

CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS

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36 LAYCOCK STREET, CAREY BAY NSW 2283**

CLAUSE 4.3 HEIGHT OF BUILDINGS

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1. INTRODUCTION

This submission seeks a variation to *Clause 4.3* of the *Lake Macquarie Local Environmental Plan 2014* (LM LEP 2012), which prescribes a maximum building height of 10m to the subject site.

This submission has been prepared with regards to a development application for the demolition of an existing Residential Aged Care Facility (RACF) and construction of a new RACF upon the premise known as 36 Laycock Street, Carey Bay (Lot 200 DP731318) (the site).

As detailed in this request, the proposed development is considered to meet the requirements prescribed under *Clause 4.6* of the LM LEP 2014, as the development standard is considered unreasonable and the development displays sufficient environmental planning grounds to warrant contravention of the development standard.

Clause 4.6 states the following:

“4.6 Exceptions to development standards

- (1) *The objectives of this clause are as follows:*
 - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - i. *the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - ii. *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (a) *the concurrence of the Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone*



RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note. *When this Plan was made it did not include all of these zones.*

- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following:*
 - (a) a development standard for complying development,*
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) clause 5.4*
 - (d) clause 2.8, 6.1 or 6.2*

The use of Clause 4.6 to enable an exception to this development standard is appropriate in this instance and the consent authority should be satisfied that all requirements of the Clause have been suitably addressed via the content in this formal request.

Clause 4.6 – Exceptions to development standards, establishes the framework for varying development standards applying under a LEP. Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

“4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

4.6(3)(b) that there is sufficient environmental planning grounds to justify contravening the development standard.”

In addition, 4.6(4)(a)(i) and (ii) requires that development consent must not be granted to a 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.*

The Environmental Planning Instrument to which these variations relate to is the *Lake Macquarie Local Environmental Plan 2014*. The development standard to which this variation relates to is *Clause 4.3 – Height of Buildings*, which reads as follows:

4.3 Height of buildings

(1) The objectives of this clause are as follows:

- (a) to ensure the height of buildings are appropriate for their location,
- (b) to permit building heights that encourage high quality urban form.

