

Clause 4.6 Exemption Request to Development Standards- Height

No 144- 146 Killeaton Street, 1 Yarrabung Road and 1-5 College Crescent
St Ives.

Demolition of 6 x dwellings and construction of a 120 bed high-care aged care facility



Prepared by:

On Behalf of:

Smyth Planning

Suite 67, 330 Wattle Street

ULTIMO NSW 2007

Ph: 9211 3366 Fax: 9211 8081

Email: rm@smythplan.com



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1 Introduction

This Clause 4.6 Development Standard Exemption Request is submitted in support of a Development Application (DA) for the demolition of 6 x residential dwellings and the construction of a new 120 bed high-care aged care facility for Estia Health, an established aged care provider. The DA has been made under State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 ("SEPP Seniors Living"). This Exemption Request is made with respect to the development standard set by clause 40(4)(a) & (b) of SEPP Seniors Living, which sets a maximum height of 8m and 2 storeys for development under that instrument.

It is noted that this Exemption Request is made under c.14.6 of Ku-ring-gai LEP (City Centres) 2012 (and not State Environmental Planning Policy No1 – Development Standards) as a result of cl1.9(2) and cl4.6(2) of that instrument. SEPP 1 does not apply to land in Ku-ring-gai, and cl 4.6 is to be used to vary standards under the LEP and "any other environmental planning instrument," including SEPP Seniors Living. Nevertheless this Exemption Request may equally be treated as an objection under SEPP 1, and equally satisfies the requirements of that instrument.

This Request should be read in conjunction with the Statement of Environmental Effects prepared by Smyth Planning dated July 2016. It relates to the permissible maximum height in storeys set by cl 40 (4)(a) & (b) of SEPP Seniors 2004.

SEPP Seniors Living Clause 40(4) applies in residential zones where residential flat buildings are not permitted and sets development standards for height in metres (**maximum 8m** – subclause (a)), storeys (**maximum 2 storeys** – subclause (b)) and imposes a single storey height control for the rear 25% area of sites (subclause (c)). The subject site has 3 x street frontages and no "rear" so that sub-clause (c) is not applicable.

The proposal exceeds the 8m height control having a maximum height of 8.9m and exceeds the 2 storey height control in the central part of the RACF above the basement as illustrated in the following diagrams at **Figures 1-3**. Notably the design achieves full compliance along the street elevations and all parts of the building visible from the public domain.

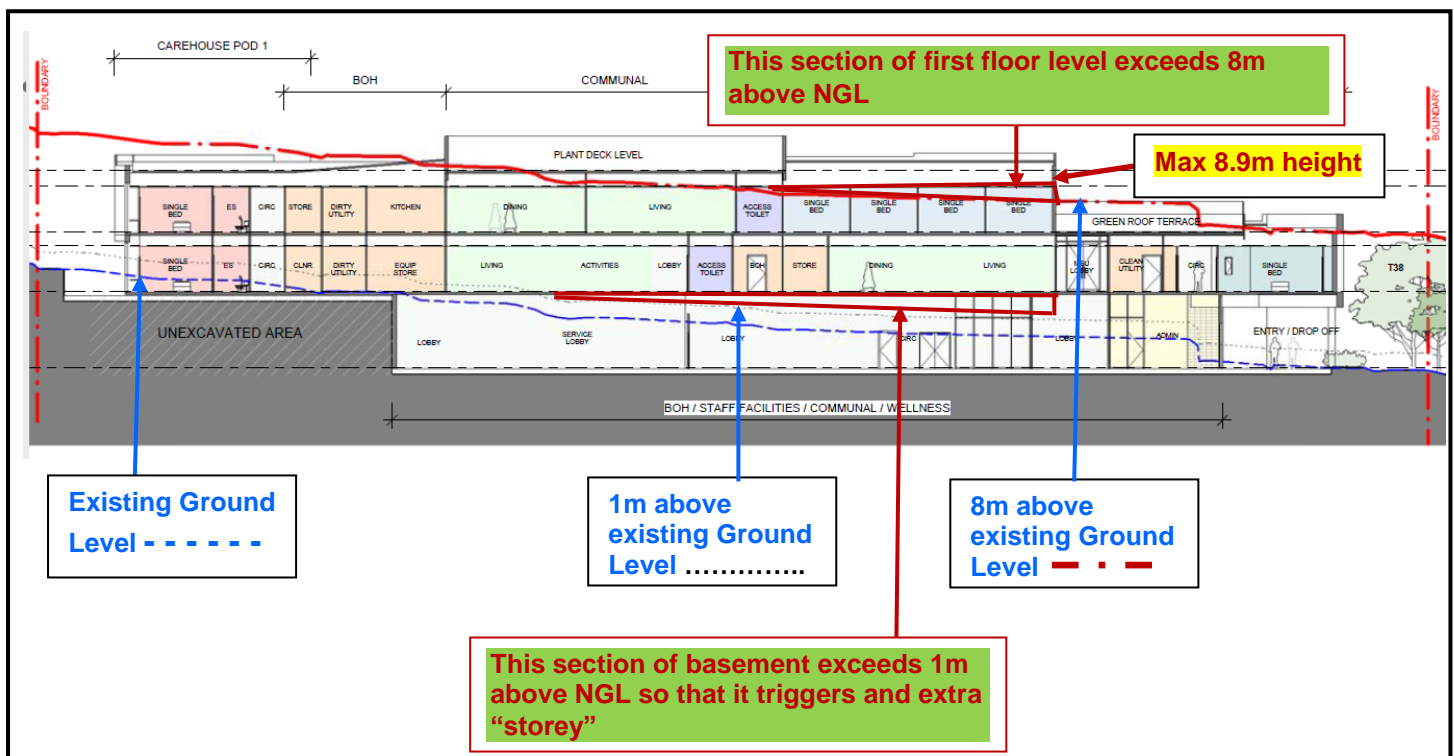


Figure 1 Section – West (No 142 Killeaton St) to East (Yarrabung Rd) – illustrating maximum height exceedances within the development

