

27 March 2020

## **Submission - Clause 4.6 Exception to a Development Standard**

### **State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 - Clause 40(2) site area 85-87 Blackbutts Road, Frenchs Forest**

#### **1 Request for exception to Clause 40(2) site area**

##### **1.1 Overview**

Clause 4.6 of Warringah LEP 2011 provides a mechanism to allow an exception to a development standard.

As identified, the proposal contravenes Clause 40(2) of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (the SEPP). Clause 40(2) relates to the area of the allotment. It states in 40(2) Site size – *‘The size of the site must be at least 1,000 square metres’*. This is a development standard and an exception is sought.

As required by clause 4.6 (3) the following is a written request to justify this contravention for the consent authority’s consideration.

##### **1.2 Site details**

The site is located at 85 – 87 Blackbutts Road, Frenchs Forest. The site is legally described as, Lot 2413 in Deposited Plan 752038. The site has an area of 938.1 m<sup>2</sup> (by survey). The site is slightly irregular in shape with dimensions as follows:

- Street frontage to Blackbutts Road 23.595m
- East side: 30.48m
- West side: 45.39m
- South rear: 13.845 & 13.245m

##### **1.3 Proposed development and the nature and extent of exception sought**

The application seeks development consent, for demolition of existing structures, a Seniors and Disabled Housing development, under the provisions of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 for 3 dwellings in a 1 to 2 storey built-form. The proposal is for *Infill self-care* housing for independent living.

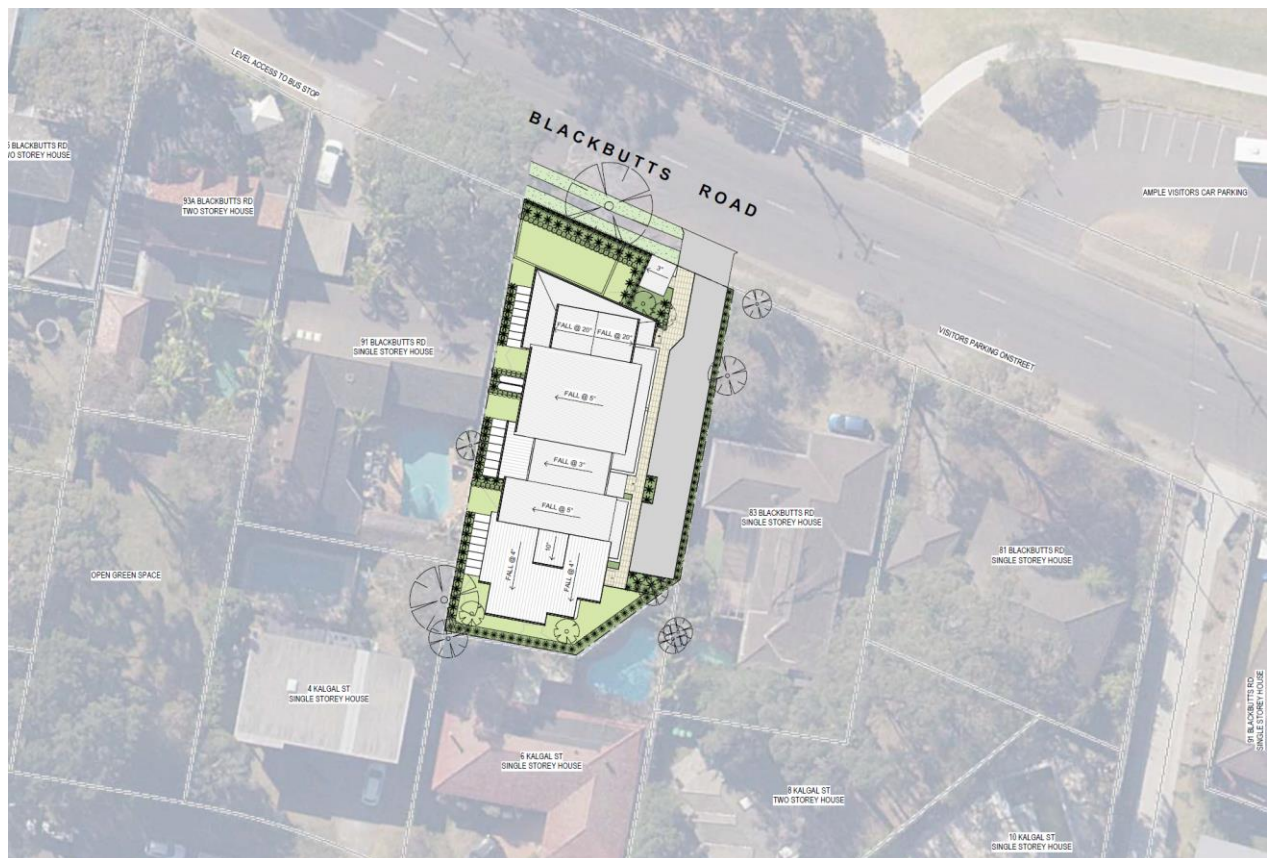
The exception relates to Clause 40(2) of the SEPP in relation to the site area being 1,000m<sup>2</sup>. The clause states (our emphasis added):

