

ANNEXURE “G” CLAUSE 4.6 OBJECTIONS

INTRODUCTION – THE CONTEXT

Exceptions to Development Standards

As previously noted this project is a special project to provide housing in a Nursing Home type setting for local elderly residents and this introduction is to provide a setting for the Clause 4.6 submission seeking an exemption to certain height standards set in clause 40 and Clause 26. Because it is relevant to the whole facility this introduction is to the Annexure that contains a Clause 4.6 submission to the height standards contained in clause 40(4) and the distance to services standards contained in clause 26.

The design of the subject RACF does not meet the standards set in the SEPP HSPD Clause 48 which if complied with prevent Council from refusing the policy on those defined standards. Indeed the proposed building does not meet the majority of the Standards set in Clause 48 of the Policy. Part of the reason for this is that the site is relatively tight or small for the necessary facility and there is a high demand for the facility in Auburn so it has been designed to cater for the maximum number of people.

The Commonwealth Department of Social Services has approved of the proponents as an aged Care provider and provided a Grant to the special needs group centred on Auburn. The basis of the Special Needs Group for the RACF, was the Culturally and Linguistically Diverse (“CALD”) communities in Auburn. Additionally provision is made for other residents, e.g. ATSI and the homeless.

The facility is 85% concessional and 15% non concessional which reflects the low socio-economic status of the region as well as the very significant social aspect of the proposal. The submission for the Clause 4.6 objections should be read in the above context.

Clause 4.6 Exemption Objection to Development Standard - Clause 40 (4) (a), (b) & (c)

Introduction

This Section 4.6 Exemption Objection to a Development Standard is submitted to Auburn Council in support of a Development Application (DA) for the demolition of existing houses and the construction of a new RACF at 9 – 13 Gelibolu Parade, Auburn. The objection to vary the standard is made under Clause 4.6 of *Auburn LEP 2012*.

This Statement has been prepared in accordance with “*Varying Development Standards- A Guide*” prepared by the Department of Planning and Infrastructure, dated August 2011.

This Statement should be read in conjunction with the submitted Statement of Environmental Effects prepared by Smyth Planning dated April 2015. It relates to the permissible maximum height of 8 metres set in Clause 40(4)(a) of SEPP HSPD and a 2 storey height limit adjacent to the boundary set in Clause 40(4)(b) and the rear of site height set in Clause 40(4)(c).

1.1 Section 4.6 Framework

The objective of Section 4.6 is to allow flexibility in the application of numeric development standards. The relevant Clauses of *Auburn LEP 2010* are:

Clause 4.6(1) of *Auburn LEP 2012* states that the objectives of the clause are:

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

Clause 4.6 (2) states that:

“Development consent may, subject to this clause, be granted for development even though the development would contravene the development standard imposed by this or any other environmental planning instrument”.

Clause 4.6 (3) states that:

“Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- (a) *that compliance with a 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”.*

Clause 4.6 (4) states that:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - b) *the concurrence of the Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
 - a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - b) *the public benefit of maintaining the development standard, and*
 - c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

The document “*Varying Development Standards- A Guide*” applies to both exemptions sought pursuant to Section 4.6 and to *State Environmental Planning Policy No.1 Objections- Development Standards (SEPP No.1)*. The Guide requires consideration of the questions set out by the NSW Land and Environment Court in regard to the application of SEPP 1 through the judgement of Justice Lloyd, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89.

The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827. The test now is as follows:

- (1) *The applicant must satisfy the consent authority that “the objection is well founded” and compliance with the development standard is unreasonable and unnecessary in the circumstances of the case;*
- (2) *The consent authority must be of the opinion that granting consent to the development application would be consistent with the policy's aim of providing flexibility in the application of planning controls where strict compliance with those controls 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 Environmental Planning and Assessment Act 1979 (EP&A Act, 1979) and;*
- (3) *It is also important to consider:*
 - a) *whether non-compliance with the development standard raises any matter of significance for State or regional planning; and*
 - b) *the public benefit of maintaining the planning controls adopted by the environmental planning instrument.*

Accordingly, the following Section 4.6 Statement is set out using the Land and Environment Court considerations for varying development standards.

It is to be noted that the Department of Planning and Infrastructure's advice regarding “*Varying Development Standard's- A Guide*” not only applies to *SEPP 1* but also to exemptions sought pursuant to Section 4.6.

1.2 Is the planning control in question a development standard?

The Environmental Planning Instrument to which this objection relates is the State Environmental Planning Policy (Housing for Seniors and People with a Disability).

The height development standard applicable to the development is found in Clause 40 and that Clause reads as follows:

40 Development standards—minimum sizes and building height

(4) General

A consent authority must not consent to a development application made pursuant to this Chapter unless the proposed development complies with the standards specified in this clause.