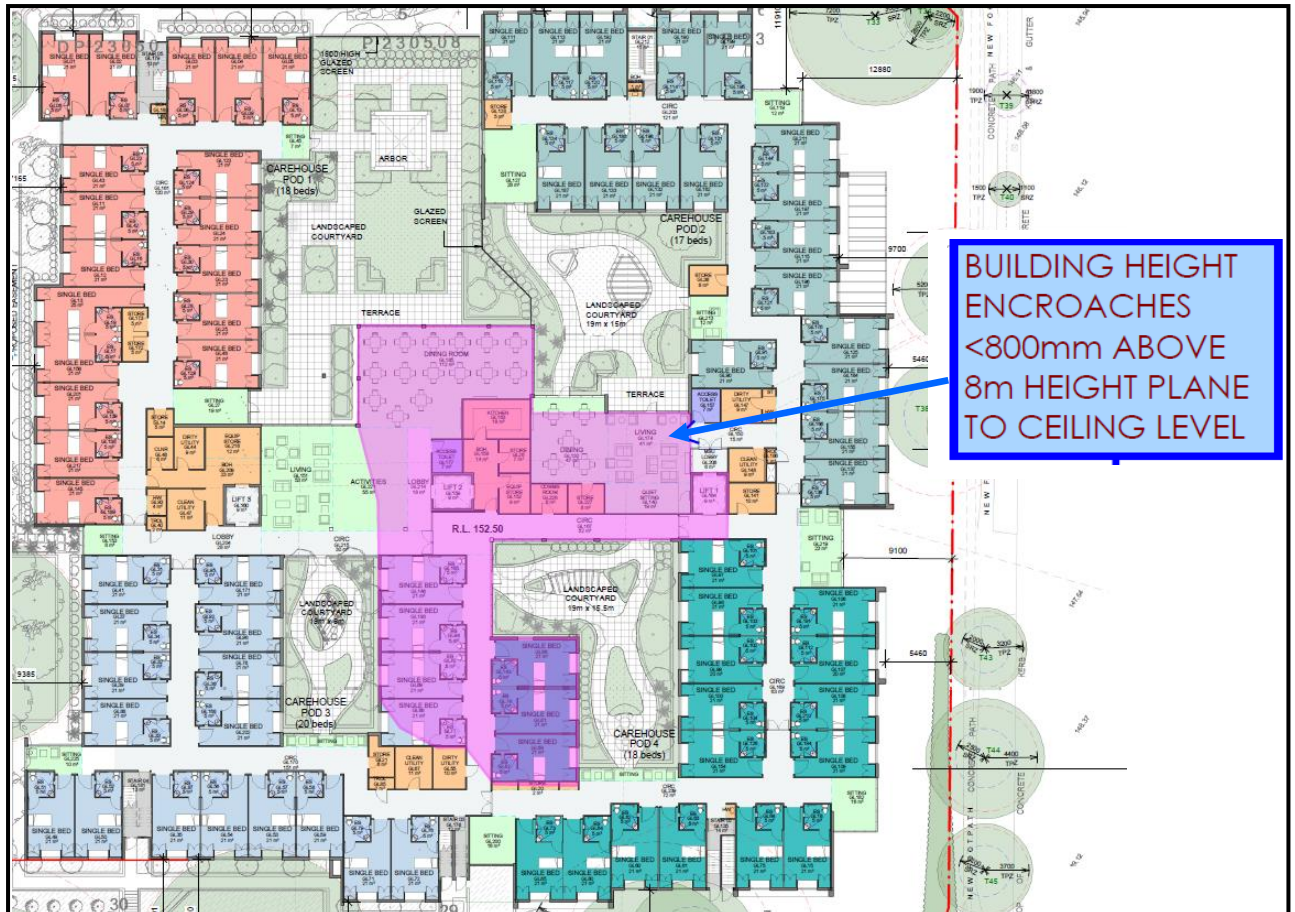


Figure 2 - Ground floor plan – with area over 8m in height highlighted

Source: MDP

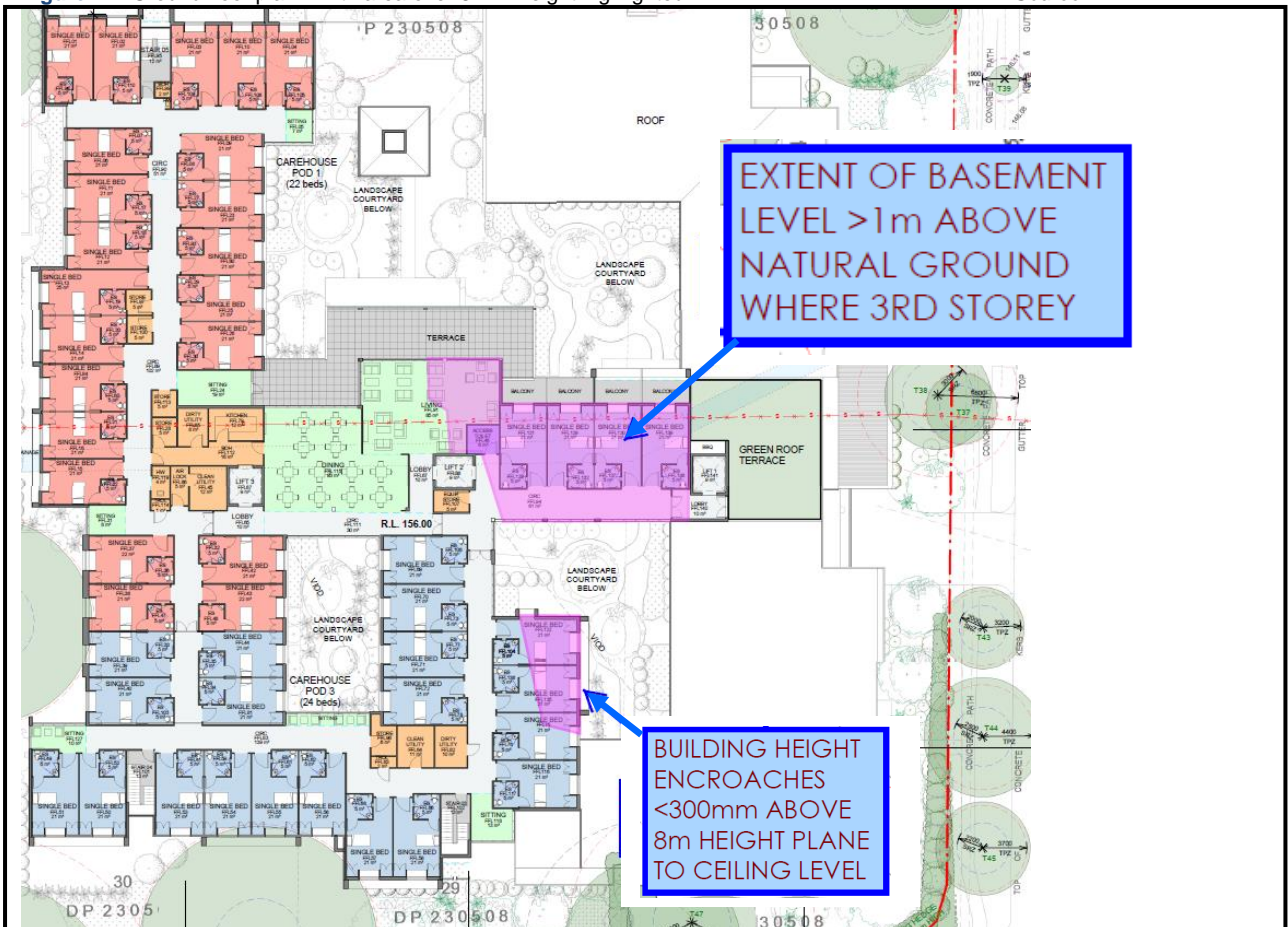


Figure 3 - First floor plan – with area of 8m height exceedance and 3rd storey sections highlighted

