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 FORSENIORS OR PEOPLE WITH A DISABILITY) 2004* AT 11-19 FRENCHMANS ROAD, RANDWICK

UPDATED REQUEST UNDER CLAUSE 4.6 OF *RANDWICK LOCAL ENVIRONMENTAL PLAN 2012* TO VARY THE DEVELOPMENT STANDARD FOR FLOOR SPACE RATIO UNDER CLAUSE 4.4 *RANDWICK LOCAL ENVIRONMENTAL PLAN 2008*

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 buildingover 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 4.4 of the *Randwick Local Environmental Plan 2012* (RLEP).
2. As detailed in the Original Statement of Environmental Effects (Original SEE) report and the Addendum Statement of Environmental Effects (Addendum SEE) which accompanies this Amended DA, the design has had consideration of the Floor Space Ratio (FSR) standard contained in Clause 4.4 of the RLEP, the proposal will result in a variation to the FSR standard in Clause 4.4 of the RLEP FloorSpace Ratio Mapping.
3. The permitted 0.9:1 FSR standard under Clause 4.4 of the RLEP applies as the land under the FSR Map, for the land at 11-19 Frenchmans Road, Randwick.
4. Therefore, this request is to vary the RLEP FSR standards under the provisions of Clause 4.6 of the RLEP.
5. This Updated 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*
     - *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No 1')*
     - *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*

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- *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].***
>
> *[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].*

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[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 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].

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[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].

6. 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?

7. The Environmental Planning Instrument (EPI) to which this variation relates is the *Randwick Local Environmental Plan 2012* (RLEP).

WHAT IS THE ZONING OF THE LAND?

8. In accordance with Clause 2.2 of the RLEP the site is zoned R34 Medium Density Residential.

WHAT ARE THE OBJECTIVES OF THE ZONE?

9. 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

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- *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?

10. The development standard being varied is the "Floor Space Ratio" (FSR) standard shown in the RLEP FSR Map.

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

11. The development standard being varied is prescribed under Clause 4.4 of the RLEP. Clause 4.4 is detailed below. The RLEP FSR Map identifies the subject site with the designation 'L = 0.9:1', see Figure 1. The land is zoned R3 Medium Density Residential under the RLEP zoning map. Therefore, under Clause 4.4, the RLEP FSR Map and this clause apply.

4.4 Floor space ratio

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

(a) to ensure that the size and scale of development is compatible with the desired future character of the locality,

(b) to ensure that buildings are well articulated and respond to environmental and energy needs,

(c) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,

(d) to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.

(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

(2A) Despite subclause (2), the maximum floor space ratio for a dwelling house or semi-detached dwelling on land in Zone R2 Low Density Residential or Zone R3 Medium Density Residential is not to exceed—

(a) if the lot is more than 300 square metres but not more than 450 square metres—0.75:1, or

(b) if the lot is more than 450 square metres but not more than 600 square metres—0.65:1, or

(c) if the lot is more than 600 square metres—0.6:1.

(2B) Despite subclause (2), there is no maximum floor space ratio for a dwelling house or semi-detached dwelling on a lot that has an area of 300 square metres or less.

The RLEP FSR mapping designation 'L = 0.9:1' is shown in extract from the FSR Mapping in **Figure 1 below**.

