



Clause 4.6

Variation Request

Height of Buildings


Clause 40(4)(a) Seniors
Housing SEPP 2004

Submitted to the Lake Macquarie City Council
On Behalf of Royal Freemason's Benevolent Institution

7 March 2019



REPORT REVISION HISTORY

Revision	Date Issued	Revision Description	
01 - DRAFT	06/03/19	Revision tracking notes	
		Prepared by	Verified by
		Lydia Kuczera <i>Project Planner</i>	 Murray Blackburn-Smith <i>Regional Director</i>
02 - FINAL	07/03/19	Revision tracking notes	
		Prepared by	Verified by
		Lydia Kuczera <i>Project Planner</i>	Jillian Kuczera <i>Snr. Project Planner</i>

Certification

This report has been authorised by City Plan Strategy & Development P/L, with input from a number of other expert consultants. To the best of our knowledge the accuracy of the information contained herein is neither false nor misleading. The comments have been based upon information and facts that were correct at the time of writing.

Copyright © City Plan Strategy & Development P/L
 ABN 58 133 501 774

All Rights Reserved. No material may be reproduced without prior permission. While we have tried to ensure the accuracy of the information in this publication, City Plan Strategy & Development P/L accepts no responsibility or liability for any errors, omissions or resultant consequences including any loss or damage arising from reliance in information in this publication.



TABLE OF CONTENTS

1. Introduction	3
2. Extent of variation	4
3. Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case. [cl.4.6 (3)(a)]	6
4. There are sufficient environmental planning grounds to justify contravening the standard. [cl. 4.6(3)(b)]	9
5. The Proposal will be in the public interest because it is consistent with the objectives of the standard and the objectives of the zone. [cl.4.6(4)(a)(ii)]	11
6. Contravention of the development standard does not raise any matter of significance for State or regional environmental planning. [cl. 4.6(5)(a)]	12
7. There is no public benefit of maintaining the standard. [cl. 4.6(5)(b)]	13
8. Conclusion	14

FIGURES

Figure 1: Extract of 'RAC Sections' plan showing cross-section view of proposed building with SH SEPP 8m ceiling height limit indicated by red line	5
Figure 2: Western view of proposed building from Northville Drive (Source: Calder Flower Architecture) ...	7
Figure 3: Northern view of proposed building from main driveway entry (Source: Calder Flower Architecture)	8

TABLES

Table 1: Consistency with R2 zone objectives from LMLEP 2014	11
--	----



1. INTRODUCTION

This is a formal written request prepared in accordance with Clause 4.6 of the *Lake Macquarie Local Environmental Plan 2014* (LMLEP 2014) to support a development application (DA) submitted to Lake Macquarie City Council (the Council). The DA is for the demolition of selected existing development and the construction of a new 3-storey seniors Residential Care Facility (RCF) and 'Community Hub' building with underground carparking at No. 3 Northville Drive, Edgeworth (the subject site).

Specifically, the request seeks approval to vary the 'Height in zones where residential flat buildings are not permitted' development standard in Clause 40(4)(a) of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (SH SEPP). For the avoidance of doubt, the development standard is not specifically excluded from the operation of Clause 4.6 of LMLEP 2014.

Clause 40(4)(a) provides a numerical building height limit of 8 metres from the ceiling of the topmost floor of the building to the pre-development ground level immediately below that point. The exception to this standard relates to the uppermost level of the proposed building, only. Specifically, the ceiling of the building reaches a maximum height of 11.23m as measured from ground level (existing), exceeding the prescribed maximum height by 3.23m (approximately 40%).

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. As the following request demonstrates, by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application, compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the standard. This request also demonstrates that the proposal will be in the public interest, as the proposed development will be consistent with the inferred objectives of the development standard and the zoning of the site.

This request has been prepared having regard to the NSW Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011) and relevant decisions in the New South Wales Land & Environment Court (L & E Court). Of particular recent relevance are the decisions of Dixon SC in *Brigham v Canterbury – Bankstown Council [2018] NSWLEC 1406* and of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, which both provide a clear outline of the matters required to be demonstrated pursuant to Clause 4.6, including the structure of such requests.

Sections 0 and 0 of this request explain how flexibility is justified in this case in terms of the matters explicitly required to be addressed in a written request on behalf of the applicant. Sections 5, 6 and 7 address additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 or the assumed concurrence of the Secretary.



2. EXTENT OF VARIATION

The numerical value of the development standard contained in Clause 40(4)(a) is 8m. The SH SEPP defines height as 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. Ground level is defined as the level of the site before development is carried out pursuant to the SEPP.

The subject site encompasses the existing 'Hawkins Village' retirement village (described herein as the 'Village Site'). The area the subject of this development application is located in the central northern portion of the Village Site, and is described herein as the 'Development Site'.

The proposed development will involve the construction of a new RCF and 'Community Hub' building with underground carparking in the Development Site. The built form comprises a 3-storey split-level building composed of 4 separate wings attached to a central spine. The proposed separated wings of the building allow the creation of landscaped spaces between, providing green outlooks from all resident rooms, while breaking up the building's bulk and scale.

As discussed in the following sections, the proposed building has been sited and designed to respond to a number of key considerations and constraints including the Development Site's topography, existing site vegetation, services along Masters Drive, and the building's operational and accessibility requirements.

Topographically, the Development Site generally slopes down from Poplar Drive, steeply and unevenly, towards the west and south-west with a cross fall of approximately 8m. Some levelling and lowering has previously occurred around existing buildings immediately adjoining Masters Drive (i.e. Boronia Court). Ideally, to minimise the need for cut and fill, the proposed building would have been predominantly located in these more-level areas. However, relocation of the proposed building footprint further north was required to preserve existing trees along Masters Drive and to avoid conflict with services.

In this context, the optimum design approach to the layout of the building is to enable additional height in the western and south-western portions of the building (particularly the southern wing). In doing so, this enables generous and level floorplates stepping down the site, ensuring operational requirements and accessibility standards can be met. In addition, the additional height enables direct access to external areas of the building at all levels and avoids the need for more extensive cut and fill across the Development Site, which would be required for a lower but less compact building footprint.

The exception to the development standard concerns a departure from the standard contained in Clause 40(4)(a) of the SH SEPP. Specifically, the ceilings of the southern and middle western-facing building wings reach the following maximum height as measured from ground level (existing):

- Southern wing: 10.45m (RL 29.60m AHD), exceeding the prescribed maximum height by 2.45m (30%).
- Middle wing: 8.7m (RL 29.60m AHD), exceeding the prescribed maximum height by 0.7m (8.8%).

