6 August 2018

General Manager
Liverpool City Council
Locked Bag 7064
Liverpool BC NSW 1871

Dear Sir/Madam,

RE: WITHOUT PREJUDICE

DEVELOPMENT APPLICATION FOR PROPOSED CONSTRUCTION AND OPERATION OF A RESIDENTIAL AGED CARE FACILITY AT 11-15 LANG ROAD, 76-80 MARSH PARADE & 536-542 HUME HIGHWAY, CASULA

REQUEST UNDER CLAUSE 4.6 OF THE *LIVERPOOL LOCAL ENVIRONMENTAL PLAN 2008* TO VARY THE DEVELOPMENT STANDARD IN RELATION TO THE DISTANCE CONTROL IN CLAUSE 26(2)(B)(I) OF STATE ENVIRONMENTAL PLANNING POLICY (HOUSING FOR SENIORS OR PEOPLE WITH A DISABILITY) 2004

INTRODUCTION

1. This letter has been prepared on behalf of the applicant, Catholic Healthcare Limited (CHL), to further assist with the consideration of the proposed development for a "residential aged care facility" (RACF) and the variation sought to the distance control under Clause 26(2)(b)(i) of S*tate Environmental Planning Policy (Housing for Seniors and People with a Disability)* 2004 (Seniors Housing SEPP).
2. As detailed in the Statement of Environmental Effects (SEE) report which accompanies this Development Application (DA), and the slightly amended design of the proposed development has had consideration of the distance control contained in Clause 26(2)(b)(i) of the Seniors housing SEPP, as the proposal will result in a minor variation of standard in the RACF proposed at 11-15 Lang Road, 76-80 Marsh Parade and 536-542 Hume Highway, Casula.
3. The distance standard under the Seniors Housing SEPP for the proposed RACF is 400 metres and the proposal seeks approval for 622 metres.
4. Therefore, this request is to vary the Seniors Housing SEPP distance standard under the provisions of Clause 4.6 of the Liverpool Local Environmental Plan 2008 (LLEP).
5. This Clause 4.6 variation request has been prepared having regard to:
   - The NSW prepared in accordance with the Department of Planning & Environment's Guideline *Varying Development Standards: A Guide*, August 2011, and
   - has incorporated as relevant principles identified in the applicable Case law, (established tests) in the following judgements:
     - *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*
     - *Wehbe v Pittwater Council [2007] NSWLEC 827*
     - *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No 1')*
     - *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*

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- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 ('Four2Five No 3')*
- *Moskovich v Waverley Council [2016] NSWLEC 1015*
- *Project Venture Developments v Pittwater Council [2005] NSWLEC 191*
- *Ex Gratia P/L v Dungog Council [2015] (NSWLEC 148)*

6. This letter has explained how flexibility is justified in this case in terms of the matters explicitly required to be considered and addressed under Clause 4.6 in a written request from the applicant. This letter also addresses, where relevant and helpful, additional matters that the consent authority is required to be satisfied of when exercising the discretion afforded by Clause 4.6 and the assumed concurrence of the Secretary.

WHAT IS THE ENVIRONMENTALPLANNING INSTRUMENT (EPI) APPLICABLE?

7. The Environmental Planning Instrument (EPI) to which this variation relates is the Liverpool Local Environmental Plan 2008 (LLEP).

WHAT IS THE ZONING OF THE LAND?

8. In accordance with Clause 2.2 of the LLEP the site is zoned R3 Medium Density Residential.

WHAT ARE THE OBJECTIVES OF THE ZONE?

9. The land use table to Clause 2.2 of the LLEP provides the following objectives for the R3 Medium Density Residential zoning:

1 Objectives of zone

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide for a concentration of housing with access to services and facilities.*
- *To provide for a suitable visual transition between high density residential areas and lower density areas.*
- *To ensure that a high level of residential amenity is achieved and maintained.*

WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?

10. The development standard being varied is the "Distance" standard in Clause 26(2)(b)(i) of the Seniors Housing SEPP.

UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE EPI?

