



Clause 4.6 Variation - Building Height

Residential Care Facility – Seniors Housing

43-47 Murray Farm Road, 13 Watton Road and
19 Watton Road, Carlingford

Lot 1 DP210512, Lot 16 DP238510 and Lot 6
DP259726

Prepared by Willowtree Planning Pty Ltd on
behalf of Japara Healthcare

October 2019

Clause 4.6 Variation

Japara Healthcare Residential Care Facility (Seniors Housing)– 43-47 Murray Farm Road, 13 Watton Road and 19 Watton Road, Carlingford (Lot 1 DP210512, Lot 16 DP238510 and Lot 6 DP259726)

Document Control Table

Document Reference:	WTJ18-283_Clause 4.6 Variation		
Date	Version	Author	Checked By
11 December 2018	Draft for review	J. Miller	A. Cowan
27 September 2019	Final	J. Miller	A. Cowan

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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 the redevelopment construction of a 120 bed Residential Care Facility (Seniors Housing) with 30 car parking spaces. The proposed development would comprise the delivery of a new Class 9c Residential Care Facility (Seniors Housing).

The proposed development would be located at 43-47 Murray Farm Road, 13 Watton Road and 19 Watton Road, Carlingford (Lot 1 DP210512, Lot 16 DP238510 and Lot 6 DP259726). It would take place on a site area of 7,063.94m².

The proposed non-compliances pertain to Clause 40(4) (a) and (b) of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (SEPP HSPD).

This Variation request has therefore been prepared in accordance with the requirements of Clause 4.6 of HLEP 2012, 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.*

As the proposal is lodged pursuant to the provisions of SEPP HSPD, consideration of the development standards under Clause 40 have been considered throughout this 4.6 variation.

1.2 PROPOSED NON-COMPLIANCES

1.2.1 Height of Buildings

Under SEPP HSPD, the site is subject to a maximum height of 8m. The definitions of building height, however, differ between The Hills Local Environmental Plan 2012 (THLEP 2012) and SEPP HSPD.

When measured according to the provisions of SEPP HSPD, the proposed development would have a maximum height of 12.60m (measured to the underside of the ceiling), an exceedance of the SEPP HSPD 8m height control by 4.60m at its greatest extent. It should be noted that this only occurs within the central portion of the site, and generally the exceedance is 2.7m across the top floor.

The variations in the finished height of the proposed development are a result of the site sloping towards the north. Importantly, the breach of the 8m height limit does vary across the site, having regard to the natural slope of the land. This is shown in **Figure 1** below with the extent of the breach shown in red.

Clause 3 of SEPP HSPD defines building height as follows for the purpose of this Clause 4.6 variation.

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.

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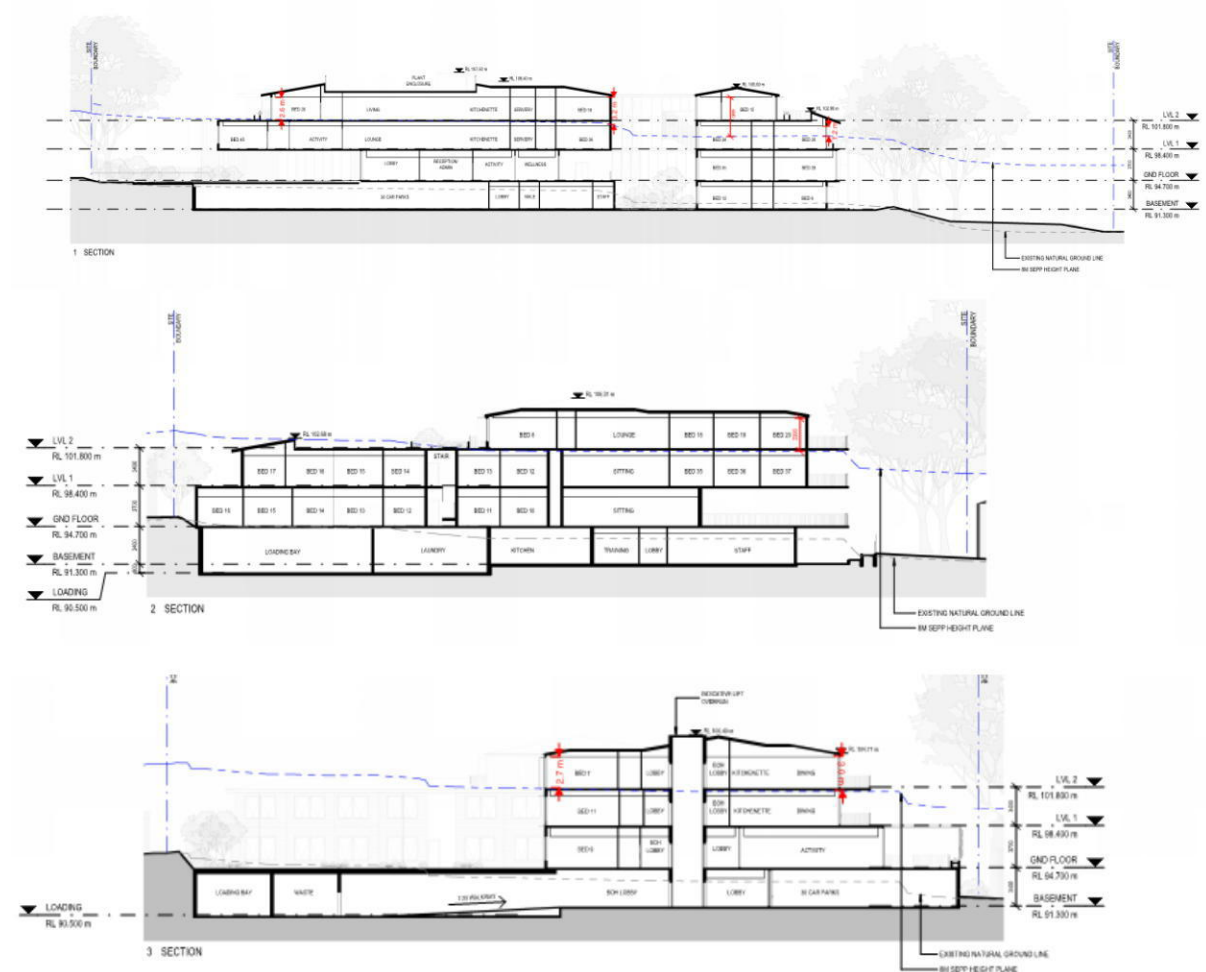


