

Lane Cove LEP 2009 Revised Clause 4.6 Exceptions to Development Standards – Height of Building

New Seniors Housing Development at

**No. 266 Longueville Road,
Lane Cove**

Prepared for:
AUSTRALIAN UNITY LIMITED
114 Albert Road
SOUTH MELBOURNE VIC 3205

Prepared by:
GSA PLANNING
Urban Design, Environmental & Traffic Planners
(A.B.N 18 003 667 963)

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LANE COVE LOCAL ENVIRONMENTAL PLAN 2009 REVISED CLAUSE 4.6 – EXCEPTIONS TO DEVELOPMENT STANDARDS

APPLICANT'S NAME: Australian Unity Limited

SITE ADDRESS: No. 266 Longueville Road, Lane Cove

PROPOSAL: Construction of a New Seniors Housing Development

1. (i) Name of the applicable planning instrument which specifies the development standard:

Lane Cove Local Environmental Plan (LEP) 2009

(ii) The land is zoned:

R4 High Density Residential

(iii) The number of relevant clause therein:

Clause 4.3 – Height of Buildings

Clause 4.6 - Exception to Development Standards

2. Description of the Proposed Development and Relevant Background

The proposal is for the construction of a seniors housing development that includes three interconnected buildings which appear as two storeys when viewed from Longueville Road. These buildings vary in height from two to six storeys above ground by utilising a steeply sloping site. The development comprises a 70-bed residential aged care facility, 82 independent living units/self-contained dwellings for seniors, recreational facilities for residents, communal courtyards and basement car parking for 122 vehicles. This breakdown has been slightly altered from the originally submitted DA as part of a refined design.

The proposal also incorporates publicly accessible facilities including a café and multi-purpose rooms, a new public park fronting Longueville Road and a landscaped through-site link along the northern boundary, connecting the park to the existing nearby golf course.

As Lane Cove Council recognised a need for seniors housing in the local area, a design competition for aged care providers was conducted by Council. Australian Unity was the successful tenderer in that competition. The NSW Department of Planning and Environment (DP&E) subsequently granted a Site Compatibility Certificate advising that the site is suitable for increased development density.

The subject site has been earmarked for redevelopment since as early as **2007** when it was included in Council's Major Project Plan. Since that time, there has been extensive community consultation; the preparation of a Planning Proposal; a public hearing relating to the reclassification of the site; and amendments to Council's LEP to facilitate the redevelopment.

Council's reporting indicates that, at the time of the community consultation for the Major Projects Plan, over 80% of the Lane Cove community was supportive of the Plan and it was

also found that 77% of the community supported the development of No. 266 Longueville Road.

The planning controls have been developed to encourage the redevelopment of the site for a seniors living development which in general terms, has a two storey height to Longueville Road and a six storey height at the rear. A background to the evolution of the planning controls that apply to the site is set out below.

Planning Proposal prepared by Don Fox Planning (DFP)

The Planning Proposal to amend the planning controls that apply to the site was prepared for Council by Don Fox Planning in **2013**. This detailed document considered the existing conditions on the site, analysed the surrounding context and based on this, proposed a height limit for the subject site of RL 65.5. The Planning Proposal stated the following, inter alia:

"It is recommended that an RL of 65.5 be adopted as the height limit across that part of the site proposed to be zoned R4....This height limit would allow for development of 2-3 storeys at the street frontage and around 6/7 storeys at the bushland interface."

Resolution of Council

The Planning Proposal was reported to Council on **15 April 2013** and Council resolved to proceed with the height of RL 65.5. The report stated, inter alia:

The consultant has taken into account the existing ground level, topography, surrounding building heights, and views through the site, as well as the desired future character. It was considered that "a suitable height for the subject site is one which retains a consistent bulk and scale at the street frontage and yet responds appropriately to topography and surrounding development".

The Planning Proposal was forwarded to the NSW DP&E for assessment on this basis.