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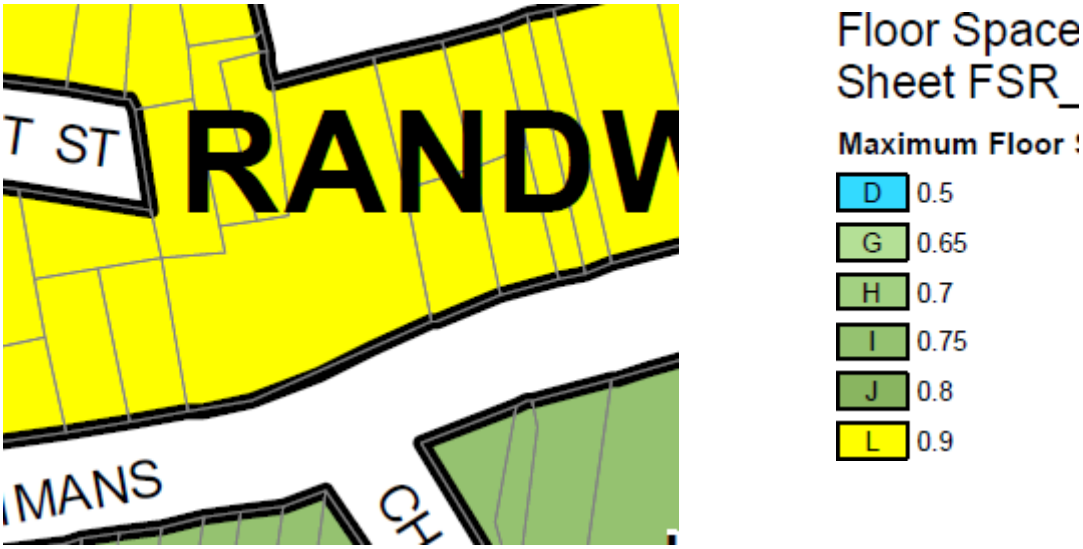

Figure 1: RLEP 2012 FSR Map Extract (site outlined in red)
Source: NSW Legislation

This development standard relates to the maximum permitted floor space ratio of a building, as Clause 4.4 of the RLEP falls within the scope of a "development standard" as defined under Section 4 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

12. The objectives in Clause 4.4 of the RLEP, are as follows:

    (a) to ensure that the size and scale of development is compatible with the desired future character of the locality,

    (b) to ensure that buildings are well articulated and respond to environmental and energy needs,

    (c) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,

    (d) to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.

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

13. An extract of the RLEP FSR map is shown in **Figure 1**. The map prescribes the site being within 'L = 0.9:1' for the subject site.

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

14. The Amended DA seeks a minor variation to the FSR mapping. The design of the proposed development involves a total FSR of 1.276:1 (3,458.4m^2 of Gross Floor Area under Clause 45 of the Seniors Housing SEPP).
15. The proposed seniors housing development is submitted under State Environmental Planning Policy (Housing for Seniors or Persons with a Disability) 2004 (Seniors Housing SEPP) and has been designed in a "vertical village" format under Clause 45 of the Seniors Housing SEPP. The provisions of Clause 45(2) of the Seniors Housing SEPP enable a "vertical village" seniors housing development to seek a bonus 0.5:1 where a proposal meets the criteria details in Clause 45. The Original Statement of

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Environmental Effects and the Addendum SEE details how the proposed seniors housing development is consistent with the provisions of Clause 45 of the seniors Housing SEPP. In addition, the Addendum SEE report details that the provisions of the Seniors Housing SEPP are to prevail over the provisions of a local environmental plan.