Figure 1: Sections – Extent of Height Breach

1.2.2 Number of Storeys Adjacent a Boundary

Clause 40(4)(b) of SEPP HSPD provides:

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

-
- (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.

.....

The proposed development results in a building form that exceeds this requirement in part, with some three storey elements proposed for a very limited portion of the area adjacent the side boundaries. The distribution of the number of storeys is shown below in **Figure 2**.

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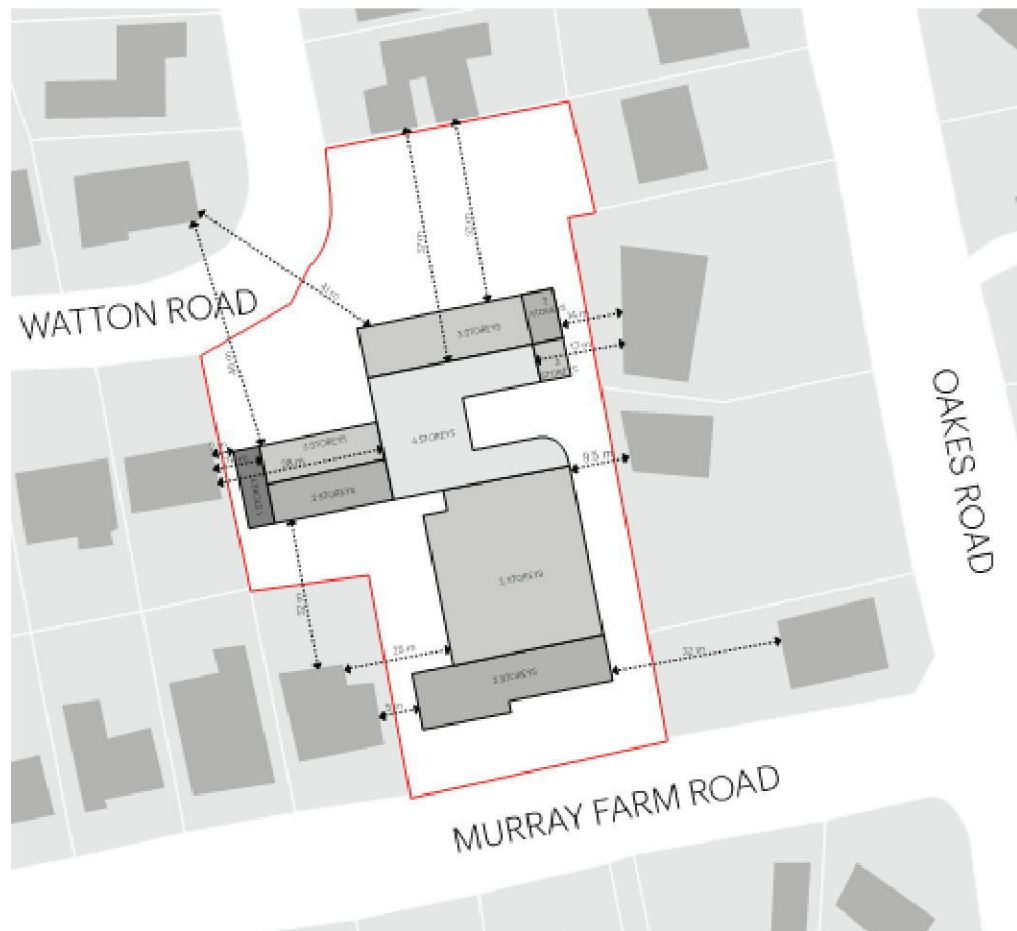


