

Proposed Affordable Housing Development

1 – 5 Rainbow Road, Mittagong

Amended Statement of Environmental Effects

14 February 2024

Ref: 21158/2/A

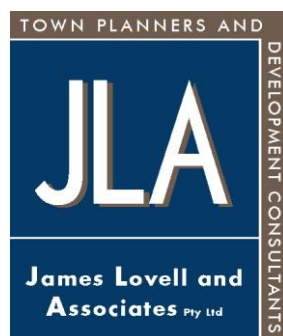


TABLE OF CONTENTS

1. INTRODUCTION	1
1.1 Preamble	1
1.2 Background	3
1.3 Council Assessment	5
1.4 Purpose	6
 2. SITE DESCRIPTION	 7
2.1 Site Details	7
2.2 Site Context	8
 3. PROPOSED DEVELOPMENT	 11
3.1 General Description	11
 4. SECTION 4.15 ASSESSMENT	 16
4.1 Environmental Planning Instruments	16
4.2 Proposed Environmental Planning Instruments	33
4.3 Development Control Plans	33
4.4 Planning Agreements	47
4.5 Impacts of the Development	47
4.6 Suitability of the Site	48
4.7 Public Interest	48
 5. CONCLUSION	 49

LIST OF ATTACHMENTS

Attachment A Request to Vary the Floor Space Ratio Control

1. INTRODUCTION

1.1 Preamble

This Amended Statement of Environmental Effects (SEE) has been prepared to accompany a Development Application (DA) to Wingecarribee Shire Council for an affordable housing development at No's 1 – 5 Rainbow Road, Mittagong.

The subject site is located on the northern side of Rainbow Road, approximately 80 metres to the east of Brewster Street. The site comprises three (3) adjoining allotments with a combined area of approximately 5,150.94m². The site is rectangular in shape with a combined frontage of approximately 80 metres to Rainbow Road.

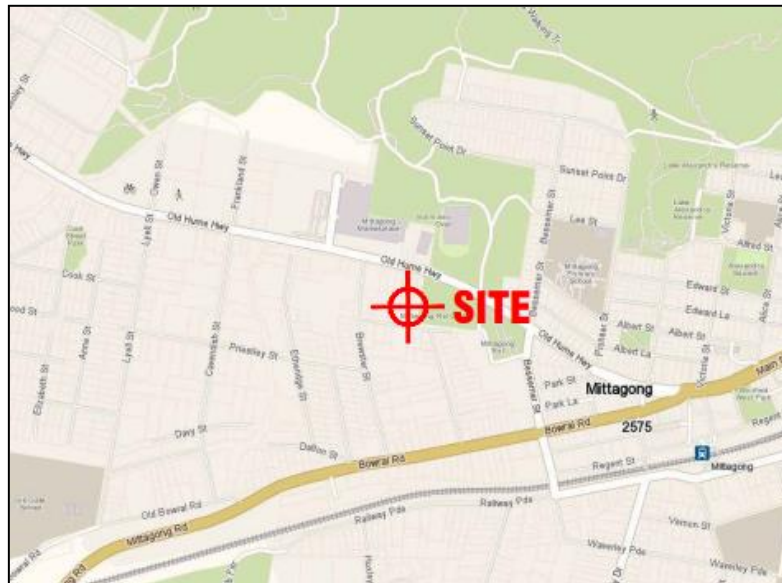


Figure 1: Location

The site is currently occupied by three (3) dwelling houses and associated structures. The individual dwelling houses are accessed via separate driveways extending to/from Rainbow Road.

The topography of the site is reasonably level, with a gentle fall towards the rear (north) of approximately 2 – 4 metres. The existing vegetation comprises a scattering of trees, shrubs and groundcovers, typical of a modified urban environment.

The proposed development (as amended) comprises the demolition of the existing structures, and the construction of an affordable housing development. The proposed development provides 50 apartments, comprising 10 x 1-bedroom apartments, 35 x 2-bedroom apartments, and 5 x 3-bedroom apartments.

Off-street car parking is proposed for 73 vehicles in a basement structure, accessed via a combined entry and exit only driveway located along the Rainbow Road frontage of the site.

The site is zoned R3 – Medium Density Residential pursuant to the Wingecarribee Local Environmental Plan (LEP) 2010, and *“residential flat buildings”* are permissible in the zone with the consent of Council. Further, the objectives of the zone include to provide for the housing needs of the community, and provide a variety of housing types, *“within a medium density residential environment”*.

The proposed development is made pursuant to the provisions of Part 2 of State Environmental Planning Policy (SEPP) (Housing) 2021. In that regard, forty (40) of the apartments (80%) will be maintained and managed by a *“registered community housing provider”* (Robsea Nominees Pty Ltd as Trustee for the TBG Affordable Rental Trust) as *“affordable housing”* for a period of at least 15 years. Further, the site is located within an accessible area pursuant to Clause 16 of the SEPP.

Finally, the *Wingecarribee Local Housing Strategy* (Amended July 2021) notes the following issues in relation to housing affordability:

Our community's housing tenure is influenced by housing availability and affordability. Over the last 20 years, housing in Australia and NSW in particular has become increasingly unaffordable.

In Wingecarribee, the median weekly rent (\$320) and median monthly mortgage repayments (\$1,950) are higher than the NSW average, while the median weekly household income (\$1,335) is lower than the State average. These numbers alone would suggest that housing affordability has the potential to be a significant issue in the Shire.

A better indication of housing affordability issues in Wingecarribee is ‘rental stress’, where rent represents more than 30% of the gross

household income. Some 10% of all households in the Shire meet this definition of rental stress, representing approximately 55% of all renting households. Alarming, the average waiting time for social housing in the Wingecarribee Shire is 224 days (general) and 13 days (priority).

Housing affordability is an issue that requires action from all levels of Government, the development industry and housing providers, and ensuring our community has equitable access to housing is a significant housing challenge for the Shire.

The proposed development will make a very important contribution to the availability of affordable housing in the local community, and directly promote *Planning Priority 2* to “Provide a greater mix of price points in the housing market to improve housing affordability, and work with community housing providers to increase the stock of social and community housing throughout the Shire”.

1.2 Background

The Applicant attended a pre-lodgment meeting with Council staff on 1 September 2021. The Minutes of the Meeting include “Town Planning Comments” which are considered in Table 1.2 as follows:

Table 1.2 – Pre-Lodgement Town Planning Comments	
Planning Comment	Response
The site is zoned R3 – Medium Density pursuant to the Wingecarribee LEP 2013, and residential flat buildings and affordable housing are permissible in the zone with the consent of Council.	Noted.
Council will advertise the DA and notify it to owners and occupants of surrounding properties and consider any submissions made regarding the proposed development.	Noted.
The land includes bush fire prone land, circumstances in which the DA should be accompanied by information demonstrating the proposed development conforms to the relevant specifications	The DA is accompanied by a <i>Bushfire Risk Assessment Report</i> which concludes that the proposed development can comply to the Deemed to Satisfy (DTS) provisions of AS3959-2018 - Construction of Buildings

and requirements of <i>Planning for Bushfire Protection</i> .	in Bushfire Prone Areas.
The adjoining land at No. 1A Rainbow Road accommodates a heritage item, and the DA should be accompanied by a Heritage Impact Statement.	The DA is accompanied by a <i>Heritage Impact Statement</i> which concludes that the proposed development will have no significant or adverse impacts on the heritage item adjoining the site to the east.
Council may refer the DA to NSW Police for review and comment.	Noted.
Council may require a Condition of Consent requiring the developer to provide a public footpath or footpaths and a pedestrian crossing or crossings to ensure satisfactory pedestrian access to nearby business premises in Zone B1, B2 of B4.	Noted.
The maximum floor space ratio for the development is 1:1, representing a gross floor area of 5,142m ² .	The proposed development (as amended) provides a gross floor area (excluding the basement level car parking) of 5,003.7m ² , representing a compliant FSR of 0.97:1 (refer to Attachment A).
Council is required to consider whether the design of the proposed development is compatible with the character of the local area. The maximum height of a residential flat building shall not exceed three storeys, the third storey being located within the roofline, and the roof pitch shall reflect the dominant roof forms of the existing streetscape.	The site is located within an established residential neighbourhood, currently characterised by a predominance of detached dwellings, with a scattering of townhouses and aged care facilities. The site is located within convenient walking distance of community, retail and recreation facilities, and the site is zoned R3 – Medium Density Residential pursuant to the Wingecarribee LEP 2013. The proposed development has been carefully designed to substantially maintain the amenity of the surrounding properties whilst implementing the transition in land use and building form consistent with the zoning of the site and surrounds. Further, the proposed development has been intentionally designed to incorporate design features and materials common

	within the Southern Highlands and the surrounding locality, including traditionally pitched roofs, roof terraces and dormers, covered verandahs and courtyards. The proposed development includes design elements intended to visually and physically reduce the building bulk and scale, including a strong base element, a recessed first floor level, and a lightweight upper level, substantially contained with the roof form. Finally, the proposed development includes the introduction of a substantially enhanced landscaped treatment, including 45 new endemic large trees, supporting a hierarchy of shrubs, groundcovers and grasses.
Council shall consider the proposed development's design quality when evaluated in accordance with the design quality principles set out in SEPP No. 65 and the Apartment Design Guide.	The DA is accompanied by a <i>SEPP 65 Design Verification Statement</i> which concludes that the proposed development achieves the design quality principles set out in Part 2 of the SEPP, and the accompanying Apartment Design Guide.
The proposed development is considered to be regionally significant development and the DA will be determined by the Southern Regional Planning Panel.	Noted.
The proposed development should be prepared with regard to the relevant provisions of the applicable environmental planning instruments and development control plans.	The relevant provisions of the applicable environmental planning instruments and development control plans are included in this SEE.

1.3 Council Assessment

On 23 August 2023, the Council wrote to the Applicant with a *"Request for Additional Information"*. The issues raised in the correspondence generally related to the provisions of the NSW Apartment Design Guide and the Wingecarribee Development Control Plan (DCP).

Further, the correspondence requested a series of additional documentation including a Crime Prevention Through Environmental Design (CPTED) Report, a Social Impact Assessment (SIA), a draft Subdivision Plan, a Flora and Fauna Assessment, a Waste Management Plan and additional clarification and/or details in relation to heritage, landscaping and engineering.

The Applicant has carefully considered the issues raised in the correspondence and made a series of amendments to the proposed development intended to improve the internal amenity, moderate the bulk and scale of the built form, minimise the impacts on the amenity of the public domain and surrounding properties, and enhance the landscaped setting of the site and surrounds.

Further, the DA is accompanied by a CPTED Report, a SIA, a draft Subdivision Plan, and additional clarification and/or details in relation to heritage, landscaping and engineering.

1.4 Purpose

This SEE has been prepared pursuant to the provisions of the *Environmental Planning and Assessment Act 1979* and accompanying *Regulation*. To that end, it:

- identifies the site and provides details of its locational context;
- describes the physical and operational characteristics of the proposed development;
- identifies the environmental planning instruments and policies that apply to the site and considers the proposed development against those that are relevant; and
- provides an assessment of the proposed development against the provisions of Section 4.15 of the *Environmental Planning and Assessment Act 1979*.

