

ANNEXURE B

Clause 4.6 / SEPP No. 1 Variation Request – Building Height





Cl. 4.6 / SEPP No. 1 Variation Request – Maximum Building Height

SITE ADDRESS: 3 Martin Luther Place, Allambie Heights

PROPOSAL: Demolition of existing structures and construction of a residential care facility.

Name of the applicable planning instrument which specifies the development standard;

State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004

The number of the relevant clause therein

Clause 40(4)(a)

Specify the nature of the Development Standard sought to be varied and details of variation:

Clause 40(4)(a) of the SEPP relates, to maximum building heights in circumstances where residential flat buildings are not permissible on the land. The relevant parts of the clause are stated inter alia:

“(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)."*

Clause 40(4) above relates only to sites where residential flat buildings are not permitted. The site of the proposed development is within *Zone R2 – Low Density Residential* under the provisions of the *Warringah Local Environmental Plan 2011* (WLEP 2011). Under WLEP 2011, residential flat buildings are not permitted in Zone R2. Accordingly, Clause 40(4) is applicable to the site.

The building height definition in the Seniors Housing SEPP differs to that of the Standard Instrument LEP, and is provided as follows:

“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.”

Ground level is defined as follows:

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

The proposal has a maximum height of 10 metres, exceeding the maximum 8 metre height limit in Clause 40(4)(a) by 2m. The extent of the building height breach varies considerably due to the erratic topography of the site, and this is illustrated in the height blanket diagram provided at **Figure 9**. The roof has been removed from the model to demonstrate maximum ceiling height, as per the height definition.



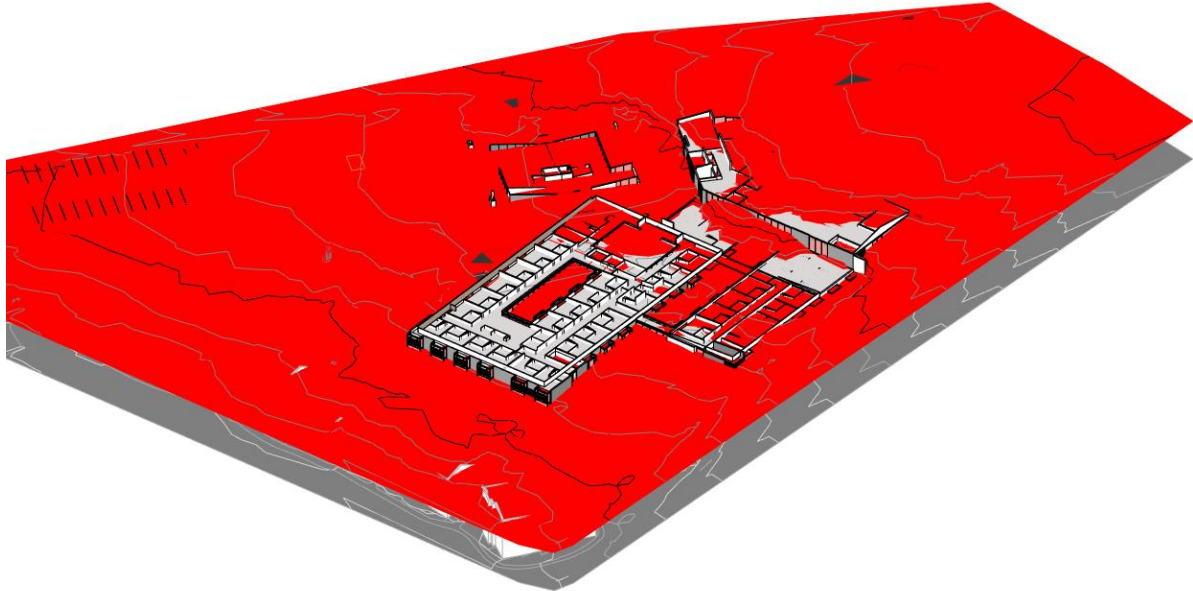


Figure 9 Height blanket diagram indicating variation in maximum building height

Justification for varying the development standard

In the case of *Winten Property Group Limited v North Sydney Council* [2001] 130 LGERA 79, Lloyd J established an ‘underlying object test’ to determine the reasonableness of a SEPP No. 1 Objection. In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ reformulated the *Winten* tests and that judgement is utilised to inform the assessment of the proposed variation.

