

# Clause 4.6 – Written Request for Exemption to Clause 26 “SEPP Seniors” (Without Prejudice)

## TO ACCOMPANY A DEVELOPMENT APPLICATION FOR:

The demolition of the existing Chatswood Golf Club clubhouse and car parking area, construction of a new Chatswood Clubhouse, 106 “serviced self-care” seniors dwellings with associated on-site services, basement parking facilities, landscaping, earth works and staged subdivision.

At

## 128 Beaconsfield Road, Chatswood



Submitted to Willoughby City Council

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Prepared for:

**WATERMARK**  
CHATSWOOD



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## 1.0 Introduction

Levy Planning has been commissioned by Watermark Living (WM) to prepare a written request pursuant to Clause 4.6 of Willoughby Local Environmental Plan 2012 (Willoughby LEP 2012), in respect of the proposed seniors housing development at Chatswood Golf Club 128 Beaconsfield Road, West Chatswood (the Site).

This Clause 4.6 is provided in support of the Development Application for the demolition of the existing Chatswood Golf Club clubhouse and car parking area, construction of a new Chatswood Clubhouse, 106 “serviced self-care” seniors dwellings with associated on-site services, basement parking facilities, landscaping, earth works and staged subdivision. The Clause 4.6 written request addresses the Clause 26 Location and Access to Facilities contained in **State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004** (“SEPP Seniors”).

**NOTE:** The submission is provided on a WITHOUT PREJUDICE basis, given the subject proposal is considered to meet the **Clause 26 Location and Access to Facilities** contained in State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (**SEPP Seniors**).

However, Willoughby City Council are of the view that the SEPP may possibly require a 7 day public bus service to comply with 26(2) despite clause 26(2)(b)(iii) expressly requiring a 5 day/weekday service.

Accordingly, the cl.4.6 submission has been prepared in the event that the Consent Authority should determine that a request to vary the SEPP Seniors Clause 26 Development Standard is required to approve the application.

The mixed-use development comprising Seniors Housing and a new Clubhouse at Chatswood Golf Club is fully described in the accompanying Statement of Environmental Effects (SEE) prepared by Levy Planning. This request should be read in conjunction with the SEE and the related access report prepared by Funktion.

In preparing this clause 4.6 variation request, regard has been given to the following;

- NSW Department of Planning and Infrastructure varying Development standards: A Guide August 2011
- The relevant principles identified in *Whebe v Pittwater Ccl* (2007) NSW LEC 827 (*Whebe*)
- The *Fore2Five Pty Ltd v Ashfield Council* cases (“Four2Five”)
- *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) NSWLEC 118 (“Initial Action”)
- *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* (2018) NSWLEC 191 (“Rebel”)
- *Randwick City Council v Micaul Holdings Pty Ltd* (2016) NSWLEC 7 (“Micaul”)
- *Principle Healthcare v City of Ryde* (2017) NSW LEC 1300 (“Principle Healthcare”)
- *Australian Nursing Home Foundation Limited v Ku-ring-gai Council* (2019) NSWLEC 1300 (“ANEF”)

Notably, “*Principle Healthcare*” and “*ANEF*” were cases that involved SEPP Seniors clause 26.

Clause 4.6 of the Willoughby Local Environmental Plan 2012 (WLEP 2012) provides the consent authority with the power to flexibly apply development standards in a particular case where they can achieve better outcomes in particular circumstances, where it is satisfied it is in the public interest to do so. The objectives of Clause 4.6 Exceptions to Development Standards 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.

This Exemption Request is made with respect to the development standard set by cl 26 of SEPP Seniors which sets out requirements for access to services and facilities which apply to the subject site. It is acknowledged that a judgement in *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde [2016] NSWLEC 153*, concluded that “cl 26 of SEPP (HSPD) is not a prohibition, but is rather a development standard, and is therefore amendable to clause 4.6”.

Clause 26 of SEPP Seniors requires Seniors Housing (including serviced self-care housing) to be located within 400m of the services and facilities listed in subclause (1) of cl.26 of SEPP Seniors and to be accessible by a suitable access pathway, or to be located within 400m of a public transport service that can take residents to the services and facilities listed in subclause (1) of cl.26 of SEPP.

#### **Transport Overview for the Subject Development at Chatswood Golf Club**

The Chatswood Golf Club (CGC) site is conveniently located in relation to public transport services. There is an existing bus stop in Beaconsfield Road between Colwell Crescent and Cramer Crescent, which is located 80m to the east of the entrance to the Golf Club site. Refer to **Figure 1** below. A sealed & level pathway on the northern side of Beaconsfield Road links the CGC site entry to the bus stop.



Figure 1: Bus stop route to northern bus stop in Beaconsfield Road

Source - <http://maps.six.nsw.gov.au/>

The (public) bus service **Route 255** (10mins trip) connects Beaconsfield Road with Chatswood Train Station, where all the services to meet the relevant requirements of SEPP (Housing for Seniors or People with a Disability) 2004 are available. Refer **Figure 2** Bus Route 255 map extract overleaf. The buses currently undertake a 3-point turn at the intersection of Beaconsfield Road and Colwell Crescent which is at the end stop of the 255 bus route.



