

This and the following **17** pages comprise the Annexure marked " **A** " referred to in the Affidavit of

Catherine Marginson

sworn/affirmed before me on 24/04/2024.



.....
Solicitor/~~Justice of the Peace~~

CLAUSE 4.6 VARIATION (FSR)

HAY STREET, COLLAROY

PROJECT INFORMATION

The Proposal: This Clause 4.6 Variation (FSR) accompanies a development application lodged with consent of the registered property owners. The proposal seeks approval for demolition of the existing dwellings and construction of a seniors housing development comprising 10 x 3 bedroom independent living units over a basement level of car parking.

Site: Lots 43 – 46 Section 12 Deposited Plan 10648
Nos. 37 – 43 Hay Street
COLLARROY NSW 2097

Architect: **PopovBass**
No. 208 Devonshire Street
SURRY HILLS NSW 2010



1 PLANNING FRAMEWORK

STATE ENVIRONMENTAL PLANNING POLICY (HOUSING) 2021

The NSW Housing Strategy: Housing 2041 is the NSW Government's plan to meet the State's housing needs over the next 20 years ¹. State Environmental Planning Policy (Housing) 2021 (SEPP Housing) commenced on 26 November 2021 and the relevant principles of the policy are:

- (b) encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability,*
- (c) ensuring new housing development provides residents with a reasonable level of amenity,*
- (d) promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,*
- (f) reinforcing the importance of designing housing in a way that reflects and enhances its locality,*

Part 5 of SEPP Housing sets out the land use planning and assessment framework for seniors housing in NSW, is facultative in nature, and permits seniors housing in the R2 Low Density Residential zone.

WARRINGAH LOCAL ENVIRONMENTAL PLAN 2011

Warringah Local Environmental Plan 2011 (the LEP) applies to all land within the former Warringah local government area (LGA).

Land Use Zone

The site is zoned R2 Low Density Residential Zone. The objectives of the zone are:

- *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.*

The proposed Seniors Housing development is permissible with consent within the R2 Low Density Residential zone via application of SEPP Housing and satisfies the objectives of the zone, as the development provides for the housing needs of the community, by increasing the availability and variety of dwellings to enable population growth, and is compatible with the established low density residential environment. The proposed landscaping will ensure the development's setting is in harmony with the natural environment.



FIGURE 1

Site photograph taken looking south and east from the corner of Hay Street and Anzac Avenue.