(5) Site size

The size of the site must be at least 1,000 square metres.

(6) Site frontage

The site frontage must be at least 20 metres wide measured at the building line.

(It should be noted that the proposed development complies with clauses 40(2) and 40(3) site size and site frontage or width respectively).

(7) 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*

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.*

(8) Development applications to which clause does not apply

Subclauses (2), (3) and (4) (c) do not apply to a development application made by any of the following:

- a) the Department of Housing,
- b) any other social housing provider.

Clauses 4(a) & (b) are addressed below.

For clause 4(c) it is necessary to find the rear of the property.

The front of the bulk of the properties that make up the site front St Hilliers Road, with the back of the lots facing the Lane, thus there is no "rear" boundary, as such.

The side boundary is the dividing line between Lot 10 and Lot 9. It is understood that Clause 4(c) is in the Policy to protect neighbours places, both in regard to solar access and privacy. In this instance 4(c) it is an irrelevant consideration or in other words: *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.*

“Development Standards” has the following definition under Section 4(1) of the *Environmental Planning and Assessment Act (EP&A Act, 1979)*:

“Development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- b) the proportion or percentage of the area of a site which a building or work may occupy,*
- c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- d) the cubic content or floor space of a building,*
- e) the intensity or density of the use of any land, building or work,*
- f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- h) the volume, nature and type of traffic generated by the development,*
- i) road patterns,*
- j) drainage,*
- k) the carrying out of earthworks,*
- l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- m) the provision of services, facilities and amenities demanded by development,*
- n) the emission of pollution and means for its prevention or control or mitigation, and*
- o) such other matters as may be prescribed”.*

As this Section 4.6 objection relates to two departures from the numerical standard of “height”, it is considered that Clause 40 nominates Development standards.

1.3 What is the underlying object or purpose of the standard?

There is no maximum height permissible on the site. The standard’s relevant purposes are to:

- to ensure that the buildings are of a reasonable base height and likely to be compatible with the height,, scale, streetscape and existing character of the locality;
- to justify extras to increase the overall scale of development within reason with the intent of preserving the environmental amenity of neighbouring properties and minimizing any adverse impacts on the amenity of the locality.

1 Is the objection is "well founded"?

Item 1 of the Land and Environment Court *SEPP 1* Matters for Consideration states that the applicant must satisfy the consent authority that "the objection is well founded" and that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston expressed the view that there are five different ways in which an objection to a development standard might be shown as unreasonable or unnecessary and is therefore well founded. The five ways include:

- (1) The objectives of the standard are achieved notwithstanding non-compliance with the standard.*
- (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 that particular land. That is, that particular parcel of land should not have been included in the zone.*

Items 2 & 3 are of particular relevance to the proposed development.

The following section demonstrates that the proposed development will achieve the objectives of the height standard in spite of being varied.

These points are discussed in more detail below:

2.1 Compliance with the objectives of the control

Notwithstanding the non-compliance with the development standard, it is considered that the proposed development meets the relevant objectives of the height control. The heights specified as being the benchmark for Council's base line consideration is 8 metres overall and 2 storeys adjacent to the boundaries and Council has the discretion to permit more height in both cases.

The objectives of particular relevance to the subject development standard are from Clause 4.4 in the Auburn LEP of 2010; notably:

- (c) to ensure that buildings are compatible with the bulk, scale, streetscape and existing character of the locality,*
- (d) to establish limitations on the overall scale of development to preserve the environmental amenity of neighbouring properties and minimise the adverse impacts on the amenity of the locality.*

The proposed development is considered to perform favourably in relation to the objectives of Clause 4.4 on the following grounds:

Streetscape

- The proposed building presents as 3 storeys or (12 -14 metres) from the level of the street.. When viewed from the street it is of less bulk and scale than the Mosque to its west and comparable in bulk and scale to the industrial building to its east although that building is well setback from the St Hilliers road boundary.

- The proposed development provides a high quality modern development design which includes good articulation which in turn is sympathetic to the existing character of the streetscape.
- Although it is 3 storeys along the boundaries it is setback from the street boundary by a 4 metre strip of landscaping thus increasing the setback to the properties across St Hilliers Road to 24metres , significantly reducing any impact.

Views and Privacy

- The proposed building has been designed to maximize the benefits of the site's north and west aspect.. It has been also designed having regard to neighbouring properties. A number of measures including sensitive window placement, translucent glass and screens and landscaping have been incorporated into the design where necessary to ensure the privacy of neighbours;

Design

- The design of the proposed building has been based on quality principles as desired by the future residents to facilitate enhanced amenity for the future occupants. This has resulted in additional floor space within the building eg: entry area and has, to some extent contributed to the additional FSR sought. However, it is considered that the proposed bulk and scale of the building is appropriate for the size and shape of the allotment and in its setting from Gelibolu Parade;

Compliance with zone objectives

- The proposed development represents an efficient and appropriate use of the land that is compatible with the environmental capacity of the site.