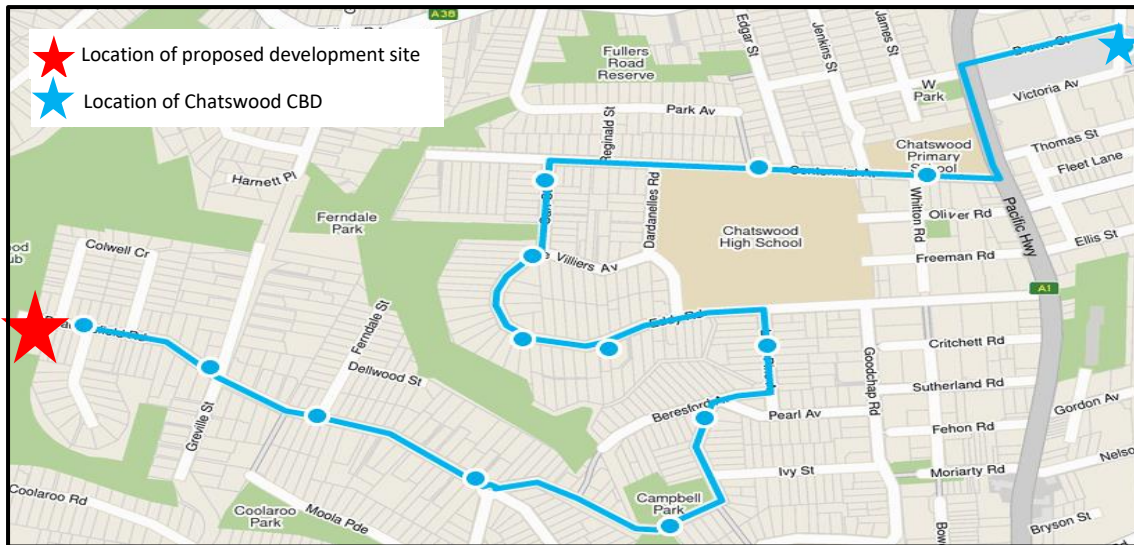


Figure 2: Route 255 Bus route

Source: - <http://www.transportnsw.info/>

This bus stop is also serviced by the “On Demand” bus service for the Macquarie Park region, which commenced 26 March 2018 (on a trial basis) and is operated by Keolis Downer. Currently the service operates in West Chatswood weekdays from **6am-10am & 3pm-7pm**. Refer **Figure 3** extracts for the “On Demand” bus service. This provides an alternative on-demand public bus service for the CGC site on the weekdays.

## Macquarie Park On Demand service

Keoride is the On Demand service in the Macquarie Park region, which began 26 March 2018 and is operated by [Keolis Downer](#).

[Keoride](#) provides On Demand transport to those who live or work within 7.5km of the Central Macquarie Park Precinct.

During peak times (6-10am and 3-7pm), the service takes you between a point near your home and the Central Precinct.

During off-peak times (10am – 3pm), the service operates in a reduced zone, and takes you between a point near your home and key hubs (including anywhere in the Central Precinct).

### Bookings

Bookings can be made from 1 month up to 30 minutes prior to your trip. Bookings are subject to availability.

**You can book this service via the Keoride app:**

### Fares

A one-way trip will cost:

- \$2.60 for less than 3km
- \$4.30 for 3-8km
- \$5.60 for more than 8km

There are no concession fares for this service.

### Hours of operation

<b>Monday to Friday</b>	• 6am–7pm
<b>Saturday and Sunday</b>	No service
<b>Public holidays</b>	No service

**From 6-10am and 3-7pm weekdays**

Keoride will operate between your home and the central Macquarie Park Precinct including Macquarie University, Macquarie Shopping Centre, North Ryde Business Park, Optus Centre and Foxtel. The service area is split into 9 zones within a 7.5km radius of the precinct.

**From 10am-3pm weekdays**

Keoride will operate between your home and key hubs in a reduced service area, including Eastwood, Marsfield, Macquarie Park, Ryde, East Ryde, North Ryde, West Ryde, Putney and Gladesville.






Figure 3: “On demand” bus service extracts

The public buses are to be supplemented by the following;

- Provision of golf buggies to transfer residents or visitors, including one wheelchair accessible buggy from the Clubhouse to Beaconsfield Road. Whilst not replacing the public bus services, this will promote easier access for residents who may not wish to walk up from the apartments to the street frontage. A communication system to call for pickup would be required. This could be operated by staff during daylight hours. A system of this type has been implemented at “Greenhill Manor” in Figtree, where the site is similarly sloping topography.
- Provision of a regular village mini-van (minimum 10 persons) service as required by SEPP Seniors cl 43 which that provides a daily resident pickup/drop off service to selected nearby locations e.g. Chatswood Shopping Centre, Chatswood Station. The service will be available both to and from the proposed development to Chatswood CBD at least once between 8am and 12pm each day and at least once between 12pm and 6pm each day. An expanded loop service is envisaged by Watermark in response to resident demand.
- Provision of two (2) x dedicated car spaces within the basement carpark for communal share (electric) vehicles owned/maintained by the village, to promote reduced reliance on private car ownership and/or second car ownership.

The below table summarises all public and private transport services available to residents in the retirement village;

	<b>Public Bus Pre-Pay (Route 255)</b>	<b>Public Bus “On Demand”</b>	<b>Village Bus</b>	<b>Electric Car (Communal) Basement L1&amp; L2</b>
<b>Sun</b>	n/a	n/a	AM & PM services	Available 24/7
<b>Mon</b>	6.50am-5.37pm (12 x services to Chats Stn) & 9.10am-6.23pm (10 x return services)	6am-10am & 3pm-7pm	AM & PM services	Available 24/7
<b>Tues</b>	6.50am-5.37pm (12 x services to Chats Stn) & 9.10am-6.23pm (10 x return services)	6am-10am & 3pm-7pm	AM & PM services	Available 24/7
<b>Wed</b>	6.50am-5.37pm (12 x services to Chats Stn) & 9.10am-6.23pm (10 x return services)	6am-10am & 3pm-7pm	AM & PM services	Available 24/7
<b>Thurs</b>	6.50am-5.37pm (12 x services to Chats Stn) & 9.10am-6.23pm (10 x return services)	6am-10am & 3pm-7pm	AM & PM services	Available 24/7
<b>Frid</b>	6.50am-5.37pm (12 x services to Chats Stn) & 9.10am-6.23pm (10 x return services)	6am-10am & 3pm-7pm	AM & PM services	Available 24/7
<b>Sat</b>	9.25am -5.25pm (5 x services to Chats Stn) & 9.10am-5.10pm (5 x return services)	n/a	AM & PM services	Available 24/7

## 1.2 Willoughby LEP 2012 Clause 4.6 Framework

The objective of Willoughby LEP 2012 Clause 4.6 is to allow flexibility in the application of numeric development standards. The relevant Clauses of Willoughby LEP 2012 are:

Clause **4.6(1)** of Willoughby LEP 2012 states that the objectives of the clause are:

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

**Comment:** In the Land and Environment Court proceedings *Initial Action v Woollahra Municipal Council* the Chief Judge held that a clause 4.6 variation request does not need to demonstrate that the proposal is consistent with these objectives., instead they are the objectives of clause 4.6 itself.

