

Clause 4.6 – Exemptions to development standards request – Clause 26 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
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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 26 of SEPP HSPD, which sets out requirements for access to services and facilities which apply to the subject site. It is acknowledged that a recent judgement in *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde* [2016] NSWLEC 153, concluded that “cl 26 of SEPP (HSPD) is not a prohibition, but is rather a development standard, and is therefore amendable to clause 4.6”.

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 December 2016 and the related consultant documentation including access report prepared by Access Associates Sydney.

Clause 26 of SEPP HSPD requires Seniors Housing (including RACF's) to be located within 400m of the services and facilities listed in subclause (1) of cl.26 of SEPP HSPD and to be accessible by a suitable access pathway, or within 400m of a public transport service that can take residents to the services and facilities listed in subclause (1) of cl.26 of SEPP (HSPD).

The subject site is not located within 400m of the required services and facilities listed in cl 26 of SEPP HSPD or within 400m of a public transport service. The subject site is located approximately 416m from the 558 bus stop to Chatswood and approximately 530m from Roseville Train Station (only accessible via steps) and the 558 bus stop to Linfield (refer to **Figure 1**) and approximately 500m to Roseville Centre on Hill Street which contains a number of the services and facilities identified in cl 26 including a Medical Practice, Dentist, Post Office, Chicken Shop, dress shop, fruit shop, baker, Pharmacy, dry cleaner, milk bar, café, newsagent and more.

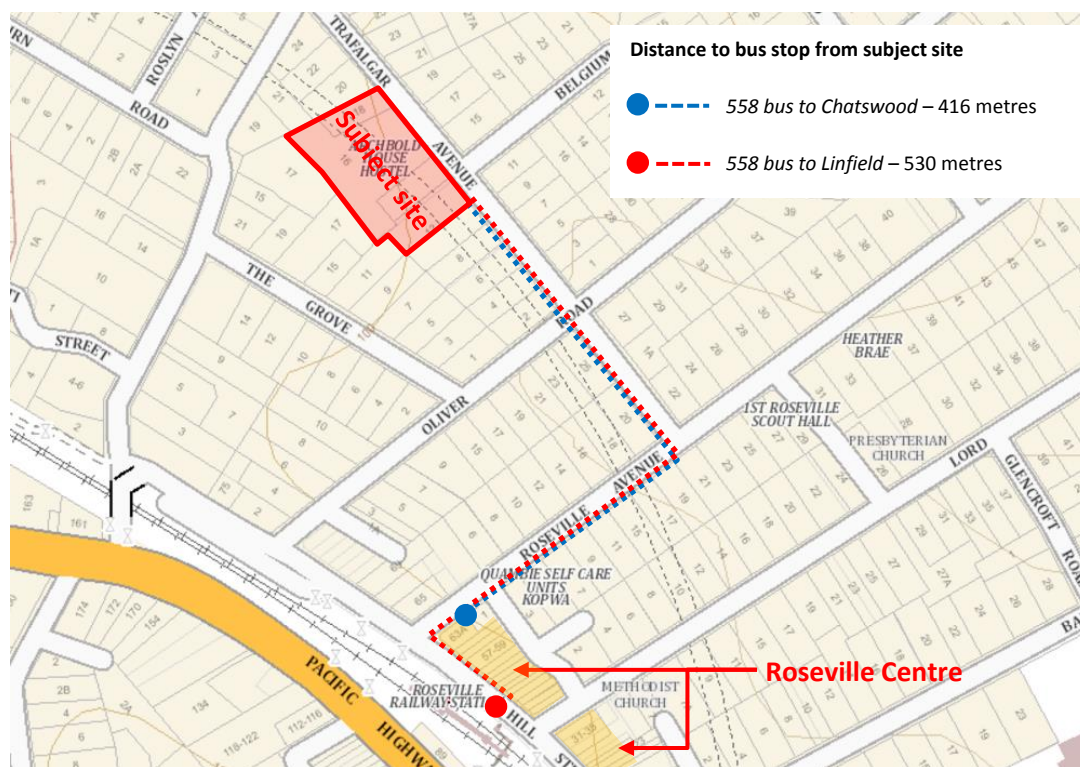


Figure 1: Location map showing distance from subject site to bus stop. Source - <http://maps.six.nsw.gov.au/>

