

21 October 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 8M CEILING HEIGHT CONTROL IN CLAUSE 40(4)(A) AND THE STOREYS CONTROL IN CLAUSE 40(4)(B) AND THE 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 8m ceiling height control in clause 40(4)(a) and the storeys control in clause 40(4)(b) of *State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004* (Seniors Housing SEPP).
2. As detailed in the original Statement of Environmental Effects (SEE) report and the addendum SEE which accompanies this Development Application (DA), the proposal has been submitted under the Seniors Housing SEPP, and the amended architectural design drawings dated 6 August 2018 of the proposed development has had consideration of the 8m ceiling height control in clause 40(4)(a) and the storeys control in clause 40(4)(b) of the Seniors Housing SEPP. The proposal will result in a minor variation of standards in the Seniors Housing SEPP for the RACF proposed at 11-15 Lang Road, 76-80 Marsh Parade and 536-542 Hume Highway, Casula.
3. Therefore, this request is to vary the Seniors Housing SEPP 8m ceiling height control in clause 40(4)(a) and the storeys control in clause 40(4)(b) standard under the provisions of Clause 4.6 of the Liverpool Local Environmental Plan 2008 (LLEP).
4. 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*
- *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)*

5. 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 ENVIRONMENTAL PLANNING INSTRUMENT (EPI) APPLICABLE?**

6. 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?**

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

#### **WHAT ARE THE OBJECTIVES OF THE ZONE?**

8. 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?**

9. The development standard being varied is the 8m ceiling height control in clause 40(4)(a) and the storeys control in clause 40(4)(b) of the Seniors Housing SEPP.

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

10. The development standard being varied is prescribed under 8m ceiling height control in clause 40(4)(a) and the storeys control in clause 40(4)(b) of the Seniors Housing SEPP. The development standard to which this objection relates is Clauses 40(4)(a) & (b) under the Seniors Housing SEPP, which contains provisions relating to 8m ceiling height and 2 storeys for development of the site for the purposes of a residential care facility. The relevant clause in the Seniors Housing SEPP is as follows:

#### **40 Development standards—minimum sizes and building height**

##### **(1) General**

*A consent authority must not consent to a development application made pursuant to this Chapter unless the proposed development complies with the standards specified in this clause.*

...

**(4) Height in zones where residential flat buildings are not permitted** *If the development is proposed in a residential zone where residential flat buildings are not permitted:*

**(a)** *the height of all buildings in the proposed development must be 8 metres or less, and*

**Note.** *Development consent for development for the purposes of seniors housing cannot be refused on the ground of the height of the housing if all of the proposed buildings are 8 metres or less in height. See clauses 48 (a), 49 (a) and 50 (a).*

**(b)** *a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height, and*

**Note.** *The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.*

...

11. As demonstrated in the amended architectural drawings dated 6 August 2018 a small portion of the ceiling height exceeds 8m across part of the site by the “blue plain” which is 8m above natural ground level, which the ceiling of the top-most floor does not comply. Where 8 metres is measured from the ceiling height of the top-most floor to surveyed ground level of the site, where “ground level” and “height” are defined under Clause 3 of the Seniors Housing SEPP as:

**ground level** *means the level of the site before development is carried out pursuant to this Policy.*

**height** *in relation to a building, means the distance measured vertically from any point on the ceiling of the topmost floor of the building to the ground level immediately below that point.*

12. It is noted that the Senior Housing SEPP does not define “storey”, however the dictionary under the Liverpool Local Environmental Plan 2008 states:

**storey** *means a space within a building that is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above, but does not include:*

- (a)** *a space that contains only a lift shaft, stairway or meter room, or*
- (b)** *a mezzanine, or*
- (c)** *an attic.*

13. It is noted under the provisions of Clause 3(2) of the Seniors Living SEPP, further states:

**(2)** *In calculating the number of storeys in a development for the purposes of this Policy, a car park that does not extend above ground level by more than 1 metre is not to be counted as a storey.*

14. The ground floor level of the building associated with the “back of house” has been designed to be below existing ground level, however the car parking is provided under cover but could not be described as basement car parking below the existing ground level.
15. Therefore, based on the drawing information submitted with this DA the design of the development demonstrates that the building includes two / part three storeys of residential accommodation, and the third storey component is non-complaint with Clause 40(4)(b) of the Senior Housing SEPP.