16. The provisions of Clause 4.4 of the RLEP indicates a maximum 0.9:1 FSR. The base RLEP FSR in combination with the maximum bonus FSR of 0.5:1 in Clause 45 is a maximum 1.4:1. The proposed seniors housing development has been calculated as having an FSR of 1.276:1. This exceeds the RLEP FSR and therefore this Clause 4.6 variation letter has been prepared.
17. The Amended DA seeks a variation of the FSR control in Clause 4.4 of the RLEP based on the provisions of Clause 45 of the Seniors Housing SEPP and the design has considered a number of factors which have influenced the proposed seniors housing development including:
    a) The character of the immediate locality has been considered by Boffa Robertson in consultation with the advice provided by the urban design Matthew Pullinger. This is demonstrated in the Urban Design Peer Review and subsequently the Amended Design and Further Urban Design Review in Appendix G of the Addendum SEE. The proposed development inclusive of the overall building height has been designed to be consistent with the existing and desired future character which includes two existing 4 level buildings in this section of Frenchmans Road. The applicant has adopted a strategy to move the building height away from the northern boundary so as to mitigate overshadowing to adjoining properties tothe immediate east and west while at the same time minimizing visual bulk from nearby residential properties, while shifting the building bulk towards the Frenchmans Road frontage;
    b) The Original and Addendum Statement of Environmental Effects reports state this proposal is submitted as a "seniors housing" development under Statement Environmental Planning Policy (Housing forSeniors or Persons with a Disability) 2004 (Seniors Housing SEPP) as a "Clause 45 vertical village" designformat, where the provisions in another environmental planning instrument whereinconsistent with the Seniors Housing SEPP are not to be used to limited the "vertical village"development outcome;
    c) As detailed in Section 2.2 "Strategic Planning Context" of the Original SEE the applicant has adopted a strategy to move the building bulk and scale away from the northern boundary so as to ensure loss of solar access is maintained to adjoining properties while at the same time minimising visual bulk when viewed from nearby residential properties, while shifting the building bulk towards the Frenchmans Road frontage;
    d) In shifting the building bulk, the proposal seeks to create a suitable streetscape presentation to Frenchmans Road which is consistent and sympathetic with the surrounding streetscape and does not result in unacceptable loss of amenity to adjoining properties;
    e) The proposed seniors housing development has been designed to an appropriate bulk and scale given the site area and its locational context;
    f) As the proposal involves a Clause 45 vertical village format of seniors housing development under the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*, referred to here as the Seniors Housing SEPP, and includes the provision of not only a diverseform of housing which has been demonstrated in the Original SEE as needed, but also the inclusion of affordable housing for 1 of the proposed independent living units component and at least 40% concessional beds within the residential care facility component of the "Clause 45 vertical village", which is an outcome which would not be

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provided if the land were development for a residential flat building within the permitted FSR control under the RLEP;

g) The FSR non-compliance does not create a detrimental privacy impact on adjoining properties;
h) The proposal remains compliant with the maximum FSR with inclusion of a 0.5:1 bonus under Clause 45 vertical village provisions ofthe Seniors Housing SEPP; and
i) The extent of the breaches of the FSR control is considered to be moderate .

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

(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

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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 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) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(ca) clause 6.16(3)(b).

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 Amended 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 Floor Space Ratio (FSR) standard 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 Addendum Statement of Environmental Effects submitted with the Amended DA indicates a specific request is included with the application to seek a variation of the FSR development standard. This letter isthe 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:

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(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 development will be in the public interest because it is consistent with the objectives of the FSR 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 38 and 39 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 stated objectives of the development standard.

Consideration of whether there is any public benefit in maintaining the development standard is considered in paragraphs 40, 41 and 42.

As the development is consistent with the stated 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.*

(7) The provisions of Clause 4.6(6) do not apply to the subject site and proposed development in this Amended DA. The Consent Authority must keep a record after determining this Amended DA.

(8) 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).

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

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(ca) clause 6.16(3)(b).

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 development will be consistent with the stated objectives of Clause 4.4 of the RLEP: *(a) to ensure that the size and scale of development is compatible with the desired future character of the locality,* *(b) to ensure that buildings are well articulated and respond to environmental and energy needs,* *(c) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,* *(d) to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.* In light of the objectives above, which 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 Clause 4.4 is **unnecessary** because: • The design of the proposed seniors housing development results in a better outcome particularly as the buildings allows for disabled access throughout without resulting in overlooking given the perimeter landscaping; • The design provides for an improved public domain with specific improvements to make existing pram crossing complaint with disabled access requirements of the Australian Standard and as detailed in the Clause 26 Report included at Appendix U of the Original SEE, along with each street frontage with a new landscaped setting to be created; • The design of the building results in a better urban design outcome without resulting in unacceptable streetscape presentations and does not propose to unacceptably alter the existing site topography while creating a sense of address to each frontage, appropriate proportion and access to the proposed seniors housing to create an active street frontage to Frenchmans Road in character with the existing and desired streetscape character, which is considered to be consistent with the objectives; • The Statement of Heritage Impact prepared by Weir Phillips in Appendix X of the Original SEEindicates the design will not adversely impact on the adjoining heritage items • The design despite the minor breach of the FSR control, the proposal has been designed to provide for a high-quality urban form as detailed in the Architectural Design Report at Appendix B of the Original SEE and the Urban Design Peer Review at Appendix Y of the Original SEE and the Further Urban Design Review in Appendix G of the Addendum SEE, consistent with the objectives; • The design includes a transition within the building away from its northern boundary with McLennan Avenue so as to shift the building bulk away from the

