

ATTACHMENT 2 - ASSESSMENT OF THE SEPP 1 VARIATION TO A DEVELOPMENT STANDARD

JRPP-15-482 - Assessment of a Residential Aged Care Facility (RACF)

12-16 Florence Street, Oakhurst

The proposed development has been assessed against the provisions of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors Housing SEPP). Clause 40(4)(c) of the Seniors Housing SEPP states that a building located in the rear 25% area of the site must not exceed 1 storey in height.

Given the proposal is for an entirely two storey development, the applicant seeks a SEPP 1 variation to this control on the basis this is a unique site that has no rear boundary rather than two street frontages and so should not have to comply with this requirements.

In accordance with Planning Circular B1 issued 17 March 1989 by the Department of Planning (known as the Department of Urban Affairs and Planning when the circular was released) an assessment of the applicant's SEPP 1 Objections has been carried out. In assessing the applicant's SEPP 1 Objections the following matters are addressed:

(A) Whether or not the planning control is a development standard

Clause 40(4)(c) – 1 storey height within rear 25% of the site

The building height must not exceed 1 storey in the rear 25% area of the site as contained in Clause 40(4)(c) within the SEPP is considered a numerical development standard.

(B) The underlying objective of the development standard

Clause 40(4)(c) – 1 storey height within rear 25% of the site

The SEPP Seniors Housing is not specifically supported by an objective in relation to Clause 40(4)(c). However the underlying objective is assumed to relate to the scale of development on adjoining properties and impacts on amenity and privacy.

The proposal does not conflict with the zone objectives and is consistent with the assumed underlying objectives of the development standard. See further comments below.

(C) Consistency of the development with the aims of the policy and the objectives of the Environmental Planning & Assessment Act, 1979 (EPA Act)

The proposal for a residential aged care facility is considered to be a compatible form of development with the existing land uses in the immediate vicinity, including residential dwellings, the NSW RFS, a swim school and a child care centre. The proposal is representative of the existing two storey building forms along both street frontages. The development as proposed would assist in attaining the objectives specified in Section 5 (a)(i) and (ii) of the EPA Act, in particular the proper management and co-ordination of the orderly and economic use and development of land.

(D) Whether compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

Chief Justice Preston set out five alternative ways of establishing that compliance is unreasonable or unnecessary in the preparation of a SEPP 1 objection in *Wehbe v Pittwater Council* (2007) NSW LEC 827, albeit only one of these 5 ways needs to apply in order for the objection to be well founded.

1. *Establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achievable notwithstanding non-compliance with the standard.*
2. *Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
3. *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
4. *Establish that the development standard has been virtually abandoned or destroyed by Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.*
5. *Establish that "zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to the land" and that "compliance with the standard in that case would also be unreasonable or unnecessary."*

Clause 40(4)(c) – 1 storey height within rear 25% of the site

The applicant has provided the following justification as to why the underlying objective is not relevant to the development:

- *"The site does not have a "rear" – it has two street frontages and both streets contain two storey development on either side of the development.*
- *The adjoining properties to the east and west have been designed such that the front of the dwellings face towards the proposed development. As such, there are no adjoining residential properties which present the "rear" of their development or their "private open space" to the site.*
- *The driveways on the adjoining properties provide a setback zone between the developments.*
- *The proposed development still provides a low scale residential form, notwithstanding that it has two storeys.*
- *As shown in the shadow diagrams submitted with the DA, the overshadowing impacts on adjoining properties between 9am and 3pm in mid-winter are such that the adjoining properties still receive at least 3 hours of direct sunlight.*
- *The eastern and western (side) boundaries of the site are the most sensitive as they are the boundaries shared with medium density housing developments, and the proposal deals with this relationship in an appropriate way through the proposed setbacks, landscaping and louvres over some of the bedroom windows.*
- *The landscaping proposed as part of the development will provide a pleasant outlook from adjoining properties.*

On the basis of the above, the height of the proposal in the rear 25% area of the site is appropriate in the circumstances of the case."