11. The development standard being varied is prescribed under Clause 26(2)(b)(i) of the Seniors Housing SEPP. The development standard to which this objection relates is Clause 26(2)(b)(i) under the Seniors Housing SEPP, which contains provisions relating to the distance for development of the site for the purposes of a residential care facility. The relevant clause in the Seniors Housing SEPP is as follows:

26 Location and Access to Facilities

…

(2) Access complies with this clause if:

…

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

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

The proposed development is located on land which is more than 400m away from the facilities specified in Clause 26(1)(a) to (c) for the forward journey to all of the range of the facilities and services in the Liverpool City Centre from the bus stop on the opposite of the site near the corner of Kurrajong Road with the Hume Highway, being some 622m. However, the gradients of this route via the pathways within the streets comply with those detailed above or can be made to comply. The return journey from the Liverpool City Centre alights at a bus stop immediately at the street frontage of the site on the Hume Highway near the corner with Lang Road being some 77m. If using the Social Impact Comment, the distance to services via a suitable accessible pathway is some 450m to the local shops on the Hume Highway at Casula near De Meyrick Avenue.

Due to the average age of residents for which the proposed residential care facility will provide a home (being between 83 and 85 years of age), most persons on-site will not have the capacity to independently leave the site to access the services and facilities outlined in Clause 26 above. The criteria are more suited to a self-care style of Seniors Housing which this proposed development does not involve.

In any event, the proposed development complies with the objectives of this clause and provides access to facilities by a superior means to those identified in clause 26(2).

For example, CHL as the managers of the proposed residential care facility seeks to provide superior services on-site which will include:

- Physiotherapy,
- Hairdressing salon;
- Cafe;
- Strategically located lounge and dining areas for residents to enjoy outlooks to the landscaped gardens;
- Nurse stations at each residential level;
- On-site facilities for provision of catering with full commercial kitchen and refrigeration/store rooms;
- On-site linen services;
- Plant areas;
- Storage areas;

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- Staff amenities;

- Lift access to each level of the building for residents with a separate service lift access for "back-of-house" functions;

With respect to the provisions of Clause 26, should CHL be successful in receiving Residential Aged Care Places in the 2016-17 ACAR, it is anticipated that residents will generally be from the surrounding localities and local government area. Given this, residents will be able to continue to access their existing local treating doctor and therefore will not place any greater burden on existing medical services in the area.

The NSW Land and Environment Court (the Court) considered whether the provisions of Clause 26 act as a prohibition or whether they are a development standard in the recent case of *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde* [2016] NSWLEC 153 .

This matter involved an appeal of a decision of the Sydney East Region Joint Regional Planning Panel to refuse a development application prepared by the applicant Principal Healthcare Finance Pty Ltd. The development application sought approval to demolish an existing nursing home facility with 72 beds and construct a new 'high care' residential aged care facility with 141 beds in West Ryde. On 8 June 2016, Pain J of the Land and Environment Court of NSW ordered that the Court independently deal with the question of whether clause 26 of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability)* 2004 (SEPP HSPD) is a development standard amenable to clause 4.6 of the *Ryde Local Environmental Plan* 2014 or a prohibition, prior to the commencement of the main hearing. This decision considers that separate question.

In its submission to the Court, the applicant argued that clause 26 of the Seniors Housing SEPP is a development standard, as distinct from a prohibition. The applicant submitted that the matters set out in the Seniors Housing SEPP were not essential preconditions, but rather a set of standards relating to how the permissible use (that being seniors living, or the use of the site as a residential care facility) is to be carried out.

The Court considered a number of clauses in the Seniors Housing SEPP and reiterated clause 26 should be considered in the context of the instrument as a whole. The Court applied the 'two-step' approach as outlined in the case of *Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319 which required firstly, a consideration of whether the proposed development is prohibited under any circumstances pursuant to clause 26 of Seniors Housing SEPP, and secondly, if it is not prohibited, a consideration of whether clause 26 of Seniors Housing SEPP specifies a requirement or imposes a standard in relation to an aspect of the proposed development.

In relation to the first step, the Court confirmed that despite clause 26 of the Seniors Housing SEPP having the flavour of a prohibition, it was not so when read in the context of the whole instrument. It was noted that the Seniors Housing SEPP does not act to prohibit developments, but rather permits them when certain criteria are met.

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The Court also found that the criteria in clause 26 of the Seniors Housing SEPP are not essential conditions, and to consider them so would defeat the purpose of the Seniors Housing SEPP by discouraging the establishment of RACF as a type of seniors housing facilities.