1. *Is the planning control in question a development standard?*

Clauses 40(4)(a) of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* relates to building height and is expressed in the SEPP as a development standard as defined under Section 4(1) of the *Environmental Planning and Assessment Act, 1979* (EP&A Act).

2. *State the objective of the standard to be varied as it relates specifically to the subject site and proposal:*

There are no specific objectives within the SEPP that relate to the control of building height. Notwithstanding, the Land and Environment Court in the case of *Winten Group Architects Pty Ltd v Kuring-gai Council* [2005] NSWLEC 546 has identified those objectives as being:

“To control impacts upon neighbours and to ensure that the proposed development is not overbearing in terms of bulk, scale and height and also in terms of overshadowing impacts and privacy concerns.”

It is considered that these are the appropriate objectives of the development standards and are therefore adopted for the purposes of this objection.

3. Is compliance with the development standard consistent with the aims of the Policy, and in particular, does the development standard tend to hinder the attainment of the objects specified in Sections 5(a)(i) and (ii) of the Environmental Planning and Assessment Act, 1979?

Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case given that the proposed development complies with the objectives of the standard, as outlined below.

- The proposed residential care facility will replace an existing residential care facility and will generally be contained with a similar footprint. In terms of bulk and scale, the proposed development has a two storey form which is visually compatible with the existing two storey self-contained dwellings situated around the perimeter of the site, which will be retained. The two storey form is also compatible with the built form and scale of buildings on adjoining allotments, including the site to the north which is also a residential care facility.
- The development displays a high degree of articulation along each elevation to ameliorate visual bulk and break the structure into modules. In particular, the ground and upper levels are recessed and vertical 'breaks' are provided at intervals to achieve a suitable degree of modulation. External materials and finishes have been selected to complement building form and articulation and provide a high quality and visually pleasing aesthetic. The proposed landscape concept proposes dense planting at the perimeter of buildings and along property boundaries and street edges, which serve to soften the appearance of the development.
- Rooms within the proposed residential care facility are, for the most part, oriented outward, towards open spaces and circulation areas within the site. Siting and orientation of buildings ensures there is limited potential for overlooking of neighbouring premises. In any case, proposed building setbacks are generous and ensure that separation distances between new buildings and buildings on adjoining properties are such that cross views between habitable spaces are limited and will not compromise visual privacy. External louvres are also proposed to be installed, which together with proposed perimeter landscaping will further mitigate potential for overlooking.
- Shadow diagrams demonstrating the extent of overshadowing associated with the proposed development have been prepared and are submitted with the development application. These diagrams indicate shadow cast at 9am, 12 noon and 3pm on the winter solstice (21st June). The diagrams confirm that the development will have no significant overshadowing impacts. Shadows cast by new development generally fall within or marginally beyond the boundaries of the site. Shadows extend further into the neighbouring property to the south-east in the afternoon and will impact the dwellings within this facility to a small degree, however sufficient direct solar access is maintained throughout the day.
- The building height breach can be attributed in part to site topography which falls dramatically from the street to the rear of the allotment. The development has been designed to respond to topography by 'terracing' building mass, however height breaches occur and are largely unavoidable without incorporating level changes throughout the development, which is obviously not desirable in an aged care facility, where level graded access is necessary.

Accordingly, notwithstanding the breach of the height standards, the proposal satisfies the intent of the standard. In the circumstances of the particular case, the SEPP No. 1 Objection for the building height non-compliance is considered to be well founded and is consistent with the objectives of the development standard.