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Objective	Comment
	northern boundaries consistent with objectives; • The Amended DA is accompanied by Shadow Diagrams in the Architectural Drawings atAppendix B which analyses the 3pm and 4pm hour periods on 21 June and demonstrate suitable amenity can be maintained to adjoining properties and withinthe development: o The proposed design and the solar access to adjoining properties will not be adversely affected by the shadow cast associated with the projection of the roof and lift overrun. o The shadow diagrams at 3pm and 4pm on 21 June (winter solstice) indicate that the Amended DA design will cast a minor amount of additional shadowing onto the intersection of Frenchmans Road with Chapel Street roadway and the front fences of 14, 16, 18 and 20 Frenchmans Road. o Therefore, based on these diagrams in the architectural drawings, the shadow analysis demonstrates that the building will not result in an unacceptable impact on the amount of solar access available to the south and within the proposed seniors housing development. • The proposed design and the solar access to adjoining properties will not be adversely affected by the shadow cast associated with the FSR above the RLEP control. • The shadow diagrams delineate at hourly intervals between 9am to 3pm on 21 June (winter solstice) indicate that the Amended DA design will cast a minor amount of additional shadowing. • Based on these diagrams in the architectural drawings, the shadow analysis demonstrates that the minor breach of the FSR control will not result in an unacceptable impact on the amount of solar access available to the south and within the proposed seniors housing development. • The design will adequately maintain privacy for residents of existing and future dwellings and promotes privacy for the existing and future residents which is consistent with the objectives of the FSR control in Clause 4.4. • The design will maintain an appropriate visual relationship and correlation with its context as detailed in the Addendum SEE report and the urban design review at Appendix G of the Addendum SEE. • The design provides for building envelopes and articulation in each façade to modulate the overall design and leaves generous spaces between boundaries and the building which is consistent with the desired future character and nearby approved development, and in combination with the above objectives being achieved is overall consistent with objectives of Clause 4.4 of the RLEP. • The proposed development will not result in an unacceptable adverse impact in terms of loss of solar access, loss of privacy or loss of views to or from adjoining properties. The proposed development is of a compatible design with its context and is of a scale and density as envisaged with the future character of the area. Therefore, strict compliance with the development standard is unnecessary as the development will still achieve the environmental and planning objective of Clause 4.4, as discussed above. For reasons outlined above a development which is made to comply with the planning control is unreasonable in the circumstances. A development that strictly complies with the FSR standard is unreasonable or unnecessary in the circumstance for the following reasons:

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Objective	Comment

- The non-compliance with the FSR does not result in a building that will be out of scale with surrounding future development. Removing the non-compliance would not significantly alter the perceived FSR of the building as viewed from the public domain or from other surrounding development.
- The FSR of the proposed development is consistent with surrounding desired future character in the R3 zone;
- The proposed development is considered to be compatible with the streetscape along Kurrajong Road and from Randwick Close;
- The proposed development will provide a direct public benefit in the provision of 20% concessional places for the RCF residents and 1 affordable ILU as part of the "Clause 45 vertical village" and improved public domain access connections;
- 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
- The scale of the desired future surrounding development has been considered carefully and the proposed development is considered to be compatible.
- There is no discernible difference in the environmental impacts between a seniors housing development that strictly complies with the RLEP FSR control in terms of:
  - Visual and acoustic privacy impacts