16. There are a number of reasons/factors for the non-compliance and these factors when combined have contributed to the design as proposed:
- The goal to minimise impacts on adjoining properties views/outlooks;
  - To create a streetscape presentation which is generally two (2) storeys to Lang Road and the Hume Highway, rather than more storeys while still complying with the maximum permitted Floor Space Ratio (FSR);
  - To achieve a driveway access to the car parking area and loading dock suitable for gradients for the ramping system;
  - The desire to gain disabled access throughout the development with landscaped garden areas to the Marsh Parade, Lang Road and Hume Highway frontages; and
  - To accommodate the gradient of the site which is at its steepest in the cross-fall is just under 5m while at the same time minimising level changes at the eastern side of the site.
17. The design seeks to integrate each of these factors, however due to the existing topography the building in part exceeds the 8m ceiling height.
18. The design seeks to integrate each of these factors, however due to the existing topography the building is in part three (3) storeys. This Clause 4.6 relates to a departure from a numerical standard prescribed under Clause 40(4)(b) of the Seniors Housing SEPP and is a development standard as it specifies storeys as a numeric which fit within the definitions as outlined above.
19. The design seeks to integrate each of these factors, however the overall ceiling height exceeds 8m and the overall number of storeys exceeds 2 storeys.
20. This clause 4.6 variation relates to a departure from a numerical standards prescribed under Clause 40(4)(a) & (b) of the Seniors Housing SEPP for a RACF which fits within the definitions as outlined above.

#### **WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?**

21. It is noted that there is no specifically stated objectives of the standard. There is one purpose of the standard which is shown as a “note” under Clause 40(4) of the Seniors Housing SEPP which is as follows:

...

**Note.** *The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.*

22. Therefore, it is considered the underlying objectives include:
- (a) to minimise the impact of new development on existing views along the Hume Highway, Lang Road and Marsh Parade including public and private open spaces,
  - (b) to provide compatibility with the adjoining residential neighbourhood,
  - (c) to safeguard visual privacy of interior and exterior living areas of neighbouring dwellings,
  - (d) to minimise unacceptable detrimental impacts on adjoining properties, and
  - (e) to maintain the amenity of the public domain, surrounding areas and the special qualities of the streetscapes.

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

23. The provisions of Clause 40(4)(a) and (b) advises:

### **40 Development standards—minimum sizes and building height**

#### **(1) General**

*A consent authority must not consent to a development application made pursuant to this Chapter unless the proposed development complies with the standards specified in this clause.*

...

**(4) Height in zones where residential flat buildings are not permitted** *If the development is proposed in a residential zone where residential flat buildings are not permitted:*

**(a)** *the height of all buildings in the proposed development must be 8 metres or less, and*

**Note.** *Development consent for development for the purposes of seniors housing cannot be refused on the ground of the height of the housing if all of the proposed buildings are 8 metres or less in height. See clauses 48 (a), 49 (a) and 50 (a).*

**(b)** *a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height, and*

**Note.** *The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.*

...

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

24. The ceiling height of the proposed RACF is 10.2m (being the ceiling of the top most floor of RL48.5 to existing natural ground level at RL38.20). This represents a variation of 2.2m or 27.5%. The design of the RACF includes providing all of the floor space used for service activities below existing natural ground level underneath the building, and while it represents a storey, the design seeks to minimise this projection. The proposed RACF presents as a 2-level building (2 storeys) when viewed from Lang Road and the Hume Highway, and 3 level building (3 storeys) when viewed from Marsh Parade and the corner of Marsh Parade with the Hume Highway. Therefore, the RACF when viewed from Marsh Parade will present in part as 3 storeys, this represents a variation of 1 storey.

## MATTERS TO BE CONSIDERED UNDER CLAUSE 4.6

25. 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.
- (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.