2. SITE DESCRIPTION

2.1 Site Details

The subject site formally comprises Lot 32 in Deposited Plan 9299, and Lots 141 and 142 in Deposited Plan 531051, and is commonly known as No's 1 – 5 Rainbow Road, Mittagong.

The site is located on the northern side of Rainbow Road, approximately 80 metres to the east of Brewster Street.

The site comprises three (3) adjoining allotments with a combined area of approximately 5,150.94m². The site is rectangular in shape with a combined frontage of approximately 80 metres to Rainbow Road.

The site is currently occupied by three (3) dwelling houses and associated structures. The individual dwelling houses are accessed via separate driveways extending to/from Rainbow Road.

The topography of the site is reasonably level, with a gentle fall towards the rear (north). The existing vegetation comprises a scattering of trees, shrubs and groundcovers, typical of a modified urban environment.



Photograph 1: Subject Site Viewed from Rainbow Road

2.2 Site Context

The site is located within an established residential neighbourhood, currently characterised by a predominance of detached dwellings, with a scattering of townhouses, aged care facilities

The existing buildings extend across multiple development eras, contributing to an eclectic mix of building forms and architectural styles.

The site is located within convenient walking distance of a multitude of community, retail and recreation facilities, including *Mittagong Marketplace*, *Mittagong RSL* and *Ironmiles Oval*.



Figure 2: Site Context

The site is adjoined to the north by a series of detached dwelling houses fronting Old Hume Highway. The existing dwellings are setback approximately 19 – 25 metres from the common boundary with the subject site.

The site is adjoined to the east by an expanse of open space accommodating *Chalybeate Springs*. The site is identified as a heritage item pursuant to Schedule 5 of the Wingecarribee LEP 2010.



Photograph 2: Adjoining Property to the East

The site is adjoined to the west by a detached dwelling house (No. 7 Rainbow Road) setback approximately 10 – 13 metres from Rainbow Road, and 2 metres from the common boundary with the subject site.



Photograph 3: Adjoining Property to the West (No. 7 Rainbow Road)

The existing development on the opposite side of Rainbow Road (to the south) comprises a series of detached dwelling houses and townhouses. The existing buildings are typically setback approximately 7 – 12 metres to Rainbow Road.



Photograph 4: Existing Development on the Opposite Side of Rainbow Road

3. PROPOSED DEVELOPMENT

3.1 General Description

The proposed development (as amended) is illustrated in the Architectural Plans prepared by *Coble Stephens Architects*, identified as Revision P, dated 15 December 2023.

The proposed development (as amended) comprises the demolition of the existing structures, and the construction of an affordable housing development. The proposed development provides 50 apartments, comprising 10 x 1-bedroom apartments, 35 x 2-bedroom apartments, and 5 x 3-bedroom apartments.

Further, forty (40) of the apartments (80%) will be maintained and managed by a *“registered community housing provider”* (*Robsea Nominees Pty Ltd as Trustee for the TBG Affordable Rental Trust*) as *“affordable housing”* for a period of at least 15 years.

Off-street car parking is proposed for 73 vehicles in a basement structure, accessed via a combined entry and exit driveway located along the Rainbow Road frontage of the site.

Further, the proposed development includes the introduction of a substantially enhanced landscaped treatment, including 45 new endemic large trees, supporting a hierarchy of shrubs, groundcovers and grasses.

Basement Level

The Basement Level (RL615.655 – RL617.015) provides off-street car parking for 73 vehicles, including 9 shared spaces and 9 visitor spaces. The Basement Level also provides eight (8) motorcycle/scooter spaces.

The Basement Level accommodates a garbage bin storage area, cleaner’s storeroom, general storage space and plant areas.

The Basement Level is accessed via a combined entry and exit driveway located along the Rainbow Road frontage of the site. The Basement Level also provides stair and lift access to the levels above.

Ground Floor Level

The Ground Floor Level (RL618.515 – RL619.975) accommodates 2 x 1-bedroom apartments, 13 x 2-bedroom apartments and 1 x 3-bedroom apartment. The individual apartments include private open space accessed directly to/from the main living rooms.

The Ground Floor Level includes a centralised communal terrace incorporating a BBQ area, community gym/activities area, play ground, and seating area. The communal terrace is conveniently accessed via the central lift and/or the pedestrian pathway extending through the central portion of the site.

First and Second Floor Levels

The First (RL621.715 – RL623.075) and Second (RL624.815 – RL626.175) Floor Levels accommodate 8 x 1-bedroom apartments, 22 x 2-bedroom apartments and 4 x 3-bedroom apartments.

Fourteen (14) of the apartments occupy the First Floor Level only, with the remaining 20 apartments comprising two (2) storey apartments internally connected between the First and Second Floor Levels. The individual apartments include private open space accessed directly to/from the main living rooms.

Building Form

The proposed development has been carefully designed to substantially maintain the amenity of the surrounding properties whilst implementing the transition in land use and building form consistent with the zoning of the site and surrounds.

Further, the proposed development has been intentionally designed to incorporate design features and materials common within the Southern Highlands and the surrounding locality, including traditionally pitched roofs, roof terraces and dormers, covered verandahs and courtyards.

The proposed development includes design elements intended to visually and physically reduce the building bulk and scale, including a strong base element, a recessed first floor level, and a lightweight upper level, substantially contained within the roof form.

Finally, the proposed development includes the introduction of a substantially enhanced landscaped treatment, including 45 new large endemic trees, supporting a hierarchy of shrubs, groundcovers and grasses.

External Materials and Finishes

The schedule of external materials and finishes includes a combination of off-form concrete walls, rendered walls, face brickwork, aluminium cladding, aluminium framed windows and doors, steel balustrades, granite paving, steel pergolas, and colorbond metal roofing.

Waste Management

The Basement Level accommodates a garbage bin storage area. The bins will be transported by the building management via a mechanical tug to the street frontage for collection purposes by private contractor. The building management will be responsible for returning the bins to the bin storage area after collection.

Landscaping

The proposed development includes the introduction of a new landscaped treatment, comprising a hierarchy of trees, shrubs, groundcovers and grasses.

The proposed tree planting includes 45 new trees with a mature height of 3 – 25 metres, with the new trees located within the setback to Rainbow Road, the setbacks to the rear and side boundaries, and within the central communal area.

The proposed trees are supplemented by 254 new shrubs within a mature height of 0.6 – 3.0 metres, with the shrubs extending along the entirety of the boundaries. Finally, the trees and shrubs are supplemented by a multitude of grasses and groundcovers.

The Landscaped Design Statement includes the following explanation of the intention of the proposed landscaping:

The site is adjoined to the east by an expanse of open space accommodating Chalybeate Springs which is identified as a heritage

item. As documented by Sue Rosen Associates in the Heritage Responses to RFI, 'Review of historic photos of the site indicate that there were eucalypts present around the boundary of the spring house. The existing trees along the shared boundary have been examined and it has been determined that the trees are largely a mix of exotic species that won't match well with the intent to return the setting to a more natural eucalypt 'woodland' evident in the primary sources.'

Accordingly in order to reinstate the site similar to the historic woodland setting of Chalybeate Springs, Corymbia maculata have been proposed as the dominate canopy species along the eastern boundary. These are combined with an understorey of native shrubs and grasses and groundcovers. The layered planting will provide sufficient screening of the proposed building. The locally native species were carefully selected in conjunction with the Arborist, and it is considered the proposed landscape design will integrate the site into the wider open space of the adjacent Chalybeate Springs. Similarly the generous side setback to the west with Eucalyptus as the dominate canopy species growing up to 20m high with screening underplanting will ensure privacy between the adjoining neighbour.

The proposed landscape design integrates within the existing streetscape with the retention of existing trees where possible and the introduction of additional trees and shrubs to maintain the leafy appearance of the street. The streetscape of Rainbow Road currently contains a mix of exotic and native trees. The opposite side of Rainbow Road in front of the subject site is lined with eucalypts. It is considered the site will be well integrated into the existing streetscape with the selection of native species such as Ceratopetalum gummiferum combined with Magnolias and Betula pendula which will provide autumn colour and winter sun.

The principles of safe design have been considered in the landscape design with pedestrian entries to the building being clearly defined. Open turf areas have been incorporated into the front of the site to reinforce the connection with the native woodland setting of Chalybeate Springs whilst ensuring there are clear sight lines from the ground floor apartments.

As discussed above, the landscape design has carefully considered the impact on the surrounding neighbouring properties and addressed this by providing increased generous deep soil zones along boundaries which ensures visual privacy and softens the bulk and scale of the proposed buildings. This has been achieved by the proposed planting of 45 endemic large trees and under planting of native species. This is almost double the council request of 1 large tree per 80m² of deep soil which is 23 large trees. The range of ground covers, shrubs and small trees will achieve various heights and screening which satisfies the objectives of the DCP.

Therefore, the proposed landscape design contributes to the development by improving the existing streetscape with additional plantings and reduces the impact on adjoining properties with generous setbacks and retaining significant trees where possible. It is considered the landscape design improves the design quality of the development and achieves council's desired future character of the area whilst respecting the adjoining heritage site of Chalybeate Springs.

Finally, the proposed landscaping has been designed to complement the architectural style of the development and enhance the internal amenity of the proposed apartments and associated communal and private open space.

4. SECTION 4.15 ASSESSMENT

The heads of consideration incorporated in Section 4.15 of the *Environmental Planning and Assessment Act 1979* comprise:

- any environmental planning instrument;
- any proposed instrument that is or has been the subject of public consultation and that has been notified to the consent authority;
- any development control plan;
- any planning agreement or draft planning agreement;
- any matters prescribed by the Regulation;
- the likely impacts of the development, including environmental impacts on both the natural and built environments, and the social and economic impacts in the locality;
- the suitability of the site for the development;
- any submissions made in accordance with the Act or the Regulations; and
- the public interest.

4.1 Environmental Planning Instruments

The following environmental planning instruments are relevant to the proposed development:

1. State Environmental Planning Policy (SEPP) (Resilience and Hazards) 2021;
2. State Environmental Planning Policy (SEPP) (Biodiversity and Conservation) 2021;
3. State Environmental Planning Policy (SEPP) (Housing) 2021;
4. State Environmental Planning Policy (SEPP) No. 65 – Design Quality of Residential Apartment Development; and
5. Wingecarribee Local Environmental Plan (LEP) 2010.

SEPP (Resilience and Hazards) 2021

Clause 4.6 specifies that a consent authority must not consent to the carrying out of development on land unless it has considered whether the land is, or is likely to be contaminated, and if the land is, or is likely to be contaminated, whether the land requires remediation before the land is developed for the proposed use.

The site is currently used for residential purposes, and evidently has not been zoned or used for industrial, agricultural or defense purposes at any time in the lands recent history.

In the circumstances, there is no evidence to suggest that the land is likely to be contaminated to the extent that would render it unsuitable for continued residential use.

