18 June 2021

General Manager
Randwick City Council
30 Frances Street
RANDWICK NSW 2031

Dear Sir/Madam,

RE: AMENDED DEVELOPMENT APPLICATION FOR PROPOSED SENIORS HOUSING DEVELOPMENT INVOLVING 77 ROOM (86 BED) RESIDENTIAL CARE FACILITY AND 2 INDEPENDENT LIVING UNITS IN A BUILDING OVER BASEMENT CAR PARKING AS A "CLAUSE 45 VERTICAL VILLAGE" UNDER *STATE ENVIRONMENTAL PLANNING POLICY (HOUSING FOR SENIORS OR PEOPLE WITH A DISABILITY) 2004* AT 11-19 FRENCHMANS ROAD, RANDWICK

REQUEST UNDER CLAUSE 4.6 OF *RANDWICK LOCAL ENVIRONMENTAL PLAN 2012* TO VARY THE DEVELOPMENT STANDARD IN RELATION TO THE MINIMUM LANDSCAPED AREA CONTROL IN CLAUSE 48(C),CLAUSE 50(C)(I) AND CLAUSE 50(C)(II) OF *STATE ENVIRONMENTAL PLANNING POLICY (HOUSING FOR SENIORS OR PEOPLE WITH A DISABILITY) 2004*

INTRODUCTION

1. This letter has been prepared on behalf of the applicant Frenchmans Lodge Pty Ltd c/- Higgins Planning to further assist with the consideration of the Amended Development Application (Amended DA) for the proposed demolition of existing structures, construction and operation of a seniors housing development involving 77 room (86 bed) Residential Care Facility (RCF) and 2 Independent Living Units (ILUs) in a building over basement car parking as a "Clause 45 vertical village" under *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* and the variation sought to the "minimum landscaped area" controls in clause 48(c), 50(c)(i) and 50(c)(ii) of *State Environmental Planning Policy (Housing for Seniors and People with a Disability)* 2004 (Seniors Housing SEPP).
2. As detailed in the Statement of Environmental Effects (SEE) report which accompanies this DA, the design has had consideration of the "minimum landscaped area" under Clauses 48(c) and 50(c) of the Seniors Housing SEPP.
3. The minimum landscaped area of 25m^2 per bed standard under Clause 48(c) of the Seniors Housing SEPP, for the proposed residential care facility, and a minimum 35m^2 landscaped area per dwelling by a social housing provider, noting 1 ILU is nominated to be managed by a social housing provider under Clause 50(c)(i) of the Seniors Housing SEPP, and for the proposed independent living units a minimum 30% of the site area is to be landscaped under Clause 50(c)(ii) of the Seniors Housing SEPP on the land at 11-19 Frenchmans Road, Randwick.
4. This Clause 4.6 variation request has been prepared having regard to:
   - The NSW Department of Planning & Environment's Guideline *Varying Development Standards: A Guide*, August 2011, and
   - has incorporated as relevant principles identified in the applicable Case law, (established tests) in the following judgements:

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- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*
- *Wehbe v Pittwater Council [2007] NSWLEC 827*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No 1')*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 ('Four2Five No 3')*
- *Moskovich v Waverley Council [2016] NSWLEC 1015*
- *Project Venture Developments v Pittwater Council [2005] NSWLEC 191*
- *Ex Gratia P/L v Dungog Council [2015] (NSWLEC 148)*
- *And various other cases*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118:*

The relevant paragraphs from "Initial Action" have been considered below:

> *[13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*
>
> *[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].*
>
> *[15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.*
>
> *[16] As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.*
>
> ***[17] The first and most commonly invoked way is to 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: Wehbe v Pittwater Council at [42] and [43].***

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[18] A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

[19] A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

[20] A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

[21] A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

[22] These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

[23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

[24] The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

[25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in Randwick City Council v Micaul Holdings Pty Ltd at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl

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4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see Wehbe v Pittwater Council at [38].

[26] The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii).

[27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

[28] The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

[29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: Fast Buck$ v Byron Shire Council (1999) 103 LGERA 94 at 100; Wehbe v Pittwater Council at [41].

