



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**

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JOB NO. 16229
April 2019

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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 seven 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 incorporates publicly accessible facilities including a café, 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 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 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 involved 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 as well as concept envelopes prepared by Council (which were not substantially detailed). The chairman 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 of RL 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 the proposed 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).

A revised design submitted to Council in **May 2018** reflected this recommendation by relocating the seventh storey to Building B in the middle of the site.

Sydney North Planning Panel

On **11 July 2018**, the Development Application was presented to the Sydney North Planning Panel (SNPP) for determination. The Panel deferred the matter to allow the applicant to provide additional information. This included an increased setback along the southern boundary by one metre without any decrease on the northern side.

This revised Clause 4.6 Variation reflects the revised drawings which includes the additional one metre setback 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 RL 62.80 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 below 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

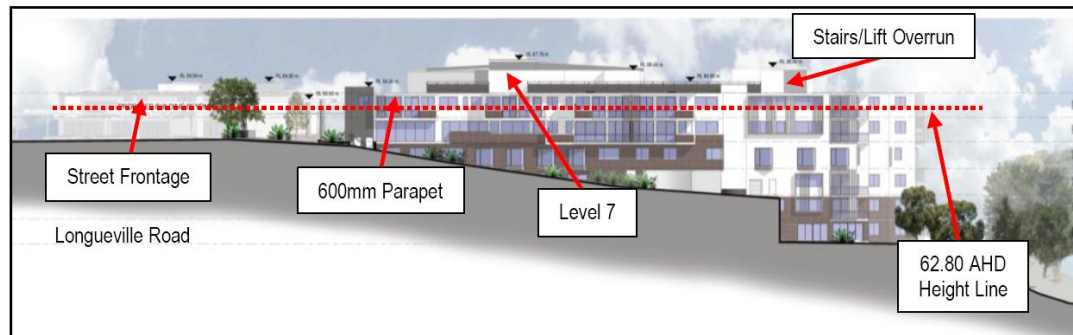


Figure 1: Southern Elevation Showing Extent of Non-Compliance

Variation No. 1 – Streetscape

The proposal will present a portico and two storey built form to the street and with a parapet at the street frontage of RL63.40 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 RL 63.40, which is 600mm above the height limit.

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 since the DA design.

Variation No. 4 - Level 7

Three 2 bedroom units are proposed on Level 7 which is proposed at the top of Building B. This level will have a maximum pitched roof height of RL 67.01, which is 4.21m over the height limit (see Figure 2).

