



Addendum Clause 4.6 – Height of Building

56 Quarry Road, Bossley Park
Lot 8 DP 713734

**Prepared by Willowtree Planning Pty Ltd on behalf
of Opal Aged Care**

March 2020

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility

56 Quarry Road, Bossley Park (Lot 8 DP 713734)

Document Control Table

Document Reference:	Addendum Clause 4.6 Variation – Height of Building		
Date	Version	Author	Checked By
6 November 2019	Draft	A Smith	C Wilson
5 March 2020	Amended	A Smith	A Smith

© 2019 Willowtree Planning (NSW) Pty Ltd

This document contains material protected under copyright and intellectual property laws and is to be used only by and for the intended client. Any unauthorised reprint or use of this material beyond the purpose for which it was created is prohibited. No part of this work may be copied, reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system without express written permission from Willowtree Planning (NSW) Pty Ltd.

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility

56 Quarry Road, Bossley Park (Lot 8 DP 713734)

TABLE OF CONTENTS

PART A	PRELIMINARY	3
1.1	INTRODUCTION	3
1.2	STRATEGIC PLANNING JUSTIFICATION.....	3
PART B	THRESHOLDS THAT MUST BE MET	5
2.1	CLAUSE 4.6 OF FLEP 2013	5
2.2	CASE LAW	5
PART C	THE STANDARD BEING OBJECTED TO	8
3.1	CLAUSE 40 OF SEPP HSPD	8
PART D	PROPOSED VARIATION TO CLAUSE 40 OF SEPP HSPD	2
4.1	COMPLIANCE WITH THE UNDERLYING OBJECTIVE OR PURPOSE OF THE STANDARD	2
4.2	OBJECTIVES OF THE ZONE.....	6
4.3	ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY ...	7
4.4	SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD.....	8
4.5	PUBLIC INTEREST	9
4.6	MATTERS OF STATE AND REGIONAL SIGNIFICANCE.....	9
4.7	PUBLIC BENEFIT IN MAINTAINING THE STANDARDS.....	9
PART E	CONCLUSION	12

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility
56 Quarry Road, Bossley Park (Lot 8 DP 713734)

PART A PRELIMINARY

1.1 INTRODUCTION

This Clause 4.6 Variation Request has been prepared in support of a Development Application (DA) for the redevelopment of the Site for a residential aged care facility at 56 Quarry Road, Bossley Park. The Site is legally described as Lot 8 and DP 713734.

Clause 40 of State Environmental Planning Policy – Housing for Seniors and People with a Disability 2004 (SEPP HSPD) prescribes that if development is proposed in a residential zone where residential flat buildings are not permitted, the height of all buildings must be not more than 8 metres to the ceiling and 2 storeys adjacent to a boundary. It is proposed to vary these height controls.

The proposed RACF is a Part 2 and Part 3 storey building. The western part of the building is a 2 storey structure and the central element comprises a 2 storey plus basement comprising back of house facilities. The eastern part of the building is a 3 storey element with the lower ground floor sited up to 2.5m below existing ground level. The development mostly complies with the 8 metre height control with the exception of a small portion of the building in the east. The extent of the 8m height exceedance is **10.742m** (top of the lift overrun for access to roof terrace), measured to the height of the roof ridge, which is equivalent to a maximum **34%** height exceedance.

The proposed development application was lodged under the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD)*, therefore the request to vary **SEPP HSPD** Clause 40(4) height standards is made under Clause 4.6 of *Fairfield Local Environmental Plan 2013 (FLEP 2013)*.

This variation request has been prepared in accordance with the requirements of Clause 4.6 of FLEP 2013, which includes the following objectives:

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

1.2 PROPOSED NON-COMPLIANCE

Under the provisions of Clause 40 (a) in SEPP HSPD, the Site is subject to a maximum permissible building height of 8m measured to the ceiling of the upper most floor.

The proposed development comprises a non-compliance with Clause 40 development standard of 8m by 2.742m (34%) as summarised in **Table 1** below.

Table 1. Variation Summary			
SEPP HSPD	SEPP HSPD Development Standard	Maximum Building Height	Proposed Development Non-Compliance
Clause 40	8m	10.74m	2.74m (34%)

1.3 STRATEGIC PLANNING JUSTIFICATION

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 and FLEP 2013. It considers various planning controls, strategic planning objectives and existing characteristics of the site, and concludes that the proposed building height non-compliance is the best means of achieving the objective of encouraging orderly and economic use and development of land under section 5 of the *Environmental Planning and Assessment Act 1979*.

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility

56 Quarry Road, Bossley Park (Lot 8 DP 713734)

Further, the proposal will introduce a transitional residential development that complements the range of surrounding land uses, integrates with the variety of built form densities in the general area, response to the strategic centre and leverages on the existing community infrastructure.

PART B THRESHOLDS THAT MUST BE MET

2.1 CLAUSE 4.6 OF FLEP 2013

In accordance with Clause 4.6 of FLEP 2013 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 ways in which numerical compliance with a development standard might be considered unreasonable or unnecessary as follows:
 - The objectives of the standard are achieved notwithstanding the non-compliance with the standard;

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility

56 Quarry Road, Bossley Park (Lot 8 DP 713734)

- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- 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
- 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.

A key principle that stems from **Four2Five v Ashfield** case is that the sufficient environmental planning grounds have to be particular to the circumstances of the proposed development to the site. As a result of **Four2Five**, it is now necessary to demonstrate something more than achieving the objective of the standard. A development that contravenes the development standard, and as a result that achieves the object of the development standard to a greater degree than a development that complied with the standard, would suffice.