4. Is compliance with the standard unreasonable and unnecessary in the circumstances of the case?

In the circumstances of the case, compliance with the SEPP's development standard for building height is considered to be both unreasonable and unnecessary given the design of the proposal and its relationship to neighbouring properties. The proposal will provide a well-designed and appropriate residential care facility which will not create a

significant impact on adjoining properties, in terms of bulk and scale, and will not result in any significant adverse impact on surrounding properties in terms of overshadowing or loss of privacy

Use of the site for seniors housing is existing and it continues to be a permissible form of development within the R2 Low Density Residential zone. The proposal will contribute to a larger facility that will provide a much needed housing choice for the elderly, as encouraged by the objectives for the R2 Residential zone. Notwithstanding the building height non-compliance, the proposed built form outcome does not contravene the zoning objectives.

Strict compliance with the standard would unnecessarily complicate orderly and economic development of the land as previously discussed. Accordingly, strict compliance, if sought would be antipathetic to the objectives of the Standard, the objectives of the Act and is therefore considered to be unreasonable and unnecessary in the circumstances of the case.

5. Is the objection well founded?

In *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

"An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."



The judgement goes on to state that:

"The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows:

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 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 zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

For an objection to be well-founded it is only necessary for an applicant to demonstrate that any one of these five different ways is applicable. In the present case, it is the first method that is relied upon, namely that the objectives of the standard are achieved notwithstanding non-compliance with the standard, as outlined in this SEPP 1 Objection.



For the reasons outlined in this Objection, variation to the development standard is reasonable as it will allow for the attainment of the objects of the EP&A Act and the underlying objectives of Clause 40(4) of *SEPP (Housing for Seniors or People with a Disability) 2004*, despite the numerical non-compliance.

Comment on clause 4.6 of Warringah LEP 2011

It is understood that there is a degree of uncertainty in relation to whether or not SEPP No.1 or clause 4.6 of Warringah LEP 2011 is the correct mechanism for varying a development standard contained in SEPP (Housing for Seniors or People with a Disability) 2004. For the sake of completeness, the following discussion is provided in relation to clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard.

On “planning grounds” and in order to satisfy that the proposal meets objective 1(b) of clause 4.6 in that allowing flexibility in the particular circumstances of this development will achieve “*a better outcome for and from development*”, it is considered that:

- The proposed development will present as a series of contemporary two storey structures, connected by internal corridors. The bulk and scale of the development is consistent with that of existing development within the subject site, as well as development on adjoining properties and is considered to be compatible with desired built form and character. The site is physically and visually disconnected from the streetscape and will therefore have no adverse impact on streetscape continuity.
- The proposed floor to ceiling heights of the development enhance the internal amenity of living spaces and rooms and allow for large windows and bright spaces, which is a critically important factor in relation to quality of life of the elderly residents who spend a large portion of their time indoors. The increased floor to ceiling heights are seen to offer significant amenity benefits to the residents and this will not be to the detriment of an adjoining property. Lowering the ceiling heights would reduce the internal amenity of the facility with no material benefit for an adjoining property.
- From a practical point of view, the floor to ceiling heights are necessary to allow for services plant and equipment and, while it may ordinarily be possible to alter floor levels where services, plant and equipment are not required, this is not feasible in a development where changes in level are undesirable. In fact, the floor levels proposed have been adopted to avoid transitions in level and enhance access to and through the facility.
- The building height breach relates in part to site topography which falls dramatically from the street to the rear of the allotment. The development has been designed to respond to topography by ‘terracing’ building mass, however height breaches occur and are largely unavoidable without incorporating level changes throughout the development, which is obviously not desirable in an aged care facility, where level graded access is necessary.

For the reasons listed above, it is considered that there are sufficient environmental planning grounds to support a variation to the landscape area development standard.