ATTACHMENT A

Request to Vary the Building Height Control

INTRODUCTION

Clause 4.3 of the Hornsby Local Environmental Plan (LEP) 2013 specifies a maximum building height of 23.5 metres. The proposed building has a maximum height of approximately 41.68 metres measured to the top of the feature screen, and 39.58 metres to the upper level roof.

Clause 48 of SEPP (Housing for Seniors or People with a Disability) 2004 does not specify a maximum building height, and there is no maximum building height control for a *"residential care facility"*.

Further, Clause 5(3) of the SEPP specifies that the SEPP prevails to the extent of any inconsistency with any other environmental planning instrument (including the Hornsby LEP 2013).

Irrespective, in the event that the building height control incorporated in the LEP is deemed to apply to the proposed development, this *"written request"* pursuant to Clause 4.6 of the LEP has been prepared for abundant caution.

CLAUSE 4.6 OF THE HORNSBY LEP 2013

Clause 4.6(1) is facultative and is intended to allow flexibility in applying development standards in appropriate circumstances.

Clause 4.6 does not directly or indirectly establish a test that non-compliance with a development standard should have a neutral or beneficial effect relative to a complying development (*Initial* at 87).

Clause 4.6(2) of the LEP specifies that *"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"*.

Clause 4.6(3) specifies that development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

The requirement in Clause 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard has a better environmental planning outcome than a development that complies with the development standard (*Initial* at 88).

Clause 4.6(4) specifies that 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.

Clause 4.6(5) specifies that in deciding whether to grant concurrence, the 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 Secretary before granting concurrence.

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;*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118; and*
- *Hansimikali v Bayside Council [2019] NSWLEC 1353*.

"Varying development standards: A Guide" (August 2011) outlines the matters that need to be considered in DA's involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ, in *Wehbe v Pittwater Council [2007] NSWLEC 827* to the extent that there are effectively five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary as follows:

1. The objectives and purposes of the standard are achieved notwithstanding non-compliance with the development standard.
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
4. The development standard has been 'virtually abandoned or destroyed' by the Councils own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.

5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

As Preston CJ, stated in *Wehbe*, the starting point with a SEPP No. 1 objection (now a Clause 4.6 variation) is to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances. The most commonly invoked 'way' to do this is to show that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard.

The Applicant relies upon ground 1 in *Wehbe* to support its submission that compliance with the development standard is both unreasonable and unnecessary in the circumstances of this case.

In that regard, Preston CJ, in *Wehbe* states that *"… development standards are not ends in themselves but means of achieving ends"*. Preston CJ, goes on to say that as the objectives of a development standard are likely to have no numerical or qualitative indicia, it logically follows that the test is a qualitative one, rather than a quantitative one. As such, there is no numerical limit which a variation may seek to achieve.

The above notion relating to 'numerical limits' is also reflected in Paragraph 3 of Circular B1 from the former Department of Planning which states that:

> *As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small in others it may be numerically large, but nevertheless be consistent with the purpose of the standard.*

It is important to emphasise that in properly reading *Wehbe*, an objection submitted does not necessarily need to satisfy all of the tests numbered 1 to 5, and referred to above. This is a common misconception. If the objection satisfies one of the tests, then it may be

upheld by a Council, or the Court standing in its shoes. Irrespective, an objection can also satisfy a number of the referable tests.

In *Wehbe*, Preston CJ, states that there are three (3) matters that must be addressed before a consent authority (Council or the Court) can uphold an objection to a development standard as follows:

1. The consent authority needs to be satisfied the objection is well founded;
2. The consent authority needs to be satisfied that granting consent to the DA is consistent with the aims of the Policy; and
3. The consent authority needs to be satisfied as to further matters, including non-compliance in respect of significance for State and regional planning and the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

Further, it is noted that the consent authority has the power to grant consent to a variation to a development standard, irrespective of the numerical extent of variation (subject to some limitations not relevant to the present matter).

The decision of Pain J, in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* suggests that demonstrating that a development satisfies the objectives of the development standard is not necessarily sufficient, of itself, to justify a variation, and that it may be necessary to identify reasons particular to the circumstances of the proposed development on the subject site.