In **Randwick City Council v Micaul Holdings** the Commissioner discerned that CI 4.6 imposes 4 tests:

This imposes a number of tests, the first that compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case, the second that there are sufficient environmental planning grounds to justify contravening the development standard, the third that the applicant's written request has adequately addressed the matters required to be demonstrated by sub-clause (3) and the fourth, that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out. In addition, satisfaction of those matters that must be considered by the Secretary in determining whether concurrence should be granted is required.

In the above **Micaul Holdings** appeal the outcome was that a residential flat building in Randwick was approved with a 55% exceedance of the height limit (at its highest point) and a 20% exceedance of the FSR control. The Commissioner was satisfied that the written clause 4.6 variation request by the applicant's town planner was comprehensive and had addressed all of the prerequisites of clause 4.6. She was also persuaded that the site was "*unusual in terms of its location at the low point of the locality, its proximity to larger RFBs that would not comply with the building height development standard and its flood affectation*". Those features, when taken together with other benefits of the proposal such as its design excellence and internal amenity, provided sufficient environmental planning grounds to justify approval via clause 4.6 of the LEP. In February 2016 an appeal by Randwick Council was dismissed.

While the judgment did not directly overturn the **Four2Five v Ashfield** decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligations is to be satisfied that "*the applicant's written request has adequately addressed...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard.*" He held that this means:

"the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility

56 Quarry Road, Bossley Park (Lot 8 DP 713734)

In ***Moskovich v Waverley Council [2016]*** a residential flat building in Bondi was approved with a floor space ratio of 1.5:1 where the control was 0.9:1 (about a 65% exceedance).

The applicant's development was located on a large, steep sloping site in Bondi that proposed the amalgamation of two allotments to accommodate a five storey residential flat building with two levels of basement parking.

Some of the factors which persuaded the Commissioner to uphold the clause 4.6 variation request were the lack of environmental impact of the proposal, the environmental benefits that arise from replacing two existing flat buildings with poor amenity, the characteristics of the site such as its steeply sloping topography, size, two street frontages, and its context which included existing adjacent buildings of greater height and bulk than the proposal.

Some important principles that have arisen from Land and Environment Court decisions are:

- The requirement that the consent authority be personally satisfied the proposed development will be in the public interest because it is "consistent with" *the objectives of the development standard and 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'".*
- Establishing that '*compliance with the standard is unreasonable or unnecessary in the circumstances of the case*' does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe "test" 1). Other methods are available, for example that the relevant objectives of the standard would not be achieved or would be thwarted by a complying development (Wehbe "test" 3).
- It is always best, when pursuing a clause 4.6 variation request, to demonstrate how the proposal achieves a better outcome in relation to the objects of the Act. The Objectives at s1.3 of the EP&A Act include the following:

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

PART C THE STANDARD BEING OBJECTED TO

3.1 CLAUSE 40 OF SEPP HSPD

Clause 40(4)(a) of SEPP HSPD prescribed the following:

40 Development standards—minimum sizes and building height

(4) Height in zones where residential flat buildings are not permitted *If the development is proposed in a residential zone where residential flat buildings are not permitted:*

*(a) the height of all buildings in the proposed development must be **8 metres or less**, and....*

Per Clause 3 – Height in relation to a building, means the distance measured vertically from any point on the ceiling of the topmost floor of the building to the ground level immediately below that point.

The proposed Residential Aged Care Facility (RACF) mostly complies with the 8m height control prescribed in Clause 40(4)(a) with the exception of a small portion of the building, centralised within the Site.

Table 2 below outlines the proposed Clause 4.6 Variation to SEPP HSPD.

Table 2. Summary of Building Height Non-Compliance			
Location	Development Standard Clause 40 SEPP HSPD	Proposed Height	Non-compliance
Central Lift Lobby	8m	10.742m	2.724m (34%)
Egress Stair	8m	9m	1m (12.5%)
Roof Plant	8m	9m	1m (12.5%)
Storage Room	8m	10.4m	2.4m (30%)

Pursuant to SEPP HSPD, all other building elements located above the 8m building height are compliant with the 8m height measured to the ceiling of the upper level.

Figure 1 below illustrates the location of the variation. The extent of the variation exceeds the 8m maximum building height by **34%**. The additional building height will not be visible from the public domain and will not result in additional environmental or amenity impacts on adjoining residential properties.

