



Clause 4.6 Building Height

Integrated Seniors Living Precinct 3 Quarry Road, Dural

Lot 2A in DP 158064 and Lot 1 in DP 230172

Prepared by Willowtree Planning Pty Ltd on
behalf of Thelem Consulting

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Clause 4.6 – Building Height

Proposed Integrated Seniors Living Precinct

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PART A PRELIMINARY

1.1 INTRODUCTION

This Clause 4.6 Variation request has been prepared in support of a Development Application (DA) for an Integrated Seniors Living Precinct, located at 3 Quarry Road, Dural. The Site is legally described as Lot 2A in DP 158064 and Lot 1 in DP 230172.

The application is made under State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004 (SEPP HSPD). The proposed development exceeds the relevant height provision in Clause 40 of SEPP HSPD.

This Clause 4.6 has been prepared in accordance with the requirements of the *Hornsby Local Environmental Plan 2013* (HLEP 2013). Clause 4.6 (2) outlines that:

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.

In accordance with Clause 1.9 (2) of HLEP 2013, State Environmental Planning Policy 1 – Development Standards (SEPP 1) does not apply, the variation to the control is made under Clause 4.6 of HLEP 2013.

It is understood that in accordance with Section 3.28 of the Environmental Planning and Assessment Act 1979 gives presumption that any SEPP prevails over the provision of a Local Planning Instrument. In light of this, the proposal requests a Clause 4.6 of the HLEP 2013 variation to height controls in SEPP HSPD.

This Variation request has therefore been prepared in accordance with the requirements of Clause 4.6 of HLEP 2013, which include the following objectives:

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

1.2 PROPOSED NON-COMPLIANCE

The proposed variations to development standards for the proposed development are in relation to Clause 4.3 – Building Heights, of HLEP 2013. In summary the following variations are proposed:

| Table 1 Proposed Variations | | |
|-----------------------------------|-------------|--|
| HLEP 2013 | Existing | Proposed |
| Clause 4.3 Building Height | 10.5 metres | The proposed development seeks consent for a building height that ranges from 5.2m to 13.96m |

In accordance with Clause 4.6 of HLEP 2013, Council is required to consider the following:

(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*

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- b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposal is supported by demand for the provision of Seniors Housing in NSW. The proposal would provide significant aged care and accommodation for the elderly and disabled in the surrounding community. This service has become more essential as the population grows and dominant demographic skew to persons over 55 years of age. The proposal has been designed to provide a built form that is complementary to the existing and desired character and is sympathetic to the existing nature of the Site. The proposal is a positive outcome for the Site and the community.

This request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards, pursuant to HLEP 2013.

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PART B THRESHOLDS THAT MUST BE MET

2.1 CLAUSE 4.6 OF THE HLEP 2013

In accordance with Clause 4.6 of HLEP 2013 Council is required to consider the following Subclauses:

(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:

- c) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- d) 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.*

These matters are responded to in Part D of this Clause 4.6 Variation.

2.2 CASE LAW

Relevant case law on the application of the standard Local Environmental Plan Clause 4.6 provisions has established the following principles:

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, which emphasised that the proponent must address the following:
 - Compliance with the development standard is unreasonable and unnecessary in the circumstances;
 - There are sufficient environmental planning grounds to justify contravening the development standard;
 - The development is in the public interest;
 - The development is consistent with the objectives of the particular standard; and
 - The development is consistent with the objectives for development within the zone;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, which held that the degree of satisfaction required under Subclause 4.6(4) is a matter of discretion for the consent authority;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827, which emphasized the need to demonstrate that the objectives of the relevant development standard are nevertheless achieved, despite the numerical standard being exceeded. Justification is then to be provided on environmental planning grounds. Wehbe sets out five ways in which numerical compliance with a development standard might be considered unreasonable or unnecessary as follows:
 - The objectives of the standard are achieved notwithstanding the non-compliance with the standard;

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- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- 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; or
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

These matters are responded to in Part D of this Clause 4.6 Variation.

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PART C STANDARD BEING OBJECTED TO

3.1 CLAUSE 4.6 BUILDING HEIGHT OF THE HLEP 2013

The development standard being requested to be varied is **Clause 4.3 Building Height** of HLEP 2013.

| Table 2 Proposed Building Height Variation | | | | |
|--|---|------|--|---|
| HLEP 2013 Clause | HLEP Development Standard | 2013 | Proposed Non-Compliance | Percentage Variation of |
| Clause 4.3 Building Height | Clause 4.3 of HLEP 2013 has a maximum building height of 10.5m. | | The proposed development seeks consent for a building height that ranges from 5.2m to 13.96m | The maximum proposed building height is 13.96m. The percentage of the maximum variation is 32.9%. |