Further, Commissioner Tuor, in *Moskovich v Waverley Council [2016] NSWLEC 1015*, considered a DA which involved a relatively substantial variation to the FSR (65%) control. Some of the factors which convinced the Commissioner to uphold the Clause 4.6 variation request were the lack of environmental impact of the proposal, the characteristics of the site such as its steeply sloping topography and size, and its context which included existing adjacent buildings of greater height and bulk than the proposal.

The decision suggests that the requirement that the consent authority be satisfied the proposed development will be in the public interest because

it is *"consistent with"* the objectives of the development standard and the zone, is not a requirement to *"achieve"* those objectives. It is a requirement that the development be 'compatible' with them or 'capable of existing together in harmony'. It means *"something less onerous than 'achievement'"*.

In *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118,* Preston CJ found that it is not necessary to demonstrate that the proposed development will achieve a *"better environmental planning outcome for the site"* relative to a development that complies with the development standard.

Finally, in *Hansimikali v Bayside Council [2019] NSWLEC 1353*, Commissioner O'Neill found that it is not necessary for the environmental planning grounds relied upon by the Applicant to be unique to the site.

ASSESSMENT

Is the requirement a development standard?

The building height control is a development standard and is not excluded from the operation of Clause 4.6 of the LEP.

What is the underlying object or purpose of the standard?

The objective of the building height control is expressed as follows:

> *(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*

The locality surrounding the site is undergoing a transition towards a more intensified precinct, with the newer development characterised by multi-storey mixed-use buildings. Further, the site effectively functions as the southern gateway to the Hornsby Town Centre, providing an opportunity to construct a high-quality building to be perceived as an important built form marker.

In that regard, the proposed development has been designed under the direction of an urban design specialist (Karla Castellanos of [then] *GMU*

Urban Design & Architecture), and has been carefully designed to accommodate the specific operational requirements of the proposed uses, whilst achieving a benchmark for high quality architecture within the Hornsby Town Centre.

The applicable building height and floor space ratio (FSR) controls incorporated in the LEP effectively generate a *"squat building form"* which, in terms of design quality, is inherently inappropriate for a prominent gateway site.

Accordingly, the proposed development has been designed to comply with the FSR control, and has intentionally redistributed the floor space to provide a more appropriate, vertical building form, that extends above the current building height control.

The proposed development does not involve exceeding the development capacity of the site in terms of overall floor space, and the site is serviced by all necessary infrastructure.

Further, the proposed building form, including the variation to the building height control, has specifically been designed to achieve a building form that is more appropriate for the site having regard to its physical context, and the nature of surrounding development.

In the circumstances, the proposed development is consistent with the objective of the building height control, notwithstanding the numerical variation.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The Department of Planning published *"Varying development standards: A Guide"* (August 2011), to outline the matters that need to be considered in Development Applications involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ in *Wehbe v Pittwater Council [2007] NSWLEC 827* to the extent that there are five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary.

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

As noted above, the proposed development is consistent with the objective of the building height control, notwithstanding the numerical variation.

In that regard, the Applicant relies upon ground 1 in *Wehbe* (ie. that the objectives and purposes of the standard are achieved notwithstanding non-compliance with the development standard) to support its submission that compliance with the development standard is both unreasonable and unnecessary in the circumstances of this case.

2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

The objectives and purpose of the building height control remain relevant, and the proposed development is consistent with the objective of the building height control, notwithstanding the numerical variation.

3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

The proposed development is consistent with the objective of the building height control, notwithstanding the numerical variation.

Further, strict compliance with the building height control would generate a *"squat building form"* which, in terms of design quality, is inherently inappropriate for a prominent gateway site.

4. *The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*

The building height control has not been abandoned or destroyed by the Council's actions. However, the Council has consistently adopted an orderly but flexible approach to the implementation of development standards in appropriate circumstances, including when the objectives of the standard are achieved, notwithstanding numerical variations.

Further, the objectives of Clause 4.6 of the LEP includes to provide *"an appropriate degree of flexibility in applying certain development standards to particular development"*.