26. 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
<p>(1) The objectives of this clause are as follows:</p> <p>(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,</p> <p>(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</p>	<p>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.</p>
<p>(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.</p>	<p>The 8m ceiling height and 2 storey standards are not excluded from operation of this clause.</p>

Clause 4.6 Consideration	Response
<p>(3) <i>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:</i></p> <p>a. <i>that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</i></p> <p>b. <i>that there are sufficient environmental planning grounds to justify contravening the development standard.</i></p>	<p>The Statement of Environmental Effects submitted with the DA indicates a specific request is included with the application to seek a variation of the development standards. This letter is the applicant's formal written request.</p> <p>Refer to <b>table 2</b> below for an assessment under Clause 4.6(3)(a) and (b).</p>
<p>(4) <i>Development consent must not be granted for development that contravenes a development standard unless:</i></p> <p>a. <i>the consent authority is satisfied that:</i></p> <p>i. <i>the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</i></p> <p>ii. <i>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</i></p> <p>b. <i>the concurrence of the Director-General has been obtained.</i></p>	<p>This written request addresses all requirements of subclause (3).</p> <p>As set out in paragraph 27 and <b>table 2</b> 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 <b>table 2</b>) and the objectives for the zones (refer to <b>table 3</b>).</p> <p>Concurrence is assumed but is a matter to be determined by the Consent Authority.</p>
<p>(5) <i>In deciding whether to grant concurrence, the Director-General must consider:</i></p> <p>a. <i>whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and</i></p> <p>b. <i>the public benefit of maintaining the development standard, and</i></p> <p>c. <i>any other matters required to be taken into consideration by the Director-General before granting concurrence.</i></p>	<p>Potential matters of significance for State or regional environmental planning is addressed in paragraphs 45 &amp; 46, and <b>table 4</b>.</p> <p>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.</p> <p>Consideration of whether there is any public benefit in maintaining the development standard is considered in paragraphs 48, 49 &amp; 50.</p> <p>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.</p> <p>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.</p>
<p>(6) <i>Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production,</i></p>	<p>The provisions of Clause 4.6(6) do not apply to the subject site and proposed development in this DA.</p>

Clause 4.6 Consideration	Response
<p>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:</p> <p>(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</p> <p>(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.</p> <p>Note. When this Plan was made it did not include all of these zones.</p>	
<p>(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).</p>	<p>The Consent Authority must keep a record after determining this DA.</p>
<p>(8) This clause does not allow development consent to be granted for development that would contravene any of the following:</p> <p>(a) a development standard for complying development,</p> <p>(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,</p> <p>(c) clause 5.4,</p> <p>(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.</p>	<p>This subclause does not affect the subject site.</p>

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

**Table 2: Clause 4.6(3) assessment**

Objective	Comment
<p><b>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case</b></p>	<p>Strict application of the development standard is considered to be unreasonable and unnecessary as the proposed development will be consistent with the underlying objectives:</p> <ul style="list-style-type: none"> <li>to minimise the impact of new development on existing views along the Hume Highway, Lang Road and Marsh Parade including public and private open spaces,</li> <li>to provide compatibility with the adjoining residential neighbourhood,</li> <li>to safeguard visual privacy of interior and exterior living areas of neighbouring dwellings,</li> <li>to minimise unacceptable detrimental impacts on adjoining properties, and</li> <li>to maintain the amenity of the public domain, surrounding areas and the special qualities of the streetscapes.</li> </ul> <p>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 <b>unnecessary</b> because:</p>

