

119 Barton St, Monterey

Clause 4.6 variation request

Number of storeys control in Seniors Living SEPP

On behalf of
Monterey Equity Pty Ltd
November 2021



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1 Introduction

This Clause 4.6 Variation Request supports a Development Application (DA) to Bayside Council (Council) for a Residential Aged Care Facility with 121 rooms at 119 Barton Street, Monterey (the site).

The Clause 4.6 Variation Request seeks to vary Clause 40(4)(c) within the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors SEPP).

This Clause 4.6 Variation Request demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case and that justification is well founded. The variation allows for a development that represents the orderly and economic use of the land in a manner which is appropriate when considering the site's context, and as such, is justified on environmental planning grounds.

This Clause 4.6 Variation Request demonstrates that, notwithstanding the non-compliances, the proposed development:

- Is consistent with the purpose of Clause 40(4)(c) of the Seniors SEPP 2004;
- Achieves the objectives of the R3 Medium Density Residential zone under RLEP 2011;
- Will deliver a development that is appropriate for its context, despite the numerical breach to the development standards, and therefore has sufficient environmental planning grounds to permit the variation; and
- Is in the public interest.

As a result, the DA may be approved as proposed in accordance with the flexibility afforded under Clause 4.6 of the RLEP 2011.

2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the RLEP 2011 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 enables a variation to any development standard to be approved upon consideration of a written request from the applicant that justifies the contravention in accordance with Clause 4.6.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;

- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- That 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.

The consent authority's satisfaction as to those matters must be informed by the objectives, which are:

1. To provide flexibility in the application of the relevant control; and
2. To achieve better outcomes for and from development.

Clause 4.6 of the RLEP 2011 reads as follows:

Clause 4.6 Exceptions to development standards

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

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

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

- (a) that compliance with the development standard is **unreasonable or unnecessary in the circumstances of the case**, and*
- (b) that there **are sufficient environmental planning grounds to justify contravening the development standard**.*

(4) Development consent must not be granted for development that contravenes a development standard unless—

- (a) the consent authority is satisfied that—*
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) the proposed development will be in the **public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out**, and*

(b) the concurrence of the Secretary has been obtained.

- (5) *In deciding whether to grant concurrence, the Secretary must consider—*
- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) the public benefit of maintaining the development standard, and*
 - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

...

- (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).*

(emphasis added)

3 The Development Standard to be varied

This Clause 4.6 Variation has been prepared as a written request seeking to justify the variation to development standard Clause 40(4)(c) minimum sizes and building height in the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors SEPP):. Clause 40(4)(c) requires a 1 storey building height limit to the rear 25% of the site and reads as follows:

40 Development standards—minimum sizes and building height

- (1) **General** A consent authority must not consent to a development application made pursuant to this Chapter unless the proposed development complies with the standards specified in this clause.
- (2) **Site size** The size of the site must be at least 1,000 square metres.
- (3) **Site frontage** The site frontage must be at least 20 metres wide measured at the building line.
- (4) **Height** in zones where residential flat buildings are not permitted If the development is proposed in a residential zone where residential flat buildings are not permitted—
 - (a) the height of all buildings in the proposed development must be 8 metres or less, and
Note—
Development consent for development for the purposes of seniors housing cannot be refused on the ground of the height of the housing if all of the proposed buildings are 8 metres or less in height. See clauses 48 (a), 49 (a) and 50 (a).
 - (b) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height, and
Note—
The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.
 - (c) **a building located in the rear 25% area of the site must not exceed 1 storey in height.**
- (5) **Development applications** to which clause does not apply Subclauses (2), (3) and (4) (c) do not apply to a development application made by any of the following—
 - (a) the Department of Housing,
 - (b) any other social housing provider.

4 Extent of Variation to the Development Standard

Clause 40(4)(c) of the Seniors SEPP requires a building located in the rear 25% area of the site must not exceed 1 storey in height. The proposed built form at the rear presents **1 storey** for the first 12.5m from the rear boundary. The building then steps up to **2 storeys** in height (refer to figure below).