*‘Development standards—minimum sizes and site size, (2) Site size - The size of the site must be at least 1,000 square metres’*

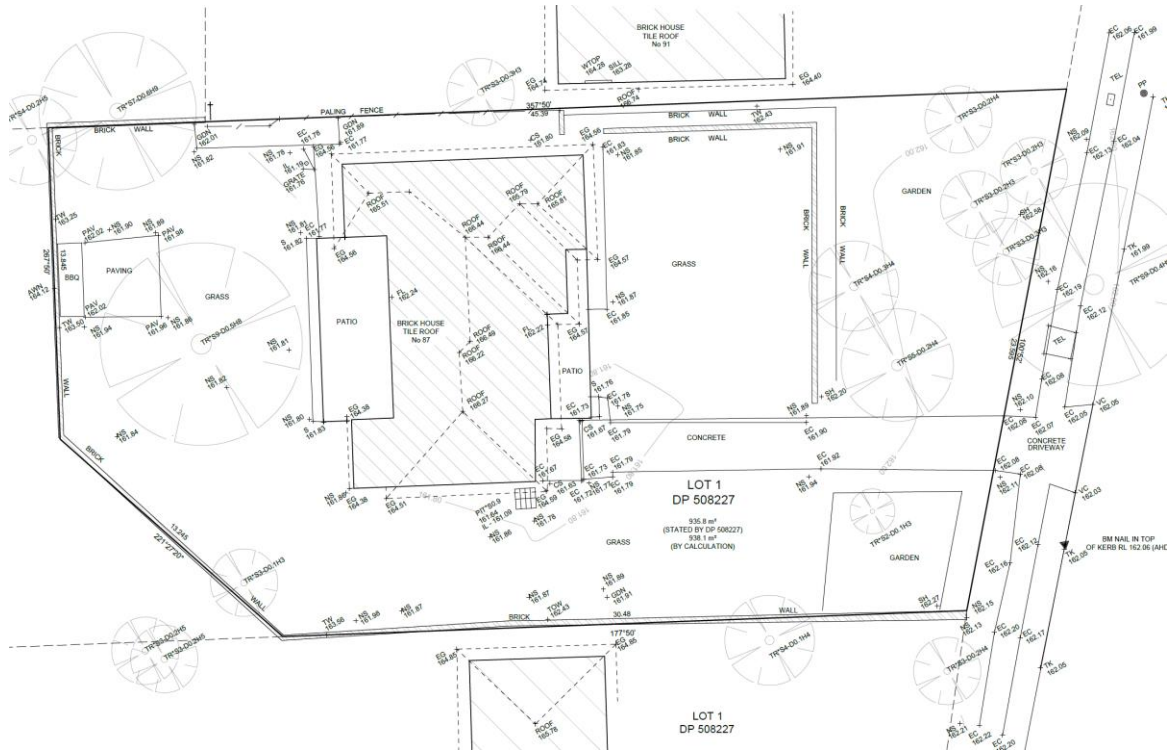
Being 938.1m<sup>2</sup> the site area demonstrates a 6.2% / 61.9m<sup>2</sup> exception to the lot size standard. Clause 4.6 of Warringah LEP 2011 (LEP) provides a mechanism to allow an exception to a development standard.