    The non-compliant FSR does not generate any privacy impacts over or above those that exist with a fully compliant FSR. This is the same for acoustic privacy;
  - Visual impacts

    There is a nominal difference in visual impacts between the proposed building and a complying building. When viewed from Frenchmans Road and McLennan Avenue as demonstrated in the elevation drawing in Appendices C & D of the Addendum SEE; and
- Strict compliance with the development standard is unnecessary as the Amended DA will stillachieve the environmental and planning objectives of Clause 4.4, as discussed above.
- 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:
- An assessment of the proposal demonstrates it is consistent with the desired future character of the R3 zone;
- The design is considered to be compatible with the streetscape along Frenchmans Road and McLennan Avenue;
- 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; and
- The scale of the desired future surrounding development has been considered carefully and the design is considered to be compatible.

For these reasons it is considered that strict application of the FSR control in Clause 4.4 is

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Objective	Comment
	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 minor as the design seeks the inclusion of the seniors housing development within its direct public benefits on the land. The minor non-compliance with the development standard is far outweighed by the design achieving the aims in Clause 4.4 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: • a mix of uses with a focus on the nearby Randwick health and education precinct; and • Increasing jobs and better utilising land already zoned R3 High Density residential which envisages higher density residential development. In this regard, the Amended 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:

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

25. Clause 4.4 does have stated objectives, and it is considered that the variation still achieves the stated objectives of the development standard as detailed previously in Table 1 above:

(a) to ensure that the size and scale of development is compatible with the desired future character of the locality,

(b) to ensure that buildings are well articulated and respond to environmental and energy needs,

(c) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,

(d) to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.

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26. The Amended DA achieves the above stated objectives for the reasons stated in Table 1, the minor increase in the non-compliance with the FSR standard.
27. The breach of the FSR standard does not cause inconsistency with these objectives, and therefore the intents of clause 4.4 of the RLEP is 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 stated objectives of the standard in Clause 4.4 and as discussed above, the objectives of Clause 4.4 are relevant to the Amended 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 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 FSR 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 Addendum Statement of Environmental Effects (Addendum SEE) prepared for this Amended 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 planninggrounds to support the DA.
33. There are robust justifications throughout the Original SEE report and Addendum 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 therefore the proposed building isconsistent with the desired future outcome and is appropriate on environmental planning grounds.
34. The particular circumstances of this case distinguish it from others as detailed in Table 2 above.

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 development 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.

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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 similar to 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 Original 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.

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 FSR 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.*

39. 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 Amended DA substantially complies with the stated 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.

40. 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))

41. 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".
42. 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 FSR standard, whilst better planning outcomes are achieved.
43. 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?

44. This Clause 4.6 variation request is well founded as it demonstrates, as required by Clause 4.4 of the RLEP, 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 development meets the objectives of the development standard and where relevant, the objectives of the R3 zone, notwithstanding the variation;
    d) The Amended DA is in the public interest and there is no public benefit in maintaining the standard;

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e) The proposal results in a better planning outcome in that a compliant scheme would result where the portion of the building which breaches the controls does not result in unreasonable adverse impacts on adjoining properties or the portions of the buildings which exceeds the control do not result in an unacceptable loss of amenity to adjoining properties;

f) The non-compliances with the FSR control under the RLEP do not result in any unreasonable environmental impact or adverse impacts on adjoining owners/occupiers;

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

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

CONCLUSIONS

45. This Clause 4.6 variation request to Clause 4.4 of R LEP should be supported on the basis that the strict application of the development standard to the Amended 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.
46. For the reasons set out above, the seniors housing development should be approved with the minor exception to the numerical FSR standard in Clause 4.4. Importantly, the development as proposed achieves the stated objectives of the standard and zone 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,

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