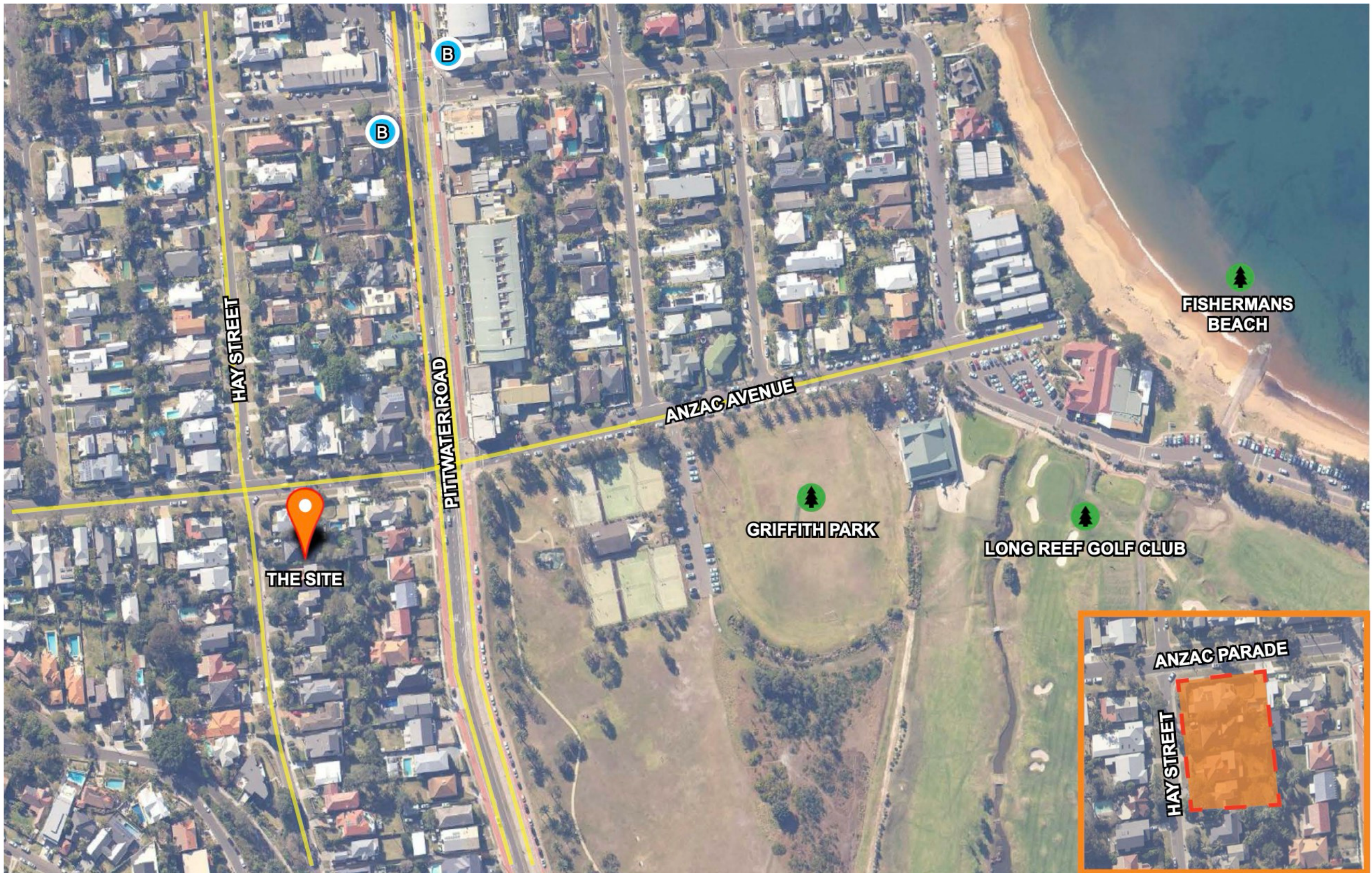


FIGURE 2

The site and its context (extract from SixMaps).



FIGURES 3 – 6

The subject site (above) and its immediate context, including a range of established 1 – 3 storey dwelling houses.



2 CLAUSE 4.6 VARIATION (FSR)

Clause 4.6 – Exceptions to Development Standards

This Clause 4.6 variation has been prepared having regard to the provisions of clause 4.6 and the principles in relevant authorities of the Court.

The proposal seeks to vary Clause 108(2)(c) of State Environmental Planning Policy (Housing) 2021 which establishes a non-discretionary development standard for floor space ratio as follows:

108 Non-discretionary development standards for independent living units—the Act, s 4.15

(1) The object of this section is to identify development standards for particular matters relating to development for the purposes of independent living units that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.

(2) The following are non-discretionary development standards in relation to development for the purposes of independent living units—

(c) the density and scale of the buildings when expressed as a floor space ratio is 0.5:1 or less,

The site is not subject to a maximum FSR development standard as might otherwise be prescribed at Clause 4.4 of the LEP.

In light of this and the context of the proposed development, the 'density' of development in the locality is managed by Part 5 of SEPP Housing (including Section 108), and built form controls established by the Warringah Development Control Plan 2011 (DCP), to determine a development's permitted building envelope.

Clause 108(1) establishes the object of the non-discretionary development standards for independent living units:

(1) The object of this section is to identify development standards for particular matters relating to development for the purposes of independent living units that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.