The proposed encroachment of the 2 storey structure into the rear 25% of the site is not considered to result in adverse amenity impacts as the adjoining developments have their driveways along the shared boundary and the living areas and private open spaces are on the opposite side of the site, therefore the amenity of these areas is protected. The provision of a two storey element to both Florence and Cassar Place are suitable in the context of the neighbouring two storey developments in the immediate vicinity.

The justification provided by the applicant demonstrates that the variation to the 1 storey height limit within the rear 25% of the site does not contravene the objectives of the standard and is considered satisfactory.

(E) Whether the SEPP 1 objection is well founded

Compliance with the above development standard is considered unnecessary in this circumstance given the site features two street frontages, as opposed to a rear area. Therefore, the circumstances of the site render the standard irrelevant. Strict application of the development standards would hinder the attainment of the objectives of the EPA Act pertaining to the orderly and economic use and development of the land.

Therefore, the SEPP 1 objections are considered to be well founded and are considered satisfactory.

A copy of the applicant's SEPP 1 Objection is also provided below.



**OBJECTION PREPARED PURSUANT TO “STATE
ENVIRONMENTAL PLANNING POLICY NO. 1 –
DEVELOPMENT STANDARDS” IN RELATION TO
THE “MAXIMUM HEIGHT PERMITTED FOR A
BUILDING LOCATED IN THE REAR 25% OF THE
SITE” STANDARD IN CLAUSE 40(4)(C) OF STATE
ENVIRONMENTAL PLANNING POLICY (HOUSING
FOR SENIORS OR PEOPLE WITH A DISABILITY)
2004**

**SUBMITTED IN SUPPORT OF A DEVELOPMENT
APPLICATION FOR A RESIDENTIAL AGED CARE
FACILITY AT**

12-16 Florence Street, Oakhurst

**Prepared for
Melaleuca Holdings Pty Ltd**

**By
BBC Consulting Planners**

**Job No. 14-184
SEPP1 Objection Maximum Height Final.docx
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TABLE OF CONTENTS

1.	INTRODUCTION	1
2.	AIMS AND OBJECTIVES OF SEPP NO. 1	1
3.	REQUIREMENTS FOR APPLICATIONS	1
4.	RELEVANT STANDARD	2
5.	 GROUNDS OF OBJECTION	3
5.1	Is the Planning Control a Development Standard?	3
5.2	What Is the Purpose/Object of the Standard?	3
5.3	Is Compliance with the Development Standard Consistent with the Aims of the Policy? Does Compliance Hinder the Attainment of the Objects Specified in Section 5(a)(i) and (ii) of the EP&A Act?	3
5.3.1	<i>Aims of SEPP No. 1</i>	3
5.3.2	<i>Objects of the Act – Section 5(a)(i) and (ii)</i>	4
5.4	Is Compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?	4
5.5	Is the Objection Well Founded?	5
6.	CONCLUSION.....	5

1. INTRODUCTION

This SEPP 1 objection has been prepared on behalf of Melaleuca Holdings Pty Ltd (“the Applicant”), in support of a DA for a residential aged care facility at 12-16 Florence Street, Oakhurst (“the site”).

The site comprises three elongated narrow lots having a total area by title of 4,885 metres (1,585m² + 1,650m² + 1,650m²) with two road frontages: a northern frontage of 39.945 metres (13.315 metres + 13.315 metres + 13.315 metres) to Florence Street and a southern frontage of 40.483 metres (26.63 metres + 13.853 metres) to Cassar Place, a cul-de-sac. The configuration of the site is shown on **Figure 2** in the SEE.

The aerial photo in **Figure 3A** of the SEE illustrates the immediate context of the site and its relationship to the residential developments and swim school to the east and west, Florence Street to the north and Cassar Place to the south.

The site does not present a rear 25% area of this site given the fact the site has two street frontages, its context and the underlying objectives of the control.

It can be assumed that the objective of the standard is to minimise amenity impacts of overshadowing and overlooking on adjoining dwellings and their private open spaces (traditionally a back yard backing onto another allotment) and to maintain a low scale residential form.

A simple interpretation of the clause would be that the rear 25% area is taken to be the part of the site at the opposite end of the “main” road frontage, in which case it would be the 25% of the site closest to Cassar Place. However, the problem with this approach is that Cassar Place is not a rear lane or the like; it is a standard public road, albeit in the form of a cul-de-sac. No other site in Cassar Place would be considered to have its rear facing the street and Cassar Place has mostly 2 storey dwellings on it in any case.