Source: MDP

This application has been prepared in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline Varying development standards: A Guide, August 2011, and has incorporated as relevant the latest authority on clause 4.6, contained in the following judgements:

1. Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46
2. Wehbe v Pittwater Council [2007] NSWLEC 827
3. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No 1')
4. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 ('Four2Five No 2')
5. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 248 ('Four2Five No 3')

A key principle that stems from *Four2Five v Ashfield* case is that the sufficient environmental planning grounds have to be particular to the circumstances of the proposed development to the site. As a result of *Four2Five*, it is now necessary to demonstrate something more than achieving the objective of the standard. A development that contravenes the development standard, and as a result that achieves the object of the development standard to a greater degree than a development that complied with the standard, would suffice. This aspect is addressed at the section 4.2.

Definitions

SEPP Seniors defines height but not storeys. The following SEPP definitions are relevant to calculating height and the interpretation of the basement carpark height in storeys;

Clause 3(1):

car park means a building or place primarily used for the purpose of parking motor vehicles, including any manoeuvring space and access to the building or space, whether operated for gain or not.

ground level means the level of the site before development is carried out pursuant to this Policy.

Height in relation to a building, means the distance measured vertically from any point on the ceiling of the topmost floor of the building to the ground level immediately below that point.

Clause 3(2)

In calculating the number of storeys in a development for the purposes of this Policy, a car park that does not extend above ground level by more than 1 metre is not to be counted as a storey.

Even though the car park level renders the building 3 storeys in height within the centre of the development, the non-compliance is technical only, in the sense expressed by the Court in *Boston Blyth Fleming Pty Ltd v Pittwater Council* [2010] NSWLEC 1203 at [42]. The additional "storey" gives rise to no additional impacts and cannot be perceived.

1.1 Clause 4.6 Framework

The objective of Clause 4.6 is to allow flexibility in the application of numeric development standards. The relevant Clauses of *Ku-ring-gai (City Centres) LEP 2012* are:

Clause 4.6(1) of *Ku-ring-gai (City Centres) LEP 2012* states that the objectives of the clause are:

- | | |
|--|---|
| <ol style="list-style-type: none"> (a) (b) | <p>"to provide an appropriate degree of flexibility in applying certain development standards to particular development, and</p> <p>to achieve better outcomes for and from development by allowing flexibility in particular circumstances".</p> |
|--|---|

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”. However this clause does not apply to a development standard that is expressly excluded from the operations of this clause.

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 State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004. The height in metres and storeys standards applicable to the site is found in SEPP Seniors cl 40(4)(a) and (b), and is as follows:

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.

"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”.

SEPP Seniors Clause 40(4)(a) and (b) sets a numerical standard for

- “the height of all buildings in the proposed development must be 8 metres or less”
- “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”.

Accordingly these height controls are a development standard.

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

The Note to cl. 40(4)(b) of the SEPP expressly states the objective of the height in storeys control. The objective is clear and unambiguous and could reasonably be applied to cl40(4)(a) height in metres control.

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

This objective is picked up by SEPP CI 33 Neighbourhood amenity and streetscape which contains additional design provisions in respect of height (the relevant provision is [highlighted](#)):

The proposed development should:

- (a) recognise the desirable elements of the location’s current character (or, in the case of precincts undergoing a transition, where described in local planning controls, the desired future character) so that new buildings contribute to the quality and identity of the area, and
- (b) retain, complement and sensitively harmonise with any heritage conservation areas in the vicinity and any relevant heritage items that are identified in a local environmental plan, and
- (c) [maintain reasonable neighbourhood amenity and appropriate residential character by:](#)
 - (i) providing building setbacks to reduce bulk and overshadowing, and
 - (ii) using building form and siting that relates to the site’s land form, and
 - (iii) [adopting building heights at the street frontage that are compatible in scale with adjacent development, and...](#)

In terms of building height, cl 33 requires the same outcome as the note to cl 40(4)(b), namely that at the frontage, buildings are to be of a compatible scale to adjacent development, ie no abrupt changes.

The SEPP itself contains no specific objectives relating to height in metres. **KLEP2012** provides the following general objectives with respect to height (in metres) controls;

- (a) to ensure that the *height of development is appropriate* for the scale of the different centres within the hierarchy of Ku-ring-gai centres,
- (b) to establish a *transition in scale* between the centres and the adjoining lower density residential and open space zones to protect local amenity,
- (c) to enable development with a *built form that is compatible with the size of the land* to be developed.

The subsidiary objectives are taken from Seniors Housing Policy **Section 4 Impacts on Neighbours** , Objectives as follows;

- to minimise impacts on the privacy and amenity of existing neighbour dwellings
- to *minimise overshadowing* of existing dwellings and private open space by new dwellings
- to *retain neighbours views and outlook* to existing mature planting and tree canopy
- to *reduce the apparent bulk* of development and its impact on neighbour properties
- to provide *adequate building separation*

2 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 *NSWLEC Four2Five Pty Ltd v Ashfield Council 2015*, Pearson C found that due to the consistency in language used in SEPP 1 Development Standards and Clause 4.6 that when determining whether compliance with a development standard is unreasonable or unnecessary under Clause 4.6 that the consideration provided in *NSWLEC Wehbe v Pittwater 2007* (typically applied to SEPP 1) may be of assistance.

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.*

The above list is not considered to be exhaustive, and other grounds for establishing that compliance is unreasonable or unnecessary may also be relied upon (*Liberty Investments Pty Ltd v Blacktown City Council [2009] NSW LEC 7* at [29]).

Methods 1, and 4 are of relevance to the proposed development.

These points are discussed in more detail ahead.

2.1 Compliance with the objectives of the control

Objectives Generally

The objective of the control is expressly stated in the note to cl40(4)(b):

to avoid abrupt changes in scale in the streetscape

There is clearly no abrupt change in the scale of buildings in the streetscape resulting from the proposal and indeed the proposal presents as smaller in scale than the proposed adjoining (3-storey) townhouse development at No.142 Killeaton Street (DA233/16) and is significantly smaller in scale to the new residential flat buildings at 128-132 Killeaton Street, St Ives as denoted in the Streetscape Elevation prepared by MDP and Taylor Brammer Landscape Architects at **Figure 4** below;



Figure 4- Killeaton Street elevation (with existing trees and proposed plantings). DA233/16 denoted in red outline.