The definition of 'seniors housing' contained in clause 10 of the Seniors Housing SEPP as detailed previously in this SEE report, covers a wide range of developments, from self-contained dwellings to residential aged care facilities, each established for residents with different needs.

With this in mind, the Court found that the criteria in clause 26 of the Seniors Housing SEPP does not necessarily cater for those who would reside in the applicant's proposed "residential aged care facility", i.e. frail persons not capable of independent living.

It should be noted that the applicant in this case, CHL proposes a RACF at Casula which will cater for frail persons who are not capable of independent living, and thus is consistent with the first step.

With respect to the second step, the Court highlighted that the definition of 'development standards' in section 4 of the *Environmental Planning and Assessment Act 1979* (NSW) essentially has three elements. Firstly, the relevant provision must be in relation to the carrying out of development. Secondly, the relevant provision must specify requirements or set standards in respect of an aspect of the development. In relation to these elements, the Court indicated that the empirical criteria contained in clause 26 of the Seniors Housing SEPP (i.e. the gradient measurements and minimum access distance of 400m), both specify requirements and set standards for the proposed development. According to the Court, the third element was also satisfied, adding further comfort.

The Court therefore determined that clause 26 of Seniors Housing SEPP both falls within the definition of 'development standard' and confirmed that it meets the second step in the two-step test.

As the proposed CHL RACF measures at a distance of some 622m to the bus stop on the opposite side of the Hume Highway near the traffic signal-controlled intersection with Kurrajong Road for the forward journey to facilities and services in the Liverpool City Centre, this is the applicant's request to vary the development standard under Clause 4.6 of the LLEP, which assesses the established principles as follows.

This clause 4.6 variation relates to a departure from a numerical standard prescribed under Clause 26(2)(b)(i) of the Seniors Housing SEPP and is a development standard as it specifies a distance for a RACF which fits within the definitions as outlined above.

WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

12. It is noted that there is no specifically stated objectives of the standard. Therefore, it is considered that the underlying objectives of clause 26(2)(b)(i) include:

    (a) To encourage different forms of seniors housing; and

    (b) To ensure that residents of seniors housing developments who are independent and capable of using public transport have reasonable access to public transport services to take them to facilities and services that they are likely to want to use. It is not relevant as

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a standard with highly dependent people who are not capable of walking to and using public transport;

And, these objectives of the standard should be read in conjunction with the objectives of the chapter under the Seniors Housing SEPP, where Clause 14 of the Seniors Housing SEPP:

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

WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE EPI?

13. The provisions of Clause 26(2)(b)(i) advises:

26 Location and Access to Facilities

…

(2) Access complies with this clause if:

…

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

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

WHAT IS THE PROPOSED NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE DA AND THE VARIATION PROPOSED?

14. The distance of the proposed RACF is 622 metres via a suitable access pathway to the nearest bus stop for the forward journey to Liverpool City Centre. The proposed variation is therefore 222 metres.

MATTERS TO BE CONSIDERED UNDER CLAUSE 4.6

16. Clause 4.6 of the LLEP states:

4.6 Exceptions to development standards

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

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(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.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

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(5) In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note.

When this Plan was made it did not include all of these zones.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(ca) clause 6.4, 6.5, 6.6, 7.22, 7.23, 7.24, 7.25, 7.26, 7.26A, 7.27, 7.28, 7.29 or 7.30.

17. Table 1 provides a summary of the key matters for consideration under Clause 4.6 of the LLEP and response to each consideration.

Table 1: Matters for Consideration under Clause 4.6

Clause 4.6 Consideration	Response
(1) The objectives of this clause are as follows: *(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,* *(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*	The objectives of this clause expressly indicate a degree of flexibility should be applied "in particular circumstances". This is such a circumstance to enable a flexible approach to the outcome sought by this DA.
(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.	The distance standard is not excluded from operation of this clause.
(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*	The Statement of Environmental Effects submitted with the DA indicates a specific request is included with the application to seek a variation of the distance development standard. This letter is the applicant's formal written request. Refer to **table 2** below for an assessment under Clause 4.6(3)(a) and (b).

