

Clause 4.6 Variation Request

Edinglassie Village Residential Care Facility – SEPP (Housing for Seniors or People with a Disability) 2004 - Clause 40(4)(b)

1-11 Emerald Street and 6-8 Troy Street, Emu Plains

Submitted to Penrith City Council
on behalf of Uniting

SUITE 6.02, 120 SUSSEX ST, SYDNEY NSW 2000
TEL +61 2 8270 3500 FAX +61 2 8270 3501 WWW.CITYPLAN.COM.AU
CITY PLAN STRATEGY & DEVELOPMENT P/L ABN 58 133 501 774

March 2018 | 15-091

Report Revision History

Revision	Date Issued	Prepared by	Reviewed by	Verified by
01	28/03/18	Mark Purdy <i>Senior Project Planner</i>	David Ryan <i>Executive Director</i>	David Ryan <i>Executive Director</i> 

This document is preliminary unless approved by a Director of City Plan Strategy & Development

CERTIFICATION

This report has been authorised by City Plan Strategy & Development, with input from a number of other expert consultants, on behalf of the Client. The accuracy of the information contained herein is to the best of our knowledge not false or misleading. The comments have been based upon information and facts that were correct at the time of writing this report.

Copyright © City Plan Strategy & Development P/L
 ABN 58 133 501 774

All Rights Reserved. No material may be reproduced without prior permission. While we have tried to ensure the accuracy of the information in this publication, the Publisher accepts no responsibility or liability for any errors, omissions or resultant consequences including any loss or damage arising from reliance in information in this publication

SUITE 6.02, 120 SUSSEX ST, SYDNEY NSW 2000
 TEL +61 2 8270 3500 FAX +61 2 8270 3501 WWW.CITYPLAN.COM.AU
 CITY PLAN STRATEGY & DEVELOPMENT P/L ABN 58 133 501 774

Table of Contents

1. Introduction	4
2. Extent of variation	5
3. Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case. [cl. 4.6(3)(a)]	6
4. There are sufficient environmental planning grounds to justify contravening the standard. [cl. 4.6(3)(b)].....	10
5. The proposal will be in the public interest because it is consistent with the objectives of the standard and the objectives of the zone. [cl. 4.6(4)(a)(ii)].....	12
6. Contravention of the development standard does not raise any matter of significance for State or regional environmental planning. [cl. 4.6(5)(a)]	14
7. There is no public benefit of maintaining the standard [cl. 4.6(5)(b)]	15
8. Conclusion.....	16

1. Introduction

This Clause 4.6 variation request accompanies a Development Application (DA) submitted to Penrith City Council for demolition of structures and the construction of a three storey Residential Care Facility (RACF) at 1-11 Emerald Street and 6-8 Troy Street, Emu Plains.

The Environmental Planning Instrument (EPI) to which this variation relates is the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors SEPP). The purpose of this Clause 4.6 variation request is to address a variation to Clause 40(4)(b) of the Seniors SEPP. The numeric value of Clause 40(4)(b) 'Height in zones where residential flat buildings are not permitted' development standard is 2 storeys adjacent to a boundary. The zoning of the land is R3 Medium Density Residential under the PLEP and Residential Flat Buildings are not permitted in the zone.

This request has been prepared in accordance with the Department of Planning & Environment (DP&E) Guideline Varying Development Standards: A Guide, August 2011, and has incorporated as relevant principles identifies in the following judgements:

1. *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*
2. *Wehbe v Pittwater Council [2007] NSWLEC 827*
3. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No 1')*
4. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*
5. *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 ('Four2Five No 3')*
6. *Moskovich v Waverley Council [2016] NSWLEC 1015*

In this report, we have explained how flexibility is justified in this case in terms of the matters explicitly required by Clause 4.6 to be addressed in a written request from the Applicant. This report also addresses, where relevant and helpful, additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 and the assumed concurrence of the Secretary.

2. Extent of variation

As show in Figure 1 below, approval is sought to vary the standard by 1 storey. The height adjacent to the north and eastern boundary exceeds two storeys.



Figure 1: Extract of east elevation indicating the maximum height non-compliance shown in red (Source: MDP Architects)

3. Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case. [cl. 4.6(3)(a)]

Achieves the objectives of the standard

Compliance with in Clause 40(4)(b) 'Height in zones where residential flat buildings are not permitted' development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in Table 1 (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard¹.