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility

56 Quarry Road, Bossley Park (Lot 8 DP 713734)

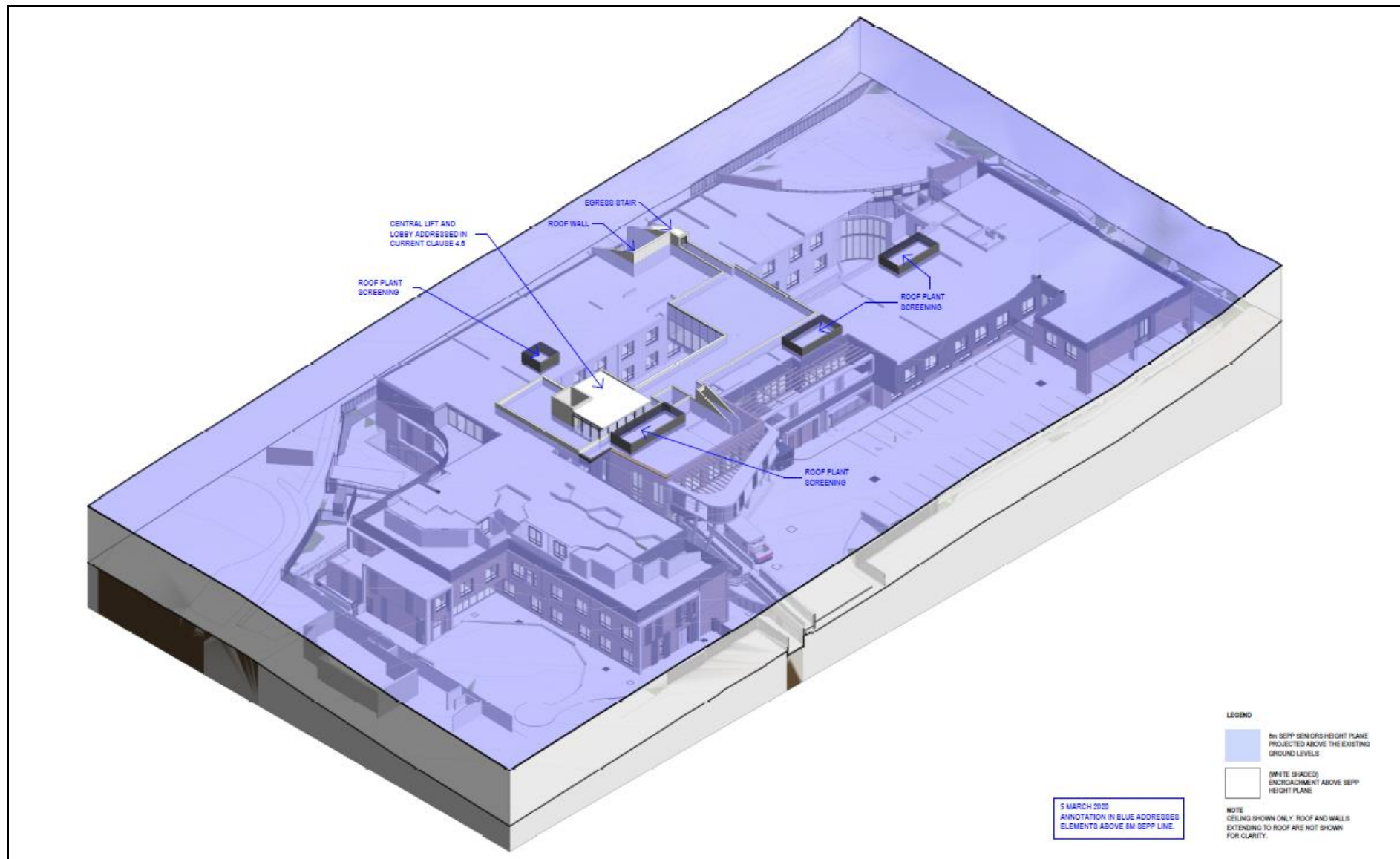


Figure 1. Building Height Plan for 8m Height Limity (Source: Jackson Teece Atchitects, 2020)

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility
56 Quarry Road, Bossley Park (Lot 8 DP 713734)

Clause 40(4)(b) of SEPP Seniors prescribes the following:

40 Development standards—minimum sizes and building height

(4) Height in zones where residential flat buildings are not permitted *If the development is proposed in a residential zone where residential flat buildings are not permitted:*

(b) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height, and

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

The proposed RACF is a Part 2 and Part 3 storey building as depicted in **Figure 2**. The proposed development has been revised at the interface with low density residential development to the east to present as a two (2) storey development. Along the eastern boundary, the lower ground floor is sited up to **2.5m** below existing ground level, further reducing the proposed built form at the interface, and presents at a building height of **5.940m**; a height below that of a two storey development. Further the roof form has been reconfigured to present as a two (2) development and roof feature.

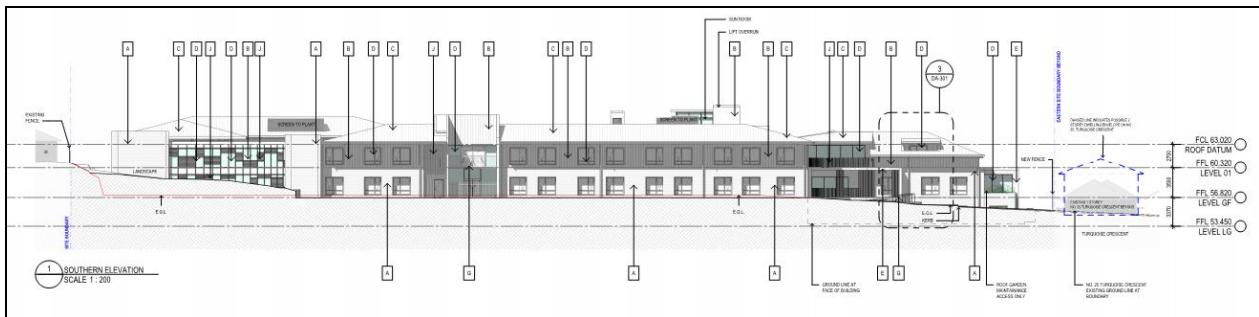


Figure 2. Southern Elevation (Source: Jackson Teece, 2019)

Clause 40(4)(c) of SEPP HSPD prescribes the following:

40 Development standards—minimum sizes and building height

(4) Height in zones where residential flat buildings are not permitted *If the development is proposed in a residential zone where residential flat buildings are not permitted:*

(c) a building located in the rear 25% area of the site must not exceed 1 storey in height.