Clause 40(2) of the SEPP is a development standard and is applicable to the assessment of the proposal. This clause 4.6 submission is made to address the statutory provisions of the Act and the LEP and there is no statutory impediment to the consideration of this submission under clause 4.6.

As required by clause 4.6 (3) the following is a written request for the proposed development to exceed the development standard for the consent authority’s consideration.



**Figure 1 – excerpt of the site plan showing the location of the site, the proposed development footprint, the subdivision pattern and the location of surrounding development. The exception relates to the area of the allotment which is 938.1m<sup>2</sup>**



**Figure 2 – excerpt of the site survey**



**Figure 3 – excerpt of the site survey**



## 2 Clause 4.6

Relevant to the subject matter, Clause 4.6 states:

- (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 Secretary has been obtained.*

In response to the provisions of Clause 4.6, and with the guidance provided by the above judgements, the matters in support of the proposal are documented with this *written request* to justify this contravention of the development standard.

## 3 Context and Format

This “*written request*” has been prepared having regard to “*Varying development standards: A Guide*” (August 2011), issued by the former Department of Planning, and relevant principles identified 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 Pty Ltd v Ashfield Council* [2015] NSWLEC 90;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7;
- *Moskovich v Waverley Council* [2016] NSWLEC 1015; and
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.
- *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130
- *Hansimikali v Bayside Council* [2019] NSWLEC 1353

In response to the provisions of Clause 4.6, and with the guidance provided by the above judgements, the matters in support of the proposal are documented with this *written request* to justify this contravention of the development standard.

## **4 Assessment**

### **4.1 Compliance is unreasonable or unnecessary in the circumstances**

Subsection 3 (a) of Clause 4.6 states:

*(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*

Guidance is provided by the following court judgement in establishing what the relevant considerations are in assessing what is ‘*unreasonable or unnecessary in the circumstances of the case*’.

In addressing the requirements of Clause 4.6 (3) (a), the accepted five possible approaches for determining whether compliance is unnecessary or unreasonable were established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council*. Whilst at the time, this was specific to SEPP 1, in the matter of *Four2Five* (2007) LEC 827, the Commissioner stated within the judgement the following, in reference to a variation:

*“...the case law developed in relation to the application of SEPP 1 may be of assistance in applying Clause 4.6. While Wehbe concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under Clause 4.6 where Clause 4.6 (3)(a) uses the same language as Clause 6 of SEPP 1.”*

In the decision of *Wehbe vs Pittwater Council* (2007) LEC 827, Preston CJ summarised the five (5) different ways in which an objection under SEPP 1 has been well founded and that approval of the objection may be consistent with the aims of the policy. The five possible ways are:

*1<sup>st</sup> The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.*

*The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.*

*2<sup>nd</sup> 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.*

*3<sup>rd</sup> 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.*

*4<sup>th</sup> A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.*

*5<sup>th</sup> A fifth way is to establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary.*

In response to the 5 Wehbe principles it is assessed that the second and third principles are relevant to the subject matter. Our assessment of the proposal under clause 4.6(3)(a) finds that:

Having regard to the second principle of Wehbe, compliance with the development standard is unreasonable and unnecessary in the circumstances of the case because, despite the proposed site size exception, the proposal satisfies the various design quality and built form provisions of the SEPP, noting:

- The proposal demonstrates that the site area can physically accommodate the footprint, intensity and scale of the proposed development without having any unreasonable or excessive physical impacts on the neighbouring properties or the streetscape quality.
- The proposal incorporates appropriate compensatory design measures, in that:
  - The proposal provides generous boundary setbacks that, in various instances, significantly exceed the minimum setbacks.
  - The proposed development will not be incompatible or out of context with the visual scale and character of established development in the location.
  - The proposal complies with, and is considerably under the SEPP's height standard.
  - The proposal complies with SEPP's FSR standard.