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

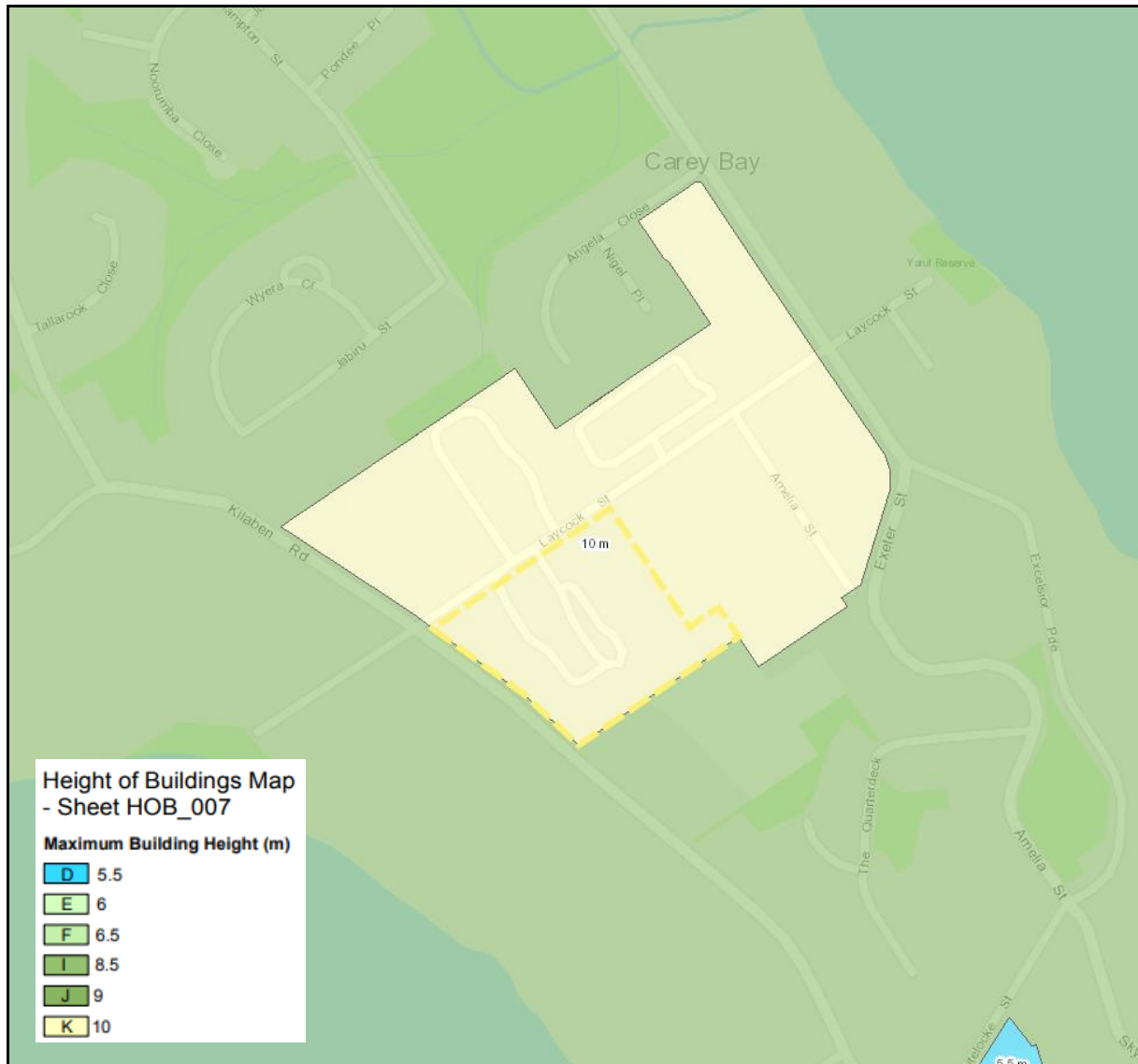


Figure 1-1: Height of Buildings Map. Source: NSW Planning Portal

A maximum building height of 10m applies to the subject site, as per Figure 1-1 above.

Written justification for the proposed variation to the height of buildings standard development standard in accordance with Clause 4.6 of the Lake Macquarie LEP 2014 is required.

2. EXTENT OF VARIATION

As noted above, Clause 4.3 of the Lake Macquarie Local Environmental Plan 2014 states that the land is subject to a maximum building height of 10m.

Referring to the architectural plans incorporated into the DA package, it is noted that the maximum building height above existing ground level is displayed as 13.3 meters (m), being a 3.3m (33%) exceedance to the Development Standard.

It is acknowledged that the variation to the standard is in excess of 10% and thereby requires referral to the elected Council. The proposal seeks to provide improved functionality and accessibility for the site, a significant increase to the amenity of the residents and staff, and a strong and appropriate connection to topographical constraints of the land.

The increase in height is primarily due to the fall in topography towards Laycock Street – This undulating landscape is a present characteristic of the locality.

In order to avoid excessive earthworks, lower ground floor parking is to be established downslope within a natural low point at site, opposite the northwestern boundary. An alternative parking location would require substantial ground disturbance (excessive site cut) to accommodate the 56 semi-basement spaces. The proposed design provides the most favorable environmental outcome for the site. It is relevant to note, to guarantee site accessibility and assist movement of occupants and staff, which is fundamental to the operation of a RACF, a consistent finished floor level (FFL) is required across the two aged care floors. The result is a higher ground floor level than what would be typically proposed which has a flow on effect for the remaining development and is the primary reason for non-compliance with the maximum height limit.

When viewed from the streetscape, the height exceedance will not create a bulk and scale that is disproportionate to the existing building form currently existing at the site. This can be attributed to the proposed built form; the development has considered its relationship to the streetscape and provides substantial articulation and architectural treatment viewable from the Laycock Street frontage, providing connection to and visual interest from the public domain. It should be noted that in addition to the retention of existing mature vegetation along the northeastern boundary, additional landscaping treatments will be provided to the north/northwest side of the site. Landscaping will provide a sympathetic contrast between the natural and built environment.

