

## Clause 4.6 – Exemptions to development standards request – Clause 40(4)(b) of SEPP (HSPD)

TO ACCOMPANY A DEVELOPMENT APPLICATION FOR:

Demolition of existing structures at 12 and 16 Trafalgar Avenue, partial demolition and adaptive re-use of 14 Trafalgar Avenue and construction of a part two (2) / part three (3) storey Residential Aged Care Facility (RACF) comprising 102 beds, basement car park, earthworks, removal of trees, and associated landscaping



**12, 14 and 16 Trafalgar Avenue, Roseville NSW 2069  
(Lot 101 of DP1077490 and Lots 5,6,7 & 8 of DP1047218)**

**Prepared for:**

KOPWA Aged Care  
17 January 2019

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## 1.0 Introduction

This Clause 4.6 Development Standard Exemption Request is submitted in support of a Development Application (DA) by KOPWA Limited for demolition of existing structures at 12 and 16 Trafalgar Avenue, partial demolition and adaptive re-use of 14 Trafalgar Avenue and construction of a part two (2) / part three (3) storey Residential Aged Care Facility (RACF) comprising 102 beds, basement car park, earthworks, removal of trees, and associated landscaping at 12, 14 and 16 Trafalgar Avenue, Roseville. The DA has been made under State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD).

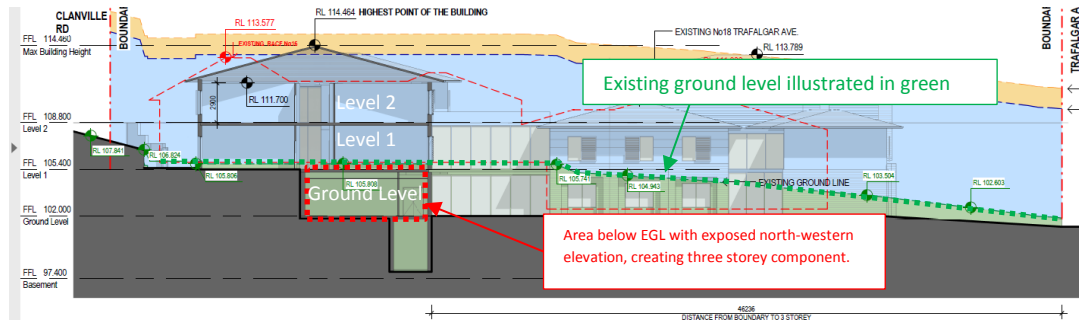
Clause 4.6 of the Ku-ring-gai Local Environmental Plan (Local centres) 2012 (KLEP 2012) provides the consent authority with the power to flexibly apply development standards in a particular case where they can achieve better development outcomes in particular circumstances, where it is satisfied it is in the public interest to do so. The objectives of Clause 4.6 Exceptions to Development Standards are as follows:

- (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 Exemption Request is made with respect to the development standard set by cl 40(4)(b) of SEPP HSPD, which sets out development standards for the permissible number of storeys (**maximum 2 storeys**) for a RACF development in zones where residential flat buildings are not permitted. It is noted that the proposed development complies with the maximum height requirement of 8 metres set in cl40(4)(a) and as the application is being made by a ‘social housing provider’, the single storey height control for the rear 25% area of sites prescribed by cl40(4)(c) is not applicable.

The proposed development comprises a technical non-compliance with the 2-storey height control. The 3-storey component of the development is set back approximately 46.23m from Trafalgar Avenue and located centrally to the development to the rear of the northern wing

of the RACF, directly behind the proposed Porte Cochere and central courtyard. Due to the varying topography and significant level changes on the site, a degree of excavation is required to achieve wheelchair accessibility across the Ground level of the building so that frail/aged residents can readily access all parts of their accommodation as well enabling access for care providers. The non-compliance results from the excavation of part of the ground floor level - which at this point is located entirely below existing ground level with only the north-eastern elevation of the ground level being exposed, hence is technically considered a 'storey'. As there are two (2) storeys located above the ground level at this point, this technically is defined as three (3) storeys in height (refer to **Figure 1**). Despite the non-compliance, the height of the development achieves compliance with the 8-metre height control set in set in cl40(4)(a) and the frontage to the street and all adjoining neighbours is compliant with the 2-storey height control.



**Figure 1:** Extract from DA-4004 illustrating area of non-compliance. Source- Group GSA DA-4006

It is noted that this Exemption Request is made under cl.4.6 of Ku-ring-gai LEP (Local 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 (HSPD). 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 17 January 2017 and the related consultant documentation.