Report by NSW Department of Planning and Environment (DP&E)

In the Planning Proposal assessment report prepared by NSW DP&E, the proposed height was considered and supported on the basis it would result in minimal impact and that the proposal would provide housing for seniors within an ageing local population. The report stated the following, inter alia:

The Planning Proposal is supported as it will have minimal impact on the surrounding environment and local community due to the proposed controls limiting proposed buildings to 2-3 storeys at the Longueville Road frontage and 6-7 storeys at the rear in response to the downward slope of the site

Public Hearing into Reclassification of Land

As the Planning Proposal involves the reclassification of the subject site from 'recreational' to 'operational' pursuant to the *Local Government Act 1993*, there was a legislative requirement to hold a public hearing. At this hearing, the issue of building height was considered. The chairman of the public hearing considered submissions in relation to building height, considered concept envelopes prepared by Council (which were not substantially detailed) and recommended the proposed building height be reduced to RL 62.8, being the parapet height of the adjoining 'Timbertops' development at Nos. 268-270 Longueville Road.

Further Council Resolution and LEP Amendment

Council Officers reported the recommendations of the public hearing to Council, seemingly without significant additional testing of architectural implications, and it was resolved to proceed with the LEP amendment at a height of RL 62.80. The LEP was subsequently made to this effect.

Development Application

On **10 August 2017**, a Clause 4.6 Variation Application was lodged with the Development Application (DA No. 117/2017) to Lane Cove Council. The Clause 4.6 related to several height non-compliances with a maximum height RL of 68.00.

Revised Design

Post lodgement, the design was refined after meeting with 'Timbertops' and in response to Council feedback and community submissions. A revised Clause 4.6 variation was submitted as part of an additional information package on **22 December 2017**. This responded to Point 4 of Council's letter dated **8 December 2017**, which requested additional assessment of the proposed non-compliances. Further, a response to submissions was submitted to Council on **1 February 2018**.

Council provided a further letter on **6 April 2018** which identified a series of items that were required to be addressed in greater detail. This included further justification in the Clause 4.6 for Level 7. Council's letter stated, inter alia:

It is considered that sufficient justification has been provided in relation to the exceptions described as "streetscape", "southern edge", and "roof structures".

...

Council's Independent Assessor has formed the view that a partial seventh storey may be justifiable if it was located in a position other than on the eastern end of building and perhaps near the lift overrun (sic).

The revised design that accompanies this submission reflects this recommendation by relocating the seventh storey to Building B in the middle of the site. This revised Clause 4.6 reflects the revised drawings and responds to the additional justification requested by Council.

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

The development standard to which this request for variation relates is Clause 4.3 of the LEP – Height of Buildings. This clause operates in conjunction with the Height of Buildings Map which indicates that a maximum building level of 62.80 AHD applies to the subject site.

Areas of Height Non-Compliance

The height of the proposal varies across the site and within each of the proposed buildings (see Table 1 and Figure 1 on the following page). Broadly speaking, there are three predominant areas of non-compliance which will be outlined individually below.

Table 1: Extent of Proposed Height Variation			
Building	Roof Level	Lift Overrun Level	Extent of Variation
Building A	RL 63.70	RL 64.93	0.9m – 2.1m
Building B	RL 67.01	RL 67.76	4.21m – 4.96m
Building C	RL 63.40	RL 66.80	0.6m – 4.0m

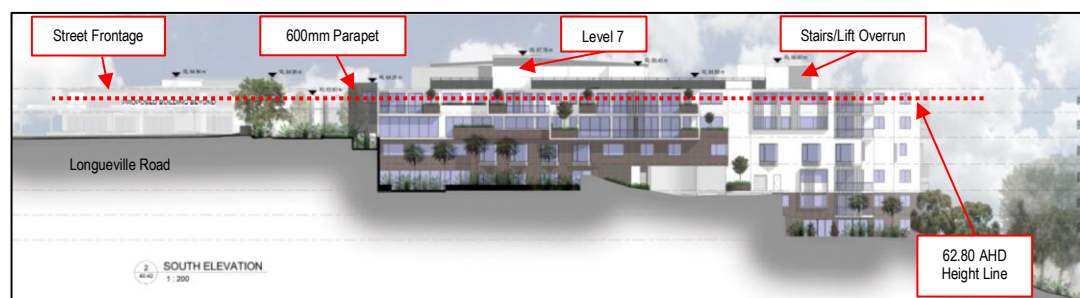


Figure 1: Southern Elevation Showing Extent of Non-Compliance

Variation No.1 – Streetscape

The proposal will present a portico and two storey built form to the street which is 600mm over the height limit. The street frontage height ranges between 4.3m and 7.2m and includes retail tenancies and pedestrian access with a high level of articulation. This has not been altered since the previous Clause 4.6.