In addition, the ceiling over the building's main entry (central spine) is raised to accommodate high-level clerestory windows. The ceiling reaches a maximum height of 11.23m (approximately RL 32.72m AHD) as measured from ground level (existing), exceeding the prescribed maximum height by 3.23m (40%). Several other roof-top elements of the building's central spine, comprising plant and lift overruns, exceed the prescribed maximum height, but to a lesser degree.

The extent of the proposed variation is shown in Figure 1 below. It is noteworthy that, with the exception of the high-level clerestory windows, roof-top plan and lift overruns above and near the main entrance, the building's central spine and north-eastern wing do not exceed the prescribed maximum height.

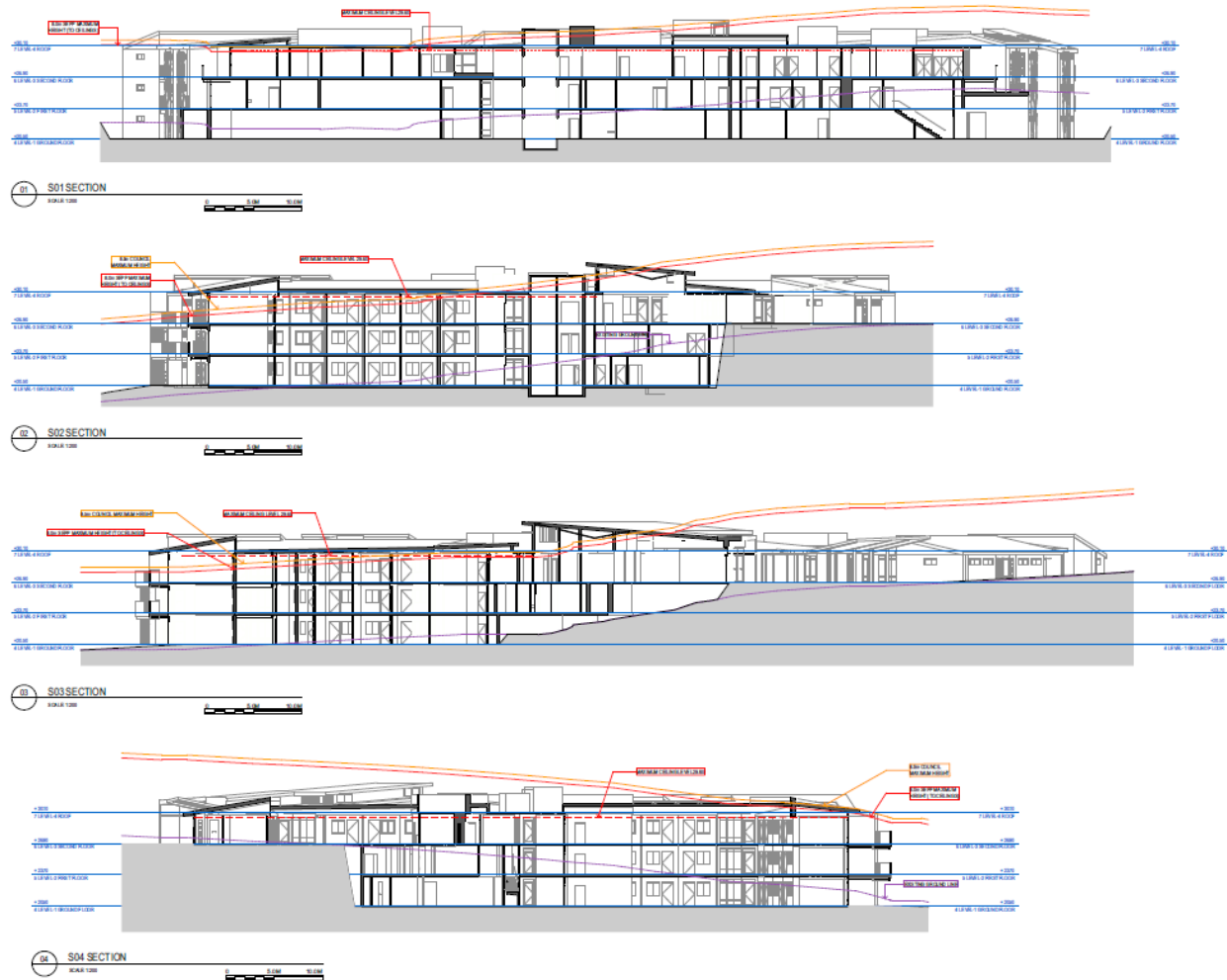


Figure 1: Extract of 'RAC Sections' plan showing cross-section view of proposed building with SH SEPP 8m ceiling height limit indicated by red line



3. COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THIS CASE. [cl.4.6 (3)(a)]

The L & E 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 satisfied the objectives of the standard notwithstanding the non-compliance (the first 'test').

The remaining four 'tests' in *Wehbe* are as follows:

1. *The underlying objective or purpose is not relevant, or*
2. *The objective would be defeated if compliance was required resulting in compliance being unreasonable, or*
3. *The development standard has been abandoned, or*
4. *The zoning is unreasonable or inappropriate.*

This request seeks to rely on the first 'test' in *Wehbe*, only, and therefore the remaining four 'tests' are not considered. This approach is consistent with the findings of Dixon SC in *Brigham v Canterbury – Bankstown Council* [2018] NSWLEC 1406 who notes 'you do not need to list all five tests from *Wehbe* if the first test is relied upon and said to be satisfied'.

The SH SEPP and associated guidelines provide no instruction on the intent of the height controls in Clause 40(4)(a), nor an explanation as to why ceiling height is utilised rather than overall building height. Clause 40(4)(a) does not otherwise nominate any objectives to underpin the intent of ceiling height control. It is therefore necessary to assume what the purpose of the standard might be, and then to evaluate whether a variation to the control would be consistent with these objectives.

Although not entirely clear, it could be inferred that the use of ceiling heights is related to a desire to ensure appropriate floor to ceiling heights are provided within the building to maximise amenity for senior residents, while still ensuring the building sits comfortably in a low-density residential landscape.