- The proposal complies with SEPP's Landscaped area standard.
- The proposal reflects the pattern of development within the location.
- The proposal will result in high internal amenity to the future dwelling occupants.
- The proposed site size exception will have an insignificant impact in terms of its physical effects on adjoining land in the areas of shadowing, privacy, bulk, scale and view impacts.
- The proposed site size exception will not result in significant or inappropriate visual impacts on the streetscape or public spaces.

These matters are further explained within this submission.

Having regard to the third principle of Wehbe, compliance with the development standard would defeat the underlying aims of the SEPP, if compliance was required, noting that:

- The proposal will increase the supply and diversity of residences that meet the needs of seniors or people with a disability;
- The proposal makes efficient use of existing infrastructure and services;
- The proposal is of good design;
- The site is positioned in an ideal location accessible to various shops, recreation, transport links and community services.;
- The proposed site size exception will have an insignificant impact in terms of its physical impacts on adjoining land in the areas of shadowing, privacy, bulk, scale and view impacts.

In these circumstance, strict application of the standard would result in the aims of the SEPP being defected by a proposal of high merit that satisfies the other provisions of the SEPP.

For these reasons, in the circumstances, insistence upon strict compliance with the standard would be *unreasonable or unnecessary*. For these reasons it is assessed at the requirements of clause 4.6(3)(a) are satisfied and Council has the authority to grant approval to the proposal.

## **5 Environmental planning grounds**

Subsection 3 (b) of Clause 4.6 states:

*(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:*

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

The proposed exception to the site size *development standard* does not undermine or disrespect the relevance of the control or its objectives. There are sufficient environmental planning grounds to justify contravening the development standard in the particular circumstances on the basis of the following considerations:

- The proposed exception does not result in an excessive visual building bulk or scale, maintaining an appropriate building presentation to the street frontage and neighbouring properties.

- The proposed exception in the minimum site size development standard is modest in its extent (6.2%) and it would not be perceivable in the visual presentation of the property to surrounding properties or the streetscape.
- The proposed exception does not result in a significant reduction in the quality of the proposed built form will not significantly alter the spatial characteristics of the property.
- The proposed exception will not result in unreasonable or excessive physical impacts on the neighbouring properties or the streetscape quality of the property.
- The proposed exception is capable of being accommodated on the site without imposing any significant or adverse impacts on the amenity of the surrounding land, or the scenic quality of the wider locality.
- Strict compliance with the minimum site size development standard would be unreasonable and unnecessary to the extent that the site would be unable to accommodate a form of development that is consistent with the aims and objectives of the SEPP, in circumstances where the building form does not impose any significant or adverse impacts on the amenity of surrounding land.
- The extent of the proposed development is not excessive as a result of this exception, and the development-to-land ratio proposed, as evidenced by the proposal's compliance with the suite of built form controls relating to car parking, boundary setbacks, private open space, deep soil landscaped area, building height and floor space ratio. It is compatible to the extent of development that can be reasonably expected upon land within the the R2 zone generally.
- The proposed dwellings will not result in a significant reduction in landscaped areas on the property. There remain appropriately located landscaped areas for vegetation and private recreational use. For these reasons the proposal will achieve a suitable balance between landscaped areas and the built form despite the site size exception.

### **5.1 Unreasonable burden**

The exception has minimal impact given that the proposal demonstrates that the site area can physically accommodate the footprint, intensity and scale of the proposed development, in a manner that is compliant with the SEPP, without having any unreasonable or excessive physical impacts on the neighbouring properties or the streetscape quality.

There are positive impacts achieved by the development. It is therefore appropriate that the merits of the proposal on environmental planning grounds be balanced with the impact that strict compliance with the standard places on the site, and whether such strict compliance would result in a better or neutral planning outcome. The proposed exception will provide a compatible development outcome consistent with various local and State planning provisions that relate to the site.