Clause **4.6 (2)** provides as follows:

*“Development consent may, subject to this clause, be granted for development even though the development would contravene the 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 operations of this clause.*

**Comment:** Subclause 8 of clause 4.6 sets out the development standards under Willoughby LEP 2012 to which clause 4.6 does not apply. They are;

- (a) development standards for complying development
- (b) development standards relating to a BASIX certificate ;
- (c) development standards in clause 5.4 of WLEP 2012; and
- (ca) clause 4.3 (to the extent that it applies to land at 219 Pacific Highway, Artarmon)

The numerical provision of bus services to the Beaconsfield Road bus stop is not excluded from the provisions of clause 4.6 and accordingly the consent authority may grant development consent to this development it be determined that a 8am-12noon daily bus service (not 5 days) is required to meet SEPP clause 26(2)(b)(iii).

Clause **4.6 (3)** provides as follows:

*“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 a 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”.*

**Comment:** Section 2.2 overleaf address the above two subclauses of Willoughby LEP 2012.

*Clause 4.6 (4) provides as follows:*

*(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 Director-General has been obtained.*

*(5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

**Comment:** The variation request does not raise any significance for state or regional planning. It is noted that a Site Compatibility Certificate was recommended for approval by DPIE and approved by Sydney North Planning Panel 13-6-19 which involved 23 months of consideration as to the suitability of the site including locational criteria. There is no public benefit of maintaining the interpretation that a 7 day bus service is required for morning services and only 5 day (weekday) service is required for the afternoon service as this is non-sensical in terms of requiring only one-way services and no requirement for a return trip on weekends.

Refusing the request for variation to SEPP cl 26 and so the 106 dwelling serviced self-care seniors housing development on grounds of having only a private mini-van daily service (as required by SEPP clause 43) plus 2 x village electric "share cars" and weekday but not full weekend public bus services would have an adverse effect and would not be a benefit to the public.



### 1.3 Is the planning control in question a development standard?

The Environmental Planning Instrument to which this request relates is State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP Seniors). The development standard to which this Clause 4.6 request seeks to vary is Clause 26 of SEPP (Seniors) which states as follows:

***“26 Location and access to facilities***

***(1) A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have access that complies with sub clause***

***(2) to:***

***(a) shops, bank service providers and other retail and commercial services that residents may reasonably require, and***

***(b) community services and recreation facilities, and***

***(c) the practice of a general medical practitioner.***

***(2) Access complies with this clause if:***

***(a) the facilities and services referred to in sub clause (1) are located at a distance of not more than 400 metres from the site of the proposed development that is a distance accessible by means of a suitable access pathway and the overall average gradient for the pathway is no more than 1:14, although the following gradients along the pathway are also acceptable:***

***(i) a gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,***

***(ii) a gradient of no more than 1:10 for a maximum length of 5 metres at a time,***

***(iii) a gradient of no more than 1:8 for distances of no more than 1.5 metres at a time, or***

***(b) in the case of a proposed development on land in a local government area within the Sydney Statistical Division—there is a public transport service available to the residents who will occupy the proposed development:***

***(i) that is located at a distance of not more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and***

***(ii) that will take those residents to a place that is located at a distance of not more than 400 metres from the facilities and services referred to in sub clause (1), and***

***(iii) that is available both to and from the proposed development at least once between 8am and 12pm per day and at least once between 12pm and 6pm each day from Monday to Friday (both days inclusive), and the gradient along the pathway from the site to the public transport services (and from the public transport services to the facilities and services referred to in sub clause (1)) complies with sub clause (3), or***

***(c) in the case of a proposed development on land in a local government area that is not within the Sydney Statistical Division—there is a transport service available to the residents who will occupy the proposed development:***

***(i) that is located at a distance of not more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and***

***(ii) that will take those residents to a place that is located at a distance of not more than 400 metres from the facilities and services referred to in sub clause (1), and***

***(iii) that is available both to and from the proposed development during daylight hours at least once each day from Monday to Friday (both days inclusive), and the gradient along the pathway from the site to the public transport services (and from the transport services to the facilities and services referred to in sub clause (1)) complies with sub clause (3).***

**Note.** Part 5 contains special provisions concerning the granting of consent to development applications made pursuant to this Chapter to carry out development for the purpose of certain seniors housing on land adjoining land zoned primarily for urban purposes. These provisions include provisions relating to transport services.

(3) For the purposes of sub clause (2) (b) and (c), the overall average gradient along a pathway from the site of the proposed development to the public transport services (and from the transport services to the facilities and services referred to in sub clause (1)) is to be no more than 1:14, although the following gradients along the pathway are also acceptable:

- (i) a gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,
- (ii) a gradient of no more than 1:10 for a maximum length of 5 metres at a time,
- (iii) a gradient of no more than 1:8 for distances of no more than 1.5 metres at a time.

(4) For the purposes of sub clause (2):

- (a) a suitable access pathway is a path of travel by means of a sealed footpath or other similar and safe means that is suitable for access by means of an electric wheelchair, motorised cart or the like, and
- (b) distances that are specified for the purposes of that sub clause are to be measured by reference to the length of any such pathway.

(5) In this clause:

bank service provider means any bank, credit union or building society or any post office that provides banking services."