The proposed development seeks approval for the demolition of existing structures and the construction of an Integrated Seniors Living Precinct comprising of seven (7) x 3 Independent Living Units, one (1) x 3 storey RACF, central community facilities and ancillary wellness centre. The proposed development would result in a maximum building height of 13.96m (32.9% variation) under Clause 4.3 of HLEP 2013. The variation across the individual building components is summarised in **Table 3** below. The proposed built form responds to the topography of the Site, with the bulk of the development centrally located within the Site. The varying heights across the individual building envelopes has also been captured in **Table 3**.

| Table 3 Proposed Building Height Variations | | | |
|---|-------------------------|---------------------|-------------------------|
| Building Type | Proposed Non-Compliance | Metres of Variation | Percentage of Variation |
| Independent Living Units | | | |
| Building A | 12.14m | 1.64m | 15% |
| | 12.07m | 1.57m | 14.9% |
| Building B | 12.07m | 1.57m | 14.9% |
| Building C | 12.07m | 1.57 | 14.9% |
| | 11.94m | 1.44m | 13.7% |
| | 12.14m | 1.64m | 15% |
| Building D | 12.14m | 1.64m | 15% |
| | 12.07m | 1.57m | 14.9% |
| Building E | 12.07m | 1.57 | 14.9% |
| Building F | 12.02m | 1.52m | 14.4% |
| Building G | 11.44m | 0.94m | 8.9% |
| | 11.31 | 0.81m | 7.7m |
| Residential Aged Care Facilities | | | |
| RACF | 13.96m | 3.46m | 32.9% |
| Wellness Centre | Compliant | | |

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The building heights have been measured from the lowest level to ground floor of the split buildings and the highest roof ridge.

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PART D PROPOSED DEVELOPMENT

4.1 OBJECTIVES OF THE CLAUSE 4.3 BUILDING HEIGHT UNDER HLEP 2013

A key determination of the appropriateness of a Clause 4.6 Variation to a development standard is the proposed development's compliance with the underlying objectives and purpose of that development standard.

Indeed, *Wehbe v Pittwater Council* recognized this as one of the ways in which a variation to development standards might be justification (refer to **Section 2.2**). In *Four2Five Pty Ltd v Ashfield Council*, it was found that the proponent must demonstrate compliance with these objectives (refer to **Section 2.2**).

Therefore, while the site is subject to a specified numerical control for FSR, the objectives and underlying purpose behind the development standard are basic issues for consideration in the development assessment process.

The objectives of Clause 4.3 under the HLEP 2013 are as follows:

- *To permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*

The Site has benchmarked the adjoining properties as a reasonable indication of the intended character for the locality.

The proposed development has been configured with respect to the surrounding land uses. The proposed buildings will be setback from the boundaries to minimise the impact on surrounding land uses. The proposed building envelopes has been designed to respond to the Site's constraints and to deliver the best urban outcome for both future residents of the Site and surrounding properties. Further, the proposed spilt into several, single building envelopes, with visible separation, will ensure permeability and sightlines to and from the Site, reducing the perceived bulk. The façade of the proposed built form has been articulated so as they ensure they retain a human scale and reduce the perceived height and bulk from around the Site, as well as adjoining buildings.

Furthermore, the significant setbacks will allow for extensive landscaping at the interface with the adjoining buildings. The overall landscape design has taken into consideration the siting of the proposed built form and the relation with adjoining properties. Further, the design strategy has been produced with the intention of not only retaining the ecological value across the Site, as well as the existing character being maintained.

As demonstrated in the shadow diagrams, accompanying this development application, the development does not adversely impact on the surrounding development or the public domain in relation to daylight access.

Overall, the proposed development presents a development concept of a sympathetic height and scale with increased landscaping and connection to the existing vegetation, which is in keeping with the existing and desired future character of the local area. The proposal's building envelopes are considered appropriate and responsive to the Site and its surrounds. Therefore, the proposed addresses the objectives of Clause 4.3 of HLEP 2013.

4.2 OBJECTIVES OF THE ZONE

The Site is currently zoned RU2 Rural Landscape under HLEP 2013. The proposal for an Integrated Seniors Living Precinct is permitted in accordance with SEPP HSPD. The proposal is able to demonstrate consistency with the RU2 zone objectives, which state:

- *To encourage sustainable primary industry production by maintaining and enhancing the natural resource base;*

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- *To maintain the rural landscape character of the land;*
- *To provide for a range of compatible land uses, including extensive agriculture;*
- *To encourage land uses that support primary industry, including low-scale and low-intensity tourist and visitor accommodation and the provision of farm produce direct to the public;*
- *To ensure that development does not unreasonably increase the demand for public infrastructure, services or facilities.*

An SCC was issued by the Department of Planning & Environment (DoPE) on 24 May 2017, permitting Seniors Housing on the Site to overcome this prohibition. As a result, Seniors Housing is now permissible with consent on the Site.

