



**WRITTEN REQUEST PREPARED PURSUANT TO
CLAUSE 4.6 OF WYONG LOCAL ENVIRONMENTAL
PLAN 2013 IN RELATION TO A VARIATION WHICH IS
SOUGHT TO THE MAXIMUM BUILDING HEIGHT
DEVELOPMENT STANDARD**

**Submitted in support of an amended development
application lodged to Central Coast Council for the
construction of a new three-storey 122 bed
residential aged care facility at Nos 149-157 Main
Road and Nos 6-12 Tamar Avenue, Toukley**

**Prepared for
Opal Aged Care**

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1. Introduction – Relevant Development Standard

This written request has been prepared in support of an amended development application (“amended DA”) lodged on behalf of Opal Aged Care for the construction of a new three-storey 122 bed residential aged care facility (“the amended proposal”) at Nos 149-157 Main Road and Nos 6-12 Tamar Avenue (“the site”).

Pursuant to the Height of Buildings Map referred to in Clause 4.3 (‘Height of buildings’) of the Wyong Local Environmental Plan 2013 (“the LEP”), the site is subject to a maximum building height of 12 metres. As indicated on the amended architectural drawings prepared by Jackson Teece (accompanying the DA), the maximum building height of the amended proposed building is 13.38 metres. This occurs at the top of the plant enclosure with the overall building parapet height being generally under the 12 metres maximum building height. Accordingly, the proposal contravenes the provisions of LEP Clause 4.3.

Clause 4.6 of the LEP allows approval to be granted to a development application where a proposal contravenes a development standard, in this instance Clause 4.3.

The objectives of Clause 4.6 are:

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

This written request addresses the requirements of Clause 4.6.

1.1 Site Zoning and Permissibility

The site is zoned R3 (Medium Density Residential) pursuant to the LEP (see **Figure 4A**).

The objectives of the R3 Zone are:

- “To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To maintain and enhance the residential amenity of the surrounding area.
- To encourage amalgamation of existing lots to facilitate well designed medium density development and to avoid unnecessary isolation of lots.”

The amended proposal is consistent with the above objectives in that:

- the new 122-bed residential care facility will contribute to meeting the housing needs of the local community within the prevailing medium density residential environment;
- the residential care facility will meet the day-to-day needs of seniors and people with a disability;

- the residential amenity of the surrounding area will be maintained and enhanced;
- the proposal will amalgamate 13 lots and will not result in isolation of other lots.

1.2 Clause 4.3 of Wyong Local Environmental Plan 2013

Pursuant to the Height of Buildings Map referred to in clause 4.3 of the LEP, the site is subject to a maximum building height of 12 metres. Clause 4.3 states:

4.3 Height of buildings

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

(a) *to establish the maximum height limit for buildings to enable the achievement of appropriate development density,*

(b) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*

(c) *to ensure that the height of buildings protects the amenity of neighbouring properties in terms of visual bulk, access to sunlight, privacy and views.*

(ca) *in relation to land at Kanwal that is within Zone B6 Enterprise Corridor and is identified as "Area 4" on the Height of Buildings Map:*

(i) *to provide incentives for the development of health-related facilities in this locality, and*

(ii) *to encourage lot consolidation of smaller lots to reduce the possibility of fragmented development, encourage shared facilities and manage traffic movements.*

(2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

1.3 Principles and Relevant Authorities

The principles and relevant authorities which have been considered in the preparation of this replacement Clause 4.6 variation request are those found in:

- Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;
- Wehbe v Pittwater Council [2007] NSWLEC 827 ("Wehbe");
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ("Four2Five No 1");
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 ("Four2Five No 2");
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 248 ("Four2Five No 3");
- Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386; and
- Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7.

2. Exceptions to Development Standards - Clause 4.6

Clause 4.6 of the LEP permits development consent to be granted for development even though the development would contravene a development standard imposed by the LEP.

2.1 Objectives of Clause 4.6

The objectives of Clause 4.6 are:

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

2.2 Clause 4.6: Requirements for DA's

Clause 4.6 of the LEP states (as relevant):

- “(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 issue.*
- (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.”*



Accordingly, the provisions of Clause 4.6 can be used to vary (to the extent required) the maximum building height development standard applying to the site pursuant to Clause 4.3.

The matters raised above are addressed below in **Section 4** of this submission.

3. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case and are there sufficient planning grounds to justify contravening the standard?

3.1 Extent of non-compliance

The maximum building height of the proposed development is 13.38 metres at the highest point which is the top of the plant enclosure.