"**Development Standards**" has the following definition under Section 4(1) of the Environmental Planning and Assessment Act (EP&A Act, 1979):

"Development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
- (b) the proportion or percentage of the area of a site which a building or work may occupy,
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,
- (d) the cubic content or floor space of a building,
- (e) the intensity or density of the use of any land, building or work,
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,
- (h) the volume, nature and type of traffic generated by the development,
- (i) road patterns,
- (j) drainage,
- (k) the carrying out of earthworks,
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,
- (m) the provision of services, facilities and amenities demanded by development,
- (n) the emission of pollution and means for its prevention or control or mitigation, and
- (o) such other matters as may be prescribed".

**Comment:** SEPP Seniors **Clause 26 (2)(b)(iii)** sets a numerical standard for the minimum number of **public** transport services to/from the subject site as follows;

**(iii) that is available both to and from the proposed development at least once between 8am and 12pm per day and at least once between 12pm and 6pm each day from Monday to Friday (both days inclusive), and the gradient along the pathway from the site to the public transport services (and from the public transport services to the facilities and services referred to in sub clause (1)) complies with sub clause (3), or**

Accordingly, it is considered that the numerical elements relating to regularity of public transport services (bus route 255) within Clause 26 fit within the definition of ‘development standards’ in Section 4(1) of the Environmental Planning and Assessment Act (EP&A Act, 1979) and accordingly Clause 26 is a development standard.

This is supported in the decision by Justice Robson (2 December 2017) in **Principal Healthcare Finance Pty Ltd v Council of the City of Ryde** [2016] NSWLEC 153, concluded that: “cl 26 of SEPP (HSPD) is not a prohibition, but is rather a development standard, and is therefore amendable to clause 4.6”.

Subsequent to *Principal Healthcare* case, the issue was further considered in **Australian Nursing Home Foundation Limited v Ku-ring-gai Council** [2017] NSWLEC 1300 in which Senior Commissioner Dixon found no reason to depart from the law and at paragraph 163 states; “Clause 26 is plainly a development standard and this view is supported by the reasoning in *Georgakis* at [40]-[46] which dealt with an identical provision under an older version of the SEPP as accepted by the Court in *Principal Healthcare*”.

#### 1.4 What is the underlying objective or purpose of the standard?

Pursuant to SEPP Seniors there are no objectives listed under cl 26 or Part 2 ‘Site Related Requirements’. In the absence of any specific objectives, the objective of Chapter 3 Part 1 General of SEPP Seniors has been adopted as follows:

##### **14 Objective of the Chapter**

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

Further, aims of the SEPP Seniors Policy in Clause 2 are achieved by;

- (a) *setting aside local planning controls that would prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this Policy, and*
- (b) *setting out design principles that should be followed to achieve built form that responds to the characteristics of its site and form, and*
- (c) ***ensuring that applicants provide support services for seniors or people with a disability for developments on land adjoining land zoned primarily for urban purposes.***

The subject seniors housing development is for “**serviced self-care housing**” that adjoins land zoned primarily for urban purposes, which is defined as follows under clause 13(3);

*“In this Policy, serviced self-care housing is seniors housing that consists of self-contained dwellings where the following services are available on the site: meals, cleaning services, personal care, nursing care”.*

Further to this, the SEPP imposes additional requirements under SEPP clause 42 (access to meals, nursing and housework) & clause 43 (transport services);

**43 Transport services to local centres**

*(1) A consent authority must not consent to a development application made pursuant to this Chapter to carry out development for the purpose of serviced self-care housing on land that adjoins land zoned primarily for urban purposes unless the consent authority is satisfied that a bus capable of carrying at least 10 passengers will be provided to the residents of the proposed development—*

*(a) that will drop off and pick up passengers at a local centre that provides residents with access to the following—*

*(i) shops, bank service providers and other retail and commercial services that residents may reasonably require,*

*(ii) community services and recreation facilities,*

*(iii) the practice of a general medical practitioner, and*

*(b) that is available both to and from the proposed development to any such local centre at least once between 8am and 12pm each day and at least once between 12pm and 6pm each day.*

*(2) Subclause (1) does not apply to a development application to carry out development for the purposes of the accommodation of people with dementia.*

*(3) In this clause, bank service provider has the same meaning as in clause 26*

**Comment:** Having regard to the above, it is considered that the underlying objective of SEPP Seniors cl 26 development standard is to ensure that residents of seniors living housing permitted by the SEPP will have reasonable access to facilities and services they may require.

## 2.0 Compliance with the Development Standard is Unreasonable or Unnecessary

In considering this sub-clause we have had regard to “*Whebe*” wherein Chief Judge expressed the view that there are five different ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. And that it is sufficient for only one of these ways to be established. Although the decision concerned SEPP1, it remains relevant to requests under clause 4.6 as confirmed by Justice Pain in *Four2Five Pty Ltd v Ashfield Council* (2015) NSW LEC 90. The five ways in “*Whebe*” are;

1. *Notwithstanding the non-compliance, does the proposal achieve the objectives of the development standard ?*
2. *Is the underlying objective or purpose of the development standard not relevant to the development with the consequence that compliance is unnecessary ?*
3. *Would the underlying objective or purpose of the development standard be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable ?*
4. *Has the development standard been virtually abandoned or destroyed by the consent authority’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable ?*
5. *Is the zoning of the particular land unreasonable or inappropriate ?*

Further in “*Macaul*” the Chief Judge confirmed that an established means of demonstrating that compliance with a development standard is unreasonable or unnecessary is to establish that a development would not cause environmental harm and is consistent with the objectives of the development standard.

### 2.1 The numerical provision of public transport service (Unreasonable or Unnecessary)

**Interpretation:** The site is not located within 400m wheelchair accessible distance of the required services and facilities prescribed under SEPP Seniors Clause 26 (1), so that the proposed retirement village relies upon having suitable access/transport to and from those facilities/services as prescribed under SEPP Seniors Clause 26 (2)(b).