SEPP (Biodiversity and Conservation) 2021

Part 8 of the SEPP relates to land within the Sydney drinking water catchment, and Clause 8.8 requires the consent authority to be satisfied that the proposed development will have a neutral or beneficial effect on water quality.

The DA is accompanied by *Concept Drainage Plans* which describe the proposed method of stormwater management on the site. Further, the DA is accompanied by a *Music Model Assessment & Drainage Concept Report* which concludes that *"the Neutral or Beneficial Effect criteria would be achieved for the proposed post development scenario given the treatment measures described in sections 2.1 and 2.2"*.

Finally, normal precautions will be taken during the construction of the proposed development to ensure there are no adverse impacts in terms of runoff and water quality.

SEPP (Housing) 2021

SEPP (Housing) 2021 generally aims to enabling the development of diverse housing types, encourage the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, ensure new housing development provides residents with a reasonable level of amenity, promote the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services, minimise adverse climate and environmental impacts, reinforce the importance of designing housing in a way that reflects and enhances its locality, support short-term rental accommodation as a home-sharing activity and contributor to local economies, and mitigate the loss of existing affordable rental housing.

Chapter 2 of the SEPP relates to *affordable housing* as defined in Clause 13, and Clause 16 specifies that Division 1 (In-fill affordable housing) applies to development if *"the development is permitted with consent under another environmental planning instrument"* and *"at least 20% of the gross floor area of the building resulting from the development will be used for the purposes of affordable housing"* and *"all or part of the development is within 800m walking distance of land within 1 or more of the B1 – Neighbourhood Centre, B2 – Local Centre, B4 – Mixed Use zones", or "an equivalent land use zone"*.

The proposed development (defined as a *"residential flat building"*) is permissible in the R3 – Medium Density Residential zone pursuant to the Wingecarribee LEP 2010.

Further, forty (40) of the apartments (80%) will be maintained and managed by a *"registered community housing provider"* (Robsea Nominees Pty Ltd as Trustee for the TBG Affordable Rental Trust) as *"affordable housing"* for a period of at least 15 years.

Finally, the site is located within approximately 115 metres walking distance of land zoned B4 – Mixed Use, and within approximately 345 metres of land zoned B5 – Business Development (which is considered *"an equivalent land use zone"*).

Clause 17 specifies a maximum floor space ratio (FSR) of 1:1 based on the FSR control of 0.5:1 pursuant to Section C3.4 of the Mittagong Township Development Control Plan (DCP), plus 0.5:1 based on 80% of the gross floor area of the building being used for affordable housing.

The proposed development (as amended) provides a gross floor area (excluding the basement level car parking) of 5,003.7m², representing a compliant FSR of 0.97:1.

Clause 19(f) specifies an off-street car parking requirement of 26 spaces which, if complied with, prevents the consent authority from requiring a more onerous standard.

In the event the additional car parking is included in the calculation of *"gross floor area"*, the proposed development provides a gross floor area of approximately 6,147.7m², representing an FSR of 1.19:1.

Alternatively, the proposed development generates an off-street car parking requirement of 72 spaces pursuant to the provisions of the Mittagong Township Development Control Plan (DCP).

In the event the additional car parking is included in the calculation of “gross floor area”, the proposed development provides a gross floor area of approximately 5018.7m², representing a compliant FSR of 0.97:1.

Irrespective, Section 4.15(3) of the *Environmental Planning and Assessment Act 1979* specifies that, if an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a DA does not comply with those standards:

- (a) *subsection (2) does not apply and the discretion of the consent authority under this section and section 4.16 is not limited as referred to in that subsection, and*
- (b) *a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.*

In the circumstances, the DA is accompanied by a “written request” to vary the FSR control pursuant to Clause 4.6 of the LEP (**Attachment A**). In this instance, the provision of basement level car parking facilitates a very significant improvement (compared to a fully compliant scheme with ground level car parking) in relation to the provision of landscaped area, including deep soil landscaping, the landscaped setting of the site and surrounds, the internal amenity of the apartments, the spatial separation from the property boundaries, and the amenity of the public domain and the surrounding properties, including the expanse of open space adjoining the site to the east.

Clause 19 of the SEPP specifies development standards, that if complied with, prevent the consent authority from requiring more onerous standards in relation to:

- (a) *a minimum site area of 450m²;*

The site encompasses a total area of approximately 5,150.94m².

- (b) *at least 35m² of landscaped area per dwelling;*

The proposed development provides a total landscaped area of approximately 2,461.8m², representing 49.24m² per dwelling.

- (d) *a deep soil zone of at least 15% of the site area, where each deep soil zone has minimum dimensions of 3 metres and, if practicable, at least 65% of deep soil zone is located at the rear of the site;*

The proposed development provides a total deep soil landscaped area of approximately 1,833.54m², representing 35.6% of the site area. Further, the deep soil area has a minimum width of 6 metres, and approximately 65% of the deep soil zone is located in the rear half of the site.

- (e) *living rooms and private open space in at least 70% of the dwellings receive at least 3 hours of direct solar access between 9am and 3pm in mid-winter;*

The living rooms and private open space of 39 apartments (78%) will receive a minimum of 3 hours sunlight between 9am and 3pm in mid-winter.

- (f) *for a development application made by a social housing provider for development on land in an accessible area—*
 (i) *for each dwelling containing 1 bedroom—at least 0.4 parking spaces, or*
 (ii) *for each dwelling containing 2 bedrooms—at least 0.5 parking spaces, or*
 (iii) *for each dwelling containing at least 3 bedrooms— at least 1 parking space;*

The proposed development generates an off-street car parking requirement of 26 spaces, and the proposed development provides 73 off-street car parking spaces.

- (h) *for development for the purposes of residential flat buildings—the minimum internal area specified in the Apartment Design Guide for each type of apartment;*

The Apartment Design Guide (APD) recommends apartment sizes of 50m² for a 1-bedroom apartment, 70m² for a 2-bedroom apartment and 90m² for a 3-bedroom apartment.

The 1-bedroom apartments have floor areas of 50.03m² – 74.71m², the 2-bedroom apartments have floor areas of 70m.13² – 114m², and the 3-bedroom apartments have floor areas of 106m² – 117.16m².

Clause 19 requires the consent authority to consider the extent to which the proposed development is not inconsistent with the provisions of *Seniors Living Policy: Urban Design Guidelines for Infill Development* ("the Guidelines").

The relevant provisions of the *Design Guidelines* are considered in Table 4.1.1 as follows:

Table 4.1.2 – Seniors Living Policy: Urban Design Guidelines for Infill Development		
Criteria	Proposed	Satisfactory
1. Responding to Context		
New development should respond to the overall existing and likely future character of the area.	The site and surrounds are zoned R3 – Medium Density Residential and the objectives of the zone include to provide for the housing needs of the community, and provide a variety of housing types, " <i>within a medium density residential environment</i> ". In that context, the proposed development is compatible with the existing and likely future character of the area in terms of overall building form and landscaped setting, including the expanse of open space adjoining the site to the east.	Yes
Buildings should have a good relationship to the street and contribute positively to the neighbourhood character.	The proposed development and associated landscaping will make an appropriate visual contribution to the streetscape, and contribute positively to the neighbourhood character, including the likely future character as the locality transitions towards medium density housing consistent with the zoning of the site and	Yes

	surrounds.	
2. Site Planning and Design		
Site design should optimize internal amenity and minimise impacts on neighbours.	The site design optimizes internal amenity and minimises the potential impacts on surrounding land.	Yes
Maximise the number of dwellings with frontage to a public street.	The proposed development includes a significant number of apartments with a frontage to Rainbow Road.	Yes
Development towards the rear of the site should limit the impacts on adjoining properties.	The development towards the rear of the site complies with the applicable building height control, and the spatial separation and intervening landscaping will mitigate the potential impacts on the adjoining properties.	Yes
Design and orientate dwellings to respond to environmental conditions.	The individual apartments have been designed and orientated to address the street and maximise solar penetration to the north facing apartments and associated communal and private open space.	Yes
Maintain existing patterns and character of gardens and trees.	The proposed development includes the introduction of a new landscaped treatment, comprising a hierarchy of trees, shrubs, groundcovers and grasses. The proposed tree planting includes 45 new large endemic trees with a mature height of 3 – 25 metres, with the new trees located within the setback to Rainbow Road, the setbacks to the rear and side boundaries, and within the central communal area.	Yes
Improve amenity by increasing the proportion of landscaped area.	The proposed development provides substantially more deep soil landscaping than required under the SEPP.	Yes

Provide deep soil zones to absorb run-off and sustain vegetation, including large trees.	The proposed development provides substantially more landscaped area than required under the SEPP, and the proposed landscaping includes a total of 45 new large endemic trees with a mature height of 3 – 25 metres.	Yes
Minimise the amount of space occupied by driveways, garages and approaches to garages.	The off-street car parking is provided within a basement structure, and the driveway widths have been minimised.	Yes
3. Impacts on Streetscape		
New developments should present attractively to the street and complement surrounding dwellings.	The proposed development and associated landscaping will make an appropriate visual contribution to the streetscape, and contribute positively to the neighbourhood character, including the likely future character as the locality transitions towards medium density housing consistent with the zoning of the site and surrounds.	Yes
Locate and design new development to be sympathetic to existing streetscape patterns, and provide a front setback that relates to adjoining development.	The proposed development complies with the front boundary setback control, and will establish an appropriate building alignment for future development as the locality transitions towards medium density residential development.	Yes
Reduce the visual bulk by breaking up the buildings, articulating the facades, using variation in materials, colours and openings, setting back upper levels behind the front façade, breaking down the roof form into smaller elements, and avoiding uninterrupted building facades.	The proposed development includes design elements intended to visually and physically reduce the building bulk and scale, including a strong base element, a recessed first floor level, and a lightweight upper level, substantially contained with the roof form. Further, the proposed development includes a	Yes

	refined palette of external materials and finishes that are common within the locality, and complement the architectural style and composition of the building.	
Retain existing trees or use new planting in the front setback.	The proposed development includes the retention of existing trees and new tree planting within the setback to Rainbow Road.	Yes
Design dwellings at the front of the site to address the street.	The apartments at the front of the site are orientated towards Rainbow Road.	Yes
Provide a high quality transition between public and private domains.	The proposed development provides a high quality transition between the public and private domains.	Yes
Avoid long, straight driveways that are visually dominant.	The length of the driveways has been minimised.	Yes
Minimise the impact of basement entrances by reducing the width, or locating it to the side.	The width of the driveways has been minimised.	Yes
4. Impacts on Neighbours		
Design the relationship between buildings and open space to be consistent with the existing street pattern.	The proposed development complies with the front boundary setback control, and will establish an appropriate building alignment for future development. Further, the floor space has been separated into two (2) buildings to reduce the bulk and scale when viewed from surrounding properties, limit the length of the building adjacent to the side boundaries, and provide spatial separation to accommodate perimeter landscaping.	Yes
Protect neighbours amenity by carefully designing the bulk and scale.	The neighbours amenity has been reasonably maintained by separating the floor space into	Yes

	two (2) buildings to reduce the bulk and scale when viewed from surrounding properties, limiting the length of the building adjacent to the side boundaries, and providing spatial separation to accommodate perimeter landscaping.	
Design second storeys to reduce overlooking of neighbouring properties.	The potential overlooking of the surrounding properties has been moderated by limiting the openings along the side elevations and orientating the apartments towards the central communal open space and/or the front and rear boundaries where the boundary setbacks are increased, and new landscaping is proposed within the setback areas.	Yes
Use vegetation to provide a buffer between new and existing dwellings.	The existing and proposed landscaping will provide a buffer between the proposed development and the adjoining properties.	Yes
Protect sun access and ventilation to living areas and private open space of neighbouring dwellings.	The proposed development will have a relatively minor impact on the adjoining residential property to the west, with the impact limited to a short period during the morning in mid-winter. At all other times the shadows cast by the proposed development will fall within the boundaries of the site, the road reserve, or the adjoining non-residential property to the east. Further, all of the surrounding residential properties will maintain good solar access at all times of the year.	Yes