5. This letter explains how flexibility is justified in this case in accordance with the matters required to be considered and addressed under Clause 4.6 in a written request from the applicant. This letter also addresses where relevant other matters the consent authority is required to be satisfied when exercising the discretion of the assumed concurrence of the Secretary.

WHAT IS THE ENVIRONMENTALPLANNING INSTRUMENT (EPI) APPLICABLE?

6. The Environmental Planning Instrument (EPI) to which this variation relates is Clause 48(c), Clause 50(c)(i) and Clause 50(c)(ii) of the Seniors Housing SEPP.

WHAT IS THE ZONING OF THE LAND?

7. In accordance with Clause 2.2 of the Randwick Local Environmental Plan 2012 (RLEP) the site is zoned R3 Medium Density Residential and *State Environmental Planning Policy (Housing for Seniors or People with a Disability)* 2004

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WHAT ARE THE OBJECTIVES OF THE ZONE?

8. The land use table to Clause 2.2 of the RLEP provides the following objectives for the R3 Medium Density Residential zoning:

> ***Zone R3 Medium Density Residential***
>
> ***1 Objectives of zone***
>
> • *To provide for the housing needs of the community within a medium density residential environment.*
>
> • *To provide a variety of housing types within a medium density residential environment.*
>
> • *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
>
> • *To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area.*
>
> • *To protect the amenity of residents.*
>
> • *To encourage housing affordability.*
>
> • *To enable small-scale business uses in existing commercial buildings.*

WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?

9. The development standard being varied is the "minimum landscaped area of 25m^2 per bed " in Clause 48(c) for the residential care facility, and "a minimum 35m2 of landscaped area per social housing provider dwelling" in Clause 50(c)(i) and "30% of the area of the site is to be landscaped" for the self-contained dwellings in Clause 50(c)(ii) of the Seniors Housing SEPP.

UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE EPI?

10. The development standard being varied is prescribed as 25m^2 minimum landscaped area per bed under clause 48(c) of the Seniors Housing SEPP. The development standard to which this objection relates is Clause 48(c) under the Seniors Housing SEPP, which contains provisions relating to 25m^2 minimum landscaped area per bed for development of the site for the purposes of a residential care facility. The relevant clause in the Seniors Housing SEPP is as follows:

> ***48 Standards that cannot be used to refuse development consent for residential care facilities***
>
> *A consent authority must not refuse consent to a development application made pursuant to this Chapter for the carrying out of development for the purpose of a residential care facility on any of the following grounds:*
>
> *…*
>
> *(c) landscaped area: if a minimum of 25 square metres of landscaped area per residential care facility bed is provided,*

11. The proposal includes two self-contained dwellings (independent living units - ILUs) on the upper level. One of those ILUs is supported by a social housing provider. Therefore Clause 50(c) of the Seniors Housing SEPP has been considered:

> ***50 Standards that cannot be used to refuse development consent for self-contained dwellings***
>
> *A consent authority must not refuse consent to a development application made pursuant to this Chapter for the carrying out of development for the purpose of a self-contained dwelling (including in-fill self-care housing and serviced self-care housing) on any of the following grounds—*
>
> …

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(c) ***landscaped area:*** *if—*

(i) in the case of a development application made by a social housing provider—a minimum 35 square metres of landscaped area per dwelling is provided, or

(ii) in any other case—a minimum of 30% of the area of the site is to be landscaped,

WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

12. There are no stated objectives in Clause 48(c) or Clause 50(c) of the Seniors Housing SEPP, however the underlying objectives have been assumed as follows:

    (a) to minimise the impact of new development on existing views along Frenchmans Road and the nearby public open spaces,

    (b) to provide compatibility with the adjoining residential neighbourhood,

    (c) to safeguard visual privacy of interior and exterior living areas of neighbouring dwellings,

    (d) to minimise unacceptable detrimental impacts on adjoining properties, and

    (e) to maintain the amenity of the public domain, surrounding areas and the special qualities of the streetscape.

WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE EPI?

13. Minimum 25m^2 per bed landscaped area, 35m2 per self-contained dwelling (ILU) and a minimum of 30% of the site area is to be landscaped.

WHAT IS THE PROPOSED NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE DA AND THE VARIATION PROPOSED?