Variation No. 2 – Southern Edge

The parapet of Level 6 along the southern edge of the development is proposed at 600mm above the height limit. This has not been altered since the previous Clause 4.6.

Variation No. 3 – Roof Structures

The lift overruns and stairs servicing the respective buildings are the highest points of the development. However, these are setback from both the property boundaries and from the leading edge of the buildings (see Figure 2). It is noted that the centrally located rooftop landscaped courtyard is also located above the height limit. The location of some of the roof structures have been altered under the revised proposal.

Variation No. 4 - Level 7

Three 2 bedroom units are proposed on Level 7 with a pitched roof height of RL 67.01 which is 4.21m over the height limit (see Figure 2).

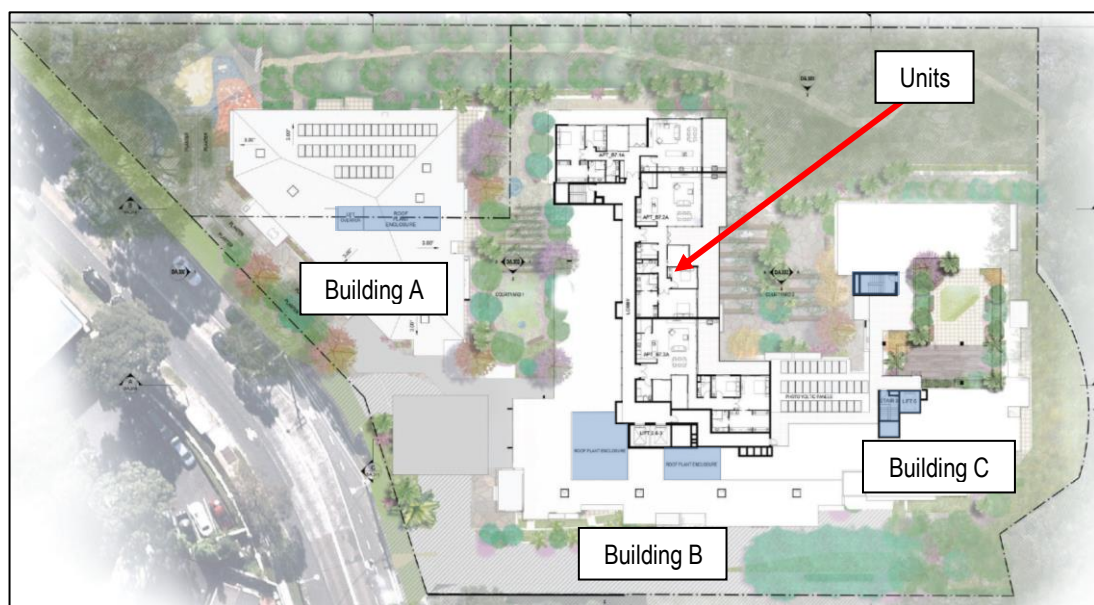


Figure 2: Level 7 Floor Plan Showing Units and Services

■ Roof Service Structures

4. Consistency with the Objectives of Clause 4.6

It is noted that the objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. The objectives of Clause 4.6 and our planning response are as follows:

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

The proposal seeks flexibility in the application of the height development standard to the development. It is our opinion that the height of the proposal is appropriate for a number of reasons including the constraints of the site, the compliant floor space ratio (FSR), minor additional overshadowing compared to a compliant building envelope, the high level of Apartment Design Guide (ADG) compliance, the quality streetscape presentation and the provision of additional accommodation for seniors housing to respond to an identified demand. In our opinion, these matters represented better planning outcomes both for and from the development.

The subject site has steep topography, falling considerably from the street to the rear of the site. In addition, the site has environmental constraints including the proximity of bushfire prone land and requirements for public through site links and green space. The development responds carefully to each of these factors and, in our opinion, presents a high quality urban design outcome. In order to respond to the site constraints and design requirements that have been outlined above, it has become necessary to increase the height of the building beyond the LEP height limit. This is supported by the high level of ADG compliance exhibited by the proposal.

