

15 March 2023 (revised 30 June 2023)

Submission - Clause 4.6 Exception to a Development Standard

State Environmental Planning Policy (Housing) 2021 – Part 5 Housing for seniors and people with a disability Clause 85(1)(a) Schedule 4 Clause 17 85-87 Blackbutts Road, Frenchs Forest

1 Proposed development and the nature and extent of exception sought

The application seeks development consent for demolition of existing structures and Infill self-care housing for independent living under the provisions of State Environmental Planning Policy Housing 2021 (SEPP) for 4 dwellings.

An exception is sought in relation to Clause 85(1), Schedule 4, Clause 17 which requires the main bedroom to be located on the entry level (ground floor level) of dwelling 1.

- cl 85 is titled 'Development standards for hostels and independent living units'.
- cl 85 (1) states: *'Development consent must not be granted for development for the purposes of a hostel or an independent living unit unless the hostel or independent living unit complies with the relevant standards specified in Schedule 4'.*
- Schedule 4 is titled *'Standards concerning accessibility and usability for hostels and independent living units'* and contains a detailed list of specific access related requirements. The DA is accompanied and supported by an access report which addresses these requirements.
- Clause 17 of Schedule 4 states:
*'17 Access to kitchen, main bedroom, bathroom and toilet
In a multi-storey independent living unit, the kitchen, main bedroom, bathroom and toilet must be located on the entry level'.*

Dwelling 1, located at the front of the proposed development, does not comply with this requirement and an exception is sought.

- Rather than contain the main bedroom on the ground floor level, which could not be accommodated within the development footprint whilst maintaining compliance with the front setback control, the proposed dwelling includes an internal mechanical passenger lift connecting the ground and first floor levels within dwelling 1.
- The kitchen, bathroom, and toilet (as required by the standard) are contained at the entry level but the main bedroom is located on the first-floor level.
- All areas within dwelling 1 become accessible through the inclusion of the proposed passenger lift.

- The design of the ground floor of dwelling 1 has also considered the potential for temporary power outages during which the lift would be inoperable. In response, amended (plans dated June 2023) include a shower within the bathroom on the ground floor level. Furthermore, the applicant also agrees to ensure that a temporary bed (like a sofa bed) is kept and available for use on the ground floor of dwelling. This may form a condition of development consent. These amendments mean that a laundry, bathroom, kitchen, bed, private open space, and egress are contained on the ground floor level, meaning that the ground floor of dwelling 1 can be fully self-contained during temporary power outages.

Clause 85 of the SEPP is a development standard applicable to the assessment of the DA.

As required by LEP 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.

1.1 Key SEPP Housing provisions

Clause 85 states:

cl 85 Development standards for hostels and independent living units

'(1) Development consent must not be granted for development for the purposes of a hostel or an independent living unit unless the hostel or independent living unit complies with the relevant standards specified in Schedule 4.

(2) An independent living unit, or part of an independent living unit, located above the ground floor in a multi-storey building need not comply with the requirements in Schedule 4, sections 2, 7–13 and 15–20 if the development application is made by, or by a person jointly with, a social housing provider.

Note—

Development standards concerning accessibility and usability for residential care facilities are not specified in this Policy. For relevant standards, see the Building Code of Australia'.

Schedule 4 Clause 17 states:

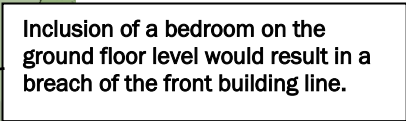
'17 Access to kitchen, main bedroom, bathroom and toilet

In a multi-storey independent living unit, the kitchen, main bedroom, bathroom and toilet must be located on the entry level'.