Strict compliance in the circumstances would not achieve any significant gains with regards to the objectives for supplying a diversity of housing specific to the needs of older people and people with a disability in the R2 zone or relevant aims of the SEPP. In fact, strict compliance would defeat the aims of the SEPP which are to increase the supply of this form of housing, within accessible locations.

Based on the above, strict compliance would result in an unreasonable burden on the proposed development with insufficient environmental planning outcomes.



## **5.2 How does the proposed development / exception relate to the objectives of the Act?**

Having regard to *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the built form outcomes achieved through the minor redistribution of site sizes and footprints across the site are consistent with the following objectives at clause 1.3 of the Environmental Planning and Assessment Act 1979 (the Act) noting the following:

- In response to objective 1.3(c), the exception results in a proposed residential development that will promote the orderly and economic use and development of the land in an efficient manner by a design that is responsive to its development context that will increase the supply of housing, specific to the needs of older people and people with a disability in the R2 zone, close to public transport and a local centre, in a manner that is entirely consistent with the SEPP.
- In response to objective 1.3(g), the proposed development results in a residential development that will promote good design and amenity of the built environment. The built form outcome has been developed through detailed site, context, privacy, and shadow analysis to ensure an appropriate contextual and streetscape fit. The building footprint has been designed to reflect the shape and orientation of the site, creating an interesting, site-specific building design that presents appropriately to each of its boundaries. The proposed development maintains high levels of residential amenity to adjoining properties by concentrating living spaces at ground floor level, minimising its height, by generous boundary setbacks and through the quality of its surrounding landscape spaces.

## **5.3 Conclusion**

The proposal is entirely consistent with the aims of the SEPP because it will increase the supply of housing specific to the needs of older people and people with a disability in the R2 zone, close to public transport and a local centre. Based on the above, there are appropriate circumstances to support the proposed development based on the site suitability and the extent of development proposed. Conversely, there are insufficient grounds to refuse the proposal based on its site size deficit. For these reasons the proposed exception is assessed as being appropriate to the circumstances of the site, and its context. It is assessed that there are appropriate and sufficient environmental planning grounds to support the proposed exception.

## **6 Public Interest Considerations**

### **6.1 Objectives of the development standard**

In accordance with 4.6 (4)(a)(ii) the proposed development will be in the public interest because it is consistent with the objectives of the development standard. The objectives of Clause 40(2) are not specifically expressed in the SEPP, however the aims of the SEPP are to increase the supply and diversity of residences that meet the needs of seniors or people with a disability, make efficient use of existing infrastructure and services, and be of good design.

It is also reasonable to conclude that the objectives of the site size control are to ensure that sites are of sufficient size to provide for buildings, vehicular access, landscaping / deep soli area, private open space, solar access and retention of natural topographical features in a manner that is positive for the future occupants of the land. Furthermore, that the property is able to be developed without incurring any reasonable physical impacts on neighbouring properties in terms of shadowing, privacy, visual impact, view loss or the natural environment.

The following submissions are made in response to the above objectives.

### **Compensatory design measures**

Being 938.1m<sup>2</sup> the site area demonstrates a 6.2% / 61.9m<sup>2</sup> exception to the lot size standard. In response to this characteristic of the site, the following key compensatory design measures have been incorporated to address this issue and provide an appropriate building form on the site:

- **Lower building height** – The proposed building height ranges from 6.2m to 6.9m, as measured to the ceiling level. The height of the building is up to 1.8m lower than the height permitted under the Seniors SEPP (8.0m).
- **Increased eastern and western side setbacks** - The side setbacks have been increased and range between approx. 6.4 to 9.6m (approx.) on the east side and between approx. 3.0 to 5.9m on the west side; the outcome being generous separation distances to adjoining dwellings. It is noted that each of these setbacks are significantly greater than a development permitted in the R2 zone under the local planning controls.
- **Compliant rear setback** - The proposed building is compliant with the SEPP's rear setback requirement, thereby providing an appropriate shading and visual impact on the land that adjoins the rear of the site.
- The proposed setbacks assist in achieving a compatible relationship with the neighbouring properties ensuring existing dwellings retain a high level of solar access, privacy and amenity levels.
- The proposed side setbacks exceed both the Seniors SEPP and the DCP's side setback requirements. Furthermore, the proposed side setbacks meet and exceed the DCP's minimum side boundary envelope requirement.