Compliance with Landscaping and Open Space

- Although the proposed building exceeds the maximum Height it is in a well designed landscape setting and is therefore in an appropriate setting when viewed from the street and also contributes to sustainable development outcomes.

Overshadowing

- The orientation of the proposed RACF is such that the shadow at about 2pm starts to fall over the front yards of the properties on the opposite side of St Hilliers Road and by 3 pm they are completely in shadow.

In terms of the relevant objectives it is considered that there are no significant impacts that occur as a result of the non-compliance with the height standard in the two instances.

2.2 Consistency with the objectives of the zone

The site is located within the R2 Low Density Residential Zone of *Auburn LEP 2010*

Clause 2.1 of *Auburn LEP 2010* outlines the following objectives of the R2 Low Density Residential Zone.

The objectives of the R2 Low Density Residential Zone are:

- (a) *To provide for the housing needs of the community within a low density residential environment.*
- (b) *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposed development complies with the objectives of the R2- Low Density Residential Zone in that the proposal provides new housing for the socially disadvantaged within the Local Government Area.

3. Consistency with the policy's aim

Item 2 of the Land and Environment Court Matters for Consideration states that the consent authority must be of the opinion that granting consent to the development application would be consistent with the Policy's aim of providing flexibility in the application of planning controls where strict compliance with those controls 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 *EP&A Act, 1979*.

- (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,*

If Council insisted on strict compliance with the development standards contained in Clause 40 of the SEPPHSPD such a decision would hinder the attainment of the above objects of the *EP &A Act 1979* in that:

- The social and economic welfare of the community would not be promoted as it would prevent the construction of a new high quality RACF or nursing home and
- The co-ordination of the orderly and economic use and development of the land would be discouraged as it would deter the construction of a well designed development of a similar size in an established lower socio economic residential locality with access to existing services and infrastructure.

4. Other matters for consideration

Item 3 of the Land and Environment Court *SEPP 1* Matters for Consideration states that it is also important to consider:

- (a) *whether non-compliance with the development standard raises any matter of significance for State or regional planning; and*
- (b) *the public benefit of maintaining the planning controls adopted by the environmental planning instrument.*

These matters are addressed in detail ahead.

4.1 Matters of State or Regional Planning Significance

The proposed development and variation from the development standards does not raise any matters of significance for State or regional environmental planning, nor does it conflict with any State planning policies or Ministerial directives.

4.2 Public Benefit

The public benefit is best served by the proposed development complying with the objectives of the control rather than strictly complying with the numeric standard of the control. It is noted that the development will still provide the expected public benefits that the objectives of *Auburn LEP 2010* seek to achieve, being proposed new housing for the older or disabled people of CALD origins.

As such it is in the public benefit to support the variation in the control in order to provide for a development which is contextually sympathetic to the adjacent development, meets the expectations of future residents, provides an appropriate modern streetscape presentation and a high level of amenity for future residents of the site.

5 Conclusion

While the proposed development exceeds the height development standards contained in Clause 40(4) (a) & (b), of the *SEPP HSPD*, it never the less satisfies the broader zoning objectives of the locality such that:

- The proposed development is consistent with the Objectives of the R2 Low Density Residential Zone;
- The siting, design and external appearance of the proposed development are considered to be appropriate , it complements the scale and emerging character of immediately adjacent development in the area and will meet the expectations of future residents;
- The proposed development, on balance does not result in adverse impacts on surrounding properties or the neighbourhood.

CLAUSE 4.6 OBJECTION TO CLAUSE 26 DISTANCE TO SERVICES

Property/Site: 9-13 Gelibolu Parade, Auburn plus adjoining properties

Proposal: Housing for Seniors or People with a Disability – Construction of a 100 Bed Residential Aged Care Facility on the above property.

Zoning: Zone R2 Low Density residential

(1) Development Standards to which Objection is taken:

Clause 26 –Part 2 of the SEPP, contains a development standard relating to the location and access to facilities, and states the following:

26 Location and Access to Facilities

- (1) *A consent authority must not consent to a development application made pursuant to this Chapter unless the authority is satisfied, by written evidence, that residents of the proposed development will have access that complies with subclause (2) to:*
 - (a) *Shops, bank service providers and other retail and commercial services that residents may reasonably require, and*
 - (b) *Community services and recreation facilities, and*
 - (c) *The practice of a general medical practitioner.*
- (2) *Access complies with this clause if:*
 - (a) *The facilities and services referred to in subclause (1) are located at a distance of not more than 400 metres from the site of the proposed development that is a distance accessible by means of a suitable access pathway and the overall average gradient for the pathway is no more than 1:14, although the following gradients along the pathway are also acceptable:*
 - (i) *A gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,*
 - (ii) *A gradient of no more than 1:10 for a maximum length of 5 metres at a time,*
 - (iii) *A gradient of no more than 1:8 for distances of no more than 1.5 metres at a time, or*
 - (b) *In the case of a proposed development on land in a local government area within the Sydney Statistical Division – there is a public transport service available to the residents who will occupy the proposed development.*
 - (i) *That is located at a distance of not more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and*
 - (ii) *That will take those residents to a place that is located at a distance of not more than 400metres from the facilities and services referred to in subclause (1).*

For the purposes of sub-clause (2):

- (4) (a) a **“suitable access pathway”** is a path of travel by means of a sealed footpath or other similar and safe means that is suitable for access by means of an electric wheelchair, motorised cart or the like, and

- (b) distances that are specified for the purposes of that subclause are to be measured by reference to the length of any such pathway.

1) The Proposal

The proposed development is for a 102 Bed Residential Aged Care Facility, and the application has been made under the State Environmental Planning Policy (SEPP) - Housing for Seniors or People with a Disability (2004).

2) Background to the Objection

- (1) The proposed development is located on a site which is R2 low density residential and is located adjacent to a Mosque with a training centre located next to the Mosque.
- (2) The proposed RACF will be accommodating relatively high care patients, and facilities will be provided on site to satisfy their care requirements. Due to age and frail health of the residents it is unlikely that these residents will leave the premises unaccompanied.
- (3) Because of the fact outlined in (2) above the facilities provided within the RACF itself include the following: Doctors Room, (A GP will visit the facility daily and emergency services will be available on call) a Therapy Room; an ATM;
- (4) Hairdresser and beauty parlour, a library, internet connection, a number of entertaining spaces with dining areas and a room that could become a Cinema. There is a community room and dining room proposed for each floor that also includes a tea/coffee bar. Daily newspapers will be delivered to the RACF and there will be a post delivery and collection.
- (5) In addition, there will be a Neighbourhood shop on the ground floor level of the RACF, located on the north western corner of Gelibolu parade and St Hilliers Road.
- (6) The Operators of the RACF intend to use a mini bus to support their residents as well as to support older local residents who want to stay in their own homes nearby. For residents wanting to go to the Auburn Town Centre the mini bus will provide a regular service.

3) The Aim of the Objection:

Is to address this clause and satisfy the consent authority that the access to the services and facilities identified in Clause 26, is adequate and meets the intent of the policy with the facilities in the RACF, including the neighbourhood shop.

4) Addressing the Issues

5.1 The Purpose of the Development Standard

There are no objectives of Clause 26, however they may be assumed to be:

- a) *To ensure that the future occupants of the facility (if that facility does not have such facilities on site or nearby within 400 metres of the site) have suitable access paths to appropriate and necessary public transport that connects directly to such facilities as identified in Clause 26;*

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

Compliance with the Clause 26(2) is considered unnecessary and unreasonable in this case for the following reasons:

- The facilities and services that residents of a high care RACF might reasonably require are provided within the RACF with the shop. Indeed it would be of an unacceptable standard if these facilities were not provided “in house”.
- The future occupants of the RACF will most likely be frail, and it is unlikely that they will leave the facility unaccompanied. It is even more unlikely that they would travel by public transport if it was available. The most likely mode of transport for outings to such identified services and other facilities outside the RACF campus will be in the form of the private bus that the Operator will be providing.
- Accordingly, the RACF itself will be providing the majority of all facilities and services that the occupants will be requiring, to ensure that they can easily access a doctor, recreation facilities, hairdresser, postal services, ATM, etc,etc.
- In addition there are also a number of services within the neighbourhood shop located adjacent to the RACF if they are not located within the RACF such as the ATM.

5) Conclusion

On the basis of the points made above it is argued that the proposal is consistent with the objectives of the Clause which seek to ensure an appropriate level of services and facilities are provided within 400 metres or residents have access to public transport within 400 metres to take them to such facilities. It is the Operators intention to provide all these facilities within the RACF or have them available by the use of a private mini -bus based at the RACF.

The services and facilities provided in the RACF and the neighbourhood shop are based upon the Operator’s experience of what elderly and frail residents need on a day to day basis and for anything more the residents are transported to the facilities and services by private mini bus.

The proposal is also consistent with the requirements and objectives of both the Auburn LEP 2010 and the SEPP HSPD notably in that the proposal results in a better environmental planning outcome. Therefore absolute compliance with the distance control stated in the SEPP is considered to be unreasonable and unnecessary in the circumstances of this case.