Notwithstanding the non-compliance, the subject site contains an existing 58 bed RACF which has provided housing for seniors since 1977. The proposed development seeks to upgrade and expand the existing RACF and provide a facility that will exclusively cater for high care residents with limited mobility and independent access by residents to the services and facilities identified in cl 26 of SEPP (HSPD) is not anticipated. It is acknowledged that SEPP (HSPD) does not differentiate between the different practical requirements for different categories of seniors housing. For example, a high care resident living in a RACF where all meals are prepared and nursing care is available on-site at all times has far less need/ ability to attend the services and facilities identified in cl 26 compared to a senior/

person with a disability who is living in an independent living unit where on-site nursing care is not necessarily available and they were able to prepare their own food etc. and live more independently. In the recent judgement in *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde* [2016] NSWLEC 153, Justice Robson made the following statement with regard to the necessity of access to the requires services and facilities for residents in a RACF:

“To consider such a provision as essential would therefore defeat the aims of SEPP (HSPD), as it would act to discourage relevant persons from seeking to increase the supply and diversity of senior residences.”

Notwithstanding the above, the subject site is not within 400m of the services and facilities referred to in cl 26 of SEPP (HSPD) or within 400m of a public transport service that can take residents to the services and facilities, therefore a clause 4.6 Development Standard Exemption Request is required.

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 the *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.

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 Clause 26 of SEPP (HSPD). Clause 26 is as follows:

"26 Location and access to facilities

(1) A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have access that complies with sub clause

(2) to:

(a) shops, bank service providers and other retail and commercial services that residents may reasonably require, and

(b) community services and recreation facilities, and

(c) the practice of a general medical practitioner.

(2) Access complies with this clause if:

(a) the facilities and services referred to in sub clause (1) are located at a distance of not more than 400 metres from the site of the proposed development that is a distance accessible by means of a suitable access pathway and the overall average gradient for the pathway is no more than 1:14, although the following gradients along the pathway are also acceptable:

- (i) a gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,*
- (ii) a gradient of no more than 1:10 for a maximum length of 5 metres at a time,*
- (iii) a gradient of no more than 1:8 for distances of no more than 1.5 metres at a time, or*

(b) in the case of a proposed development on land in a local government area within the Sydney Statistical Division—there is a public transport service available to the residents who will occupy the proposed development:

(i) that is located at a distance of not more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and

(ii) that will take those residents to a place that is located at a distance of not more than 400 metres from the facilities and services referred to in sub clause (1), and
(iii) that is available both to and from the proposed development at least once between 8am and 12pm per day and at least once between 12pm and 6pm each day from Monday to Friday (both days inclusive), and the gradient along the pathway from the site to the public transport services (and from the public transport services to the facilities and services referred to in sub clause (1)) complies with sub clause (3), or

(c) in the case of a proposed development on land in a local government area that is not within the Sydney Statistical Division—there is a transport service available to the residents who will occupy the proposed development:

- (i) that is located at a distance of not more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and
- (ii) that will take those residents to a place that is located at a distance of not more than 400 metres from the facilities and services referred to in sub clause (1), and
- (iii) that is available both to and from the proposed development during daylight hours at least once each day from Monday to Friday (both days inclusive), and the gradient along the pathway from the site to the public transport services (and from the transport services to the facilities and services referred to in sub clause (1)) complies with sub clause (3).

Note. Part 5 contains special provisions concerning the granting of consent to development applications made pursuant to this Chapter to carry out development for the purpose of certain seniors housing on land adjoining land zoned primarily for urban purposes. These provisions include provisions relating to transport services.

