



Clause 4.6 Variation – Development Standards – Minimum Sizes and Building Height (Clause 40 of SEPP (HSPD) 2004)

Proposed Residential Aged Care Home

5-7 Floribunda Avenue, Glenmore Park
(Lot 1 DP 825553)

Prepared by Willowtree Planning Pty Ltd on behalf
of Opal Aged Care c/- Pure Projects

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CLAUSE 4.6 VARIATION – DEVELOPMENT STANDARDS – MINIMUM SIZES AND BUILDING HEIGHT UNDER CLAUSE 40 OF SEPP (HSPD) 2004

Proposed Residential Aged Care Home – 5-7 Floribunda Avenue, Glenmore Park (Lot 1 DP 825553)

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CLAUSE 4.6 VARIATION – DEVELOPMENT STANDARDS – MINIMUM SIZES AND BUILDING HEIGHT UNDER CLAUSE 40 OF SEPP (HSPD) 2004

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PART A PRELIMINARY

1.1 INTRODUCTION

This Clause 4.6 Variation request has been prepared in support of the Development Application (DA) for the redevelopment of the Subject Site, for the purposes of the construction and operational use of a 142 bed Residential Aged Care Home (RACH) and Allied Health Facility, including earthworks; infrastructure & services; and associated landscaping and car parking. The proposed development would be located at 5-7 Floribunda Avenue, Glenmore Park (Lot 1 DP 825553), for which it would be located on a site area of approximately 10,000 m².

The proposed development forms non-compliances with Clause 40 Development Standards – Minimum Sizes and Building Height under *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (SEPP (HSPD) 2004).

This Clause 4.6 Variation request has therefore been prepared in accordance with the requirements of Clause 4.6 of the *Penrith Local Environmental Plan 2010* (PLEP2010), which includes the following objectives:

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

In accordance with Clause 4.6(3) of PLEP2010 Council is required to consider the following:

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.*

This request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standard.

1.2 PROPOSED NON-COMPLIANCES

1.2.1 Height in Zones where Residential Flat Buildings are not Permitted

1.2.1.1 Clause 40, Subclause 4(a) of SEPP (HSPD) 2004

Under the provisions of Clause 4.3 of PLEP2010, the Site is subject to a maximum building height of approximately 8.5 m; however, pursuant to the Development Standards under Clause 40(4)(a) of SEPP (HSPD) 2004, the Site is subject to a maximum height of approximately 8 m. It is noted, that the definitions of building height differ between each Environmental Planning Instrument; however, given, the DA is lodged pursuant to SEPP (HSPD) 2004, the SEPP prevails, for which an 8 m height would apply.

The proposed development would have a maximum height of approximately 8.2 m (which is only experienced in three (3) of the building's rooms), measured from the ceiling of the topmost floor of the building, to the ground level immediately below that point, in accordance with the definition bestowed in SEPP (HSPD) 2004. The proposed development would accrue an exceedance of the SEPP (HSPD)

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2004 8 m height control by approximately 0.2 m (or by 2.5%). The height plane drawing prepared by Calderflower Architecture within the Architectural Plans demonstrates the minor height contravention along the northern wing of the proposed building (refer to **Appendix 3**).

1.2.1.2 Clause 40, Subclause 4(b) of SEPP (HSPD) 2004

The proposed development adjoins existing residential development along the southeastern boundary of the Subject Site and a Community Centre along the northwestern boundary of the Subject Site, for which the proposed development would comprise a part three (3) storey and part two (2) storey RACH, forming a non-compliance with the Clause 40(4)(b) of SEPP (HSPD) 2004.

1.2.1.3 Clause 40, Subclause 4(c) of SEPP (HSPD) 2004

The proposed development includes provisions for more than one (1) storey to be located in the rear 25% of the site area, for which a non-compliance with Clause 40(4)(c) of SEPP (HSPD) 2004 is formed.