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 m² (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



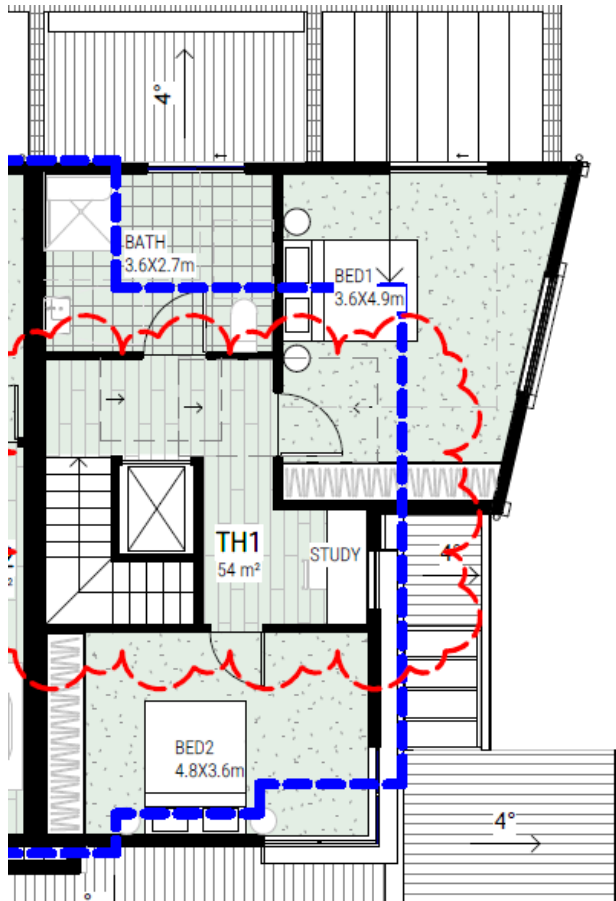


Figure 3 – excerpt of the first-floor plan showing that the proposed passenger lift is appropriately located to achieve access within the dwelling

2 Assessment

2.1 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

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* (2007) LEC 827.

In the decision of *Wehbe vs Pittwater Council*, 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:

1st *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.

2nd *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.*

3rd *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.*

4th *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.*

5th *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 third principle is relevant to the subject matter.

The underlying objective or purpose is identified to be:

- To provide housing that enables residents to age-in-place by living in housing without the need to use stairs, which due to their diminishing physical capability as they age, they may not be able to use.

The proposal satisfies this objective because the proposal is designed to enable residents to live within dwelling 1 without the need to use stairs. A vertical mechanical lift is a suitable option that addresses the principle of ageing-in-place without the need to locate the master bedroom at ground floor level. The 'alternative solution' of a lift in place of a ground level bedroom is assessed as appropriate outcome that satisfies the underlying objectives of the standard.

Insistence upon strict compliance with the standard would result in the underlying objective or purpose being defeated with the consequence that compliance is unreasonable. 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.

3 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.

In accordance with 4.6 (3)(b) there are sufficient environmental planning grounds to justify the exception to the development standard the basis of the following considerations:

3.1.1 Designed to meet the specific physical needs of older people and people with a physical disability

The proposal is designed to meet the specific physical needs of older people and people with a physical disability. The proposal is designed to enable residents to live without the need to use stairs.

A vertical mechanical lift is a suitable design solution that addresses the principle for ageing-in-place without the need to locate the master bedroom at ground floor level. The provision of a lift is consistent with the principle of ageing-in-place; for residents to continue living in dwelling 1, as they age, and their physical capabilities change.

3.1.2 Contingency during a power outage

The property is adequately serviced by utility infrastructure including electricity that will power the proposed passenger lift.

Power outages within the local area are infrequent and for short periods of time. Notwithstanding contingency has been made within the design for the occasions when a power outage would render the lift inoperable.

The design of the ground floor of dwelling 1 has been amended (plans dated 28.06.23) to include a shower within the bathroom on the ground floor level. The applicant also agrees to ensure that a sofa bed is made available for use on the ground floor of dwelling 1. Therefore, a laundry, bathroom, kitchen, and bed are contained on the ground floor level. These provisions would mean dwelling 1 will be self-contained for a short period.

Further, a condition of consent may be included to regulate this outcome in perpetuity and for the life of the approval.

3.1.3 Consistent with the broader aims of the SEPP

The proposed development is consistent with the broader aims of the SEPP because it will:

- provide additional housing designed to enable ageing-in-place.
- provide additional housing designed and located to meet the specific physical needs of older people and people with a physical disability.

- increase the supply and diversity of accommodation options (in addition to age care facilities, and seniors housing villages) that meet the specific physical needs of seniors or people with a disability, make efficient use of existing infrastructure and services, and be of good design.