Pursuant to the first 'test' in *Wehbe*, compliance with the height development standard contained in Clause 40(4)(a) is considered to be unreasonable and unnecessary in the circumstances of this case because, as demonstrated below, the inferred objectives of the development standard are satisfied, notwithstanding non-compliance with the standard.

Inferred Clause 40(4)(a) Objectives

(a) To ensure appropriate floor to ceiling heights are provided within the building to maximise amenity for senior residents

The proposed building provides floor to floor heights of 3.2m, and ceiling heights of 2.7m (with the exception of ensuites and service rooms which are 2.4m). The 2.7m ceiling heights, particularly in the resident rooms and living areas, provide better amenity for the residents.

In addition, the ceiling over the building's main entry is raised to accommodate high-level clerestory windows. These windows will provide a pleasant light filled space, with good natural ventilation, as well as internal garden elements.

(b) To ensure that the development does not dominate the streetscape by virtue of its scale and bulk and is consistent with the character of the area

The proposed building does not present directly to a public street. It is separated from Northville Drive by approximately 50m and visually screened by existing stands of mature vegetation. The most prominent views of the proposed building from Northville Drive would be when approaching the site from the west. As shown in Figure 2 below, the presence of existing and proposed vegetation, the building's generous landscaped front setback, and the site's topography would assist in screening and minimising the appearance of height, bulk and scale when viewed from Northville Drive.



Figure 2: Western view of proposed building from Northville Drive (Source: Calder Flower Architecture)

The building 'steps' down and is partially cut into the sloping topography, to minimise overall building height and to better visually integrate into its surrounds. This response also allows the development to present as a 1-storey building to the main Village entry at Northville Drive and along Poplar Drive (see Figure 3). Moreover, the expansive width of the Village Site frontage to Northville Drive allows for appropriate visual separation of the proposed building from the nearby low-density dwelling houses, ensuring there is no jarring juxtaposition between the built forms.

In addition, the building has been placed to maximise the retention of open space and smaller clusters of mature trees around the Development Site, helping to maintain the Village's existing 'parkland' feel. Some of these trees are 20 - 25m tall and provide valued amenity to the entire Village. In addition, the building's position allows space for extensive landscaping on all sides of the building, including extensive streetscape landscaping along Poplar Drive, increasing overall amenity.



Figure 3: Northern view of proposed building from main driveway entry (Source: Calder Flower Architecture)

Overall, notwithstanding the non-compliant building height, the proposed building will fit comfortably into the existing landscape and streetscape setting, and will be compatible with the character of the area.

(c) To avoid unreasonable amenity impacts on adjoining developments

The proposed building is physically and visually separated from the nearest adjoining (external) development to the north and east. On the opposite (northern) side of Northville Drive is a low-density residential subdivision which is predominantly visually separated from Northville Drive and the proposed building via a stand of dense vegetation. South-ward views for residents of this subdivision are highly constrained. Existing low-density dwelling houses to the north-east and east of the proposed building are located more than 80m from the proposed building. Existing trees, fences and buildings constrain views south-west over the Development Site from these dwellings. As a result, there would be no adverse visual or view loss impacts on nearby residential development resulting from the proposed building height.

The tallest building elements are located internally within the broader Village Site and would not result in any adverse amenity impacts to surrounding development.

In addition, the building would be suitably separated from existing village development ensuring no adverse amenity impacts on existing residents.



4. THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE STANDARD. [cl. 4.6(3)(b)]

The Statement of Environmental Effect (SEE) prepared to support this DA provides an holistic environmental planning assessment of the proposed development and concludes that there are sufficient environmental planning grounds to support the development.

Importantly, Council has considered the proposal in its preliminary form, including a ceiling height exceedance of a similar extent to that which is currently proposed (up to 2.2m), and advised the following in the Pre-Lodgement Meeting Minutes dated 7 December 2018:

'Council acknowledges that there will be an exceedance at some point of the development and the Proponent will be required to provide reasonable justification to any variation of controls. Council do not foresee any variation to the LEP building height as a major issue, given the existing site levels, internalisation of building height variation within the site (i.e. reduced visual impact) and the operational requirement for the development to operate with single floor plates.'

Specific environmental planning grounds to justify the breach of the standard, including those identified by Council, are summarised as follows:

- The sloping topography of the Development Site, the location of existing vegetation and services, and the proposed building's operational and accessibility requirements necessitates a considered design approach. The building 'steps' down and is partially cut into the slope, providing each level with generous floorplates, direct access to outdoor areas, and level access across each wing of the building from the central spine. This layout ensures accessibility compliance can be achieved, improves functionality by minimising horizontal travel paths for staff and making use of laundry and garbage chutes linking to the Back of House on Level 1, and allows residents on the upper levels views towards Cockle Creek and the bush clad hills beyond.
- To facilitate this optimum building layout, additional height is required in the western and south-western portions of the building (particularly the southern wing) where the site's topography is the steepest. It is noted that the placement of the building is constrained by existing trees and a high voltage electricity easement along Master Drive to the south, requiring the building to be positioned in the steeper area of the Development Site. To avoid more extensive cut and fill, this has resulted in some additional height. It follows that the proposed variation is largely a result of the natural and modified contouring of the Development Site, the positioning of existing vegetation and services, and the need to provide level access for the building occupants. Of particular note are the existing levels around Boronia Court which appear to have been significantly modified in the past. This has resulted in an 'existing ground level' that is up to approximately 3m lower than the surrounding 'natural' ground level, thereby exacerbating the 'height exceedance' (as defined) in certain areas of the site.
- Importantly, stepping of the building down the site helps to minimise overall building height and to better visually integrate the building into its surrounds. This design response allows the development to present as a 1-storey building to the main Village entry at Northville Drive and along Poplar Drive. The tallest non-compliant building element would be located in the south-western portion of the Development Site, separated from adjoining development and the streetscape to the north and east and north, respectively. Accordingly, the building's most prominent, 3-storey western elevation would be positioned internally within the broader Village Site.
- The sloping topography, generally away from the site's main entrance, assists in screening the appearance of height, bulk and scale from various viewpoints in the public realm. Due to the building's relatively isolated position, the non-compliant building elements would not be noticeably visible from



the street or nearby external development, ensuring the exceedances would not result in any unreasonable visual amenity or streetscape impacts. In addition, as discussed in Section 3 [objective (a)], no adverse view loss impacts would result from the proposed development, including the additional height.