The Site is irregular in shape with a frontage to both Quarry Road and Turquoise Crescent. The rear of the site is not defined for the purposes of SEPP HSPD, however ordinarily a “rear” boundary would be one that is opposite and facing the site frontage. As Quarry Road and Turquoise Crescent are parallel roads, the site accordingly has two frontages and does not have a rear boundary. Therefore, the provisions of SEPP Senior Clause 4(4)(c) are not applicable to this development application.

This view is supported by Regional Planning Panels which have previously determined R2 and R3 zoned sites with multiple frontages do not trigger this development standard. Examples include;

- **DA 189/2015** - JRPP No. 2015SYW096 at 9-13 Gelibu Pde and 2-6 St Hilliers Road Auburn
- **DA2015/210/1** - JRPP No. 2015SYW094 at 11 Pastoral Circuit, Pemulwuy
- **DA 1434/2013** – JRPP No. 2014SYW025 at 9-17 Hinemoa Ave Normanhurst
- **DA0341/16** - 2016SYW154 at 144 & 146 Killeaton Street, 1 Yarrabung Road and 1, 3 and 6, College Crescent, St Ives
- **DA-77/2016** - 2016SYE103 - 12-18 Leigh Avenue and 34 Skinner Ave, Riverwood (approved 10-1-2018)

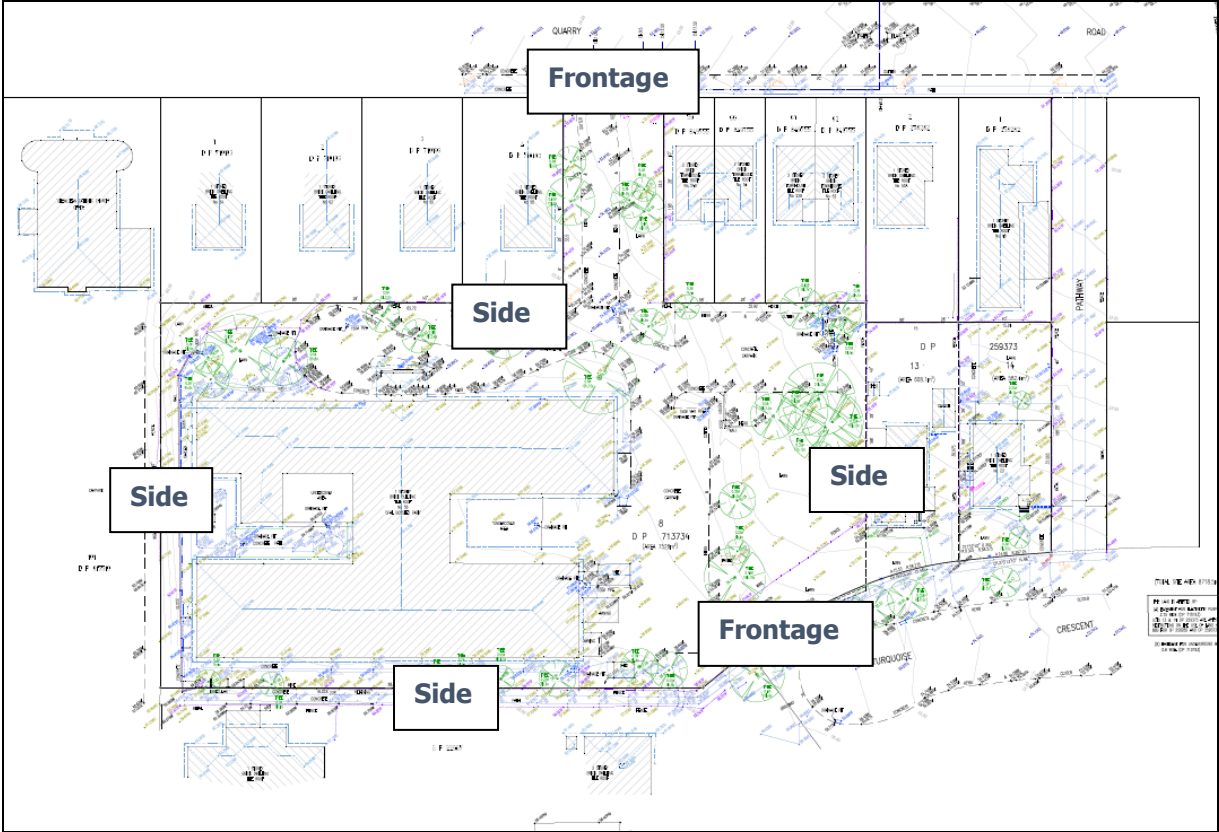


Figure 3. Location of Site Frontage, Side and Rear Boundaries

PART D PROPOSED VARIATION TO CLAUSE 40 OF SEPP HSPD

4.1 COMPLIANCE WITH THE UNDERLYING OBJECTIVE OR PURPOSE 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 and purpose of that development standard. Indeed, *Wehbe v Pittwater Council* recognised this as one of the ways in which a variation to development standards might be justified (refer to **Section 2.2**). In *Four2Five Pty Ltd v Ashfield Council*, it was found that the proponent must demonstrate compliance with these objectives (refer to **Section 2.2**).