The **rear 25% of the site area commences at the 18.93m green line** shown in the figure below. The first floor (red dashed line) protrudes past the 18.93m line in some areas, this however is not for the full expanse of the rear boundary. The **first floor protrudes a maximum of 6.43m beyond the 25% line**, with a **minimum first floor setback of 12.5m**. From a strict numerical standpoint, the proposal results in a **variation of 34%** (at its closest point). Further, it is important to note the elements of the first floor which encroach into the rear 25% of the site comprise minor expanses of the building, due largely to the angled building envelope.

As explained further below in this report, it is important to note that given the scale of the site, 25% constitutes a significant portion of site area. In this respect, on a smaller site, in many cases a 12.5m first storey setback would achieve compliance. Coupled with the irregular building line along this boundary (as well as the side boundaries), the limited first floor built form located between 12.5m and 18.93m from the rear boundary results in nominal impacts on neighbouring dwellings to the south, particularly given the generous setback provided.

It is important to note that the existing bowling club provides a zero setback to the southern boundary for 40% of the boundary length. The proposal is considered to represent a vastly improved built form and amenity outcome for residences to the south.

5 Objectives of the Standard

5.1 Clause 40(4)(c) – Development Standards – Minimum Sizes and Building Height

There are no stated objectives associated with Clause 40 of the Seniors SEPP. However, it is considered that the purpose of Clause 40 of the SEPP is to ensure that seniors housing is compatible within its context, provides an appropriate transition and does not result in any adverse impacts to the surrounding area.

Additionally, Clause 40(4) specifically sets out the height requirements where Residential Flat Buildings (RFB) are not permitted in the zone, it is considered that the purpose of Clause 40(4) is to ensure appropriate height transitions in zones and avoid abrupt changes in scale of the development in zones where RFB are not permitted, as well as minimal environmental impacts to the adjoining properties, including overshadowing and privacy.

This is reflected in the 'note' associated with 40(4)(b), which states:

- *The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.*

6 Objectives of the Zone

6.1 R3 Medium Density Residential

The objectives of the R3 Medium Density Residential zone are as follows:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that land uses are carried out in a context and setting that minimises any impact on the character and amenity of the area.*

7 Assessment

7.1 Clause 4.6(3)(a) - Is Compliance with the development standard unreasonable or unnecessary in the circumstances of the case

Compliance with the height and restriction of the 1 storey building height in the rear 25% of the site, is unreasonable or unnecessary in the circumstances of the case for the following reasons:

- **Test 1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;**

With respect to the subject application, we consider that the proposed development meets the requirements of **Wehbe Test #1** and therefore compliance with the development standard is unreasonable and unnecessary when considered holistically with the development outcome being sought, in addition to the following justifications:

- The specific environmental planning grounds that justify contravening the development standards, and the sufficient quality of the written request to justify the variation in this instance; and
- The proposal will enable delivery of a residential aged care facility with 121 rooms, which will significantly help with the Bayside LGA's future aging population.

7.1.1 Wehbe Test 1 - Objectives of the Standard are achieved

There are no stated objectives associated with Clause 40 of the Seniors SEPP. However, it is considered that the purpose of Clause 40 of the SEPP is to ensure that seniors housing is compatible with its context and does not result in any adverse impacts to the surrounding area.

Additionally, Clause 40(4) specifically sets out the height requirements where Residential Flat Buildings (RFB) are not permitted in the zone, it is considered that the purpose of Clause 40(4) is to ensure appropriate height transitions in zones and avoid abrupt changes in scale of the development in zones where RFB are not permitted, as well as minimal environmental impacts to the adjoining properties, including overshadowing and privacy.

This is reflected in the 'note' associated with 40(4)(b), which states:

- *The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.*

The proposal is therefore consistent with the aims of Clause 40 based on the following particular circumstances of this proposal:

- The precinct is characterised predominately of detached single and double storey dwelling houses and strata developments. In particular, the existing buildings to the rear (south) of the site are largely two storey dwellings. The proposed two storey built form at rear of the subject site will be consistent with the heights of the adjoining properties and will not be seen from public streets (e.g. Scarborough Street).
- The proposal includes a ground floor setback of 3.9m, at its closest point, from the rear boundary. The first floor includes a setback of 12.5m, at its closest point, from the rear boundary. The proposal incorporates a staggered edge (not a solid/consistent built form) and includes landscaping to create a buffer with the adjoining properties to ensure an appropriate built form transition and to protect the amenity of surrounding neighbours.
- The proposal incorporates generous landscaping buffers along all the boundaries. The proposal incorporates 3,850.5m² landscaping which equates to 33.2m² /bed. The generous amount of landscaping will be focused along the front, side and rear boundaries with the adjoining residents and in between the fingers of the built form.
- The DA is accompanied by overshadowing diagrams which illustrate that the proposal will not significantly overshadow the adjoining neighbours at mid-winter. The neighbours to the west will enjoy solar access to their rear yards from 12pm onwards whilst the neighbours to the east will enjoy solar access in the morning between 9am and 12pm. The proposal will result in additional overshadowing to the southern neighbours however they will generally enjoy at least 3 hours solar access. The development will not overshadow any adjoining main living areas of adjoining neighbours and will only generate minor additional overshadowing to the private open space areas.
- The development has been designed to ensure visual and acoustic privacy of neighbours and future residents through use of building separation, location and design of windows (generally off set or positioned at oblique angles), privacy screens (louvered screens) and landscaping.
- In relation to the change in scale between the proposed development and that immediately to the rear (south), the generous separations between these built forms facilitates an appropriate transition and is sympathetic to the residents to the south. In this respect, the elements of the first floor which encroach into the rear 25% of the site are minimal. This coupled with the generous setback (12.5m) result in an appropriate transition from the rear of the development to the properties to the south.

Further to the above, in *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ states that "... development standards are not ends in themselves but means of achieving ends". Preston CJ, goes on to say that as the objectives of a development standard are likely to have no numerical or qualitative indicia, it logically follows that the test is a qualitative one, rather than a quantitative one. As such, there is no numerical limit which a variation may seek to achieve.

The above notion relating to 'numerical limits' is also reflected in Paragraph 3 of Circular B1 from the Department of Planning which states:

As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small in others it may be numerically large, but nevertheless be consistent with the purpose of the standard.

In consideration of the above and in the circumstances of this case, the numerical non-compliance does not reflect the environmental impact and ability of the non-compliant building elements to satisfy the objectives of the standard. In this respect, a compliant outcome is not considered to yield a material benefit and thus, the proposed development is capable of satisfying the objectives of the standard as much as a compliant outcome.

7.2 Clause 4.6(3)(b) - Are there sufficient environmental planning grounds to justify contravening the development standard?

The development offers a range of benefits to the local community in delivering social and affordable housing for seniors. Further, the site is strategically located to benefit from surrounding local services and public transport infrastructure. As such, the development promotes the social and economic welfare of the community.

It is acknowledged however that it is the specific aspect of the development that contravenes the development standard that must be brought into consideration when demonstrating sufficient environmental planning grounds.

Firstly however, the strategic merit of the proposal and the reasons for departing from the development standard are considered relevant are summarised as follows:

- The proposal seeks to deliver a high-quality aged care facility that directly responds to the needs of the ageing population. The additional height generated as a result of the proposal will accommodate additional rooms to service the ageing population, in line with the additional FSR permitted through the Seniors SEPP. The additional residents and workers will benefit from easy access to public transport, shops and other key infrastructure such as hospitals, which strongly aligns with Regional and State strategic planning objectives.
- The proposal will facilitate investment in health services and social infrastructure that will support the liveability and productivity Planning Priorities for the South District.
- The proposed aged care facility will create and deliver additional employment opportunities within the LGA for this critical workforce. The proposal will enhance the existing strong health workforce within the Bayside LGA, as well as creating additional jobs and assisting with its economic growth.
- The proposal will provide generous open space with landscaping within the development. The communal open space will promote more outdoor social

interactions, as well as provide generous natural light penetration into the development.

- The subject site benefits from its proximity to public transport and nearby services such as commercial centres and the St George Hospital precinct which has been designated for major health/education development.
- The proposed built form has carefully designed to minimise any impact on the character and amenity of the area, the proposed built form is stepped down to two storeys at all side boundaries; one storey at the rear boundary; and incorporates a generous front setback.
- The overshadowing diagrams illustrate that the proposal will not significantly overshadow the adjoining neighbours at mid-winter. The development will not overshadow any adjoining main living areas of adjoining neighbours to the south and will only generate minor additional overshadowing to the private open space areas compared to existing.