5. *Compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

The zoning of the land remains relevant and appropriate.

Are there sufficient environmental planning grounds to justify contravening the development standard?

The proposed numerical variation to the building height control is reasonable and appropriate in the particular circumstances on the basis that:

- Clause 48 of SEPP (Housing for Seniors or People with a Disability) 2004 does not specify a maximum building height, and there is no maximum building height control for a *"residential care facility";*
- the applicable building height and FSR controls incorporated in the LEP effectively generate a *"squat building form"* which, in terms of design quality, is inherently inappropriate for a prominent gateway site;
- the proposed development has been designed to comply with the FSR control, and has intentionally redistributed the floor space to provide a more appropriate, vertical building form, that extends above the current building height control;
- the proposed development does not involve exceeding the development capacity of the site in terms of overall floor space, and the site is serviced by all necessary infrastructure;
- the compliance with the total FSR control of 5:1 ensures the proposed development the bulk and scale of the building is an appropriate response to the site constraints, development potential and infrastructure capacity of the locality;
- strict compliance with the building height control would generate a *"squat building form"* which, in terms of design quality, is inherently inappropriate for a prominent gateway site;
- the proposed development is consistent with the objectives of the B4 – Mixed Use zone; and
- the proposed development is consistent with the objective of the building height control, notwithstanding the numerical variation.

The quality and form of the immediate built environment creates unique opportunities and constraints to achieving a good design outcome: *Initial Action v Woollahra Council 209 NSWLEC 1097* (O'Neill C) at 42. The proposal is a justified response to the scale and immediate built environment of the site.

In particular, the proposed development is consistent with object (c) of Section 1.3 of the Act: to promote the orderly and economic use and development of land; and object (g) to promote good design and amenity of the built environment. There are obvious economic and design/amenity considerations which should be taken into account in order to achieve those objects.

Are there any matters of State or regional significance?

The proposed numerical variation to the residential FSR control does not raise any matters of State or regional significance.

What is the public benefit of maintaining the standard?

The proposed development is consistent with both the expressed and assumed objectives of the residential FSR control, notwithstanding the numerical variation.

In the circumstances, the proposed development does not affect the public benefit of maintaining compliance with the residential FSR control in other instances.

In that regard, the objectives of Clause 4.6 of the LEP includes to provide *"an appropriate degree of flexibility in applying certain development standards to particular development"*.

Any other matters?

There are no further matters of relevance to the proposed variation to the residential FSR control.

Zone Objectives and Public Interest

The site is zoned B4 – Mixed Use pursuant to the Hornsby LEP 2013, and the objectives of the zone are expressed as follows:

- *To provide a mix of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

The proposed development is consistent with (and not antipathetic to) the relevant objectives of the zone on the basis of the mix of compatible retail, commercial and residential care land uses.

Further, the workers, visitors and residents of the building will have access to the extremely good public transport facilities located within a comfortable walking distance of the site.

Finally, the proposed development serves the public interest by providing a benchmark for high quality architecture within the Hornsby Town Centre, offering a good level of internal amenity without imposing any unreasonable impacts on the amenity of surrounding land.

CONCLUSION

The purpose of this submission is to formally request a variation in relation to the building height control in Clause 4.3 of the Hornsby LEP 2013.

In general terms, strict compliance with the building height control is unreasonable and unnecessary in the particular circumstances, and there are sufficient environmental planning grounds to justify the numerical variation.

ATTACHMENT B

Request to Vary the Residential Floor Space Ratio Control

INTRODUCTION

Clause 4.4 of the Hornsby Local Environmental Plan (LEP) 2013 specifies a maximum floor space ratio (FSR) of 5:1, and Clause 4.4(2A) specifies that the FSR for *"residential accommodation"* shall not exceed 2:1.

The proposed development provides a gross floor area of 5,883.78m^2, representing an FSR of 5:1.

The Dictionary of the LEP defines *"residential accommodation"* to include *"seniors housing"*, irrespective of whether the *"seniors housing"* comprises a *"residential care facility"*, a *"hostel"*, or *"self-contained dwellings"*.