(3) For the purposes of sub clause (2) (b) and (c), the overall average gradient along a pathway from the site of the proposed development to the public transport services (and from the transport services to the facilities and services referred to in sub clause (1)) is to be no more than 1:14, although the following gradients along the pathway are also acceptable:

- (i) a gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,
 - (ii) a gradient of no more than 1:10 for a maximum length of 5 metres at a time,
 - (iii) a gradient of no more than 1:8 for distances of no more than 1.5 metres at a time.
- (4) For the purposes of sub clause (2):

(a) a **suitable access pathway** is a path of travel by means of a sealed footpath or other

similar and safe means that is suitable for access by means of an electric wheelchair, motorised cart or the like, and

(b) distances that are specified for the purposes of that sub clause are to be measured by reference to the length of any such pathway.

(5) In this clause:

bank service provider means any bank, credit union or building society or any post office that provides banking services.”

(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”.

Having consideration of the definition of “development standards” in Section 4(1) of the Environmental Planning and Assessment Act (EP&A Act, 1979), Clause 26 (2)(a) & (b)(i)(ii) of SEPP (HSPD) sets a numerical standard for the distance from the subject site to the facilities and services referred to in sub clause (1) via a ‘suitable access pathway’ with a gradient that complies with subclause (2)(a)(i)(ii) and (iii).

(2) Access complies with this clause if:

(a) the facilities and services referred to in sub clause (1) are located **at a distance of not more than 400 metres from the site** of the proposed development

(b) in the case of a proposed development on land in a local government area within the Sydney Statistical Division—there is a public transport service available to the residents who will occupy the proposed development:

(i) that is located **at a distance of not more than 400 metres** from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and

(ii) that will take those residents to a place that is located **at a distance of not more than 400 metres from the facilities and services referred to in sub clause (1),**

(emphasis added)

Having regard to the above, it is considered that the numerical elements within Clause 26 SEPP (HSPD) fit within aspects (a), (c) and (m) of the definition of ‘development standards’ in Section 4(1) of the Environmental Planning and Assessment Act (EP&A Act, 1979) and accordingly Clause 26 is a development standard.

(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,**

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

(m) the provision of **services, facilities and amenities demanded by development,**

(emphasis added)

It is noted that a recent decision in Principal Healthcare Finance Pty Ltd v Council of the City of Ryde [2016] NSWLEC 153, concluded that:

“cl 26 of SEPP (HSPD) is not a prohibition, but is rather a development standard, and is therefore amendable to clause 4.6”.

This recent determination provides further clarification that cl 26 of SEPP (HSPD) is a development standard.

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

Pursuant to SEPP (HSPD) there are no objectives listed under cl 26 or Part 2 'Site Related Requirements'. In the absence of any specific objectives, the objective of Chapter 3 of SEPP Seniors has been adopted and are as follows:

"The objective of this Chapter is to create opportunities for the development of housing that is located and designed in a manner particularly suited to both those seniors who are independent, mobile and active as well as those who are frail, and other people with a disability regardless of their age."

It can also be assumed that the overarching objective of cl 26 is to ensure residents of Seniors housing have appropriate access to the facilities and services identified in cl 26 via a suitable access path or via a mode of public transport.

It is noted that cl 26 does not identify the different practical requirements for residents living in different categories of Seniors Housing. The proposed facility is a high care facility which will cater for persons who require a high standard of care and are no longer capable of independent living or travel. Given that a high portion of residents will have mobility restrictions and/or have advanced stages of dementia, they will be unable to leave the facility unaccompanied.

In these circumstances, it is considered that the underlying objective and purpose of the standard is not relevant to the proposed development given the category of seniors housing that is being proposed. Therefore, the requirement to be within 400m of the facilities and services identified in cl 26 or public transport is not relevant.

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]). Methods 1, and 2 are of relevance to the proposed development. These points are discussed in further detail below.

2.1 Compliance with the objectives of the control

As acknowledged above, it is considered that the underlying objective and purpose of the standard is not relevant to the proposed development. Given the category of seniors housing that is being proposed, the requirement to be within 400m of the facilities and services identified in cl 26 or public transport is not relevant.

Notwithstanding, it is considered that the assumed objectives of the standard have been met albeit non-compliance and are discussed below.