Further to the above, in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

Specifically in relation to the building height departure, the environmental planning grounds to justify contravening the rear 25% development standard are as follows:

- The proposed variation better promotes the orderly and economic use of the land compared to a compliant scheme. The proposed height variation facilitates the delivery of an aged care facility of a density envisaged under the Seniors SEPP while allowing for improved amenity at ground level for residents, as well as the interface with surrounding properties. The generous site area facilitates a more orderly development outcome through the rear first second storey building height variation as opposed to locating this floor space at the ground which would be at the expense of the surrounding residents and internal amenity of the residents of the facility.
- The proposed variation allows for improved internal amenity and equitable access for residents to common open space area and landscaped area due to relocation of permitted floor space from the ground level. The use of the ground floor amenities and open space would likely be compromised in the event the permitted floor space was not located on the first floor.
- Much of the built form that exceeds the development standard is not discernible as viewed from surrounding residential properties as it still provides a generous setback from the rear boundary. The proposed elements that breach the standard do not contribute to distinguishable bulk, scale or density of the building due the generous setbacks from the rear boundary which

would otherwise be compliant on a smaller site. In this respect, it is important to note that the development standard is applicable to all residential aged care facilities proposed under the Seniors SEPP, regardless of the site area. This includes sites with an area as small as 1,000m² (minimum lot size under the Seniors SEPP). Accordingly, this standard doesn't necessarily contemplate lots of a much greater scale, such as the subject site, which as a result require a far greater second storey setback. In such circumstances, it is considered reasonable to submit that a similar built form and amenity outcome can be achieved when departing from the standard on a larger site compared to a compliant outcome on a smaller site.

- The proposal has demonstrated that the portion of the building which exceeds the maximum rear building height limit would not give rise to any unreasonable environmental impacts. These matters are summarised as follows:
 - The proposed built form has carefully designed to minimise any impact on the character and amenity of the area.
 - The overshadowing and sun access diagrams illustrate that the proposal will not significantly overshadow the adjoining neighbours at mid-winter. The development will not overshadow any adjoining main living areas of adjoining neighbours to the south and will only generate minor additional overshadowing to the private open space areas compared to existing.
 - As demonstrated through a View Analysis undertaken, the building elements exceeding the maximum building height do not result in any material or adverse impact on the views from surrounding properties. **Figure 2** below illustrates the views of the proposed building (including the third storey) in comparison to a building without the third storey. As demonstrated in this figure, visibility of the third storey building elements from the southern properties is nominal and does not contribute to additional visual impacts compared to a compliant two storey building.
 - The proposal, including the rear height variation, delivers a built form which is compatible with the prevailing streetscape and character of the area.

In the absence of any material or adverse environmental impact arising from the proposed rear second storey building height, delivering a compliant rear building height would not yield a better outcome for the site, the surrounding properties or the streetscape. Accordingly, the proposal, including the rear building height variation, promotes good design and amenity of the built environment.

In light of the above, it is reasonable to conclude that in the absence of any unreasonable physical impact on surrounding properties and the character of the area, there are sufficient environmental planning grounds to justify contravening the development standard, as the development will deliver one of the key Objects of the Planning Act, while also allowing for the promotion and coordination of the orderly and economic use and development of the land for community housing, community services and local commercial services.

In addition, it is noted that the proposed development will still produce a contextually appropriate outcome consistent with the objectives of the development standards, despite the non-compliances with the numerical provisions. Accordingly, there are sufficient environmental planning grounds to justify contravening the development standard.



Figure 2 Visual Impact Analysis (from the south)

Source: Boffa Robertson

7.3 Clause 4.6 (4)(a)(i) – The consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)

1. As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) by providing a written request that demonstrates;
 - i. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and
 - ii. There are sufficient environmental planning grounds to justify contravening the development standard.

7.4 Clause 4.6(4)(a)(ii) - Is the proposed development 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?

The proposed development is in the public interest as it is consistent with the objectives of the development standard. The objectives of the development standard are addressed below under the relevant headings:

7.4.1 The objectives of the particular standard

While there are no specific objectives relating to the development standard in question, it has been demonstrated elsewhere in this report that the development achieves the intent of the development standard of the Senior SEPP.