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')
6. *Randwick City Council v Micaul Holdings* [2015] NSWLEC 1386
7. *Randwick City Council v Micaul Holdings* [2016] NSWLEC 7
8. *Moskovich v Waverley Council* [2016]

A key principle that stems from the **Four2Five v Ashfield** [2015] 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.

In **Randwick City Council v Micaul Holdings** [2016] the Commissioner discerned that cl 4.6 imposes 4 tests;

*This imposes a number of tests, the first that compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case, the second that there are sufficient environmental planning grounds to justify contravening the development standard, the third that the applicant's written request has adequately addressed the matters required to be demonstrated by sub-clause (3) and the fourth, that 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. In addition, satisfaction of those matters that must be considered by the Secretary in determining whether concurrence should be granted is required.*

While the judgment did not directly overturn the **Four2Five v Ashfield** [2015] decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligations is to be satisfied that *"the applicant's written request has adequately addressed...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard."* He held that this means:

*"the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, **but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary**".*

*(emphasis added)*

In **Moskovich v Waverley Council** [2016] some important principles arose from the decision which are as follows:

- The requirement that the consent authority be personally satisfied the proposed development will be in the public interest because it is *"consistent with" the objectives of the development standard and zone is not a requirement to "achieve" those objectives. It is a requirement that the development be 'compatible' with them or 'capable of existing together in harmony'. It means "something less onerous than 'achievement'".*
- Establishing that *'compliance with the standard is unreasonable or unnecessary in the circumstances of the case'* does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe "test" 1). Other methods are available, for example that the relevant objectives of the standard would not be achieved or would be thwarted by a complying development (Wehbe "test" 3).
- It is always best, when pursuing a clause 4.6 variation request, to demonstrate how the proposal achieves a better outcome than a complying scheme. In the case of Moskovich an indicative complying building envelope was provided as part of the DA to demonstrate that it resulted in an inferior outcome for the site.



## Definitions

SEPP (HSPD) defines height but not storeys. The following SEPP (HSPD) definitions are relevant to the interpretation of the height in storeys;

*Clause 3(1):*

**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.

Even though the exposed north eastern elevation of the northern wing of the RACF renders the building 3 storeys in height, 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:

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

Clause 4.6 (2) states that:

*“Development consent may, subject to this clause, be granted for development even though the development would contravene the development standard imposed by this or any other environmental planning instrument”. 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 (SEPP HSPD). The development standard to which this Clause 4.6 request seeks to vary is cl 40(4)(b) of SEPP (HSPD) 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.*

**(emphasis added)**

“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”.

**(emphasis added)**

Having consideration of the definition of “development standards” in Section 4(1) of the Environmental Planning and Assessment Act (EP&A Act, 1979), cl 40(4)(b) of SEPP (HSPD) sets a numerical standard for the maximum number of storeys permitted as highlighted below.

*“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**”*

Having regard to the above, it is considered that the numerical elements within Clause cl 40(4)(b) of SEPP (HSPD) fit within aspect (c) of the definition of “development standards” in Section 4(1) of the Environmental Planning and Assessment Act (EP&A Act, 1979) and accordingly Clause cl 40(4)(b) is a development standard.

*(c) the character, location, siting, bulk, scale, shape, size, **height**, density, design or external appearance of a building or work,*

**(emphasis added)**

### 1.3 What is the underlying objective 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 is as follows:

*“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 cl 33 *Neighbourhood amenity and streetscape* within SEPP (HSPD) which contains additional design provisions in respect of height and is as follows:

*“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..."*

**(emphasis added)**

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, i.e. no abrupt changes.

The Ku-ring-gai Local Environment Plan (Local Centres) 2012 (KLEP 2012) contains no specific objectives relating to height in storeys, however it contains the following general objectives with respect to height (in metres) control:

- (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.*

**(emphasis added)**

## 2.0 Is the objection "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]). Method 1 is of relevance to the proposed development. These points are discussed in further detail below.

## 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”*

The proposed development has been designed to avoid any abrupt change in the scale of the buildings in the streetscape. It has been designed so it is perceived as a series of pronominally two-storey forms from Trafalgar Avenue, relating to the existing dwellings along the street.

All of the street-facing facades of the development comply with the 8m SEPP (HSPD) height control and do not exceed 2 storeys in height. The building has been articulated as four discreet volumes to respect the streetscape rhythm established by the existing separation of freestanding dwellings along the street (refer to **Figure 2**). Each volume is articulated by separate pitched roofs, with three of the blocks separated by a glazed passage between them.