14. As demonstrated in the Site Plan DA01 and Landscape & Deep Soil Areas DA24a architectural drawing, the landscaped area is less than 25m^2 per bed of the RACF and does not comply.

15. "Landscaped area" is defined under the Seniors SEPP as follows:

    landscaped area *means that part of the site area that is not occupied by any building and includes so much of that part as is used or to be used for rainwater tanks, swimming pools or open-air recreation facilities, but does not include so much of that part as is used or to be used for driveways or parking areas*.

16. The proposal seeks the inclusion of 86beds which equates to 2,150 square metres of landscape area, and the proposal will provide 1,247.50 square metres landscaped area or 14.5m^2 per bed.

17. Amended architectural drawing no. DA24a includes information to demonstrate the quantum of landscaped area as per the Seniors Housing SEPP definition. In addition, this drawing includes details to demonstrate the quantum of "deep soil" at the ground floor level where the basement level below has been excluded being 450.7m^2 being an increase compared to the original deep soil areas; and a calculation of the external terraces and balcony areas being 332.1m^2 being an increase compared to the existing balconies currently available.

18. Several locations accessible from the "central spine" of the RACF design include areas capable of "open-air recreation" which have direct supervision and private courtyards, balconies, and terraces, inclusive of the roof terrace which have a combined area of approximately 332.1 square metres, which despite not complying with the landscaped area definition provide for open spaces. These in combination have an area of 1,579.60m^2 or 18.4m^2 per bed.

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19. Due to the average age of residents for which the proposed residential care facility will provide a home (being between 83 and 85 years of age), most persons on-site will not have the capacity to independently enter the gardens without supervision of assistance. The criteria are more suited to a self-care style of Seniors Housing which this proposed development does not involve.

20. It is considered that the criteria in clause 48(c) of the Seniors Housing SEPP does not necessarily cater for those who would reside in the applicant's proposed "residential aged care facility", i.e. frail persons not capable of independent living. It should be noted that the operator in this case, SummitCare, proposes a replacement RACF at Randwick which will cater for frail persons who are not capable of independent living and this proposed development includes two self-contained dwellings – referred to as ILUs - being 2 x 1-bedroom ILUs.

21. Based on the provisions of Clause 50(c)(i) requiring 35m^2 for the self-contained dwelling to be managed by a social housing provider as required by Clause 45 of the Seniors Housing SEPP. More than 35m^2 of landscaped area is available.

22. And, based on the provisions of Clause 50(c)(ii) of the Seniors Housing SEPP a minimum landscaped area of 30% or 812.91m^2 is required. More than 812.91m^2 of landscaped area is available.

23. The proposal complies with the 35m^2 and 30% landscaped of the site area and is compliant with Clauses 50(c)(i) and (ii) if considered individually, but in combination that is added together (it is noted that the provisions of Clauses 50(c)(i) at the end include "or" before Clause 50(c)(ii) in the Seniors Housing SEPP are therefore do not state the minimum amounts are to be combined, however this Clause 4.6 has been prepared out of an abundance of caution to assist with any assessment of the proposal to gain support). By adding the requirement of Clause 48(c) being 2,150m^2 with Clause 50(c)(i) 35m^2 plus the requirement in Clause 50(c)(ii) 812.91m^2 equals 2,997.91m^2, whereas as detailed previously the proposed landscaped area available is 1,247.5m^2

24. The proposed development, while not strictly complying with the minimum 25 square metres landscaped area per bed, seeks to off-set this small non-compliance by providing for increased resident amenity within the development itself by inclusion of several generously sized "lounge areas" internally and private courtyard and terrace areas. Each of the lounge and courtyard / terrace areas has an attractive aspect overlooking the private landscaped areas of the proposed development.

25. There are several reasons/factors for the non-compliance and these factors when combined have contributed to the design as proposed:
    - The goal to minimise impacts on adjoining properties views/outlooks;
    - To create a streetscape presentation which is two (2) storeys to McLennan Avenue, rather than more storeys, as the height of building control would facilitate additional storeys, while still complying with the maximum permitted Floor Space Ratio (FSR) under the RLEP plus bonus FSR under Clause 45 of the Seniors Housing SEPP;
    - To achieve a driveway access to the car parking area and loading dock (which are contained below the building to mitigate noise as occurs today at the McLennan Avenue frontage) suitable for gradients for the ramping system;
    - The desire to gain disabled access throughout the development from the main pedestrian entry at the Frenchmans Road frontage with landscaped garden areas; and
    - To accommodate the gradient of the site which is at its steepest in the cross-fall is just under 1.9m while at the same time minimising level changes at the southern side of the site.