There can be no debate that the express objective of the control is met, and to require compliance with the control is unnecessary and unreasonable. On this basis alone, this exemption request should be upheld.

To the extent that the subsidiary objective of the control can broadly be stated:

to mitigate impacts of the proposal on adjoining development.

With respect to this subsidiary objective, this is principally a function of the overall height, especially at the boundary, of the development. The additional height/storey, occurs internally within the RACF building and so does not impinge upon the amenity of adjoining residential development.

What is read from adjoining development and from the street is a 2 storey building that is compliant under the height control set by SEPP Seniors Living and also significantly lower in height than existing/future development that adjoins the subject site on its western boundary.

With respect to anticipated redevelopment other than under the SEPP, Ku-ring-gai Local Environmental Plan (City Centres) 2012 (KLEP 2012) sets a maximum height control of **9.5m** measured to the highest point of the building (cl 4.3). However, KLEP 2012 does not impose any development standards that limit height to two (2) storeys. While the Ku-ring-gai Development Control Plan 4.C1 Building Envelopes does not apply to Seniors Housing, it allows for dwelling houses to “present as a 2-storey dwelling” in the R2 zone and thus makes it possible to achieve 3 storeys within the development where it is not visible from the public domain eg in respect of sloping sites.

With the absence of a 2 storey height standard from in KLEP 2012, its reasonable to assume that part 2 /part 3 storey developments could potentially occur in R2 zones particularly where there is sloping topography.

The impacts of the proposal on adjoining development resulting from height, whether in storeys or metres, are entirely consistent with the impacts that would be expected from any redevelopment of the subject site. Given the purpose of the SEPP to promote housing for seniors and people with a disability by setting aside local planning controls (cl 2, cl 15) the objective of any SEPP control cannot be to achieve a lesser impact than would be generated by compliance with the local controls. Given that the proposal achieves compliance with both 8m/2 storeys along the respective building elevations, it must be inferred that the impacts of the proposal on adjoining development as they relate to height (whether in metres or storeys) are acceptable.

Both objectives as broadly stated above are met, and are considered in more detail below.

Principal Objective:

The 2 storey height standard to which the site is subject under SEPP Seniors is exclusive to residential zones which do not permit residential flat buildings. The sole stated objective of the control is *“to avoid an abrupt change in the scale of development in the streetscape”*.

The subject proposal achieves a 2 storey presentation to all street frontages and the neighbouring western boundary which is zoned to permit 3 storeys/11.5m building height (measured to ridge).

The streetscape elevations overleaf (Source: MDP) illustrates the compatibility with adjoining houses and future townhouse developments. The lower density housing within the R2 zoned lands (KLEP2015) to the east/north/south are physically separated from the site by Killeaton Street, Yarrabung Road and College Crescent respectively. Accordingly, the direct impacts in terms of a change in scale on the lower density zones is diminished by distance separation and screen plantings within the road reserve. Given the proposed development achieves a maximum 2-storeys / 8m height when viewed from the public domain, there is no abrupt change in the scale of development in the streetscape. Infact, given the site's location adjacent to R3 and R4 zones on its western boundary, the proposal achieves an appropriate transitional built form that steps down from the 4-6 storeys at No 132-138 Killeaton Street and the (future) 3 storeys at No 140 & 5-11 College Crescent and 142 Killeaton Street properties.

Clause 2 of SEPP Seniors Living sets out the aims of that instrument and the means by which the aims of the Policy are to be achieved:

2 Aims of Policy

- (1) *This Policy aims to encourage the provision of housing (including residential care facilities) that will:*
 - (a) *increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and*
 - (b) *make efficient use of existing infrastructure and services, and*
 - (c) *be of good design.*
- (2) *These aims will be achieved by:*
 - (a) *setting aside local planning controls that would prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this Policy, and*
 - (b) *setting out design principles that should be followed to achieve built form that responds to the characteristics of its site and form, and*
 - (c) *ensuring that applicants provide support services for seniors or people with a disability for developments on land adjoining land zoned primarily for urban purposes.*

The proposal responds to the sloping site by presenting a two storey height to all street frontages/building elevations and confining the additional height to the centre of the site.

In effect the storeys “breach” occurs below ground/street level of the new development and is not visibly discernible. The proposal thus meets the stated objective *“to avoid an abrupt change in the scale of development in the streetscape”*.

In addition to the primary streetscape objective of the control being met by this development, the underlying objectives in relation to streetscape impacts and impacts on neighbours objectives contained within the “Seniors Housing Policy”, replicated below, are also met:

- “To minimise impacts on the existing streetscape and enhance its desirable characteristics
- To ensure that new development, including the built form, front and side setbacks, trees, planting and front fences , is designed and scaled appropriately in relation to the existing streetscape
- To minimise dominance of driveways and carpark entries to the streetscape
- To provide high level activation and passive surveillance to the street”

- “to minimise impacts on the privacy and amenity of existing neighbour dwellings
- to minimise overshadowing of existing dwellings and private open space by new dwellings
- to retain neighbours views and outlook to existing mature planting and tree canopy
- to reduce the apparent bulk of development and its impact on neighbour properties
- to provide adequate building separation”

The proposed development is considered to perform favourably in relation to the underlying “Seniors Housing Policy” objectives of on the following grounds:

Streetscape

- The subject site is located within the area covered by Ku-ring-gai (City Centres) LEP 2012 which up-zoned land immediately adjoining the site to R3 (Medium Density) and R4 (High Density). Refer **Figure 5** KLEP 2012 zone map and **Figure 6** KLEP2012 height map extract below:

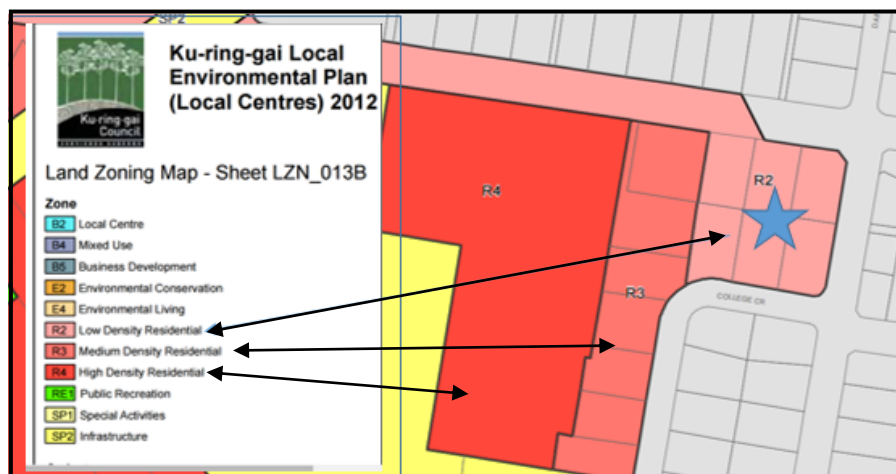


Figure 5 - Zone Map extract .