Use side setbacks to achieve privacy and soften the visual impact of new development by planting screen vegetation.	The proposed development (as amended) provides side boundary setbacks of 5.898 – 6.752 metres to the eastern and western boundaries at the ground floor level, with substantially increased setbacks at the first and second floor levels. Further, the floor space has been separated into two (2) buildings to reduce the length of the walls along the side boundaries. Finally, the proposed development includes new landscaping within the setback areas to mitigate overlooking and soften the visual impact of the built form.	Yes
Provide planting and trees between driveways and side fences to screen noise and reduce visual impacts.	New landscaping is proposed between the driveways and the side boundaries to screen noise and reduce visual impacts.	Yes
5. Internal Site Amenity		
Maximise solar access to living areas and private open space.	The living rooms and private open space of 39 apartments (78%) will receive a minimum of 3 hours sunlight between 9am and 3pm in min-winter.	Yes
Design dwelling entries so they are visible from the street or driveway.	The main pedestrian entrance will be visible from the street and the driveways.	Yes
Achieve adequate privacy between habitable rooms and driveways.	Adequate privacy is achieved through landscaping between the habitable rooms and the driveway.	Yes
Avoid large uninterrupted areas of hard surface.	There are no large areas of hard surface without any perimeter and/or internal landscaping.	Yes
Provide distinct and separate pedestrian and vehicular circulation.	The proposed development provides separate pedestrian and vehicular access points.	Yes

Give adequate consideration to safety and security.	The arrangement of apartments and open space ensures good natural surveillance of the public domain.	Yes
Provide generous private open space, orientated towards the north, east or west, uses screening for privacy, and provide paving and planted area at ground level.	The individual apartments are serviced by generous areas of private open space, incorporated a combination of paved areas and garden beds, with an orientation that will capture good access to sunlight.	Yes
Provide accessible communal open space incorporating mature trees and vegetation, and shared facilities such as seating and barbecues.	The proposed development includes generous areas of communal open space through the central portion of the site.	Yes

Clause 20 specifies that nothing in the SEPP affects the application of SEPP No. 65 – Design Quality of Residential Apartment Development. The relevant provisions of the SEPP are considered in Table 4.1.1 below.

Clause 21 specifies that the consent authority must be satisfied that the affordable housing component will be used for affordable housing, and managed by a registered community housing provider.

Forty (40) of the apartments (80%) will be maintained and managed by a *“registered community housing provider” (Robsea Nominees Pty Ltd as Trustee for the TBG Affordable Rental Trust) as “affordable housing”* for a period of at least 15 years.

SEPP No. 65 – Design Quality of Residential Apartment Development¹

SEPP No. 65 aims to improve the design quality of residential flat development in New South Wales (NSW). The Policy is to be considered in the assessment of residential flat buildings of three (3) or more storeys, incorporating at least four (4) apartments.

¹ State Environmental Planning Policy (SEPP) No. 65 – Design Quality of Residential Apartment Development continues to apply to the proposed development pursuant to the savings and transitional provision in Schedule 7A(8) of SEPP (Housing) 2021.

SEPP No. 65 requires consideration of a range of design quality principles including context and neighbourhood character, built form and scale, density, sustainability, landscape, amenity, housing diversity and social interaction, and aesthetics.

The “*design quality principles*” specified in Schedule 1 of the SEPP are considered in Table 4.1.2 as follows:

Table 4.1.2 – Schedule 1: Design Quality Principles	
Proposed Development	Satisfactory
Principle 1: Context and Neighbourhood Character	
The site is located within an established residential neighbourhood, currently characterised by a predominance of detached dwellings, with a scattering of townhouses, aged care facilities. The existing buildings extend across multiple development eras, contributing to an eclectic mix of building forms and architectural styles. The site is zoned R3 – Medium Density Residential pursuant to the Wingecarribee LEP 2010, and “ <i>residential flat buildings</i> ” are permissible in the zone with the consent of Council. Further, the objectives of the zone include to provide for the housing needs of the community, and provide a variety of housing types, “ <i>within a medium density residential environment</i> ”. the proposed development has been intentionally designed to incorporate design features and materials common within the Southern Highlands and the surrounding locality, including traditionally pitched roofs, roof terraces and dormers, covered verandahs and courtyards. The proposed development includes design elements intended to visually and physically reduce the building bulk and scale, including a strong base element, a recessed first floor level, and a lightweight upper level, substantially contained within the roof form. Finally, the proposed development includes the introduction of a substantially enhanced landscaped treatment, including 45 new large endemic trees, supporting a hierarchy of shrubs, groundcovers and grasses.	Yes
Principle 2: Built Form and Scale	
The proposed development complies with the applicable building height, FSR, landscaped area and deep soil zone controls. Further, the building form provides horizontal and vertical articulation, and reflects the topographic fall of the site towards the north. The proposed development includes design elements intended to visually and physically reduce the building bulk and scale, including a strong base element, a recessed first floor level, and a lightweight upper level,	Yes

substantially contained with the roof form. Further, the proposed development includes the introduction of a substantially enhanced landscaped treatment, including 45 new large endemic trees, supporting a hierarchy of shrubs, groundcovers and grasses.	
Principle 3: Density	
The proposed development complies with the applicable building height, FSR, landscaped area and deep soil zone controls. Further, the proposed development will provide for the housing needs of the community, and contribute to the variety and affordability of housing in the locality. Further, the site is zoned R3 – Medium Density Residential pursuant to the Wingecarribee LEP 2010, and the site is located within convenient walking distance of a multitude of community, retail and recreation facilities, including <i>Mittagong Marketplace</i> , <i>Mittagong RSL</i> and <i>Ironmiles Oval</i> . The proposed development has a density appropriate for its site and context in terms of the bulk, height, spatial separation, and the type and mix of accommodation. Further, the building form provides a very good level of internal amenity for future occupants while minimising the impacts on the amenity of surrounding land.	Yes
Principle 4: Sustainability	
The proposed development makes efficient use of natural resources, and the buildings also provide for the use of energy efficient building materials and achieve a compliant BASIX Score. The proposed development achieves solar access to 78% of the apartments to the private open space and main living areas for a minimum of 3 hours in mid-winter, and 82% of the apartments will be naturally cross-ventilated.	Yes
Principle 5: Landscape	
The existing vegetation comprises a scattering of trees, shrubs and groundcovers, typical of a modified urban environment. The proposed development includes the introduction of a new landscaped treatment, comprising a hierarchy of trees, shrubs, groundcovers and grasses. The proposed tree planting includes 45 new endemic large trees with a mature height of 3 – 25 metres, with the new trees located within the setback to Rainbow Road, the setbacks to the rear and side boundaries, and within the central communal area. The existing and proposed trees are supplemented by 254 new shrubs within a mature height of 0.6 – 3.0 metres, with the shrubs extending along the entirety of the boundaries. Finally, the trees and shrubs are supplemented by a multitude of grasses and groundcovers.	Yes
Principle 6: Amenity	

Amenity is optimised through appropriate room dimensions/shapes, sunlight access, natural ventilation, visual and acoustic privacy, storage, indoor/outdoor space, efficient layouts/service areas, outlook and access. Further, the proposed development achieves solar access to 78% of the apartments to the private open space and main living areas for a minimum of 3 hours in mid-winter, and 82% of the apartments will be naturally cross-ventilated. In summary, the proposed development provides appropriate room dimensions and shapes, access to sunlight, natural ventilation, visual and acoustic privacy, storage, indoor and outdoor space, efficient layouts and service areas, outlook, and ease of access for all age groups and degrees of mobility.	Yes
Principle 7: Safety	
The proposed development will substantially improve casual surveillance of the public domain, with additional apartments orientated towards the public domain. Further, the proposed development provides defined points of entry, and separate pedestrian and vehicular access points. The entry lobby and access to the car parking facilities will be security controlled.	Yes
Principle 8: Housing Diversity and Social Interaction	
The proposed development is made pursuant to the provisions of Part 2 of SEPP (Housing) 2021. In that regard, forty (40) of the apartments (80%) will be maintained and managed by a <i>"registered community housing provider"</i> (Robsea Nominees Pty Ltd as Trustee for the TBG Affordable Rental Trust) as <i>"affordable housing"</i> for a period of at least 15 years. Further, the site is located within an accessible area pursuant to Clause 16 of the SEPP. The proposed development includes a mix of apartments sizes and types, and generous communal facilities to facilitate social interaction amongst residents.	Yes
Principle 9: Aesthetics	
The proposed development has been intentionally designed to incorporate design features and materials common within the Southern Highlands and the surrounding locality, including traditionally pitched roofs, roof terraces and dormers, covered verandahs and courtyards. The proposed development includes design elements intended to visually and physically reduce the building bulk and scale, including a strong base element, a recessed first floor level, and a lightweight upper level, substantially contained with the roof form. The proposed development includes a refined palette of materials and finishes, intended to complement the architectural style and form of the building.	Yes

Clause 28(2) of the Policy specifies that the consent authority is to take into consideration the *"Apartment Design Guide"* (ADG). The ADG is generally intended to *"achieve better design and planning for residential apartment development, by providing benchmarks for designing and assessing these developments"*.

The DA is accompanied by a *SEPP 65 Design Verification Statement* which states that *"Pursuant to Clause 50 (1A) of the Environmental Planning and Assessment Regulation 2000, effective from July 26 2003; I hereby declare that I am a qualified designer, which means a person registered as an architect in accordance with the Architects Act 1921 as defined by Clause 3 of the Environmental Planning and Assessment Regulation 2000. I designed, or directed the design, of the residential flat development stated above and I affirm that the design achieves the design quality principles as set out in Part 2 of the State Environmental Planning Policy No 65 Design Quality of Residential Flat Development"*.

Wingecarribee LEP 2010

The site is zoned R3 – Medium Density pursuant to the Wingecarribee LEP 2010, and *"residential flat buildings"* are permissible in the zone with the consent of Council.

The proposed development is made pursuant to the provisions of Part 2 of SEPP (Housing) 2021, and the SEPP prevails to the extent of any inconsistency with the LEP.