There is a clearly identified demand for Seniors Housing within the Lane Cove Local Government Area (LGA) to meet the needs of an ageing population. The suitability of the site for this use is another long-standing consideration for the redevelopment of the site. The increase in the height of the building would allow additional housing to be provided (up to a compliant FSR) which will benefit the community at large.

In our opinion, the proposal is consistent with the objectives of Clause 4.6 and should be afforded flexibility in the application of the height development standard.

5. Justification for Variation to Development Standards

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The clause is stated, inter alia:

- (3) *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 the 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.*

To respond to these criteria, we will provide the specific justification for each variation and a general assessment in response to the tests identified in the relevant judgements. Each proposed variation is considered appropriate from an environmental planning perspective. These variations are essential to the viability, operation and functioning of the proposed aged care facility and, in our opinion, satisfy the above objectives.

Variation No.1 – Streetscape

Despite the height non-compliance, the development will present as two storeys when viewed from Longueville Road in either direction (see Figure 3 on the following page). This is consistent with the height and scale of any number of developments within the streetscape and is considered appropriate in this regard. In addition, the scale of the frontage is consistent with the desired number of storeys fronting the streetscape as identified through most of the planning proposal process.



Figure 3: Photomontages Showing the Two-Storey Form of the Proposal as Viewed from Longueville Road (DA Submission)

Variation No. 2 – Southern Edge

The non-compliant 600mm along the length of the southern edge creates a consistent building line and is unlikely to have a significant impact on the adjoining 'Timbertops' development.

The proposed building height will present as a two storey form when viewed from the street, a three to four storey form when viewed from the side and six storeys when viewed from the rear. This is consistent with the long standing built form intentions for the site which were established as part of the early consideration of the redevelopment of the site.

As indicated, the subject site presents a number of constraints which makes it difficult to comply with the established building height. Several of these are discussed below.

Access Arrangement to the Subject Site

The floor levels of the proposal are constrained by the access to the subject site from the street. This needs to achieve specific gradients, minimise level changes and comply with the relevant Australian Standards for seniors housing. Again, the required levels of the driveway access have affected the minimum levels of the car parking and in turn increase the height of the building. The topography of the site falls substantially from the street to the rear. This affects the level of the building at the street and driveway access levels throughout the site.

Shared Driveway Configuration

A key contributing factor to the height of the proposed building is the driveway configuration both in terms of access to the site and the continued provision of access to 'Timbertops'. The existing street level, the shared driveway arrangement and the topography of the site dictates the levels of the driveway. The existing driveway at 'Timbertops' has a level of RL 51.95 and is significantly above the ground level of the driveway on the subject site at RL 50.09 (see Photograph 1).



Photograph 1: The existing driveway to the subject site and 'Timbertops' development

The revised proposal reconstructs a shared driveway to the subject site and 'Timbertops'. The difference in levels constrains access and affects the proposed floor levels (see Figure 4). A revised driveway plan is separately submitted.



Figure 4: The Shared Driveway Between the Subject Site (left) and Timbertops (right)

Floor to Ceiling Height Requirements for Residential Care Facility

The integration of the aged care and retirement living is an innovative and progressive model of care not yet built in the Sydney housing market. This model of care will enable care services to be easily delivered to residents in their home, a true ageing in place model of care. Moreover, partners can relocate to 'care' from a residential setting and maintain continuity in their living arrangements, connection to their community and minimise disruption.

In relation to the proposed height non-compliance, Council's letter dated **8 December 2017** states, inter alia:

An additional 600mm in height may be able to be justified by the benefits of incorporating residential aged care and independent living dwellings within the same building.

The non-compliance of the parapet of Level 6 is a function of the increased floor to ceiling heights that are required to be provided to the residential care facility. There are increased service requirements and complexities for residential care facilities which in turn require an increased floor to floor height. The floor to floor height is 3.5m compared to 3.2m for the residential only levels of the building. This has led to an additional 0.6m in building height.