Source - <http://www.kmc.nsw.gov.au/>

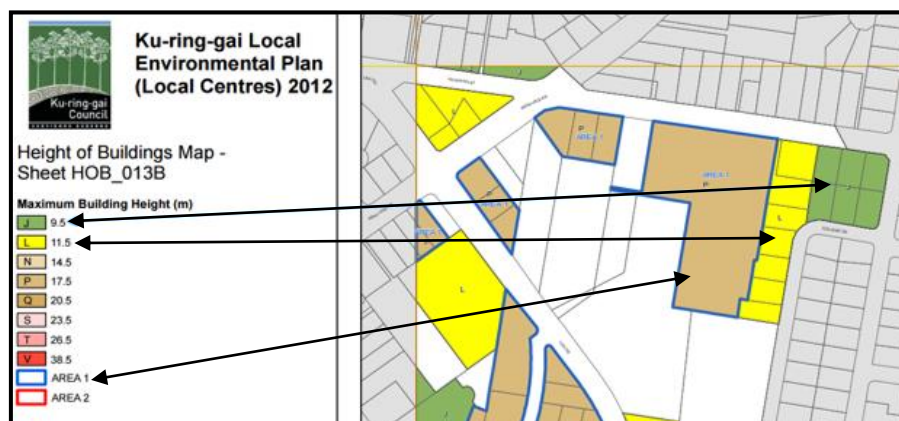


Figure 6: Height of Buildings Map extract

Source - <http://www.kmc.nsw.gov.au/>

The R4 zoned site has been developed for residential (“Meriton”) apartments with a 4-6 storey building being located at the frontage of 128-132 Killeaton Street property. Immediately adjoining the site’s western boundary is No 142 Killeaton Street which is zoned R3 with a 11.5m KLEP2012 height control and is the subject of DA 233/16 (lodged 25-5-16) for 10 x 3-storey townhouses over a basement carpark. No 140 Killeaton Street and 7-11 College Crescent to the south-west and west of the RACF site was approved for 27 x 3-storey townhouses over a basement car park on 26-4-16.

Refer aerial photo at **Figure 7** and the **Figure 8** photo of No 138-142 Killeaton Street frontage and 3-D montage lodged for DA233/16 (townhouses on No 142 Killeaton St) at **Figure 9** overleaf which illustrate the site and its proximity to existing/proposed high-density housing forms.



Figure 7: Aerial Photo showing site and adjoining development/zones

Source:nearmap



Figure 8: Residential Flat “Meriton” development at 132-138 Killeaton St

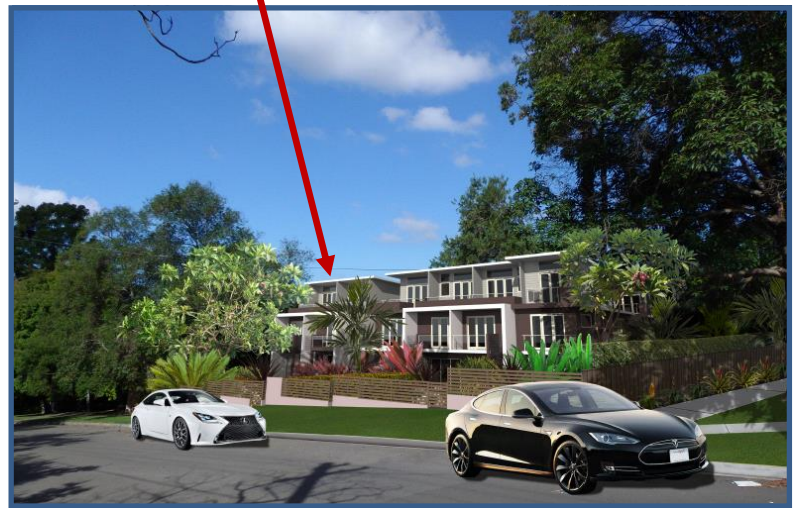


Figure 9: Proposed townhouses at 142 Killeaton St

Source:DA 233/16

The portion of the subject RACF where the height variation is sought is nearest Yarrabung Road and is currently occupied by a 2-storey residence with triple garage street presentation. Refer **Figure 10** (No 1 College Crescent) overleaf.



Figure 10: No 1 College Crescent residence to be demolished

The land to the east (Zoned R2 under KLEP 2015) comprises a mix of single and 2-storey residential dwellings including the development opposite No 1 College Crescent which is occupied by 1-2 storey attached residences (No 2B & 2C Yarrabung Road) per **Figure 11** below.



Figure 11: No 2B & 2C Yarrabung Road located opposite No 1 College Crescent property

Source: google

The portion of the building which exceeds the height controls is located on the eastern part of the RACF near (but not visible from) Yarrabung Road. While it is acknowledged the Yarrabung Road (eastern side) would have a different streetscape to that of the proposed RACF opposite, the invisibility of the non-compliant floor space from the public domain, combined with its substantial landscape screening along the Yarrabung Road elevation (including 1/3 of the frontage being set behind a 3-4 metre high hedge) will achieve a contributory streetscape contribution and arguably less visually dominant than the attached dwellings opposite the site at 2B/2C Yarrabung Road. **Figure 11** below illustrates the proposed RACF streetscape elevation from Yarrabung Road including the existing trees/hedges which are to be retained together with the proposed additional landscaping to achieve a positive streetscape presentation. Note: The landscape treatment denoted below has been overlain onto the MDP elevations by Taylor Brammer Landscape Architects to illustrate actual streetscape elevations as the RACF incorporating both existing tree plantings (shown at current heights) and the proposed landscape embellishments (shown at mature size);

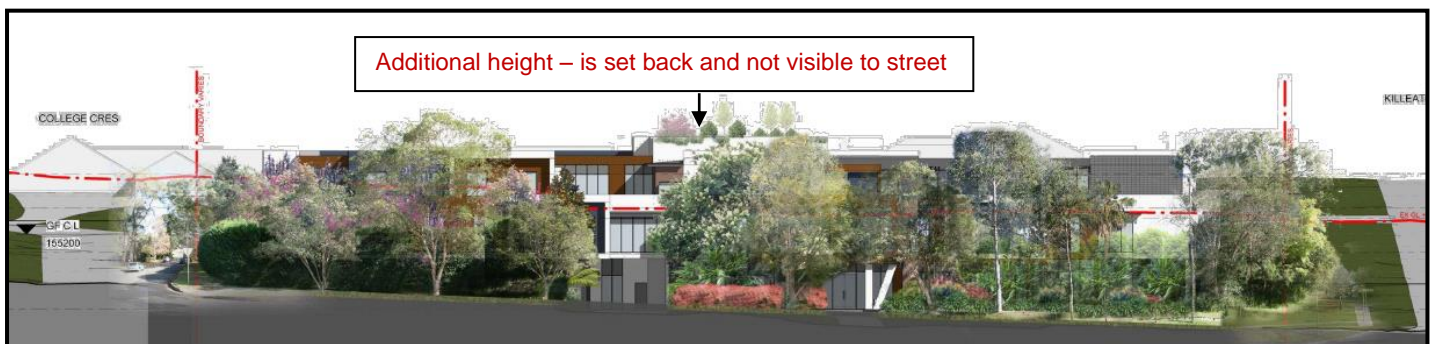


Figure 12- Yarrabung Road street elevation (with existing trees and proposed plantings)