More specifically, SEPP Seniors **Clause 26 (2)(b)(iii)** sets a numerical standard for the minimum number of public transport services to/from the subject site “***that is available both to and from the proposed development at least once between 8am and 12pm per day and at least once between 12pm and 6pm each day from Monday to Friday (both days inclusive)...***”

It is considered that the underlying object of the above development standard in SEPP clause 26 is to ensure that residents of seniors living housing will have reasonable access to required facilities and services.

The subject site is serviced by public bus Route 255 which operates Monday to Saturday, but currently there is no service on Sundays. There is also a “*Macquarie Park on Demand*” public bus service that is being trialled (since March 2018) and currently operates morning/afternoon at certain times on the weekdays.



The proposal is considered to satisfy the SEPP cl 26(2)(c) requirement for a bus services that runs a regular service to/from the Chatswood CBD six (6) days per week. The alternative interpretation that the SEPP clause 26 (2)(b)(iii) requires a public transport should be available **8am-12noon 7 days a week** (travelling from the retirement village to the Chatswood CBD) and is only required to operate **the return bus trip 12noon to 6pm on the weekdays**, which is in our view, a misinterpretation of the SEPP wording and illogical. The sentence contains an “and” so that it is abundantly clear the public transport service is required to operate at least once in the morning (outbound) and once in the afternoon (inbound) Monday to Friday (inclusive). No weekend service is expressly required by SEPP clause 26 (2)(b)(iii).

The intention to require only a weekday (public) transport service for seniors housing development is reinforced by Clause **26 (2)(c)(iii)** which prescribes the numerical transport service requirements for regional areas outside of Greater Sydney stating as follows;

*“(c) in the case of a proposed development on land in a local government area that is **not within the Greater Sydney** (Greater Capital City Statistical Area)—there is a transport service available to the residents who will occupy the proposed development—*  
*(i) that is located at a distance of not more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and*  
*(ii) that will take those residents to a place that is located at a distance of not more than 400 metres from the facilities and services referred to in subclause (1), and*  
***(iii) that is available both to and from the proposed development during daylight hours at least once each day from Monday to Friday (both days inclusive), and the gradient along the pathway from the site to the public transport services (and from the transport services to the facilities and services referred to in subclause (1)) complies with subclause (3).***  
**Note.** Part 5 contains special provisions concerning the granting of consent to development applications made pursuant to this Chapter to carry out development for the purpose of certain seniors housing on land adjoining land zoned primarily for urban purposes. These provisions include provisions relating to transport services”

The fact that the SEPP clearly only requires a weekday transport service for areas outside of Sydney region is at odds with the alternate interpretation that the same seniors development within greater Sydney would require a part 7day/part 5day public bus service.

**Adequacy of Private Transport Service:** As noted in Clause 26, SEPP seniors also contains special provisions for certain seniors housing on land adjoining land zoned primarily for urban purposes. SEPP Seniors **Clause 43 Transport services to local centres** provides as follows;

*“(1) A consent authority must not consent to a development application made pursuant to this Chapter to carry out development for the purpose of **serviced self-care housing** on land that adjoins land zoned primarily for urban purposes unless the consent authority is satisfied that a bus capable of carrying at least 10 passengers will be provided to the residents of the proposed development—*  
*(a) that will drop off and pick up passengers at a local centre that provides residents with access to the following—*  
*(i) shops, bank service providers and other retail and commercial services that residents may reasonably require,*  
*(ii) community services and recreation facilities,*  
*(iii) the practice of a general medical practitioner, and*  
***(b) that is available both to and from the proposed development to any such local centre at least once between 8am and 12pm each day and at least once between 12pm and 6pm each day.***  
*(2) Subclause (1) does not apply to a development application to carry out development for the purposes of the accommodation of people with dementia.*  
*(3) In this clause, bank service provider has the same meaning as in clause 26.*

The additional transport requirements contained in SEPP cl 43 reflect the proposal for “serviced self-care housing” and its location adjoining land zoned primarily for urban purposes. The wording requires a daily private transport service presumably, having regard to the non-urban zoning of the site so that additional private transport provisions to supplement the **Cl 26 (2)(b)(iii)** requirements for a weekday public transport service.

If the public transport provisions required a 7day/week service then there is little work for the SEPP Clause 43 requirement of 7 day week private transport service to do.

The applicant proposes to include a mini-van (min 10 persons) daily service for the residents of the development in accordance with SEPP clause 43 and this is reflected in the Operational Plan of Management that accompanies the DA submission. Presumably the consent authority will impose a condition of consent that requires the provision of the daily private transport service to further ensure that residents (and council) will have certainty regarding its on-going provision.

**On-Site Service Provision:** The proposal is for “serviced self-care housing” which is “seniors housing that consists of self-contained dwellings where the following services are available on the site: meals, cleaning services, personal care, nursing care”. Where “serviced self-care housing” is provided on a site that adjoins land zoned primarily for urban purposes (the subject site) SEPP clause 42 requires that the consent authority must be satisfied that the proposed development will have reasonable access to the following;

- (a) home delivered meals, and
- (b) personal care and home nursing, and
- (c) assistance with housework

The subject development comprises seniors housing and a new clubhouse which contains a range of services and onsite facilities which are available for both club members and retirement village residents. These are detailed in the following table;

Component / Floor Level	Description
Golf Course	All Club members and Seniors Residents have access to the golf course.
Pro shop (LG)	Direct access to outdoor terrace & fairway
Café (LG)	Indoor and outdoor seating (co-located with kitchen)
Lounge (LG)	Private lounge suitable for smaller groups
Gym (L1)	21m x 10m with access to terrace overlooking fairway
Pool (L1)	2 lanes with access to terrace overlooking fairway
Salon (L1)	Salon with outlook to golf course fairway
Consulting Rooms x 2 (L1)	For visiting health care professionals with space for consultations. The consulting rooms are primarily for the ILU residents and can be readily accessed via the lift adjacent to the waiting area
Function Rooms x 3 (L2) & bar	For various group activities/ social events
Cinema (L2)	28 seats plus space for wheelchairs
Dining/Bistro/Bar/Cafe (L3)	78 seats (indoor) 26 seats (outdoor terrace). The kitchen will also provide ILU residents with meals delivered to their units as required.
Club Lounge (L3)	15 seats (indoor)
ILU Lounge, mail room & Admin(L3)	Private area for management of ILU resident services and private lounge with direct access to clubhouse
Library (L3) in North block building adjacent to Club	Library for ILU residents

The co-location with the Chatswood Golf Club including provision for on-site health consultation services, indoor & outdoor recreation facilities, indoor communal spaces for the private use of residents and shared spaces for larger social gatherings and dining services available for village residents reduces reliance on the need for travel to off-site services. This is in contrast to “in-fill” seniors housing where no on-site support services or private transport service are required to be provided.