On that basis, the proposed development provides a non-residential FSR of approximately 1.05:1, and a residential FSR of approximately 3.95:1.

Clause 19 of the State Environmental Planning Policy (SEPP) (Housing for Seniors or People with a Disability) 2004 species that development for the purposes of seniors housing should not include the use of any part of the ground floor level of a building that fronts a street for residential purposes if the building is located on land zoned primarily for commercial purposes.

The site is zoned *"primarily for commercial purposes"* on the basis of the range of permissible uses, and the FSR control of 5:1 includes a maximum FSR for *"residential accommodation"* of 2:1.

The SEPP does not require any additional non-residential development above the ground floor level, and the proposed development complies with Clause 19 of the SEPP.

Irrespective, in the event that Clause 19 of the SEPP is deemed not to be inconsistent with the residential FSR control, this *"written request"* pursuant to Clause 4.6 of the LEP has been prepared for abundant caution.

CLAUSE 4.6 OF THE HORNSBY LEP 2013

Clause 4.6(1) is facultative and is intended to allow flexibility in applying development standards in appropriate circumstances.

Clause 4.6 does not directly or indirectly establish a test that non-compliance with a development standard should have a neutral or beneficial effect relative to a complying development (*Initial* at 87).

Clause 4.6(2) of the LEP specifies that *"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"*.

Clause 4.6(3) specifies that development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

> *(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
> *(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

The requirement in Clause 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard has a better environmental planning outcome than a development that complies with the development standard (*Initial* at 88).

Clause 4.6(4) specifies that development consent must not be granted for development that contravenes a development standard unless:

> *(a) the consent authority is satisfied that:*
> *(iii) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
> *(iv) 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.*

Clause 4.6(5) specifies that in deciding whether to grant concurrence, the 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 Secretary before granting concurrence.*

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:

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- *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;*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118; and*
- *Hansimikali v Bayside Council [2019] NSWLEC 1353.*

"Varying development standards: A Guide" (August 2011) outlines the matters that need to be considered in DA's involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ, in *Wehbe v Pittwater Council [2007] NSWLEC 827* to the extent that there are effectively five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary as follows:

1. The objectives and purposes of the standard are achieved notwithstanding non-compliance with the development standard.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
4. The development standard has been 'virtually abandoned or destroyed' by the Councils own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

As Preston CJ, stated in *Wehbe*, the starting point with a SEPP No. 1 objection (now a Clause 4.6 variation) is to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances. The most commonly invoked 'way' to do this is to show that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard.

The Applicant relies upon ground 1 in *Wehbe* to support its submission that compliance with the development standard is both unreasonable and unnecessary in the circumstances of this case.

In that regard, Preston CJ, in *Wehbe* states that *"… development standards are not ends in themselves but means of achieving ends"*. Preston CJ, goes on to say that as the objectives of a development standard are likely to have no numerical or qualitative indicia, it logically follows that the test is a qualitative one, rather than a quantitative one. As such, there is no numerical limit which a variation may seek to achieve.

The above notion relating to 'numerical limits' is also reflected in Paragraph 3 of Circular B1 from the former Department of Planning which states that:

> *As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some*

> *circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small in others it may be numerically large, but nevertheless be consistent with the purpose of the standard.*

It is important to emphasise that in properly reading *Wehbe*, an objection submitted does not necessarily need to satisfy all of the tests numbered 1 to 5, and referred to above. This is a common misconception. If the objection satisfies one of the tests, then it may be upheld by a Council, or the Court standing in its shoes. Irrespective, an objection can also satisfy a number of the referable tests.

In *Wehbe*, Preston CJ, states that there are three (3) matters that must be addressed before a consent authority (Council or the Court) can uphold an objection to a development standard as follows:

1. The consent authority needs to be satisfied the objection is well founded;
2. The consent authority needs to be satisfied that granting consent to the DA is consistent with the aims of the Policy; and
3. The consent authority needs to be satisfied as to further matters, including non-compliance in respect of significance for State and regional planning and the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

Further, it is noted that the consent authority has the power to grant consent to a variation to a development standard, irrespective of the numerical extent of variation (subject to some limitations not relevant to the present matter).