Proposed Variation to Non-discretionary Development Standards

The prescribed non-discretionary limit to FSR is 0.5:1. The proposed FSR is 0.55:1 being (1,570.43m²), which represents a 10% variation to the development standard through an additional 150.88m².

The extent of the FSR sought is on Drawing No 0638-DA116, Compliance Calculations, Revision 10, dated 11 April 2024. The site area is 2,839.1m² (by calculation stated on Survey Plan prepared by C&A Surveyors dated 28 February 2023) so 0.5 FSR control envisions an allowable GFA of 1,419.55m² on the site.

Pursuant to Section 4.15 of the Environmental Planning Assessment Act 1979:

(2) Compliance with non-discretionary development standards—development other than complying development

If an environmental planning instrument or a regulation contains non-discretionary development standards and development, not being complying development, the subject of a development application complies with those standards, the consent authority—

- (a) is not entitled to take those standards into further consideration in determining the development application, and*
- (b) must not refuse the application on the ground that the development does not comply with those standards, and*
- (c) must not impose a condition of consent that has the same, or substantially the same, effect as those standards but is more onerous than those standards, and the discretion of the consent authority under this section and section 4.16 is limited accordingly.*

(3) If an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a development application does not comply with those standards—

- (a) subsection (2) does not apply and the discretion of **the consent authority under this section and section 4.16 is not limited** as referred to in that subsection, and*
- (b) a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.*

This statutory provision confirms that clause 4.6 of the WLEP may be applied to a non-compliance with clause 108(2) of the Housing SEPP.

Clause 4.6 Request

Clause 4.6 of the Warringah Local Environmental Plan 2011 provides a consent authority the ability to provide an exception to a prescribed development standard. The objectives of this provision are:

- (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.*

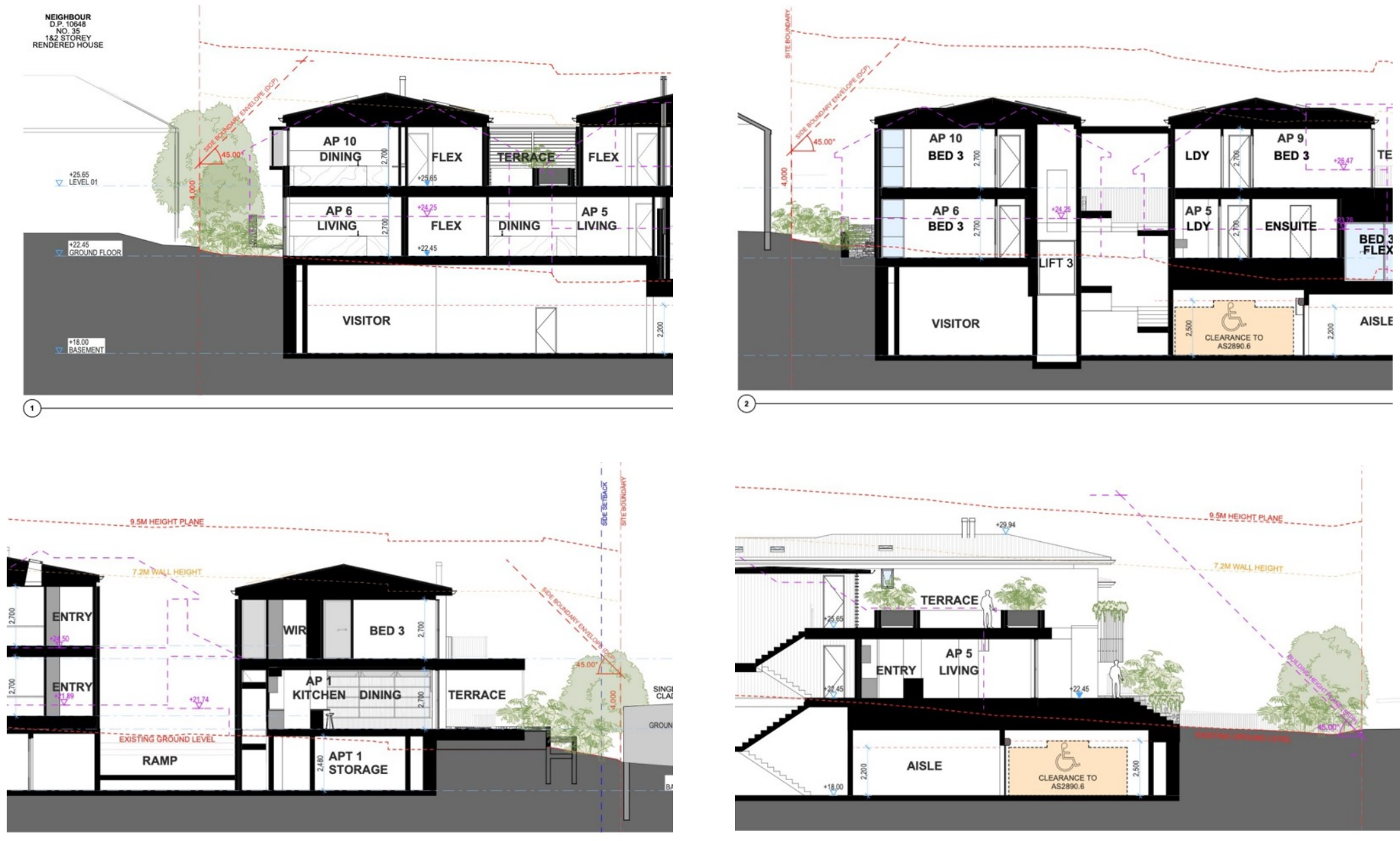
For the purposes of section 4.15(3)(b), this indicates that clause 4.6 is the relevant provision of an environmental planning instrument that allows flexibility in the application of a development standard that may be applied to the non-discretionary development standard.