Clause 2.3 of the LEP requires the consent authority to have regard to the objectives for development in the zone. The objectives of the zone relating to residential development are expressed 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.*

The proposed development is consistent with (or not antipathetic to) the relevant objectives of the zone on the basis that the proposed development will provide for the housing needs of the community, and contribute to the variety and affordability of housing within a medium density residential environment.

Clause 5.10 requires the consent authority to consider the impacts of the proposed development on any heritage items or heritage conservation area. The site is not identified as a heritage item, and is not located in a heritage conservation area.

The site is adjoined to the east by an expanse of open space accommodating *Chalybeate Springs*. The site is identified as a heritage item pursuant to Schedule 5.

The DA is accompanied by a *Heritage Impact Statement* which concludes that:

The existing dwellings at 1-5 Rainbow Road Mittagong do not meet the criteria to warrant individual heritage listing, nor does the nature of the streetscape warrant listing as a Heritage Conservation Area.

The Chalybeate Spring site is a rare site of high historical and research value. It holds aesthetic value primarily for its leafy, parkland setting, which was cultivated as a tourist attraction in the 19th and early 20th centuries.

The visual impact of the development on the setting and views of the Spring site have been mitigated through respectful design which has resulted in an unobtrusive architectural outcome. The use of a traditional hip roofline, third floor incorporated into the roof plane with 'dormer' style balconies, recessive and muted earthy tones, and the leafy setting ensures that the development will sit sympathetically in the streetscape.

The 2nd and 3rd floor and gable ends of the blocks of flats are stepped back from the E boundary to avoid dominating/blocking views to the Spring site. The visual impact of the development will be further minimised through the retention of the street trees, select mature trees at the boundaries, and the addition of masterplanned landscaping to provide screening and maintain the leafy setting of the northern side of Rainbow Road. The natural screening provided at the site also maintains the visual relationship with the parkland setting of the adjacent Chalybeate Spring site.

Clause 7.3 requires the consent authority to consider any detrimental impacts on existing drainage patterns or soil stability, the likely future

use of the land, the quality of the fill or excavated material, the amenity of neighbouring properties, the likelihood of disturbing relics, any adverse impacts on any waterway, drinking catchment or environmentally sensitive area, the potential impacts on any heritage items, and any measures to mitigate the impacts of the development.

The DA is accompanied by *Concept Drainage Plans* which demonstrate the proposed method of stormwater management for the site. The excavated material will be reused on site, and/or delivered to an approved waste management/recycling facility.

Further, the construction phase will be carefully managed in accordance with standard engineering and geotechnical advice to ensure there are no adverse impacts on the environment, the amenity of neighbouring properties, or water quality.

Finally, a search of the AHIMS provided by the New South Wales (NSW) Department of Environment and Heritage reveals that no “*Aboriginal sites*” or “*Aboriginal Places*” have been recorded within a 200 metre radius of the site.

The LEP does not incorporate any further controls of specific relevance to the proposed development.

4.2 Proposed Environmental Planning Instruments

There are no proposed environmental planning instruments of specific relevance to the proposed development.

4.3 Development Control Plans

The site is subject to the following development control plan:

1. Mittagong Township Development Control Plan (DCP).

Mittagong Township DCP

The Mittagong Township DCP is generally intended to supplement the provisions of the Wingecarribee LEP 2010, and provide more detailed objectives and controls to guide development.

Section 3.42 of the *Environmental Planning and Assessment Act 1979* specifies that the provisions of a DCP *"are not statutory requirements"*.

Further, Section 4.15(3A)(b) specifies that the consent authority *"is to be flexible in applying"* the provisions of a DCP, and *"allow reasonable alternative solutions that achieve the objectives of those standards for dealing with that aspect of the development"*.

Part A of the DCP applies to *All Land*, and Part C applies to *Residential Zoned Land*, including Section 3 which relates to *Medium Density Development*.

The relevant objectives and controls in Part A of the DCP are the subject of specialist documentation and assessment in relation to biodiversity, water management, vegetation management and landscaping, demolition, siting and design, safer by design, and construction standards and procedures.

The suite of controls incorporated in the DCP includes a floor space ratio (FSR) of 0.5:1. In this instance, SEPP (Housing) 2009 specifies an FSR of 1:1. The SEPP prevails to the extent of the inconsistency, and the FSR control in the DCP does not apply to the proposed development.

Further, SEPP (Housing) 2021 is specifically intended to, *inter alia*, *"(a) enabling the development of diverse housing types, including purpose-built rental housing"*, and *"(b) encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability"*.

The FSR control in the SEPP is specifically intended to encourage the development of *"affordable housing"*, and in this instance, forty (40) of the apartments (80%) will be maintained and managed by a *"registered community housing provider"* (Robsea Nominees Pty Ltd as Trustee for the TBG Affordable Rental Trust) as *"affordable housing"* for a period of at least 15 years.

In the circumstances, the suite of controls in the DCP must be considered in the context of the alternate controls in the SEPP, including the controls that are specifically intended to encourage the provision of *"affordable housing"*.

In that context, the relevant provisions² of the DCP are summarised and considered in Table 4.3.1 as follows:

Table 4.3.1 – Mittagong Township DCP		
Control	Proposed	Satisfactory
Section 3 – Medium Density Development		
C3.1.1 Objectives		
a) Wingecarribee Shire offers a variety of housing forms to cater for differing lifestyles and income levels;	a) The proposed development will contribute to the variety and affordability of housing within a medium density residential environment;	Yes
b) The provision of medium density housing does not adversely affect the amenity of existing and likely future residents of a locality;	b) The proposed development will not adversely affect the amenity of existing and future residents in the locality;	Yes
c) The design of medium density housing is appropriate to the existing residential streetscape;	c) The proposed development will contribute positively to the existing and likely future streetscape;	Yes
d) The proposed development takes advantage of any particular site features to maximum urban amenity and convenience for residents;	D) The proposed development responds to the site features to maximise urban amenity and convenience for residents;	Yes
e) Development is located within reasonable walking distance of public transport;	e) The site is located within convenient walking distance of public transport;	Yes
f) Development is located within reasonable walking distance of retail and service facilities.	f) The site is located within convenient walking distance of retail and service facilities.	Yes
C3.2 – Site Amalgamation and Minimum Frontage Requirements		
Council shall not grant consent to the carrying out of multi dwelling development unless it is satisfied that the allotment:		
(a) Has at least 25 metres of site frontage to a public street.	(a) The consolidated site has a frontage of approximately 80	Yes

² The relevant provisions of the DCP comprise those which relate specifically to the proposed development and/or those which would not normally be required and/or provided as Conditions of Consent and/or as part of a Construction Certificate.

	metres to Rainbow Road.	
(b) Does not unreasonably compromise the development potential of adjoining allotments.	(b) The proposed development does not compromise the development potential of any adjoining allotments.	Yes
(c) Allows for an acceptable level of amenity for residents and neighbours at the density proposed.	(c) The proposed development maintains a good level of amenity for residents and neighbours within a medium density residential environment.	Yes
C3.3 – Site Planning		
Council shall not grant consent to the carrying out of medium density housing development unless it is satisfied that the proposed development:		
(a) Maximises the number of dwellings that address a public street.	(a) The proposed development maximise the number of dwellings addressing Rainbow Road.	Yes
(b) Maintains existing street patterns to all streets.	(b) The proposed development and associated landscaping will make an appropriate visual contribution to the streetscape, including the likely future character as the locality transitions towards medium density housing consistent with the zoning of the site and surrounds.	Yes
(c) Avoids long, unbroken building forms greater than 25 metres in length.	(c) The proposed development provides extensive vertical and horizontal articulation and there are no unbroken building elements greater than 25 metres in length.	Yes
(d) Limits the proportion of dwellings more than 50 metres from a public street.	(d) The majority of dwellings are located within 50 metres of the front boundary.	Yes
(e) Uses landscape plantings to reduce the apparent bulk of new dwellings when viewed from the street or adjoining land.	(e) The proposed development includes the introduction of a new landscaped treatment, comprising a hierarchy of trees, shrubs, groundcovers and grasses.	Yes

(f) Minimises the dominance of areas set aside for the vehicular circulation and storage.	(f) The access driveways have been minimised in length and width.	Yes
(g) Ensures buildings are designed and sited so as to preserve the visual and acoustic privacy of the proposed dwellings and adjoining residential development.	(g) The proposed development appropriately maintains the visual and acoustic privacy of the adjoining dwellings to the north and west.	Yes
(h) Locates dwellings, driveways and open space so as to allow for the retention of existing natural and cultural features.	(h) The proposed development responds to the topographical features of the site.	Yes
(i) Orients and configures dwellings to achieve good solar access.	(i) The living rooms and private open space of 39 apartments (78%) will receive a minimum of 3 hours sunlight between 9am and 3pm in min-winter.	Yes
C3.4 – Density and Site Coverage		
Maximum floor space ratio of 0.5:1.	The proposed development complies with the FSR control in SEPP (Housing) 2021 (excluding the basement level car parking), and the SEPP prevails over the DCP.	Yes
Sub-zone C is the only location where residential flat buildings will be considered by Council.	The site is zoned R3 – Medium Density Residential and “residential flat buildings” are permissible in the zone with the consent of Council. Further, a DCP cannot prohibit a permissible from of development, and in any event, the proposed development is permissible pursuant to SEPP (Housing) 2021, and the SEPP prevails over the DCP.	Yes
Council will not grant consent to the carrying out of medium density housing unless it is satisfied that the proposed development:		
(a) Respects the maximum density permissible for medium density housing.	(a) The proposed development complies with the FSR control in SEPP (Housing) 2021 (excluding	Yes

	the basement level car parking), and the SEPP prevails over the DCP.	
C3.5 – Street Presentation		
Dwellings located closest to the street should maintain the same dwelling orientation as in the existing street pattern.	The proposed development maintains the dwelling orientation typical of Rainbow Road.	Yes
C3.6 – Front Setbacks		
(b) Front setbacks of new development will be consistent with those of the buildings immediately adjacent to the site and to those in the immediate vicinity.	(b) The proposed development complies with the front boundary setback control, and the building alignment is compatible with the existing and likely future character of development along Rainbow Road.	Yes
(c) Where properties immediately adjacent to the proposed development do not feature a consistent front setback: (i) If the difference between existing front setbacks is 2 metres or greater, new buildings can adopt a setback within the range established by adjacent buildings; (ii) If the difference between existing front setbacks is greater than two (2) metres, new buildings will adopt an average of the existing setbacks.	(c) The proposed development complies with the front boundary setback control, and the building alignment is compatible with the existing and likely future character of development along Rainbow Road.	Yes
(d) In the case where adjacent setbacks are not relevant, the minimum front setback for: (i) Residential flat buildings will generally be nine (9) metres.	(d) The proposed development provides a minimum front boundary setback of 9.0 metres.	Yes
C3.7 – Side Setbacks		
(b) Side setbacks will be generally consistent with those of existing development in the immediate adjacent context.	(b) The setbacks to the side boundaries are consistent with (greater than) the majority of the existing development in the surrounding locality.	Yes