- The height of the proposed building facilitates a number of positive external and internal amenity outcomes, such as:
 - The pitched roofs, although adding additional height, provide for greater articulation and screening for the plant on the roof, which can be up to between 2m and 2.4m in height.
 - The building's proposed height allows its ground-level footprint to be minimised, to maximise the retention of open space and existing vegetation, helping to maintain the Village's existing 'parkland' feel.
 - The roof and ceiling over the building's main entry is raised above the height limit to enable high-level clerestory windows providing natural light and ventilation, as well as internal garden elements.
- The height and scale of the proposed building provides for appropriate economies of scale for staffing, meal preparation and other services for residents, and for the accommodation of centralised Village services and recreational spaces, such as the Community Hub. It also facilitates a 'household' design model which utilises larger communal spaces within households without inefficient circulation corridors. The additional proposed height would further enhance residential amenity, as well as facilitating attractive views of the site's broader surrounds.

The above points are environmental planning grounds that warrant the departure from the development standard and are not "generic" but rather specific to the site and the circumstances of the case.



5. THE PROPOSAL WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE STANDARD AND THE OBJECTIVES OF THE ZONE. [cl.4.6(4)(a)(ii)]

Clause 4.6(4)(a)(ii) provides 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.

In Section 0 of this request, it was demonstrated that the proposal is consistent with the objectives of the development standard. The proposal is also consistent with the objectives of the R2 zone as explained in Table 1 below:

Table 1: Consistency with R2 zone objectives from LMLEP 2014

Objective	Discussion
To provide for the housing needs of the community within a low density residential environment.	The proposed development would provide for the specific housing needs of the frail aged 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	The development would provide supportive, ancillary landuses (such as community facilities and a small boutique / shop) to meet the day to day needs of RCF residents, as well as the residents of the overall village.
To encourage development that is sympathetic to the scenic, aesthetic and cultural heritage qualities of the built and natural environment.	The development would be sympathetic to the scenic and aesthetic values of the surrounding environment. In particular, the building has been sited and designed to maximise the retention of open space and existing vegetation, helping to maintain the Village's existing 'parkland' feel.

The objectives of the zone, as demonstrated above, as well as the objectives for the standard, have been adequately satisfied. Therefore, the proposed variation to the development standard is considered to be in the public interest.



6. CONTRAVENTION OF THE DEVELOPMENT STANDARD DOES NOT RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING. [cl. 4.6(5)(a)]

There is no identified outcome which would be prejudicial to planning matters of State or Regional significance that would result as a consequence of varying the development standard as proposed by this application.



7. THERE IS NO PUBLIC BENEFIT OF MAINTAINING THE STANDARD. [cl. 4.6(5)(b)]

Pursuant to case law in *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*'.

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 standard. Rather, the proposal would provide for the social needs of the community by providing seniors housing in a well-serviced location, co-located with existing seniors housing to facilitate 'ageing in place'. Importantly, the additional building height will not present any unreasonable impacts upon adjoining development or the streetscape.

Accordingly, there is no public benefit in maintaining strict compliance with the height of buildings development standard given that there are no unreasonable impacts that will result from the variation to the standard.



8. CONCLUSION

This Clause 4.6 variation request demonstrates, as required by Clause 4.6 of the NLEP 2012, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard and is consistent with the objectives of the R2 Low Density Residential zone, notwithstanding the variation;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard in this instance; and
- The variation does not raise any matter of State or Regional Significance.

Accordingly, it is considered appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.

A background graphic consisting of a dark blue diagonal band across the page. To the right of this band is a grayscale image of a city skyline with several tall buildings. Overlaid on the entire page is a pattern of white, 3D-outlined rectangular blocks of varying heights and widths, some of which are slightly offset from each other, creating a sense of depth and architectural structure.


Clause 4.6
Variation Request
Height of Buildings
Clause 4.3 LMLEP 2014

Submitted to the Lake Macquarie City Council (Without Prejudice)
On Behalf of Royal Freemason's Benevolent Institution

7 March 2019



REPORT REVISION HISTORY

Revision	Date Issued	Revision Description	
01 - DRAFT	06/03/19	Revision tracking notes	
		Prepared by	Verified by
		Lydia Kuczera <i>Project Planner</i>	 Murray Blackburn-Smith <i>Regional Director</i>
02 - FINAL	07/03/19	Revision tracking notes	
		Prepared by	Verified by
		Lydia Kuczera <i>Project Planner</i>	Jillian Kuczera <i>Snr. Project Planner</i>

Certification

This report has been authorised by City Plan Strategy & Development P/L, with input from a number of other expert consultants. To the best of our knowledge the accuracy of the information contained herein is neither false nor misleading. The comments have been based upon information and facts that were correct at the time of writing.

Copyright © City Plan Strategy & Development P/L
 ABN 58 133 501 774

All Rights Reserved. No material may be reproduced without prior permission. While we have tried to ensure the accuracy of the information in this publication, City Plan Strategy & Development P/L accepts no responsibility or liability for any errors, omissions or resultant consequences including any loss or damage arising from reliance in information in this publication.



TABLE OF CONTENTS

1. Introduction	3
2. Extent of variation	4
3. Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case. [cl.4.6 (3)(a)]	8
4. There are sufficient environmental planning grounds to justify contravening the standard. [cl. 4.6(3)(b)]	11
5. The Proposal will be in the public interest because it is consistent with the objectives of the standard and the objectives of the zone. [cl.4.6(4)(a)(ii)]	13
6. Contravention of the development standard does not raise any matter of significance for State or regional environmental planning. [cl. 4.6(5)(a)]	14
7. There is no public benefit of maintaining the standard. [cl. 4.6(5)(b)]	15
8. Conclusion	16

FIGURES

Figure 1: Extract of Height of Building map (source: LMLEP 2014)	4
Figure 3: 3D view of proposed clerestory windows and roof-top elements of the building's central spine with LEP 8.5m height plane in shaded orange	6
Figure 2: Extract of 'RAC Height Plane' plan showing 3D view of proposed building with LEP 8.5m height plane in shaded orange	6
Figure 4: Extract of 'RAC Sections' plan showing cross-section view of proposed building with LEP 8.5m height limit indicated by orange line	7
Figure 5: Western view of proposed building from Northville Drive (Source: Calder Flower Architecture) ...	9
Figure 6: Northern view of proposed building from main driveway entry (Source: Calder Flower Architecture)	10

TABLES

Table 1: Consistency with R2 zone objectives from LMLEP 2014	13
--	----



1. INTRODUCTION

This is a formal written request prepared in accordance with Clause 4.6 of the *Lake Macquarie Local Environmental Plan 2014* (LMLEP 2014) to support a development application (DA) submitted to Lake Macquarie City Council (the Council). The DA is for the demolition of selected existing development and the construction of a new 3-storey seniors Residential Care Facility (RCF) and 'Community Hub' building with underground carparking at No. 3 Northville Drive, Edgeworth (the subject site).