Further to the above, the Seniors SEPP provides no instruction on the intent of the height controls in Clause 40(4)(b) and does not otherwise nominate any objectives to underpin the intent of the various height controls. Notwithstanding this, subclause (b) includes a note as follows:

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

It is therefore necessary to assess whether the development results in an *abrupt* change in the scale of development in the streetscape. Abrupt is typically defined as "sudden an unexpected" or "steep" change. In the context of the development control, an abrupt change can therefore be viewed as a sudden or steep change in the scale of development.

A 3 storey building is proposed adjacent to the eastern and northern boundary of the site, being Emerald Street and the Great Western Highway respectively.

Proposed development along the eastern frontage includes a single storey canopy feature designating the main pedestrian entry, with a two storey building element above. This 3 three storey building line is a smaller protruding wing of the eastern façade that is located approximately 13.6m from the Emerald Street boundary. The majority of the building line is further recessed, providing for a building line located approximately 23.7m from the Emerald Street boundary. In this regard, the proposed built form of the eastern façade is visually broken up so that it does not appear as one building from key aspects, with the different sections of the building being separated by generous breaks and landscaping.

Based on the above, the non-compliant section of the eastern façade is located approximately 36m from the nearest adjoining dwelling located on Emerald Street. The significant physical separation between the proposal and the dwelling houses on Emerald Street to the east, in combination with the differentiated building line, provides for a gradual and respectful transition in building height. In this respect, the change in scale is neither sudden or steep.

¹ In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established. Although the decision concerned SEPP 1, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii). The 5 ways in *Wehbe* are: 1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; 2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; 3. The objective would be defeated or thwarted if compliance was required with the consequence that 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 the standard is unreasonable and unnecessary; or 5. The zoning of the land is unreasonable or inappropriate.

As shown on the submitted site analysis plan, the proposal is setback further than the eastern elevation of the current building. This design feature has been specifically incorporated to preserve the mature vegetation along the eastern frontage, offer enhanced views to the Uniting Church heritage item and ensure that the change in streetscape is neither sudden nor steep. The greater setback in combination with the mature tree retention is considered to satisfactorily accommodate the greater height of the proposed building and the scale of the development is appropriately managed in this respect.

Further to the above, the proposed development seeks to increase the building setback to the Uniting Church heritage item, thereby enabling part of the original landscaping to be re-instated. The retention of the heritage item, proposed increased building setbacks and re-instated landscaping further assist to ensure that the development does not result in an abrupt change in the scale of development when viewed from the south-east.

The northern site frontage is adjoined by the Great Western Highway and an expansive shopping centre with a maximum height limit of 15m. The proposed development is located approximately 56m-70m from the adjoining shopping centre. The significant physical separation between the proposal and the Shopping Centre to the north results in a development outcome that is neither a sudden or steep change in the scale of development along the Great Western Highway, indeed the building height represents something of a transitional height from the Shopping Centre to the lower buildings to the south of Edinglassie Village.

As shown in **Figure 1**, the adjoining shopping centre is set behind at grade parking and a row of mature eucalyptus trees, which is a common local streetscape feature in this locality. Following consultation with Council, the proposed development has been designed to preserve mature vegetation along the northern frontage where possible. These preserved trees assist to soften the view of the proposed development, whilst also maintaining a common element of the streetscape. Proposed additional landscaping will further soften and screen the resultant built form. The scale of the development is appropriately managed in this respect.



Figure 1 Development adjoining northern frontage

The proposed built form along the northern façade is visually broken up so that it does not appear as one building from key aspects, with the different sections of the building being separated by a generous central courtyard and landscaping. In addition, the proposed materials, colours and finishes have been chosen with care and sensitivity to the site context, further assisting to reduce the scale of the building. These specific design features, in combination with preserved mature vegetation and extensive setback to the shopping centre ensure a gradual and respectful transition in building height. In this regard, the change in scale should be considered as neither sudden or steep.

In conclusion, the preservation of existing built and natural site characteristics in combination with the building siting and design features will result in a gradual and respectful transition in building height. It follows that the proposal will not result in a sudden or steep change in the scale of development. For the reasons set out above, it is therefore considered unreasonable and unnecessary to maintain the standard in this instance as the development achieves the intended purpose of the standard.