The decision of Pain J, in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* suggests that demonstrating that a development satisfies the objectives of the development standard is not necessarily sufficient, of itself, to justify a variation, and that it may be necessary to identify reasons particular to the circumstances of the proposed development on the subject site.

Further, Commissioner Tuor, in *Moskovich v Waverley Council [2016] NSWLEC 1015*, considered a DA which involved a relatively substantial

variation to the FSR (65%) control. Some of the factors which convinced the Commissioner to uphold the Clause 4.6 variation request were the lack of environmental impact of the proposal, the characteristics of the site such as its steeply sloping topography and size, and its context which included existing adjacent buildings of greater height and bulk than the proposal.

The decision suggests that the requirement that the consent authority be satisfied the proposed development will be in the public interest because it is *"consistent with"* the objectives of the development standard and the zone, is not a requirement to *"achieve"* those objectives. It is a requirement that the development be 'compatible' with them or 'capable of existing together in harmony'. It means *"something less onerous than 'achievement'"*.

In *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118,* Preston CJ found that it is not necessary to demonstrate that the proposed development will achieve a *"better environmental planning outcome for the site"* relative to a development that complies with the development standard.

Finally, in *Hansimikali v Bayside Council [2019] NSWLEC 1353*, Commissioner O'Neill found that it is not necessary for the environmental planning grounds relied upon by the Applicant to be unique to the site.

ASSESSMENT

Is the requirement a development standard?

The non-residential FSR control is a development standard and is not excluded from the operation of Clause 4.6 of the LEP.

What is the underlying object or purpose of the standard?

The objective of the FSR control (which also applies to the residential component) is expressed as follows:

> *(a) to permit development of a bulk and scale that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*

Further, it is reasonable to conclude that the residential FSR control is intended to ensure that development make an appropriate contribution to employment generation and business activity within certain specific locality.

In relation to the expressed objective of the FSR control, the proposed development complies with the total FSR control, circumstances in which the bulk and scale of the building is an appropriate response to the site constraints, development potential and infrastructure capacity of the locality.

In relation to the assumed objective of the residential FSR control, the proposed *"residential care facility"* will generate employment for approximately 35 staff, with additional *"flow on effects"* arising due to the sites proximity to major retail and transport infrastructure, including *Westfield Hornsby Shopping Centre* and *Hornsby Railway Station*.

Finally, the *"residential care facility"* (whilst technically a form of *"residential accommodation"*) will provide more employment than any other form of *"residential accommodation"*, and substantially more employment than the approved residential apartments on the site.

In the circumstances, the proposed development is consistent with both the expressed and assumed objectives of the residential FSR control, notwithstanding the numerical variation.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The Department of Planning published *"Varying development standards: A Guide"* (August 2011), to outline the matters that need to be considered in Development Applications involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ in *Wehbe v Pittwater Council [2007] NSWLEC 827* to the extent that there are five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary.

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

As noted above, the proposed development is consistent with both the expressed and assumed objectives of the residential FSR control, notwithstanding the numerical variation.

In that regard, the Applicant relies upon ground 1 in *Wehbe* (ie. that the objectives and purposes of the standard are achieved notwithstanding non-compliance with the development standard) to support its submission that compliance with the development standard is both unreasonable and unnecessary in the circumstances of this case.

2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

The objectives and purpose of the residential FSR control remain relevant, and the proposed development is consistent with both the expressed and assumed objectives of the residential FSR control, notwithstanding the numerical variation.

3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

The proposed development is consistent with both the expressed and assumed objectives of the residential FSR control, notwithstanding the numerical variation.

Further, strict compliance with the non-residential FSR control would require a not insignificant proportion of the *"residential care facility"* to be converted to an alternate use, and thereby the signifcant public, health and economic benefits arising from the inclusion of that important use would be unnecessarily lost.

4. *The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*

The non-residential FSR control has not been abandoned or destroyed by the Council's actions. However, the Council has consistently adopted an orderly but flexible approach to the implementation of development standards in appropriate circumstances, including when the objectives of the standard are achieved, notwithstanding numerical variations.