1.3 STRATEGIC PLANNING JUSTIFICATION

If the proposal was to include a compliant scheme in accordance with the Development Standards of SEPP (HSPD) 2004, the built-form potential of the Site would be under-realised. Hypothetically, if a height compliant scheme for the proposal was submitted, it would:

- Not contribute towards meeting the demand for additional RACH beds within the Penrith LGA, as identified in the Ageing Strategy, *A Metropolis of Three Cities*, and the *Western City District Plan*, by potentially resulting in a reduction in the provision of RACH beds at the Site;
- Threaten the commercial viability of the proposed development by reducing the number of residential units that can be delivered to the marketplace;
- Create fewer full-time equivalent jobs for staff working at the Site, resulting from fewer residents being able to reside at the Site;
- Fail to meet the Objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act) by making orderly and economic use of the Site for its full planning potential;
- Result in substantial clearing of the vegetation within the rear of the Site, thus, undermining the natural setting;
- Results in building setbacks that unreasonably impose amenity impacts on surrounding properties; and
- Not achieve a floor plate configuration conducive to aged care operations.

Notwithstanding, this Clause 4.6 Variation request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant Development Standards under SEPP (HSPD) 2004. It considers various planning controls, strategic planning objectives and existing characteristics of the Site, and concludes that the proposed non-compliances are the best means of achieving the objective, which encourages orderly and economic use and development of land under Section 1.3 of the EP&A Act.

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PART B THRESHOLDS THAT MUST BE MET

2.1 CLAUSE 4.6 OF PLEP2010

In accordance with Clause 4.6 of PLEP2010, Council is required to consider the following Subclauses:

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

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

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

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

(5) In deciding whether to grant concurrence, the Secretary must consider:

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

These matters are responded to in **Part D** of this Clause 4.6 Variation.

2.2 CASE LAW

Relevant case law on the application of the standard Local Environmental Plan Clause 4.6 provisions has established the following principles:

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, which emphasised that the proponent must address the following:
 - Compliance with the development standard is unreasonable and unnecessary in the circumstances;
 - There are sufficient environmental planning grounds to justify contravening the development standard;
 - The development is in the public interest;
 - The development is consistent with the objectives of the particular standard; and
 - The development is consistent with the objectives for development within the zone;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, which held that the degree of satisfaction required under Subclause 4.6(4) is a matter of discretion for the consent authority;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827, which emphasized the need to demonstrate that the objectives of the relevant development standard are nevertheless achieved, despite the numerical standard being exceeded. Justification is then to be provided on environmental planning grounds. Wehbe sets out five (5) ways in which numerical compliance with a development standard might be considered unreasonable or unnecessary as follows:

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1. The objectives of the standard are achieved notwithstanding the non-compliance with the 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 Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable; or
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

These matters are responded to in **Part D** of this Clause 4.6 Variation.

2.3 CASE LAW FOR INVOKING CLAUSE 4.6 DESPITE BEING SUBJECT TO THE PROVISIONS OF SEPP (HSPD) 2004

Clause 4.6(2) of PLEP2010 explicitly states, that Development Consent may be granted, even though a development contravenes a Development Standard. Clause 4.6(2) reads as follows:

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

Notwithstanding the abovementioned, Clause 40 of SEPP (HSPD) 2004 should be treated and assessed as a Development Standard. Clause 4.6(2) may therefore, be relied upon by the Proponent to obtain Development Consent, despite the proposal contravening the Development Standard prescribed in SEPP (HSPD) 2004. Relevant case law on the application of Clause 4.6 with regard to SEPP (HSPD) 2004 has been utilised in the following four (4) examples:

1. *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde* [2016] NSW LEC 153, considered that a Development Standard imposed by SEPP (HSPD) 2004 does not prevent Council from applying Clause 4.6 of an LEP and approving the Development Consent.
2. *Goergakis v North Sydney Council* [2004] NSW LEC 123, emphasises, that the Courts have held the view, that there is not any inconsistency between Clause 4.6 of a LEP and Clause 40 of SEPP (HSPD) 2004 and that Clause 40 of SEPP (HSPD) 2004 and Clause 4.6 of a LEP are to be read in conjunction with one another.
3. *Ku-ring-gai Council v Pathways Property Group Pty Ltd* [2018] NSW LEC 73, which Justice Moore (His Honour) of the Land and Environment Court, held that Clause 4.6 of the LEP is available to seek dispensation from the Development Standards in Clause 40 of SEPP (HSPD) 2004, for which consent was granted, even though it was in breach of the Development Standard.
4. *Binetter v Woollahra*, which adopted the same approach as the abovementioned in *Ku-ring-gai Council v Pathways Property Group Pty Ltd* [2018] NSW LEC 73.