Figure 2: Number of Storeys Diagram

1.3 STRATEGIC PLANNING JUSTIFICATION

Under the alternative compliant scenario, the built form potential of the site would be under-realised. It is furthermore submitted that a hypothetical height compliant building at the site would:

- Not contribute towards meeting the demand for additional Residential Care Facility beds within the Parramatta LGA, as identified in the NSW Ageing Strategy 2016-2020, the A Metropolis of Three Cities 2018 and the Central City District Plan 2018 by potentially resulting in a reduction in the provision of Residential Care Facility beds at the site;
- Threaten the commercial viability of the proposed development by reducing the number of residential units that can be delivered to the marketplace;
- Create fewer full-time equivalent jobs for staff working at the site, resulting from fewer residents being able to reside at the site; and
- Fail to meet the objectives of the *Environmental Planning and Assessment Act 1979* (EP&A Act) by making orderly and economic use of a brownfields site for its full planning potential.
- Fail to provide an effective aged care service in accordance with the relevant requirements;
- Result in a development that does not achieve the substantial setbacks as proposed to ensure the amenity of surrounding properties is maintained to an acceptable level.

This Clause 4.6 Variation request has therefore been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards under SEPP HSPD. It considers various planning controls, strategic planning objectives and existing characteristics of the site, and concludes that the proposed height non-compliance is the best means of achieving the

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objective of encouraging orderly and economic use and development of land under section 1.3 of the EP&A Act.

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PART B THRESHOLDS THAT MUST BE MET

2.1 CLAUSE 4.6 OF THE HLEP 2012

In accordance with Clause 4.6 of HLEP 2012 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:

- 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.*

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 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

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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;
- 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.

2.3 CASE LAW FOR INVOKING CLAUSE 4.6 DESPITE BEING SUBJECT TO THE PROVISIONS OF SEPP (HSPD) 2004

Clause 4.6(2) of THLEP 2012 explicitly states, that development consent may be granted, even though a development contravenes a development standard. Clause 4.6(2) reads as follows:

*"(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."*

Notwithstanding the abovementioned, Clause 40 of SEPP HSPD should be treated and assessed as a development standard. Clause 4.6(2) may therefore, be relied upon by to obtain development consent, despite the proposal contravening the development standard prescribed in SEPP HSPD. Relevant case law on the application of Clause 4.6 with regard to SEPP (HSPD) 2004 has been utilised in the following four (4) examples:

1. *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde* [2016] NSW LEC 153, considered that a development standard imposed by SEPP (HSPD) 2004 does not prevent Council from applying Clause 4.6 of an LEP and approving the Development Consent.
2. *Goergakis v North Sydney Council* [2004] NSW LEC 123, emphasises, that the Courts have held the view, that there is not any inconsistency between Clause 4.6 of a LEP and Clause 40 of SEPP (HSPD) 2004 and that Clause 40 of SEPP (HSPD) 2004 and Clause 4.6 of a LEP are to be read in conjunction with one another.
3. *Ku-ring-gai Council v Pathways Property Group Pty Ltd* [2018] NSW LEC 73, which Justice Moore (His Honour) of the Land and Environment Court, held that Clause 4.6 of the LEP is available to seek dispensation from the development standards in Clause 40 of SEPP (HSPD) 2004, for which consent was granted, even though it was in breach of the development standard.
4. *Binetter v Woollahra*, which adopted the same approach as the above mentioned in *Ku-ring-gai Council v Pathways Property Group Pty Ltd* [2018] NSW LEC 73.

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Therefore, it is well established that the proposal, can rely on Clause 4.6 of an LEP to obtain consent for a development that exceeds the development standards in Clause 40 of SEPP HSPD. The information provided hereunder considers the non-compliances arising with the development standards identified and the justification and reasoning behind each non-compliance.