The proposed development has been designed in order to address the existing and desired surrounding character. The proposed built form, height and scale of the development have carefully considered and designed to harmonise and enhance the desired future character of the area. The proposed development does not visually detract from the rural, bushland setting and does not compromise the scenic value of Dural.

4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

Subclause 4.6(3)(a) and the judgement in *Four2Five Pty Ltd v Ashfield Council* (refer to **Section 2.2**) emphasise the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances.

As shown in **Section 4.1**, the proposed development is considered consistent with the objectives of Clause 4.3 of HLEP 2013, and subsequently Clause 40 of SEPP HSPD.

Compliance with Clause 4.3 of HLEP 2013 would be unreasonable or unnecessary given the;

- The existing topography of the Site and its surrounds;
- The location of the built form over the height control in locations on the site which do not create any additional impacts beyond that of a compliant height envelope;
- The lack of impact generated by the non-compliant elements of the building;
- The siting of the proposal in relation to existing buildings and surrounding uses; and,
- The existing and desired character of the surrounding locality.

The proposed variation provides a more appropriate planning outcome as it supports the density that is considered appropriate for the Site, as approved under the Site Compatibility Certificate issued by the DoPE, and is in accordance with public demand. The proposed development results in a density that is generally in accordance with the controls of SEPP HSPD and provisions of HLEP 2013. The *Plan for a Growing Sydney* also further highlights the greater demand for services to address an aging demographic. The development also provides the logical progression of building form given the surrounding development, particularly on the adjacent B2 Local Centre.

The proposed development responds to the site's topography and adjoining land uses to ensure that the buildings present as a compatible and consistent built form when considered against the surrounding development and locality generally.

Further, the proposal contributes to the objectives of RU2 zone objectives. A range of facilities are able to be sited across the site to ensure the efficient provision of housing and care. In ensuring the proposal contains a range of different facilities for Seniors Housing on the site, the proposal creates housing located and designed for seniors who are independent, mobile and active as well as those who are frail, which specifically aligns with the objectives provided in Clause 14 of SEPP HSPD. In facilitating the provision of a variety of housing that meet the needs of the community, the proposal further contributes to the objectives of the RU2 zoned land. In addition, the proposed will not unreasonably increase demand on existing infrastructure and has been designed to provide an appropriate interface between the built form and adjoining properties, and will not detract from the existing and desired character.

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The built form has been re-massed to respond to the topography of the land (**Figure 1**), to ensure the building height is not dominant. The density of the built form is located in the fall of the Site, reducing the overall bulk and scale and perceiving as two (2) storeys in height from the public domain. The siting of the building within the site ensures that the proposed internal open space and low density nature is maintained. Generous setbacks have been provided and will ameliorate the environmental impacts on neighbouring properties. It is noted the surrounding mature trees are of a height that exceeds the proposed height of the building.



Figure 1 | Elevation (Source: Marchese Partners, 2018)

The proposal provides significantly less mass when compared with the adjoining B2 zoned land. The proposal has ensured that adjoining development will maintain adequate solar access, as well as visual privacy.

The abovementioned justification is considered valid and, in this instance, the proposed variation is considered to be acceptable. The proposed development will integrate with the surrounding character whilst providing aged care service and accommodation to an increasingly ageing population. The scale, form and design of the development will provide a positive outcome for the site and streetscape. A high level of amenity will be preserved to adjoining sites and within the site itself, the objectives of the relevant Clause and RU2 zone will be upheld as a result of the proposal.

4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

The variation to the development standard for height of buildings is considered well founded because, notwithstanding the proposed non-compliance with this standard:

- The re-massing of the built form to areas above the 10.5m height controls has facilitated the increased setbacks and landscaping outcome provided for which permits the proposal to respond to the surrounding character and adjoining land uses and locate built form in areas of the site which, due to its topography, are of minimal impact.
- The proposed development is consistent with the underlying objective or principles of the standard as demonstrated in SEPP HSPD;
- The objectives of the RU2 Rural Landscape zone are reflected and complemented by the proposal, which creates a design response to existing character(s) through the provision of landscaped setbacks and a design response which locates the built form in areas away from sensitive locations or view corridors;
- The built form is complementary to the existing and desired character of the area and facilitates the provision of a high-quality seniors living development in a manner which sits comfortably within the rural context and does not create any adverse amenity impacts while providing for a high-quality seniors living development;
- The scale of the buildings has been re-massed to respond to the fall of the Site with taller buildings being located at the low point of the land. This approach has allowed the development to benefit from additional height whilst being perceived as two (2) storeys from the public domain and facilitated greater opportunities for setbacks adjoining the neighbouring development and landscaping for the site;
- The generous setbacks will accommodate and facilitate significant landscaping, which will ameliorate environmental impacts on adjoining properties and will improve the overall appearance of the built form;

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- The proposed development will not adversely impact on the amenity of adjoining properties, or properties within the Site in relation to solar access, privacy or views;
- The proposal represents the orderly and economic redevelopment of the land.