Therefore, it is well established that a proponent (in this case Opal Aged Care), can rely on Clause 4.6 of an LEP to obtain consent for a development that exceeds the Development Standards in Clause 40 of SEPP (HSPD) 2004. The information provided hereunder considers the non-compliances arising with the Development Standards identified in **Sections 1.2.1.1-1.2.1.3** of this Variation request and the justification and reasoning behind each non-compliance.

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PART C THE STANDARDS BEING OBJECTED TO

3.1 CLAUSE 40 (DEVELOPMENT STANDARDS – MINIMUM SIZES AND BUILDING HEIGHT) OF STATE ENVIRONMENTAL PLANNING POLICY (HOUSING FOR SENIORS OR PEOPLE WITH A DISABILITY) 2004

The Development Standard requested to be varied is Clause 40 Development Standards – Minimum Sizes and Building Height under SEPP (HSPD) 2004. **Table 1** below outlines the proposed Clause 4.6 Variation to Clause 40 of SEPP (HSPD) 2004.

Table 1: Proposed Development Standard Variation in Relation to SEPP (HSPD) 2004			
Clause	SEPP (HSPD) 2004 Development Standard	Proposed Development Non-Compliance	Percentage of Variation
Clause 40	<i>Clause 40(4)(a) the height of all buildings in the proposed development must be 8 metres or less, and</i>	The proposed development seeks consent for a maximum building height of approximately 8.2 m (as defined under SEPP (HSPD) 2004. It is noted, that the minor height contravention is experienced in only three (3) rooms along the northern wing of the building proposed.	The proposed development would result in a variation of Subclause 40(4)(a) by 0.2 m or 2.5%.
Clause 40	<i>Clause 40(4)(b) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height, and</i>	The proposed development seeks consent for a building, which attains part three (3) storeys, adjoining existing residential development along the southeastern boundary of the Site.	The proposed development would result in a variation of Subclause 40(4)(b) by one (1) storey, or by 33%.
Clause 40	<i>Clause 40(4)(c) a building located in the rear 25% area of the site must not exceed 1 storey in height.</i>	The proposed development seeks consent for a building, which attains two (2) storeys of built-form within the rear 25% of the Site.	The proposed development would result in a variation of Subclause 40(4)(c) by one (1) storey, or by 33%.

3.2 HYPOTHETICAL COMPLIANT DESIGN

As mentioned above in **Section 1.3**, an alternative, hypothetical design compliant with Clause 40 would:

- Not contribute towards meeting the demand for additional RACH beds within the Penrith LGA, as identified in the Ageing Strategy, *A Metropolis of Three Cities*; and the *Western City District Plan*, by potentially resulting in a reduction in the provision of RACH beds at the Site;
- Threaten the commercial viability of the proposed development by reducing the number of residential units that can be delivered to the marketplace;

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- Create fewer full-time equivalent jobs for staff working at the Site, resulting from fewer residents being able to reside at the Site;
- Fail to meet the Objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act) by making orderly and economic use of the Site for its full planning potential;
- Result in substantial clearing of the vegetation within the rear of the Site, thus, undermining the natural setting;
- Results in building setbacks that unreasonably impose amenity impacts on surrounding properties; and
- Not achieve a floor plate configuration conducive to aged care operations.

Overall, an alternative, hypothetical design compliant with Clause 40 is not considered justified for the Site.

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PART D PROPOSED VARIATION TO CLAUSE 40 DEVELOPMENT STANDARDS – MINIMUM SIZES AND BUILDING HEIGHT

4.1 OBJECTIVES OF THE STANDARD

A key determination of the appropriateness of a Clause 4.6 Variation to a Development Standard is the proposed development's compliance with the underlying objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out. In accordance with the decision in *Wehbe v Pittwater Council*, the NSW Land and Environment Court recognised this as one of the ways in which a variation to Development Standards might be justified (refer to **Section 2.2** above).

Therefore, while the Site is subject to specified numerical controls for building height (including the number of storeys, by which a development can be), the objectives and underlying purpose behind these applicable Development Standards are considered to be viewed as basic issues for consideration in the development assessment process.