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PART C STANDARD BEING OBJECTED TO

3.1 HEIGHT OF BUILDING CONTROL UNDER HLEP 2012 AND SEPP HSPD DEVELOPMENT STANDARDS

The development standards being requested to be varied is Clause 40(4)(a) and (b). **Table 1** outlines the proposed Clause 4.6 Variation SEPP HSPD.

Table 1 Proposed Height Variation – HLEP 2012					
SEPP Clause	HSPD	SPP Development Standard	HSPD	Proposed Development Non-Compliance	Percentage of Variation
Building Height		Clause 40(4) provides a height limit of 8m.		The proposed development seeks consent for a maximum building height of 12.54m (as defined under SEPP HSPD).	The proposed development would result in a variation of Clause 40(4)(a) by 57.5%.
Number of Storeys Adjacent Boundary		Clause 40(4)(b) limits the number of storeys to 2 adjacent a boundary		Some portions of the building contain 3 storey elements	The proposed variation in percentage terms would be 50%

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PART D PROPOSED VARIATION TO CLAUSE 4.3 HEIGHT OF BUILDINGS

4.1 OBJECTIVES OF THE PLANNING CONTROL

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* recognised this as one of the ways in which a variation to development standards might be justified (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 building height, the objectives and underlying purpose behind these development standards are basic issues for consideration in the development assessment process.

4.2 SEPP HSPD

SEPP HSPD does not set out any specific objectives relating to the height of buildings. However, Clause 2 of SEPP HSPD sets out the following aims for SEPP HSPD overall:

- (1) This Policy aims to encourage the provision of housing (including residential care facilities) that will:*
 - (a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and*
 - (b) make efficient use of existing infrastructure and services, and*
 - (c) be of good design.*
- (2) These aims will be achieved by:*
 - (a) setting aside local planning controls that would prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this Policy, and*
 - (b) setting out design principles that should be followed to achieve built form that responds to the characteristics of its site and form, and*
 - (c) ensuring that applicants provide support services for seniors or people with a disability for developments on land adjoining land zoned primarily for urban purposes.*

Clause 14 of SEPP HSPD also provides that the objectives of the SEPP HSPD are:

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

With respect to Clause 40(40(b)), it is noted that the purpose of the standard is:

to avoid an abrupt change in the scale of development in the streetscape

The proposed development is considered to exemplify these aims and objectives by:

- Providing an additional 120 Residential Care Facility beds for the locality;
- Making efficient use of a brownfield site which has good access to utility services infrastructure as well as quality road and public transport infrastructure and nearby commercial, retail and medical land uses;
- Be of a quality design;
- Responding to the unique characteristics of the site, particularly its topography and surrounding character; and

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- Include specific services and design elements suited to residents who are living with dementia alongside other residents.

4.3 OBJECTIVES OF THE ZONE

The site is currently zoned R2 Low Density Residential under THLEP 2012. The proposed development is consistent with the following R2 Low Density Residential zone objectives:

- *To provide for the housing needs of the community within a low-density residential environment;*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents; and*
- *To maintain the existing low-density residential character of the area.*

In addition, the proposed development also meets the objectives of the R2 Low Density Residential zone as it would provide for the housing needs of the local ageing community within a low-density residential environment. The proposed development, as a form of Seniors Housing, would directly deliver on the R2 Low Density Residential zone objective of enabling a land use that provides facilities or services to meet the day to day needs of residents. The proposed development would also not detract from the existing low-density residential character of the area. Indeed, in relation to adjoining properties, the height of the proposed development would generally be perceptible as a two-storey development when viewed from the streetscape

4.4 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

4.4.1 Height of Buildings and Number of Storeys Adjacent Boundary

When considering whether a development standard is appropriate and/or necessary, one must take into account the nature of the proposed variation, the site context, and the design of the proposed development. Each of these matters is discussed below.

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.

Reducing the height of the design to strictly meet the SEPP HSPD controls is considered unreasonable as this would result in a less efficient use of the site's floorspace, and a building design which may not respond as well to the site's prevailing topography (which alters the building height from north-to south, effectively resulting in the need for a split-level building design).

The abovementioned justifications are considered valid, and in this instance the proposed Clause 4.6 Variation is acceptable. The objectives of the relevant clauses and the R2 Low Density Residential zone would be upheld as a result of the proposed development.

Nature of Variation

The proposed maximum height of the building is 12.6m (to the underside of the ceiling – refer **Figure 1**), being 4.6m above the maximum height limit. Whilst this is the case the building is designed to generally present as two storeys to the street frontages. The effect is that the building's predominant height is visually read as being consistent in scale with the surrounding built form, which measures between approximately 9.2m to 12.6m to the underside of the ceiling. The visual perspectives of the development are shown below from Murray Farm and Watton Road are shown in **Figure 3** and **4** respectively.