The extensive range of on-site services and facilities provides greater suitability for aging in place so that as village residents become more frail and less inclined to travel to Chatswood CBD they will have less use for public bus travel on weekdays or on the weekends. A copy of the range of support services to be provided on-site for village residents accompanies the DA at **Annexure 22**.

## 2.2 Compliance with zone objectives of Willoughby Local Environment Plan 2012

The subject site is zoned RE2 Private recreation under the Willoughby Local Environment Plan 2012 (WLEP 2012). The objectives of the zone are:

- *To enable land to be used for private open space or recreational purposes.*
- *To provide a range of recreational settings and activities and compatible land uses.*
- *To protect and enhance the natural environment for recreational purposes.*
- *To minimise the potential for adverse effects from new development on the amenity of the locality.*

Uses permitted with consent in the RE2 {Private Recreation zone under WLEP 2012 are; Aquaculture; Centre-based child care facilities; Community facilities; Environmental facilities; Environmental protection works; Kiosks; Recreation areas; Recreation facilities (indoor); Recreation facilities (outdoor); Registered clubs; Respite day care centres; Roads.

The proposed mixed-use development proposal will facilitate the on-going financial viability of the Chatswood Golf Club (CGC) via a 150year lease arrangement with the retirement village. The retention of the CGC is consistent with the above zone objectives and notably will ensure the retention of an important recreational outdoor facility and ancillary services that are of social and recreational value to the local community.

In addition to the above permitted landuses, SEPP Seniors overrides local planning controls and clause 4(5)&(6) & 17 expressly permit “serviced self-care” seniors housing or a “retirement village” on RE2 zones where the site adjoins land zoned primarily for urban purposes and when provided in conjunction with an “existing registered club”. A Site Compatibility Certificate (SCC) to facilitate lodgement of a mixed-use seniors DA was issued pursuant to SEPP cl 24 by Sydney North Planning Panel on 13-6-2019. Clause 2 Aims of the SEPP Seniors policy are as follows;

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

The proposal is consistent with the SEPP Seniors aims and in particular sub-clause (a) which seeks to increase the supply and diversity of residences for seniors/people with a disability. The “serviced self-care housing” proposal incorporates a range of on-site support services that will facilitate aging in place so that the proposal is suitable for both active seniors and those who are more frail and less able to travel to commercial centres via public transport.

## 2.3 Precedent

The Department of Planning and Environment (DPIE) undertook a comprehensive assessment of the SCC application between July 2017 and June 2019 when it was recommended to SNPP for approval. The assessment report took into consideration Willoughby Council submission (dated 18-8-2017) which was generally supportive of the proposal and raised no issues in relation to compliance with SEPP cl 26 as per below extract;

Thank you for inviting Willoughby Council to comment on the application for a Site Compatibility Certificate under State Environmental Planning Policy (Housing for Seniors or People with a Disability) in relation to land owned by Chatswood Golf Club in Beaconsfield Road, Chatswood.

Council is advised that the Seniors Living proposal is the result of a strategy on the part of the current owners to revitalise the existing Chatswood Golf Club facilities to ensure the long term sustainability and on-going viability of the club and course. With the exception of the proposed temporary club house in Mooney Street, it is also acknowledged that the proposal is generally located on land that is currently being utilised for a club house and car parking facilities. It is considered that a Seniors Living development appears to be broadly compatible with the subject land in terms of the surrounding environment and locality.

Following a review of the information provided by the applicant, there is no objection in principle to the issue of a Site Compatibility Certificate for a Seniors Living proposal on the land described in the proposal. At the same time it must be stressed that Council does not support uses that reduce the Private Recreation RE2 zoned land owned by the golf club. In this regard the important role of the golf course land as open space is outlined below.

Figure 4 - Extract Council submission in response to SCC referral

Source: WCC

The assessment report prepared by DPIE considered provisions contained in SEPP cl 26(5)(b) which sets out a number of matters which must be satisfied including subclause (iii) which states *“the services and infrastructure that are or will be available to meet the demands arising from the proposed development (particularly, retail, community, medical **and transport services having regard to the location and access requirements set out in clause 26**) and any proposed financial arrangements for infrastructure provision”*,

The SCC was recommended approval by DPIE stating the following in respect of clause 26;

### Location and access to facilities

The subject land is near the Lane Cove town centre (1.5km), which provides a range of retail, community and medical services including supermarkets, medical centres, a post office, a library, Council chambers and an aquatic leisure centre within a short commute by public transport. Medicare centres are located in Chatswood and Lane Cove, and North Shore Private Hospital and Royal North Shore Hospital are approximately 5km south-east of the subject site.

### Traffic and transport services

An access review prepared by Funktion Access Consultants confirms the proposal complies with clause 26 of the Seniors Housing SEPP as a regular public bus service route and bus stops are within 400m of the site and this service provides direct links to local facilities and services. The proposal confirms that the footpath appears to comply with the functional gradients, and uneven portions of the footpath will need to be upgraded. This matter can be reviewed more closely as part of the detailed design of the proposal and submitted and addressed as part of the development application.