The proposed RACF when viewed from the south (College Crescent) presents to the street as partly 2-storey (No 3-5 College Crescent) and near 1-storey (along southern end of No 1 College Crescent) near the SE corner of the RACF. Thus the single storey element at the SE corner of the RACF will be screened from view by the existing 3-4m height hedge as illustrated in the 3D montage at **Figure 13** and **Figure 14** Streetscape Elevation below;



Figure 13: 3D montage of RACF viewed from SE (corner Yarrabung Road and College Crescent)
(**Note:** Additional building height sought is not visible from Yarrabung Road or College Crescent)



Figure 14- College Crescent street elevation (with existing trees and 3-4m height hedge and proposed plantings)
(**Note:** DA131/15 3 storey townhouses approved 26-4-16 envelope is outlined in red)

Driveway/carpark

- The proposal achieves a near level basement entry from Yarrabung Road. Lowering the overall building height by lowering the basement level would result in an overall lowering of the development (to maintain consistent/accessible floor levels across the RACF) which would trigger increased excavation and would have a detrimental impact on RACF amenity for ground floor level bedrooms and increased tree impacts which the design has expressly sought to avoid.

Minimising Impacts on Neighbours

- The proposal achieves a maximum 2-storey elevation to the 3 x street frontages and to the neighbouring properties (No 140 & 142 Killeaton Street & 7 College Crescent) to the west.

The extra building height occurs nearer the eastern boundary (Yarrabung Road and not the western boundary (No 140-142 Killeaton Street & 7 College Crescent). Notwithstanding an assessment of the proposal in terms of neighbor impact to its western boundary (being the only boundary that directly adjoins neighbour housing) has been undertaken.

The RACF site is screened from No 140-142 properties by an existing fence and 3-4m high hedge which extends along the majority of the western boundary. Both hedge and fence are to be retained. Accordingly both existing single dwellings and future townhouses on the neighbour properties will be screened by the existing vegetation. It is further noted that the RACF is downhill from its western neighbours and is a full storey+ lower in height than the 3-storey townhouses uphill. Moreover the portion of the RACF which exceeds 8m/2 storeys is setback approximately 40m+ from the boundary of 140-142 Killeaton Street properties so that it will not be visible or have any detrimental impacts on its western neighbours. This is illustrated in the following building elevations which incorporate the outline (in red) of the proposed 3-storey townhouses on the western neighbours lands.

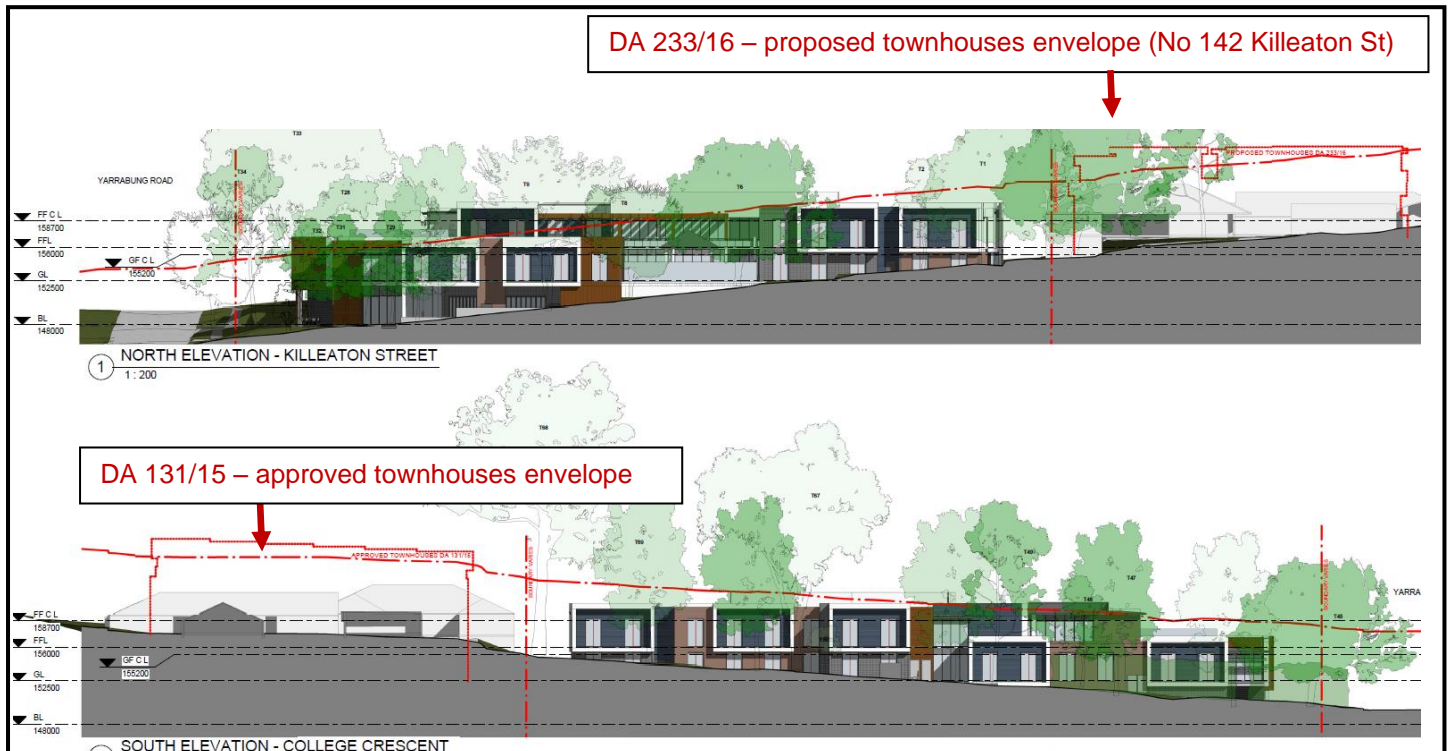


Figure 15: Building elevations showing relationship to approved/proposed townhouses to western side of RACF site.