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26. The design seeks to integrate each of these factors, however the landscaped area for the RACF is below the minimum 25m^2 landscaped area per bed, being 14.5m^2 per bed or a variation of 58%. As advised, this is off set by the large internal lounge / communal areas and the proposed communal balconies and terraces.
27. The proposal includes a large communal "core" area in the centre of the proposed building and extends to the south between the northern, eastern, and western wings as a climate controlled internal area for the amenity of residents which affords a level of supervision for carers which can open directly to the outdoor landscaped areas.

MATTERS TO BE CONSIDERED UNDER CLAUSE 4.6

28. Clause 4.6 of the RLEP states:

> ***4.6 Exceptions to development standards***
>
> *(1) The objectives of this clause are as follows—*
>
> *(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
>
> *(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
>
> *(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
>
> *(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—*
>
> *(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
>
> *(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*
>
> *(4) Development consent must not be granted for development that contravenes a development standard unless—*
>
> *(a) the consent authority is satisfied that—*
>
> *(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
>
> *(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
>
> *(b) the concurrence of the Planning Secretary has been obtained.*
>
> *(5) In deciding whether to grant concurrence, the Planning 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 Planning Secretary before granting concurrence.*
>
> *(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—*

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(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note—

When this Plan was made, it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E3 Environmental Management or Zone E4 Environmental Living.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) clause 5.4,

29. Each of the matters for consideration under Clause 4.6 of the RLEP and response to each consideration as detailed below:

4.6 Exceptions to development standards

(1) The objectives of this clause are as follows:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The objectives of this clause expressly indicate a degree of flexibility should be applied "in particular circumstances". This is such a circumstance to enable a flexible approach to the outcome sought by this DA.

(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.

The landscaped area standard under the Seniors Housing SEPP is not excluded from operation of this clause.

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

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

The original and addendum Statement of Environmental Effects submitted with the DA indicates a specific request is included with the application to seek a variation of the landscaped area development standard. This letter is the applicant's formal written request.

Refer to **table 1** below for an assessment under Clause 4.6(3)(a) and (b).

(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

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subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Director-General has been obtained.

This written request addresses all requirements of subclause (3).

As set out in **table 1** of this written request, the proposed development will be in the public interest because it is consistent with the underlying objectives of the landscaped area standard (refer to **table 1**) and the objectives for the zone (refer to **table 2**).

Concurrence may be assumed but is a matter to be determined by the Consent Authority.

(5) In deciding whether to grant concurrence, the Director-General must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

Potential matters of significance for State or regional environmental planning are addressed in paragraphs 48 and 49, and **table 3**.

The minor non-compliances with the development standard do not raise any matters of significance for State or regional planning as the development meets the underlying objectives of the development standard.

Consideration of whether there is any public benefit in maintaining the development standard is considered in paragraphs 50, 51 and 52.

As the development is consistent with the underlying objectives of the development standard, and as such requiring strict compliance with the development standard is unreasonable and unnecessary. There is no public benefit of maintaining the development standard in this instance.

All matters required to be considered by the Secretary (formerly Director-General) before granting concurrence have been addressed as part of this Clause 4.6 variation request.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

***Note.** When this Plan was made it did not include all of these zones.*

The provisions of Clause 4.6(6) do not apply to the subject site and proposed development in this DA.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

The Consent Authority must keep a record after determining this DA.

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(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) clause 5.4.

These subclauses do not affect the site.