Central to the clause 4.6 request is compliance with the other applicable built form controls which demonstrate that the proposed development will be compatible with the surrounding development.

Clause 4.3 of the LEP prescribes a maximum building height of 8.5 metres. However, SEPP Housing prescribes a maximum building height for seniors housing of 9.5 metres. Where there is an inconsistency between SEPP Housing and another environmental planning instrument, the SEPP prevails to the extent of the inconsistency. The development proposes a building height of 8.69 metres which is compliant with the applicable 9.5 metre development standard.

The DCP provides various setback and building envelope controls that otherwise constrain the bulk and scale of development in a locality. The proposed development is consistent with the front, side and rear boundary setback controls, and is also consistent with the side boundary envelope controls. The objectives of the DCP's side boundary envelope controls are to ensure that development

does not become visually dominant by virtue of its height and bulk, to ensure adequate light, solar access and privacy by providing spatial separation between buildings, and to ensure that development responds to the topography of the site. Despite the increased building height permitted on the site by SEPP Housing, the proposed development is compliant with the DCP side boundary envelope controls as demonstrated at Figures 7 – 10.



FIGURES 7 – 10

Demonstration of the development’s compliance with the maximum prescribed building height development standard (SEPP) and building setback and side boundary envelope controls (DCP).

The objectives of the DCP’s side boundary setback controls include to ensure that development does not become visually dominant and to ensure the bulk and scale of buildings is minimised. The objective of the rear setback control is to maintain the existing visual continuity and pattern of buildings, rear gardens and landscape elements. The proposed development is compliant with each of these controls.

