



**CLAUSE 4.6 REQUEST
TO THE 20M HEIGHT CONTROL
AT CLAUSE 4.3 OF THE
BLACKTOWN LEP 2015**

37 - 43 KILDARE ROAD, BLACKTOWN

**Prepared for
Opal Healthcare**

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1. INTRODUCTION

The Applicant seeks approval for a 2 lot subdivision and erection of a 5 storey Residential Care Facility to be used as Seniors Housing at 37 – 43 Kildare Road, Blacktown. The current development application (DA) was lodged on the 11 December 2015 (see JRPP 2015/02700).

The proposed works seek: -

- Demolition of the existing 4 dwelling houses located at 43, 41, 39 and 37 Kildare Road;
- Subdivision of the site to consolidate existing lots and create 2 lots (Lot 1 - 2,500sqm and Lot 5 - 5212sqm);
- Erection of a 5 level Residential Care Facility providing for 149 'high care' beds and provision of associated support and back-of-house facilities such as kitchens and support offices on lot 2;
- Vehicular access to Kildare Road and provision of 33 above ground car parking spaces, loading area and pick-up facilities; and
- Site landscaping to the access handle and purpose designed gardens around the proposed building suitable for Seniors (often with dementia).

A Clause 4.6 Request was not lodged with the Statement of Environmental Effects ("SEE") prepared to accompany the now lodged DA as the application is lodged under the provisions of the State Environmental Planning Policy Housing for Seniors or People with a Disability 2004 (the Seniors SEPP).

The provisions of the Seniors SEPP prevail over those of the Blacktown Local Environmental Plan 2015 (the LEP) that contains the site's 20m height control.

The SEPP prevails over the LEP where there is an inconsistency. Our view is that clause 48 of the Seniors SEPP provides for the height standard for the site. This standard is a 'can't refuse if you comply' 8m height provision. The proposed building is above 8m; however, this provision does not set an upper limit to the height of the proposed building. The Seniors SEPP's height provisions do not impose any limitations on the grounds on which a consent authority may grant development consent. A building under 8m can't be refused on the grounds of height. A building over 8m can be approved or refused on the grounds of height; however, there is no technical upper limit to this height provision.

Nevertheless, the 20m height control has been treated as a relevant consideration in respect to this development and the proposed building has been designed to generally comply with it. The substantial building is under the 20m height control and the non-compliance is limited to the lift overrun only and limited to a minor non-compliance of 300mm. This portion of the building is also centred within the main roof/ floor plate of the building and has negligible physical and visual impacts.

The applicant's grounds for this request are provided within this written document.

