

# 119 Barton St, Monterey

Clause 4.6 Variation Request

Height of Buildings control in the Seniors Living SEPP

On behalf of  
Monterey Equity Pty Ltd  
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# Table of Contents

1	Introduction.....	3
2	Clause 4.6 Exceptions to Development Standards.....	4
3	The Development Standard to be varied .....	6
4	Extent of Variation to the Development Standard .....	7
5	Objectives of the Standard.....	9
6	Objectives of the Zone .....	9
6.1	R3 Medium Density Residential .....	9
7	Assessment .....	9
7.1	Clause 4.6(3)(a) - Is Compliance with the development standard unreasonable or unnecessary in the circumstances of the case .....	9
7.1.1	Wehbe Test 1 - Objectives of the Standard are achieved .....	10
7.2	Clause 4.6(3)(b) - Are there sufficient environmental planning grounds to justify contravening the development standard? .....	15
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) .....	20
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? .....	20
8	Any matters of significance for State or regional environmental planning .....	22
9	Secretary's concurrence.....	22
10	Conclusion to variation to develop standards .....	22

# 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)(a) and (b) of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors SEPP) which stipulates that the height of all building in the proposed development must:

- be 8m or less (clause 40(4)(a)); and
- not be greater than 2 storeys when adjacent to a site boundary (clause 40(4)(b)).

**Note:** In relation to subclause (4)(b), it remains uncertain as to whether the proposed third storey is in fact 'adjacent' to the property boundary given the generous setback provided. Notwithstanding, for the purpose of completeness, this variation request responds to both Clauses 40(4)(a) and (b).

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)(a) and (b) 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 standard 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 Clause 40(4)(a) and (b) in the Seniors SEPP. Clause 40(4)(a) and (b) reads as follows:

#### **40 Development standards—minimum sizes and building height**

**(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.*

Under the Seniors SEPP, a building height is measured from the any point on the ceiling of the topmost floor of the building to the ground level immediately below, refer to the definition below:

*height in relation to a building, means the distance measured vertically from any point on the ceiling of the topmost floor of the building to the ground level immediately below that point.*

Furthermore, it is important to note that Clause 48(a) stipulates that the building height control is a standard that cannot be used to refuse development consent for residential care facilities. While a Clause 4.6 Variation Request is not warranted in relation to any departures from Clause 48(a) specifically, it is important to note that the building height standard under Clause 40(4)(a) is also reflected as a non-discretionary standard under Clause 48(a). Clause 48(a) reads as follows:

**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

.....

Note—

The provisions of this clause do not impose any limitations on the grounds on which a consent authority may grant development consent.

## 4 Extent of Variation to the Development Standard

The development is subject to the following building height standards pursuant to clause 40(4)(a) and (b) of the Seniors SEPP:

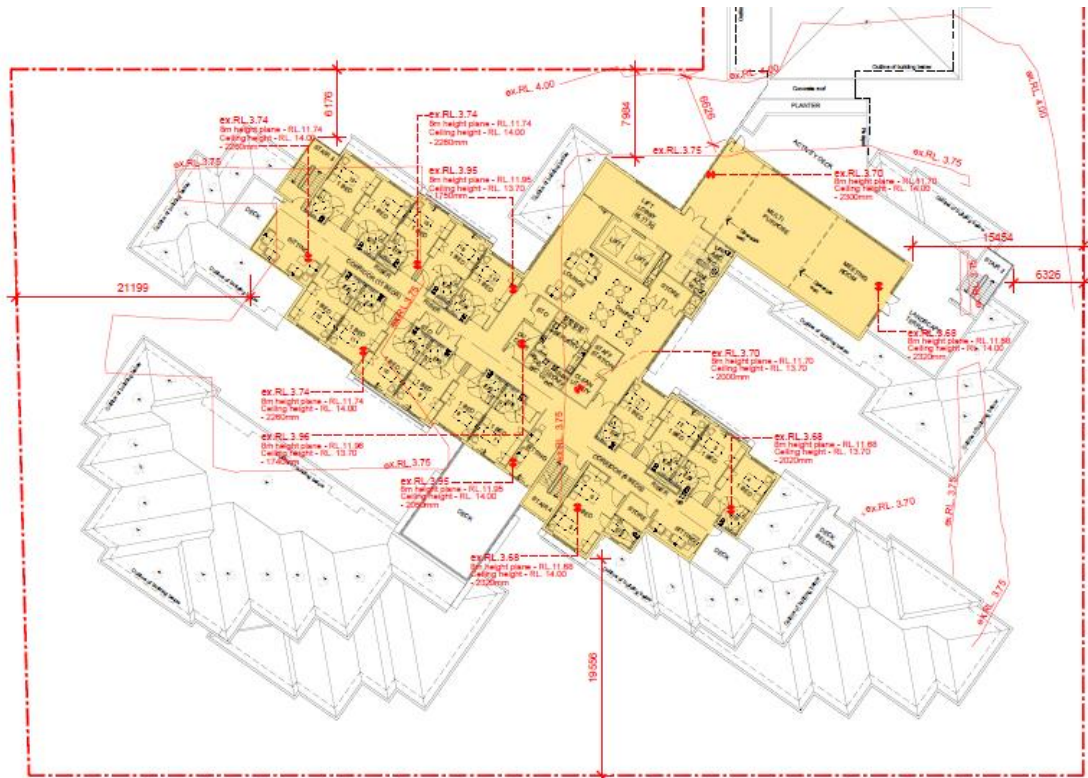
- **Maximum height control of 8m** which, under the Seniors SEPP, is measured to the ceiling of the topmost floor from the ground directly below. The proposal seeks a maximum building height of **9.975m**, which represents a **1.975m** or **24.7%** non-compliance with the maximum building height.
- **Maximum of 2 storeys** where building is adjacent to the site boundary. The third storey of the proposed development is largely well setback from the 6m setback control of the DCP. However, the third storey comprises minor building elements which are located close to the 6m setback line along the northern boundary. In these locations, these building elements may be considered as being 'adjacent' to the boundary. Accordingly, this variation request includes consideration of this standard where the third storey elements of the building align with the 6m setback requirement.

It is important to note that the proposed height variation applies to a portion of the proposed built form which is largely centralised and setback from the property boundaries.

As illustrated in the figure below, the built form which protrudes above the 8m building height line (to ceiling) is setback generously from the property boundaries. In this respect, the following setbacks are provided to the building elements which exceed the 8m and 2 storey building height standard:

- Northern boundary: minimum 6.17m setback
- Southern boundary: minimum 19.5m setback
- Western boundary: minimum 21.2m setback
- Eastern boundary: minimum 15.4m setback

These setbacks result in no unreasonable environmental impacts arising from the proposed height encroachment. These matters are discussed further below.



**Figure 1** Building above the 8m building height standard  
Source: Boffa Robertson Group



**Figure 2** 3D Height Plan  
Source: Boffa Robertson Group



## 5 Objectives of the Standard

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, avoids abrupt changes in scale and does not result in any adverse impacts to the surrounding area.

## 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 building height development standard, 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 2004. 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 RFBs 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 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).
- With a minimum setback of 6m (at closest point) from the rear boundary, the proposal incorporates a staggered edge (not a solid/consistent built form) along all boundaries to facilitate greater landscaping and create a buffer with the adjoining properties to ensure an appropriate built form transition and protect the amenity of surrounding neighbours.
- The proposal incorporates generous landscaping buffers along all the boundaries. The proposal incorporates 3,850.5m<sup>2</sup> of landscaped area which equates to 33.2m<sup>2</sup> /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.