- Neighbours to the east with potentially most visual impact (fronting Yarrabung Road) will not be able to see the additional building height either from the public domain or from ground/first floor levels as illustrated in **Figure 14** sightline sections prepared by MDP Architects. Accordingly there are no privacy or visual bulk impacts on neighbours opposite the site in the R2 low density zone.

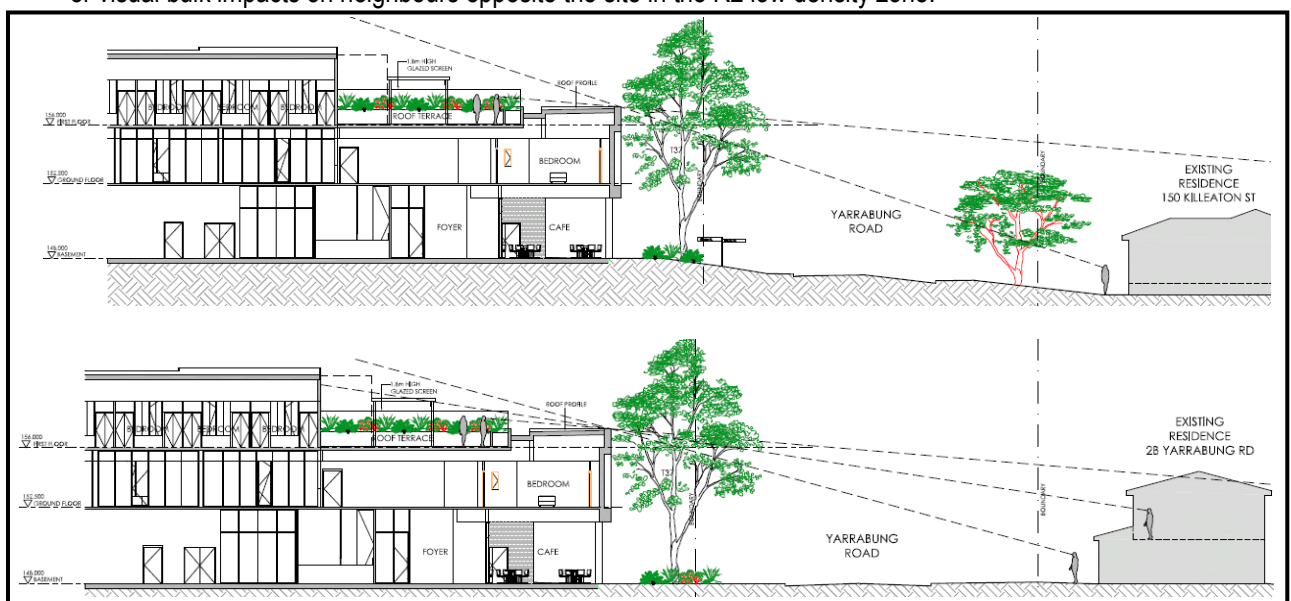


Figure 16: Sections illustrating sight lines from Yarrabung Road properties to the RACF

Overshadowing

- The RACF site has 3 road frontages. The additional building height located near the Yarrabung Road (eastern) side of the site does not result in any shadow impacts on adjoining properties as illustrated in **Figure 17** shadow impact drawings prepared by MDP Architects.

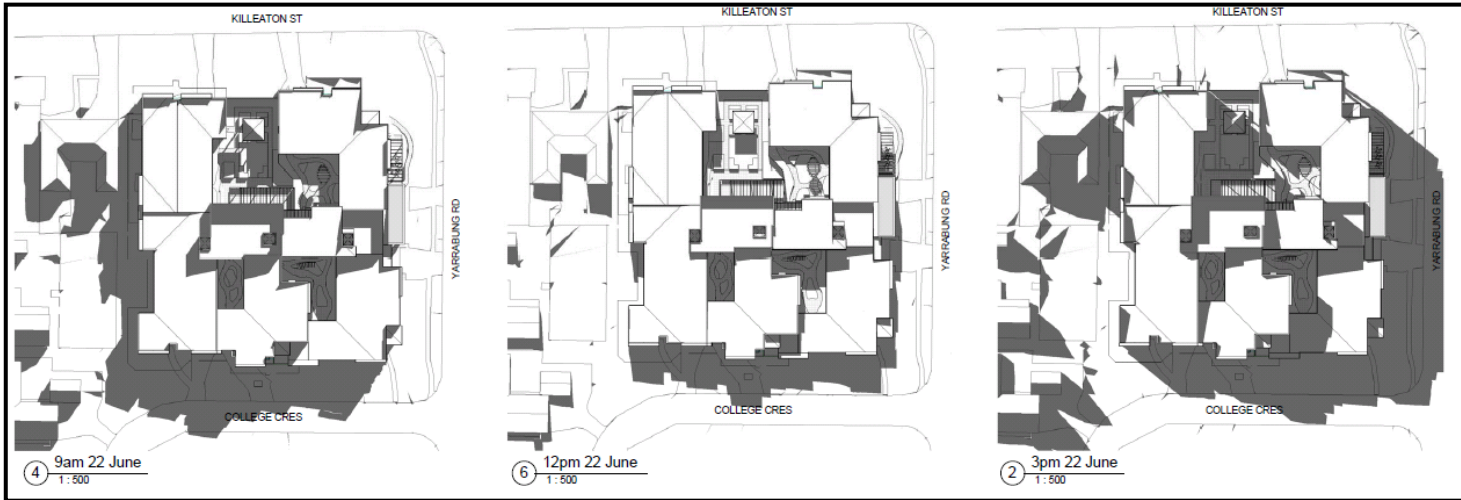


Figure 17: Shadow Diagram (mid-winter)

Compliance with zone objectives for KLEP2012 Height Controls

- The proposed development represents an efficient and appropriate use of the land that is compatible with the environmental capacity of the site and its R2-Low Density Residential Zoning given the site's generous proportions of over 75m length street frontages and 7066m² site area. While this form of RACF development is not envisaged/permissible in the R2 zone under KLEP2012, the SEPP expressly allows this form of development in the zone and thus overrides the LEP, so that this form of development is permissible with consent. The following response to the KLEP2012 height controls is provided below;

4.3 Height of buildings

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

- (a) (a) to ensure that the *height of development is appropriate for the scale* of the different centres within the hierarchy of Ku-ring-gai centres,
- (b) (b) to establish a *transition in scale* between the centres and the adjoining lower density residential and open space zones to protect local amenity,
- (c) (c) to enable development with a *built form that is compatible with the size of the land* to be developed.

While building heights do not fully meet the SEPP Seniors numerical controls for height, the proposed RACF development has adopted a high standard of architectural design which presents as 2-storey townhouses rather than a large institutional building combined with comprehensive landscape screenings (largely comprising existing tree/hedge plantings) around the perimeters. There is a notable absence of private courtyards along the boundaries so that a 2-storey built form largely screened by trees/hedges streetscape character is achieved.