Therefore, while the Site is subject to relevant numerical standards for Height of Building, the objectives and underlying purpose behind these development standards are basic issues for consideration in the development assessment process.

4.1.1 Ceiling Height

The underlying objective of **SEPP HSPD Clause 40(4)(a)** which prescribes an 8 metre height standard is assumed to be furthering the design principles contained in **SEPP HSPD Clause 33 Neighbourhood amenity and streetscape**.

The proposed development is consistent with the design principles in Clause 33 of SEPP HSPD as detailed in the ensuing sections of this report.

(a) Consistency with Character of the Area

a) recognise the desirable elements of the location's current character so that new buildings contribute to the quality and identity of the area,

The proposed development will replace an older 100 bed facility with a **new 134 bed RACF** comprising **112 bedrooms**. The new facility has been designed to positively contribute to the quality and identity of the area and achieve a better environmental outcome by:

- Significantly improving the quality of accommodation available to local residents within this new purpose built facility and increasing the availability of aged care beds in Western Sydney;
- Being predominately 2 storeys in height, with much of the additional third storey bulk being not visible from the public domain as the mid-section basement is below ground;
- Providing generous setbacks to neighbouring residential dwellings;
- The built form material palette optimises on the unique natural setting of the environment to enhance the character of the leafy neighbourhood;
- As part of the proposal, the cohesiveness of the landscape character is maintained through the retention and reinstating of landscaping particularly in the north-eastern corner of the Site which will also provide additional screening to mitigate any visual impacts;
- The proposal maintains the existing use of the building and increases value of the Site as a modern aged care destination;
- The proposal maintains the 'sense of closeness' character of the cul-de-sac, through the consistent street address, enhancement of community interaction, both within the facility and with surrounding residents visiting;
- The proposal increases social and community value by allowing more ageing residents the opportunity to 'age in place' and retain their sense of belonging to the neighbourhood;
- Being sited and designed to improve bushfire safety;
- Retaining a cluster of Grey Box trees that protects the environment, maintains the landscape setting and contributes to local residential amenity; and

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility
56 Quarry Road, Bossley Park (Lot 8 DP 713734)

- The urban form provides a positive enhancement to the wider context of Bossley Park in a way that contributes to the diverse and vibrant neighbourhood, response to its growing population and changing demographic.

(b) Compatibility with Heritage Items and Conservation Areas

Clause 33(b) of SEPP HSPD requires:

b) retain, complement and sensitively harmonise with any heritage conservation areas in the vicinity and any relevant heritage items that are identified in a local environmental plan, and

Not Applicable. The development is not in the vicinity of any heritage items or heritage conservation areas.

(c) Maintain Neighbourhood Amenity

Clause 33(c) of SEPP HSPD requires:

c) maintain reasonable neighbourhood amenity and appropriate residential character by:
(i) providing building setbacks to reduce bulk and overshadowing, and
(ii) using building form and siting that relates to the site's land form, and
(iii) adopting building heights at the street frontage that are compatible in scale with adjacent development, and
(iv) considering, where buildings are located on the boundary, the impact of the boundary walls on neighbours, and

The bulk and scale of the RACF is sited and designed to maintain reasonable neighbourhood amenity as described in the following:

Building Setback to Reduce Bulk and Overshadowing

The building setbacks are generous and have been provided to reduce visual bulk and overshadowing as detailed below.

There is no shadow impact on the residential properties on Quarry Road as the development is located to the south of these residential lots.

Overshadowing of the Bossley Gardens retirement village to the south of the site is limited by the inclusion of a large setback zone in the south-western corner of the site, siting of the RACF Ground floor below the ground level of the adjacent property, adequate separation between the RACF and the neighbouring villas and compliance with the 8m building height control.

Overshadowing of the adjacent residence at No.25 Turquoise Crescent is limited given the generous setback of the building footprint to maintain a cluster of Grey Box trees. There is no overshadowing of the rear(north) yard to No 25 which results from the 17.7m setbacks to the NE wing. There is no overshadowing of the dwelling at 12 noon in mid-winter, with a small amount of overshadowing to No.25 western windows occurring after 2.30pm mid-winter. Mid winter shadowing to the dwelling is limited to the front south-western corner.

While the proposed building exceeds the 8 metre ceiling height, it is setback 4.3 metres from the eastern side boundary with the remainder eastern elevation having 17.7m setbacks to minimise the extent of overshadowing. As a result, the overshadowing is less than what often occurs in low density residential areas where compliant two storey dwelling houses, with a north facing rear yards, would ordinarily cast some shadow over a neighbour's westerly side boundary in mid winter. Reasonable neighbourhood amenity is thus achieved.

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility
56 Quarry Road, Bossley Park (Lot 8 DP 713734)

Building Form and Siting

The built form and siting relates to the site's landform by setting it down below natural ground level where the land steeply rises to Turquoise Crescent. This achieves a built form and siting that is compatible with the locality by reducing the visual impacts of bulk and scale on the streetscape.