Specifically, the request seeks approval to vary the height of buildings development standard in Clause 4.3 of the LMLEP 2014. For the avoidance of doubt, the development standard is not specifically excluded from the operation of Clause 4.6 of LMLEP 2014.

Clause 4.3 provides a numerical building height limit of 8.5m over the subject site. In the first instance, City Plan Strategy and Development (CPSD) notes that Subclause 40(4) of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (SH SEPP) provides for a maximum building height of 8m for the proposed development. CPSD submits that, as both subclause 40(4) of the SH SEPP and Clause 4.3 of the LMLEP both serve to limit the height of buildings, subclause 40(4) of the SH SEPP prevails pursuant to Clause 5 of the SH SEPP. However, specific advice from Council (Pre-Lodgement Meeting Minutes dated 7 December 2018, and emails from Council officers on 17 December 2018) indicate Council's interpretation that the building height provisions under both the SH SEPP and LMLEP 2014 apply to the proposal and must each be addressed.

The exception to the development standard contained in Clause 4.3 of LMLEP 2014 relates to the uppermost level of the proposed building, only. Specifically, the building reaches a maximum height of 12.75m as measured from ground level (existing) to the highest part of the pitched roof, exceeding the prescribed maximum height by 4.25m (50%).

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. As the following request demonstrates, by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application, compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the standard. This request also demonstrates that the proposal will be in the public interest, as the proposed development will be consistent with the objectives of the development standard and the zoning of the site.

This request has been prepared having regard to the NSW Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011) and relevant decisions in the New South Wales Land & Environment Court (L & E Court). Of particular recent relevance are the decisions of Dixon SC in *Brigham v Canterbury – Bankstown Council* [2018] NSWLEC 1406 and of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, which both provide a clear outline of the matters required to be demonstrated pursuant to Clause 4.6, including the structure of such requests.

Sections 3 and 4 of this request explain how flexibility is justified in this case in terms of the matters explicitly required to be addressed in a written request on behalf of the applicant. Sections 5, 6 and 7 address additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 or the assumed concurrence of the Secretary.

2. EXTENT OF VARIATION

The subject site encompasses the existing 'Hawkins Village' retirement village (described herein as the 'Village Site'). The area the subject of this development application is located in the central northern portion of the Village Site and is described herein as the 'Development Site' (refer to Figure 1 below).

As shown in Figure 1, the LMLEP 2014 prescribes a maximum building height for the Village Site, including the Development Site, of 8.5m.

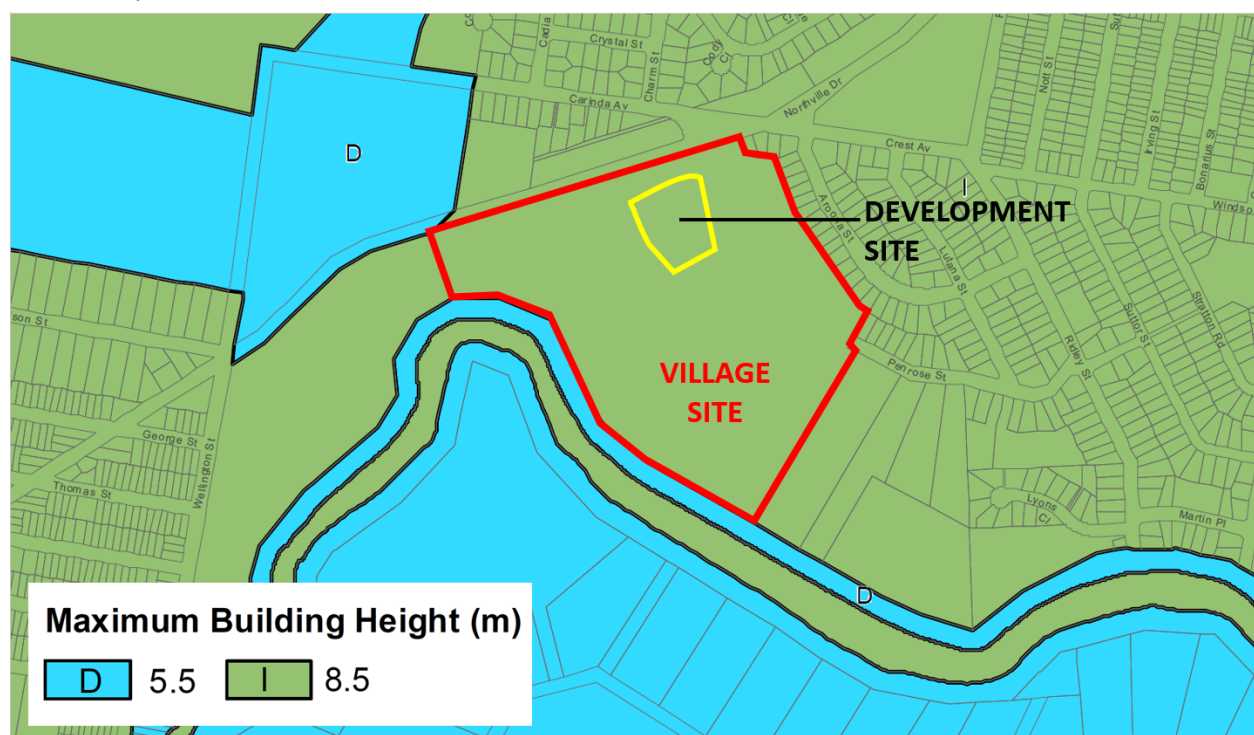


Figure 1: Extract of Height of Building map (source: LMLEP 2014)

The proposed development will involve the construction of a new RCF and 'Community Hub' building with underground carparking in the Development Site. The built form comprises a 3-storey split-level building composed of 4 separate wings attached to a central spine. The proposed separated wings of the building allow the creation of landscaped spaces between, providing green outlooks from all resident rooms, while breaking up the building's bulk and scale.