In addition to the above assumed objectives, the proposed variation should also be considered as to whether it is consistent with the SEPP Seniors aims/objectives pursuant to Clause 2(1) - Aims of the Policy, which are outlined below:

"This Policy aims to encourage the provision of housing (including residential care facilities) that will:

(a) increase the supply and diversity of residences that meet the needs of seniors

or people with a disability, and


(b) make efficient use of existing infrastructure and services, and

(c) be of good design Response"

The proposal is consistent with and achieves the aims of the policy as outlined in Table 2 (below):

TABLE 1 - ACHIEVEMENT OF SEPP SENIORS CLAUSE 2(1) - AIMS OF THE POLICY

Objective	Discussion
(a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability;	The proposed development will promote the social and economic welfare of the local community through the provision of contemporary seniors housing that complies with all relevant standards relating to facilities and accessibility for the aged and disabled people.
(b) make efficient use of existing infrastructure and services, and	The existing facility is provided with all the utility services to support seniors housing. This application seeks to provide beds within the existing facility, which directly achieves the aims under Clause 2(1)(a) and (b). The additional demands associated with the extra accommodation is not expected to be beyond the capacity of the existing utility services, which will be augmented as necessary to meet the requirements of relevant service providers.
(c) be of good design response	<p>There will be no unreasonable adverse impacts on the environment. The Design Statement prepared by MDP Architects in support of this development application demonstrates that the development provides a good design response that meets the needs of seniors and people with disabilities.</p> <p>Further to the above, the proposal is considered to be consistent with the principles outlined in PC No 5 (Wombarra) Pty Ltd v Wollongong City Council [2003] NSWLEC 268 based on the following:</p> <ul style="list-style-type: none"> ▪ The built form is visually broken up so that it does not appear as one building. The different sections



	<p>of the building are separated by generous breaks and landscaping;</p> <ul style="list-style-type: none">▪ The design largely preserves existing site characteristics, including vegetation and topography, which assist in reducing the visual dominance of development;▪ The proposed built form and materials have been chosen with care and sensitivity to the site context; and▪ The design is considered to be compatible with the streetscape.
--	---

4. There are sufficient environmental planning grounds to justify contravening the standard. [cl. 4.6(3)(b)]

The SEE prepared for this DA provides a holistic environmental planning assessment of the proposed development and concludes that subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the development. In particular, the SEE has demonstrated that the proposal is substantially compliant with the relevant environmental planning framework. Therefore, it can be concluded that the proposal does not result in any unreasonable environmental impacts.

Additional specific environmental grounds to justify the breach of the standard are summarised as follows:

- A compliant density of development could be achieved on site through provision of a larger building footprint and significantly reduced setbacks to the eastern boundary. However, this would require more extensive tree removal and lead to increased impacts on adjoining residences, the Uniting Church Heritage Item and the balance of the Edinglassie Village. In comparison, the proposed noncompliance enables an extensive building setback (13.6m to 23.7m) along Emerald Street frontage. Consequently, the proposed noncompliance effectively provides for:
 - Increased retention of vegetation along the sites eastern frontage;
 - Increased setbacks and privacy for adjoining residential development;
 - Consolidation of seniors housing in in a single location;
 - An enhanced view corridor to the existing Uniting Church Heritage Item from the Great Western Highway; and
 - Increased building setbacks to the Uniting Church Heritage Item and an improved landscaped curtilage.
- It follows that the proposed breach of the height standard provides for an improved response to the sites existing natural and built environment.
- The additional accommodation is not expected to be beyond the capacity of the existing utility services or transport network, indicating that the additional development can be sustainably accommodated on the site. In this regard, the proposed development actually decreases the number of beds located on site whilst providing them in a more concentrated built form in a landscape setting.
- Given the extensive scale of the existing nursing home, hostel and independent living units (ILUs), it is considered that the existing development forms its own character, which is not that of a low density residential development. Rather, the existing development has the character of a medium density residential development as envisaged by the objectives of the R3 Medium Density zone.
- The site is effectively bookended by the Lennox Village Shopping to the north and the school to the south. The Lennox Village Shopping Centre has a 15m height limit and the school to the south also has a height limit of 22m in accordance with the SEPP (Educational Establishment and Child Care Facilities). The site is also surrounded by mature vegetation up to 20m in height as depicted on the urban height and significant tree context analysis Plan DA062 at **Appendix 2**. It follows that the breach of the standard allows for a development that is contextually appropriate and not inconsistent with the existing and desired future character of the area.

- The proposed contravention of the development standard will not lead to any adverse loss of views or overshadowing of adjoining properties over and above that associated with a compliant development.

In addition to the above, Uniting have advised the following in relation to the specific environmental grounds that further justify the breach of the standard:

- The proposed contravention enables a built form response that meets the conventional aged care models for development. Specifically, the development provides for internal accessibility and large level floor plates, suitable sight distances from centralised nursing stations and the need for a certain number of beds for operational and commercial viability. The more vertical design, as opposed to a spread out low form, also ensures facilities are operationally efficient. The combination of these specialist built form requirements generally leads to multi-storey development. When combined with the need to retain vegetation and address flooding, these factors can further increase the non-compliance as in this case. It therefore follows that the proposed contravention enables a built form that meets the needs of future occupants, is commercially viable whilst also enabling the preservation of the natural site features.
- Uniting intends to maintain continuity of aged care services on this site during the redevelopment phase, which is evidenced by the retention of 50 hostel beds during the construction period at some considerable cost; and
- The reintroduction of the Fellowship Centre on the ground floor of the proposed development will require larger floor to ceiling heights, which increases the overall building height. Uniting sees the continuation of this community service an important element of this development.