30. **Table 1** below provides an assessment against Clause 4.6(3):

Table 1: Clause 4.6(3) assessment

Objective	Comment
(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case	Strict application of the development standard is unreasonable and unnecessary as the proposed development will be consistent with the underlying objectives of Clause 48(c) of the Seniors living SEPP: (a) to minimise the impact of new development on existing views along McLennan Avenue and the nearby public open spaces, (b) to provide compatibility with the adjoining residential neighbourhood, (c) to safeguard visual privacy of interior and exterior living areas of neighbouring dwellings, (d) to minimise unacceptable detrimental impacts on adjoining properties, and (e) to maintain the amenity of the public domain, surrounding areas and the special qualities of the streetscape. The objectives above encourage a flexible approach to compliance with design principles where the design of the development responds to the site and its form, strict compliance with the standard under Clauses 48(c), 50(c)(i) and 50(c)(ii) when combined is **unnecessary** because: • The proposed development will be consistent with the stated aims of the Seniors Housing SEPP as discussed in the original and addendum Statement of Environmental Effects (SEE) reports; • If made to comply the presentation of the development to McLellan Avenue would be an abrupt change of scale in the streetscape; and • The proposed development does not result in a significant adverse impact in terms of loss of solar access, loss of privacy or loss of views from adjoining properties. Strict compliance with the development standard is unnecessary as the DA will still achieve the environmental and underlying planning objectives of Clause 48(c), as discussed above. The proposed development will be consistent with the objectives of the zone: i. Senior's housing is a permissible use which is compatible with the mix of uses in the locality; ii. A renewed seniors housing development in the form of a residential care facility with ILUs including affordable housing with 20% concessional places in the RACF and 1 ILU in an accessible location is provided and includes the provision of access to services; iii. The renewed use will promote affordable housing with the inclusion of up to 40% concessional places to support the needs of the local community in Randwick and the wider Randwick LGA. Strict compliance is **unreasonable** as no environmental or planning purpose would be served by enforcing the development standard and would not bring about a good planning outcome, on the following grounds: I. An assessment of the proposal demonstrates it is consistent with the desired future character of the R3 zone; II. The design is considered to be compatible with the streetscape along McLennan Avenue and Frenchmans Road;

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Objective	Comment
	III. The design will not create any unreasonable overshadowing, result in loss of privacy or create an adverse visual impact upon the streetscape or the environment given the areas of non-compliance is in a portion of the site which does not dominate the streetscape; IV. The landscaped area of the proposed development is consistent with surrounding development, and is located to provide direct supervision from within the lounge areas; V. The proposed development will not create any unreasonable overshadowing, result in loss of privacy, or create an adverse visual impact upon the streetscape or the environment given the area of non- compliance is in a portion of the site which does not dominate the streetscape and has building has been lowered in its RLs to achieve suitable levels internally of the RACF which converge with the available landscaped area; VI. The development will not generate any adverse traffic impacts and will improve the amenity of McLennan Avenue having moved truck deliveries away from this frontage; VII. The breach of the minimum landscaped area control will not be readily visible from Frenchmans Road, McLennan Avenue, or the adjoining public open space, VIII. The scale of the surrounding development has been considered carefully as outlined in the Architectural Design Statement by Boffa Robertson Group which includes a site analysis, refer to Appendix B of the SEE, and the proposed development is compatible with the streetscape along the site frontage to McLennan Avenue and Frenchmans Road, given the following: • The design is complementary to the streetscapes and will not unreasonably impact on the available solar access to the adjoining residential properties; • The landscaped area breach will enable the public benefit of the creation of a RACF with 20% concessional places which will be maintained by SummitCare, and could not be brought about if the development were not supported in its current form; and I. The scale of the desired future surrounding development has been considered carefully and the design is compatible. In summary the design in its current form with the breach of the 25m^2 per bed landscaped area control can be supported because: 1. there are sufficient environmental planning grounds to justify contravening the standard; and 2. the proposed development will be consistent with the underlying objectives of the standard. For these reasons it is considered that strict application of the landscaped area control in Clause 48(c) of the Seniors Housing SEPP is unreasonable and unnecessary in this circumstance, particularly given that the non-compliance is minimal and there are no unacceptable impacts flowing from the non-compliance.
(b) that there are sufficient environmental planning grounds to justify contravening the	The exceedance of the development standard is a very minor part of the proposed built form, as the design seeks the inclusion of affordable housing and lift access to existing street frontage from Frenchmans Road and McLennan Avenue allowing accessibility throughout the seniors housing development and land. The minor non-compliance with the development standard is far outweighed by the design achieving the underlying aims in Clause 48(c) of the Seniors Housing SEPP in promoting the principles outlined in the Greater Sydney Region Plan – A Metropolis of Three Cities. For example, the development promotes a use in an urban area which supports:

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Objective	Comment
development standard	• Inclusion of more affordable housing; and • Increasing jobs and better utilising land already zoned R3 Medium Density residential which envisages higher density residential development. In this regard, the DA is consistent with the State and regional objectives.