This SEPP No. 1 Objection has been prepared in relation to the non-compliance with this standard.

2. AIMS AND OBJECTIVES OF SEPP NO. 1

SEPP No. 1 “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”.

3. REQUIREMENTS FOR APPLICATIONS

Clause 6 of the SEPP No. 1 states as follows:

- “6. *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 therefore) the person intending to carry out that development may make a DA 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 Land and Environment Court, in *Winten Property Group Limited v North Sydney Council*, *Hooker Corporation Pty Limited v Hornsby Shire Council* and *Wehbe v Pittwater Council*, has defined the approach to be taken when considering an objection under SEPP 1. The approach involves answering a number of questions:-

“First, is the planning control in question a development standard?

Second, what is the underlying object or purpose of the standard?

Third, is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a) (i) and (ii) of the EP&A Act?

Fourth, is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Fifth, is the objection well founded?”

The questions are addressed in Section 5 below.

4. RELEVANT STANDARD

The standard relating to the maximum building height in the rear 25% area of the site, to which this SEPP No.1 Objection relates, is that imposed by Clause 40(4)(c) of the Seniors Housing SEPP. Clause 40 of the Seniors Housing SEPP provides development standards relating to minimum sizes and building height and Clause 40(4) provides height standards for development which is located in zones where residential flat buildings are not permitted. Under the provisions of Blacktown LEP 1988, residential flat buildings are not permitted on the site and the provisions of Clause 40(4) are thus relevant to the proposed development.

Clause 40(4)(c) states:

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

It is difficult to define and identify the rear 25% area of this site given the fact the site has two street frontages, its context and the underlying objectives of the control.

A simple (but erroneous) interpretation of the clause would be that the rear 25% area is taken to be the part of the site at the opposite end of the “main” road frontage, in which case it would be the 25% of the site closest to Cassar Place. However, the problem with this approach is that Cassar Place is not a rear lane or the like; it is a standard public road, albeit in the form of a cul-de-sac. No other site in Cassar Place would be considered to have its rear facing the street and Cassar Place has mostly 2 storey dwellings on it in any case.

On this basis, part of the proposed building which is located in the rear 25% area of the site is 2 storeys in height, thus exceeding the 1 storey height limit.

However, having the part of the site at the opposite end of the “main” road frontage, in which case it would be the 25% of the site closest to Cassar Place limited to being single storey in

height would not achieve the assumed objective of the standard, which is to protect the amenity of the adjoining neighbours.

In fact, every single development (except one) in this section of Cassar Place is double storey in height, therefore a single storey component facing Cassar Place would be out of character with the existing and established streetscape.

5. GROUNDS OF OBJECTION

Pursuant to the provisions of SEPP No. 1, the Applicant objects to the strict application of the “maximum height permitted for a building located in the rear 25% area of the site” development standard in Clause 40(4)(c) of the Seniors Housing SEPP in the circumstances of this case, in accordance with the approach taken in *Winten Property Group v North Sydney*, *Hooker Corporation Pty Limited v Hornsby Shire Council* and *Wehbe v Pittwater Council*.

5.1 Is the Planning Control a Development Standard?

Clause 40(4)(c) is a numerical control specifying the maximum building height in the rear 25% of the site. The planning control in Clause 40(4)(c) is a development standard.

5.2 What Is the Purpose/Object of the Standard?

There is no specifically stated purpose or object expressed in Clause 40(4)(c) of the Seniors Housing SEPP. However, it can be assumed that the objective of the standard is to minimise amenity impacts of overshadowing and overlooking on the rear of adjoining residential properties including their private open spaces, and to maintain a low scale residential form towards the rear of properties to which the SEPP applies.

5.3 Is Compliance with the Development Standard Consistent with the Aims of the Policy? Does Compliance Hinder the Attainment of the Objects Specified in Section 5(a)(i) and (ii) of the EP&A Act?