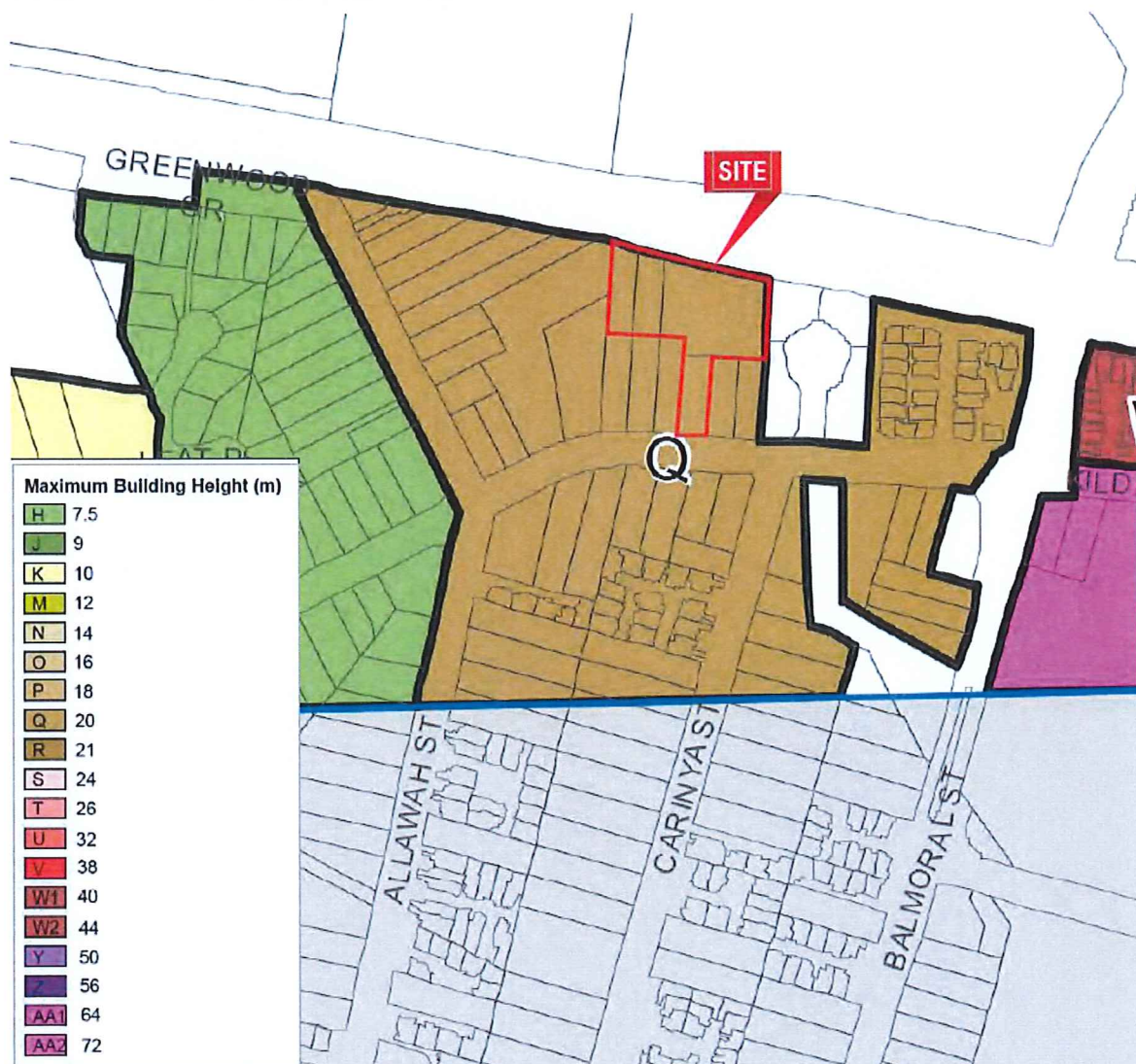
2. CLAUSE 4.6 OBJECTION TO THE HEIGHT CONTROL

2.1 The Height Standard and the Variation Sought

Pursuant to Clause 4.3 of the LEP there is a 20m height control for the site – see extract from LEP height map below.

The proposal seeks to vary the building height by up to 300mm above the permissible height limit of 20m, being a variation of 1.5%. This variation relates to a minor portion of the roof structure, being the lift and stair overrun.

Diagram 1 – LEP Height Map Extract



This document is the Applicant's written request under Clause 4.6 (4) of the LEP for this control to be varied in this instance.

2.2 The Clause 4.6 Tests

The relevant matters to consider under Clause 4.6 of the LEP are addressed below.

2.2.1 Clause 4.6 3 (a): that compliance with the development standard is ***unreasonable or unnecessary in the circumstances of the case,***

The objectives of the site's R4 High Density Residential zone under the LEP are provided below.

"Zone R4 High Density Residential

1 Objectives of zone

- To provide for the housing needs of the community within a high density residential environment.*
- To provide a variety of housing types within a high density residential environment.*
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- To enable certain activities to be carried out within the zone that do not adversely affect the amenity of the neighbourhood.*
- To permit residential flat buildings in locations close to public transport hubs and centres".*

These zone objectives and the accompanying controls envisage robust 6 storey development on the site. For example, a floor space control is not attached to R4 zoned lands.

The proposed building is 5 storeys. The non-compliance with the height control is confined to 300mm of the lift core/ stair overrun. This part of the building is located within the middle of the roof/ floor plate and has no real impact (in respect to shadows etc). The non-compliant part of the building will only cast a shadow on the roof of the building and is not highly visible from the public domain.

In a practical sense, the proposed building has the environmental impacts of a building that is fully compliant with the 20m height control.

The proposal is a high-quality 5 storey Residential Care Facility that is contextually appropriate. In this instance the additional height proposed is intrinsically linked to providing a functional building (i.e. lift access) and minor (i.e. limited to 300mm non-compliance to the lift overrun only).