Accordingly, notwithstanding the non-compliance with the numerical standard the proposed development achieves the objectives of the standard as well as being consistent with the planning controls and thus the objection is well founded. Strict compliance in the circumstances of this case is unnecessary and unreasonable to achieve the specified objective of the standard.

5. The proposal will be in the public interest because it is consistent with the objectives of the standard and the objectives of the zone. [cl. 4.6(4)(a)(ii)]

In section 2 (above), it was demonstrated that the proposal is consistent² with the objectives of the development standard. The proposal is also consistent with the objectives of the zone as explained in Table 2 (below).


TABLE 2 - CONSISTENCY WITH ZONE OBJECTIVES

Objective	Discussion
To provide for the housing needs of the community within a medium density residential environment.	The proposal provides contemporary housing for the local area, addressing the local market demand for seniors housing. The breach of the standard does not result in an inconsistency with this objective.
To provide a variety of housing types within a medium density residential environment.	The breach of the standard does not result in an inconsistency with this objective. The proposed new RACF will be in the form of a three (3) storey building containing 100 beds. The seniors housing has been designed around the concept of providing 'households'. The households seek to provide a homelike environment for residents by grouping bedrooms with their own living, dining, kitchen, and laundry areas, all within a secure household environment.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The breach of the standard does not result in an inconsistency with this objective. The proposed development incorporates a range of ancillary uses and services including a café, beauty and hair salon, multi-purpose room, chapel and fellowship centre - all of which meet the day to day needs of residents and encourage an integration with the wider community.
To provide for a concentration of housing with access to services and facilities.	The proposal provides the concentration of housing with access to a range of ancillary services on site and located within the adjoining shopping centre. The breach of the standard does not result in an inconsistency with this objective.
To enhance the essential character and identity of established residential areas.	The breach of the standard does not result in an inconsistency with this objective. As discussed earlier, the design largely preserves existing site characteristics such as vegetation and topography, which enhances the character of the area. The proposed built form and materials have also been chosen with care and sensitivity to the site context, ensuring a sense of 'domesticity' to the building. The building has substantial setbacks to adjoining development and provides for a gradual and respectful transition in scale.

² In *Dem Gillespies v Warringah Council* [2002] LGERA 147 and *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC the term 'consistent' was interpreted to mean 'compatible' or 'capable of existing together in harmony'.

<p>To ensure that a high level of residential amenity is achieved and maintained.</p>	<p>The breach of the standard does not result in an inconsistency with this objective. As discussed earlier, the design largely preserves existing site characteristics such as vegetation and topography, which enhances the character of the area. The proposed built form and materials have also been chosen with care and sensitivity to the site context, ensuring a sense of 'domesticity' to the building. The building has substantial setbacks to adjoining development and provides for a gradual and respectful transition in scale.</p>
<p>To ensure that development reflects the desired future character and dwelling densities of the area.</p>	<p>The breach of the standard does not result in an inconsistency with this objective. The character of the area is comprised of a mixture of medium density and low density residential dwellings, institutional buildings and commercial shopping centre developments. Within this context, the proposed development is not inconsistent with the desired future character and dwelling densities of the area.</p>

As can be seen from Table 2, the proposal is consistent with the objectives of the standard and the objectives of the zone, and is therefore in the public interest.



6. Contravention of the development standard does not raise any matter of significance for State or regional environmental planning. [cl. 4.6(5)(a)]

There is no identified outcome that would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

7. There is no public benefit of maintaining the standard [cl. 4.6(5)(b)]

There is no public benefit³ in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the development standard and hence there are no public disadvantages. Conversely, non-compliance with the development standard will allow for the consolidation of seniors housing in a single location (rather than ad-hoc piecemeal seniors development on other R3 zoned land), whilst retaining significant views and vegetation and not having any unreasonable environmental impacts. Moreover, the proposal will provide additional seniors accommodation and care for the community in an area highly serviced by suitable retail, medical services and public transport. Therefore, the advantages of the proposal outweigh the disadvantages.

³ *Ex Gratia P/L v Dungog Council (NSWLEC 148)* established that the question that needs to be answered to establish whether there is a public benefit is “whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development”