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Figure 3: Watton Road Perspective

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Figure 4: Murray Farm Road Perspective

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Site Context

Site context is a key consideration when determining the appropriateness and necessity of a development standard. Importantly, the maximum proposed building height as defined under the SEPP is approximately 12.6m from existing ground level to the underside of the ceiling. Furthermore, the area is also characterised by an eclectic mix of buildings of varying heights and sizes which present which due to the topography of the land are not uniform in height. The slope of the land and natural conditions is considered grounds to support the variation as proposed.

Design of the Proposed Development

The proposed development has been the subject of an iterative design process aimed at creating a building that meets its functional needs and recognises and responds to its dual street frontage and location on the boundary of zone changes. The building visually reads as predominantly two storeys to both street frontages. The massing of the building façade has been articulated through the use of materials, recesses and projection to further reduce perceived building bulk as shown in the submitted photomontages.

The following fundamental planning considerations have informed the design:

- a) It is consistent in terms of the prevailing streetscape and character, by providing increased setbacks.
- b) The resultant Floor Space Ratio is under the 1:1 threshold identified under Clause 48 of SEPP HSPD;
- c) The rear 25% of the site remains undeveloped pursuant to Clause 40 of SEPP HSPD;
- d) The height breach pertains to the central portions of the building, which generally gives the perception of a two-storey element from surrounding properties and the public domain;
- e) The extent of buildings setbacks provided, and orientation of rooms minimises overlooking and associated privacy impacts;
- f) Solar access in mid-winter is achieved to surrounding properties;
- g) The overall quantity and quality of landscaping creates a desirable character within the locality and serves to offer a high level of amenity for residents.
- h) The facility has been reduced from 132 beds to 120 beds to accommodate the design changes and comments raised by Council.

Amenity Considerations

The following design measures have been incorporated with respect to the design to ensure the height breach does not adversely impact on surrounding properties:

- Increased building setbacks are provided as shown on the Architectural Plans and within the design report at Appendix 5 of the response matrix. Setbacks and building separation are provided as per the following diagram in **Figure 2**. Coupled with the decrease in the number of storeys at the interface with the boundaries, the overall bulk and scale of the development is reduced substantially as is any overshadowing.
- Building heights at the street frontage do not exceed two storeys in height and are therefore compatible in scale and character to the prevailing detached residential development. Photo montages are provided at Appendix 4 of the response matrix which show the relationship with the streetscape and reinforce the suitability of the development in this respect.

The 3-storey component with the adjoining property at 41A Murray Farm Road is perceived to read as a 2- storey component. The pergola over the driveway with this neighbour is used

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as a transitional element. Additionally, this part of the building has outdoor terraces with balustrades with vertical profiles, thus reducing the bulk of this portion of the building.

Careful consideration of facade elements along the Watton Street frontage, the generous setbacks, architectural components such as the hip roof, the eaves and landscape elements assist to soften the 3-storey component along the Watton Road frontage. The 4-storey component of the building is indiscernible from any of the nearby streets - this floor is critical in achieving the optimum facility yield without creating peripheral impacts.

- Resident rooms facing Murray Farm Road have no privacy impacts.
- No glazing along the western wall resulting in no privacy impact to 49 Murray Farm Road.
- Resident rooms facing west are setback 12 m to the boundary. The ground floor rooms sit lower than the adjoining property and are screened by the boundary fence. The upper floor resident rooms look out on to existing trees (20 m in height) and on to the proposed new landscaped planting with a mature height of 8-10 m. The privacy impact from these rooms is expected to be minimal in a residential context.
- No resident rooms face the adjoining property of 11 Watton Road. Only a corridor window faces this boundary as visibility is expected to be screened from the new landscape planting along the boundary. No. 11 Watton Road has only 2 small high-level windows along this boundary which appear to be bathroom windows. The privacy impact along this boundary is minimal in a residential context.
- Resident rooms facing Watton Road have no privacy impacts.
- Resident rooms facing west are set back 28 m from the boundary and have no privacy impacts.
- Lounge areas and resident rooms facing north look on to existing trees which are in the order of 8-20 m in height. Visibility is limited through this area currently – therefore along with additional new planting and a setback of over 33 m it is expected there will be no privacy impact from this area.
- No resident rooms face the adjoining property of 63 Oakes Road. Only a corridor window faces this property. However, their private open space faces north and east and is not impacted by our development. The existing trees along this boundary are 16-26 m in height with limited visibility. The existing vegetation coverage along with new planting will ensure there is minimal impact in terms of privacy.
- The lounge areas from within the courtyard are setback 26 m from the boundary. The existing tree coverage and new landscape buffer planting along the boundary will ensure no impact on privacy from this area.
- The resident rooms and balcony's facing east are setback 9-14 m from the boundary. The existing tree coverage particularly adjoining 41A Murray Farm Road is 16-26 m in height with limited visibility. The new landscape planting will have a mature height between 8-20 m which includes new Sydney Red Gum Trees. The privacy of 41A Murray Farm Road which has its private open space to the east is expected to be maintained.