**Figure 2:** Proposed building 'blocks' facing Trafalgar Avenue - Group GSA Urban Design Report

The 3-storey component of the building is set back approximately 46.23m from Trafalgar Avenue and located to the rear of the northern wing of the RACF, directly behind the proposed Porte Cochere and central courtyard. To further reduce any abrupt changes in the streetscape, the Ground level of the north-eastern elevation of the northern wing – which creates the 3-storey component, is screened with cascading landscaping that steps up the north-eastern façade so the form is read as a two-storey building from Trafalgar Avenue (refer to **Figure 3 and 4**).

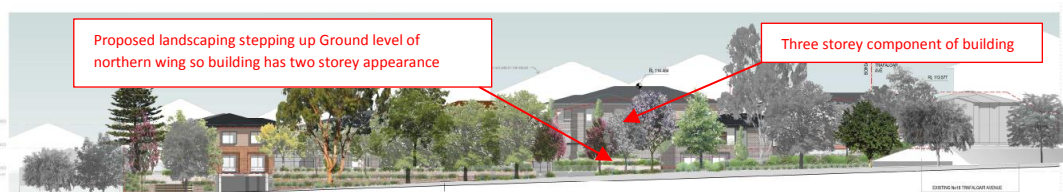


Figure 3: Streetscape Elevation (North East) with existing and proposed planting. Source-Group GSA

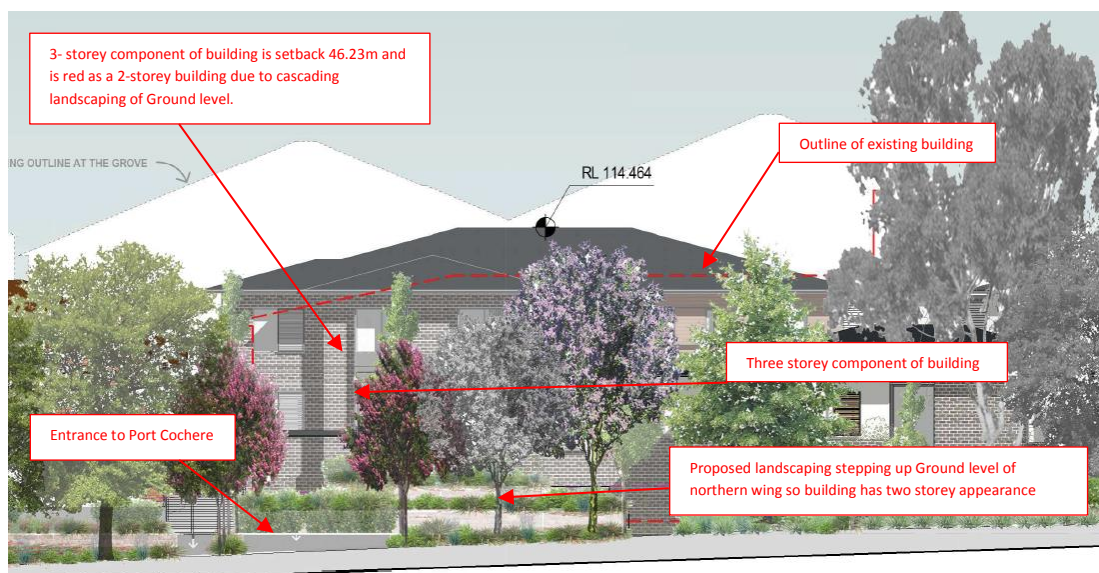


Figure 4: Extract from Streetscape Elevation (North East) with existing and proposed planting. Source-Group GSA

It is considered that the proposed development is consistent with the express objective of the SEPP (HSPD) no. of storeys standard in that it results in no abrupt changes in scale in the streetscape and the proposed development still achieves a two-storey presentation to Trafalgar Avenue. The 3-storey appearance of the building is mitigated by the significant setback from the street and the proposed landscaping measures to the Ground level so that it is perceived as a 2-storey built form. Having regard to the above, it is considered 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 3-storey comment of the building occurs centrally within the RACF building and so does not impinge upon the amenity of adjoining residential development. The development as a whole achieves compliance with the 8m height control and all frontages to adjoining properties achieve compliance with the 2-storey height control. It is also noted that the component of the building which exceeds the no. of storeys control is only marginally higher than the existing building that is currently in its place as illustrated in **figure 5** overleaf.