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Clause 4.6 Consideration	Response
b. *that there are sufficient environmental planning grounds to justify contravening the development standard.*	
(4) Development consent must not be granted for development that contravenes a development standard unless: a. *the consent authority is satisfied that:* i. *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and* ii. *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and* b. *the concurrence of the Director-General has been obtained.*	This written request addresses all requirements of subclause (3). As set out in paragraph 18 and **table 2** of this written request, the proposed development will be in the public interest because it is consistent with the underlying objectives of the particular standard (refer to **table 2**) and the objectives for the zones (refer to **table 3**). Concurrence is assumed but is a matter to be determined by the Consent Authority.
(5) In deciding whether to grant concurrence, the Director-General must consider: a. *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and* b. *the public benefit of maintaining the development standard, and* c. *any other matters required to be taken into consideration by the Director-General before granting concurrence.*	Potential matters of significance for State or regional environmental planning is addressed in paragraphs 36 and 37, and **table 4**. The minor non-compliances with the development standard does not raise any matters of significance for State or regional planning as the development meets the stated objective of the development standard. Consideration of whether there is any public benefit in maintaining the development standard is considered in paragraphs 39, 40 and 41. As the development substantially complies with the stated objective of the development standards, there is little utility in requiring strict compliance with the development standard for an otherwise compliant development. There is no public benefit of maintaining the development standard in this circumstance. It is considered that all matters required to be taken into account by the Director-General before granting concurrence have been adequately addressed as part of this Clause 4.6 variation request.
(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if: *(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*	The provisions of Clause 4.6(6) do not apply to the subject site and proposed development in this DA.

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Clause 4.6 Consideration	Response
(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard. *Note. When this Plan was made it did not include all of these zones.*	
(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).	The Consent Authority must keep a record after determining this DA.
(8) This clause does not allow development consent to be granted for development that would contravene any of the following: *(a) a development standard for complying development,* *(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,* *(c) clause 5.4,* *(ca) clause 6.4, 6.5, 6.6, 7.22, 7.23, 7.24, 7.25, 7.26, 7.26A, 7.27, 7.28, 7.29 or 7.30.*	This subclause does not affect the subject site.

18. Table 2 below provides an assessment against Clause 4.6(3):

Table 2: Clause 4.6(3) assessment

Objective	Comment
(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case	Strict application of the development standard is considered to be unreasonable and unnecessary as the proposed development will be consistent with the underlying objectives: (a) To encourage different forms of seniors housing; and (b) To ensure that residents of seniors housing developments who are independent and capable of using public transport have reasonable access to public transport services to take them to facilities and services that they are likely to want to use. It is not relevant as a standard with highly dependent people who are not capable of walking to and using public transport; And, these objectives of the standard should be read in conjunction with the objectives of the chapter under the Seniors Housing SEPP, where Clause 14 of the Seniors Housing SEPP *"The objective of this Chapter is to create opportunities for the development of housing that is located and designed in a manner particularly suited to both those seniors who are independent, mobile and active as well as those who are frail, and other people with a disability regardless of their age."* • In light of the objectives, above which encourage a flexible approach to compliance with design principles where the design of the development responds to the site and its form, strict compliance with the standard under Clause 4.4(2) is **unnecessary** because: I. The site of the proposed development is not in an isolated location and has access to the services and facilities detailed in clause 26(1) as there are public transport services within 400m of the site, despite a portion of the forward journey not complying; II. The likelihood of a bus stop being moved some 222m while not impossible, is remote; and