Figure 5 - Extract SCC Report

Source: DPIE

Accordingly, there has been no preceding objections or concerns raised by WCC or DPIE in relation to satisfying SEPP cl 26 in relation to the number of bus services and the SCC was issued.

## 2.4 Environmental Grounds to Justify Contravening the Development Standard

In the judgement of “*Four2Five*” the Chief Judge found that there is an onus on the applicant to demonstrate, through the written request, that there are “*sufficient environmental planning grounds*” such that compliance with the development standard is unreasonable or unnecessary. Furthermore, “*Four2Five*” requires the environmental planning grounds must be particular to the circumstances of the proposed development rather than public benefits that could reasonably arise from a similar development on other land.

In “*Initial Action*” the Chief Judge Preston held that it is reasonable to infer that “environmental planning grounds” as stated under LEP cl 4.6(30)(b) means grounds that relate to the subject matter, scope and purpose of the EP&A Act 1979, including the objects in s1.3 of the Act. In addition, in “*Micaul*” and “*Initial Action*”, the Chief Judge clarified that sufficient environmental planning grounds may also include demonstrating a lack of adverse impacts.

The Club is located approximately 1.6km from Chatswood CBD so that it is particularly well located in terms of proximity to a range of services including medical and health related services and general shopping facilities. The “loop” public bus stop is 80m to the east of the site entry and accessed via a level paved footpath. The proposal is for “serviced self-care” seniors housing, not “in-fill” seniors housing so that it is required to provide a private transport capable of carrying at least 10 passengers from the development and is available at least once per day 8am-12noon and once each day 12noon-6pm. Thus unlike “in-fill” seniors housing developments, the subject proposal will provide a daily private transport service for village residents and “car-share” vehicles with designated basement parking spaces so that residents will have the convenience of a door to door transport services. This will reduce reliance on the public bus which requires residents to walk 80m from the site entry along Beaconsfield Road to /from the public bus stop. Hence, even if the public bus was absent in its entirety, there would be little if any, adverse impacts on the residents due to the SEPP cl 43 mandatory requirement for a private transport service and further to this, availability of “share-car” vehicles which are owned/managed by the village.

## 2.5 Strict compliance would not better achieve the objective of the control

The proposed development involves the redevelopment of the CGC clubhouse incorporating an expansion of the existing services and facilities which will be shared via a 150 year lease arrangement with the retirement village that contributes to the CGC income in perpetuity, thus ensuring the long-term viability of the CGC and golf course.

Strict compliance with cl 26 would prevent the CGC from being re-developed and upgraded. The new and improved facility which has provided an important recreation & club facility for the local community for over 60years. Further, it would deplete the West Chatswood area of serviced self-care seniors housing for 106-150 residents which enables them to age in place in an idealic suburban location near Chatswood CBD and medical facilities.

Of particular relevance, in the recent judgement in *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde* [2016] NSWLEC 153, Justice Robson made the following statement with regard to the necessity for public bus transport to access services and facilities for residents in a RACF;

*“To consider such a provision as essential would therefore defeat the aims of SEPP (HSPD), as it would act to discourage relevant persons from seeking to increase the supply and diversity of senior residences.”*

This is equally valid for serviced self-care housing which also offers a range of community facilities,, food, nursing, cleaning services and private transport services for residents.

Having regard to the above it is considered that strict compliance with the control for public bus services on weekends as well as weekdays is unnecessary and unreasonable.



### 3.0 Other matters for consideration

#### 3.1 The Public interest

Clause 4.6(4) of Willoughby LEP 2012 provides that consent must not be granted for development that contravenes a development standard unless;

*Clause 4.6 (4) provides as follows:*

*(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 Director-General has been obtained.*

The discussion in Section 2 satisfies the requirements of subclause 4(a)(i). The following discussion addresses sub-clause 4(a)(ii) and (4(b)).

The public interest is best served by the proposed development meeting the underlying objective of cl 26 which is to ensure that residents of seniors living housing permitted by the SEPP will have **reasonable access** to basic facilities and services. In that regard there are daily public bus services (except Sundays) available from the nearby bus stop on Beaconsfield Road which is supplemented by the On Demand weekday public bus service and 7days/week private transport service which is required for serviced self-care housing developments that adjoin urban lands pursuant to SEPP clause 43 and provision for 2 x electric "share-cars" in the basement carpark which are particularly suited to out of hours & door-to-door trips eg to a medical or social appointment. Further, in the light of Covid-19, vulnerable frail/aged residents may have a preference to utilise more personal forms of transport in preference to public buses which might entail greater risk of exposure to Covid-19 or other viruses which may arise in the future. Arguably it is in the residents' best health interests to utilise smaller forms of transport where exposure risk is reduced/ more manageable.

The proposal is considered to be consistent with the objectives of the RE2 Private Recreation zone as the proposed mixed-use development proposal will facilitate the on-going financial viability of the Chatswood Golf Club (CGC) via a 150year lease arrangement with the retirement village. The retention of the CGC is consistent with the zone objectives and notably will ensure the retention of an important recreational outdoor facility and ancillary services that are of considerable value to the local community.

The proposal is therefor considered to be consistent with the underlying objectives of the standard and RE2 zone objectives. Having regard to the above, it is considered that the requirements of clause 4.6(4)(a)(ii) are satisfied.

### 3.2 Concurrence of the Secretary

Clause 4.6(5) states as follows;

*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 of matters required to be taken into consideration by the Secretary before granting concurrence.”

The noncompliance with cl 26 of SEPP Seniors does not raise any matter of significance for State and Regional Planning, nor does it conflict with any State planning policies or Ministerial directives.

There is not considered to be a public benefit of maintaining the development standard as the proposed serviced self-care & CGC development is consistent with the strategic planning objectives of the North District Plan in particular;

**Planning Priority N3** – providing services and social infrastructure to meet peoples changing needs. In this regard the Plan recognises that the Northern District is expected to have a 47% increase in the 65-84 age group and an 85% increase in people aged over 85. This will increase the need for serviced self-care seniors housing which is particularly suited to aging in place.