There are no alternative arrangements to be considered and no reasonable amendment would provide compliance with the LEP development standards. Strict compliance with the building height limit is not appropriate or necessary in this instance as the development responds directly to the environmental characteristics of the site, particularly in relation to earthworks.

It is our submission that the breach will not impact on the amenity of the development or adjoining properties, nor will the variation compromise the character of the area – which, notwithstanding the townhouse complex north of the site and scattered contemporary forms, consists of older housing stock historically limited in achieving a contemporary level of amenity. As such a degree of flexibility is considered reasonable in this instance and anticipated under the LEP where justification is made.

3. IS COMPLIANCE UNREASONABLE OR UNNECESSARY?

With reference to Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827, the first and most commonly invoked way to establish that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, is to demonstrate that the objectives of the development standard are achieved, notwithstanding the non-compliance.

The proposed variation from the development standard is assessed against the accepted “5 Part Test” for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council* (2007) LEC 827. In the matter, the Commissioner stated within the judgement the following, in reference to a variation:

“...the case law developed in relation to the application of SEPP 1 may be of assistance in applying Clause 4.6. While Wehbe concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under Clause 4.6 where Clause 4.6 (3)(a) uses the same language as Clause 6 of SEPP 1.”

It is therefore our submission that the *Wehbe* test is of relevance in the consideration of a standard to determine whether or not it is unreasonable or unnecessary in the circumstances of the case and it is evident, the above test is relevant.

In the decision of *Wehbe vs Pittwater Council* (2007) LEC 827, Chief Justice Preston expressed the view that there are five (5) different ways in which an objection may be well founded, and that approval of the objection may be consistent with the aims of the policy. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out below:

First – The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.

Second – A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.

Third – A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

Fourth – A fourth way is to establish that 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.

Fifth – A fifth way is to establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary.

The following discussion is provided in response to each of the above:

3.1 The objectives of the standard are achieved notwithstanding non-compliance with the standard

The objectives supporting the height of buildings control identified in Clause 4.3 are discussed below. Consistency with the objectives and the absence of any environmental planning impacts, would demonstrate that strict compliance with Clause 4.3 would be unreasonable in this instance.

The development as proposed will be in the public interest as it is consistent with the objectives of the development standard (being Clause 4.3), which are as follows:

(1) *The objectives of this clause are as follows:*

- (a) *to ensure the height of buildings are appropriate for their location,*
- (b) *to permit building heights that encourage high quality urban form.*

(2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The maximum height proposed is 13.3m as measured from the existing ground level, resulting in a numerical breach of 33%.

Strict compliance with the building height limit is not appropriate or necessary in this instance as the development responds directly to the environmental characteristics of the site, particularly in relation to topographical constraints. The proposal provides a built form response that is specific to the site, rather than the arbitrary application of the building height standard.

We note that the height remains compatible and appropriate in scale to building forms in the locality. Existing development comprises a residential townhouse complex consisting of 28 two-storey townhouses to the immediate northwest, the Carey Bay Shopping Village to the north/northeast and a mix of single and two-storey residential forms being of both older housing stock and more contemporary designs. The subject site has successfully operated as a seniors living facility for over 40 years. The proposal is fundamentally a redevelopment of an existing use to provide a modern purpose built development. Within that context, the development is entirely appropriate.

The design of the RACF is considered and appropriate in terms of its architectural form. Building orientation and placement utilise geographical features and will present a high quality/high amenity outcome for the site and surrounds. We submit that in view of these matters, the design provides a high-quality urban form.

The additional height is appropriate also, considering additional primary factors:

- The development achieves compliance with the applicable floor space ratio (FSR) under the HSPD;
- The number of rooms accommodated by the height is supported by the respective car parking numerical requirement being fully satisfied on site;
- The proposed built form supports a high level of accessibility for residents and visitors to the site.

Whilst creating height, the proposed built form also creates open space and separation through landscaped courtyards between each wing, maximising amenity whilst reducing building mass and bulk that might otherwise result from an alternative built form. The development provides an improved outcome in contrast to a lower mass spread across the site within the height limit.