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- The Resident rooms facing east are setback 9m from the boundary and the resident rooms on the corner face Murray Farm Road and not the adjoining property. The driveway of 41A Murray Farm Road separates our site from 39 Murray Farm Road. The existing tree coverage along the boundary protects the privacy of 39 Murray Farm Road.

Urban Design

The revised scheme has considered the height breach with respect to urban design outcomes as follows:

- The Built Form has undergone major revision to achieve a more considerate two storey edge to buildings where they relate to neighbouring houses, and the configuration and stepped envelope form ensures that where there are 3 or 4 storeys this only occurs at a substantial distance from the building perimeter and adjoining boundaries so that these parts of the proposal will have virtually no impacts on environmental conditions or amenity for either residents or neighbours.
- The façade articulation and expression has been simplified through layering of the two predominant materials of masonry and timber, complemented by filtering elements such as louvred screens, balustrades, pergolas and sun control overhangs or hoods. Upper floors will be treated in a recessive manner with a darker palette, and in conjunction with play of shadows from the building modulation, will create a very well resolved façade expression to integrate with the surrounding landscape canopy.

4.4.2 Conclusions

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 SEPP HSPD.

Moreover:

- The proposed development would not adversely impact on the amenity of surrounding properties in terms of visual bulk and scale, privacy or solar access;
- The purpose of the standard under Clause 40(4)(b) is to avoid an abrupt change in scale of the development in the streetscape. The proposed design expressly demonstrates this as the perceptible scale is 2 storeys from both street frontages with a considered architectural design that steps the upper levels;
- The proposed development preserves the rear 25% of the site with landscaping that equates to 38.4m² per resident.

Thereby, reducing the height and number of storeys to strictly meet Clause 40 of SEPP HSPD is considered unreasonable as this would result in a built form that fails to provide sufficient building setbacks, landscaped open space and a general building configuration that cannot accommodate aged care residents. It is furthermore considered unnecessary, as the changes in bulk to the site as a result of these hypothetical reductions in height and number of storeys would not be overly discernible.

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The abovementioned justifications are considered valid, and in this instance the proposed Clause 4.6 Variation is considered to be acceptable. The objectives SEPP HSPD and THLEP 2012 would be upheld as a result of the proposed development.

4.5 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

4.5.1 Height of Buildings and Number of Storeys Adjacent Side Boundary

There are considered to be sufficient environmental planning grounds to justify contravention of the Height of Buildings Standard, these being:

- The design provides for an internal configuration which provides optimal operation efficiency for the purpose of aged care. This in effect relates to the aged care model that serves to ensure the building operates in clusters and sub-communities in accordance with health guidelines and the overall needs of patients. A conventional 1-2 storey development over the site would fail to achieve efficiencies in this respect, nor would there be any material improvement on the overall neighbourhood amenity.
- The extent of setbacks (4m to 33m) provided preserves the residential amenity to surrounding properties. By increasing setbacks, the building height is increased above the 8m limit, however as it is centralised within the site and presents minimal impact in terms of privacy, solar access and visual bulk and scale.
- Any height breach is substantially offset by the ratio of landscaping (4,612sqm which equates to 38.4m² per resident which is well above the 25m² required under the SEPP HSPD).
- No development is proposed within the rear 25% of the site, thus compliance is achieved with the rear 25% control under Clause 40.
- The number of storeys along the boundaries is generally 2 storeys which is consistent with the residential amenity of the locality.
- Along the Murray Farm Road frontage (the primary frontage), the number of storeys is limited to 2 which is entirely consistent with the prevailing character.
- Along the Watton Road frontage, the development will sit lower than the neighbouring properties to the west.
- There is minimal roof pitch which reduces the overall height of the building and its visual presence whilst maintaining the residential character of the surrounding area.
- The natural contours of the land result in the site sitting lower than surrounding properties, which therefore creates less visual dominance.
- The materiality of the building is such that the tones and colours integrate with the residential amenity of the locality - this is due to the lighter colour cladding with darker tones to the upper floor creating a recessed shadowing effect.