The built form provides a suitable transition between the higher density / building heights on the lands to the west/south-west and the lower density zones/ lower building heights to the east. The site is further benefited by the road separation to adjoining R2 zones so that it is considered the proposal achieves the underlying LEP objectives for height controls.

Compliance with SEPP provisions

- The proposal has been designed to comply with the remainder SEPP development standards contained in Clause 40. Moreover, landscape area is 3137m² (or 44%) which exceeds the minimum SEPP requirement for 3000m² landscape area and has FSR 0.93:1 which is below the FSR 1:1 deemed to comply density criteria.

In terms of the relevant objectives it is considered that there are no significant impacts that occur as a result of the development having additional height in the middle portion of the building where it is screened from view from neighbour properties and/or the public domain.

2.2 Precedent of approvals varying the height development standards - abandonment of a 3-storey control

Council/JRPP has previously recognised that in certain circumstances, some relaxation of the SEPP height controls is appropriate. The most relevant and recent example being the 3-4 storey (max 41.11m) BUPA aged care facility (JRPP No013SYW062DA) approximately 400m west of the subject site at 238 – 240 Mona Vale Road St Ives which also has frontage to Killeaton Street. The BUPA site had similar characteristics to the subject site in that it has physical separation to low density zones by virtue of the 3 road frontages and an appropriate design/landscape scheme to achieve a suitable streetscape contribution.

Given the recent precedent in the vicinity of the subject site, it is considered unreasonable and unnecessary to require strict compliance with the SEPP 40(4)(a)&(b) 8m/2 storey height controls particularly given the breach relates to a part of the building which is not visible from the public domain.

2.3 Strict compliance would not better achieve the objectives of the control

The proposed development presents to the street as 2 storey townhouse style development set behind dense landscaping and not as a large institutional building which would ordinarily be envisaged by the permitted 1:1 FSR. As a RACF, the development must achieve wheelchair accessibility across each of the building levels so that frail/aged occupants can readily access all parts of their accommodation. Stepping a RACF level downslope to accommodate a sloping topography is not feasible for this type of functionally driven building.

Lowering the entire development would entail additional excavation and would detrimentally impact on significant trees which the applicant has expressly sought to achieve and also resident amenity for bedrooms located on the lower accommodation level and would result in a sloping driveway to Yarrabung road where currently the proposal achieves a near level grade entry.

The majority of the building is compliant and in fact some sections sit well below the 8m/2 storey height (eg at the SE corner). Most significantly, the additional height sought is not visible from the neighbour properties or public domain so that it has no detrimental streetscape or amenity impacts on the neighbourhood.

Given the over-arching SEPP CI 40(4)(a)&(b) 8m/2 storey height standards are met by the development and the building essentially presents as a maximum 2-storey building to all street frontages, lowering the offending section of the building would not better achieve the objectives of the control and would thwart the objectives of the SEPP under which the application is made.

In those circumstances, strict compliance with the control is unnecessary and unreasonable.

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 the consent authority insisted on strict compliance with the height standards contained in SEPP Clause 40(4)(a) & (b), 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 inhibit the construction of a 120-bed seniors housing development for frail/aged seniors including residents with dementia; 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 in an established high socioeconomic 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.*

Clause 4.6(3)(b) and 4(a)(ii) also call up public benefit and whether there are sufficient planning grounds to justify contravention of the standard.

These matters are addressed in detail ahead.

4.1 Matters of State or Regional Planning Significance

The proposed development and variation from the height in metres & storeys standards do 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 height controls rather than strictly complying with the numeric standards of the control. It is noted that the development will comply with the SEPPs stated underlying streetscape objective and moreover provides public benefits that the objectives of SEPP Seniors seek to achieve, being proposed new housing which is specifically designed to accommodate 120 frail/aged residents and residents with dementia.

As such it is in the public benefit to support the variation in the control in order to facilitate a development which is socially important and contextually sympathetic to the surrounding development/likely future medium density development next door, meets the remainder SEPP design controls and provides an appropriate modern 2 storey streetscape presentation and a high level of amenity for future frail/aged occupants.

There is a further public benefit in maintaining wheelchair accessible floor levels across each building level which could not be achieved if the building was to be stepped down slope in a manner that an ordinary residential development might be better able to accommodate. Introducing a stepped floor design into a high-care RACF for frail/aged persons would significantly reduce the functionality and resident safety associated with having a level floor plate.

Having regard to the principles of *Four2Five*, the proposal which seeks to hide the additional building height from view, achieves the environmental benefit of having reduced excavation for the basement level which ensures the retention and protection of additional significant trees within the building setbacks. Furthermore, the current driveway entry is near level so that increasing excavation to lower the building (and basement) will result in a driveway which slopes up to Yarrabung Road footpath which is less desirable from a pedestrian safety perspective than having a near level driveway.

Accordingly the requirements of clause 4.6(3)(b) and (4)(a)(ii) are also satisfied.

5. Conclusion

The proposed development does not comply with the SEPP CI 40(4)(a) and (b) 8m/2 storey height standard but only on a part of the site where it is not visible. Requiring strict compliance would not result in a better outcome, and given the aims of SEPP Seniors Living would result in a worse planning outcome, with no tangible benefit to the locality or surrounding development. It nevertheless satisfies the stated and underlying objectives of the development standard and the broader zoning objectives for the locality such that:

- the proposed development is consistent with the express objective of the SEPP height standard in that it results in no abrupt changes in scale in the streetscape and the KLEP2012 height objectives which seek to achieve an appropriate height for the city centre area, a transition in scale between the “centre” zoning and the adjoining lower density zone to protect local amenity and to achieve a built form that is compatible with the size of the land;
- the proposed development achieves a maximum 2 storey townhouse style streetscape presentation to all frontages despite the potential alternative for an “institutional” design that might reasonably be generated for a hospital / RACF style building with a permitted 1:1 FSR. Considerable design effort has been undertaken to ensure 100% retention of street trees, and retention of all significant (healthy) trees/hedges located within the building setbacks to achieve a well landscaped streetscape character from the outset.
- the proposed built form siting, design and external appearance of the proposed development are considered to be appropriate, in that it transitions down from the 4-6 storey residential flat buildings, the (future) emerging townhouse developments and complements the 1-2-storey development across the road from the site in the R2 zones.
- the portion of the building where the additional height occurs is setback toward the middle of the building and is set behind the 1-2 storey height frontages so that despite its existence, the non-compliant portions will not be visible from the street / neighbour properties and there are no impacts on neighbour amenity.
- The request for a minor variation in building height has considerable merit and is worthy of support.