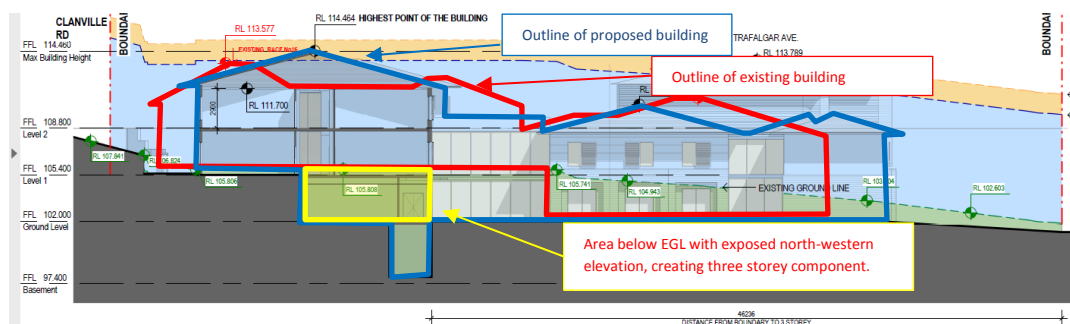


Figure 5: Extract from DA-4004 illustrating area of non-compliance. Source- Group GSA DA-4006

To further reduce impacts on adjoining neighbours, the replacement building has been setback approximately 12m further south east from the existing building alignment in the north-western corner of the site. The increased setback provides further separation from the shared boundary with no. 21 Clanville Road and with the heritage item at 18 Trafalgar Avenue. From the rear (south western boundary) of the site, the building takes advantage of the significant change in level to read as a one to two storey volume relative to the level of the dwellings behind. In particular, the component of the building which contains the 3-storeys component to the north-eastern elevation, has a single storey appearance when viewed from the rear (refer to **Figure 6**).

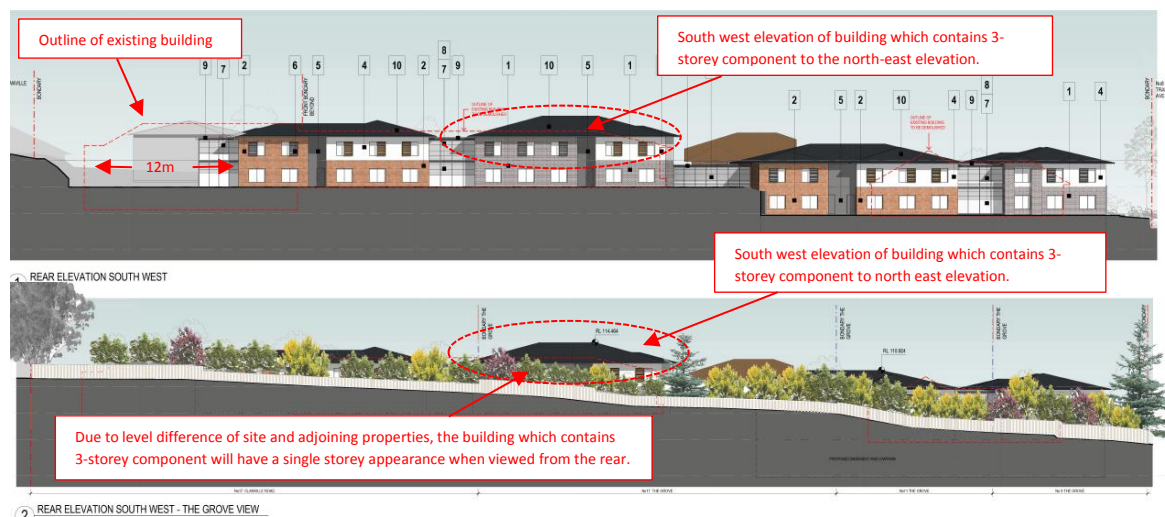


Figure 6: Rear (South West) Elevation and with existing and proposed planting. Source-Group GSA

Having regard to the above, what is read from adjoining properties and from the street is a 2-storey building that is compliant under the 8m height control set by SEPP (HSPD) and is only marginally higher than the existing building in its place. It is also noted that the proposed development (including the 3-storey component of the building), maintains compliance with the KLEP 2012 height control of 9.5m, albeit compliance is not required.

With respect to anticipated redevelopment other than under the SEPP (HSPD), 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 e.g. in respect of sloping sites.

With the absence of a 2-storey height standard from in KLEP 2012, it's reasonable to assume that part 2 /part 3 storey developments could potentially occur in R2 zones particularly where there is sloping topography or significant level changes on a site, which is the case in this instance.



