

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 LANDSCAPED AREA CONTROL IN CLAUSE 48(C) 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 landscaped area control under Clause 48(c) of *State 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 Landscaped area control contained in Clause 48(c) 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 Minimum Landscaped Area standard under the Seniors Housing SEPP for the proposed RACF is 3,600 square metres and the proposal seeks approval for 2,559 square metres landscaped area.
4. Therefore, this request is to vary the Seniors Housing SEPP Landscaped Area 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

- *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 ENVIRONMENTAL PLANNING 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 "Landscaped Area" standard in Clause 48(c) 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 48(c) of the Seniors Housing SEPP. The development standard to which this objection relates is Clause 48(c) under the Seniors Housing SEPP, which contains provisions relating to the landscaped area for development of the site for the purposes of a residential care facility. The relevant clause in the Seniors Housing SEPP is as follows:

Division 2 Residential care facilities

48 Standards that cannot be used to refuse development consent for residential care facilities

A consent authority must not refuse consent to a development application made pursuant to this Chapter for the carrying out of development for the purpose of a residential care facility on any of the following grounds:

- (a) *building height: if all proposed buildings are 8 metres or less in height (and regardless of any other standard specified by another environmental planning instrument limiting development to 2 storeys), or*
- (b) *density and scale: if the density and scale of the buildings when expressed as a floor space ratio is 1:1 or less,*
- (c) **landscaped area:** *if a minimum of 25 square metres of landscaped area per residential care facility bed is provided,*
- (d) *parking for residents and visitors: if at least the following is provided:*
 - (i) *1 parking space for each 10 beds in the residential care facility (or 1 parking space for each 15 beds if the facility provides care only for persons with dementia), and*
 - (ii) *1 parking space for each 2 persons to be employed in connection with the development and on duty at any one time, and*
 - (iii) *1 parking space suitable for an ambulance.*

Note. The provisions of this clause do not impose any limitations on the grounds on which a consent authority may grant development consent.

As demonstrated in the Site Plan drawing attached the landscaped area is less than 25 square metres per bed of the RACF and does not comply.

The proposed residential care facility will provide up to 144 beds and therefore under Clause 48(c) requires some 3,600 square metres landscaped area. "Landscaped area" is defined under the Seniors SEPP as follows:

landscaped area means that part of the site area that is not occupied by any building and includes so much of that part as is used or to be used for rainwater tanks, swimming pools or open-air recreation facilities, but does not include so much of that part as is used or to be used for driveways or parking areas.

The proposal provides for 2,559 square metres of deep soil landscaped areas not occupied by the building as per the above definition, not including the driveway, pathways and associated areas. Refer to the amended "Site Plan". In addition, a number of locations accessible from the "central spine" of the RACF design include areas capable of "open-air recreation" which have direct supervision, these include balconies and terraces which have a combined area of 469 square metres. However, the landscaped area for the proposal is less than 25 square metres of landscaped area per residential care facility bed, being 18 square metres per bed. The non-compliance is minor, and a variation is considered reasonable in this instance.

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 enter the gardens without supervision or assistance. The criteria are more suited to a "self-care or independent living" style of Seniors Housing which this proposed development does not involve.

It is considered that the criteria in clause 48(c) 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.

The proposed development, while not strictly complying with the 25 square metres landscaped area per bed, seeks to off-set this small non-compliance by providing for increased resident amenity within the development itself by inclusion of several generously sized “lounge areas” internally and balcony/terrace areas. Each of the lounge and balcony/terrace areas has an attractive aspect overlooking the private landscaped areas of the proposed development.

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 from the main pedestrian entry at the Marsh Road frontage with landscaped garden areas to the 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.

The design seeks to integrate each of these factors, however the landscaped area within the RACF is below 25 square metres per bed.

This clause 4.6 variation relates to a departure from a numerical standard prescribed under Clause 48(c) of the Seniors Housing SEPP and is a development standard as it specifies a minimum 25 square metres per bed of landscaped area 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. There is one purpose of the standard which is shown as a “note” under Clause 48(c) 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.*

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?

13. The provision s of Clause 48(c) advises:

48 Standards that cannot be used to refuse development consent for residential care facilities

A consent authority must not refuse consent to a development application made pursuant to this Chapter for the carrying out of development for the purpose of a residential care facility on any of the following grounds:

...

*(c) **landscaped area:** if a minimum of 25 square metres of landscaped area per residential care facility bed is provided,*

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

14. The landscaped area of the proposed RACF is 2,559 square metres. The proposed variation is therefore 18 square metres per bed.