As discussed in the following sections, the proposed building has been sited and designed to respond to a number of key considerations and constraints including the Development Site's topography, existing site vegetation, services along Masters Drive, and the building's operational and accessibility requirements.

Topographically, the Development Site generally slopes down from Poplar Drive, steeply and unevenly, towards the west and south-west with a cross fall of approximately 8m. Some levelling and lowering has previously occurred around existing buildings immediately adjoining Masters Drive (i.e. Boronia Court). Ideally, to minimise the need for cut and fill, the proposed building would have been predominantly located



in these more-level areas. However, relocation of the proposed building footprint further north was required to preserve existing trees along Masters Drive and to avoid conflict with services.

In this context, the optimum design approach to the layout of the building is to enable additional height in the western and south-western portions of the building (particularly the southern wing). In doing so, this enables generous and level floorplates stepping down the site, ensuring operational requirements and accessibility standards can be met. In addition, the additional height enables direct access to external areas of the building at all levels and avoids the need for more extensive cut and fill across the Development Site, which would be required for a lower but less compact building footprint.

The exception to the building height development standard concerns a departure from the standard applicable to the overall Village Site. Specifically, each western-facing building wing reaches the following maximum height as measured from ground level (existing):

- Southern wing: 12.75m (RL 31.90m AHD) at the highest part of the roof, exceeding the prescribed maximum height by 4.25m (50%).
- Middle wing: 11m (RL 31.90m AHD) at the highest part of the roof, exceeding the prescribed maximum height by 2.5m (31%).
- Northern wing: 10.05m (RL 31.90m AHD) at the highest part of the roof, exceeding the prescribed maximum height by 1.55m (19%).

In addition, the roof and ceiling over the building's main entry (central spine) is raised to accommodate high-level clerestory windows. The roof reaches a maximum height of 11.65m (at approximately RL 33.14m AHD) as measured from ground level (existing), exceeding the prescribed maximum height by 3.15m (37%). Several other roof-top elements of the building's central spine, comprising plant and lift overruns, slightly exceed the prescribed maximum height.

The extent of the proposed variation is shown in Figures 2 - 4 below. As demonstrated in Figure 2, the non-compliant building elements are limited to less than approximately 40% of the entire building's roof area. It is noteworthy that, with the exception of the high-level clerestory windows, roof-top plant and lift overruns above and near the main entrance, the building's central spine and north-eastern wing do not exceed the prescribed maximum height.

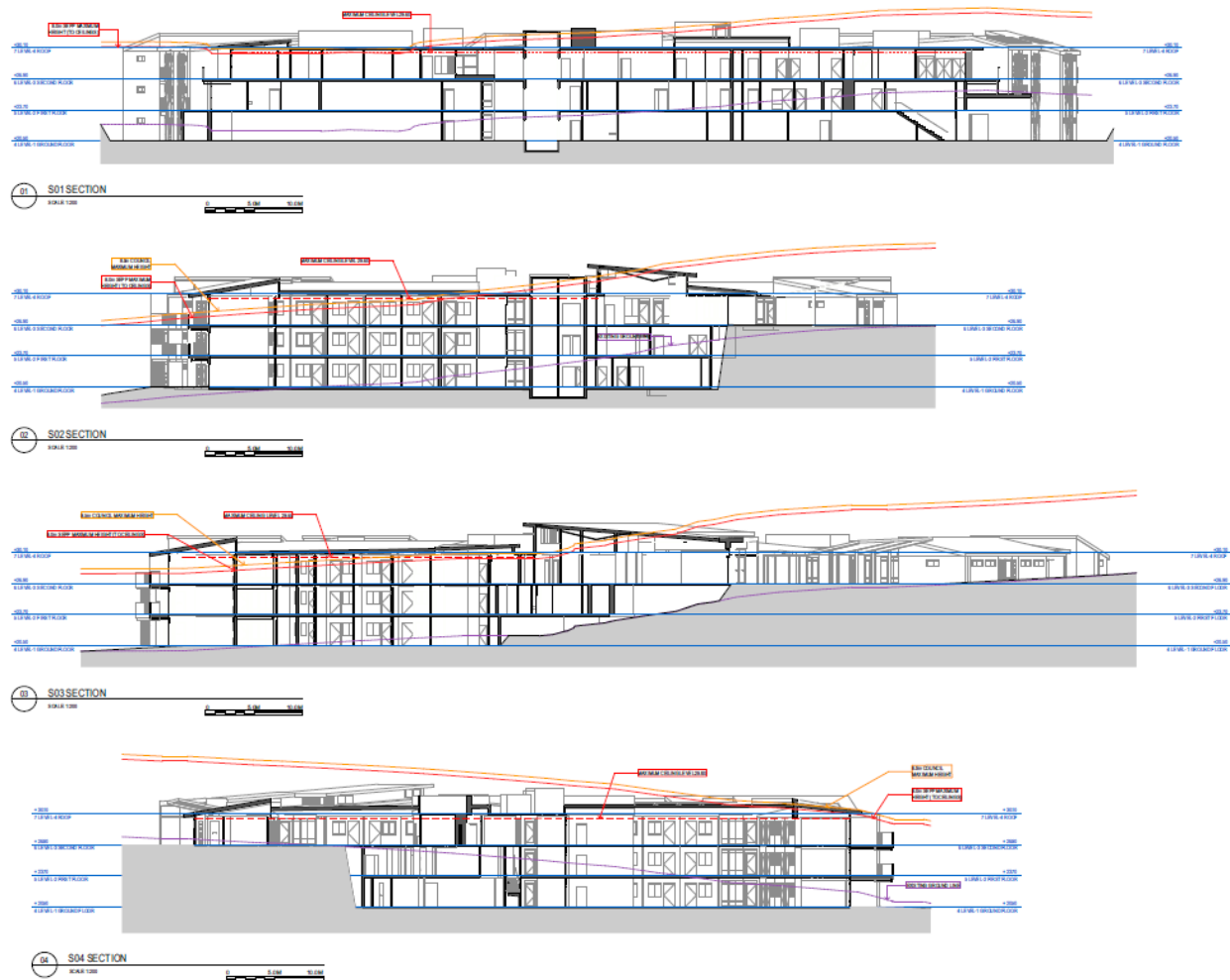


03 8.5M HEIGHT PLANE (EXISTING GROUND LEVEL TO HIGHEST POINT OF BUILDING PURSUANT TO LAKE MACQUARIE LEP)

Figure 3: Extract of 'RAC Height Plane' plan showing 3D view of proposed building with LEP 8.5m height plane in shaded orange



Figure 2: 3D view of proposed clerestory windows and roof-top elements of the building's central spine with LEP 8.5m height plane in shaded orange





3. COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THIS CASE. [cl.4.6 (3)(a)]

The L & E 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 satisfied the objectives of the standard notwithstanding the non-compliance (the first 'test').