The proposed scale of the development is the logical development of the Site. The contravention of the development standard is justified and warrants the support of the relevant consent authority.

4.5 PUBLIC INTEREST

As outlined in **Section 2.2**, *Four2Five Pty Ltd v Ashfield Council* emphasised that it is for the proponent to demonstrate that the proposed non-compliance with the development standard is in the public interest. Subclause 4.6(4)(a)(ii) requires the proposed development 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.

Sections 4.1 and **4.2** have already demonstrated how the proposed development is consistent with the objectives of both Clause 4.3 and the RU2 zone under the HELP 2013.

In *Lane Cove Council v Orca Partners Management Pty Ltd (No 2)* [2015] NSWLEC 52, Sheahan J referred to the question of public interest with respect to planning matters as a consideration of whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development.

The public advantages of the proposed development are as follows:

- Increase the availability of seniors housing in the local area, which will increase the ability for local residents to age-in-place as their living requirements change;
- The proposed built form will make a positive contribution to the surrounding locality;
- The development will create additional jobs during construction and operation;

Overall, the need for Seniors Housing is growing with an increase in population, which is compounded by an expanding ageing demographic. The proposal is in the public interest in ensuring the provision of Independent Living Units and Residential Aged Care Facilities, in line with modern services and growth demand.

4.6 MATTERS OF STATE OR REGIONAL SIGNIFICANCE

The proposed exceedance of the Clause 4.3 Building Height would not raise any matters of Significance for State or regional environmental planning. It would also not conflict with any State Environmental Planning Policies or Ministerial Directives under Section 117 of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

Overall, it is considered the amendment of Clause 4.3 control, the proposed development would better be able to meet the objectives of the following State Government planning policies:

- *A Plan for Growing Sydney*: The proposed development supports the goal of The Plan in relation to Sydney's Housing Choices, which specially describes the issue of Sydney's ageing population and the requirement to provide a housing product that will "allow people to stay in their home as they age". The proposed development will allow for individuals to downsize to a facility that has aged care services, but provides the amenity and independent living of an apartment. The co-location of the ILUs, Residential Aged Care Facilities ensures that people can age in place, progressing from low, medium and high care across the one location, as an individuals health deteriorates. It also provides the opportunity for couples to both be located in the same facility despite having different aged care needs.
- *NSW 2021*: The proposed development demonstrating a commitment to the strengthening of the local community and renovation of local infrastructure through the provision of increased residential housing suitable for seniors and/or people with a disability. Further, the proposed development will

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also contribute to the provision of employment, generating residential floor space in close proximity to existing transport and commercial infrastructure.

- *North District Plan:* The following objectives and opportunities are identified based on the strategic context:
 - Recognition of the strategic importance of the Site and the development potential to create a Seniors Living Precinct;
 - Improvement in housing diversity to cater for the increasing proportion of older people and people with a disability through additional smaller homes, group homes, adaptable housing and aged care facilities;
 - Create stronger connections between housing development and community facilities;
 - Strategic concentration of appropriately zoned land for aged care and seniors living. This is particularly relevant given the evident trend toward a significantly older population profile by 2036, there will be a 47 percent increase in people aged 65-84.

Overall, the proposed development will help address housing supply, especially in the form of seniors housing, in the Hornsby Local Government Area, which is considered an integral form of social infrastructure.

4.7 OVERVIEW

For the reasons outlined above, it is considered that the objection to Clause 40 of the SEPP Seniors is well-founded in this instance and the granting of a variation to the development standard is appropriate in the circumstances. Furthermore, the objection is considered to be well founded for the following reasons:

- The proposal is entirely consistent with the underlying objectives or purposes of the height of buildings standard.
- The built form and scale of the building will not adversely impact the character of the streetscape or neighbouring amenity.
- Strict compliance with the standards would hinder the achievement of the objects of the EP&A Act;
- No unreasonable impacts are associated with the proposed variation.

Overall, it is considered that the proposed variation to the height of buildings control is entirely appropriate and can be clearly justified having regard to the matters listed within HLEP 2013 Clause 4.6.

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PART E CONCLUSION

It is requested that Hornsby Shire Council exercise its discretion (as identified in *Randwick City Council v Micaul Holdings Pty Ltd* – refer to **Section 2.2**) and find that this Clause 4.6 Variation adequately addresses the matters required to be demonstrated by Subclause 4.6(3) of the HLEP 2013 (refer to **Section 2.1**).

This is particularly the case given the relatively minor nature of the proposed exceedance as well as the proposed development's otherwise compliance with the both SEPP HSPD and HLEP 2013, and the site's strategic suitability for the proposed development at both a local and State government level.