- As illustrated in Figure 3 above, the proposed height encroachment is setback considerably from surrounding property boundaries to ensure an appropriate transition is achieved. In this respect, it is important to note that buildings do not have to be the same height to be compatible. Where there are significant differences in height, it is easier to achieve compatibility when the change is gradual rather than abrupt. The gradual change in height from surrounding developments to the highest points of the proposed is gradual and as illustrated below, provides generous separations to the surrounding properties.
- In the context of seniors housing, it is generally accepted that buildings can exist in harmony without having the same density, scale or appearance. As such, in the absence of any measurable environmental impact resulting from the proposal, the built form should be reasonably considered. To not consider such an outcome would undermine the aims of the Seniors SEPP. In this respect, development under the Seniors SEPP should not slavishly follow the form of development anticipated by a DCP for multi dwelling housing development as the intent under the SEPP is not to replicate outcomes which would otherwise be considered for a different development type.
- A view analysis has been provided by Boffa Robertson Group (refer to **Appendix 3**) which illustrates the views of 3 x points around the perimeter of the site from adjoining properties. The view points illustrate the worst case and do not illustrate any landscaping to be carried out. The view analysis provides a comparison of the following options:
  - **'Rectilinear massing':**
    - 2 storey versus a 3 storey scheme.
  - **Proposed 'rotated massing':**
    - 2 storey scheme (6m ground and first floor setbacks); and
    - 3 storey scheme (proposed) (6m ground and first floor setbacks).

The view analysis illustrates that the 'rectilinear' massing will create a solid consistent wall along the boundary. However, the proposal will only incorporate the end of the wings along the boundary whilst the generous setbacks in between the wings will allow for greater articulation and relief for the neighbours. The proposed massing will also create greater landscaping areas along the boundaries which will allow for privacy landscaping buffers.

The view analysis illustrates that the upper storey will not be highly visible from the adjoining neighbours and where visible, it will be generally behind the building edge of the lower level.

The view analysis illustrates that the proposed scheme does not create any measurable or discerning impact when compared to the 'complying' scheme.

## Height of Buildings objectives

Whilst not strictly applicable in this case, in the absence of building height objectives under Clause 40 of the Seniors SEPP, the objectives of Clause 4.3 of the RLEP 2011 have been considered and addressed below.

**(a) to establish the maximum limit within which buildings can be designed and floor space can be achieved,**

- The site has an uncommon 'battle axe' form with a narrow frontage and large square shape that abuts a number of smaller residential lots. The building envelope has been designed to response to the land form and its surrounds and includes a series of fingers that extend from a central core.
- The proposal includes a part one, two and three storey residential aged care facility with the direct boundary interfaces comprising either one or two storeys. The third storey has been introduced at the centre of the site, which provides additional floor space to accommodate the ageing population, and has been designed to minimise overshadowing and overlooking to the immediate neighbouring properties.
- In accordance with the Seniors SEPP, the development has been afforded an additional up to 0.4:1 FSR in recognition of the importance of seniors housing and its dire need within NSW. Accordingly, the particular circumstances of the site make it difficult to achieve this additional FSR within the building height standard. While it is acknowledged that the intent of the building height standard is to establish a maximum limit in which buildings can be designed, it is important to note that this 'maximum limit' cannot be imposed as a 'one size fits all' standard. Doing so would not allow for the characteristics and attributes of each site and proposal to be considered on their own merits and would completely undermine the intent of the Seniors SEPP in facilitating a response to the demand of social infrastructure. In this respect, it is considered reasonable that such a 'maximum limit' should be imposed only where it gives rise to unreasonable environmental impacts on surrounding properties.

The scale of the site presents an opportunity to deliver additional floor space in a location where the resulting environmental impact would be nominal. While the proposed building height does exceed the established 'maximum limit', Clause 4.6 of the RLEP 2011 provides a mechanism to apply a reasonable level of flexibility in such cases. To not allow for such flexibility to be applied or supported, there must be a clear nexus between the proposed building height and unreasonable environmental impacts. The determining factor in considering the level of flexibility afforded under Clause 4.6 cannot be the extent of variation being sought.

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

- The proposal includes a 2 storey built form fronting Barton Street as well as the side and rear boundary interfaces. The proposed scale and built form are consistent with the neighbouring developments which are two largely

storeys in height and thus compatible with the prevailing character of the area.

- The proposal includes a generous 20m front setback to Barton Street and includes significant landscaping which will soften the built form viewed from public streets.
- The façade of the building incorporates face brick and rendered walls which will be painted white, grey and gold shades. The windows are to include aluminium frames and the balcony balustrades will be metal and glass materials. The proposal will bring a contemporary edge to the surrounding area whilst reflecting the scale, rhythm and materiality of the neighbouring residence.
- Part of the breach is the result of ensuring high-quality and amenity floor to ceiling heights and to deliver appropriate servicing within the structure, which both contribute to a high quality urban form that guarantees appropriate amenity for the residents.