The assumed overarching objective of cl 26 is to ensure residents of Seniors housing have appropriate access to the facilities and services identified in cl 26 via a suitable access path or via a mode of public transport.

The subject site does not comply with cl 26- Location and access to facilities as the site is located at a distance greater than 400m from the services and facilities specified in clause 26(1) and is located greater than 400m from a public transport service to the specified services and facilities that is accessible via a suitable access pathway. The subject site is located approximately 416m from the 558 bus stop to Chatswood and approximately 530m from Roseville Train Station (accessible only via stairs) and the 558 bus stop to Linfield and approximately 500m to Roseville Centre on Hill Street which contains a number of the services and facilities identified in cl 26 including the following services and facilities:

- Medical Practice, Dentist, Post Office, Chicken Shop, dress shop, fruit shop, baker, Pharmacy, dry cleaner, milk bar, café, newsagent and more.

As previously discussed, the proposed development is for a RACF that will cater for high care residents with limited mobility and independent access by residents to the services and facilities outlined in cl 26 of SEPP (HSPD) does not occur for existing residents of the facility and is not anticipated for future residents. As previously discussed, it acknowledged that cl 26 of SEPP (HSPD) does not differentiate between the different practical requirements for different categories of seniors housing and a high care resident living in a RACF has far less need/ ability to attend the services and facilities outlined in cl 26 compared to persons living in other categories of Seniors Housing where they are more independent. In the recent judgement in *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde* [2016] NSWLEC 153, Justice Robson made the following statement with regard to the necessity of access to the requires services and facilities for residents in a RACF:

“To consider such a provision as essential would therefore defeat the aims of SEPP (HSPD), as it would act to discourage relevant persons from seeking to increase the supply and diversity of senior residences.”

An Access Report was prepared by Access Associates Sydney and is provided at **Annexure 6**. The report concluded that despite the development not meeting the numerical requirements of cl 26 of SEPP (SHPD), the proposed facility will meet the anticipated

functional requirements of a significant number of visitors, staff and residents and meet the overarching access objectives of SEPP (HSPD).

As an indication of the necessity of the access to services provisions for residents in high care, KOPWA confirmed that out of the 58 residents in the existing facility, only three (3) residents are able to leave the facility unassisted. The three (3) residents that are able to leave, generally only go for short walks in the immediate vicinity of the facility and do not go on extensive outings to the services/ facilities referred to in clause 26. For the majority of dementia and very frail/ aged residents who will live in the facility, the carers, guardians and professional staff attend to all resident's needs.

In order to satisfy the underlying intent of cl 26(1) of SEPP (HSPD) and provide a residential aged care environment that meets the needs and expectations of residents and their families, KOPWA will provide a range of fully integrated 'in home' services within the proposed new facility which are detailed in the service statement provided by KOPWA at **Annexure 7**. The range of services and facilities includes, but is not limited to the following:

General practitioner visits including the provision of a dedicated consulting room (s) within the design of the new Archbold house.	Physiotherapy Services (including a room with appropriate equipment for rehabilitations exercises).
Dental care Visits	Spiritual services
Optometry care visits	Hair dressing salon (with weekly visit from hairdresser)
Podiatry care visits	Food services (All meals and Snacks) prepared fresh on site by in-house Catering team.
Laundry Service – all personal items laundered on site.	Delivery of Pharmaceuticals, newspapers and magazines
Excursions with Aged care Staff to local Banks, Shopping Centres and Mystery Bus Excursions in the Facility owned bus	Provision of internet services
Entertainment services which will include but not limited to singers, musicians, trivia nights, artists etc.	Provision of café/ kiosk which will be available to all residents, their families, Aged care staff and other stakeholders
Dedicated multipurpose room for residents to view the latest movies via homes' Foxtel Channels & to access activities coordinated by the activities officers, such as Bing, Chess, cards, panting and Craft	A dedicated mini bus will be able to provide excursions for residents with aged care staff to local banks, shopping centres, post office and other facilities.