2.2.2 Clause 4.6 3 (b): that there are sufficient environmental planning grounds to justify contravening the development standard.

As discussed in the Introduction, the current DA is lodged under the Seniors Housing SEPP and the provisions of this SEPP provide for a height provision that supersedes the 20m height control at clause 4.3 of the LEP.

The basis of this view is outlined below.

At clause 5 the Seniors SEPP relationship to other planning instruments is outlined below (our emphasis added).

"5 Relationship to other environmental planning instruments

- (1) This Policy repeals State Environmental Planning Policy No 5—Housing for Older People or People with a Disability.*
- (2) Despite anything to the contrary in this Policy:*
 - (a) a consent authority may not grant consent to a development application made pursuant to Chapter 3 in relation to the land referred to in clause 4 (9) if the proposed development does not comply with the requirements of clause 65 (5) of Sutherland Shire Local Environmental Plan 2000 relating to development for the purposes of seniors housing, and*
 - (b) the provisions of clause 65 (5) of Sutherland Shire Local Environmental Plan 2000 relating to development for the purposes of seniors housing prevail over the provisions of this Policy to the extent of any inconsistency.*

Note. Clause 7 (2) (a) of Sutherland Shire Local Environmental Plan 2006 continues the application of Sutherland Shire Local Environmental Plan 2000 to the land referred to in clause 4 (9).

Clause 65 (5) of Sutherland Shire Local Environmental Plan 2000 (when read with clause 4 in Part 1 of Schedule 8 to that Plan):

- (a) applies the development standards in Parts 4 and 7 of Chapter 3 of this Policy to development for the purposes of seniors housing on the land referred to in clause 4 (9), and*
- (b) provides for those development standards to prevail to the extent of any inconsistency with development standards set out in Part 1 of Schedule 8 to the Plan for such development on that land.*
- (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.***
- (4) This Policy does not affect a provision in another environmental planning instrument that relates to the demolition of a heritage item."*

Then at clause 48 there is a general height provision in the SEPP provided below (again our emphasis added).

"40 Development standards—minimum sizes and building height

(1) 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.

(2) Site size

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

(3) Site frontage

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

(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**

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 height control at clause 40(4) of the Seniors SEPP does not apply to the site, as residential flat buildings are permissible in the site's R4 zone.

The relevant height provision for the site is a non-discretionary development standard provided at clause 48 of the Seniors SEPP provided below and again our emphasis added.

"48 Standards that cannot be used to refuse development consent for residential care facilities

A consent authority must not refuse consent to a development application made pursuant to this Chapter for the carrying out of development for the purpose of a residential care facility on any of the following grounds:

- (a) building height: if all proposed buildings are 8 metres or less in height (and regardless of any other standard specified by another environmental planning instrument limiting development to 2 storeys), or**
- (b) density and scale: if the density and scale of the buildings when expressed as a floor space ratio is 1:1 or less,**
- (c) landscaped area: if a minimum of 25 square metres of landscaped area per residential care facility bed is provided,**
- (d) parking for residents and visitors: if at least the following is provided:**
- (i) 1 parking space for each 10 beds in the residential care facility (or 1 parking space for each 15 beds if the facility provides care only for persons with dementia), and**
 - (ii) 1 parking space for each 2 persons to be employed in connection with the development and on duty at any one time, and**
 - (iii) 1 parking space suitable for an ambulance.**

Note. The provisions of this clause do not impose any limitations on the grounds on which a consent authority may grant development consent.

A non-discretionary development standard is in effect a 'can't refuse the development if that development complies with that control' provision.

In this instance, the development is over the 8m height provision at clause 48(a), however the provisions of this clause state that a consent authority may approve a building over 8m.

Regardless of the actual statutory status of the 20m height control, the building was designed cognisant and respectful of the 20m LEP height control (noting the substantial building complies with this control). The actual portion of the building over the 20m height control is limited to 300mm of the lift overrun and lacks impact.

The 20m LEP height control is inconsistent with the height provisions of clause 48; therefore, the provisions of the SEPP prevail over those of the LEP.

There are no significant environmental planning impacts associated with the non-compliance with the height control and hence no grounds to justify seeking compliance with this control. The non-compliance is minor and is without unreasonable impact and the building as a whole provides for a sound urban planning outcome for the site.