The remaining four 'tests' in *Wehbe* are as follows:

1. *The underlying objective or purpose is not relevant, or*
2. *The objective would be defeated if compliance was required resulting in compliance being unreasonable, or*
3. *The development standard has been abandoned, or*
4. *The zoning is unreasonable or inappropriate.*

This request seeks to rely on the first 'test' in *Wehbe*, only, and therefore the remaining four 'tests' are not considered. This approach is consistent with the findings of Dixon SC in *Brigham v Canterbury – Bankstown Council* [2018] NSWLEC 1406 who notes 'you do not need to list all five tests from *Wehbe* if the first test is relied upon and said to be satisfied'.

Pursuant to the first 'test' in *Wehbe*, compliance with the height of buildings development standard is considered to be unreasonable and unnecessary in the circumstances of this case because, as demonstrated below, the objectives of the development standard contained in Clause 4.3 of the LMLEP 2014 are satisfied, notwithstanding non-compliance with the standard.

Clause 4.3 Height of buildings objectives

(a) *to ensure the height of buildings are appropriate for their location*

The height of the proposed building is considered appropriate in its location for the following reasons:

- Located within the central northern portion of the existing 'Hawkins Village' retirement village, the proposed building is surrounded by existing village development in three directions. The Village Site is large in area and characterised by areas of open space, vegetation and a range of built forms, including large-scale buildings (e.g. the adjoining 'Jacaranda House' RCF). The height of the proposed building would not be out of character with existing built form within the expansive Village Site. In addition, the building would be suitably separated from existing village development ensuring no adverse amenity impacts on existing residents.
- The *Landscape and Visual Impact Assessment* (LVIA) prepared for the proposal by Taylor Brammer (see Appendix 16 to the SEE) assesses the potential visual impact of the development against the *Lake Macquarie City Council Scenic Management Guidelines 2013* (the Guidelines). The LVIA notes that the site is situated within the Wakefield (11) landscape setting under the Guidelines, which has a moderate to low scenic quality rating. Importantly, the LVIA found that the overall ridgeline of the proposed building is below the adjacent ridgeline to the north of the site and as such does not break the natural ridgelines of the area. Additional discussion of the proposal's compliance with the Guidelines is provided at Section 6.1.1 of the SEE.

- The proposed building does not present directly to a public street, being separated from Northville Drive by approximately 50m and visually screened by existing stands of mature vegetation. The most prominent views of the proposed building from Northville Drive would be when approaching the site from the west. As shown in Figure 5 below, the presence of existing and proposed vegetation, the building's generous landscaped front setback, and the site's topography would assist in screening and minimising the appearance of height, bulk and scale when viewed from Northville Drive. The provision of additional local native species planting within the road setback (refer to *Biodiversity Development Assessment Report* at Appendix 9) will provide additional screening of the building.



Figure 5: Western view of proposed building from Northville Drive (Source: Calder Flower Architecture)

- The proposed building is physically and visually separated from the nearest adjoining (external) development to the north and east. On the opposite (northern) side of Northville Drive is a low-density residential subdivision which is predominantly visually separated from Northville Drive and the proposed building via a stand of dense vegetation. South-ward views for residents of this subdivision are highly constrained. Existing low-density dwelling houses to the north-east and east of the proposed building are located more than 80m from the proposed building. Existing trees, fences and buildings constrain views south-west over the Development Site from these dwellings. As a result, there would be no adverse visual or view loss impacts on nearby residential development resulting from the proposed building height.
- The expansive width of the Village Site frontage to Northville Drive allows for appropriate visual separation of the proposed building from nearby dwelling houses to the north-east and east, ensuring there is no jarring juxtaposition between the built forms and heights.
- The tallest building elements are located internally within the broader Village Site and would not result in any adverse amenity impacts to surrounding development. Importantly, as shown on the *Shadow Diagrams* prepared for the proposal (within the plans at Appendix 1 of the SEE), the proposed development would have no overshadowing impacts on existing neighbouring development, including adjacent Village dwellings.

In the context of the large area and existing built scale of the overall Village Site, the proposed building's visual and physical separation from Northville Drive and nearby low-density dwelling houses, and the Development Site's topography, the proposed height is considered appropriate.

(b) to permit building heights that encourage high quality urban form

The proposal has been architecturally designed to create a modern and efficient building that achieves a high-quality urban form. The building's height and massing has been considered with respect to the Development Site's topography and to reduce the visual bulk and scale of the building by articulating smaller sections of the façades. The pitched roofs (although potentially taller than an alternate roof form) contribute to the building's articulation and provide screening for the roof-top plant.

The building 'steps' down and is partially cut into the sloping topography, to minimise overall building height and to better visually integrate into its surrounds. This response also allows the development to present as a 1-storey building to the main Village entry at Northville Drive and along Poplar Drive (see Figure 6). This response is achieved by positioning additional height in the western and south-western portions of the building.

The additional height also facilitates the retention of open space and existing vegetation within the Development Site by allowing the building's ground-level footprint to be minimised and by allowing for the positioning of car parking underground. This built form outcome facilitates the provision of seniors housing and ancillary facilities in a landscaped setting, helping to maintain the Village's existing 'parkland' feel, including when viewed from public areas.



Figure 6: Northern view of proposed building from main driveway entry (Source: Calder Flower Architecture)

As discussed above, the proposed building is visually and physically separated from the streetscape and adjoining external low-density residential development, ensuring no jarring juxtaposition between the built forms and heights. In addition, any future developments within the broader Village Site would be undertaken by the village operator, with due regard to external and internal urban form outcomes.

Overall, the proposed building's height, in conjunction with its siting and massing, achieves a high quality built form outcome.



4. THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE STANDARD. [cl. 4.6(3)(b)]

The Statement of Environmental Effect (SEE) prepared to support this DA provides a holistic environmental planning assessment of the proposed development and concludes that there are sufficient environmental planning grounds to support the development.