In addition to the above, KOPWA will provide recreational activities within the home that will be tailored to the specific interests of the high care residents that will live there. An example of the activities is provided in Appendix A to the KOPWA Service Statement at **Annexure 7**. KOPWA also provides a mini-bus that is used and will continue to be used to provide excursions for residents and although unlikely, is able to transport residents to any of the services and facilities outlined in cl 26 of SEPP (HSPD) if required. The mini-bus will be available for residents at all times and can transport residents directly from the proposed facility under the supervision and with the assistance of staff if necessary. The mini bus will provide access in lieu of public transport which is generally an inappropriate mode of transport for high care residents given their physical condition and limited mobility.

Having consideration of the proposed level of care offered by the RACF, and the provision of extensive on-site services and a private transport alternative (mini-bus), it is considered

that the assumed objective of control is met and the proposed variation to the development standard is well founded and a better outcome is reached with the proposed alternative mode of transport.

To create opportunities for the development of housing that is located and designed in a manner particularly suited to both those seniors who are independent, mobile and active as well as those who are frail, and other people with a disability regardless of their age.

The proposal involves the redevelopment of an existing facility on the site that provides high care for seniors, rather than the development of a new facility. The existing facility is in need of major refurbishment and the layout and facilities/ services offered do not adequately respond to the market demand for aged care and current statutory requirements for such facilities. Therefore, redevelopment of the site is required to achieve a higher standard of amenity for the existing and future frail/aged residents and to improve building functionality. The expansion of the facility onto 12 and 14 Trafalgar Avenue will enable KOPWA to provide much needed high care beds with a high level of amenity which will assist at increasing the overall supply of suitably located high care seniors housing in Roseville and within the wider Ku-ring-gai LGA.

The existing facility has provided high care for seniors for close to forty years, demonstrating that the site is not only appropriately located for high care Seniors housing but also has an established history within the immediate and surrounding locale.

As discussed above, a key consideration of the suitability of the sites location is the different practical requirements for the different categories of Seniors Housing. Whilst SEPP (HSPD) acknowledges the different categories of seniors housing, the criteria with cl 26 does not necessarily have consideration of the needs of persons within the proposed facility and RACF's in general. The proposed facility will cater for high care residents with limited mobility and independent access by residents to the services and facilities outlined in cl 26 of SEPP (HSPD) is not anticipated nor occur at the existing facility. The omission of acknowledgement of the different needs for the different categories of seniors housing within cl 26 was acknowledged in the recent judgement in Principal Healthcare Finance Pty Ltd v Council of the City of Ryde [2016] NSWLEC 153 where Justice Robson made the following statement with regard to the location requirements within SEPP (HSPD):

'The locational requirements for "independent, mobile and active" seniors, who are unlikely to compromise that independence by residing at a residential care facility and are more likely to travel to attend shops, banks and other facilities, are naturally different to "those who are frail" and cannot independently visit such locations. As such, whilst the locational criteria in cl 26 of SEPP (HSPD) may be suited to those who reside in self-contained dwellings, they are not necessarily suited to "frail" persons who reside in residential care facilities.'

(emphasis added)

having consideration of the facilities established history within the immediate and surrounding locale and the proposed level of care offered, it is considered that the proposed development satisfies the assumed objectives of cl 26 as it will increase the supply of suitably designed and located high care seniors housing, and to require compliance with the control is unnecessary and unreasonable.

Compliance with zone objectives of Ku-ring-gai Local Environment Plan (Local Centres) 2012

The subject site is zoned R2 Low Density Residential under the Ku-ring-gai Local Environment Plan (Local Centres) 2012 (KLEP 2012). The objectives of the zone are:

- *To provide for the housing needs of the community within a low density residential environment.*

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide for housing that is compatible with the existing environmental and built character of Ku-ring-gai*

The proposed development represents an efficient and appropriate use of the land that is compatible with the environmental capacity of the site and the objectives of the R2 – Low Density Residential Zoning. While this form of RACF development is not envisaged/permissible in the R2 zone under KLEP 2012, SEPP (HSPD) expressly allows this form of development in the zone and thus overrides the LEP, so that this form of development is permissible with consent. Notwithstanding, it is considered that the proposed development still satisfies the objectives of the R2 zone for the following reasons:

- The proposed development is for the redevelopment and expansion of an existing RAFC that has operated on part of the subject site for close to 39 years;
- The proposal will provide much needed high care beds for seniors which will provide a significant social benefit and will assist in meeting the demand for seniors requiring high care in Roseville and the broader Ku-ring-gai LGA;
- The proposed development is considered to be compatible with the character of the locality and has been designed to minimise any potential impacts on the amenity of the adjoining properties;
- The subject site is unusually large being 8,186m² which affords potential to accommodate for development of a larger built form mitigated by a combination of appropriate setbacks and landscaping; and
- The proposed development seeks to retain and adaptively re-use the existing dwelling at 14 Trafalgar Avenue.

2.2 Precedent of approval varying the development standard

It is noted that until recently there has been differing opinions by both Council and the JRPP as to whether cl 26 of SEPP (HSPD) was a prohibition or a development standard that could be varied. Only recently has this been clarified in the judgment of *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde [2016] NSWLEC 153*, where it was concluded that:

“cl 26 of SEPP (HSPD) is not a prohibition, but is rather a development standard, and is therefore amendable to clause 4.6”.

Given that this has only recently been clarified by the court, there are limited known examples of consent authorities varying cl 26. Notwithstanding, an application for a new RACF at 9, 11 & 13 Gelibolu Parade and 2, 2A, 4 & 6 St Hilliers Road, Auburn (DA189/201) sought to vary cl 26 and was approved by the JRPP on 10 December 2015 (2015SYW096).

The subject site was not within 400m of the services and facilities identified in cl 26 or within 400m of a mode of public transport that would take residents to the services and facilities identified in cl 26. The subject site was located approximately 500m from a mode of public transport, which was accessible by a pedestrian path that did not comply with the gradient requirements within cl 26. In their assessment of the application the JRPP considered the applicants request to vary cl 26 and determined that:

“compliance with the standard would be unreasonable in the circumstances of this case as the variation will not deny residents reasonable access to facilities and services

given the level of onsite care, onsite facilities and the dedicated bus service to the provided.”

Similar to the approved RACF in Auburn, the proposed development seeks to provide a range of onsite services and facilities in order to satisfy the requirements of cl 26(1) of SEPP (HSPD) and provide a residential aged care environment that meets the needs and expectations of residents and their families, KOPWA will provide a range of fully integrated ‘in home’ services within the proposed new facility which are detailed in the service statement provided by KOPWA at **Annexure 7**. KOPWA also provides a mini-bus that is used and will continue to be used to provide excursions for residents and although unlikely, will be available to transport residents to any of the services and facilities outlined in cl 26 of SEPP (HSPD) if required.

Given the precedent in the Auburn RACF and the recent judgement in *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde [2016] NSWLEC 153* it is considered unreasonable and unnecessary to require strict compliance with cl 26 of SEPP (HSPD) particularly given the established use of the site for high care seniors housing, the proposed onsite services and facilities and the provision of a mini-bus and the unlikelihood of residents requiring access to the services and facilities identified in cl 26.

2.3 Strict compliance would not better achieve the objective of the control.

The proposed development involves the redevelopment and expansion of the existing 58 bed RACF facility that is currently on part of the subject site. Strict compliance with cl 26 would prevent the site from being re-developed as a new and improved facility that has provided Seniors Housing for close to forty years.

The redevelopment of the existing facility and proposed expansion onto 12 and 14 Trafalgar Avenue will enable KOPWA to provide much needed high care beds with a high level of amenity which will assist at increasing the overall supply of seniors housing in Roseville and within the wider Ku-ring-gai LGA. Strict compliance with the standard would prevent the redevelopment and expansion of the existing facility and which will prevent the opportunity to upgrade the level of service and available facilities for the existing residents and 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.