The impacts of the proposal on adjoining development resulting from height in storeys are entirely consistent with the impacts that would be expected from any redevelopment of the subject site. Given the purpose of SEPP (HSPD) is 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 (HSPD) 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 8 metre and 2 storeys along the respective building elevations to the street and adjoining properties, it must be inferred that the impacts of the proposal on adjoining development as they relate to height – in 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 (HSPD) is exclusive to residential zones which do not permit residential flat buildings. The sole stated objective of the control is as follows:

*“to avoid an abrupt change in the scale of development in the streetscape”*

The subject proposal achieves a 2-storey presentation to the street frontage and due to the level change of the site, it is read as a one-two storey building volume from the other boundaries.

The streetscape elevations at **Figure 3** illustrates the compatibility with adjoining houses. Generous setbacks to the street frontage and adjoining boundaries further reduce any perceived change in scale. Given the proposed development achieves a maximum 2-storeys / 8m height when viewed from the public domain, it is considered that there is no abrupt change in the scale of development in the streetscape.

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.”*

**(emphasis added)**

The proposal responds to the varying topography and significant level changes of the site by presenting a 2-storey height to the street frontage and confining the additional storey to the centre of the site. In effect the storeys “breach” results from the excavation of the ground floor level, which at this point is located entirely below existing ground level but the north-



eastern elevation of the ground level is exposed. The 3-storey component is set back considerably from Trafalgar Avenue (46.23m) and the ground level has been screened with cascading landscaping that steps up the north-eastern façade so the form is read as a two-storey building from Trafalgar Avenue, making the third storey 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 neighbour's 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 as detailed below:

### Streetscape

The proposed development is considered to have a positive impact on the streetscape. This is achieved by a building height that complies with the SEPP (HSPD) controls as well as the KLEP 2012 Height controls – albeit not required. The development is appropriate and consistent with its context and comprises a building form that responds to the site and makes use of the varied topography of the site. When broken down into the separate building forms, the bulk and scale of the proposal is not out of character with the existing character which includes multiple 2 storey forms. It is considered that the proposed development respects the scale and form of the traditional residential streetscape of the existing residential context and will have an acceptable presentation to the streetscape that is harmonious with the residential setting. The height of all building forms fronting the street comply with the SEPP (HSPD) 8m and 2-storey height control

It is also noted that the subject site is unusually large being 8,186m<sup>2</sup> which affords potential to accommodate for development of a larger built form mitigated by a combination of appropriate setbacks and landscaping. The building setbacks to Trafalgar Avenue are a minimum of 10m and increase to 15.09m. The proposed setbacks are consistent with the adjoining dwellings and enable the retention of existing landscaping and provide opportunities for further landscaping in the front setback that is compatible with the character of the conservation area. The below photomontage at **Figure 7** prepared by Group GSA illustrates that through the incorporation of generous setbacks and retaining existing vegetation where possible, the proposed development – in particular the 3-story component, will not be visibly discernible when viewed from Trafalgar Avenue.



**Figure 7:** Photomontage – Looking South towards subject site from Trafalgar Avenue. Source-Group GSA  
To minimise impacts on the privacy and amenity of existing neighbour dwellings

The proposed development has a 2-storey presentation to the street frontage with the additional storey occurring centrally on the site and there are no elevations to any property boundaries that are greater than 8m/ 2 -storeys in height. Notwithstanding, an assessment of the proposal in terms of neighbour impact has been undertaken.

As previously discussed, the 3-storey component of the building is set back approximately 46.23m from Trafalgar Avenue and centrally on the site so does not impinge upon the amenity of adjoining residential development.

From the rear (south western boundary) of the site, the building takes advantage of the significant change in level to read as a one to two storey volume relative to the level of the dwellings behind (refer to **Figure 6** above). Similarly, when the building is viewed from the south-eastern and north western properties, the proposed change in levels results in the building being read as a one to two storey volume (refer to **Figures 9 & 10**).

**Note:** The landscape treatments denoted below have been overlaid onto the elevations by Group GSA to illustrate actual streetscape elevations for the RACF incorporating both existing tree plantings (shown at current heights) and the proposed landscape embellishments (shown at mature size);