5.3.1 Aims of SEPP No. 1

The aims of SEPP No. 1 are noted above in Section 2. SEPP No. 1 provides flexibility for development standards where compliance would be unreasonable or unnecessary or hinder the objects in Section 5(a)(i) and (ii) of the Act.

When the proposed development is tested against the underlying objectives of the standard, compliance with the standard would be inconsistent with the aims of the policy because the height, bulk, scale and characteristics of the proposal, are all appropriate and acceptable. The proposed development does not have a rear component and needs to address two street frontages, both of which contain two storey developments on either side of the site.

In addition, the adjoining sites to the east and west contain medium density housing developments which contain driveways along the shared boundary of the site, as illustrated in **Figure 3A** of the SEE. The adjoining properties to the east and west have been designed such that the front of the dwellings face towards the proposed development. As such, there

are no adjoining residential properties which present the “rear” of their development to the site. The driveways also provide a setback area to the RACF.

Therefore, the proposed development is a case where flexibility in the application of the development standard is justified. Strict application of the standard is unreasonable and unnecessary for the reasons noted in Section 5.4 below.

5.3.2 Objects of the Act – Section 5(a)(i) and (ii)

These objects state as follows:

“5. The objects of this Act are:

(a) to encourage:

- (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*
- (ii) the promotion and co-ordination of the orderly and economic use and development of land”*

Compliance would hinder the attainment of the above objects in that the proposal does not undermine the underlying objective of the standard.

The proposed development is consistent with the objects of the Act and represents the orderly and economic use of the land which is justified in terms of building form and scale, and the absence of adverse impacts on residential amenity.

5.4 Is Compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?

Strict compliance with the development standard in Clause 40(4)(c) of the Seniors Housing SEPP is considered to be unreasonable and unnecessary in the circumstances of the case.

To the extent that the purpose of the standard is to minimise amenity impacts of overshadowing and overlooking on adjoining dwellings and their “private open spaces” and to maintain a low scale residential form, it is submitted that the proposed development meets the underlying objective of the development standard for the following reasons:-

- the site does not have a “rear” – it has two street frontages and both streets contain two storey development on either side of the development;
- the adjoining properties to the east and west have been designed such that the front of the dwellings face towards the proposed development. As such, there are no adjoining residential properties which present the “rear” of their development or their “private open space” to the site;
- the driveways on the adjoining properties provide a setback zone between the developments;

- the proposed development still provides a low scale residential form, notwithstanding that it has two storeys;
- as shown in the shadow diagrams submitted with the DA, the overshadowing impacts on adjoining properties between 9am and 3pm in mid-winter are such that the adjoining properties still receive at least 3 hours of direct sunlight;
- the eastern and western (side) boundaries of the site are the most sensitive as they are the boundaries shared with medium density housing developments, and the proposal deals with this relationship in an appropriate way through the proposed setbacks, landscaping and louvres over some of the bedroom windows; and
- the landscaping proposed as part of the development will provide a pleasant outlook from adjoining properties.

On the basis of the above, the height of the proposal in the rear 25% area of the site is appropriate in the circumstances of the case.

5.5 Is the Objection Well Founded?

The objection to Clause 40(4)(c) is well founded for the following reasons:-

- the development is appropriate in this location;
- the development does not undermine the underlying objective of the standard because it satisfactorily addresses and deals with the interrelationship of scale with neighbouring properties to the east and west;
- the site does not have a “rear” as it has dual street frontages;
- the non-compliance does not result in any significant adverse environmental impacts on the amenity of the surrounding area in general, or on the amenity of nearby residential properties in particular; and
- the scale of the proposal, notwithstanding the non-compliance, is compatible with surrounding development.

Pursuant to the provisions of SEPP No. 1, the applicant objects to the strict adherence to the above development standard.

6. CONCLUSION

It can be concluded that the proposed non-compliance with the standard which prescribes the “maximum height permitted for a building located in the rear 25% area of the site” does not undermine or frustrate the underlying objectives of the standard.

The non-compliance will give rise to no adverse environmental impact.

Additionally, the proposal displays particular sensitivity to the properties to the east and west (effectively adjacent to the “side” boundary), thereby achieving the intent of this particular standard.



For the reasons set out above in 5.4, strict compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.