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Objective	Comment
	III. The site is not in an isolated location and has access to the services and facilities detailed in clause 26(1) as it is not an excessive distance from access to services and facilities. Strict compliance with the development standard is unnecessary as the development will still achieve the underlying environmental and planning objectives as discussed above. • Strict compliance is **unreasonable** as no environmental or planning purpose would be served by enforcing the development standard and would not bring about a good planning outcome, on the following grounds: I. With this in mind, it is important to note since the State legislation was first drafted in the Senior Housing SEPP that a Residential Aged Care Facility (RACF) no longer provides a distinction between low and high care, and as a result of this change at the Commonwealth level, and the increase in the provision of services in the home has meant that low care residents are much fewer. Specifically, in the case of this site it will only accommodate high care and high care dementia residents. The frailty of most high care residents will exclude them from being able to walk a distance to a bus stop. The removal of the distinction between low care and high care in aged care and clear policy of the Commonwealth government to keep people in home longer would reduce the likelihood of a change of use to provide care for lower need residents at this RACF. For these reasons it is considered that strict application of the distance control is unreasonable and unnecessary in this circumstance, particularly given that the non-compliance is minor and there are no impacts flowing from the non-compliance.
(b) that there are sufficient environmental planning grounds to justify contravening the development standard	The exceedance of the development standard for the development is a very minor part of the proposal. The minor non-compliance with the development standard is far outweighed by the development achieving the aims in promoting the principles outlined in the Greater Sydney Region Plan – A Metropolis of Three Cities. For example, the development promotes the improved use of existing housing stock in an existing low density residential urban area which supports: • Existing urban housing; and • Increasing residential housing choice for aged care within the R3 zone which permits this form of development under the LLEP. In this regard, the development is also consistent with the State and regional objectives.

19. The requirement for consideration and justification of a Clause 4.6 variation necessitates an assessment of the criteria. It is recognised that it is not merely sufficient to demonstrate a minimisation of environmental harm to justify a Clause 4.6 variation, although in the circumstance of this case, the absence of any environmental impact, the request is of considerable merit.
20. The proposed variation from the development standard is assessed below against the accepted "5 Ways" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council [2007] NSWLEC 827* and the principles outlined in *Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46*. Whilst the principle applied to SEPP 1, it has been generally applied in the consideration of a request under Clause 4.6 of the LLEP, as confirmed in *Four2Five*.

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HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?

21. The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council [2007] NSW LEC 827*. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the variation. Under *Four2Five*, whilst this can still be considered under this heading, it is also necessary to consider it under Clause 4.6(3)(a) (see below).
22. The five ways described in *Wehbe* are therefore appropriately considered in this context, as follows:

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

23. The objectives of the standard are set out below. It is considered that the variation still achieves the stated objectives of the development standard as detailed previously in Table 2 above:

    (a) To encourage different forms of seniors housing; and

    (b) To ensure that residents of seniors housing developments who are independent and capable of using public transport have reasonable access to public transport services to take them to facilities and services that they are likely to want to use. It is not relevant as a standard with highly dependent people who are not capable of walking to and using public transport;

And, these objectives of the standard should be read in conjunction with the objectives of the chapter under the Seniors Housing SEPP, where Clause 14 of the Seniors Housing SEPP

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

24. The proposed development achieves the above stated objectives for the reasons stated in Table 2, notwithstanding the minor non-compliances with the distance standard.
25. The breach of the distance standard does not cause inconsistency with the underlying objectives of the Seniors Housing SEPP, and these objectives are achieved.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

26. Not applicable. The stated objectives of the standard are relevant to the development and can be maintained by the proposed variation.

3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

27. As the stated previously the objectives of the standard can still be maintained, and therefore the purpose will not be defeated or thwarted by the variation requested and strict compliance is unreasonable.

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4. ***The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;***

28. It is noted that Council has varied the distance standard from time to time based on the merits of each case.

5. ***The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.***

29. Not applicable.

SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY THE CONTRAVENTION

30. The Statement of Environmental Effects prepared for this Development Application provides a comprehensive environmental planning assessment of the proposed development and concludes that subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the development.
31. Strict application of the standard is considered to be unreasonable and unnecessary in the current circumstance for the following reasons:

- The distance while not strictly compliant, would not be a burden and is reasonable for persons to complete as a journey having set out to gain access to the public transport service via the suitable access pathway. This is because the additional distance required to access the closest bus stop to the public transport services via a suitable access pathway is not an unreasonable distance to travel once the journey has been commenced. It is noted that the distance travelled to the intersection of the Hume Highway with Kurrajong Road is some 390m, and at this point the bus stop is able to be viewed on the opposite side Hume Highway at the safe signalise intersection for crossing, therefore traversing the remaining leg of the journey to the bus stop while greater than 400m overall, is able to be achieved;
- The Social Impact Comment at Appendix F indicates the distance is some 450m to the local centre on the Hume Highway at Casula, which is a minor variation;
- The operator and manager of the residential aged care facility when completed has recognised that the proposed development should provide for access to the specific services and facilities required by their residents, and to this extent have included provision for a number of services and facilities on-site. A mini-van will be available when required should the need arise, suitable for door to door access between the proposed development and the specific service requested access by a resident. This will also enable residents to be supervised for this journey and afforded personalised care which the public transport service does not provide. The proposed development can allow for provision of day excursions for residents if required, which would also be supervised. The RACF can provide services which are superior to that of the public transport service and can ensure that the site cannot be described as isolated;
- Most residents, if not all the residents who will reside at the residential aged care facility, no longer have a level of independence suitable to seek out access to public transport services. The main reason for that resident residing at this residential aged car facility will be because they require a level of care which involves supervision by the staff of the facility; if this were not the case they would otherwise be residing in a "self-care" facility or their own homes with

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"Homecare" services which do not provide for a level of support now legislated for by the Commonwealth for a RACF;

- The variation of the standard will not undermine achievement of the underlying objectives of the standard;
- The variation does not result in an impact on the level of amenity which will be afforded residents of the residential aged care facility; and
- There is case law which supports the rationale for the variation of the development standard.

32. The particular circumstances of this case distinguish it from others for the following key reasons:
    - Not result in any inconsistency with the underlying purpose of the development standard which is to ensure that the site is not isolated from the services and facilities detailed in clause 26(1);
    - Not undermine the application of this development standard in the future as other sites may not afford the public benefits proposed in this development both:
        - as a facility for aged persons which is an identified need for the Liverpool City Local Government Area; and
        - 40% concessional places for the local community.
    - The development does not significantly adversely impact on the amenity of adjoining properties; and
    - The matters raised in Table 2 establish the reasons why compliance is unreasonable and unnecessary

IS THE VARIATION IN THE PUBLIC INTEREST?

33. Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless 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.
34. The objectives of the standard have been addressed in paragraphs 23 to 34, and **table 3** and are demonstrated to be satisfied. The proposal is consistent with the zone objectives and permissible in the zone. Each of the objectives of the zone are addressed in **Table 3** below.

Table 3: *Assessment of the proposed development against the zone objectives – R3 Medium Density Residential zone under the LLEP*

R3 Medium Density Residential zone - objectives	Comment
• ***To provide for the housing needs of the community within a medium density residential environment.***	The research undertaken for CHL has identified as discussed previously the need for residential aged care in the form of development as proposed by the applicant being a RACF, being a medium density form of housing consistent with the objective.
• ***To provide a variety of housing types within a medium density residential environment.***	The form of development as a RACF is a type of "seniors housing" which is listed as a residential housing permitted within the R3 zone and is therefore consistent with the objective.

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R3 Medium Density Residential zone - objectives	Comment
• ***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***	The building includes ancillary uses as part of the overall support for the RACF to meet the day to day needs of future residents and their visitors being consistent with the objective.
• ***To provide for a concentration of housing with access to services and facilities.***	The proposed building has access to services and facilities.
• ***To provide for a suitable visual transition between high density residential areas and lower density areas.***	The design includes setbacks and privacy louvers, along with levels to accommodate the site topography to provide for a suitable transition.
• ***To ensure that a high level of residential amenity is achieved and maintained.***	The design seeks to provide for a high level of internal amenity as detailed in the architectural design report at **Appendix C**, which is consistent with the objective.

35. The objectives of the zone, as demonstrated above, as well as the underlying objectives for the standard have been adequately satisfied, where relevant. Therefore, the variation to the distance standard is in the public interest.

MATTERS OF STATE OR REGIONAL SIGNIFICANCE (CL.4.6(5)(A))

36. Clause 4.6(5) of the LLEP states:

(5) In deciding whether to grant concurrence, the Director-General must consider:

(a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

(b) *the public benefit of maintaining the development standard, and*

(c) *any other matters required to be taken into consideration by the Director- General before granting concurrence.*

37. The matters for consideration in Clause 4.6(5) have been addressed in **Table 4** below.

Table 4: Clause 4.6(5) assessment

Matter of Consideration	Comment
(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning	The minor non-compliance with the development standard does not raise any matters of significance for State or regional planning as the development meets the underlying objectives of the development standard.
(b) the public benefit of maintaining the development standard	As the development substantially complies with the stated objectives of the development standards, there is little utility in requiring strict compliance with the development standard for an otherwise compliant development. There is no public benefit of maintaining the development standard in this circumstance.
(c) any other matters required to be taken into consideration by the Director-General before granting concurrence	It is considered that all matters required to be taken into account by the Director-General before granting concurrence have been adequately addressed as part of this Clause 4.6 variation request.