***(c) to provide building heights that maintain satisfactory sky exposure and daylight to buildings, key areas and the public domain,***

- The proposal will contribute a quality residential aged care building to the area which will be compatible with surrounding residential dwellings, strata buildings and the local context.
- The proposed height is consistent and compatible with the existing skyline profile and is contextually appropriate when the surrounding building form is considered.
- 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 floor to ceiling heights and overall building height have been designed to be more generous than minimum requirements in order to maximise both sky exposure and daylight for the residents.
- Centralising the third storey results facilitates greater sky exposure and access to daylight access to surrounding buildings. In this respect, the third storey will only be marginally visible from surrounding properties, as demonstrated in the visual impact analysis carried out. Removing the third storey would not result in any measurable view benefits and would only serve to impact the development itself in delivering in demand social infrastructure.

***(d) to nominate heights that will provide an appropriate transition in built form and land use intensity.***

- The building envelope has been designed to relate to the existing surrounding land form and includes a series of fingers that extend from a central core. The 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 proposed development has been designed with significant building separation and setbacks from boundaries to reduce bulk, minimal overshadowing and ensure adequate visual and acoustic privacy.
- This design and approach ensures that the future development will appropriately transition to surrounding development and is of a land use intensity less than permissible in the Seniors SEPP – as the maximum permissible FSR of 1:1 has not been achieved.
- An appropriate transition in building heights from surrounding development to the highest point of the proposed building has been adopted. In this respect, the proposed development is compatible with the prevailing character of the area and is capable of existing harmoniously with the surrounding development. In considering whether the proposed development, and specifically building height is compatible with the existing character of the area, in *GPC No 5 (Wombarra) Pty Ltd v Wollongong City Council* [2003] NSWLEC 268 the Court established principles for the specific case of medium density housing for older people fitting into the streetscape in a low-density housing area. One of these principles is that medium density development does not have to be single storey to be compatible even where most existing buildings are single storey. The same principle and rationale could be applied when considering a three storey development in an area where there primarily double (and single) storey dwellings.

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, the proposed development, including the non-compliance building elements, is capable of achieving the underlying purpose 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 building height 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.

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.

As discussed above, the proposal breaches the maximum building development standard of 8m and 2 storeys adjacent to the property under the Seniors SEPP. Specifically in relation to the building height departure, the environmental planning grounds to justify contravening the building height 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 building height variation as opposed to locating this floor space at the ground or first level 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 ground and first floors. 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 second level.
- Much of the area that exceeds the development standard is not discernible as viewed from the public domain or surrounding residential properties as it has been setback from the edges of the building. The proposed elements that breach the height standard do not contribute to distinguishable bulk, scale or density of the building due the generous setbacks from surrounding properties and allowance of an appropriate height transition where visible. In this respect, it is important to note that the 8m building height limit is applicable to all residential aged care facilities proposed under the Seniors SEPP, regardless of the site context. The height limit has been established in consideration of sites as small as 1,000m<sup>2</sup> (minimum lot size under the Seniors SEPP). Accordingly, the height limit doesn't necessarily contemplate lots of a much greater scale, such as the subject site, which may facilitate a more appropriate height transition.
- The proposal has demonstrated that the portion of the building which exceeds the maximum 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 proposed built form is stepped down to two storeys at all boundaries and incorporates a generous front setback.
  - 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. **Figures 3-5** below illustrate the views of the proposed building (including the third storey) in comparison to a building without the third storey. As demonstrated in these figures, visibility of the third storey building elements is nominal and does not contribute to additional visual impacts compared to a compliant two storey building.
- The proposal, including the height variation, delivers a built form which is compatible with the prevailing streetscape and character of the area. While the building height is greater than those surrounding properties, the site area facilitates an appropriate building height transition for the centrally located elements that exceed the maximum building height.