**Figure 9:** Side (North West) Elevation and with existing and proposed planting. Source-Group GSA

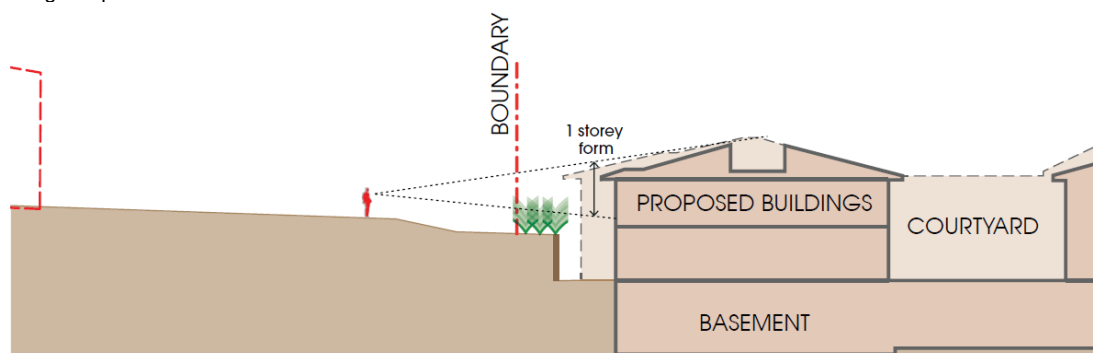


**Figure 10:** Side (South East) Elevation and with existing and proposed planting. Source-Group GSA

To minimise any unreasonable amenity impacts to adjoining neighbours in terms of privacy, overshadowing and visual bulk, a minimum setback of 6m from the side boundary is maintained around the building, which increases to 10m -20m in some areas (refer to **Figure 11**). The proposed design also takes advantage of the topography to maintain a suitable character of lower scale buildings as viewed from adjoining properties as illustrated in **Figure 12** below.



**Figure 11:** Comparison of existing and proposed setbacks to property boundaries. Avenue - Group GSA Urban Design Report



**Figure 12:** Section illustrating that development will be read as a one storey form when viewed from 11 The Grove-Group GSA Urban Design Report

### Overshadowing

The building has been designed to minimise any adverse impacts on the adjoining properties in terms of solar access and overshadowing. Given the central location of the 3-storey component, it does not create any unreasonable overshadowing to the adjoining properties as illustrated in the existing and proposed shadow diagrams prepared by Group GSA (refer to **Figure 13**). Notwithstanding, the 2-storey component of the building (to the rear of the 3-storey component) creates a minor increase in shadowing - in comparison to the existing building, to a small portion of 17 The Grove at 9am. It is acknowledged that this minor increase in shadowing does not derive from the 3-storey component of the building.



#### Compliance with zone objectives for KLEP 2012 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 street frontage of 109.66m and its unusually large size of 8.186m<sup>2</sup>. 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 KLEP 2012 height controls is provided below;

#### 4.3 Height of buildings

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

- (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 proposal complies not only with the 8m SEPP (HSPD) height control but also with the 9.5m KLEP 2012 height Control within KLEP 2012 - albeit not required. The proposal is appropriate and consistent with its context and comprises a building form that responds to the usually large size of the site and makes use of the varied topography of the site. When broken down into the separate building forms, the bulk and scale of the proposal is not out of character with the existing character which includes multiple 2 storey forms. It is considered that the proposed development respects the scale and form of the traditional residential streetscape of the existing residential context and will have an acceptable presentation to the streetscape that is harmonious with the residential setting and provides an acceptable transition to the adjoining properties.

#### Compliance with SEPP provisions

The proposal has been designed to comply with the remaining SEPP (HSPD) development standards contained in Clause 40. Moreover, the proposed landscape area is 4,627m<sup>2</sup> (or 56.52%) which greatly exceeds the minimum SEPP requirement for 2550m<sup>2</sup> landscape area and has an FSR 0.829 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 comprising an additional 'technical' storey that is centrally located on the site and is screened from view from neighbouring properties and the public domain.



## 2.2 Strict compliance would not better achieve the objective of the control.

The proposed development presents to the street as four (4) separate two storey buildings 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 residents can readily access all parts of their accommodation as well enabling access for care providers. Given the significant level differences of the site, extensive excavation is unavoidable as it is required to achieve a level and accessible development. To not excavate the portion of the site that contains the 3-storey component - which is positioned entirely below existing ground level with only the north-eastern elevation exposed, would create unprecedented challenges for residents and from an operator's perspective as the ground level at this point enables level access to the northern wing from the south-eastern wing of the development as well as from the main reception area (refer to **Figure 14**). To not provide level access would not be feasible for this type of functionally driven development.