4.1.1 SEPP (HSPD) 2004

SEPP (HSPD) 2004 does not set out any specific objectives relating to the height of buildings; however, it is noted, that Clause 2 of SEPP (HSPD) 2004 sets out the following aims for the SEPP:

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

Clause 14 of SEPP (HSPD) 2004 also provides, that the objectives of the key development controls outlined within SEPP (HSPD) 2004 include:

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

The proposed development, for the purposes of a RACH, is considered to exemplify these aims and objectives by:

- Providing an additional 142 bed RACH for the locality;
- Make efficient use of a site, which has good access to utility services and infrastructure, as well as quality public and road transport infrastructure routes, and nearby commercial, retail and medical land uses;
- Be of a good quality design;
- Retaining significant vegetation;

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- Providing a high level of amenity within the Site;
- Responding to the unique characteristics of the Site, particularly its topography and surrounding urban streetscape and landscape character; and
- Include specific services and design elements suited to residents who are living with dementia alongside other residents.

4.2 OBJECTIVES OF THE ZONE

The Site is currently zoned R2 Low Density Residential pursuant to PLEP2010. The proposed development is consistent with the following R2 Low Density Residential zone objectives:

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

The proposed development satisfies the objective by providing for the housing needs of the local ageing community within a low density residential environment. Additionally, this is considered to be consistent with the strategic direction of *A Metropolis of Three Cities* and the *Western City District Plan*.

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

The proposed development, for the purposes of a RACH is permitted with consent within the R2 Low Density Residential zone, for which it would enable a land use, that provides a facility and service that meets the day to day needs of its future residents. Overall, the proposed development would adhere to the zone objective.

- *To promote the desired future character by ensuring that development reflects features or qualities of traditional detached dwelling houses that are surrounded by private gardens.*
- *To enhance the essential character and identity of established residential areas.*
- *To ensure a high level of residential amenity is achieved and maintained.*

The intent of the proposed development is to contribute to the existing character of the immediate locality in a complementary manner, consistent with SEPP (HSPD) 2004, PLEP2010 and PDGP2014.

The design approach of the proposal has evolved in a considerate relationship to the adjoining residential properties along the southeastern and southern boundaries of the Subject Site, whilst also being sympathetic to the community centre along the northwestern boundary. Through strategies, such as integrating a conducive architectural treatment and landscape design, the current and future amenity experienced by adjoining land uses would not be compromised

By noting the proposal's overall site configuration; a well resolved built-form; and potential public realm benefits, the proposed development can create a high quality built-form, which is considered complementary toward street character of the Floribunda Avenue frontage and quality contribution to the urban built-form of the immediate locality. Through generous landscaping and peripheral amenities to assist in activating the Floribunda Avenue street frontage, the proposed development could achieve a suitable fit within the existing public realm, adjoining the noting R2 Low Density Residential and RE1 Public Recreation land uses. As a result, the proposed development would contribute to positive social and environmental benefits for the immediate vicinity, as well as the broader community.

In order to facilitate high quality resolution of the proposed building envelope and to enable the best outcome for relationships with adjoining sites, the proposed development comprises legible and efficient floor plans, that integrate with the topography of the Site, with scope for wall modulation; material and finishes selection; and balcony or terrace expression. Underpinned by the subtly expressive architectural language, the building articulation transitions well, both horizontally and vertically in its streetscape

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relationships. Scope for the inclusion of light wells and green walls would add to the envisaged 'green' and 'biophilic' architectural landscape design character intended for the proposal.

It is noted, that the proposed development comprises a built-form, which is larger than the dominant residential typologies experienced within the immediate proximity of the Subject Site and surrounding area. Notwithstanding, the design approach for the proposed development considers the Site and its contextual relationships with the adjoining and surrounding land uses.

Adherence to the objective of enhancing the identity of the established residential area would be achieved through articulation of the building envelopes, which has been strategically designed to create well-modelled architectural forms, with a rhythm that reflects the scale of nearby houses and landscaped open spaces between, with scope for setbacks and high quality architectural design, that could mitigate against any concerns about appropriate streetscape character and / or neighbouring amenity.