(e) The standard minimum side setback for residential flat buildings is 1.5 metres plus the height of the building metres.	(e) The proposed development (as amended) provides side boundary setbacks of 5.898 – 6.752 metres to the eastern and western boundaries at the ground floor level, with the setbacks substantially increased at the first and second floor levels. The proposed setbacks provide spatial separation and sufficient space for landscaping, and the proposed development provides an appropriate building alignment in the context of the applicable FSR control of 1:1.	Yes
C3.8 – Rear Setbacks		
(b) Rear setbacks of new development will be generally consistent with those of existing adjacent development.	(b) The proposed development provides a minimum rear boundary setback of 8.0 metres, and the locality is characterised by a diversity of building alignments.	Yes
(c) In the case of inconsistent rear setbacks in the immediate context of the proposed development, consideration will be given to: (i) Existing vegetation and natural features on the site; (ii) Privacy of the proposed dwellings and existing dwellings; (iii) Solar access to the proposed dwellings and existing dwellings.	(c) The locality is characterised by a diversity of building alignments, and the proposed development reasonably maintains the amenity of the surrounding properties in relation to privacy and solar access. Further, the proposed development includes the introduction of a new landscaped treatment, comprising a hierarchy of trees, shrubs, groundcovers and grasses.	Yes
C9 – Building Height		
(b) The maximum height of a residential flat building shall not exceed three (3) storeys in height, the third storey being located within the roofline.	(b) The proposed development complies with the 12 metre and 3-storeys building height controls. The proposed development includes design elements intended to visually and	Yes

	physically reduce the building bulk and scale, including a strong base element, a recessed first floor level, and a lightweight upper level, substantially contained with the roof form.	
(d) The roof pitch shall reflect the dominant roof forms of the existing streetscape.	(d) The locality is characterised by a diversity of roof forms, and the pitched roof pitch is compatible with the existing streetscape.	Yes
C3.10 – Dwelling Orientation		
(a) A living area and 50% of the primary private open space of that dwelling must receive a minimum of 3 hours of direct sunlight on June 21st.	(a) The proposed development achieves solar access to 78% of the apartments to the private open space and main living areas for a minimum of 3 hours in mid-winter,	Yes
(b) The solar access currently enjoyed in living areas and 50% of the primary private open space of adjacent dwellings so be less than 3 hours of direct sunlight on June 21st.	(b) The overshadowing impacts of the proposed development are limited to the adjoining property to the west, for a short period during the morning in mid-winter. The adjoining dwelling and yard area will retain substantially more than 3 hours of direct sunlight on June 21st.	Yes
C3.11 – Building Design		
(a) The design and arrangement of the buildings is to consider the natural features of the site such as slope, vegetation, aspect, drainage and the like.	(a) The proposed development responds to the topographical features of the site.	Yes
(b) Buildings shall be designed and sited to be energy efficient, and landscaping shall also be designed to increase the energy efficiency.	(b) The proposed development makes efficient use of natural resources, and the buildings also provide for the use of energy efficient building materials and achieve a compliant BASIX Score. Further, the proposed development achieves solar access to 78% of the apartments	Yes

	to the private open space and main living areas for a minimum of 3 hours in mid-winter, and 82% of the apartments will be naturally cross-ventilated.	
(c) Wherever practicable, buildings shall be orientated to the north.	(c) The proposed development maximises the number of dwellings with a northern orientation.	Yes
(d) The bulk, scale, height, dwelling type, and construction material of the development shall be compatible with, and not affect the amenity of, existing or future residential development in the vicinity.	(d) The proposed development has been carefully designed to substantially maintain the amenity of the surrounding properties whilst implementing the transition in land use and building form consistent with the zoning of the site and surrounds.	Yes
(e) Consideration should be given to the effect of shade on adjoining properties.	(e) The adjoining properties will maintain good solar access at all times of the year.	Yes
(f) Provide attractive on-site visual variation by use of staggered building setbacks, variation of roof lines, curved driveways and access roads, landscaping and the like.	(f) The building form provides horizontal and vertical articulation, variation in the roof lines, curved driveways and extensive new landscaping.	Yes
(g) Dwellings should not be identical in design and façade treatment.	(g) The dwellings are not identical in design or façade treatment.	Yes
(h) All buildings shall be generally of brick, brick veneer or masonry construction, with a proportion of the external cladding as a feature material.	(h) The schedule of external materials and finishes includes a combination of off-form concrete walls, rendered walls, face brickwork and aluminium cladding.	Yes
(i) Windows of habitable rooms shall be screened or adequately separated from communal areas, windows of other dwellings and adjoining private open space.	(i) The windows of habitable rooms are appropriately screened or separated from communal areas, and the windows and adjoining private open space.	Yes
(j) Buildings shall be sited to	(j) The proposed development	Yes

ensure that courtyard areas receive direct sunlight during the major part of daylight hours.	achieves solar access to 78% of the apartments to the private open space and main living areas for a minimum of 3 hours in mid-winter.	
(k) Courtyard walls, walls of buildings, carport screen walls are acceptable screening.	(k) The courtyard and building walls assist in providing privacy.	Yes
(l) A balcony shall not encroach more than 2 metres or 25 per cent on the setback to the front, rear and side boundaries.	(l) The balconies do not encroach more than 2 metres or 25 per cent into the boundary setbacks.	Yes
(m) Living areas and private open spaces shall be located towards the north and west.	(m) The majority of the living areas and private open space are orientated towards the north.	Yes
(n) Bedrooms, kitchens and utility rooms shall receive less solar access.	(n) The bedrooms, kitchens and utility rooms generally receive less solar access than the main living rooms.	Yes
C3.12 – Dwelling Mix		
(a) Multi dwelling housing of more than eight (8) dwellings should provide a mix of dwelling sizes, both in terms of both the number of bedrooms and the size of the rooms.	(a) The proposed development provides a mix of apartment types in terms of the number of bedrooms and the size of bedrooms.	Yes
(b) Provide a variety of private open space areas.	(b) The proposed development provides a variety of private open space areas.	Yes
(c) Buildings should be arranged to maximise resident amenity and minimise adverse streetscape impacts.	(c) The proposed development maximises resident amenity and minimises adverse streetscape impacts.	Yes
C3.13 – Privacy		
(a) Design and locate windows to reduce direct overlooking into an adjoining dwelling.	(a) The windows along the side elevations have been limited, and the spatial separation and proposed landscaping will further mitigate overlooking of the surrounding properties.	Yes
(b) Where a transparent window	(b) The windows at the second	Yes

in a second storey is to be located less than 9 metres from an adjoining dwelling, the window must: (i) be offset from the edge of any windows in the adjoining dwelling by a distance of 0.5 metres; or (ii) have a sill height of at least 1.7 metres above the floor or have fixed obscure glazing in any part of the window less than 1.7 metres above the floor.	floor level are setback in excess of 9 metres from an adjoining dwelling.	
C3.14 – Materials and Finishes		
Materials and colours should be sympathetic with other buildings in the vicinity.	The proposed development has been intentionally designed to incorporate design features and materials common within the Southern Highlands.	Yes
The use of zincalume is not permitted and galvanised steel requires Council consent.	The schedule of materials and finishes does not include zincalume or galvanised steel.	Yes
C3.15 – Landscaped Open Space		
(a) Fifty per cent (50%) of the site shall comprise Open Space and be landscaped.	The proposed development complies with the landscaped area control in SEPP (Housing) 2021, and the SEPP prevails over the DCP.	Yes
(b) Landscaping shall be in accordance with a fully documented Landscape Plan.	(b) The DA is accompanied by a fully documented Landscape Plan.	Yes
(c) The Open Space shall include outdoor entertainment areas for resident use.	(c) The Ground Floor Level includes a centralised communal terrace incorporating a BBQ area, community gym/activities area, play ground, and seating area.	Yes
(d) All dwellings shall have private open space.	(d) All of the dwellings have private open space.	Yes
(f) All ground floor dwellings shall provide a minimum private open space area of 30m ² with a minimum length of 4 metres.	(f) The proposed development complies with the open space requirements of the Apartment Design Guide (ADG), and the	Yes

	provisions of the ADG prevail over the DCP.	
(g) All above ground floor dwellings shall provide a minimum private open space area of 15m ² with a minimum length of 3 metres.	(g) The proposed development complies with the open space requirements of the Apartment Design Guide (ADG), and the provisions of the ADG prevail over the DCP.	Yes
(h) Locate private open space to maximise solar access.	(h) The private open space has been sited and designed to maximise solar access.	Yes
(i) Private open space shall allow include a combination of hard surface, landscaping and deep soil areas.	(i) The private open space includes a combination of hard surface, landscaping and deep soil areas.	Yes
(j) The primary private open space should be adjacent to and accessible from the primary living area.	(j) The private open space is adjacent to and accessible from the main living rooms.	Yes
(k) Provide appropriate treatment of boundaries to the street frontages.	(k) The proposed development provides appropriate treatment to the street frontage.	Yes
(l) The area of the site between the building line and the street alignment shall be devoid of any structure, concrete area, or hard standing surface other than that which is necessary to gain access.	(l) The structures between the building line and the street alignment have been minimised.	Yes
(m) Landscape plantings shall not overshadow neighbouring properties.	(m) The landscaping will not contribute to any significant overshadowing of neighbouring properties.	Yes
(o) All plantings shall provide an immediate landscaping effect.	(o) The proposed landscaping will provide an immediate landscaping effect.	Yes
(p) Make provision for landscape management systems.	(p) The landscaped areas will incorporate appropriate management systems.	Yes
(r) Driveways shall be located a minimum of one (1) metre from any side boundary.	(r) The driveways are located more than one (1) metre from the side boundaries.	Yes