The floor levels of the independent living portion of the building are to be compliant with the ADG which requires a minimum clear ceiling height of 2.7m. Allowing for structure (min. 0.2m) and services (min. 0.3m), this requires floor heights of 3.2m.

Given the mix of the residential care and independent living uses, there is an increase in the floor to ceiling requirements of the building however this does not increase the number of storeys above that envisaged by Council's controls.

Variation No. 3 – Roof Structures

The roof structures, which include the lift cores and roof terrace are centralised and not readily visible from the public domain. Accordingly, they will not increase the perceived bulk and scale of the building and are unlikely result in any privacy impacts. The lift and stairs provide access to the roof terrace and plant equipment, improving the functionality of the building. The roof terrace will provide communal green space with a high level of solar access and amenity.

As indicated in Figure 2, the structures are relatively small and are not considered to result in adverse environmental impacts.

Variation No. 4 - Level 7

Variation No. 4 relates to the three two-bedroom aged care units located on Level 7 as part of Building B in the middle of the site. These have been moved from the rear of the site in accordance with the Independent Assessor's advice in order to reduce the visual impact resulting from the sloping site. The number of units on the upper level have been reduced and further set back from the original DA submission. This will enhance the privacy of the adjoining residential flat building at Nos. 268-270 Longueville Road. The relocated Level 7 will continue to provide a considerable building separation from 'Timbertops', well in excess of the ADG requirements.

The revised design will further minimise aural impacts and inhibit direct sightlines to the neighbouring property. There will be no openings towards 'Timbertops' to the south. In addition, the proposal will only result in minor additional overshadowing over the northern and eastern façade windows of 'Timbertops' compared to a compliant built form. This is outlined in Steve King's Overshadowing Analysis submitted separately. In addition, the units will not be readily visible from the public domain and will therefore not contribute to the perceived bulk and scale of the development.

Accordingly, there are particular circumstances that justify flexibility in this instance and there will be planning benefits both for and from the development as a result of this flexibility. The following section will identify why enforcing strict compliance with the numerical provisions of the control is unreasonable and unnecessary in the circumstances of this particular case and will also consider the merits of the proposal.

There is considerable case law to justify what is unreasonable and unnecessary. Clause 4.6(3)(a) requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*), Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary.

The Court's recent decision in *Four2Five Pty Limited v Ashfield Council* [2015] NSWLEC 90 has altered the way the five tests ought be applied, requiring justification beyond compliance with the objectives of the development standard and the zone. That is, more than one of those five grounds is now arguably required to be made out.

It is our opinion that the proposal satisfies several of the five tests established in *Wehbe* and for that reason, the development standard is unreasonable and unnecessary in this instance. The relevant tests will be considered below.

Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard

Clause 4.3 contains the objectives for height of buildings. The objectives state, inter alia:

- (a) *minimise any overshadowing, loss of privacy and visual impacts of development on neighbouring properties, particularly where zones meet, and*
- (b) *to maximise sunlight for the public domain, and*
- (c) *to relate development to topography.*

Objective (a): minimise any overshadowing, loss of privacy and visual impacts of development on neighbouring properties, particularly where zones meet,

In our opinion, the extent of non-compliance will not result in unreasonable impacts on adjoining or nearby properties in respect of overshadowing, loss of privacy and visual impacts. This will now be discussed.

Overshadowing

External

In order to assess the overshadowing implications of the revised proposal, shadow diagrams have been prepared for 9am to 3pm on the winter solstice (June 21) along the northern elevation of the 'Timbertops' development. In addition, shadow diagrams of the eastern elevation are provided until 12:45pm, after which time there will be no overshadowing from the proposed built form. These shadow diagrams indicate the additional overshadowing caused by Level 7 (**Variation No. 4**) compared to a compliant built form.

The overshadowing analysis to Timbertops prepared by Steve King as part of this submission states, inter alia:

"The full 3D model analysis confirms that between 9 AM and 3 PM on June 21 additional overshadowing of 'Timbertops' can be expected to affect only two apartments, each for approximately half an hour, where those apartments otherwise have the benefit of sun throughout the day.

In my considered opinion overshadowing impact of the proposed aged care and independent living unit development on neighbouring residential property is so small as to be negligible."