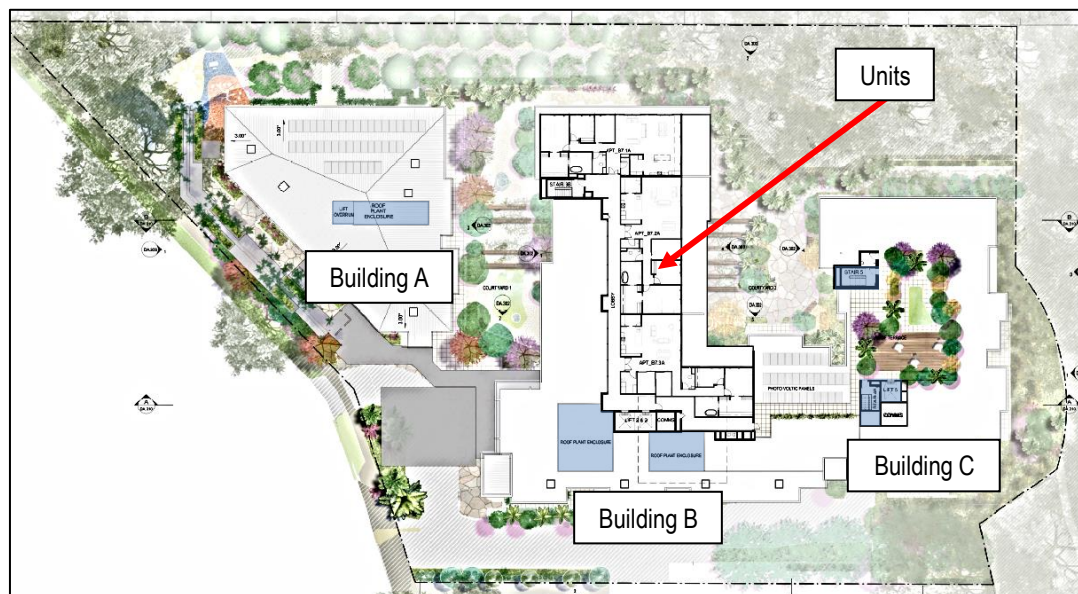


Figure 2: Level 7 Floor Plan Showing Units and Services

 Roof Service Structures

4. Consistency with the Objectives of Clause 4.6

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. In the recent Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC118 (*Initial Action*), Preston CJ notes at [87, 90]:

Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development...In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

However, for abundant caution, it is still considered helpful to provide a preliminary assessment against the objectives of the Clause. The objectives of Clause 4.6 and our planning response are as follows:

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

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 by achieving a better outcome for and from the development.

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 criteria.

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). 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 throughout the Planning Proposal process.



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

In *Initial Action v Woollahra Municipal Council* [2019] NSWLEC 1097, Commissioner O'Neill states at [42] that:

I am satisfied that justifying the aspect of the development that contravenes the development standard as creating a consistent scale with neighbouring development can properly be described as an environmental planning ground within the meaning identified by His Honour in Initial Action [23], because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome (see s 1.3(g) of the EPA Act).

The proposal will provide a two storey built form on what is currently an under-developed site. This will be in keeping with the scale of the streetscape, which is a sufficient environmental planning ground for contravening the development standard. The proposal will also facilitate to orderly and economic development of the land in accordance with Object (c) of the Environmental Planning and Assessment Act 1979 (EPA Act).

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 considerations for redevelopment.

As indicated, the subject site presents a number of constraints which make 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 on the following page).



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. Partners can relocate to 'care' from a residential setting allowing them to maintain continuity in their living arrangements and connection to their community; thereby minimising 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. A floor to floor height of 3.5m is proposed, compared to 3.2m for the residential only levels of the building. This has contributed to the 0.6m in building height above the LEP standard.

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 residential 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 are further set back compared to the original DA submission. The additional 1m setback required by the SNPP in its Record of Deferral and reflected in the current plans represents a further improvement in respect of neighbour amenity. This will enhance the privacy of the adjoining 'Timbertops' development. 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' from Level 7. 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 separately submitted. Furthermore, 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. This is further detailed in *Initial Action* where Preston CJ states at [22]:

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

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(1) 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.*

It is noted that under Clause 4.6(4)(a)ii, 'achieved' has been replaced by the lesser test of 'consistent'. 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.

Similar reasoning was provided in *Initial Action*, however this has been challenged, but not overturned, by *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (*Al Maha*). Despite the non-compliance, the proposal is consistent with the desired high density character of the area. The proposal provides a height, bulk and scale that is consistent with that envisaged by Council's controls. The proposal is consistent with the objectives of the height standard which will now be discussed.

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 were prepared prior to the presentation to the SNPP 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 demonstrate 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 the submission presented to the SNPP 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 that were presented to the SNPP indicate that all windows of the adjoining property at Nos. 268-270 Longueville Road will receive 2 hours sunlight.

In response to the SNPP deferral, the proposal has been modified to include a further 1m setback from the southern boundary. This would invariably improve the already acceptable impact of solar access on 'Timbertops' compared to the DA. In this regard, additional comment was sought from Steve King based on the revised scheme who states, inter alia:

I note that the effect of the amended plans is to further improve the solar access for 'Timbertops'. The conclusions remain the same as previously.