Objective	Comment
	<p>I. The proposed development will be consistent with the stated aims of the Seniors Housing SEPP as discussed in the Statement of Environmental Effects (SEE) report;</p> <p>II. If made to comply the presentation of the development to Lang Road and the Hume Highway would be an abrupt change of scale in the streetscape;</p> <p>III. The proposed development will not create any unreasonable overshadowing, result in loss of privacy or create an adverse visual impact upon the streetscape or the environment given the area of non – compliance with the storeys and ceiling height controls are in a central portion of the site which does not dominate the streetscape and has building has been lowered in its RLs to achieve suitable levels internally of the RACF which converge with the available landscaped area;</p> <p>IV. The scale of the surrounding development has been considered carefully as outlined in the Architectural Design Statement by Group GSA which includes a site analysis, refer to Appendices B and C of the SEE, and the proposed development is considered to be compatible with the streetscape along each site frontage Marsh Parade, Lang Road and the Hume Highway, given the following:</p> <ul style="list-style-type: none"> <li>• The design is complementary to the streetscapes and will not unreasonably impact on the available solar access to the adjoining residential properties; and</li> <li>• The 8m ceiling height breach and the 2-storey control breach will enable the public benefit of the creation of a RACF with 40% concessional places which will be maintained by CHL and could not be brought about if the development were not supported in its current form.</li> </ul> <p>Strict compliance with the development standard is unnecessary as the development will still achieve the underlying environmental and planning objectives as discussed above.</p> <p>Strict compliance is <b>unreasonable</b> 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:</p> <p>V. The goal to minimise impacts on adjoining properties views/outlooks;</p> <p>VI. To create a streetscape presentation which is generally two (2) storeys to Lang Road and the Hume Highway, rather than more storeys while still complying with the maximum permitted Floor Space Ratio (FSR);</p> <p>VII. To achieve a driveway access to the car parking area and loading dock suitable for gradients for the ramping system;</p> <p>VIII. The development will not generate any adverse traffic impacts;</p> <p>IX. The breach of the storeys control in terms of the 3rd storey will not be readily visible from Lang Road or the Hume Highway;</p> <p>X. The desire to gain disabled access throughout the development and the landscaped garden areas to the Marsh Parade, Lang Road and Hume Highway frontages; and</p> <p>XI. To accommodate the gradient of the site which is at its steepest in the cross-fall is just under 5m while at the same time minimising level changes at the eastern side of the site.</p> <p>For these reasons it is considered that strict application of the 8m ceiling height and 2 storey controls are unreasonable and unnecessary in this circumstance, particularly given that the non-compliance is minor and there are no impacts flowing from the non-compliance.</p>
<b>(b) that there are sufficient</b>	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

Objective	Comment
<b>environmental planning grounds to justify contravening the development standard</b>	<p>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 medium density residential urban area which supports:</p> <ul style="list-style-type: none"> <li>Existing urban housing; and</li> <li>Increasing residential housing choice for aged care within the R3 zone which permits this form of development under the LLEP.</li> </ul> <p>In this regard, the development is also consistent with the State and regional objectives.</p>

28. 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.
29. 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*.

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

30. 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).
31. 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;**
32. The objectives of the standard are set out below. It is considered that the variation still achieves the underlying objectives of the development standard as detailed previously in Table 2 above:
- (a) to minimise the impact of new development on existing views along the Hume Highway, Lang Road and Marsh Parade including public and private open spaces,
  - (b) to provide compatibility with the adjoining residential neighbourhood,
  - (c) to safeguard visual privacy of interior and exterior living areas of neighbouring dwellings,
  - (d) to minimise unacceptable detrimental impacts on adjoining properties, and
  - (e) to maintain the amenity of the public domain, surrounding areas and the special qualities of the streetscapes.
33. The proposed development achieves the above stated objectives for the reasons stated in Table 2, notwithstanding the minor non-compliances with the 8m ceiling height and 2 storey standards.

34. The breach of the 8m ceiling height and 2 storey standards do 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;***

35. 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;***

36. As the stated previously the underlying 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.

***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;***

37. It is noted that the determination authority has varied the 8m ceiling height and 2 storey standards 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.***

38. Not applicable.

#### **SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY THE CONTRAVENTION**

39. 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.

40. There are robust justifications throughout the SEE and accompanying documentation to support the proposed alterations and additions to the existing dwelling given the overall visual height, bulk and scale of the development will be essentially the same as that of the existing dwelling house and contend that the outcome is appropriate on environmental planning grounds.

41. The particular circumstances of this case distinguish it from others for the following key reasons:

- The cause of the non-compliance with the development standard is as a result of providing for disabled access throughout the development while at the same time ensuring an appropriate streetscape to Marsh Parade, along with the public benefit of 40% concessional places in the RACF on the property;
- 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?

