

Clause 4.6 Variation Request

Cumberland Golf Club Seniors Housing Development: 246 –
248 Old Prospect Road, Greystanes

Submitted to the Department of Planning, Housing and
Infrastructure
on behalf of Pariter Cumberland Pty Ltd

SSD-64795219



'Gura Bulga'

Liz Belanjee Cameron

'Gura Bulga' – translates to Warm Green Country. Representing New South Wales.



'Dagura Buumarri'

Liz Belanjee Cameron

'Dagura Buumarri' – translates to Cold Brown Country. Representing Victoria.



'Gadalung Djarri'

Liz Belanjee Cameron

'Gadalung Djarri' – translates to Hot Red Country. Representing Queensland.

Ethos Urban acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture.

We pay our respects to their Elders past, present and emerging.

In supporting the Uluru Statement from the Heart, we walk with Aboriginal and Torres Strait Islander people in a movement of the Australian people for a better future.

Contact:		Sophie Kuszniarczyk	skuszniarczyk@ethosurban.com 0422 852 008
This document has been prepared by:		This document has been reviewed by:	
Sabrina Bichara	10 February 2025	Sophie Kuszniarczyk and Karen Armstrong	27 February 2025
Version No.	Date of issue	Prepared by	Approved by
1.0 (DRAFT)	10/02/2025	SB/SK	KA
2.0 (DRAFT)	20/02/2025	SB/SK	KA
3.0 (FINAL)	27/02/2025	SK	KA

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Appendix	Author
A. Legal Advice in Relation to Permissibility of Proposed Development	Mills Oakley
B. Legal Advice in Relation to Redevelopment of Cumberland Country Golf Club	The Hon Malcolm Craig KC

1.0 Introduction

1.1 Overview

This Clause 4.6 Variation Request has been prepared by Ethos Urban on behalf of Pariter Cumberland Pty Ltd (the Applicant) in support of a State Significant Development Application (SSDA) for seniors housing at 246 – 248 Old Prospect Road, Greystanes (SSD- 64795219).

The purpose of this request is to enable a paper subdivision prior to the commencement of the development proposed under the SSDA. This sequence is required by the Proponent to enable the delivery of this important seniors housing project.

The Variation Request is submitted in response to a request for information from the Department of Planning Housing and Infrastructure (DPHI). As part of the assessment process, DPHI has sought a response on the proposed upfront staging of subdivision within the staging of the SSDA in the context of Section 90 (1) of the State Environmental Planning Policy (Housing SEPP) 2021. Section 90(1) states that subdivision must not take place until such time as the Seniors Housing component of the development “has been ‘carried out”.

In response, the EIS was updated to include legal advice by Mills Oakley and the Hon. Malcolm Craig KC which considers the intended operation of Section 90(1). The legal advice notably identifies that Section 90(1) is expressed in permissive terms. It is not intended as a restriction that prohibits subdivision until the Seniors Living Development has been carried out.

Notwithstanding that the legal advice concludes that the subdivision may lawfully be undertaken as the first step in implementing the proposed development, this Clause 4.6 Variation Request has been prepared as an abundance of caution to address the status of Section 90(1) as a Development Standard under Part 5, Division 3 of the Housing SEPP and to demonstrate under Clause 4.6 of the Cumberland Local Environmental Plan (LEP) 2021 that:

- a) Compliance with the development standard is unreasonable or unnecessary in the circumstances.
- b) There are sufficient environmental planning grounds to justify the contravention of the development standard.

This Variation Request has regard to the DPHI *Guide to Varying Development Standards*, dated November 2023, Planning Circular – PS 18-003 in relation to variations to development standards (which makes specific reference to non-numerical standards) and the DPHI *Guide to exclusions from clause 4.6 of the Standard Instrument* dated November 2023. The *Guide to exclusions from Clause 4.6* helpfully outlines that:

Development standards are defined in the EP&A Act and are provisions of an EPI or the Environmental Planning and Assessment Regulation 2021 that specify requirements or fix standards in respect of any aspect of carrying out development

A prohibition precludes the granting of development consent unless certain criteria have been met and cannot be varied.