By lowering the height of the building and increasing its setbacks to adjoining residential allotments the potential amenity impacts (privacy, shading and visual) of the proposed development on the adjoining neighbours are reduced in accordance with the SEPP's aims and objectives.

### **Generous spatial separation is provided and high internal amenity levels to the proposed dwellings are achieved, despite the site being 938.1m<sup>2</sup> and less than 1,000m<sup>2</sup>**

- Despite the site being 938.1m<sup>2</sup> and less than 1,000m<sup>2</sup>, the proposal achieves a generous amount of spatial separation around the proposed building. The side setbacks have been increased and range between approx. 6.4 to 9.6m (approx.) on the east side and between approx. 3.0 to 5.9m on the west side; the outcome being generous separation distances to adjoining dwellings.
- The proposed setbacks assist in achieving a high internal amenity levels to the proposed dwellings each dwelling meeting (and in the case of the front dwelling, exceeding) the SEPP's minimum solar access requirements. This is achieved despite the site being 938.1m<sup>2</sup> and less than 1,000m<sup>2</sup>.
- The proposed side setbacks facilitate appropriate levels of solar access to the site and high levels of privacy in relation to neighbouring properties.

**Generous landscaping and deep soil areas are provided that exceed the minimum controls, despite the site being 938.1m<sup>2</sup> and less than 1,000m<sup>2</sup>**

- Despite the site being 938.1m<sup>2</sup> and less than 1,000m<sup>2</sup>, the proposal achieves a landscaping and deep soil outcome that meets and exceeds the planning controls under the Seniors SEPP and DCP.
- The design provides a landscape setting complemented by a landscaping plan that will enhance the amenity of the site to the benefit of future occupants and the surrounding amenity. 297.4m<sup>2</sup> or 31.7% of the site is proposed to be landscaped area (the minimum requirement being 30%), within which the proposed building will be sited. 27.4% / 256m<sup>2</sup> of the site is proposed to be deep soil landscaped area having a minimum dimension of 3m (the minimum requirement being 15%). Each of these landscaped areas exceed the SEPP's minimum requirement).

**No significant physical impacts, despite the site being 938.1m<sup>2</sup> and less than 1,000m<sup>2</sup>**

Despite the site being 938.1m<sup>2</sup> and less than 1,000m<sup>2</sup>, the proposal will not result in any inappropriate physical or amenity impacts on the streetscape or adjoining land noting that:

- the proposal achieves a generous spatial separation around the proposed building The side setbacks have been increased and range between approx. 6.4 to 9.6m (approx.) on the east side and between approx. 3.0 to 5.9m on the west side; the outcome being generous separation distances to adjoining dwellings.
- The physical impacts of the proposal, including, overlooking, overshadowing, visual impact and view loss have been considered. It is assessed that the proposal will not unreasonably impact upon the existing amenity or physically constrain the future development potential of the surrounding land.

In relation to shadowing impacts –

Shadow diagrams accompany and support the proposal and demonstrate that the compliance with the DCP is achieved. The following key aspects are noted:

The site and the adjoining properties have a south to north orientation to Blackbutts Road. As a result, shade will be relatively evenly shared between (mainly) the rear yard of each adjacent property. The shadow diagrams demonstrate that shade will be cast over the rear yard, eastern side and southern portions of the dwelling at 91 Blackbutts Road in the morning time period, then over the rear yard, western side and southern portions of the dwelling at 83 Blackbutts Road during the afternoon time period. This reflects the existing development & shading pattern for properties along the southern side of Blackbutts Road, and provides a relatively even distribution of shade, consistent with the development pattern along the street.