Furthermore, the residential amenity with respect to the immediate neighbouring properties would be satisfactorily addressed through integrating appropriate floor layouts into the overall design, that would minimise any direct overlooking, as well as provide extensive landscaping that would further screen any possible visual intrusions. While it is not anticipated, that any significant noise generation issues would occur as a result of the proposed development's operation, there are also provisions to include perimeter acoustic screening, if required. Provisions for deep-soil landscape planting would reinforce the private nature of residential areas within the adjoining properties. Additionally, private area within the Subject Site would be separated by a landscape buffer from the public domain.

4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

When considering whether a Development Standard is appropriate and / or necessary, one must take into account the nature of the proposed variation; the site context; and the design of the proposed development. Each of these matters are discussed below.

It is noted, that Subclause 4.6(3)(a) of PLEP2010 and the judgement incurred within *Four2Five Pty Ltd v Ashfield Council* (refer to **Section 2.2** above) emphasises the need for the proponent to demonstrate how the relevant Development Standard is unreasonable or unnecessary in the circumstances.

As demonstrated in **Section 4.1** above, the proposed development is considered consistent with the objectives and aims stipulated within Clause 2 & 15 of SEPP (HSPD) 2004.

Compliance with the standard would be unreasonable and unnecessary given that the proposed development generally maintains the height permitted under Clause 40 of SEPP (HSPD) 2004 with regard to the Subject Site. The non-compliance primarily arises due to the exceedance in height proposed, that exceeds the standards imposed under Clause 40 of SEPP (HSPD) 2004 in regard to the maximum building height and the permitted number of storeys in particular aspects of a site.

The standard is unreasonable and unnecessary in the circumstances of the case on the following basis:

- The proposed development, for purposes of a RACH, would generally maintain the maximum permitted building height under Clause 40 of SEPP (HSPD) 2004, with regard to the Subject Site (exceedance by 0.2 m). Accordingly, the density and scale of the built-form proposed, would remain generally consistent with the existing residential and recreational buildings surrounding the Site. Additionally, the proposed development would effectively integrate the streetscape and character of the area into the proposed scheme to result in a conducive architectural design.
- By providing a transition and appropriate setback controls between the existing residential and recreational buildings in close proximity to the Subject Site, the built-form relationship of the Site contrasted to the surrounding built-form, would remain consistent with existing situation

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currently experienced within the adjoining R2 Low Density Residential and RE1 Public Recreation zones. Notwithstanding, the proposed part two (2) and three (3) storey heights proposed in regard to Clause 40 are considered unreasonable and unnecessary, due to the surrounding residential built-form achieving two (2) storey residential dwellings, which would be of almost equal scale, bulk and density as opposed to the proposed development.

- The built-form character of the surrounding residential and recreational developments are generally consistent with the built-form proposed under this Application, for which it is considered to respond to the local context and the objectives of the R2 Low Density Residential zone.
- The proposed development would respond to the existing residential and recreational developments surrounding the Site, for which the protection of amenity would be ensured accordingly, through strategic architectural treatment and an aesthetically pleasing landscaped design. Furthermore, consideration for solar access, privacy, overshadowing and view / outlook has been considered (where possible).
- The proposed development's building height (including the provision for part two (2) and three (3) storey's) is considered a key attribute in creating an internal building environment that would ensure the delivery of open space and amenity that is required to support the requirements and outcomes intended for the future residents of the Site.
- Reducing the height of the design to strictly meet the SEPP (HSPD) 2004 Development Standards under Clause 40(4) are considered unreasonable, as this would result in less efficient use of the Site's floorspace, and a building design which may not respond as well to the Site's prevailing topography, which has influenced the overall design of the Site.

The abovementioned justifications are considered valid and imperative in achieving the best and highest appropriate use for the Site. Additionally, the objectives outlined within Clause 2 & 15 of SEPP (HSPD) 2004 and the R2 Low Residential zone objectives would be upheld as a result of the proposed development.

4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

There are considered to be sufficient environmental planning grounds to justify contravention of the Development Standards outlined in Clause 40(4) of SEPP (HSPD) 2004:

- The exceedance of the Development Standard (including the provision for part two (2) and three (3) storey's) would have minimal impact on the streetscape, visual privacy and solar access of neighbouring residential and recreational development;
- The building height is suitable for the size and dimensions of the Site in its context in relation to surrounding residential development. This is of particular relevance with regard to subclause 40(4)(c) of SEPP (HSPD) 2004;
- The building incorporates suitable setbacks and building separation;
- In relation to adjoining properties, the height of the proposed development would only read as one additional floor above the height limit, or the equivalent of a two-storey house with a roof. This is considered to represent the architectural treatment across the Site and further reinforces the contravention with Clause 40(4);
 - Particularly, in relation to subclause 40(4)(c), the proposed development rear boundary adjoins vacant recreational parkland (Rotary Park) and the Glenmore Loch (waterbody), for which the contravention in height would not be considered to display any adverse amenity impacts.