38. There is no prejudice to planning matters of State or Regional significance resulting from varying the development standard as proposed by this application.

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THE PUBLIC BENEFIT OF MAINTAINING THE STANDARD (CL.4.6(5)(B))

39. Pursuant to *Ex Gratia P/L v Dungog Council (NSWLEC 148),* the question that needs to be answered is "whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development".
40. There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the maximum height of buildings standards, whilst better planning outcomes are achieved.
41. We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will be in the public interest.

IS THE VARIATION WELL FOUNDED?

42. This Clause 4.6 variation request is well founded as it demonstrates, that:
    a) Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
    b) There are sufficient environmental planning grounds to justify the contravention, which results in a better planning outcome than a strictly compliant development in the circumstances of this case;
    c) The development meets the objectives of the development standard and where relevant, the objectives of the R3 zone, notwithstanding the variation;
    d) The proposed development is in the public interest and there is no public benefit in maintaining the standard;
    e) The non-compliance with the distance requirement does not result in any unreasonable environmental impact or adverse impacts on adjoining occupiers. It is considered the proposal is appropriate for the orderly and economic use of the land and is consistent with character of this location; and
    f) The contravention does not raise any matter of State or Regional significance.

CONCLUSIONS

43. This Clause 4.6 variation request to Clause 26(2)(b)(i) of Seniors Housing SEPP should be supported on the basis that the strict application of the development standard to the development is both unreasonable and unnecessary given that:

    - The distance while not strictly compliant, would not be a burden and is reasonable for persons to complete as a journey having set out to gain access to the public transport service via the suitable access pathway. This is because the additional distance required to access the closest bus stop to the public transport services via a suitable access pathway is not an unreasonable distance to travel once the journey has been commenced. It is noted that the distance travelled to the intersection of the Hume Highway with Kurrajong Road is some 390m, and at this point the bus stop is able to be viewed on the opposite side Hume Highway at the safe signalise intersection for crossing, therefore traversing the remaining leg of the journey to the bus stop while greater than 400m overall, is able to be achieved;
    - The Social Impact Comment at Appendix F indicates the distance is some 450m to the local centre on the Hume Highway at Casula, which is a minor variation;
    - The operator and manager of the residential aged care facility when completed has recognised that the proposed development should provide for access to the specific

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services and facilities required by their residents, and to this extent have included provision for a number of services and facilities on-site. A mini-van will be available when required should the need arise, suitable for door to door access between the proposed development and the specific service requested access by a resident. This will also enable residents to be supervised for this journey and afforded personalised care which the public transport service does not provide. The proposed development can allow for provision of day excursions for residents if required, which will also be supervised. The RACF can provide services which are superior to that of the public transport service and can ensure that the site cannot be described as isolated;

- Most residents, if not all of the residents who will reside at the residential aged care facility, no longer have a level of independence suitable to seek out access to public transport services. The main reason for that resident residing at this residential aged car facility will be because they require a level of care which involves supervision by the staff of the facility; if this were not the case they would otherwise be residing in a "self-care" facility or their own homes with "Homecare" services which do not provide for a level of support now legislated for by the Commonwealth for a RACF;
- The variation of the standard will not undermine achievement of the underlying objectives of the standard;
- The variation does not result in an impact on the level of amenity which will be afforded residents of the residential aged care facility; and
- There is case law which supports the rationale for the variation of the development standard.

44. For the reasons set out above, the development should be approved with the minor exception to the numerical distance requirement standard in Clause 26(2)(b)(i) of the Seniors Housing SEPP. Importantly, the development as proposed achieves the stated objectives of the standard and zone despite the minor numerical non-compliance with the development standard.

Should you have any queries or require clarification on any matters please do not hesitate to contact the undersigned on (02) 9929 4044.

Yours faithfully,

Marian Higgins
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