42. 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.
43. The objectives of the standard have been addressed in paragraphs 21 to 22, and **table 2**, 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
<ul style="list-style-type: none"> <li><b>To provide for the housing needs of the community within a medium density residential environment.</b></li> </ul>	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.
<ul style="list-style-type: none"> <li><b>To provide a variety of housing types within a medium density residential environment.</b></li> </ul>	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.
<ul style="list-style-type: none"> <li><b>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</b></li> </ul>	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.
<ul style="list-style-type: none"> <li><b>To provide for a concentration of housing with access to services and facilities.</b></li> </ul>	The proposed building has access to services and facilities.
<ul style="list-style-type: none"> <li><b>To provide for a suitable visual transition between high density residential areas and lower density areas.</b></li> </ul>	The design includes setbacks and privacy louvers, along with levels to accommodate the site topography to provide for a suitable transition.
<ul style="list-style-type: none"> <li><b>To ensure that a high level of residential amenity is achieved and maintained.</b></li> </ul>	The design seeks to provide for a high level of internal amenity as detailed in the architectural design report at <b>Appendix C</b> of the original SEE, which is consistent with the objective.

44. 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 8m ceiling height and 2 storeys standards are in the public interest.

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

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

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

- whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- the public benefit of maintaining the development standard, and*
- any other matters required to be taken into consideration by the Director-General before granting concurrence.*

46. 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
<i>(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning</i>	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.
<i>(b) the public benefit of maintaining the development standard</i>	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.
<i>(c) any other matters required to be taken into consideration by the Director-General before granting concurrence</i>	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.

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

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

48. 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”.

49. 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.

50. 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?**

51. 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 proposal results in a better planning outcome in that a compliant scheme would result in a loss of access throughout the existing site which does not impact adjoining properties or result in unacceptable built form;

- f) The non-compliance with the 8m ceiling height and the 2 storey controls do not result in any unreasonable environmental impact or adverse impacts on adjoining occupiers. It is considered the proposed ceiling height of 10.2m and the 3 storey design are appropriate for the orderly and economic use of the land and is consistent with character of this location; and
- g) The contravention does not raise any matter of State or Regional significance.

## CONCLUSIONS

52. This Clause 4.6 variation request to Clauses 40(4)(a) and (b) 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 proposed development will be consistent with the stated aims of the Seniors Housing SEPP as discussed in the Statement of Environmental Effects (SEE) report;
- If made to comply the presentation of the development to Lang Road and the Hume Highway would be an abrupt change of scale in the streetscape;
- The proposed development will not create any unreasonable overshadowing, result in loss of privacy or create an adverse visual impact upon the streetscape or the environment given the area of non – compliance with the storeys and ceiling height controls are in a central portion of the site which does not dominate the streetscape and has building has been lowered in its RLs to achieve suitable levels internally of the RACF which converge with the available landscaped area;
- The scale of the surrounding development has been considered carefully as outlined in the Architectural Design Statement by Group GSA which includes a site analysis, refer to Appendices B and C of the SEE, and the proposed development is considered to be compatible with the streetscape along each site frontage Marsh Parade, Lang Road and the Hume Highway, given the following:
  - The design is complementary to the streetscapes and will not unreasonably impact on the available solar access to the adjoining residential properties; and
  - The 8m ceiling height breach and the 2-storey control breach will enable the public benefit of the creation of a RACF with 40% concessional places which will be maintained by CHL and could not be brought about if the development were not supported in its current form.
- The goal to minimise impacts on adjoining properties views/outlooks;
- To create a streetscape presentation which is generally two (2) storeys to Lang Road and the Hume Highway, rather than more storeys while still complying with the maximum permitted Floor Space Ratio (FSR);
- To achieve a driveway access to the car parking area and loading dock suitable for gradients for the ramping system;
- The development will not generate any adverse traffic impacts;
- The breach of the storeys control in terms of the 3rd storey will not be readily visible from Lang Road or the Hume Highway;

- The desire to gain disabled access throughout the development and the landscaped garden areas to the Marsh Parade, Lang Road and Hume Highway frontages; and
- To accommodate the gradient of the site which is at its steepest in the cross-fall is just under 5m while at the same time minimising level changes at the eastern side of the site.

53. For the reasons set out above, the development should be approved with the minor exception to the numerical 8m ceiling height and 2 storey standards in Clause 40(4)(a) and (b) of the Seniors Housing SEPP. Importantly, the development as proposed achieves the stated objectives of the standard and zone despite the minor numerical non-compliances with the development standards.

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  
Planning Manager  
**Higgins Planning Pty Ltd**