepared by:

Lewis Westhoff
Planner
For **Cardno (NSW/ACT) Pty Ltd**
Ph: (02) 4228 4133

Reviewed by:

David Laing
Senior Principal

Enc:

Photomontages from Gwinganna Avenue
Photomontages from Whitton Place



Existing view from Gwinganna Avenue
Note the roof of the existing Nurses Home behind Holden Avenue properties



View of proposed development from Gwinganna Avenue.



View of proposed development
Abutting Holden Avenue properties superimposed from SketchUp model for verification purposes



View of existing site from Whitton Place. Red tiled roofs behind Holden Avenue properties are existing Hospital and Nurses home facilities.



View of proposed development from Whitton Place



View of proposed development.
Abutting Holden Avenue properties superimposed from SketchUp model for verification purposes

DA 10.2015.198.1 – Kiama Aged Care Centre of Excellence – Response to Submissions

Submission	Issue	Comment	Where Addressed?
Submission 1 - raises a number of points regarding the impacts of south western portion of the RACF	Height	<p>The objection noted that the RACF will exceed the applicable height limit based on an interpretation that the natural ground level is the historical ground level of the site prior to the construction of the current hospital and car park.</p> <p>As noted within the letter submitted on 10 November, the Standard Instrument LEP and Seniors SEPP refer to the existing ground level when determining the relevant height limit of the proposal. Both definitions refer to the existing level or point on site and not the historical level. As a result, the height of the RACF building is not as extreme as noted in the submission.</p> <p>Additionally, it is noted that a minor portion of the RACF building in the south west corner exceeds the height limit. This is due to the topography of the site and, due to the building utilising appropriate setbacks, there will be no impact to the adjoining properties. The variation to the minor height exceedance is formalised in the Clause 4.6 and SEPP 1 reports.</p>	<p>Clarification provided within Boffa Robertson's letter dated 10 November.</p> <p>Clause 4.6 and SEPP 1 Reports.</p>
	Overlooking / Privacy	<p>The updated sections prepared by Boffa Robertson illustrate the relationship between the RACF building and the residences at 14 and 16 Reid Street, including relevant floor levels, screen planting and setback distances.</p> <p>The sections and plan demonstrate that there is adequate separation between the RACF and side boundary, permitting an appropriate area for planting to occur to minimise overlooking. The mature tree height shown on the plan indicates that views between 14 and 16 Reid Street and the lounge room of the RACF will be limited.</p>	<p>Drawing DA32 prepared by Boffa Robertson</p>
	Overshadowing	<p>All overshadowing impacts are within the applicable guidelines, as noted by the submission.</p>	<p>Drawings DA25-DA27 prepared by Boffa Robertson as part of DA submission</p>

DA 10.2015.198.1 – Kiama Aged Care Centre of Excellence – Response to Submissions

Submission	Issue	Comment	Where Addressed?
	Noise	<p>Noise impacts associated with the RACF were assessed in the Environmental Noise Assessment prepared by Renzo Tonin as part of the DA Lodgement. The assessment concluded that an assessment of mechanical noise and equipment be undertaken as part of the detailed design to ensure any noise exceedances to adjoining properties would not occur.</p> <p>It is considered that this is a reasonable mitigation measure and commitment from the applicant, as the exact schedule of mechanical services and equipment has not been agreed upon at this stage of the project. To allay any future concerns of residents along this common boundary, it is suggested that appropriate conditions of consent ensure that any noise impact associated with mechanical service equipment be in accordance with relevant noise criteria. This requirement will need to be demonstrated on construction certificate documentation.</p>	<p>Environmental Noise Assessment from Renzo Tonin</p> <p>Conditions of Consent</p>
Submission 2 – <i>concern regarding the provision of communication services to the development</i>	Communication service provision	<p>It is noted that the provision of communications infrastructure to the development is an important consideration. During the detailed design phase of the project, consultation with all utility and service providers will occur to ensure that adequate infrastructure will be provided to each unit and building on site.</p> <p>It is expected that the provision of relevant services and utility plans as part of the Construction Certificate documentation will be required as a condition of consent. This will ensure this matter is effectively addressed.</p>	Conditions of consent
Submission 3 – <i>raises concerns regarding the height exceedance, overshadowing and noise associated with the ILUs</i>	Overshadowing	All overshadowing impacts of the proposal are within the applicable guidelines, which require overshadowing impacts to be considered between 9am and 3pm only.	Drawings DA25-DA27 prepared by Boffa Robertson as part of DA submission
	Noise	The letter prepared by Renzo Tonin investigated potential noise impacts along the Holden Avenue Boundary noted that the installation of a 1.5m	Renzo Tonin Noise Letter