The design facilitates appropriate development of the site with encroachment into the maximum permissible building height justified on the basis of a better design outcome than would be otherwise achieved. Again, the proposed built form responds to topographical constraints and aims to limit the building footprint and subsequent earthworks; as such the proposed built form is the preferred response. In order to comply with the height restrictions, address topographical constraints, achieve the desired room yield and accommodate associated parking on site, additional split-level and single storey built form would be required. It is considered that this built form would have a much larger development footprint to the detriment of the site and surrounding areas. A larger building footprint would result in substantial encroachments into proposed areas of outdoor open space and existing developments, have a more significant visual impact, and would extend substantially into the bushfire hazard area to the southeast. Furthermore, a larger building footprint has the potential to worsen the current geotechnical risk of the land, requiring more substantial earthworks and ground disturbance to facilitate the development. Finally, more split-level and single storey development over a larger area would limit the movement of elderly or disabled people and the efficient and effective delivery of services to residents.

The proposed development is broken up into a number of 'wings' and articulated according to each element's use rather than proposing a uniform building mass. The built form is provided with visual buffers to the residential development directly north in the form of existing mature vegetation to be retained. Views from the nearby townhouses and the adjoining Laycock Street road reserve will be buffered by proposed vegetation.

A number of design features are included in the building to improve overall building design and internal living space such as:

- Building is broken up into a series of massing elements as opposed to a single built form;
- The architectural elements are sympathetic to recently approved and constructed development and consistent with the vision for future development in the locality;
- Buildings are oriented around the internal courtyard / communal open space to maximise solar access to internal living spaces;
- Exceedance in height is partially for architectural roof forms permissible under Clause 5.6 which create interest.

The design facilitates appropriate development of the site with encroachment into the maximum permissible building height justified on the basis of a design outcome that provides a high level of amenity for occupants and that addresses the topographical characteristics of the site. This is considered to be a positive outcome within the context of the R3 Zone.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard through adherence to the objectives of the development standard. As demonstrated, the objectives of the standard have been achieved.

3.2 The underlying objective or the purpose of the standard is not relevant to the development

The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in 1.3.1 above. Therefore, this clause is not applicable.

3.3 The underlying object or purpose would be defeated or thwarted

It must be considered whether the underlying object or purpose of the standard would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.

Restricting development forms via the development standard may be overly restrictive and could result in architectural outcomes that are both unsuitable to the locality and of lesser or poor architectural quality. The proposal has not disregarded the development standard, however, looks for a level of flexibility tailored to the specific and unique setting. On balance, the proposed development provides a better outcome.

Note that the building has been 'skilfully' designed (as required in the view loss test set out in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 at 25-29) as the height does not result in any significant loss of views. A building design that complied with the height standard may have additional view impacts as a result of a more extensive building footprint and would potentially therefore result in a building design that is not of a higher quality built form.

The development responds to the site's location and constraints in particular, those relating to topographical constraints. The development responds to these constraints by locating built form where it is most appropriate at the site, guaranteeing impacts to the natural land formation are minimised. Compliance with the height standard would require significant alteration to parking arrangements, additional single storey and split-level built form which, in order to achieve the same yield, would have a much larger building footprint which would inevitably require significant / excessive ground disturbance. Furthermore, a larger building footprint would result in the loss of open space (landscaped courtyards) which forms a key element of the facility character and design and also provides management through delineating different wings of the site.

Therefore the proposal in its current form is therefore more appropriate to its location than a development that complies with the standard.

3.4 The development standard has been virtually abandoned or destroyed

Of consideration is whether 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; and



This particular aspect is not applicable in this instance.

3.5 The zoning of the land is unreasonable or inappropriate

The final matter for consideration is whether the zoning of the land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Not applicable as the zoning of the site is appropriate.

4. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS?

The assessment above and shown throughout the Statement of Environmental Effects demonstrates that the resultant environmental impacts of the proposal will be satisfactory. The proposal addresses the site constraints and relevant objectives of both the standards and the zone. The proposal will not result in any unreasonable amenity or environmental impacts as detailed in the submitted reports. The proposed variation to the development standard is 3.3m (33%). Notwithstanding the variation, the proposed works represent a well-considered development that addresses the site constraints, streetscape and relevant objectives of both the standards and the R3 Medium Density Residential zone. The proposal will maintain high levels of amenity within the development and to the surrounding context. The proposal seeks to make a positive contribution to the existing streetscape and has been architecturally designed in consideration of its surrounding context.