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- The proposed development would revitalise the Site's landscaping aesthetic, by strategic architectural landscape design, through a dichotomous selection of native and endemic flora species, including an array of trees, plants species and shrubs, which would improve overall the floristic character and quality of the Site;
- It is considered, that there would be no unreasonable additional views compromised by the proposed development. The heights selected throughout the Site are considered to respond to the Site topography and the adjoining and neighbouring residential and recreational land uses;
- Whilst there are non-compliances with the relevant Development Standards articulated within Clause 40(4) of SEPP (HSPD) 2004, the scale and form of the development is of a contemporary design, consistent with future development anticipated in the immediate area, as well as the wider locality;
- The additional height would not result in any significant adverse impacts on the amenity of the neighbouring buildings, in terms of overshadowing, privacy, outlook and amenity;
- The proposed variation to the Development Standard under Clause 40(4) of the SEPP (HSPD) 2004 would not result in a building form that is out of character with the surrounding area;
- The Floor Space Ratio (FSR) of the proposed development, at 0.82:1, would comply with the prevailing FSR control stipulated under Clause 48 of SEPP (HSPD) 2004 of 1:1;
- The proposed development is consistent with the aims and objectives under Clause 2 & 15 of SEPP (HSPD) 2004, noting, that under Clause 40 of SEPP (HSPD) 2004 there are no such objectives in achieving the Development Standards. Notwithstanding, compliance with the SEPP objectives would be able to be achieved, as identified above in **Section 4.1**;
- The locality would benefit through the increased provision of open space and peripheral street activation;
- Any potential overshadowing impacts are considered to be unreasonable, as overshadowing from the proposed development would not prevent other properties from obtaining an acceptable level of sunlight under the relevant controls and standards.

4.5 PUBLIC INTEREST

As outlined in **Section 2.2** above, *Four2Five Pty Ltd v Ashfield Council* emphasised, that it is for the proponent to demonstrate that the proposed non-compliance with the Development Standard is in the public interest. Subclause 4.6(a)(ii) of PLEP2010 requires the proposed development be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within zone in which the development is proposed to be carried out.

Sections 4.1 & 4.2 have satisfactorily addressed how the proposed development is consistent with the relevant R2 Low Density Residential zone objectives and the aims and objectives of SEPP (HSPD) 2004.

The proposed development would also contribute towards meeting the increased demand for RACH beds within the Penrith LGA, as identified in the *NSW Ageing Strategy 2016-2020, A Metropolis of Three Cities*, and the *Western City District Plan*. Specifically, the proposed development would be considered a social benefit to the immediate and wider community within Glenmore Park, as it would provide an additional 142 RACH beds for the locality; thereby, allowing local residents to age in a communal place, which is in a highly accessible location.

There are no significant public disadvantages which would result from the proposed development. Accordingly, the proposed development is therefore considered to be justified on public interest grounds.

4.6 MATTERS OF STATE OR REGIONAL SIGNIFICANCE

The proposed non-compliances with Clause 40 of SEPP (HSPD) 2004 would not raise any matters of significance for both State and Regional environmental planning. Additionally, the proposal would not conflict with any State Environmental Planning Policies or Ministerial Directives under Section 9.1 of the EP&A Act.

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The proposed development would result in exceedances of the relevant planning controls as follows:

- Clause 40(4)(a) of SEPP (HSPD) 2004 8 m building height Development Standard by 2.5%;
- Clause 40(4)(b) of SEPP (HSPD) 2004 two-storey Development Standard for adjoining developments, by one-storey; and
- Clause 40(4)(c) of SEPP (HSPD) 2004 one-storey Development Standard in the rear 25% of the Site by two-storey's.