Privacy and Interface with Neighbours

The building has been designed to largely orientate windows away from residential neighbour properties and/or to have large setbacks to mitigate potential for privacy impacts. Where smaller setbacks occur to the north (**4.8m**) and east (**4.36m**) boundaries, proposed windows are either high sill bedroom windows (eg bedroom 14) or end corridor windows contain louvres which restrict visibility downwards into neighbour yards (eg East Corridor 2). This mitigates against privacy issues. Further setback/privacy details are outlined below:

- The bedroom windows 51-55 looking north towards the residential properties at No.58 to No.64 Quarry Road are setback 18 metres from the common boundary behind a landscaped carpark.
- The bedroom windows 6-10 looking east towards No.25 Turquoise Crescent are setback 17.7 metres from the common boundary behind a cluster of Grey Box trees.
- End hall windows which are sited near the northern boundary incorporate privacy measures to mitigate overlooking to neighbour rear yards.
- North-facing bedroom windows 11-13 incorporate screening to mitigate oblique views into No 25 rear yard/detached buildings and are sited 26.39m from the No 52/52A Quarry Road residential properties to the north.
- The end hall window to the eastern wing is overlooking the front yard to No 25 which is already visible to the street.
- Removal of balconies at the end of the corridors.

The bedroom windows looking south towards the No 26 Bossley Gardens Retirement Village are overlooking a community facility and carpark area which are readily visible from the ROW pathway along No 26 northern boundary. The nearest Bossley Gardens' residential villas are located near the SW corner of the Site which the new building achieves compliance with the 2 storey/8m height controls and those villas are currently screened by a **1.8m** fence along their northern side to ensure privacy from persons using the ROW pathway.

Building Heights at the Street Frontage

The new residential aged care building is setback approximately **40 metres** from Quarry Road and therefore the streetscape impacts of the new facility on the primary frontage is limited.

The 2 to 3 storey building element has a secondary frontage to Turquoise Crescent. The building is sited at the terminus of the cul-de sac with a variable setback to the public domain. The bottom floor of the building is set down well below the existing ground level and street level at this location reducing the visual impact from Turquoise Crescent. The ceiling height of the building along the southern elevation to Turquoise Crescent is generally compliant, ranging from 6.5m to 8m above existing ground.

The front setback, generally 6m from Turquoise Crescent, is proposed to be landscaped, with the revised landscape plan indicating additional Grey Box trees to complement the existing trees being retained on the site. See previous discussed at 3.2.1(a) regarding consistency with the character of the area.

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility

56 Quarry Road, Bossley Park (Lot 8 DP 713734)



Figure 4. Turquoise Crescent (Source: Taylor Brummer, 2019)

(d) Compatible Front Setbacks

Clause 33(d) of SEPP HSPD requires:

d) be designed so that the front building of the development is set back in sympathy with, but not necessarily the same as, the existing building line, and

As discussed above, the building is setback approximately **40 metres** from Quarry Road and therefore the streetscape impacts of the new facility on the primary frontage is limited.

The building has a **6m** setback to Turquoise Crescent, subject to two minor projections, and has been designed to minimise impacts on the locality and facilitate a compatible development with the locality by:

- Providing a landscaped setback between the building and the street and the side boundaries;
- Maintaining the existing driveway crossing to Quarry Road to allow the front setback to Turquoise Crescent to be predominately landscaped;
- Providing a significant setback in the north-eastern corner to retain the Grey Box trees and minimise impacts on neighbouring properties;
- The built form massing and scale of the building create a consistent rhythm with the surrounding development through appropriate setbacks, articulation and landscaping.

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility
56 Quarry Road, Bossley Park (Lot 8 DP 713734)

(e) Compatible Landscaping

Clause 33(e) of SEPP HSPD requires:

e) embody planting that is in sympathy with, but not necessarily the same as, other planting in the streetscape, and

As part of the proposal, the cohesiveness of the landscape character is maintained through the retention and reinstating of landscaping particularly in the north-eastern corner of the Site which will also provide additional screening to mitigate any visual impacts.

(f) Maintain Major Trees

Clause 33(f) of SEPP HSPD requires:

f) retain, wherever reasonable, major existing trees, and

The proposal continues to retain a cluster of Grey Box trees in the north-east of the site that contributes to the landscape character of the area and is part of the streetscape. Furthermore, the retention of these trees facilitates a substantial **26.39m** distance separation between the RACF building and the rear gardens of neighbouring residential properties. As a result, the retention of the Grey Box trees assists in the maintenance of neighbourhood amenity.

4.1.2 Storey Height Control

The underlying objective or purpose of the 2-storey height control is contained within the **Clause 40(4)(b)** which states; "*Note. The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.*"

The underlying objective of the control is considered to be satisfied by the development have regard to the following site context attributes:

- The 3 storey built form is not readily visible from the Quarry Road frontage given the building setbacks and the location of the non-compliant building height;
- The back of house facilities such as kitchens, laundry and store rooms are located on the Lower Ground Floor below ground within a basement to minimise the visible building bulk;
- The visual impact of the 3 storey built form adjacent to Turquoise Crescent is mitigated by siting the lower ground level partly below street level. The ground level is at **RL56.82m** which is comparable to the adjacent natural ground level at the Turquoise Crescent frontage that ranges from **RL55.3m** to **RL56.6m**;
- The urban form provides a positive enhancement to the wider context of Bossley Park in a way that contributes to the diverse and vibrant neighbourhood, response to its growing population and changing demographic.

4.2 OBJECTIVES OF THE ZONE

The Site is currently zoned R2 Low Density Residential under FLEP 2013. The proposed development is located within an established low density residential area and is permissible at the Site. The proposed development is permissible with the following R2 zone objectives.