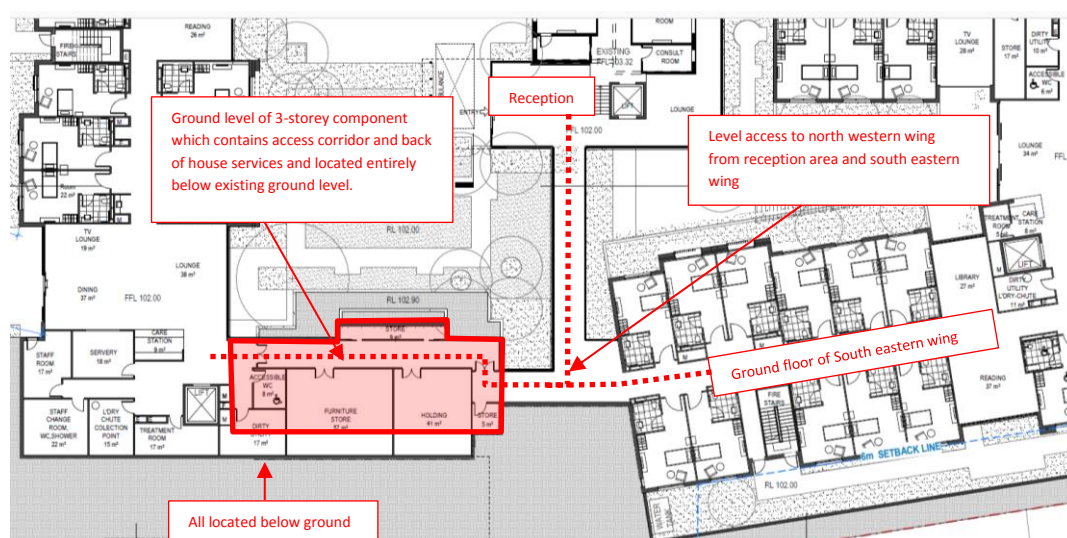


Figure 14: Extract from Ground Floor Plan illustrating ground level of 3-storey component. Source- Group GSA DA-2003

The other alternative to achieve compliance would be to remove the upper level of the 3-storey component which result in the loss of a minimum of four (4) high care rooms and other key operational components of the RACF (refer to **Figure 15**). Strict compliance – removal of the upper level, is likely to impact on the viability of the remaining rooms on the upper level as each care pod in the RACF is designed for a certain carer/ resident ratio. If the resident/ carer ratios cannot be met, the entire upper level may not be viable from an operator's perspective.

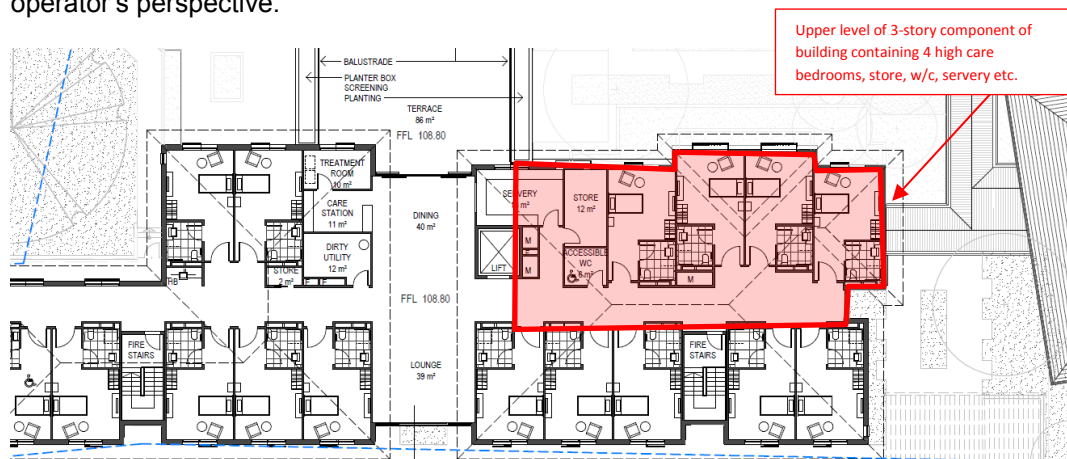


Figure 15: Extract from Level 2 Floor Plan illustrating Ground level of 3-storey component. Source- Group GSA DA-2003



The removal of the upper level would not better achieve the objective of the control as it would not result in any change of the scale of development to the streetscape and would not change the buildings presentation to the adjoining properties – which all comply with the SEPP (HSPD) 8m/ 2-storey height controls. The 3-storey component of the RACF does not impinge on the amenity of the adjoining residential development, therefore its removal would only have negative impacts as it would prevent the opportunity to increase the supply of much needed seniors housing and in particular – high care seniors housing, in the immediate area and wider LGA.