C3.16 – Car Parking, Garaging, Driveways and Common Paved Areas		
(a) Off street parking will be provided at a rate of 1 space per 1 and 2 bedroom dwellings, 2 spaces per 3 or more bedroom dwellings, and visitor parking at 1 space per 3 dwellings.	(a) The proposed development generates an off-street car parking requirement of 26 spaces, and the proposed development provides 73 off-street car parking spaces.	Yes
(b) Additional visitor parking spaces to be provided where on-street visitor parking is insufficient.	(b) The proposed development provides additional off-street car parking.	Yes
(c) The width of driveways will be limited to 25% of the frontage to a public street.	(c) The access driveways occupy less than 25% of the frontage to Rainbow Road.	Yes
(e) Where possible, changes in level will be used to provide basement or sub-basement garaging.	(e) The off-street car parking spaces are located within a basement.	Yes
(f) No parking space shall be provided between the building line and the frontage to the site, and at least one parking space per dwelling shall be a covered parking space.	(f) No parking spaces are proposed between the building line and the front boundary, and all of the parking spaces are covered.	Yes
(j) Driveway and verge crossing materials shall complement the current streetscape, and shall be preferably of compacted earth, gravel, stone cobble or plain concrete surface.	(j) The driveway and verge crossing materials will complement the streetscape and comprise plain concrete surfaces.	Yes
(k) Unrelieved 'gun barrel' driveways will not be permitted.	(k) The proposed development does not include unrelieved 'gun barrel' driveways.	Yes
(l) Buildings with more than four car parking spaces shall allow vehicles to enter and exit the site in a forward direction.	(l) All vehicles will be able to enter and exit the site in a forward direction.	Yes
(m) Access driveways and manoeuvring areas shall be the minimum widths and dimensions as outlined in Council's relevant	(m) The access driveways and manoeuvring areas comply with the minimum widths and dimensions as outlined in	Yes

technical specifications.	Council's relevant technical specifications.	
C3.17 – Pedestrian Access		
(a) External common areas such as pathways and entrances shall be provided with appropriate artificial lighting.	(a) The external common areas will incorporate appropriate artificial lighting.	Yes
(b) Buildings adjacent to public streets or spaces are to be designed to allow casual surveillance and should have at least one habitable room window facing that area.	(b) The proposed development will improve casual surveillance of the public domain, with habitable room windows facing the street and the adjoining expanse of open space.	Yes
C3.18 – Waste Collection		
(a) Waste and recycling materials storage facilities shall be provided for individual bins or larger communal (or shared access) bins.	(a) A garbage bin storage area for larger bins is located within the basement.	Yes
(b) Waste and recycling receptacles are to be screened from any public road, public place or public open space.	(b) The garbage bin storage area is located within the basement and will not be visible from any public road, public place or public open space.	Yes
(c) Waste and recycling materials storage areas shall be located behind the front building line.	(c) The garbage bin storage area is located within the basement.	Yes
(d) Waste and recycling materials storage areas shall be adequately screened to minimise impacts for residents and neighbours.	(d) The garbage bin storage area is located within the basement.	Yes
(e) Where on-site collection is possible, provision for on-site manoeuvrability to enable vehicles to enter and leave the site in a forward motion.	(e) The bins will be transported by the building management to the street frontage for collection purposes and returned to the bin storage area after collection. Accordingly, on-site collection is not proposed.	Yes
C3.19 – Adaptable Housing		
(b) All dwellings located on the ground floor will be constructed to comply with not less than Class	(b) The ground floor dwellings will be constructed to comply with not less than Class C level of	Yes

C level of Australian Standard 4299 – Adaptable Housing.	Australian Standard 4299 – Adaptable Housing.	
--	---	--

4.4 Planning Agreements

There are no planning agreements of relevance to the proposed development.

4.5 Impacts of the Development

The proposed development has been carefully designed to substantially maintain the amenity of the surrounding properties whilst implementing the transition in land use and building form consistent with the zoning of the site and surrounds.

Further, the proposed development has been intentionally designed to incorporate design features and materials common within the Southern Highlands and the surrounding locality, including traditionally pitched roofs, roof terraces and dormers, covered verandahs and courtyards.

The proposed development includes design elements intended to visually and physically reduce the building bulk and scale, including a strong base element, a recessed first floor level, and a lightweight upper level, substantially contained with the roof form.

Finally, the proposed development includes the introduction of a substantially enhanced landscaped treatment, including 45 new endemic large trees, supporting a hierarchy of shrubs, groundcovers and grasses.

Further, the building form has been carefully designed to substantially preserve the amenity of the surrounding properties in terms of the key considerations of visual bulk, privacy, views and overshadowing.

Finally, to ensure that sediment laden waters are not released from the site during construction works, erosion and sediment control measures are to be established on the site and maintained during the demolition and construction phases of the proposed development.

4.6 Suitability of the Site

The site is located within an established residential neighbourhood, currently characterised by a predominance of detached dwellings, with a scattering of townhouses, aged care facilities

The site is located within convenient walking distance of a multitude of community, retail and recreation facilities, including *Mittagong Marketplace, Mittagong RSL and Ironmiles Oval*.

The site is zoned R3 – Medium Density Residential pursuant to the Wingecarribee LEP 2010, and *“residential flat buildings”* are permissible in the zone with the consent of Council.

Further, the objectives of the zone include to provide for the housing needs of the community, and provide a variety of housing types, *“within a medium density residential environment”*.

The proposed development will provide a very good level of amenity, and substantially preserve the amenity of the surrounding properties in terms of the key considerations of visual bulk, privacy, views and overshadowing.

4.7 Public Interest

The proposed development will make a very important contribution to the availability of affordable housing in the local community, and directly promote *Planning Priority 2* to *“Provide a greater mix of price points in the housing market to improve housing affordability, and work with community housing providers to increase the stock of social and community housing throughout the Shire”*.

5. CONCLUSION

The subject site is located on the northern side of Rainbow Road, approximately 80 metres to the east of Brewster Street. The site encompasses an area of approximately 5,150.94m², and is rectangular in shape with a frontage of approximately 80 metres to Rainbow Road.

The site is currently occupied by three (3) dwelling houses and associated structures. The individual dwelling houses are accessed via separate driveways extending to/from Rainbow Road.

The proposed development (as amended) comprises the demolition of the existing structures, and the construction of an affordable housing development. The proposed development provides 50 apartments, comprising 10 x 1-bedroom apartments, 35 x 2-bedroom apartments, and 5 x 3-bedroom apartments.

Off-street car parking is proposed for 73 vehicles in a basement structure, accessed via a combined entry and exit driveway located along the Rainbow Road frontage of the site.

The site is zoned R3 – Medium Density Residential pursuant to the Wingecarribee LEP 2010, and *“residential flat buildings”* are permissible in the zone with the consent of Council. Further, the objectives of the zone include to provide for the housing needs of the community, and provide a variety of housing types, *“within a medium density residential environment”*.

The proposed development is made pursuant to the provisions of Part 2 of SEPP (Housing) 2021. In that regard, forty (40) of the apartments (80%) will be maintained and managed by a *“registered community housing provider”* (Robsea Nominees Pty Ltd as Trustee for the TBG Affordable Rental Trust) as *“affordable housing”* for a period of at least 15 years. Further, the site is located within an accessible area pursuant to Clause 16 of the SEPP.

The proposed development will make a very important contribution to the availability of affordable housing in the local community, and directly promote *Planning Priority 2* to *“Provide a greater mix of price points in the housing market to improve housing affordability, and work with*

community housing providers to increase the stock of social and community housing throughout the Shire”.

Finally, the proposed development will provide a very good level of amenity, and substantially preserve the amenity of the surrounding properties in terms of the key considerations of visual bulk, privacy, views and overshadowing.

ATTACHMENT A

Request to Vary the Floor Space Ratio Control

INTRODUCTION

The proposed development (as amended) comprises the demolition of the existing structures, and the construction of an affordable housing development. The proposed development provides 50 apartments, comprising 10 x 1-bedroom apartments, 35 x 2-bedroom apartments, and 5 x 3-bedroom apartments.

Off-street car parking is proposed for 73 vehicles in a basement structure, accessed via a combined entry and exit driveway located along the Rainbow Road frontage of the site.

The site is zoned R3 – Medium Density Residential pursuant to the Wingecarribee Local Environmental Plan (LEP) 2010, and *“residential flat buildings”* are permissible in the zone with the consent of Council. Further, the objectives of the zone include to provide for the housing needs of the community, and provide a variety of housing types, *“within a medium density residential environment”*.

The proposed development is made pursuant to the provisions of Part 2 of State Environmental Planning Policy (SEPP) (Housing) 2021. In that regard, forty (40) of the apartments (80%) will be maintained and managed by a *“registered community housing provider”* (Robsea Nominees Pty Ltd as Trustee for the TBG Affordable Rental Trust) as *“affordable housing”* for a period of at least 15 years. Further, the site is located within an accessible area pursuant to Clause 16 of the SEPP.

Clause 17 of the SEPP specifies a maximum floor space ratio (FSR) of 1:1 based on the FSR control of 0.5:1 pursuant to Section C3.4 of the Mittagong Township Development Control Plan (DCP), plus 0.5:1 based on 80% of the gross floor area of the building being used for affordable housing.

The proposed development (as amended) provides a gross floor area (excluding the basement level car parking) of 5,003.7m², representing a compliant FSR of 0.97:1.

Clause 19(f) specifies an off-street car parking requirement of 26 spaces which, if complied with, prevents the consent authority from requiring a more onerous standard.

In the event the additional car parking is included in the calculation of “gross floor area”, the proposed development provides a gross floor area of approximately 6,147.7m², representing an FSR of 1.19:1.

Alternatively, the proposed development generates an off-street car parking requirement of 72 spaces pursuant to the provisions of the Mittagong Township Development Control Plan (DCP).

In the event the additional car parking is included in the calculation of “gross floor area”, the proposed development provides a gross floor area of approximately 5018.7m², representing a compliant FSR of 0.97:1.

Irrespective, Section 4.15(3) of the *Environmental Planning and Assessment Act 1979* specifies that, if an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a DA does not comply with those standards:

- (a) *subsection (2) does not apply and the discretion of the consent authority under this section and section 4.16 is not limited as referred to in that subsection, and*
- (b) *a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.*

In the circumstances, the DA is accompanied by a “written request” to vary the FSR control in Clause 17 of the SEPP pursuant to Clause 4.6 of the Wingecaribee Local Environmental Plan (LEP) 2010.

CLAUSE 4.6 OF THE WINGECARRIBEE LEP 2010

Clause 4.6(1) is facultative and is intended to allow flexibility in applying development standards in appropriate circumstances.

Clause 4.6 does not directly or indirectly establish a test that non-compliance with a development standard should have a neutral or beneficial effect relative to a complying development (*Initial* at 87).

Clause 4.6(2) of the LEP specifies that “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”.

Clause 4.6(3) specifies that 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.*

The requirement in Clause 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard has a better environmental planning outcome than a development that complies with the development standard (*Initial* at 88).

Clause 4.6(4) specifies that 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.*

Clause 4.6(5) specifies that 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.*

CONTEXT AND FORMAT

This “written request” has been prepared having regard to “Varying development standards: A Guide” (August 2011), issued by the former Department of Planning, and relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248;*
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;*
- *Moskovich v Waverley Council [2016] NSWLEC 1015;*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;*
- *Hansimikali v Bayside Council [2019] NSWLEC 1353;*
- *Big Property Group Pty Ltd v Randwick City Council [2021] NSWLEC 1161; and*
- *HPG Mosman Projects Pty Ltd v Mosman Municipal Council [2021] NSWLEC 1243.*

“Varying development standards: A Guide” (August 2011) outlines the matters that need to be considered in DA’s involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ, in *Wehbe v Pittwater Council [2007] NSWLEC 827* to the extent that there are effectively five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary as follows:

1. The objectives and purposes of the standard are achieved notwithstanding non-compliance with the development standard.
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
4. The development standard has been 'virtually abandoned or destroyed' by the Councils own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

As Preston CJ, stated in *Wehbe*, the starting point with a SEPP No. 1 objection (now a Clause 4.6 variation) is to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances. The most commonly invoked 'way' to do this is to show that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard. The Applicant relies upon ground 1 in *Wehbe* to support its submission that compliance with the development standard is both unreasonable and unnecessary in the circumstances of this case.