There are sufficient environmental and planning grounds to justify contravening the development standard and are as follows:

- The proposed development meets the zone objectives and the height control objectives;
- The proposed development is a continuation of an existing use and will provide a significant improvement to internal and external amenity, site functionality, accessibility and provides additional services and facilities to new and existing residents;
- The proposed development is compatible with existing buildings within the complex and within the surrounding locality;
- Non-compliance with the maximum permissible height is directly related to topographical constraints and seeks to provide improved amenity on the site without an adverse impact on the surrounding sites.

A compliant outcome would display limited or lesser architectural qualities and result in additional ground disturbance on the site. Additionally, the proposal displays a compliant floor space ratio (as below) and is also compliant with the principle amenity controls in the LM LEP 2014.

In this case, we submit that the proposal displays sufficient environmental planning grounds to warrant variation to the development standard.

4.1.1 Floor Space Ratio (FSR)

The Environmental Planning Instrument to which the variation relates is Lake Macquarie Local Environmental Plan 2014 (LEP) as seniors living is permitted within the zone, however SEPP HSPD (Housing for Seniors or People with a Disability) can also be considered. Clause 48 of SEPP HSPD states:

Division 2 Residential care facilities

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

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

- (a) **building height:** *if all proposed buildings are 8 metres or less in height (and regardless of any other standard specified by another environmental planning instrument limiting development to 2 storeys), or*
- (b) **density and scale:** *if the density and scale of the buildings when expressed as a floor space ratio is 1:1 or less,*

Whilst the development exceeds the maximum allowable 8m height prescribed under the SEPP Clause 48(a), the development displays a compliant density and scale pursuant to Clause 48(b). The departure to the development standards is not a direct result of any breach of other planning controls for the site (i.e. FSR) and in this regard it does not result in any adverse environmental impacts. It is considered that the development, as proposed, and despite the variation being sought to the Height of Buildings, will deliver positive environmental outcomes and that Council should not refuse consent on the basis that the FSR has been met.

4.1.2 Setbacks

The proposal achieves setback requirements.

4.1.3 Landscaping

The development displays a compliant landscaping percentage. The proposal seeks to retain substantial mature vegetation along the north/north-eastern boundary and proposes additional landscape and deep soil planting opposite the Laycock Street frontage. Extensive landscaping in the form of communal courtyards and throughout the development in the form of spot tree planting, screening shrubs and turf are also proposed.

The landscape design and philosophy is described within the Statement of Environmental Effects (SEE). The extra height allows the site to realise its development potential while allowing for significant landscaping and communal areas.

4.1.4 Orderly and Economic Development of Land

The development promotes the proper and orderly development of land as contemplated by the controls applicable to the zone, which is an objective of the Act (s 5(a)(ii)) and which it can be assumed is within the scope of the “environmental planning grounds” referred to in cl 4.6(4)(a)(i) of the LEP.

The development represents a use that is permissible as existing use rights. It is located within an area that is serviced by existing roads and other essential infrastructure. In this regard, the proposal represents the orderly and economic development of land.

4.1.5 Amenity

A scheme that achieves strict compliance with the building height controls would extend the same building envelopes into lower forms that would result in reduced building separation, reduced access to sunlight, greater areas of disturbance, greater site coverage and reduced area of ground floor communal open space. Rather, the proposal improves all of these aspects by creating taller building envelopes. Internal and external amenity is provided in the design by access to space, light and ventilation that is encouraged through high quality design within the taller building envelopes.

The proposal enables a better environmental planning outcome as the development responds to the site setting, whilst achieving a quality architectural outcome within the built form context.

4.1.6 Summary

The above demonstrates that there are sufficient environmental and planning grounds to justify the proposed contravention of the building height development standard. The additional height sought by the proposal will not result in unreasonable impacts to the physical environment, is permitted under Clause 4.6, and will not adversely impact views or visual quality of the site or the amenity of neighbours. The proposal seeks to create a development that enhances the existing use and built form of the site and will make a significant positive contribution to the streetscape and community. In this regard, there are sufficient environmental planning grounds to justify the proposal.