Furthermore, by including these non-compliances with the overall scheme, the proposed development would be able to meet the objectives of the following State Government planning policies:

- *A Metropolis of Three Cities:*
 - By providing a greater height at the site, the proposed development can better respond to the Greater Sydney Commission's vision and the NSW Government's aim of allowing people to continue to age within their communities;
- *Western City District Plan:*
 - By providing a greater height at the site, the proposed development can better respond to the Greater Sydney Commission's vision for continued housing diversity within the Western City District;
- *NSW Ageing Strategy 2016-2020 (Ageing Strategy):*
 - By providing a greater height at the site, the proposed development can better respond to the NSW Government's strategic vision for aged care within NSW by providing a greater number of Seniors Housing dwellings at the Site.

4.7 PUBLIC BENEFIT IN MAINTAINING THE STANDARDS

Given that strict compliance with Clause 40 of SEPP (HSPD) 2004 would result in:

- Not contribute towards meeting the demand for additional RACH beds within the Penrith LGA, as identified in the Ageing Strategy, *A Metropolis of Three Cities*, and the *Western City District Plan*, by potentially resulting in a reduction in the provision of RACH beds at the Site;
- Threaten the commercial viability of the proposed development by reducing the number of residential units that can be delivered to the marketplace;
- Create fewer full-time equivalent jobs for staff working at the Site, resulting from fewer residents being able to reside at the Site;
- Fail to meet the Objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act) by making orderly and economic use of the Site for its full planning potential;
- Result in substantial clearing of the vegetation within the rear of the Site, thus, undermining the natural setting;
- Results in building setbacks that unreasonably impose amenity impacts on surrounding properties; and
- Not achieve a floor plate configuration conducive to aged care operations.

As such, there is no genuine public benefit in maintaining these strict Development Standards, which prohibits site's from being able to be developed to their best and highest use, whilst not impacting on adjoining properties.

4.8 OBJECTS OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

All planning determinations made under the EP&A Act are required to be made with regard to the Objects of the Act in accordance with Section 1.3 of the EP&A Act. **Table 2** below assesses and outlines the proposed development against the Objects.

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Table 2: Objects of the Act – EP&A Act

Object	Proposed Development Compliance
The objects of this Act are as follows:	
<i>(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,</i>	The proposed development is considered to be in the public interest as it would contribute towards meeting the demand for Residential Aged Care Facility beds within the Penrith LGA, as identified in the <i>NSW Ageing Strategy 2016-2020, A Metropolis of Three Cities</i> , and the <i>Western City District Plan</i> . Specifically, the proposed development would be of social benefit to the community situated within Glenmore Park, as it would provide an additional 142 RACH for the locality.
<i>(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,</i>	<p>The proposed development has been assessed against the principles of Ecologically Sustainable Development as set out in the <i>Protection of the Environment Operations (General) Regulation 2009</i> as follows.</p> <p>The proposed development would not create the risk of serious or irreversible damage to the environment.</p> <p>Ultimately, the proposed development would not create any threats of serious or irreversible environmental damage which would require further scientific study to fully ascertain.</p> <p>The proposed development would not impact on the conservation of biological diversity or the ecological integrity of the locality.</p> <p>The proposed development would not require an Environment Protection Licence or other mechanism to compensate for any pollution generating activities at the Site.</p>
<i>(c) to promote the orderly and economic use and development of land,</i>	The proposed development would make use of a site used for similar purposes, that is currently considered to be underdeveloped and underutilised, for which it would result in orderly and economically beneficial development, without resulting in any unacceptable economic, environmental or social impacts.
<i>(d) to promote the delivery and maintenance of affordable housing,</i>	Not relevant to the proposed development.
<i>(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,</i>	It is noted, that the Subject Site has been previously developed, for which it does not contain any species protected and listed under the EPBC Act and BC Act. Further, the proposed development would not impose an impact on MNES and / or ecological impact in any such way.
<i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),</i>	<p>The Site does not contain, and nor is it in the vicinity of, any heritage items listed under both the NSW State Heritage Register or PLEP2010.</p> <p>The Site has been previously disturbed and is therefore subject to significant levels of disturbance.</p>