31. The requirement for consideration and justification of a Clause 4.6 variation necessitates an assessment of the criteria. It is recognised that it is not merely sufficient to demonstrate a minimisation of environmental harm to justify a Clause 4.6 variation, although in the circumstance of this case, the absence of any environmental impact, the request is of considerable merit.
32. The proposed variation from the development standard is assessed below against the accepted "5 Ways" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council [2007] NSWLEC 827* and the principles outlined in *Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46*. Whilst the principle applied to SEPP 1, it has been generally applied in the consideration of a request under Clause 4.6 of the RLEP, as confirmed in *Four2Five*.

HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?

33. The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council [2007] NSW LEC 827*. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the variation. Under *Four2Five*, whilst this can still be considered under this heading, it is also necessary to consider it under Clause 4.6(3)(a) (see below).
34. The five ways described in *Wehbe* are therefore appropriately considered in this context, as follows:

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

35. Clause 48(c) of the Seniors Housing SEPP does not have stated objectives, and therefore the underlying objectives have been considered, and the variation still achieves the underlying objectives of the development standard as detailed previously in Table 1 above.
36. The DA achieves the above underlying objectives for the reasons stated in Table 1 notwithstanding the minor non-compliance with the minimum landscaped area of 25m^2 per bed standard.
37. The breach of the minimum 25m^2 per bed landscaped area standard do not cause inconsistency with these objectives, and therefore the intents of clause 48(c) of the Seniors Housing SEPP are also achieved.

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

38. There are underlying objectives of the standard in Clause 48(c) and as discussed above, the underlying objectives of Clause 48(c) are relevant to the DA and can be maintained by the architectural design.

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

39. As the stated previously the underlying objectives of the standard can still be maintained, and therefore the purpose will not be defeated or thwarted by the variation requested and strict 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;***

40. It is noted that Council has varied the landscaped area standard from time to time based on the merits of each case.

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

41. Not applicable.

SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY THE CONTRAVENTION

42. The Statement of Environmental Effects (SEE) prepared for this DA provides a comprehensive environmental planning assessment of the architectural design and concludes that subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the DA.
43. There are robust justifications throughout the SEE accompanying documentation to support the proposed seniors housing given the overall bulk and scale of the development is compatible and will not adversely impact nearby residential development, and the design has been assessed as consistent with the desired future character in the urban design peer review and is appropriate on environmental planning grounds.
44. The circumstances of this case distinguish it from others as detailed in Table 1 above.

IS THE VARIATION IN THE PUBLIC INTEREST?

45. Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the proposed development will be in the public interest because it is consistent with the underlying objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.
46. The objectives of the standard have been addressed in **table 1** and are demonstrated to be satisfied. The proposal is consistent with the zone objectives and permissible in the zone. Each of the objectives of the zone are addressed in **Table 2** below.

Table 2: *Assessment of the proposed development against the zone objectives – R3 Medium Density Residential zone under the RLEP*

R3 Medium Density Residential zone - objectives	Comment
• ***To provide for the housing needs of the community within a medium density residential environment.***	The research undertaken for SummitCare has identified as discussed previously the need for diversity in aged care in the form of a "vertical village" development as proposed by the applicant, being a medium-density form of housing consistent with the objective.