5. IS THE VARIATION IN THE PUBLIC INTEREST?

It is considered that this has been adequately addressed in Parts 4 and 5 of this submission. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 of LM LEP 2014 in that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of the development;
- There are sufficient environmental planning grounds to justify the departure from the standard;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- The breach does not raise any matter of State of Regional Significance; and
- The development submitted generally aligns with Council's Development Control Plan.

The proposed development is consistent with the objectives of the R3 Medium Density Zone. Each objective is addressed as follows:

- *To provide for the housing needs of the community within a medium density residential environment.*

The proposal provides for the housing needs of the community by continuing the existing use, providing an additional form of housing for the senior community.

- *To provide a variety of housing types within a medium density residential environment.*

The proposed development ensures that a variety of housing types are present within the locality. The proposal seeks to provide a residential aged care facility, a form of seniors housing development within an area that supports a range of residential accommodation.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The development complements its location by providing additional forms of housing, services and recreational settings to existing and future residents and does not seek to impact on surrounding residential and commercial land uses present within the locality.

- *To maintain and enhance the residential amenity and character of the surrounding area.*

The redevelopment is a significant improvement to what is currently existing and provided at site. The existing RACF has been renovated and extended several times and elements of the RACF are at the end of their lifecycle. The RACF is therefore in need of replacement to ensure the continued provision of high quality seniors housing in Lake Macquarie. It is expected that the new development is consistent with the vision for future development in the locality and seeks to enhance the amenity and character of its surroundings.

The analysis presented in this document demonstrates that the development achieves the objectives of the height control and also objectives of the zone.

Based on the above, the variation is considered to be in the public interest.



6. PUBLIC BENEFIT OF MAINTAINING THE STANDARD?

It is considered that there is no benefit to the public or the community in maintaining the development standard. The proposed development will allow for the creation of a high-quality residential aged care facility development which as stated above meets the desired objectives of the standard.

It is not considered that the variation sought raises any matter of significance for State or regional environmental planning.

The departure from Clause 4.3 within LEP 2014 still allows for the orderly and economic use of the site in a manner which achieves the outcomes and objectives of the relevant planning controls.

7. IS THE VARIATION WELL FOUNDED?

It is considered that this has been adequately addressed in Parts 4 and 5 of this submission. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 of the LM LEP 2014 in that:

- Compliance with the development standards would be unreasonable and unnecessary in the circumstances of the development;
- There are sufficient environmental planning grounds to justify the departure from the standards;
- The development meets the objectives of the standard to be varied (Height of Building) and objectives of the R3 Medium Density Residential zoning of the land;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- The breach does not raise any matter of State of Regional Significance; and
- The development submitted aligns with the development expectations for the surrounding area.

Based on the above, the proposed variation is considered well founded.

8. GENERAL

Clause 4.6 also states that:

- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*
- (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note. *When this Plan was made it did not include all of these zones.*

- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
- (a) *a development standard for complying development,*
 - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) *clause 5.4,*
 - (d) *clause 2.8, 6.1 or 6.2.*

This variation does not relate to the subdivision of land. The variation sought is not contrary to subclause (6).

Should the exception to the development standard sought under this submission be supported by Council, the Council must retain a record of the assessment of this submission.

The development proposed is not complying development. A BASIX certificate is included within the development application package. The development is not affected by clauses 5.4, 2.8, 6.1 or 6.2.

9. CONCLUSION

The proposal does not comply with the height of buildings control prescribed by Clause 4.3 of the *Lake Macquarie Local Environmental Plan 2014*, with a 3.3m variation to the 10m height limit (33%) proposed. Having evaluated the likely affects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of LEP 2014 are satisfied as the breach to the height of buildings does not create any significant adverse environmental planning impacts.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular instance and use of Clause 4.6 of the LM LEP 2014 to vary this development control is appropriate in this instance.

Based on the above, it is reasonable to conclude that strict compliance with the maximum building height is not necessary and that a better planning outcome is achieved for this development by allowing flexibility in the application.