The revised 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 receive 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**) were relocated to Building B under the revised design and will not have any sightlines towards the 'Timbertops' development. Following the SNPP deferral, the design was further revised to include an additional 1m setback from the southern boundary. This will further 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). 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. When viewed from the golf course, the rear of the building is largely obscured by existing and proposed vegetation. 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 was subsequently revised to reflect 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.

Following the presentation to SNPP, a request was made to specifically address visual impacts from four locations: Richardson Street West; Richardson Street East and the ridges to the east; Lane Cove Golf Course; and Longueville Road south of the site. This has been addressed in a Visual Impact Addendum Report, prepared by Dr. Lamb and separately submitted. This report, dated August 2018, concludes, inter alia:

The analysis carried out above showed the following outcomes:

- 1. Richardson Street West.**
 - a. The proposed building would be of no visibility from the majority of the street.*
 - b. A small wedge of building would be visible between two residences on the south side of the street, from an isolated location on the northern footpath.*
 - c. The part of the building visible would include part of Level 7.*
- 2. Richardson Street East and the ridges to the east**
 - a. The proposed building would not be visible from the public domain in streets on the ridge east of the Site.*
 - b. A cameo view toward the west that includes roofs of buildings in Richardson Street East is available from the western terminus of the street. The Site is not visible as a result of heavy screening of views by vegetation in the view lines that is higher than the proposed building on the Site.*
 - c. Partial views heavily screened by intervening vegetation are available from the western terminus of the street where access is available to the Lane Cove Golf Course. The Site is not visible and the proposed building would be unlikely to be visible for the same reasons outlined in 2(b) above.*
- 3. Lane Cove Golf Course**
 - a. The proposed building would not be visible from the majority of the Golf Course north or south relative to the Site.*
 - b. Part of Levels 5 and 6 of the proposed building would be visible through a window of opportunity between existing trees, from an isolated location on the fairway of the 7/16th Hole, to the east of the Site.*
 - c. Other parts of the building may be partly visible from the same or closely adjacent locations, seen through heavy vegetation screening.*
 - d. The adjacent building at Timbertops which is at similar height to Level 6 of the proposed building is also of minimal visibility from the Golf Course, giving a clear indication that the likely future visibility of the proposed building would also be likely to be minimal.*
- 4. Longueville Road south of the Site**
 - a. The proposed building would be clearly evident in the street.*
 - b. The bulk of the upper level of the building would be of minimal visibility.*

Accordingly, the proposal is considered appropriate in terms of visual exposure to the abovementioned locations.

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 two storey bulk to Longueville Road which will maximise sunlight at the frontage.

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 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 high density 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 provides the floor to floor levels required to comply with the ADG and the additional services required by residential care facilities. The amended plans, with an additional 1m setback from the southern boundary when compared to the DA scheme, further increase ADG compliance and create 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 the entire Level 6 and 7 of the building. This would significantly reduce the amount of accommodation the proposal can provide, impacting the consistency of the proposal 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 the site constraints while having a height of between two and seven 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 in the current design. Accordingly, although exceeding the height limit, the proposed massing promotes a better design and amenity outcome in accordance with Object (g) of the EPA Act.

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)(a) Requirements

Clause 4.6(4)(a) 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.

Similar reasoning was provided in *Initial Action*, however this has been challenged, but not overturned, by *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (*Al Maha*). 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 on the following page).

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 RESIDENTIAL 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 Statement of Environmental Effects (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 including a café, shops, salon, wellness area, auditorium and other activity areas. These facilities will 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. As indicated, the proposed Level 7 facilitates three additional units consistent with the high density residential character.
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 Variation.
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 promotes landscaping as a major element of the design. This includes the provision of a new park and landscaped pedestrian link through the site which will enhance the residential environment.

7. Clause 4.6(4)(b) and 4.6(5) Requirements

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the DP&E) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

Under Clause 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice. While the proposal exceeds the development standard by over 10%, the Planning Circular provides for a Planning Panel to assume concurrence.