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R3 Medium Density Residential zone - objectives	Comment
• ***To provide a variety of housing types within a medium density residential environment.***	The form of development is a type of "seniors housing" which is listed like the types of residential housing permitted within the R3 zone and is therefore consistent with the objective.
• ***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***	The building includes ancillary uses as part of the overall support for the "seniors housing development" to meet the day to day needs of future residents and their visitors being consistent with the objective.
• ***To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area.***	The urban design peer review included in Appendix Y, demonstrates the proposal will positively contribute to the desired future character of the area.
• ***To protect the amenity of residents.***	The amenity of residents on adjoining properties and within the renewed development will be protected, as solar access, acoustic and visual privacy, views, and setbacks to adjoining properties will be adequately maintained and improved.
• ***To encourage housing affordability.***	The proposal includes the provision of affordable housing outcomes as detailed in the Social Impact Comment included in Appendix N and outlined in detail in the SEE Report in Section 3.
• ***To enable small-scale business uses in existing commercial buildings.***	The site currently operates a nursing home in the existing building which has been identified as requiring renewal.

47. The objectives of the zone as demonstrated above, as well as the objectives for the standard have been adequately satisfied, where relevant. Therefore, the variation to the minimum 25m^2 per bed landscaped area standard is in the public interest.

MATTERS OF STATE OR REGIONAL SIGNIFICANCE (CL.4.6(5)(A))

48. Clause 4.6(5) of the RLEP states:

> *(5) In deciding whether to grant concurrence, the Director-General must consider:*
>
> (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
>
> (b) *the public benefit of maintaining the development standard, and*
>
> (c) *any other matters required to be taken into consideration by the Director- General before granting concurrence.*

The matters for consideration in Clause 4.6(5) have been addressed in **Table 3** below.

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Table 3: Clause 4.6(5) assessment

Matter of Consideration	Comment
(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning	The minor non-compliance with the development standard does not raise any matters of significance for State or regional planning as the development meets the underlying objectives of the development standard.
(b) the public benefit of maintaining the development standard	As the DA substantially complies with the underlying objectives of the development standards, there is little utility in requiring strict compliance with the development standard for an otherwise compliant development. There is no public benefit of maintaining the development standard in this circumstance.
(c) any other matters required to be taken into consideration by the Director-General before granting concurrence	It is considered that all matters required to be taken into account by the Director-General before granting concurrence have been adequately addressed as part of this Clause 4.6 variation request.

49. There is no prejudice to planning matters of State or Regional significance resulting from varying the development standard as proposed by this application.

THE PUBLIC BENEFIT OF MAINTAINING THE STANDARD (CL.4.6(5)(B))

50. Pursuant to *Ex Gratia P/L v Dungog Council (NSWLEC 148),* the question that needs to be answered is "whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development".
51. There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the minimum 25m^2 per bed landscaped area standard, whilst better planning outcomes are achieved.
52. We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will be in the public interest.

IS THE VARIATION WELL FOUNDED?

53. This Clause 4.6 variation request is well founded as it demonstrates, that:

    a) Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;

    b) There are sufficient environmental planning grounds to justify the contravention, which results in a better planning outcome than a strictly compliant development in the circumstances of this case;

    c) The DA meets the objectives of the development standard and where relevant, the objectives of the R3 zone, notwithstanding the variation;

    d) The DA is in the public interest and there is no public benefit in maintaining the standard;

    e) The non-compliance with the minimum landscaped area of 25m^2 per bed under Clause 48(c) of the Seniors Housing SEPP standards does not result in any unreasonable environmental impact or unacceptable adverse impacts on adjoining owners and/or occupiers;

    f) It is considered the proposed landscaped area is appropriate for the orderly and economic use of the land and is consistent with character of this location; and

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g) The contravention does not raise any matter of State or Regional significance.

CONCLUSIONS

54. This Clause 4.6 variation request to vary Clause 48(c) of the Seniors Housing SEPP should be supported on the basis that the strict application of the development standard to the DA is both unreasonable and unnecessary given the variation is well founded and detailed above and Table 1, and will provide for a seniors housing development with affordable housing with improved access and choice for the needs of the community of Randwick and the wider LGA, which is in the public interest.
55. For the reasons set out above, the seniors housing development should be approved with the minor exception to the numerical minimum 25m^2 per bed landscaped area standard in Clause 48(c) of the Seniors Housing SEPP. Importantly, the development as proposed achieves the underlying objectives of the standard and the stated zone objectives, despite the minor numerical non-compliance with the development standard.

Should you have any queries or require clarification on any matters please do not hesitate to contact the undersigned on (02) 9929 4044.

Yours faithfully,

Marian Higgins
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