3.2 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Strict compliance with the maximum building height development standard is unreasonable and unnecessary in the specific circumstances of the subject proposal for the following reasons:

- The development is three storeys above ground which is the number of storeys envisaged under the LEP in the areas subject to the 12 metres building height control.
- The external wall height is approximately 12 metres. The non-compliance is mainly associated with the roof mounted plant room and design elements at the centre of the building providing articulation to the north and south facades and identifying the main entry to the facility. This area is set well back from front and side boundaries and would not be generally visible from the surrounding public domain as can be seen from the montages submitted with the development application.
- The height of the building is influenced by floor to ceiling heights of 3.2 metres to accommodate plant and other services for an efficient residential care facility operation. The ground floor has a higher floor to ceiling height consistent with the main entry function and nature of activity on the ground floor. These floor to floor heights are required to meet the operational requirements for this form of seniors housing.
- The proposed development has evolved from a detailed consideration of the characteristics of the site in its context including the prevailing planning controls contained in the LEP and DCP as an indicator of the desired future character of the area.
- The built form (including height) needs to be compatible with the desired future character of the area evolving in response to the planning controls of Council and State government.
- The proposal is located within an area identified as a key site where a building height of 25 metres is envisaged. The majority of the built form is contained below the 12 metre maximum and well below the building height envisaged for the site under the key site controls.

- The site is located adjacent to a business zone and on a large lot within a block identified for redevelopment as a key site. The bulk and scale of the development when perceived from the public domain would appear as a three-storey building with articulated facades and variable setbacks from Main Road. Setbacks comply with those required for a residential building of the same height providing the opportunity for perimeter landscaping and open space.
- As described below, the objectives of the standard are achieved notwithstanding the amended proposal's non-compliance with the standard.
- The development is consistent with the Toukley Planning Strategy which states in part:

"The Caravan Park on Main Road/Tamar Avenue has a consistent turnover of people and the Department of Housing use this park for emergency accommodation. Evidence indicates that the park is in very poor condition with inadequate maintenance or upkeep. Vans are in poor condition with no concrete pad, no annex, leaking water, mould issues etc. There reportedly are social problems, such as drug deals and other anti-social behaviour, occurring within the park.

Due to the state of this park it is recommended that this caravan park be encouraged to close, and the area up-zoned."

Compliance with the LEP maximum building height development standard is therefore unreasonable and unnecessary given the circumstances of the site and the proposal.

3.3 Are there sufficient environmental planning grounds to justify contravening the development standard?

The contravention of the maximum building height development standard is justified on environmental planning grounds specific to this development for the reasons set out in the amended Statement of Environmental Effects. The non-compliance with the height control does not result in any significant additional detrimental impact on the amenity of adjoining properties.

The amended proposal is considered to be consistent with the objectives and requirements of relevant planning instruments and development standards and will result in no significant adverse environmental planning impacts. The inherent characteristics of the site, including its size, its existing condition and surrounding development, make the amended proposal eminently suitable and justifiable on environmental planning grounds.

There is an absence of significant environmental harm associated with the non-compliance of the amended proposal with the minimum building height development standard.

The proposed development makes efficient use of an underutilised site being land specifically prepared and serviced for redevelopment and in this regard is consistent with the objects of the EP&A Act 1979 to promote the orderly and economic use and development of land. The development provides a much needed residential aged care facility to meet the needs of the area.

3.4 Has this written requested adequately addressed the matters required to be demonstrated by sub-clause (3)?

It is considered that the amended proposal adequately addresses the matters set out in Clause 4.6(3) as required by Clause 4.6(4)(a)(i).

4. Is the development in the public interest?

Clause 4.6(4)(a)(ii) specifies that a development will be in the public interest if it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out.

It is considered that the amended proposal will be in the public interest for the following reasons.

4.1 Consistency with the objectives of the standards

The objectives of the maximum building height development standard are as follows:

- “(a) to establish the maximum height limit for buildings to enable the achievement of appropriate development density,*
- (b) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
- (c) to ensure that the height of buildings protects the amenity of neighbouring properties in terms of visual bulk, access to sunlight, privacy and views.*
- (ca) in relation to land at Kanwal that is within Zone B6 Enterprise Corridor and is identified as “Area 4” on the Height of Buildings Map:*
 - (i) to provide incentives for the development of health-related facilities in this locality, and*
 - (ii) to encourage lot consolidation of smaller lots to reduce the possibility of fragmented development, encourage shared facilities and manage traffic movements.”*

In relation to Objective (a), the planning controls contain two height controls for the site being 12 metres and 25 metres, the latter being under the provisions of Clause 7.11. The proposed residential care facility has a height of three-storeys and the density of development is appropriate in that the building has an appropriate bulk and scale. Future traffic generated by the development is low because of its low intensity use. It is therefore considered that the density of development on the site is acceptable.