Nevertheless, the matters in Clause 4.6(5) should still be considered when exercising the power to grant development consent for development that contravenes a development standard (*Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at [100] and *Wehbe* at [41]). In deciding whether to grant concurrence, the Council, Panel or Secretary are 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.

8. Conclusion

This written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard. This is summarised in the compliance matrix prepared in light of *Initial Action* (see Table 3 on the following page).

We are of the view that the consent authority should be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives of the R4 High Density Residential Zone pursuant to the LEP. On that basis, the request to vary Clause 4.3 should be upheld.

Table 3: Compliance Matrix

Para (Initial Action)	Requirement	Section	Summary	Satisfied
10	Is it a development standard (s.1.4)	1	Yes	YES
11	What is the development standard	1	Height of Buildings	YES
12	What is the control	1 & 3	RL 62.80	YES
14	First Precondition to Enlivening the Power – Consent authority must form 2 positive opinions:		Both positive opinions can be formed as detailed below.	YES
15, 25	1st Positive Opinion – That the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3). There are two aspects of that requirement. The consent authority does not have to directly form the opinion of satisfaction regarding the matters in Clause 4.6(3)(a)&(b), but only that the applicant's written request has adequately addressed the matters required. The applicant bears the onus to demonstrate that the matters in Clause 4.6(3) have been adequately addressed in order to enable the consent authority to form the requisite opinion of satisfaction.	5	The Clause 4.6 variation has adequately addressed both matters in Clause 4.6(3) by providing a detailed justification in light of the relevant tests and planning considerations.	YES
16-22	First Aspect is Clause 4.6(3)(a) – that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Common ways are as set out in <i>Wehbe</i> .	5	The proposal is consistent with Tests 1 and 3 of <i>Wehbe</i> : <ul style="list-style-type: none"> • The objectives of the standard are achieved notwithstanding the non-compliance with the standard; and • The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable. 	YES
23-24	Second Aspect is Clause 4.6(3)(b) – The written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be indirectly satisfied under Clause 4.6(4)(a)(i) that the written request has adequately addressed this matter. The environmental planning grounds must be "sufficient" in two respects: <ol style="list-style-type: none"> a) The environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. b) The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole. 	5	Sufficient environmental planning grounds include, inter alia: <ul style="list-style-type: none"> • The proposed height facilitates a high density residential development consistent with the planning objectives of the area; • The development will appear as two storeys in the streetscape, consistent with surrounding buildings; • The proposal is consistent with the FSR development standard and generally consistent with the setback controls; • The proposal provides building separation in excess of the ADG requirement and is sympathetic to the adjoining 'Timbertops' development; • There are a number of site constraints that make strict compliance difficult including the shared driveway configuration and floor to ceiling heights for residential care facilities; • The height non-compliance does not result in unreasonable privacy, overshadowing or view impacts; 	YES

			<ul style="list-style-type: none"> • The height non-compliance results in a better planning and design outcome than additional massing on the lower levels, which would reduce the provision of open space; and • The proposal contributes to meeting the demand for seniors housing development in an area with a rapidly ageing population. 	
26-27	<p>2nd Positive Opinion – That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out.</p> <p>This second opinion differs from the first opinion of satisfaction in that the consent authority must be <u>directly</u> satisfied about the matter in Clause 4.6(4)(a)(ii).</p>	5, 6	The proposed development is consistent with the objectives of the height standard as addressed under Test 1 of <i>Webhe</i> . The proposal is also consistent with the objectives of the R4 High Density Residential Zone, as addressed in Table 2.	YES
28-29	<p>Second Precondition to Enlivening the Power – that the concurrence of the Secretary has been obtained [Clause 4.6(4)(b)]. On appeal, the Court has the power to grant development consent, subject to being satisfied of the relevant matters under Clause 4.6.</p>	7	As the relevant matters for consideration under Clause 4.6 have been satisfied as outlined above, the Council or Panel can grant development consent.	YES