The DCP requires:

*'2. At least 50% of the required area of private open space of each dwelling and at least 50% of the required area of private open space of adjoining dwellings are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21'.*

In accordance with Clause D6 of the DCP, the sunlight available to the private open space of adjoining the dwellings will not be impacted by more than 3 hours between 9am and 3pm on 22 June.

It is assessed that, whilst shade onto adjoining properties will be moderately increased above the current levels, the extent of the increase is within reasonable limits, and satisfies the DCP. Therefore, it is concluded that the proposal will not significantly or unreasonably reduce the available sunlight to the adjoining properties and the provisions of the control are satisfied.



**Figure 3 – the proposed shading impact at 9am**



**Figure 4 – the existing and proposed shading impact at 12pm**





**Figure 5 – the existing and proposed shading impact at 3pm**

In relation to privacy impacts -

Privacy has been considered in the proposed design and satisfies the DCP's objectives. The following aspects of the proposal are noted:

- The site is significantly setback from all of its boundary's. The adjacent roadway and playing fields opposite provide a significant separation to the north. Compliant setbacks are proposed to each boundary and provide generous building separation to adjoining dwellings. The proposed setbacks assist in achieving a compatible relationship with the neighbouring properties ensuring existing dwellings retain a high privacy and amenity levels.
- Window and door openings within the side elevations have been designed to provide high levels of privacy. A modest extent of glazing is proposed within the side elevations. In relation to the upper levels, these windows are principally associated with bedrooms and bathrooms.
- No first-floor balconies are proposed.
- The location and design of principal living areas, particularly with respect to their associated outdoor spaces is such that direct lines of sight have been minimised or avoided.
- Private open spaces are appropriately located with respect to neighbouring development, will be screened by dividing fencing and enhanced by a new landscaping regime for the property.

Considering these matters, it is concluded that the proposal will not significantly or unreasonably affect the visual privacy of the neighbouring properties.

## **6.2 Zone Objectives**

The proposed development will be in the public interest because it is consistent with the objectives for development within the R2 Low Density Residential zone in which the development is proposed to be carried out. These are stated and responded to as follows:

- (a) *To provide for the housing needs of the community within a low density residential environment.***

Response -

The proposal it will contribute to the variety and supply of housing within the zone and is consistent with this objective. Further, the proposed development serves the public interest by providing additional residential accommodation within an established residential environment, offering high levels of internal amenity without imposing any significant or adverse impacts on the amenity of surrounding land.

- (b) *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah***

Response -

The proposed development is not antipathetic to this objective of the zone.

- (c) *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah***

Response -

The proposed development appropriately complies with the front building line in the street.

The design provides a landscape setting complemented by a landscaping plan that will enhance the amenity of the site to the benefit of future occupants and the surrounding amenity. 297.4m<sup>2</sup> or 31.7% of the site is proposed to be landscaped area (the minimum requirement being 30%), within which the proposed building will be sited. 27.4% / 256m<sup>2</sup> of the site is proposed to be deep soil landscaped area having a minimum dimension of 3m (the minimum requirement being 15%). Each of these landscaped areas exceed the SEPP's minimum requirement).

In conclusion it is assessed that the proposal is consistent with or not antipathetic to the objectives of the zone.

## **7 Conclusion**

The purpose of this submission is to formally request a exception to the minimum site size development standard in Clause 40(2) of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.

The proposed exception is modest, and strict compliance with the control is unreasonable on the basis that the objectives are achieved anyway, and unnecessary on the basis that no beneficial planning purpose would be served.

The cl 4.6 request is well founded and compliance with the site size development standard would be unreasonable and unnecessary in the circumstances. There are sufficient environmental planning grounds to justify the contravention of that standard and that the proposed building would be consistent with the objectives of the standard and the zone and thereby be in the public interest.

Yours sincerely,



Michael Haynes  
**Director - BBF Town Planners**