7.4.2 The objectives for development within the zone in which the development is proposed to be carried out.

The site falls within the R3 Medium Density Residential zone. As outlined below the proposed development is in the public interest because it is consistent with the objectives of the R3 Medium Density Residential zone.

- ***To provide for the housing needs of the community within a medium density residential environment.***
 - I. The proposal facilitates a high quality, medium density, aged care facility that responds to the changing demographic trends, including the unprecedented growth of the ageing population;
 - II. The proposal appears to be a two storey residential aged care facility from the street and surrounding private properties, with the third storey located at the centre of the site. As such, the proposal is consistent with the surrounding medium density residential environment; and
 - III. The proposal facilitates investment in health services and social infrastructure that will support the liveability and productivity Planning Priorities for the South District.
- ***To provide a variety of housing types within a medium density residential environment.***
 - I. Diversifying housing choice by facilitating alternative housing options is crucial to help maintain the population levels. The proposed aged care facility will support the growing ageing population and responds to the community's changing needs; and
 - II. The proposal includes 116 single bedrooms and 5 twin bedrooms which provides a variety of housing choices and creates a more sustainable, equitable and healthy community.
- ***To enable other land uses that provide facility or services to meet the day to day needs of residents.***
 - I. The proposal includes a total of 776m² GFA of private amenities including lounge, dining, quiet and sitting areas for the use of future residents;
 - II. The proposal also incorporates 245m² of communal open space areas for the future residents comprising a social lane with BBQ, contemplation /fern garden, social corner, active corner/boccie court and sensory lane or productive garden; and
 - III. Finally, the proposal includes function and other spaces that can be booked by the wider community and will facilitate and assist day-to-day community activities in the area.
- ***To ensure that land uses are carried out in a context and setting that minimises any impact on the character and amenity of the area.***
 - I. As demonstrated in section 7.2 of this report above, the proposed built form has been carefully designed to minimise any impact on the character and amenity of the area. The proposed built form is stepped

down to two storeys at all side boundaries; one storey at the rear boundary; and incorporates a generous front setback. The third storey is introduced at the centre of the site which reduces its potential overshadowing onto neighbouring properties;

- II. The proposal includes a generous front street setback with significant landscaping provided which will soften the built form viewed from public streets;
- III. The development will not overshadow any adjoining main living areas of adjoining neighbours at south and will only generate minor additional overshadowing to the private open space areas compared to existing; and
- IV. Overall, the proposal is consistent with the existing character and amenity of the area. The proposal will bring a contemporary edge to the surrounding area whilst reflecting the scale, rhythm and materiality of the neighbouring residence.

8 Any matters of significance for State or regional environmental planning

The contravention of the height standard does not raise any matter of State or regional planning significance.

9 Secretary's concurrence

The Planning Circular PS 18-003, issued on 21 February 2018 (**Planning Circular**), outlines that all consent authorities may assume the Secretary's concurrence under clause 4.6 of the *Standard Instrument (Local Environmental Plans) Order 2006* (with some exceptions). The LLEP is a standard instrument LEP and accordingly, the relevant consent authority may assume the Secretary's concurrence in relation to clause 4.6 (5). This assumed concurrence notice takes effect immediately and applies to pending development applications.

We note that under the Planning Circular this assumed concurrence is subject to some conditions - where the development contravenes a numerical standard by greater than 10%, the Secretary's concurrence may not be assumed by a delegate of council unless the Council has requested it. The variation to the clause exceeds 10% for the subject site.

10 Conclusion to variation to develop standards

This written request is for a variation to the Clause 40(4)(c) of the Seniors SEPP pursuant to Clause 4.6 of the RLEP 2011. It justifies the contravention to the development standard by demonstrating that compliance is unreasonable and unnecessary in the circumstances of the case because:

- The proposal is consistent with the purpose of Clause 40(4)(c) of the Seniors SEPP 2004;
- The proposed development achieves the objectives of the R3 Medium Density Residential zone;
- The proposal will deliver a high quality, medium density development that is appropriate for its local context, and does not give rise to any unacceptable environmental impacts, despite the breaches to development standards and therefore has sufficient environmental planning grounds to permit the variation; and
- Therefore, the proposed development is in the public interest.