The proposed development is contained within a low density building envelope that is otherwise considered appropriate for development within the R2 Low Density Residential zone and warrants a degree of flexibility in 'application' of the non-discretionary development standard as an upper limit to development, where the SEPP's principle aims of encouraging the development of housing that will meet the needs of seniors and people with a disability, and ensuring new housing development provides residents with a reasonable level of amenity without adversely impacting the amenity of neighbouring properties, will be attained. The form of seniors housing proposed is not the 'same' as dwelling houses located upon adjoining lots. However, as the development is demonstrated to comply with prescribed building height, envelope and landscaping controls, it is suggested that such buildings can exist together in harmony without having the same density, scale or appearance, and that a better outcome for and from development can be achieved by allowing flexibility in this particular circumstance.

Strict Application of the non-discretionary development standard (0.5:1) as a maximum necessitates a reduction in floor space ratio (FSR) in circumstances where (a) there is no material adverse impact occasioned by the exceedance (b) the development is otherwise demonstrated to be consistent with the LEP's objectives related in application of an FSR standard (see further below), (c) a corner allotment is an appropriate location for more prominent buildings and (d) a reduction in FSR would not promote Section 1.3(c) of the Environmental Planning and Assessment Act 1979 (EPAA) being the orderly and economic use and development of land, consistent with the principle aims of SEPP Housing which include to encourage the development of housing that will meet the needs of seniors and people with a disability.

(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.

Comment: The non-discretionary development standard is Clause 108(2)(c) of State Environmental Planning Policy (Housing) 2021.

The non-discretionary development standard is not 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.*

Comment: This submission is a written request for consideration by the consent authority.

The proposed development has been designed with a high level of skill, attention to the built form controls, generous setbacks and landscaping and the built form has been highly articulated to fit into its surroundings.

Unreasonable or Unnecessary

The ways in which compliance with a development standard can be shown to be unnecessary (in that it is achieved any way) or unreasonable (in that no purpose would be served) are as follows:

- The objectives of the development standard are achieved notwithstanding non-compliance with the standard. Under this approach development standards are viewed not as the planning objectives, but as a means to achieve those objectives. If there is an alternative means to achieve the objective, then the objective would be achieved anyway (and hence compliance with the

standard is unnecessary) and there is no purpose served by requiring compliance with the standard (and hence compliance would be unreasonable). This tends to be the most common way of establishing that compliance is unreasonable or unnecessary.

- To establish that the underlying objective or purpose of the standard is not relevant to the development, and hence compliance with the standard is unnecessary.
- To establish that the underlying objective or purpose of the standard would be defeated if compliance was required, and hence compliance with the standard is unreasonable.
- To establish that the development standard has been virtually abandoned or destroyed by Council's own decisions departing from the standard, and hence compliance with the standard is unnecessary or unreasonable.
- To establish that the zoning of the particular land was an anomaly or inappropriate, and as a result the development standard applying to zoning are also an anomaly or inappropriate, and hence compliance with the standard is unnecessary or unreasonable.

(Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46); Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118).

In this case, it is the first way in Winten that is relied upon: That is, the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

It is commonly accepted that a standard for Floor Space Ratio, or FSR, is a planning tool used by consent authorities to manage the size, bulk, and scale of the built environment.

The purpose of such a control is to ensure the bulk and scale of development is compatible with the existing and desired streetscape and to minimise adverse impacts on adjoining land.

This approach is consistent with previous decisions where the Court did not have express objectives to consider in relation to FSR and the Court had to infer these objectives – see *Zenere v Canterbury City Council [2006] NSWLEC 263*; *Kolln v Sydney City Council [2006] NSWLEC 552*.

'Compliance' with the non-discretionary standard for FSR in s108(2)(c) is considered unreasonable and unnecessary in the circumstance of this case, given the numerical non-compliance is with a non-discretionary development standard, the objective of which is to identify development standards for independent living units that, if complied with, prevent the consent authority from requiring a more onerous standard. Further, it is not intended as an upper limit to development, and the Council does not otherwise prescribe a maximum FSR standard for development in this locality.

