18 June 2021

General Manager
Randwick City Council
30 Frances Street
RANDWICK NSW 2031

Dear Sir/Madam,

RE: AMENDED DEVELOPMENT APPLICATION 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 GRADIENT TO PUBLIC TRANSPORT STANDARD IN CLAUSE 26 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 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 Clause 26 of the *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 gradient under 26 of the Seniors Housing SEPP which complies, however 2 pram ramps are of gradients which exceed the requirement in Clause 26. The locations of the non-compliant pram crossings are detailed in the Clause 26 Report prepared by Judith Stubbs and Associates included with the original Statement of Environmental Effects at Appendix R, and these gradients can be corrected as demonstrated in the civil design drawings included in Appendix U of the original Statement of Environmental Effects.
3. The maximum gradient under Clause 26 of the Seniors Housing SEPP complies, for the proposed residential care facility component on the land at 11-19 Frenchmans Road, Randwick.
4. This Amended 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:
     - *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*
     - *Wehbe v Pittwater Council [2007] NSWLEC 827*

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- *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 26(of the Seniors Housing SEPP.

WHAT IS THE ZONING OF THE LAND?

7. In accordance with Clause 2.2 of the RLEP the site is zoned R3 Medium Density Residential.

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:

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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 "gradient" in Clause 26 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 a maximum gradient to the public transport services in clause 26 of the Seniors Housing SEPP being the pram ramps / pedestrian ramps at the intersection of Frenchmans Road with Avoca Street (see page 10 of Appendix R which are to be reconstructed to a gradient of 1:8 for a maximum of 1.5m. In addition, see page 17 of Appendix R which indicates the pedestrian ramps for the laneway next to Alison Park also needs to be adjusted). The development standard to which this objection relates is Clause 26 under the Seniors Housing SEPP, which contains provisions relating to a maximum gradient to the public transport service for redevelopment of the site for the purposes of a residential care facility component of the vertical village. The relevant clause in the Seniors Housing SEPP is as follows:

26 Location and access to facilities

(1) A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have access that complies with subclause (2) to—

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

(b) community services and recreation facilities, and

(c) the practice of a general medical practitioner.

(2) Access complies with this clause if—

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

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

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

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

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WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

11. There are no stated objectives in Clause 26 of the Seniors Housing SEPP, as such the underlying objectives are as follows:

    (a) To encourage different forms of seniors housing; and

    (b) To ensure that residents of seniors housing developments who are independent and capable of using public transport have reasonable access to public transport services to take them to facilities and services that they are likely to want to use. It is not relevant as a standard with highly dependent people who are not capable of walking to and using public transport.

    And these underlying objectives of the standard should be read in conjunction with the objectives of the chapter under the Seniors Housing SEPP, where Clause 14 of the Seniors Housing SEPP

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

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

12. Maximum gradient to public transport service.

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

13. The development standard in Clause 26(2)(b)(i) of the Seniors Housing SEPP is a maximum of 400m along a suitable access pathway to the public transport service.

14. The suitable access pathway has been assessed for its gradient and distance in the Survey contained in Appendix A with the distance compliant see Appendix R report, however the pram ramps / pedestrian ramps at the intersection of Frenchmans Road and Avoca Street, and at the intersection of Alison Park and the laneway do not comply as being a suitable access pathway in terms of its gradient as required by Clause 26 of the Seniors Housing SEPP. Refer to the Clause 26 Report prepared by Judith Stubbs and Associates included in **Appendix R**.

15. The provisions of Clause 26 have been considered in detail as demonstrated in the report at **Appendix R**. The applicant is prepared to implement the recommendations of this report to the footpath infrastructure improvements as detailed above, which are direct public benefits that will be delivered by the proposed development.

16. In addition, the Clause 26 Report at **Appendix R** includes information to assist with the evaluation with respect to the criteria detailed at Clause 26, to which the proposal complies.

17. The proposed redevelopment complies with the underlying objectives of this clause and provides access to facilities by a superior means to those identified in clause 26(2). For example, SummitCare as the managers and operators of the proposed residential care facility (refer to **Appendix O** SummitCare Plan of Management) seeks to provide superior services on-site which will include:

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- Gym / Physiotherapy,
- Hairdressing salon
- Cafe;
- Strategically located lounge and dining areas for residents to enjoy outlooks to the landscaped gardens;
- Nurse stations at each residential level;
- On-site facilities for provision of catering with full commercial kitchen and refrigeration/storerooms;
- On-site linen services;
- Plant areas;
- Storage areas;
- Staff amenities; and
- Lift access to each level of the building for residents with a separate service lift access for "back-of-house" functions.

MATTERS TO BE CONSIDERED UNDER CLAUSE 4.6

18. 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*

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(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—

(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,

19. 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 maximum gradient standard under Clause 26 of 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.

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The Statement of Environmental Effects submitted with the DA indicates a specific request is included with the application to seek a variation of the gradient 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 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 redevelopment will be in the public interest because it is consistent with the underlying objectives of the gradient 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 39 and 40, 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 redevelopment 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 41, 42 and 43.

As the redevelopment 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

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(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.

(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.