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

Further to the above, the impact on the residential character of the area is further analysed through the planning principle established by Moore SC in **Davies v Penrith City Council [2013] NSWLEC 1141** where the following criteria was considered for assessing impact on neighbouring properties and residential character:

- *How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?*

As demonstrated through the Solar Access and View Analysis undertaken the impact of the built form does not drastically change the amenity of surrounding properties. In this respect, adequate (and compliant) sunlight as well as prominent views are retained. Given the setbacks of the second level, providing a compliant two storey development would not provide a measurable benefit to surrounding properties and would only serve to burden the development.

- *How reasonable is the proposal causing the impact?*

As aforementioned, the proposal, including the second level of the building, does not give rise to any measurable or unacceptable amenity impacts to surrounding properties in terms of solar access or views. The proposed second storey is a reasonable design outcome as if removed compliant GFA (built form) away from residential boundaries and relocates this to a higher, but centralised, location within the site. This design outcome result in less bulk and scale along these adjoining residential boundaries and reduces impact. Accordingly, given the role the increased building height plays in improving the interface and ultimately the amenity of surrounding properties and the streetscapes, the proposed built form is reasonable.

- *How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?*

The surrounding properties are inherently vulnerable to impacts from the development of the site due to the majority of these surrounding properties (on all boundaries) comprising rear yards (open space) along these interfacing boundaries to the site. Accordingly, for any development of the site, there is an added constraint. For this reason, setbacks in excess of the DCP requirement have been imposed to ensure the amenity of these adjoining residences is maintained. In this respect, while removing the second floor may marginally remove some impact, this would be at a significant burden to the development potential. The burden of such an outcome would far outweigh any nominal benefit being achieved for those surrounding properties.

- *Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?*

The second level is not a result of poor design. As aforementioned, the second level has been provided to remove compliant GFA and built form from the boundaries of the residential properties and deliver a greater amenity outcome for surrounding residents as well as those internally. While the same amount of floor space may be achievable within the site through the removal of the second level, this would likely be at the expense of the amenity of surrounding residents.

- *Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?*

The proposal does not comply with the building height standard under the Seniors SEPP. However, as analysed through the findings of the Solar Access Analysis and View Analysis, the impacts arising from the non-compliant building elements are nominal and are acceptable.

Through the application of the above criteria established within the planning principle by Moore SC in *Davies v Penrith City Council* [2013] NSWLEC 1141, the proposal demonstrates an acceptable built form outcome as it represents good planning and design to, notwithstanding the building height non-compliance, reduce amenity impacts on surrounding properties as well as the residential character.

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.



PROPOSED SCHEME, 2 STOREY  
Ground Floor - 6m Setback  
First Floor - 6m Setback



PROPOSED SCHEME, 3 STOREY  
Ground Floor - 6m Setback  
First Floor - 6m Setback

**Figure 3** Visual Impact Analysis (from the east)  
Source: Boffa Robertson



PROPOSED SCHEME, 2 STOREY  
Ground Floor - 6m Setback  
First Floor - 6m Setback



PROPOSED SCHEME, 3 STOREY  
Ground Floor - 6m Setback  
First Floor - 6m Setback  
Second Floor - 6m Setback - NOT VISIBLE

**Figure 4** Visual Impact Analysis (from the south)  
Source: Boffa Robertson



PROPOSED SCHEME, 2 STOREY  
Ground Floor - 6m Setback  
First Floor - 6m Setback



PROPOSED SCHEME, 3 STOREY  
Ground Floor - 6m Setback  
First Floor - 6m Setback

**Figure 5** Visual Impact Analysis (from the west)  
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

It has been demonstrated elsewhere in this report that the development achieves the intent of the building height standard of the Senior SEPP. Further, while not strictly applicable in this case, in the absence of specific objective under the Seniors SEPP, the objectives of Clause 4.3 Height of Buildings of the RLEP2011, have been addressed and notwithstanding the non-compliance with the Seniors SEPP standard, it has been demonstrated that these objectives of Clause 4.3 of RLEP2011 are satisfied.

#### 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 113 single 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 634m<sup>2</sup> GFA of private amenities including lounge, dining, quiet and sitting areas for the use of future residents;
- II. The proposal also incorporates 245m<sup>2</sup> 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)(a) and (b) 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)(a) and (b) 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.