Compliance with the FSR standard is unreasonable and unnecessary in these circumstances where bulk and scale of development is compatible with the existing and desired streetscape and adverse impacts on adjoining land are minimised.

Firstly, from a streetscape perspective, the proposed bulk and scale is appropriate because:

1. It appropriately responds to the site's unique topography as demonstrated by how the design appropriately 'steps down' with the slight fall of the land towards the north-eastern corner (see Architectural Drawing 0638-DA112 'Elevations 1' Revision 09 dated 6 March 2024).
2. The height of the development at 8.69m is commensurate with the two storey built form in the locality. See below figures included in relation to sufficient planning grounds which demonstrates that the proposed development is compatible with the surrounding bulk and scale. In particular, the proposed development being 2 storeys in its form, whereas the surrounding built form is predominantly 2 storeys with some 3 storey examples.
3. The form of the proposed development has been articulated to reflect the prevailing low density streetscape, which is sympathetic to the character of the existing buildings on the site, being 4x adjoining lots that presently have 2 storey dwellings (see comparison between existing buildings and proposed on Architectural Drawings 0638-DA112 and 0638-DA113, 'East Elevation' and 'North Elevation', Revision 09 dated 6 March 2024).

4. The proposed landscaping seeks to retain, and embellish, the existing landscape treatment to the streetscape to provide sufficient screening and softening of the proposed built form such that the additional FSR sought is adequately absolved within the bulk and scale and not discernible from the streetscape.

Secondly, in relation to adverse impacts on surrounding land, the additional FSR has been integrated into the overall design and will not adversely cause:

1. Overshadowing to neighbouring properties;
2. Adverse impact on privacy of surrounding properties; or
3. Adversely impact upon views from adjoining properties (see Visual Impact Study prepared by CMS Surveyors dated 5 March 2024 in relation to how the amended design has ensured key neighbouring views are retained for surrounding properties).

As a result of compliance with the maximum building height, building envelope for 2-3 storey developments and landscaping standards prescribed by the SEPP, and development controls relating to building setbacks and side building envelopes established by the DCP, the extent of 'non-compliance' it is not visually intrusive, will not be perceptible in the streetscape will not cause impact upon views from any adjoining property, will not impact privacy, and will not cause adverse overshadowing impacts upon any adjoining property.

In this regard, the additional floor space has been specifically designed into the proposed built form so as to reduce any potential adverse impacts, while affording the future occupants increased future amenity.

Further, strict compliance is unreasonable and unnecessary where the amended design is compliant with the requisite built form controls, save for the FSR control. In an urban design context, compatible is intended to mean capable of existing together in harmony, and is thus different from sameness (see planning principle established in *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191). It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, noting the density of adjoining development is not measured by FSR.

It follows that the development achieves the objects of the controls, being to ensure bulk and scale of development is compatible with the existing and desired streetscape and adverse impacts on adjoining land are minimised. It follows that the consent authority would be satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances.

Sufficient Environmental Planning Grounds

In *Initial Action* the Court found at [23]-[24] that:

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].

In summary, the environmental planning grounds in support of the proposed variation to the height control include areas follows:

1. Corner expression
2. Development responsive to 2-3 storey elements in the streetscape
3. Additional FSR is imperceptible in the streetscape
4. Reduction in FSR would reduce amenity for no identifiable benefit
5. Consistency with the existing and desired future character of the locality
6. The proposed variation will not result in unacceptable environmental impacts

1. Corner expression and 2. Development responsive to streetscape

A strong corner expression that responds to the streetscape has been found to be an environmental planning ground: *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583 at [47]. This ground has also been more recently accepted by the Court in *Roche Group Pty Limited v Woollahra Municipal Council* [2022] NSWLEC 1199 at [102] and [103].