These shadow diagrams indicate that the non-compliant elements will not significantly impact solar access to the windows of the 'Timbertops' development. This is a substantial improvement on the DA design previously submitted.

In considering solar access, the ADG indicates that apartments should receive 2 hours sun between 9am and 3pm on 21 June. The shadow diagrams accompanying the proposal indicate that all windows of the adjoining property at Nos. 268-270 Longueville Road will receive 2 hours sunlight.

The shadow diagrams indicate that the proposal will provide sufficient and compliant solar access for adjoining properties. The proposed Level 7 will not significantly increase overshadowing on the windows of the 'Timbertops' development and can therefore be considered consistent with the objective of the control in relation to overshadowing.

Internal

Regardless of the non-compliance, within the development, 71 dwellings (87%) will have more than 2 hours solar access to their living and private open space areas in mid-winter. This will easily comply with the ADG requirements and provide amenity to future occupants. This level of solar access is achieved through the innovative 'e' shaped design.

Privacy

Variation No. 1 refers to height non-compliances at the street frontage. This area will overlook the street and is unlikely to result in any privacy impacts.

Variation No. 2 is not likely to result in any adverse privacy impacts as only parapets or the tops of windows are above the height limit.

Despite the roof top open space (**Variation No. 3**) being above the height limit, it is significantly set back from all boundaries and unlikely to result in adverse visual privacy impacts. In addition, the open space will be utilised by seniors who typically do not generate significant aural impacts.

As indicated, the proposed Level 7 units (**Variation No. 4**) have been relocated to Building B under the revised design and will not have any openings sightlines towards the 'Timbertops' development. This will inhibit sightlines and maximise the privacy of the neighbouring residential flat building. These units are also recessed and well in excess of ADG building separation provisions.

To the north, privacy is maintained for dwellings along Richardson Street West by the landscape buffer and substantial building separation. A recent photograph from a drone shows sightlines in this direction (see Photograph 2 on the following page). In addition, it is noted that the primary views are district views towards the east and future occupants are likely to predominantly face this direction.

Accordingly, the areas of non-compliance with the height standard will not have an adverse impact on privacy.



Photograph 2: Drone photograph showing sightlines directly to the north from the proposed Level 7 unit (RL 65.10)

Revised Visual Impact and Assessment by Dr. Richard Lamb

When viewed from the street, the proposal will have a two storey presentation which is compatible with the streetscape. The topography falls away within the site and the rear of the building is not readily visible from the street. In our opinion, the proposal will not have an adverse visual impact and the areas of height non-compliance will not be readily noticeable in the context of the development. In order to assess any potential visual and view impact from the proposal, a visual impact assessment was undertaken by Dr. Richard Lamb as part of the previously submitted application. This has been revised to reflect the updated plans. As part of his assessment, Dr. Lamb considers visual impact on the public domain and states the following, inter alia:

The exposure of the amended proposal to the public domain would be confined to the Longueville Road streetscape. Parts of two buildings (Building A and B), the formal entrance from the street and the proposed new public park in the north-west corner of the site would be visible in the streetscape.

Although theoretically visible from the street, the amended Level 7 would generally be of minimal presence, as it is set back a substantial distance from the street, behind and beyond Building A. To the extent that it would be visible, the height of Level 7 would not cause significant view loss, or negative impacts on view sharing. Beyond the site to the east, relative to views from the street, the existing vegetation canopy is higher than the proposed development. Level 7 if it is visible, would be seen against a leafy backdrop of vegetation canopy.

The appearance of the development in the street, as in the existing DA, is restrained, of human and residential scale and appropriate to the intended use. The entry is inviting, visually and physically permeable. The intended materiality appears to be relevant to the adjacent residential context. The landscape plans will have the effect of setting the proposal into the existing leafy setting. The increased retention of existing trees will be a benefit in this regard.

It is considered that the appearance of the proposal in the public domain is acceptable. The increased extent of deep soil planting will assist in decreasing the visibility of hard surfaces in the view down the shared driveway from Longueville Road and complement the increased articulation of the southern façades of the development.

There is a substantial separation between the subject site and the adjoining development at 'Timbertops' which acts to minimise adverse visual impact between these buildings. It is noted that these separations are in-excess of that required by the ADG.