2.2.3 Clause 4.6 (4) (a) (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,

The objectives of the height control at Clause 4.3 of the LEP are:-

4.3 Height of buildings

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

- (a) to minimise the visual impact, loss of privacy and loss of solar access to surrounding development and the adjoining public domain from buildings,***
- (b) to ensure that buildings are compatible with the height, bulk and scale of the surrounding residential localities and commercial centres within the City of Blacktown,***
- (c) to define focal points for denser development in locations that are well serviced by public transport, retail and commercial activities,***
- (d) to ensure that sufficient space is available for development for retail, commercial and residential uses,***
- (e) to establish an appropriate interface between centres, adjoining lower density residential zones and public spaces.***

While the building is not located on commercially zoned land, it is located in the Design Excellence precinct around the core commercially zoned areas of Blacktown and is in close proximity to those commercially zoned areas and the Blacktown Railway Station. The site's zoning and planning controls are designed to integrate it into the Blacktown commercial centre.

In respect to objective (a), the variation to the height control is confined to the lift overrun and limited to 300m. The substantial building is well under the 20m height control and the building will have the environmental impact of a compliant building. Objective (a) is satisfied.

In respect to objective (b), the site is located in an R4 High Density zone and within the Blacktown commercial centre precinct. The site and its immediate surrounds are identified for high density development of 5-6 storeys. In this instance a 5 storey Residential Care Facility is proposed. For example, there are 6 storey residential flat buildings to the west of the site on Kildare Road and on the proposed Lot 1 of this site a 6 storey residential flat building is proposed (see DA-16-02941). The height of the proposed building is compatible with the existing and emerging bulk and scale of buildings in this locality.

In respect to objective (c), as discussed above the site is located in the Blacktown commercial centre and the bulk and scale of this building is appropriate to this locality. The minor variation to the height control does not result in a building form that would be out-of-place in this locality. Objective (c) is satisfied.

In respect to objective (d), the proposed building is to be used as a Residential Care Facility and provide vital aged care services to the Blacktown community. The building is a purpose built Residential Care Facility and its location in the Blacktown commercial precinct, close to transport and services, is very appropriate in terms of the allocation of the development potential of this site. For example, the development of the site for general housing purposes would not have such a broad community based benefit as the proposed building. The proposal satisfies objective (d).

In respect to objective (e), the site is located in a high density zone that is part of the Blacktown commercial centre and as discussed the bulk and scale of the proposed building is very appropriate to this location. Objective (d) is satisfied.

The proposed development is in the public interest as it is consistent with the objectives of the height control and successfully implements the intent of its R4 zoning by providing a high quality Residential Care Facility. The proposal also provides a comprehensive landscape scheme for the site that includes substantial plantings.

To enforce numerical compliance with the height control and deny this building appropriate services (i.e. a functional lift core) would be contrary to the purpose of this zone and the site specific controls and objectives for this site. In this instance providing a functional 5 storey building on the site is more important than numerical compliance with the 20m height control.

The non-compliance with the 20m height control is considered to be in the public interest.

2.2.4 Clause 4.6 (4) (b): the concurrence of the Director-General has been obtained.

It is assumed the concurrence of the Director-General is delegated to the relevant consent authority in this instance Blacktown Council. Nevertheless, the relevant matters to be considered by the Director are briefly considered below.

2.2.5 Clause 4.6 (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.*

In this instance, the breach of the height control standard is limited and without impact.

The proposed non-compliance with the 20m height control does not raise any matters of significance for State or regional environmental planning.

There is no public benefit in maintaining this standard. In this instance maintaining the standard would deny approval to an efficient and high quality building that is implementing the objectives of its zoning.

There are considered to be no other matters relevant to the Director's concurrence in this instance.

2.2.6 The 'Five Part Test'

In addition to the above requirements, Councils may choose to not only use the principles of Clause 4.6 but also the 'five part test' established by the Land and Environment Court.

Court cases dealing with applications to vary development standards resulted in the Land and Environment Court setting out a five part test for consent authorities to consider when assessing an application to vary a standard to determine whether the objection to the development standards is well founded. The 'five part test' is outlined as follows:-

- "1. the objectives of the standard are achieved notwithstanding noncompliance 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 of 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."*

In relation to point (1):-

The proposal meets the relevant objectives of the height development standard, as detailed above.