It is also noted that if strict compliance was required and the ground level of the 3-storey component was to be excluded, the back of house facilities that are located in this position which include furniture storage room, holding rooms, accessible w/c and dirty utility would need to be relocated elsewhere on the site which will reduce the total amount of landscaping provided. Therefore, the inclusion of this area allows the development to maximise the amount of landscaped area provided.

Having regard to the above it is considered that strict compliance with the 2-storey control is unnecessary and unreasonable.

### 3.0 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,***

**(emphasis added)**

If the consent authority insisted on strict compliance with the height standards contained in cl 40(4)(b) in SEPP (HSPD), 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 102-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.

### 4.0 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 below in detail.

#### 4.1 Matters of State or Regional Planning Significance

The noncompliance with cl 40(4)(b) in SEPP (HSPD), does not raise any matter of significance for State and Regional 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 2-storey height control rather than strictly complying with the numeric standard of the control. It is noted that the development will comply with the SEPP (HSPD) stated underlying streetscape objective and all elevations to the street comply with the 8m/2 storey height controls and moreover provides public benefits that the objectives of SEPP Seniors seek to achieve, being proposed new housing which is specifically designed to accommodate 102 frail/aged residents and residents with dementia.

As such it is in the public benefit to support the variation of the standard in order to facilitate a development which presents a high level of social significance and is contextually sympathetic to the streetscape, adjoining properties and immediate and surrounding locale as well as the heritage significance of the conservation area.

There is a further public benefit in maintaining wheelchair accessible floor levels across each building level which could not be achieved if the ground floor of the 3-storey component of the building was removed and the building was separated or stepped down 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 from an operator's perspective and resident safety associated with having a level floor plate.

Having regard to the principles of *Four2Five*, the proposal which seeks to conceal the additional storey from view by screening the Ground level with cascading landscaping that steps up the north-eastern façade so the form is read as a two-storey building from Trafalgar Avenue and being setback 46.23m from Trafalgar Avenue, achieves the environmental benefit of providing four (4) additional high care bedrooms which assist with the overall viability of the upper level care pod from an operator's perspective.

Having regard to the above, it is considered that the requirements of clause 4.6(3)(b) and 4(a)(ii) are also satisfied.

### 5.0 Conclusion

The proposed development complies with the 8m SEPP (HSPD) height controls but contains a 3-storey component that does not comply with the 2-storey height control within cl 40(4)(b) of SEPP (HSPD). The 3-storey component is centrally located and setback considerably from the street frontage and adjoining properties where it is not visible.

Requiring strict compliance would not result in a better outcome, and given the aims of SEPP (HSPD), 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 and it is considered that compliance with the standard is unnecessary for the following reasons:

- The proposed development complies with the 8m height control within SEPP (HSPD) all facades to the street and the neighbouring properties comply with the 8m/ 2 storey height controls;
- 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 as it respects the scale and form of the traditional residential streetscape of the existing residential context and will have an acceptable presentation to the streetscape that is harmonious with the residential setting and provides an acceptable transition to the adjoining properties;
- The ground floor level of the 3-storey component of the development contains key back of house services that would need to be relocated elsewhere on the site which would result in the loss of landscaped area.
- The 3-storey component of the building is located centrally in the development and is setback 46.23m from the street and the ground level is screened with cascading landscaping that steps up the north-eastern façade so the form is read as a two-storey building from Trafalgar Avenue;
- The 3-storey component of the development is not visible from the adjoining properties and does not result in any impacts to neighbour amenity;
- The component of the building which exceeds 2 storeys in height is only marginally higher than the existing building that is currently in its place;
- The ground level of the 3-storey component enables level access to the northern wing of the RACF from the south-eastern wing of the development as well as from the main reception area which could not be achieved if the building was separated or stepped down in a manner that an ordinary residential development might be better able to accommodate;
- The removal of the upper level would result in the loss of high care bedrooms and potentially impact on the entire viability of the upper level care pod from an operator's perspective as the minimum carer/ resident ratios may not be met;
- The subject site is unusually large being 8,186m<sup>2</sup> which affords potential to accommodate for development of a larger built form mitigated by a combination of appropriate setbacks and landscaping;
- It is considered that no public benefit would be served by enforcing compliance with the storeys standard, particularly given the 8m standard is met;
- Contravention of the development standard will not raise any matter of significance for State or regional environmental planning; and
- No matters of State or regional planning would be affected by varying the standard.

Having consideration of the above, it is considered that strict compliance with cl 40(4)(b) of SEPP (HSPD) is unreasonable and unnecessary in the circumstances of this case.