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.*

(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
<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 Landscaped Area standard is not excluded from operation of this clause.</p>
<p>(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:</p> <p>a. that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</p> <p>b. that there are sufficient environmental planning grounds to justify contravening the development standard.</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 Landscaped Area development standard. This letter is the applicant's formal written request.</p> <p>Refer to table 2 below for an assessment under Clause 4.6(3)(a) and (b).</p>
<p>(4) Development consent must not be granted for development that contravenes a development standard unless:</p> <p>a. the consent authority is satisfied that:</p> <p>i. the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</p> <p>ii. the proposed development will be in the public interest because it is consistent with the objectives of the particular</p>	<p>This written request addresses all requirements of subclause (3).</p> <p>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).</p> <p>Concurrence is assumed but is a matter to be determined by the Consent Authority.</p>

Clause 4.6 Consideration	Response
<p><i>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>(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 36 and 37, and table 4.</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 39, 40 and 41.</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, 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:</i></p> <p>(a) <i>the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or</i></p> <p>(b) <i>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.</i></p> <p><i>Note. When this Plan was made it did not include all of these zones.</i></p>	<p>The provisions of Clause 4.6(6) do not apply to the subject site and proposed development in this DA.</p>
<p>(7) <i>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).</i></p>	<p>The Consent Authority must keep a record after determining this DA.</p>
<p>(8) <i>This clause does not allow development consent to be granted for development that would contravene any of the following:</i></p> <p>(a) <i>a development standard for complying development,</i></p>	<p>This subclause does not affect the subject site.</p>

Clause 4.6 Consideration	Response
<p><i>(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,</i></p> <p><i>(c) clause 5.4,</i></p> <p><i>(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.</i></p>	

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

Table 2: Clause 4.6(3) assessment

Objective	Comment
<p><i>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case</i></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"> <i>(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,</i> <i>(b) to provide compatibility with the adjoining residential neighbourhood,</i> <i>(c) to safeguard visual privacy of interior and exterior living areas of neighbouring dwellings,</i> <i>(d) to minimise unacceptable detrimental impacts on adjoining properties, and</i> <i>(e) to maintain the amenity of the public domain, surrounding areas and the special qualities of the streetscapes.</i> <ul style="list-style-type: none"> 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: <ul style="list-style-type: none"> I. The landscaped area of the proposed development is consistent with surrounding development, II. 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 is in a 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; III. The development will not generate any adverse traffic impacts, IV. The breach of the minimum landscaped area control will not be readily visible from Lang Road or the Hume Highway, V. 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: <ul style="list-style-type: none"> a. The design is complementary to the streetscapes and will not unreasonably impact on the available solar access to the adjoining residential properties; and b. The landscaped area 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.

Objective	Comment
	<ul style="list-style-type: none"> • 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: <ul style="list-style-type: none"> I. The goal to minimise impacts on adjoining properties views/outlooks; II. 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); III. To achieve a driveway access to the car parking area and loading dock suitable for gradients for the ramping system; IV. The desire to gain disabled access throughout the development from the main pedestrian entry at the Marsh Road frontage with landscaped garden areas to the Lang Road and Hume Highway frontages; and V. 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>For these reasons it is considered that strict application of the landscaped area 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.</p>
<i>(b) that there are sufficient environmental planning grounds to justify contravening the development standard</i>	<p>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:</p> <ul style="list-style-type: none"> • Existing urban housing; and • Increasing residential housing choice for aged care within the R3 zone which permits this form of development under the LLEP. <p>In this regard, the development is also consistent with the State and regional objectives.</p>

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*.

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 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.*
24. The proposed development achieves the above stated objectives for the reasons stated in Table 2, notwithstanding the minor non-compliances with the landscaped area standard.
25. The breach of the landscaped area 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.

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 landscaped area 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. 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.
32. 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?

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.
• 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.

R3 Medium Density Residential zone - objectives	Comment
<ul style="list-style-type: none"> 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.
<ul style="list-style-type: none"> 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 landscaped area 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:*

- 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.*

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.

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 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 landscaped areas;
 - f) The non-compliance with the landscaped area does not result in any unreasonable environmental impact or adverse impacts on adjoining occupiers. It is considered the proposed landscaped area is 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

43. This Clause 4.6 variation request to Clause 48 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 landscaped area of the proposed development is consistent with surrounding development,
 - 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 is in a 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 development will not generate any adverse traffic impacts,
 - The breach of the minimum landscaped area control will not be readily visible from Lang Road or the Hume Highway,
 - 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 landscaped area 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.
44. For the reasons set out above, the development should be approved with the minor exception to the numerical landscaped area standard in Clause 48 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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