As identified in addressing unreasonable and unnecessary application of the standard above, the development amalgamates four lots on the north western corner of Hay Street and Anzac Avenue and seeks approval of a built form that maintains the predominant existing built form on the street – being 2 storeys, with some 3 storey elements. Appropriate landscaping and use of materials and finishes have also been incorporated into the scheme to ensure compatibility of the proposed development, and extent of the variation within the scheme in a manner that provides a strong, yet sympathetic presentation to the streetscape and on the corner. The corner to the immediate north across Anzac Avenue also has a large prominent dwelling house opposite this location (see **Figure 11** over page).

There are also three storey elements within the immediate context, for example at No. 28 Hay Street (see **Figure 12**) and No. 30 Anzac Avenue (see **Figure 13**).

The additional FSR on this corner is an appropriate contextual response to the built form in the streetscape. These are “grounds” that are consistent with the objects of the EPAA to promote the orderly development of land and to promote the good design of the built environment.



FIGURES 11 – 13

Clockwise from top left – No. 27 Anzac Avenue; No. 28 Hay Street, and No. 30 Anzac Avenue.

3. Additional FSR is imperceptible in the streetscape

As indicated above, there are prominent 2-3 storey buildings in the immediate locality of the subject site. The development despite the variation, is demonstrated to comply with prescribed building height, setback, side boundary envelope and landscaping controls prescribed by the SEPP and DCP.

The proposed floor space including the variation, has been distributed across the site in a highly articulated and modulated 2 storey stepped building form which appropriately addresses each of its Hay Street and Anzac Avenue frontages. As such the additional floor space sought is not discernible within the streetscape which is attributed to the design of the built form which seeks to reflect the existing built form on the site.

As a result of compliance with the maximum building height, building envelope for 2 storey developments and landscaping standards prescribed by the SEPP, and development controls relating to building setbacks and side building envelopes established by the DCP, the extent of 'non-compliance' it is not visually intrusive, will not be perceptible in the streetscape, will not cause impact upon views from any adjoining property, will not impact privacy, and will not cause adverse overshadowing impacts upon any adjoining property.

Further, due to the proposal being for seniors housing, the layout of apartments has been guided by necessary accessibility requirements, which provides a larger floor plate to accommodate the future occupants of the development. The Updated Access Report prepared by Lindsay Perry Access (15 March 2024) finds the updated architectural design compliant with all necessary accessibility requirements.

The form and massing of the building is therefore demonstrated to be consistent with the desired future character of the immediate area as reflected by compliance with the appropriate building height and envelope controls. The contextually responsive development is consistent with the zone objectives and the objectives of the FSR development standard prescribed by the LEP, despite the variation.

It should otherwise be noted that there is no uniform FSR that has been applied in the locality, particularly given there is no control under the LEP.

4. Reduction in FSR would reduce amenity for no identifiable benefit

It is to be recalled the proposed development comprises independent living units for seniors housing. An object of the EPAA is (g) to promote good design and amenity of the built environment. The majority of the dwellings are accessible by lift.

The first floor of the dwellings is critical to their amenity – providing for solar access a sense of openness and views towards the ocean and headland. They are orientated to take advantage of these benefits. If floor space were removed from the ground floor in lieu of the first floor, this would result in a compromised design of the units at ground floor that would impact the available amenity to the future occupants, in regards to available habitable space and available private open space.

Further, given the ultimate use of the proposed development is for the purposes of seniors housing as independent living units, the proposed development, and variation sought, has been specifically included and designed to accommodate the necessary adaptability and accessibility, as well as boost amenity for future occupants taking advantage of the openness and views available – without causing adverse impacts to neighbouring properties.

In order to comply with the non-discretionary standard, it would have theoretically been possible to reduce the floor area one top floors of all the units, or alternatively to delete the top floor of one of the dwellings entirely.

This would have had no planning benefit.

This would have been contrary to the objective of the Act: to promote good design and amenity of the built environment.