Of particular relevance, in the recent judgement in *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde [2016] NSWLEC 153*, Justice Robson made the following statement with regard to the necessity of access to the requires services and facilities for residents in a RACF:

“To consider such a provision as essential would therefore defeat the aims of SEPP (HSPD), as it would act to discourage relevant persons from seeking to increase the supply and diversity of senior residences.”

Having regard to the above it is considered that strict compliance with the 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,*

If the consent authority insisted on strict compliance with the height standards contained in cl 26 of 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 hinder the development of a 102-bed seniors housing development for seniors requiring high care; 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 context sensitive development with an established history for the purposes of seniors housing in the area which has 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 26 of 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 adopted objectives of cl 26 rather than strictly complying with the numeric standards of the control. Notwithstanding it is considered that the criteria within cl 26 is not relevant to residents within a RACF as acknowledged in *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde* [2016] NSWLEC 153 where Justice Robson stated that the location criteria of cl 26:

“are not necessarily suited to “frail” persons who reside in residential care facilities.”

The proposed development provides public benefits that the objectives of SEPP (HSPD) seek to achieve, being an increase in high care seniors 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 adjoining properties and immediate and surrounding locale as well as the heritage significance of the conservation area.

Having regard to the principles of Four2Five, the proposal which seeks to provide on-site services and facilities which satisfy the requirements of cl 26 will also provide a mini bus for residents on an as-needed basis, which is the most appropriate means of transport given the physical condition and fragility of the residents in a RACF.

While it is unlikely that residents will require independent access to the facilities and services identified within cl 26, if required, the mini bus can transport residents from the proposed facility under the supervision and with the assistance of staff if necessary, providing convenient access to services/ facilities in lieu of public transport- which is considered an inappropriate mode of transport for high care residents. The provision of a mini bus is considered to provide public benefit for the future residents of the facility.

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 does not comply with the cl 26 of SEPP (HSPD) as the site is located at a distance greater than 400m from the services and facilities specified in clause 26(1) and is located greater than 400m from a public transport service to the specified services and facilities that is accessible via a suitable access pathway.

Requiring strict compliance would not result in a better outcome and would in fact prevent the site from being re-developed as a new and improved facility, which would result in a poor planning outcome with no tangible social benefit to the locality or surrounding development. Nevertheless, the proposal still satisfies the assumed objectives of the development standard and the broader zone objectives and it is considered that compliance with the standard is unnecessary for the following reasons:

- The underlying objective and purpose of the standard is not relevant to the proposed development given the category of seniors housing that is being proposed and the unlikelihood of residents independently catching public transport or independently accessing the services and facilities identified in cl 26.
- The proposed development is consistent with the assumed objectives of cl 26 as safe and convenient access to services/ facilities will be provided in the form of a min-bus in lieu of public transport- which is considered an inappropriate mode of transport for high care residents;
- The proposed development is consistent with the assumed objectives of cl 26 as safe and convenient access to services/ facilities will be provided in the form of a min-bus in lieu of public transport- which is considered an inappropriate mode of transport for high care residents;
- It is considered that the provision of a mini bus is a better outcome and safer alternative to public transport for the residents of the facility as it will enable residents to be transported under the supervision and with the assistance of facility staff if necessary;
- The proposal involves the redevelopment an expansion of an existing facility which has operated on part of the site which has operated harmoniously with the surrounding residential properties for close to forty years;
- All of the relevant services and facilities required by residents will be available within the facility and the dedicated min-bus will also be able to transport residents to the services and facilities identified in cl 26 although this is highly unlikely given the high care nature of the residents;

- The subject site is located approximately 500m from Roseville Village which contains access to a bus stop, train station and a number of services and facilities.
- The distance and path of travel to the required services/ public transport will meet the anticipated functional requirements of a significant number of visitors, staff and residents despite exceeding the 400m requirement;
- It is considered that no public benefit would be served by compliance with the standard;
- Contravention of the development standard will not raise any matter of significance for State or regional environmental planning;
- 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 26 of SEPP (HSPD) is unreasonable and unnecessary in the circumstances of this case.