**Planning Priority N5** – Providing housing supply, choice and affordability, with access to jobs, services and public transport. The Plan notes that housing must be located in the right places to meet different demands. As noted above the Watermark retirement village is an ideal location as the serviced self-care housing and shared club/resident facilities can be co-located in an established residential area in close proximity to public transport and facilities in Chatswood CBD and also Royal North Shore Hospital at Artarmon.

## 4.0 Conclusion

- 4.1 The proposed development is considered to comply with the cl 26 of SEPP Seniors as the site is located at a distance less than 400m from a public bus stop that is serviced Monday to Saturday inclusive, but no public bus service currently exist on Sundays. This is consistent with SEPP cl 26(2)(iii) provisions which only require weekday public transport services.

However, there is some question raised in relation to an unrelated “infill” seniors living DA that the SEPP cl 26(2)(iii) should be interpreted that the 8am-12noon public transport service is required 7 days a week, while the afternoon 12noon-6pm return trip is only required to be provided 5 days a week Monday to Friday inclusive.

It is our view that the SEPP seniors wording is clear and it is illogical to interpret the Clause 26 in this mixed-up way. However, to ensure that there is no legal impediment for the Consent Authority to approve the DA (should it be determined one is necessary), this clause 4.6 request for variation to cl 26 development standard relating to numerical provisions for public transport (bus) services has been prepared on a “without prejudice” and accompanies the DA for 106 serviced self-care seniors housing units.

- 4.2 Requiring strict compliance would not result in a better outcome and would in fact prevent the site from being re-developed as a new and improved facility for Chatswood Golf Club and would result in a poor planning outcome with no tangible social benefit to the locality due to the loss of 106 serviced self-care housing units which allow seniors/disabled people to age in place. The redevelopment of the Clubhouse and future upgrades to the golf course to improve accessibility are financially reliant upon the co-location with the retirement village. The proposal involves a shared use facilitated through a 150-year lease agreement with Watermark Living so that the CGC will have the benefit of both new and improved Club facilities and moreover have financial certainty without reliance on other less socially appropriate funding sources such as poker machines.
- 4.3 The contravention of cl26 does not hinder the ability of the mixed use development proposal to achieve the objectives of the RE2 private recreational zone and it is considered that compliance with the standard is unnecessary for the following reasons:
- the proposed development meets the underlying objective of cl 26 which is to ensure that residents of seniors living housing permitted by the SEPP will have reasonable access to facilities and services they may reasonably require. In that regard there are daily public bus services (except Sundays) available from the nearby bus stop on Beaconsfield Road which is supplemented by the “On Demand” weekday public bus service and 7 days/week private transport service which is separately required for serviced self-care housing developments that adjoin urban lands pursuant to SEPP clause 43 and provision for 2 x electric “share cars” to be provided in the basement carpark which are particularly suited to out of hours personal door to door trips. The combined public and private transport provisions for the development are practical and more suited to the “serviced self-care” housing which is intended to facilitate aging in place.
  - It is considered that the provision of a daily (village operated) mini-van service to Chatswood CBD is a better outcome and safer alternative to public transport for the residents of the facility as it will enable residents to be transported under the supervision and with the assistance of village staff or family/friends of the resident;
  - The provision of an electric community electric “share car” on Basement Levels 1 & 2 offers a private transport option for “out of hours” private use trips for active seniors who may wish to minimise car ownership and/or practice social distancing.
  - The proposal for a mixed use development will facilitate improved club facilities, provide long term financial certainty for the CGC which has operated on the site harmoniously with the surrounding residential properties since 1955;
  - A large portion of the relevant services and facilities required by residents will be available within the village/ club facility;
  - It is considered that no public benefit would be served by compliance with the standard;
  - Contravention of the development standard will not raise any matter of significance for State or regional environmental planning;
  - No matters of State or regional planning would be affected by varying the standard.

Having consideration of the above, it is considered that strict compliance with cl 26 of SEPP Seniors is unreasonable and unnecessary in the circumstances of this case.

4.4 The written request incorporates several environmental planning grounds to justify the contravention of the standard in this particular case in order to adequately address the matters required to be demonstrated by cl 4.6(4)(i). The grounds relied upon include:

- A large number of services and facilities reasonably required by the village residents will be available within the mixed use development or where external services are required which cannot be delivered on site then appropriate access can be achieved by the private transport mini-van or use of the village electric “share cars” located in the basement which are particularly suited to residents desiring a safe/convenient “door to door” service;
- The non-compliance with the standard and the provision of a range of services on site for residents does not result in any significant adverse environmental impacts on surrounding properties in the locality. Infact the absence of a large rigid vehicle on Sundays and the reliance upon a smaller mini-van service, would result in reduced large bus movements in a quiet local street when families are more likely to be present.
- The proposed mixed use development fully satisfies the underlying intent of cl 26 which is to provide appropriate services and facilities to residents taking into account the type of housing proposed and the level of independence of the resident which is a concept acknowledged in *Principal Healthcare*;
- The proposed development is a better planning outcome;

4.5 The proposed mixed use development will make a significant contribution to the availability of this serviced self-care type of accommodation within the Willoughby Council area and will promote the social wellbeing of the community. The proposed development is considered to be consistent with the s1.3 Objects of the EP&A Act 1979 which, as relevant to this proposal, are to encourage:

- “(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*
- (ii) the promotion and co-ordination of the orderly and economic use and development of land,*
- (iii) the provision and maintenance of affordable housing”.*

4.6 We have assessed the proposed mixed use seniors housing development against the relevant statutory provisions of clause 4.6 of Willoughby LEP 2012 and prepared this request which provides justification that a requirement for 7 days public bus service, not the 6 days as provided, is unreasonable or unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to support a variation to SEPP Seniors Clause 26.

Accordingly, the justification within this written request is consider to be well founded.