20. **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 considered to be unreasonable and unnecessary as the proposed redevelopment will be consistent with the underlying objectives of Clause 26(b) of the Seniors living SEPP: (a) To encourage different forms of seniors housing; and (b) To ensure that residents of seniors housing developments who are independent and capable of using public transport have reasonable access to public transport services to take them to facilities and services that they are likely to want to use. It is not relevant as a standard with highly dependent people who are not capable of walking to and using public transport. And these underlying objectives of the standard should be read in conjunction with the objectives of the chapter under the Seniors Housing SEPP, where Clause 14 of the Seniors Housing SEPP *"The objective of this Chapter is to create opportunities for the development of housing that is located and designed in a manner particularly suited to both those seniors who are independent, mobile and active as well as those who are frail, and other people with a disability regardless of their age."* In light of the objectives above, which encourage a flexible approach to compliance with design principles where the design of the redevelopment responds to the site and its form, strict compliance with the standard under Clause 26(b) is **unnecessary** because: • The proposed redevelopment will be consistent with the stated aims of the Seniors Housing SEPP as discussed in the Statement of Environmental Effects (SEE) report; • It is possible to make the proposed renewed development comply with the replacement of the gradients as detailed in Appendix U civil design drawings; 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 26(b), 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;

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Objective	Comment

ii. A renewed seniors housing development which will cater for high care needs of the local community with inclusion of on-site services compared to the existing nursing home in Frenchmans Road is a form of development involving a residential aged care facility component in an accessible location which will comply with the Clause 26 and will comply with the gradients with the replacement of the pedestrian ramps as detailed in the civil drawings included in Appendix U;

iii. The renewed of the RACF component use will promote affordable housing with the inclusion of up to 20% concessional places so as 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 Frenchmans Road and McLennan Avenue;

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 gradient of the proposed development to public transport services is consistent with surrounding development, the gradient changes will provide a benefit to all users of these public domains by less able persons,

V. The proposed redevelopment 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;

VI. The redevelopment will not generate any adverse traffic impacts,

VII. The renewal of the existing RACF will provide for improved emergency flood facilities compared to the existing situation which is a wider public benefit to the community in Frenchmans Road, which if not supported with this renewed RACF, will not be available to the community in the local area ;

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 redevelopment is considered to be compatible with the streetscape along the site frontage to 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 maximum gradient changes 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 considered to be compatible.

In summary the design in its current form with the breach of the gradient control can be supported because:

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Objective	Comment
	1. there are sufficient environmental planning grounds to justify contravening the standard; and 2. the proposed redevelopment will enable the gradient to be corrected and is consistent with the underlying objectives of the standard. For these reasons it is considered that strict application of the maximum gradient control in Clause 26(b) 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 development standard	The exceedance of the development standard is a very minor part of the proposal, as the design seeks the inclusion of affordable housing and lift access to existing street frontage from Frenchmans Road 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 26(b) of the Seniors Housing SEPP in promoting the principles outlined in the Greater Sydney Region Plan – A Metropolis of Three Cities. For example, the redevelopment promotes a use in an urban area which supports: • 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.

21. 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.
22. 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?

23. 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).
24. The five ways described in *Wehbe* are therefore appropriately considered in this context, as follows:

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

25. Clause 26(b) 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.
26. The DA achieves the above underlying objectives for the reasons stated in Table 1 notwithstanding the minor non-compliance with the maximum gradient standard.
27. The breach of the maximum gradient standard does not cause inconsistency with these objectives, and therefore the intents of clause 26(b) 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;***

28. There are underlying objectives of the standard in Clause 26(b) and as discussed above, the underlying objectives of Clause 26(b) are relevant to the DA and can be maintained by the architectural design.

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

29. 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;***

30. It is noted that Council has varied the gradient 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.***

31. Not applicable.

SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY THE CONTRAVENTION

32. 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.
33. There are robust justifications throughout the SEE accompanying documentation to support the proposed seniors housing given the overall bulk and scale of the redevelopment 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.
34. The particular circumstances of this case distinguish it from others as detailed in Table 1 above.

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IS THE VARIATION IN THE PUBLIC INTEREST?

35. 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 objectives of the particular standard and the objectives for development within the zone in which the redevelopment is proposed to be carried out.
36. 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.
• ***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.

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37. 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 maximum gradient standard is in the public interest.

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

38. 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.

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 redevelopment 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.

39. 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))

40. 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".
41. 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 maximum gradient standard, whilst better planning outcomes are achieved.
42. 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?

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

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

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 maximum gradient under Clause 26(b) 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 replacement of the problematic pram ramps / pedestrian ramps is a minor variation, the proposed RACF will cater for persons with high care needs with the inclusion of on-site services, therefore a variation is appropriate for the orderly and economic use of the land and is consistent with the character of this location; and

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

CONCLUSIONS

44. This Clause 4.6 variation request to vary Clause 26(b) 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.
45. For the reasons set out above, the seniors housing development should be approved with the minor exception to the numerical maximum gradient standard in Clause 26(b) of the Seniors Housing SEPP which will be corrected by this DA but without accepting this Clause 4.6 and the proposed development the pram ramps will remain non-compliant. Importantly, the redevelopment 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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