5. Consistency with the existing and desired future character of the locality

Despite the variation, the proposed development remains consistent with the desired future character of the area. With a height control of 9.5m, and no FSR control under the LEP within the immediately locality, it can be anticipated that the future character of the area will continue to trend towards 2 – 3 storey built forms, which is likely to intensify in bulk, scale and use in response to the NSW Government’s proposed changes to the low to medium density housing developments.

In this regard, the additional 10% of FSR sought in this proposal does not interfere, or make a discernible impact against the existing, and also, future character of the area.

6. The proposed variation will not result in unacceptable environmental impacts

Regardless of the FSR non-compliance, the proposal will not result in unacceptable environmental impacts in terms of solar access, views or privacy. As indicated, the site characteristics of a corner allotment assists in minimising any potential environmental amenity impacts.

The potential effects on water views to the as a result of the proposal would be similar to the effects of a built form compliant with the LEP development standards. The proposed FSR provides a built form offering compliant levels of solar access to nearby residential development and there will not be significant impacts beyond a compliant building envelope.

Clause 4.6(4): consistency with Applicable Objectives

(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.*

The consent authority must also be satisfied that 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.

The objectives of the standard are addressed above.

Comment: The site is zoned R2 Low Density Residential. The objectives of the zone are as follows:

- *To provide for the housing needs of the community within a low density residential environment.*
- Housing for seniors is a need of the community. The proposed development meets this need by providing 5 independent living units in a manner that meet relevant height controls, and meet the DCP controls for low density setbacks and landscaping. It is agreed that the proposal creates no material adverse impacts that would warrant refusal.
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- Does not apply.
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

A detailed landscape plan has been prepared. The proposed building setbacks and significant deep soil zones provided at the periphery of the site, combined with a high standard of landscaping will ensure the development is consistent with established 1 – 3 storey development evident within the streetscape.

Proposal in Public Interest

The proposed development is consistent with each of the above discussed controls, and for this reason, it is suggested the proposed development will be in the public interest because it is consistent with the objectives of the FSR standard and the objectives for development within the zone in which the development is proposed to be carried out.

A better planning outcome is achieved by not rigidly applying the non-discretionary development standard as an upper limit to development in the circumstances, as application of the non-discretionary development standard as an upper limit would necessitate a significant reduction in the FSR in circumstances where the development is otherwise demonstrated to be consistent with the LEP's objectives related in application of an FSR standard. It is further suggested a reduction in FSR would be contrary to Section 1.3(c) of the EPAA, as it would not promote the orderly and economic use and development of land, consistent with the principle aims of SEPP Housing, which include to encourage the development of housing that will meet the needs of seniors and people with a disability.

(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.*

Comment: The contravention raises no matters of State or regional significance. It is considered the proposal is compatible with existing development and is consistent with the desired future character of development in the locality. There is no public benefit in application of the non-discretionary standard as an upper limit to development in the circumstances given a better planning outcome achieved, including the delivery of much needed seniors housing. No other matters are required to be taken into consideration by the Director-General.

(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 C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 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.*

Comment: The proposal is not for contravention of a subdivision control.

(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).

Comment: The consent authority will keep a record of the determination.

(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,
- (ba) clause 4.4, to the extent that it applies to land identified on the Key Sites Map as Site F, Site G, Site H or Site I,
- (c) clause 5.4,
- (caa) clause 5.5.
- (d) (Repealed)

Comment: The proposal is not for complying development. The development standard does not arise from the regulations in connection with BASIX. The standard does not arise from Clause 5.4 or any of the other exclusions listed.

(8A) Also, this clause does not allow development consent to be granted for development that would contravene a development standard for the maximum height of a building shown on the Height of Buildings Map on land shown on the Centres Map as the Dee Why Town Centre.

Comment: The site is no located within the Dee Why Town Centre

(8B) Despite subclause (8A), development on Site C or Site E may exceed the maximum height of building shown on the Height of Buildings Map if the maximum height is allowable under clause 7.14.

Comment: The site is not located on Site C or E.