In relation to Objective (b), the existing character of the area is one in transition from older style dwelling houses and a dilapidated and disused caravan park site to one that facilitates economic development in a manner that also caters to a well-recognised community need for residential care facilities. Council's adopted Toukley Planning Strategy recommends the redevelopment of the caravan park site and incentives to be provided for this purpose. The desired future character of the area is seen as one that allows a higher development with site consolidation to achieve rational development sites, employment generating developments, proximity to a centre and to public transport, good urban design and associated public benefits. It is considered that the amended proposal achieves these elements of the desired future character of the area.

In relation to Objective (c), it is considered that the amended proposal has been designed in a manner that its height protects the amenity of neighbouring properties in terms of visual bulk, access to sunlight, privacy and views.

In relation to Objective (ca), the site is not identified as land at Kanwal within Zone B6 (Enterprise Corridor) and is identified as “Area 4” on the Height of Buildings Map.

It is considered that the development is consistent with the objectives of the standards.

The objectives of the key sites provisions of the LEP as outlined in Clause 7.1(1) are as follows:

- (a) to deliver a high standard of design excellence for certain key sites in Wyong,
- (b) to encourage the amalgamation of those key sites to provide opportunities for the expansion of, and improvements to, the public domain,
- (c) to provide a catalyst for the social and economic development of centres within Wyong,
- (d) to deliver significant public benefit to the community.

In relation to Objective (a), it is considered that the development achieves a high standard of design excellence as outlined in design statement prepared by architects Jackson Teece.

In relation to Objective (b), the development facilitates the amalgamation of 13 lots in a logical manner that retains development potential on the adjoining B1 (Neighbourhood Centre Zone) and on the adjoining residential sites to the east.

In relation to Objective (c), the development provides an important contribution to social infrastructure in the area by the provision of a much needed community facility (residential care facility) and to economic activity generally through the provisions of jobs over a range of skills and indirect benefits to suppliers and service providers.

In relation to Objective (d), it is considered that the development would deliver a significant public benefit through the redevelopment of an underutilised site and the provision of a residential care facility to meet the needs of the frail aged and persons with dementia.

4.2 Consistency with the objectives of the zone

The site is within Zone R3 (Medium Density Residential) under the LEP. The objectives of the zone are:

- *“To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To maintain and enhance the residential amenity of the surrounding area.*
- *To encourage amalgamation of existing lots to facilitate well designed medium density development and to avoid unnecessary isolation of lots.”*

The proposed seniors housing is consistent with these objectives in that:

- The development is for seniors housing in a three-storey built form that is a land use and form generally consistent with a medium density residential environment;

- It adds to the variety of housing in the area through the provision of residential care facility which is a form of residential accommodation;
- It comprises a facility that meets the day to day needs of residents in need of care.
- The development is for a residential use and it maintains and enhances the residential amenity of the surrounding area;
- The development incorporates the amalgamation of existing lots to facilitate well designed and avoids unnecessary isolation of lots.

The public interest is best served by the orderly and economic use of land for permissible purposes in a form which is cognisant of and does not impact unreasonably on development on surrounding land, and which satisfies a market demand for a residential care facility.

The amended proposal is in the public interest as it will:

- transform the existing site which is in poor condition in a manner which is compatible with and sympathetic to the existing and future character of the locality;
- provide a residential care facility in the area to meet future demand;
- provide high quality aged care facilities within close proximity to local services, amenities and shops within Toukley town centre;
- have positive social and economic impacts;
- provide a development that is compatible with the amenity of the site and with the adjoining area; and
- exhibit a high-quality design which will provide a high level of amenity for future residents without unreasonable impact on nearby properties.

The amended proposal is consistent with the public interest.

5. Conclusion

Compliance with the maximum building height development standard in Clause 4.3 of Wyong Local Environmental Plan 2013 is both unreasonable and unnecessary in the circumstances of the amended development application for a new Opal Aged Care residential aged care facility at Nos 149-157 Main Road and Nos 6-12 Tamar Avenue, Toukley.

There are sufficient environmental planning grounds to justify the non-compliances, and the amended proposal is in the public interest because it is consistent with the objectives of the development standard, the LEP and the provisions of the Seniors Housing SEPP.

Further, in terms of consistency with the objectives of Clause 4.3, it is considered that strict adherence to the development standard to this particular development is not warranted and relaxing the standard would result in a better form of development.