Dr. Lamb similarly considers that the proposal is unlikely to have adverse impacts in terms of view loss and undertakes an assessment against the principles of *Tenacity v Warringah Council (2004) NSWLEC 140 (Tenacity)* within his report. He concludes the following, inter alia:

The analysis carried out above showed that the proposal would make a minor but significant improvement in the visual amenity of the site. Increased articulation of the southern façades, driveway design, landscape design, provision of tree planting and retention of existing vegetation would all contribute to a higher level of amenity, in particular with the southern neighbour, Timber Tops.

The analysis also showed that the amended proposal would not cause significant view loss or overlooking. In addition, the part of the building that is not compliant with the development standard for height of buildings, Level 7, is predominantly not visible, or where it is visible, would not cause significant impacts on the streetscape, or the loss of valued items in views in Tenacity terms. The proposed amended building would not cause any significant increase in view loss, compared to a fully compliant building.

Following this analysis and the application of relevant planning principles to considering the merits of the non compliance with the development standard for height of building, the application is considered reasonable. We consider that the proposal is satisfactory with regard to view sharing and a Clause 4.6 request to vary the development standard for height of buildings, in that regard, can be supported.

Dr. Lamb also notes that a fully compliant development would not result in any different view loss. Based on the assessment undertaken by Dr. Lamb, the building – in particular the non-compliant elements - will not result in adverse visual impacts, in terms of *Tenacity* and will not impact upon the public domain.

Objective (b): to maximise sunlight for the public domain

Given the orientation of the subject site, the proposal will not result in significant overshadowing to the public domain. This includes both Longueville Road and the proposed through site link on the northern side of the development. The proposal includes a reduced two storey bulk to Longueville Road which will maximise sunlight at the frontage.

As indicated above, revised shadow diagrams have been prepared in support of the revised proposal and are separately submitted. In our opinion the proposal is consistent with Objective (b).

Objective (c): to relate development to topography

In our opinion the proposed height does not alter the manner in which the development relates to the challenging topography of the site. The current state of the site includes filled areas, undulating topography and various 'benched' areas. The

proposal responds to this, provides a high quality urban design outcome and a substantial landscaping concept which will enhance the visual quality of the site. The areas of non-compliance at the upper levels of the building will not impact this, rather creating a consistent building line along the southern edge. The elevation will be appropriately articulated through the use of balconies and recessed elements. In addition, substantial landscaping will soften the appearance of the built form (see Figure 5). Accordingly, the proposal is consistent with Objective (c).



Figure 5: Southern Elevation

Test 3 - the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;

In the case of the subject site, there is an underlying purpose of facilitating the redevelopment of the subject site for the purposes of seniors housing. Throughout the process, Council have intended that this development would have a form of a two storey building at Longueville Road and a seven storey building towards the rear. This is in fact reflected in the indicative sections which form part of the Development Control Plan (DCP).

The proposal responds to this underlying purposes and presents a high quality seniors living scheme that was supported in principle by Council during the bid process for its design excellence. The scheme has a high level of ADG compliance and responds to the site constraints outlined throughout this document. It also provides the floor to floor levels required to comply with the ADG, and provided the additional services required by residential care facilities. The amended plans have further increased ADG compliance and created an improved amenity outcome.

The non-compliances predominately relate to lift and stair overruns and the upper level of the roof (**Variation No. 3**). Although the top level (**Variation No. 4**) is above the height limit, it is unlikely to result in significant privacy impacts as it is stepped back and provides no openings to the south. The provision of compliant driveway levels and compliant floor to ceiling heights is the primary driver of the height.

In order to reduce the extent of non-compliance, it would be necessary to remove an entire level of the building. This would significantly reduce the amount of accommodation the proposal can provide, impacting the proposal's consistency with Council's long term objectives for the site. This would also thwart the underlying purpose of the standard to present a building that responds to site constraint while

having a height of between two and six storeys. It would also reduce the economic viability of the scheme and potentially reduce the amount of community and public facilities that can be provided.

In addition, enforcing strict compliance would force the FSR compliant massing onto the ground floor which will dramatically reduce the provision of open space. Relocating the bulk to the ground may also compromise the proposed pedestrian through-link which provides a significant public benefit.