Further, the objectives of Clause 4.6 of the LEP includes to provide *"an appropriate degree of flexibility in applying certain development standards to particular development"*.

5. *Compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

The zoning of the land remains relevant and appropriate.

Are there sufficient environmental planning grounds to justify contravening the development standard?

The proposed numerical variation to the residential FSR control is reasonable and appropriate in the particular circumstances on the basis that:

- the LEP specifies a maximum FSR of 5:1, and the proposed development provides an FSR of 5:1;
- the compliance with the total FSR control of 5:1 ensures the proposed development the bulk and scale of the building is an appropriate response to the site constraints, development potential and infrastructure capacity of the locality;
- the proposed development complies with Clause 19 of the SEPP which species that development for the purposes of seniors housing should not include the use of any part of the ground floor level of a building that fronts a street for residential purposes if the building is located on land zoned primarily for commercial purposes;
- Clause 19 of the SEPP does not require any additional non-residential floor space to be located above the ground floor level, even on sites zoned primarily for commercial purposes;
- the proposed *"residential care facility"* will generate employment for approximately 35 staff, with additional *"flow on effects"* arising due to the sites proximity to major retail and transport infrastructure, including *Westfield Hornsby Shopping Centre* and *Hornsby Railway Station*;
- the *"residential care facility"* (whilst technically a form of *"residential accommodation"*) will provide more employment than any other form of *"residential accommodation"*, and substantially

more employment than the approved residential apartments on the site;

- strict compliance with the residential FSR control would require a not insignificant proportion of the *"residential care facility"* to be converted to an alternate use, and thereby the signifcant public, health and economic benefits arising from the inclusion of that important use would be unnecessarily lost;
- the variation to the residential FSR does not alter the proposed building forms, circumstances in which there are no consequences arising in terms of the physical relationship and/or amenity of surrounding properties;
- the proposed development is consistent with the objectives of the B4 – Mixed Use zone; and
- the proposed development is consistent with both the expressed and assumed objectives of the residential FSR control, notwithstanding the numerical variation.

The quality and form of the immediate built environment creates unique opportunities and constraints to achieving a good design outcome: *Initial Action v Woollahra Council 209 NSWLEC 1097* (O'Neill C) at 42. The proposal is a justified response to the scale and immediate built environment of the site.

In particular, the proposed development is consistent with object (c) of Section 1.3 of the Act: to promote the orderly and economic use and development of land; and object (g) to promote good design and amenity of the built environment. There are obvious economic and design/amenity considerations which should be taken into account in order to achieve those objects.

Are there any matters of State or regional significance?

The proposed numerical variation to the residential FSR control does not raise any matters of State or regional significance.

What is the public benefit of maintaining the standard?

The proposed development is consistent with both the expressed and assumed objectives of the residential FSR control, notwithstanding the numerical variation.

In the circumstances, the proposed development does not affect the public benefit of maintaining compliance with the residential FSR control in other instances.

In that regard, the objectives of Clause 4.6 of the LEP includes to provide *"an appropriate degree of flexibility in applying certain development standards to particular development"*.

Any other matters?

There are no further matters of relevance to the proposed variation to the residential FSR control.

Zone Objectives and Public Interest

The site is zoned B4 – Mixed Use pursuant to the Hornsby LEP 2013, and the objectives of the zone are expressed as follows:

- *To provide a mix of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

The proposed development is consistent with (and not antipathetic to) the relevant objectives of the zone on the basis of the mix of compatible retail, commercial and residential care land uses.

Further, the workers, visitors and residents of the building will have access to the extremely good public transport facilities located within a comfortable walking distance of the site.

Finally, the proposed development serves the public interest by providing a benchmark for high quality architecture within the Hornsby Town Centre, offering a good level of internal amenity without imposing any unreasonable impacts on the amenity of surrounding land.

CONCLUSION

The purpose of this submission is to formally request a variation in relation to the residential FSR control in Clause 4.4 of the Hornsby LEP 2013.

In general terms, strict compliance with the residential FSR control is unreasonable and unnecessary in the particular circumstances, and there are sufficient environmental planning grounds to justify the numerical variation.