4.6 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 4.3 have already demonstrated how the proposed development is consistent with SEPP HSPD and the objectives the R2 Low Density Residential zone under THLEP 2012.

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.

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The proposed development is in the public interest as it is consistent with the overarching floor space ratio and height objectives. It would also contribute towards meeting the demand for Residential Care Facility beds within the Parramatta LGA, as identified in the NSW Ageing Strategy 2016-2020, the A Metropolis of Three Cities 2018, and the Central Sydney District Plan 2018. Specifically, the proposed development would be of social benefit to the community as it would ensure both the ongoing viability and enhanced amenity of the site for assisted living purposes. The proposed development would also contribute towards meeting the current shortfall of Residential Care Facility beds within the Catchment area.

In addition, the proposed development also meets the objectives of the R2 zone by:

- Providing for the housing needs of the community within a medium density residential environment;
- Enabling the provision of other facilities on site to meet the day to day needs of residents;
- Providing a higher density development that respects access to views; and
- Providing residential accommodation alongside long term employment opportunities in an accessible location hence maximising public transport use and encouraging walking and cycling.

The proposed development is therefore considered to be justified on public interest grounds.

4.7 MATTERS OF STATE OR REGIONAL SIGNIFICANCE

The proposed non-compliances with Clause 40(4) (a) and (b) would not raise any matters of significance for State or regional environmental planning. Additionally, there would be no conflict with any State Environmental Planning Policies or Ministerial Directives under section 117 of the EP&A Act.

These non-compliances are more than the 10% prescribed in this planning circular.

Supporting the non-compliances would enable the proposed development to contribute to the objectives of the following State Government planning policies:

- *NSW 2021:*
 - By providing a greater height at the site, the proposed development can better respond to the key strategy under NSW 2021 of rebuilding quality services by making provision for 120 Residential Care Facility beds which are required to meet the rising demand for such infrastructure within NSW;
- *A Metropolis of Three Cities:*
 - By providing a greater height at the site, the proposed development can better respond to the Greater Sydney Commission's vision and the NSW Government's aim of having integrated health and aged care services available, as well as the aim of allowing people to continue to age within their communities;
- *Central District Plan 2018:*
 - By providing a greater height and FSR at the site, the proposed development can better respond to the Greater Sydney Commission's vision for continued housing diversity within the Central District;
- *NSW Ageing Strategy 2016-2020 (Ageing Strategy):*
 - By providing a greater height at the site, the proposed development can better respond to the NSW Government's strategic vision for aged care within NSW by providing a greater number of Seniors Housing dwellings at the site.

4.8 PUBLIC BENEFIT IN MAINTAINING THE STANDARDS

Strict compliance with SEPP HSPD would result in:

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- A Residential Care Facility which does not have sufficient amenities and facilities to provide the type of quality, Residential Care Facility product which the site needs to deliver so as to respond to the type of product which is sought after in the Parramatta LGA;
- Not contributing towards meeting the demand for additional Residential Care Facility beds within the Parramatta LGA;
- Potentially failing to contribute towards meeting the current shortfall of Residential Care beds within the catchment area;
- Threatening the commercial viability of the proposed development by reducing the number of residential units that can be delivered to the marketplace;
- Creating fewer full-time equivalent jobs for staff working at the site, resulting from fewer residents being able to reside at the site; and
- Failing to meet the objectives of the EP&A Act 1979 by making orderly and economic use of a brownfields site for its full planning potential.

As such, there is no genuine public benefit in maintaining this strict building height.

4.9 OBJECTIVES OF THE *ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979*

All planning determinations made under the EP&A Act are required to be made with regard to the objectives of the EP&A Act. **Table 2** assesses the proposed development is assessed against these objectives.

Table 2 EP&A Act Objectives

Objective	Proposed Development Compliance
The objects of this Act are as follows:	
(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,	The proposed development is considered to be in the public interest as it would contribute towards meeting the demand for Residential Care Facility beds within the Parramatta LGA, as identified in the NSW Ageing Strategy 2016-2020, the A Metropolis of Three Cities 2018, and the Central District Plan 2018. Specifically, the proposed development would be of social benefit to the community as it would ensure both the ongoing viability and enhanced amenity of the site for assisted living purposes. By providing 120 beds at the site, the proposed development would also contribute towards meeting the current shortfall of Residential Care Facility beds within the catchment area.
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,	<p>The proposed development has been assessed against the principles of ecologically sustainable development as set out in the <i>Protection of the Environment Operations (General) Regulation 2009</i> as follows.</p> <p>The proposed development would not create the risk of serious or irreversible damage to the environment.</p> <p>Ultimately, the proposed development would not create any threats of serious or irreversible environmental damage which would require further scientific study to fully ascertain.</p> <p>The proposed development would take place on a brownfield site. It would not cause any impacts to the nearest sensitive areas. The proposed development would therefore not impact on the conservation of biological diversity or the ecological integrity of the locality.</p> <p>The proposed development would not require any</p>