In relation to point (2):-

We would argue that this part of the test contradicts the first point in the test. We have outlined that the objectives of the standard are still met despite the non-compliance with the standard. It would be unusual to find a situation where the underlying objective is not relevant to a development.

In relation to point (3):-

If strict numerical compliance was required with the 20m height control, then an unreasonable burden would be imposed on the site in respect to providing access to its 5 levels. The non-compliance proposed with the 20m height control is limited to a 300mm extension of the buildings lift core (not an additional level). In general, 6 storey residential flat buildings are the emerging form of development in the adjoining R4 High Density zoned lands. An institutional building such as a Residential Care Facility has a requirement for higher floor to ceiling heights than a residential flat building. A Residential Care Facility also has broader community benefits than a residential flat building. It would be unreasonable to strictly impose the 20m height control in this instance and not give some consideration to functional requirements of the building and its broader community benefits.

In relation to point (4):-

We do not have access to Council's records to know how Clause 4.6 has been determined since it was introduced. However, we do note the current application for the front portion of the site is for a 6 storey residential flat building that includes a more significant variation to the 20m height control (see DA-16-02941) than proposed in this instance.

However, we would say that each application is to be assessed on its merits and departing from the standard when there is merit in doing so does not destroy the development standard.

In relation to point (5):-

The Applicant does not rely on this point.

2.2.7 Four2Five Pty Ltd v Ashfield Council decision

This clause 4.6 Request is prepared cognisant and in accordance with recent Court decisions on the proper consideration of such requests as outlined in the Four2Five Pty Ltd v Ashfield Council decision and its recent judicial review (see [2015] NSWLEC 90). In this case the Court considered that the justification under clause 4.6(3) (b) required 'particular reference to the circumstances of the proposed development'. In practice, this means a request needs a site specific justification. In this submission additional grounds to the submitted clause 4.6 Request are provided.

In this instance the emerging character of the adjoining R4 zoned land and the broader community benefits that accompany this DA are considered to be the proposal's site specific justifications for the proposed minor non-compliance with the 20m height control in this instance.

The emerging scale of development in the adjoining R4 zoned lands is 6 storey, the proposal is 5 storeys. The proposed and minor non-compliance with the height control is not associated with a building that will look out-of-place in its locality.

As discussed, an institutional building such as a Residential Care Facility has a requirement for higher floor to ceiling heights than a residential flat building. A Residential Care Facility



also has broader community benefits than a residential flat building. It would be unreasonable to strictly impose the 20m height control in this instance and not give some consideration to the functional needs of the building and its broader community benefits.

There are also no environmental planning grounds to justify seeking compliance with the height control in this instance, as the non-compliance is limited and without unreasonable impact and the building as a whole provides for a sound urban planning outcome for the site.

3. CONCLUSION

The objectives of Clause 4.6 of the LEP are:-

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

The proposal is consistent with the objectives of Clause 4.6, the height control, its zoning and specific policy requirements for this site.

Our view is that the application is made under the Seniors SEPP and that the 20m LEP height control does not apply to this development.

However, this Clause 4.6 Request is provided in the prescribed form and can be used to address the policy issue poised by the developments compliance with the 20m height control.

The additional height sought is for a minor extension of the building's lift core by 300mm over the control. The substantial building is well under the 20m height control and the proposed building is 5 storeys; the merging scale of buildings in the adjoining R4 zoned lands is 6 storeys.

The proposal will deliver a well-designed, high-quality, Residential Care Facility which will provide a high quality institutional building to the Blacktown community in an accessible location. Blacktown's community is aging and there is a need for this type of building. Also, within a Residential Care Facility good lift access is more important than within a general residential building noting the often impaired nature of the building's user. The minor non-compliance with the height standard is associated with providing access throughout the building.

The proposal also demonstrates an absence of environmental harm associated with its non-compliance with the 20m height standard.

Having regard to the above, it can be concluded that compliance with the height standard is unreasonable and unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify the non-compliance and that the proposal is in the public interest because it is consistent with the objectives both of the height standard and those of the R4 zone.

Therefore, the non-compliance is inherently reasonable.