Importantly, Council has considered the proposal in its preliminary form, including a building height exceedance of a similar extent to that which is currently proposed, and advised the following in the Pre-Lodgement Meeting Minutes dated 7 December 2018:

'Council acknowledges that there will be an exceedance at some point of the development and the Proponent will be required to provide reasonable justification to any variation of controls. Council do not foresee any variation to the LEP building height as a major issue, given the existing site levels, internalisation of building height variation within the site (i.e. reduced visual impact) and the operational requirement for the development to operate with single floor plates.'

Specific environmental planning grounds to justify the breach of the standard, including those identified by Council, are summarised as follows:

- The sloping topography of the Development Site, the location of existing vegetation and services, and the proposed building's operational and accessibility requirements necessitates a considered design approach. The building 'steps' down and is partially cut into the slope, providing each level with generous floorplates, direct access to outdoor areas, and level access across each wing of the building from the central spine. This layout ensures accessibility compliance can be achieved, improves functionality by minimising horizontal travel paths for staff and making use of laundry and garbage chutes linking to the Back of House on Level 1, and allows residents on the upper levels views towards Cockle Creek and the bush clad hills beyond.
- To facilitate this optimum building layout, additional height is required in the western and south-western portions of the building (particularly the southern wing) where the site's topography is the steepest. It is noted that the placement of the building is constrained by existing trees and a high voltage electricity easement along Master Drive to the south, requiring the building to be positioned in the steeper area of the Development Site. To avoid more extensive cut and fill, this has resulted in some additional height. It follows that the proposed variation is largely a result of the natural and modified contouring of the Development Site, the positioning of existing vegetation and services, and the need to provide level access for the building occupants. Of particular note are the existing levels around Boronia Court which appear to have been significantly modified in the past. This has resulted in an 'existing ground level' that is up to approximately 3m lower than the surrounding 'natural' ground level, thereby exacerbating the 'height exceedance' (as defined) in certain areas of the site.
- Importantly, stepping of the building down the site helps to minimise overall building height and to better visually integrate the building into its surrounds. This design response allows the development to present as a 1-storey building to the main Village entry at Northville Drive and along Poplar Drive. The tallest non-compliant building element would be located in the south-western portion of the Development Site, separated from adjoining development and the streetscape to the north and east and north, respectively. Accordingly, the building's most prominent, 3-storey western elevation would be positioned internally within the broader Village Site.
- The sloping topography, generally away from the site's main entrance, assists in screening the appearance of height, bulk and scale from various viewpoints in the public realm. Due to the building's relatively isolated position, the non-compliant building elements would not be noticeably visible from



the street or nearby external development, ensuring the exceedances would not result in any unreasonable visual amenity or streetscape impacts. In addition, as discussed in Section 3 [objective (a)], no adverse view loss impacts would result from the proposed development, including the additional height.

- The height of the proposed building facilitates a number of positive external and internal amenity outcomes, such as:
 - The pitched roofs, although adding additional height, provide for greater articulation and screening for the plant on the roof, which can be up to between 2m and 2.4m in height.
 - The building's proposed height allows its ground-level footprint to be minimised, to maximise the retention of open space and existing vegetation, helping to maintain the Village's existing 'parkland' feel.
 - The roof and ceiling over the building's main entry is raised above the height limit to enable high-level clerestory windows providing natural light and ventilation, as well as internal garden elements.
- The height and scale of the proposed building provides for appropriate economies of scale for staffing, meal preparation and other services for residents, and for the accommodation of centralised Village services and recreational spaces, such as the Community Hub. It also facilitates a 'household' design model which utilises larger communal spaces within households without inefficient circulation corridors. The additional proposed height would further enhance residential amenity, as well as facilitating attractive views of the site's broader surrounds.

The above points are environmental planning grounds that warrant the departure from the development standard and are not "generic" but rather specific to the site and the circumstances of the case.



5. THE PROPOSAL WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE STANDARD AND THE OBJECTIVES OF THE ZONE. [CL.4.6(4)(A)(II)]

Clause 4.6(4)(a)(ii) provides 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.

In Section 3 of this request, it was demonstrated that the proposal is consistent with the objectives of the development standard. The proposal is also consistent with the objectives of the R2 zone as explained in Table 1 below:

Table 1: Consistency with R2 zone objectives from LMLEP 2014

Objective	Discussion
To provide for the housing needs of the community within a low-density residential environment.	The proposed development would provide for the specific housing needs of the frail aged 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	The development would provide supportive, ancillary land uses (such as community facilities and a small boutique / shop) to meet the day to day needs of RCF residents, as well as the residents of the overall village.
To encourage development that is sympathetic to the scenic, aesthetic and cultural heritage qualities of the built and natural environment.	The development would be sympathetic to the scenic and aesthetic values of the surrounding environment. In particular, the building has been sited and designed to maximise the retention of open space and existing vegetation, helping to maintain the Village's existing 'parkland' feel.

The objectives of the zone, as demonstrated above, as well as the objectives for the standard, have been adequately satisfied. Therefore, the proposed variation to the development standard is considered to be in the public interest.



6. CONTRAVENTION OF THE DEVELOPMENT STANDARD DOES NOT RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING. [cl. 4.6(5)(a)]

There is no identified outcome which would be prejudicial to planning matters of State or Regional significance that would result as a consequence of varying the development standard as proposed by this application.



7. THERE IS NO PUBLIC BENEFIT OF MAINTAINING THE STANDARD. [cl. 4.6(5)(b)]

Pursuant to case law in *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*'.

There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that would result from the variation to the maximum height of buildings standard. Rather, the proposal would provide for the social needs of the community by providing seniors housing in a well-serviced location, co-located with existing seniors housing to facilitate 'ageing in place'. Importantly, the additional building height would not present any unreasonable impacts upon adjoining development or the streetscape.

Accordingly, there is no public benefit in maintaining strict compliance with the height of buildings development standard given that there are no unreasonable impacts that would result from the variation to the standard.



8. CONCLUSION

This Clause 4.6 variation request demonstrates, as required by Clause 4.6 of the NLEP 2012, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard and is consistent with the objectives of the R2 Low Density Residential zone, notwithstanding the variation;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard in this instance; and
- The variation does not raise any matter of State or Regional Significance.

Accordingly, it is considered appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.