For these reasons, it is considered that compliance with the development standard is unreasonable and necessary in the circumstances of the case and the third test of *Wehbe* is satisfied.

The proposal satisfies both Test 1 and Test 3 of *Wehbe* and in our opinion, this clearly demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case. There are particular circumstances that justify flexibility in this instance and there will be planning benefits both for and from the development as a result of this flexibility. The proposal adequately addresses the matters contained in Clause 4.6(3) and should be supported.

6. Clause 4.6(4) Requirements

Clause 4.6(4) governs the consent authority's consideration of this Clause 4.6 variation request. It provides 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*

Commissioner Brown has considered the question of consistency in *Abrams v The Council of the City of Sydney* [2017] NSWLEC 1371 and at [26] held:

In considering the question of consistency, I have adopted approach of the former Chief Judge, Justice Pearlman in Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21 where, Her Honour expresses the following opinion [at 27]:

The guiding principle, then, is that a development will be generally consistent with the objectives, if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible.

In our opinion, the consent authority can be satisfied that the proposal will be in the public interest, notwithstanding the variation to the standard, because it is consistent (in accordance with the principle in *Schaffer*) with the objectives of the height development standard (as addressed above) and the zone (see Table 2).

The applicant submits that the consent authority can and should be satisfied of each of these requirements of Clause 4.6(4), for all of the reasons set out in this request, and also having regard to the unique characteristics of this particular site, in this particular locality; and having regard to the compliant FSR which has been carefully and skilfully distributed across the development in a manner that responds appropriately to the character of the local area, while also minimising any adverse amenity impacts.

TABLE 2 – HEIGHT COMPLIANCE WITH OBJECTIVES OF THE R4 HIGH DENSITY ZONE	
Objective	Response
a) <i>To provide for the housing needs of the community within a high density residential environment.</i>	The proposed height exceedance will provide additional housing within a high density residential environment. The three additional units on Level 7 will contribute to meeting the demand for seniors housing in the area.
b) <i>To provide a variety of housing types within a high density residential environment.</i>	As indicated in the SEE, the proposal will include aged care facility beds for seniors who require a higher level of care, as well as a mix of studio, one and two bedroom independent living units within a high density residential environment.
c) <i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	The proposed height contributes to a proposal that will include a number of additional facilities in the form of a café, shops, salon, wellness area, auditorium and other activity areas to meet the day to day needs of residents and enhance well-being.
d) <i>To provide for a high concentration of housing with good access to transport, services and facilities.</i>	The proposed height allows for an increase in the concentration of housing in this ideal location near public transport. The proposed high quality design will provide access to a wide range of day to day services both on and off site.
e) <i>To ensure that the existing amenity of residences in the neighbourhood is respected.</i>	The building has been designed to ensure that the existing amenity of residents in the neighbourhood is maintained. This is outlined throughout this Clause 4.6.
f) <i>To avoid the isolation of sites resulting from site amalgamation.</i>	This objective is not relevant as there will be no isolation of sites.
g) <i>To ensure that landscaping is maintained and enhanced as a major element in the residential environment.</i>	The design rationale for the location of Level 7 is to ensure there are no amenity impacts on neighbours and provide additional landscaping on the lower levels. The proposal complies with the FSR and the proposed massing enhancing landscaping as a major element of the design. This includes the provision of a new park and landscaped pedestrian link through the site will enhance the residential environment.

7. Clause 4.6(5) Requirements

The Council or the Secretary, as the concurrence authority, is required to consider the following:

- (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 Secretary before granting concurrence.*

The proposal is not likely to raise any matter of significance for State or regional environmental planning. An assessment against the relevant strategic plans was provided in the SEE. The height non-compliance is considered to be in the public interest as it will contribute to a high quality seniors housing development that will contribute to meeting the growing demand for this type of housing. In addition, the non-compliance provides a public benefit by maximising open space on the ground floor. This includes a new park and landscaped pedestrian through link which will be accessible by the public.

The public benefit of maintaining the development standard is not considered significant given the major non-compliances will not readily impact neighbouring properties or the public domain.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted under Clause 4.6(5). The height exceedance will not result in significant amenity impacts and is, in our opinion, in the public interest.