DA 10.2015.198.1 – Kiama Aged Care Centre of Excellence – Response to Submissions

Submission	Issue	Comment	Where Addressed?
Submission 4 – <i>supports the proposal however has comments regarding overshadowing and privacy</i>		high noise barrier would result in noise impacts to these properties to be within industry standard parameters.	
		Updated drawings from Boffa Robertson demonstrate that the visual impact of this wall will have no significant impacts.	
	Height	The proposed variation to the height limit associated with the ILUs have been assessed within a Clause 4.6 Variation Request and amended SEPP 1 Objection Report, in accordance with legal advice from Thomson Geer. The legal advice received from Thomson Geer identifies relevant cases where variations to the height development standards have been upheld by the Court.	Legal Advice from Thomson Geer Clause 4.6 Variation Request Amended SEPP 1 Objection Report
		Both reports demonstrate that the request to vary the height standard are well founded, with the development meeting the objectives of the control, the objectives of the zone, identifying relevant environmental planning matters justifying the departure, along with demonstrating that the enforcement of the development standards are unreasonable and unnecessary in the circumstances of the case.	
	Overshadowing	All overshadowing impacts are within applicable guidelines.	Drawings DA25-DA27 prepared by Boffa Robertson as part of DA submission
	Privacy	The design of the ILUs directly supporting positive visual privacy outcomes between residents on Holden Avenue and future residents of the facility. Specifically, the orientation of the balconies, use of the blade column and louvered openings have been provided to screen potential overlooking of adjoining properties, with all views from the ILUs directed to the north east. The use of additional screening, as suggested by the submission, would not have any direct benefit to the proposal, as visual privacy outcomes are already achieved by the design.	Elevation Drawing DA17, and Section Diagrams DA22 and DA23 prepared by Boffa Robertson as part of DA submission

DA 10.2015.198.1 – Kiama Aged Care Centre of Excellence – Response to Submissions

Submission	Issue	Comment	Where Addressed?
Submission 5 - <i>supports the proposal, however makes a number of comment regarding height, setbacks and visual impacts</i>	Height	<p>The impacts associated with the height of the ILUs has been considered as part of the design, with appropriate building separation, stepping back of the upper level, orientation of balconies and provision of landscaping screening used to minimise impacts to adjoining properties.</p> <p>Section diagrams prepared as part of the DA submission illustrate the relationship between the ILUs and Holden Avenue properties, with the perceived bulk of the development minimised through separation and staggering. Further, overshadowing impacts are within applicable guidelines.</p>	Section Diagrams DA22 to DA23 and Shadow Diagrams DA25 to DA27 by Boffa Robertson as part of DA submission.
	Setbacks	<p>It is noted that ILU A and ILU B contain minor non-compliances with the 6m setback provision within the Apartment Design Guide.</p> <p>However, as detailed in the letter dated 10 November, these non-compliances are justified based on the positive visual privacy outcomes associated with the balcony, blade column and louvers (meeting the objectives of the control). Overshadowing impacts are acceptable and landscaping will ensure the development will have no detrimental impact.</p>	Justification provided within Boffa Robertson's letter dated 10 November.
	Visual	Visual impacts have been assessed from Whitten Place and Gwinganna Avenue in accordance with the images provided by the submission. The conclusions from the assessment demonstrate that while the development of the site will increase the bulk of development compared to current, the development will still appear as buildings nestled into the hill surrounded by landscaping. Major district views to the escarpment and ocean will not be impacted as part of the proposal.	Updated visual impact assessment and associated photomontages.
Submission 6 – <i>raised concern with the detail provided regarding the proposed roundabout and its construction</i>	Proposed roundabout	<p>The location of the proposed roundabout was considered during the design of the development, with its location deemed to be the best in terms of road safety.</p> <p>Appropriate consideration regarding service relocation, construction impacts and potential disturbances to adjoining properties will be addressed</p>	Conditions of consent

DA 10.2015.198.1 – Kiama Aged Care Centre of Excellence – Response to Submissions

Submission	Issue	Comment	Where Addressed?
		within the Construction Environmental Management Plan (CEMP) and detailed design phase of the project. Appropriate conditions of consent will ensure impacts associated with construction will be within industry standard practices.	
Submission 7 – raises concern regarding stormwater runoff in the south western portion of the site	Stormwater Runoff	<p>The proposed stormwater concept plan proposes minor earthworks and a swale along the western boundary to appropriately capture and convey all stormwater away from these properties during minor and major storm events.</p> <p>The development therefore provides a positive outcome for these residents by minimising runoff impacts during storm events.</p>	Civil Drawing CO3 from Jones Nicholson