In that regard, Preston CJ, in *Wehbe* 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 former Department of Planning which states that:

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.

It is important to emphasise that in properly reading *Wehbe*, an objection submitted does not necessarily need to satisfy all of the tests numbered 1 to 5, and referred to above. This is a common misconception. If the objection satisfies one of the tests, then it may be upheld by a Council, or the Court standing in its shoes. Irrespective, an objection can also satisfy a number of the referable tests.

In *Wehbe*, Preston CJ, states that there are three (3) matters that must be addressed before a consent authority (Council or the Court) can uphold an objection to a development standard as follows:

1. The consent authority needs to be satisfied the objection is well founded;
2. The consent authority needs to be satisfied that granting consent to the DA is consistent with the aims of the Policy; and
3. The consent authority needs to be satisfied as to further matters, including non-compliance in respect of significance for State and regional planning and the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

Further, it is noted that the consent authority has the power to grant consent to a variation to a development standard, irrespective of the numerical extent of variation (subject to some limitations not relevant to the present matter).

The decision of Pain J, in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* suggests that demonstrating that a development satisfies the objectives of the development standard is not necessarily sufficient, of itself, to justify a variation, and that it may be necessary to identify reasons particular to the circumstances of the proposed development on the subject site.

Further, Commissioner Tuor, in *Moskovich v Waverley Council* [2016] NSWLEC 1015, considered a DA which involved a relatively substantial variation to the FSR (65%) control. Some of the factors which convinced the Commissioner to uphold the Clause 4.6 variation request were the lack of environmental impact of the proposal, the characteristics of the site such as its steeply sloping topography and size, and its context which included existing adjacent buildings of greater height and bulk than the proposal.

The decision suggests that the requirement that the consent authority be satisfied the proposed development will be in the public interest because it is “consistent with” the objectives of the development standard and the zone, is not a requirement to “achieve” those objectives. It is a requirement that the development be ‘compatible’ with them or ‘capable of existing together in harmony’. It means “something less onerous than ‘achievement’”.

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ found that it is not necessary to demonstrate that the proposed development will achieve a “better environmental planning outcome for the site” relative to a development that complies with the development standard.

In *Hansimikali v Bayside Council* [2019] NSWLEC 1353, Commissioner O’Neill found that it is not necessary for the environmental planning grounds relied upon by the Applicant to be unique to the site.

Finally, in *Big Property Group Pty Ltd v Randwick City Council* [2021] NSWLEC 1161, Commissioner O’Neill found that “The desired future character of an area cannot be determined by the applicable development standards for height and FSR alone”.

Further, Commissioner O’Neill found that “The presumption that the development standards that control building envelopes determine the desired future character of an area is based upon a false notion that those building envelopes represent, or are derived from, a fixed three-dimensional masterplan of building envelopes for the area and the realisation of that masterplan will achieve the desired urban character”.

Similarly, in *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] NSWLEC 1243, Commissioner O’Neill found that “The desired

future character of an area is not determined and fixed by the applicable development standards for height and FSR, because they do not, alone, fix the realised building envelope for a site. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality (SJD DB2 at [62]-[63]). Development standards that determine building envelopes can only contribute to shaping the character of the locality (SJD DB2 at [53]-[54] and [59]-[60])”.

ASSESSMENT

Is the requirement a development standard?

The FSR control is a development standard and is not excluded from the operation of Clause 4.6 of the LEP.

What is the underlying object or purpose of the standard?

The objective of Division 1 of the SEPP (which incorporates the provisions of Clauses 17 and 19) is to *“facilitate the delivery of new infill affordable housing to meet the needs of very low, low and moderate income levels”*.

Further, the objectives of the FSR control are expressed in the LEP as follows:

- (a) to identify maximum floor space ratios in major centres,*
- (b) to ensure that floor space ratios provide development opportunities that are compatible with building heights,*
- (c) to encourage development in locations readily accessible to public transport and services that will provide opportunities for increased employment opportunities.*

In relation to the objective of Division 1 of the SEPP, the proposed development includes forty (40) apartments (80%) that will be maintained and managed by a *“registered community housing provider”* (Robsea Nominees Pty Ltd as Trustee for the TBG Affordable Rental Trust) as *“affordable housing”* for a period of at least 15 years. Further, the site is located within an accessible area pursuant to Clause 16 of the SEPP.

In relation to objective (a) of the LEP, the site is not specifically located within a major centre, however the site is located within an accessible area pursuant to Clause 16 of the SEPP.

In relation to objective (b) of the LEP, the proposed development complies with the applicable building height control, and the FSR control excluding the basement level car parking which does not contribute to the bulk or scale of the proposed development.

In relation to objective (c) of the LEP, the site is located within an accessible area pursuant to Clause 16 of the SEPP.

In summary, the proposed development achieves the objectives of the FSR control, notwithstanding the numerical variation that only arises if the additional car parking within the basement is included in the calculation of gross floor area.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The Department of Planning published "*Varying development standards: A Guide*" (August 2011), to outline the matters that need to be considered in Development Applications involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 to the extent that there are five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary.

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

The proposed development achieves the objectives of the FSR control, notwithstanding the numerical variation that only arises if the additional car parking within the basement is included in the calculation of gross floor area.

2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

The objectives and purpose of the FSR control remain relevant, and the proposed development achieves the objectives of the FSR control,

notwithstanding the numerical variation that only arises if the additional car parking within the basement is included in the calculation of gross floor area.

3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

The proposed development achieves the objectives of the FSR control, notwithstanding the numerical variation that only arises if the additional car parking within the basement is included in the calculation of gross floor area.

Further, strict compliance with the FSR control would require a reduction in the provision of off-street car parking and/or the relocation of the car parking within the basement to the ground floor level to the significant detriment of the overall quality of the proposed development.

4. *The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*

The FSR control has not specifically been abandoned or destroyed by the Council's actions. Irrespective, the Council has adopted an orderly and flexible approach to the implementation of development standards where the objectives of the control are achieved notwithstanding numerical variations.

Further, the objectives of Clause 4.6 of the LEP includes to provide *"an appropriate degree of flexibility in applying certain development standards to particular development"*.

5. *Compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

The zoning of the land remains relevant and appropriate. Irrespective, strict compliance with the FSR control would require a reduction in the provision of off-street car parking and/or the relocation of the car

parking within the basement to the ground floor level to the significant detriment of the overall quality of the proposed development.

Are there sufficient environmental planning grounds to justify contravening the development standard?

The adjectival phrase “*environmental planning*” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the *Environmental Planning and Assessment Act 1979*, including the objects set out in Section 1.3 (Initial at 23).

The objects of the Act are expressed as follows:

- (a) *to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) *to promote the orderly and economic use and development of land,*
- (d) *to promote the delivery and maintenance of affordable housing,*
- (e) *to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) *to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) *to promote good design and amenity of the built environment,*
- (h) *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) *to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) *to provide increased opportunity for community participation in environmental planning and assessment.*

The numerical variation to the FSR control that only arises if the additional car parking within the basement is included in the calculation of gross floor area is reasonable and appropriate in the particular circumstances on the basis that:

- the proposed development complies with the FSR control if the additional car parking within the basement is not included in the calculation of gross floor area;
- the proposed development complies with the FSR control if the car parking requirements in the Mittagong Township DCP are applied to the proposed development;
- the capacity of the Applicant to provide basement level car parking generates a very significant improvement (compared to a fully compliant scheme with ground level car parking) in relation to the provision of landscaped area, including deep soil landscaping;
- the SEPP requires a total landscaped area of 1,750m² (35m² per dwelling) and the proposed development provides a total landscaped area of 2,461.8m², representing 49.24m² per dwelling;
- the SEPP requires a deep soil landscaped area of 772.64m² (15% of the site area) and the proposed development provides a deep soil landscaped area of 1,833.54m², representing 35.6% of the site area;
- a fully compliant scheme could provide significantly less landscaped area, and the provision of ground level car parking would result in a material increase in hard stand paving relating to the associated driveways and car parking areas;
- the provision of basement level car parking provides opportunities to significantly increase the landscaped setbacks to the front, side and rear boundaries, and materially improve the landscaped setting of the site and surrounds;
- the provision of basement level car parking will materially reduce the impacts on the amenity of the adjoining properties arising from multiple vehicles using car parking facilities and access driveway at ground level;
- strict compliance with the FSR control would require a reduction in the provision of off-street car parking and/or the relocation of the car parking within the basement to the ground floor level to the significant detriment of the overall quality of the proposed development
- the proposed development will promote good design and the amenity of the built environment which is a recently incorporated object of the Act: *“(g) to promote good design and amenity of the built environment”*;
- the Council has adopted an orderly but flexible approach to the implementation of development standards, including when the objectives of the standard are achieved, notwithstanding numerical variations;

- the proposed development is consistent with, or not antipathetic to, the relevant objectives of the R3 – Medium Density Residential zone; and
- the proposed development achieves the objectives of the FSR notwithstanding the numerical variation that only arises if the additional car parking within the basement is included in the calculation of gross floor area.

Are there any matters of State or regional significance?

The numerical variation to the FSR control that only arises if the additional car parking within the basement is included in the calculation of gross floor area does not raise any matters of State or regional significance.

What is the public benefit of maintaining the standard?

The proposed development achieves the objectives of the FSR control that only arises if the additional car parking within the basement is included in the calculation of gross floor area.

In the circumstances, the proposed development does not affect the public benefit of maintaining compliance with the FSR control in other instances.

In that regard, the objectives of Clause 4.6 of the LEP includes to provide *“an appropriate degree of flexibility in applying certain development standards to particular development”*.

Any other matters?

There are no further matters of relevance to the numerical variation to the FSR control that only arises if the additional car parking within the basement is included in the calculation of gross floor area.

Zone Objectives and Public Interest

The site is zoned R3 – Medium Density pursuant to the Wingecarribee LEP 2010, and *“residential flat buildings”* are permissible in the zone with the consent of Council.

The proposed development is made pursuant to the provisions of Part 2 of SEPP (Housing) 2021, and the SEPP prevails to the extent of any inconsistency with the LEP.

The objectives of the zone relating to residential development are expressed 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.*

The proposed development is consistent with (or not antipathetic to) the relevant objectives of the zone on the basis that the proposed development will provide for the housing needs of the community, and contribute to the variety and affordability of housing within a medium density residential environment.

Further, the proposed development will serve the public interest by making a very important contribution to the availability of affordable housing in the local community, and directly promoting *Planning Priority 2* to “*Provide a greater mix of price points in the housing market to improve housing affordability, and work with community housing providers to increase the stock of social and community housing throughout the Shire*”.

CONCLUSION

The purpose of this submission is to formally request a variation in relation to the FSR control in Clause 17 of the SEPP (Housing) 2021 pursuant to Clause 4.6 of the Wingecarribee LEP 2010.

In general terms, strict compliance with the FSR control is unreasonable and unnecessary in the particular circumstances, and there are sufficient environmental planning grounds to justify the numerical variation that only arises if the additional car parking within the basement is included in the calculation of gross floor area.