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	The potential for the proposed development to uncover any unrecorded items of Aboriginal Cultural Heritage significance is therefore considered to be low. In the unlikely event that potential Aboriginal Cultural Heritage items or human remains are uncovered at the Site, works in the vicinity of the find would cease, and the NSW OEH / NSW Police would be contacted as appropriate.
<i>(g) to promote good design and amenity of the built environment,</i>	Section 4.1 satisfactorily addresses how the proposed development responds to the character of the locality in terms of urban design.
<i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,</i>	The proposed development can be constructed and maintained without health and safety risks to future tenants.
<i>(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,</i>	The proposed development has a Capital Investment Value of approximately \$36,288,579.77 M (excluding GST). As such, it is classified as Regionally Significant Development, for which it would be determined by the Sydney Western City Planning Panel.
<i>(j) to provide increased opportunity for community participation in environmental planning and assessment.</i>	The DA for the proposed development would be subject to the relevant public notification requirements.

4.9 SUMMARY

For the reasons outlined above, it is considered that the objections to Clause 40 of SEPP (HSPD) 2004 are well-founded in this instance and the granting of Clause 4.6 Variations to the applicable Development Standards under Clause 40 of SEPP (HSPD) 2004 are considered appropriate in the circumstances. Furthermore, the objection is considered to be well-founded for the following reasons as outlined in Clause 4.6 of PLEP2010; *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde*; *Goergakis v North Sydney Council*; *Ku-ring-gai Council v Pathways Property Group Pty Ltd*; and *Binetter v Woollahra*:

- Compliance with the Development Standard is unreasonable and unnecessary in the circumstances;
- There are sufficient environmental planning grounds to justify contravening the Development Standard;
- The development is in the public interest;
- The development is consistent with the objectives of the particular Development Standard – in this case the objectives of SEPP (HSPD) 2004, as Clause 40 does not explicitly contain relevant objectives;
- The development is consistent with the objectives for development within the R2 Low Density Residential zone;
- The objectives of the SEPP are achieved notwithstanding the non-compliances incurred with the Development Standard;
- The development does not negatively impact on any matters of State or Regional significance; and
- The public benefit in maintaining strict compliance with the Development Standard would be negligible.

It is furthermore submitted that:

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- Strict compliance with the standards would hinder the achievement of the Objects of the Act (refer to **Section 4.8** above);
- The proposed development would contribute towards meeting the demand for additional RACH beds within the Penrith LGA, as identified within the Ageing Strategy, *A Metropolis of Three Cities* and the *Western City District Plan*; and
- No unreasonable impacts are associated with the proposed development.

Overall, it is considered that the proposed Clause 4.6 Variation to the Development Standard outlined in Clause 40(4) of SEPP (HSPD) 2004 is entirely appropriate and can be clearly justified having regard to the matters listed within Clause 4.6 of PLEP2010.

CLAUSE 4.6 VARIATION – DEVELOPMENT STANDARDS – MINIMUM SIZES AND BUILDING HEIGHT UNDER CLAUSE 40 OF SEPP (HSPD) 2004

Proposed Residential Aged Care Facility – 5-7 Floribunda Avenue, Glenmore Park (Lot 1 DP 825553)

PART E CONCLUSION

It is requested, that the Sydney Western City Planning Panel exercise its discretion and judicial precedence (as identified in **Sections 2.2 & 2.3**) and find that this Clause 4.6 Variation adequately addresses the matters required to be demonstrated by Subclause 4.6(3) of PLEP2010 (refer to **Section 2.1**).

This is particularly the case given that a hypothetical compliant design at the Site would:

- Not contribute towards meeting the demand for additional RACH beds within the Penrith LGA, as identified in the Ageing Strategy, *A Metropolis of Three Cities*, and the *Western City District Plan*, by potentially resulting in a reduction in the provision of RACH beds at the Site;
- Threaten the commercial viability of the proposed development by reducing the number of residential units that can be delivered to the marketplace;
- Create fewer full-time equivalent jobs for staff working at the Site, resulting from fewer residents being able to reside at the Site; and
- Fail to meet the Objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act) by making orderly and economic use of the Site for its full planning potential.

Given the justification provided throughout this Variation request, this Clause 4.6 Variation under SEPP (HSPD) 2004 is well-founded and should be favorably considered by the Sydney Western City Planning Panel. As each of the relevant considerations are satisfied for the reasons outlined elsewhere in this Report, concurrence can be assumed under Clause 4.6(5).