3.1.4 Improved streetscape presentation

Rather than contain the main bedroom on the ground floor level, which could not be accommodated within the development footprint whilst maintaining compliance with the front setback control, the proposed dwelling includes an internal mechanical passenger lift connecting the building levels within dwelling 1. This design solution enables compliance with the front set back control. It will result in a more desirable streetscape alignment of the proposed building, and optimal landscaped area within the front set back.

3.2 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 proposal is consistent with the following objectives at under Section 1.3 of the Environmental Planning and Assessment Act 1979 (the Act):

*(c) to promote the orderly and economic use and development of land;
and*

*(g) to promote good design and amenity of the built environment,
through consistent streetscape alignment and increased landscaping
at the street edge.*

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:

- through purpose designed and well-located housing to meet the living needs of future residents
- 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 DA will result in a residential development that will promote good design and amenity of the built environment through consistent streetscape alignment and increased landscaping at the street edge, noting the design incorporates:

- a compliant front setback
- a new and enhanced landscape planting regime within the front setback and to the site perimeter
- renewal and enhancement of the built-form on the property in a manner that satisfies the planning controls.
- housing that is responsive to its development context.

4 Public Interest Considerations

4.1 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 84(2)(a) Schedule 4, Clause 17 are not specifically expressed in the SEPP. It is reasonable to conclude that the underlying objectives of Clause 84(2)(a) Schedule 4, Clause 17 are to:

- To provide housing that enables residents to age-in-place by living in the housing without the need to use stairs, which due to their diminishing physical capability as they age, they may not be able to use.

The proposed development satisfies the objective because:

- The proposal is designed to enable residents to live within dwelling 1 without the need to use stairs. A vertical mechanical lift is a suitable option that addresses the principle of ageing-in-place without the need to locate the master bedroom at ground floor level. Therefore the 'alternative solution' of a lift in place of a ground level bedroom is assessed as appropriate outcome that satisfies the underlying objectives of the standard.
- The provision of the lift will allow for greater access throughout the entire independent living unit and other bedrooms compared to the other three independent living units that provide the main bedroom on ground level and don't have a lift. Therefore, the proposed lift offers a superior accessibility option and satisfies the intent of the clause.
- Three out of the four proposed units comply. It is only dwelling 1 that proposes an alternative solution.
- The proposed lift within dwelling 1 enables an additional dwelling to be provided to meet the housing needs of the community whilst maintaining compliance with the front setback control to the benefit of the proposed development's streetscape presentation.
- The provision of a lift does not impose an unreasonable use or cost burden. It is noted that future purchasers should be advised of the requirement to maintain the lift on the title of the land. Furthermore, conditions may be imposed to regulate ongoing compliance which may, for example, include regular maintenance of the lift.

Therefore the 'alternative solution' of a lift in place of a ground level main bedroom is assessed as an appropriate outcome that satisfies the underlying objective of the standard.

4.2 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:

To provide for the housing needs of the community within a low density residential environment.

To enable other land uses that provide facilities or services to meet the day to day needs of residents.

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

In response,

- will enable the provision of 4 new dwellings, designed to meet the specific physical needs of older people and people with a physical disability, and thereby provide for the housing needs of the community in a highly suitable location.

- will provide residential development in a manner that is respectful of, compatible with, and not disruptive to, the character of the local development context.
- will provide residential development that is compatible with the mixed residential development character within the local area, within a landscape setting, that is in harmony with the environmental conditions of the property and local area.

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

5 Secretary's considerations

With regards to the Secretary's considerations the proposed variation of the development standard:

- Does not raise any matter of significance for State or regional environmental planning consistent with 4.6 (5)(a).
- The public benefit is not served by maintaining the development standard consistent with 4.6 (5)(b).

6 Conclusion

The variation proposed to the development standard has been appropriately acknowledged and the circumstances assessed, having regard to the objectives of the control. In conclusion, Council can be satisfied that:

- this written request has adequately addressed the matters required to be addressed by cl 4.6(3) and
- that the proposed development will be in the public interest because it is consistent with the objectives of the contravened development standard and the zone, at cl 4.6(4),

The proposal should be granted development consent.

Yours sincerely,



Michael Haynes
Director - BBF Town Planners