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility

56 Quarry Road, Bossley Park (Lot 8 DP 713734)

Table 1. Consistency of Proposed Development with the Zone Objectives

Objective	Comment
<ul style="list-style-type: none">To provide for the housing needs of the community within a low-density residential environment.	The proposed development complies with the objectives of the R2 zone in that the proposal provides new high care accommodation for 134 frail/aged seniors including residents with dementia to help meet the demand for aged care housing in Western Sydney. The current R2 zone envisages a low density built form, though the SEPP overrides the LEP controls and facilitates a larger built form in the order of 1:1 FSR.
<ul style="list-style-type: none">To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The proposal increases social and community value by allowing more ageing residents the opportunity to 'age in place' and retain their sense of belonging to the neighbourhood.

4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ set out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation:

1. *Establish that compliance with the development standard is unreasonable or unnecessary because **the objectives of the development standard are achieved notwithstanding non-compliance with the standard.***
2. *Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
3. *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
4. *Establish that 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.*

Establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".

Strict compliance with the building height controls in Clause 40 is considered to be unreasonable and unnecessary in the circumstances of this case, and that there are sufficient environmental planning grounds to justify contravening the development standard, as follows:

- The existing aged care facility does not offer a standard of accommodation expected for current aged care provision in terms of room size, fit out, amenity, building layout and proximity to suitable/ wheelchair accessible recreational areas.
- The renewal and expansion of the existing facility is consistent with the objectives of the Western City District Plan to provide adequate facilities for an aging population and to provide much needed aged care places in Western Sydney to cater for growing demand which is currently not being met.

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility

56 Quarry Road, Bossley Park (Lot 8 DP 713734)

- The new purpose-built modern facility aims to respond to the site constraints and comply with the applicable deemed to comply FSR of 1:1, having an FSR of **0.90:1**. An examination of the site constraints has determined that a better environmental outcome is achieved by compacting the building footprint.
- The variation to the building height control is in order to allow access to the additional communal open space located on the rooftop terrace, as opposed to the creation of additional GFA.
- The building is sited and designed to minimise adverse impacts on surrounding residential properties as:
 - The compacted building footprint achieves increased setbacks, an improved landscaped setting and a reasonable level of privacy and sunlight access to neighbouring properties;
 - The visual impact of the 3 storey built form adjacent to Turquoise Crescent is mitigated by siting the lower ground level below street level;
 - The back of house facilities such as kitchens, laundry and store rooms are located on the Lower Ground Floor below ground within a basement.
- The new aged care facility has multiple positive environmental planning outcomes (ie a better environmental outcome) that are particular to the site that justify contravening the development standard, including:
 - Improved internal amenity by replacing an outdated RACF with a new purpose built facility;
 - Improved bushfire safety by setting back the new building from the bushfire hazard area;
 - Compacting the building footprint to retain a group of significant native trees.

Strict compliance with the development standard would hinder the objects of the Act. The social and economic welfare of the community would not be promoted as it would thwart the replacement of an outdated nursing home and thwart improvements to bushfire safety.

Having regard to the above, the proposal has considerable merit and is worthy of support.

4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

The variation to the development standard for building height (Clause 40) is considered well-founded because, notwithstanding the proposed non-compliance with this standard:

- The proposed development is entirely consistent with the underlying objective or purpose of the building height standard, as demonstrated in **Section 4.1**;
- The proposed development fully achieves the objectives of FLEP 2013 for the R2 Low Density Residential zone, as described in **Section 4.2**;
- Compliance with the standard would be unreasonable and unnecessary for the reasons outlined in **Section 4.3**;
- The part 2, part 3 development integrates with the character of the area and streetscape;
- The built form retains the appearance and character of a residential development, thereby complementing the low density residential environment in which it is situated;

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility

56 Quarry Road, Bossley Park (Lot 8 DP 713734)

- The proposal would deliver a significant supply of new housing, specifically designed to meet the needs of the ageing population and enable seniors to continue living in their established community;
- The development would maintain neighbouring amenity with no additional amenity impacts arising that have not already been deemed suitable from the current development.

For the reasons outlined above, it is considered that the proposed variation to the building height control is entirely appropriate and can be clearly justified having regard to the matters listed within FLEP 2013 Clause 4.6.

4.5 PUBLIC INTEREST

As outlined in Section 2.2, *Four2Five Pty Ltd v Ashfield Council* emphasised that it is for the proponent to demonstrate that the proposed non-compliance with the development standards is in the public interest. Subclause 4.6(4)(a)(ii) 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 the zone in which the development is proposed to be carried out.

Sections 4.1 and 4.2 have already demonstrated how the proposed development is consistent with the intended objectives of Clause 40 of SEPP HSPD as well as the R2 Low Density Residential Zone under FLEP 2013.

In *Lane Cove Council v Orca Partners Management Pty Ltd (No 2) [2015] NSWLEC 52*, Sheahan J referred to the question of public interest with respect to planning matters as a consideration of whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development.

The public advantages of the proposed development are as follows:

- The proposed built form will make a positive contribution to the ongoing operation of the Site;
- Provide opportunities for greater housing choice in the Fairfield LGA and assist in providing housing for the ageing population; and
- Provide a development outcome that is compatible with the existing residential character that is a permissible land use and consistent with the land use zone objectives.

4.6 MATTERS OF STATE AND REGIONAL SIGNIFICANCE

The proposed development and variation from the development standards does not raise any matters of concern for State or regional environmental planning, nor does it conflict with any State planning policies or Ministerial directives.