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	Environment Protection Licence or other mechanism to compensate for any pollution generating activities at the site.
(c) to promote the orderly and economic use and development of land,	The proposed development would make use of a brownfield site for orderly, economically beneficial development without resulting in any unacceptable economic, environmental or social impacts.
(d) to promote the delivery and maintenance of affordable housing,	The proposal seeks consent for Residential Aged Care and as such there would be no affordable housing.
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	<p>The proposed development would take place on a brownfield site. It would not cause any impacts to the nearest sensitive areas.</p> <p>No clearing of threatened plant species, ecological communities or other fauna habitat elements would be undertaken as part of the proposed development.</p> <p>The proposed development would therefore not impact on the conservation of biological diversity or the ecological integrity of the locality.</p>
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	The proposal would not impact on any historical or Aboriginal heritage.
(g) to promote good design and amenity of the built environment,	The proposed development responds to the future character of the locality in terms of urban design by providing a built form that is sympathetic to the residential character of the locality coupled with high quality landscaping.
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,	The proposed development can be constructed and maintained without health and safety risks to future tenants.
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,	The proposed development has a Capital Investment Value in excess of \$30 Million. As such, it is classified as regional development. It will therefore be determined by the Central Sydney Planning Panel.
(j) to provide increased opportunity for community participation in environmental planning and assessment.	The DA for the proposed development would be subject to the relevant public notification requirements.

4.10 SUMMARY

For the reasons outlined above, it is considered that the objections to Clause 40(4) (a) and (b) of the SEPP HSPD are well-founded in this instance and the granting of Clause 4.6 Variations to these development standards are appropriate in the circumstances. Furthermore, the objection is considered to be well founded for the following reasons as outlined in Clause 4.6 of the HLEP 2012, *FourFive Pty Ltd v Ashfield Council* and *Wehbe v Pittwater Council*.

- Compliance with the development standard is unreasonable and unnecessary in the circumstances;
- There are sufficient environmental planning grounds to justify contravening the development standard;

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- The development is in the public interest;
- The development is consistent with the objectives of the particular standard;
- The development is consistent with the objectives for development within the zone;
- The objectives of the standard are achieved notwithstanding the non-compliance with the standard;
- The development does not negatively impact on any matters of State or regional significance; and
- The public benefit in maintaining strict compliance with the development standard would be negligible.

It is furthermore submitted that:

- Strict compliance with the standards would hinder the achievement of the objects of the EP&A Act (refer to **Section 4.6**);
- The proposed development would contribute towards meeting the demand for additional Residential Care Facility beds within the Parramatta LGA, as identified in the *NSW Ageing Strategy 2016-2020*, the *A Metropolis of Three Cities 2018* and the *Central District Plan 2018*; and
- No unreasonable impacts are associated with the proposed development.

Overall, it is considered that the proposed Clause 4.6 Variations to the development standards under clause 40(4) (a) and (b) are entirely appropriate and can be clearly justified having regard to the matters listed within HLEP 2012 Clause 4.6.

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PART E CONCLUSION

4.11 RECOMMENDATION

It is requested that the Central Sydney Panel 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 2012 (refer to **Section 2.1**).

This is particularly the case given that a hypothetical compliant design at the site would:

- Result in a Residential Care Facility which does not have sufficient amenities and facilities to provide the type of quality, high-end Residential Care Facility product which the Assisted Retirement Living Market Assessment so as to respond to the type of product which is sought after in the Parramatta LGA;
- Not contribute towards meeting the demand for additional Residential Care Facility beds within the Parramatta LGA, as identified in the NSW Ageing Strategy 2016-2020, the A Metropolis of Three Cities 2018 and the Central District Plan 2018 by potentially resulting in a reduction in the provision of Residential Care Facility beds at the site rather than a net gain of 120 beds;
- Fail to contribute towards meeting the current demand for Residential Care beds.
- Threaten the commercial viability of the proposed development by reducing the number of residential units that can be delivered to the marketplace;
- Create fewer full-time equivalent jobs for staff working at the site, resulting from fewer residents being able to reside at the site; and
- Fail to meet the objectives of the EP&A Act by making orderly and economic use of a brownfields site for its full planning potential.