The Western City District Plan identifies there will be a 206 per cent proportional increase in people aged 85 and over, and a 93 per cent increase in the 65–84 age group by 2036. This means 18 per cent of the District population will be aged 65 or over in 2036, up from 13 per cent in 2016. Accordingly the District Plan has identified the need for additional health, social and aged care services to meet the expected increase in demand for local aged care facilities and respite services. The renewal and expansion of the existing Aged Care facility is consistent with the objectives of the District Plan to provide adequate facilities for an aging population and to provide much needed aged care places in Western Sydney to cater for growing demand which is currently not being met.

4.7 PUBLIC BENEFIT IN MAINTAINING THE STANDARDS

The public benefit is best served by the proposed development complying with the objectives of the control rather than strictly complying with the numerical standards of the control.

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility
56 Quarry Road, Bossley Park (Lot 8 DP 713734)

It is in the public benefit to support the variation in the control in order to provide for a development which is contextually sympathetic to the site and adjacent developments and to provide much needed aged care places in Western Sydney to meet demand.

Reducing the height to comply with the 8m/ 2-storey would likely render the development proposal unfeasible.

Compacting the building footprint and limiting the height encroachment to a portion of the site achieves the following public benefits;

- The proposal increases social and community value by allowing more ageing residents the opportunity to 'age in place' and retain their sense of belonging to the neighbourhood;
- It results in an overall increase in landscape area provision for the benefit of both staff and residents;
- It promotes a more efficient use of the developable area and reduces environmental impacts;
- It facilitates access for frail-aged occupants by reducing travel distances and avoiding internal ramps;
- It minimises tree loss by retaining existing trees in the north-eastern portion by setting back the building and provides a better local environmental outcome;
- The proposal maintains the 'sense of closeness' character of the cul-de-sac, through the consistent street address, enhancement of community interaction, both within the facility and with surrounding residents visiting;
- Achieves an increased setback and improves bushfire safety to the bushfire mapped reserve located to the south west of the site.

4.8 SUMMARY

For the reasons outlined above, it is considered that the objection to the development standard of SEPP HSPD are well-founded in this instance and the granting of Clause 4.6 Variations to these development standards are appropriate in the circumstances. Furthermore, the objection is considered to be well founded for the following reasons as outlined in Clause 4.6 of the FLEP 2013, *Four2Five Pty Ltd v Ashfield Council* and *Wehbe v Pittwater Council*:

- 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;
- The development is consistent with the objectives for development within the zone;
- The objectives of the standard are achieved notwithstanding the non-compliance with the 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:

- Strict compliance with the standards would not result in a better planning outcome for the land as it would prevent the development of a better considered proposal;
- The proposed development is considered to be key in meeting the housing targets for the ageing population within the Western City District, providing 134 beds; and

Addendum Clause 4.6 Variation – Height of Building

Residential Aged Care Facility

56 Quarry Road, Bossley Park (Lot 8 DP 713734)

- No unreasonable impacts are associated with the proposed development.

Overall, it is considered that the proposed Clause 4.6 Variation to the height of building control are entirely appropriate and can be clearly justified having regard to the matters listed within the FLEP 2013 Clause 4.6.

PART E CONCLUSION

The justification in this Clause 4.6 exemption for the exceedance of the building height controls in SEPP HSPD is based on achieving a better environmental outcome by compacting the building footprint. This is to facilitate the retention of a grove of existing native trees and to increase the setback to the adjacent reserve to improve bushfire safety. The proposed development, on balance, does not result in adverse impacts on surrounding residential properties, the Church site and adjacent bushland. The additional building height will achieve a raft of public benefits both for the staff/occupants of the development. These important social benefits and an absence of negative impacts, demonstrate technical compliance with the height control is unreasonable and unnecessary.

The objection to the building height development standard/s in Clause 40(4) (a), & (b) of SEPP Seniors is well founded and consistent with the Clause 4.6 Framework in the Fairfield LEP and the tests established by the Land and Environment Court, as summarised below:

- The objection relates to two departures from the numerical standard relating to “height”. These controls in Clause 40 of SEPP Seniors are a development standard and not a “prohibition” in respect of the development. Therefore, Clause 40 of SEPP Seniors can be varied under the provisions of Clause 4.6, as discussed at Part 2.1 of this report;
- The extent of the variation exceeds the 8m maximum building height by **34%**. The additional building height will not be visible from the public domain and will not result in additional environmental or amenity impacts on adjoining residential properties.
- The objection is well founded as it satisfies the **First Test** established by Preston CJ in that ***the objectives of the standard are achieved notwithstanding non-compliance with the standard***, as discussed at Part 3.1 of this report;
- Compliance with the development standards are unreasonable and unnecessary as the objectives of the standard and the zone are achieved notwithstanding the non-compliance, as discussed at Part 4.3;
- The proposed RACF has multiple positive environmental planning outcomes that are particular to the site that justify contravening the development standard, as discussed at Part 3.3 of this report, including:
 - Improved internal amenity by replacing an outdated RACF with a new purpose built RACF;
 - Improved bushfire safety by setting back the existing RACF footprint;
 - Compacting the building footprint to retain a group of significant trees and maximise setbacks to neighbours;
- The variation to the height control does not raise any matter of State or Regional planning significance, as discussed at Part 4.6;
- The public benefit is best served by the proposed development complying with the objectives of the control rather than strictly complying with the numeric standards of the control, as discussed at Part 4.7.

Having regard to the above, the proposal has considerable merit and is worthy of support.