The legal advice provided in the Appendix to the EIS confirms that the Section 90(1) development standard is permissive. The provision is not a prohibition and therefore the clause 4.6 objection mechanism applies.

1.2 Background

The proposed redevelopment of part of the Cumberland Country Golf Club site is a significant project that involves the construction of a new golf clubhouse with enhanced facilities and function rooms, the reconfiguration of the 18-hole championship golf course and the development of a Seniors Living village.

The Cumberland Country Golf Club is a successful member-orientated club with a 72-par championship golf course on approximately 38 hectares. The existing club facilities are aging and in need of significant investment. The proposed development seeks to renew and revitalise the Cumberland Golf Club site. The proposed development area is located at the northern end of the golf course with an approximately 440m frontage to Old Prospect Road. The area is currently occupied by the first hole and fairway, the clubhouse, parking, and the practice range.

On 5 April 2024, SSD- 64795219 was lodged to DPHI which seeks consent for subdivision, golf course enabling works, the construction of a new clubhouse and a Seniors Living village (including 234 independent living units

and a residential aged-care facility (38 beds), with ancillary facilities including café, wellness centre, and health and consulting rooms.

The objectives of the proposed development are to:

- Provide a seamlessly integrated seniors housing development comprising Independent Living Units (ILUs) and Residential Care Facilities (RCF) where residents can age in place with a continuum of care.
- Provide a great golf and social experience for members and residents.
- Allow the golf course and clubhouse to remain operational.
- Promote an active lifestyle for seniors.
- Create a high-quality place through world-class urban design and architectural quality.
- Provide building design innovation that meets modern-day standards of seniors' living.
- Create inclusive, high-amenity places to optimise community interaction.

A Response to Submissions Report (RTS) and supporting documents were prepared in November 2024 to respond to Government agency and community submissions. As part of this process, DPHI requested further advice on the proposed sequencing of the subdivision in relation to the wording of Section 90(1) of the Housing SEPP.

2.0 Site and Proposed Development

2.1 Site Description

The Cumberland Country Golf Club (the site) comprises the following lots:

- Lot 1 DP 201991
- Lots 13-26 DP 17546
- Lot 2 DP 545201
- Lot 20 DP 243734
- Lots 28-38 DP 17461
- Lot 46 DP 242898.

The Cumberland Golf Club is located on the south side of Old Prospect Road in Greystanes, 246-248 Old Prospect Road, approximately 225 metres west of Cumberland Road. It has frontage and road access to Old Prospect Road of approximately 440 metres, frontage to Brighton Street to the west of approximately 766 metres and frontage to Whalans Road to the south of approximately 373 metres.

The Golf club site is approximately 38 ha and is identified in **Figure 1** below. The site is zoned RE2 Private Recreation under the Cumberland LEP.

The site is an irregular shape and is currently characterised by maintained lawns and mature trees as part of the golf course use including two greens, one including its fairway and a practice putting green area. The trees are predominantly located at the site's northern boundary to Old Prospect Road. In the site's northeastern corner is developed with the existing Cumberland Country Golf Club, associated car parking areas and ancillary outbuildings. The Golf Course and two bodies of water are located south of the site boundary, as well as two further bodies of water along the western Golf Course boundary. These artificial water bodies were constructed to support the water management of the golf course site. A site aerial is provided in **Figure 1** below.



Figure 1 Site Aerial

Source: Nearmap/ Ethos Urban

2.2 Description of the Proposed Development

The DA seeks approval for the construction and use of the redevelopment of the Cumberland Golf Course at 246-248 Old Prospect Road, Greystanes for the purpose of seniors housing.

Specifically, the SSDA seeks approval for:

- Subdivision, proposing four lots, which involves consolidating the golf course into 1 lot, seniors housing (2 lots) and golf club facilities (one lot).
- Site preparation and excavation works, including demolition of the clubhouse and remediation works.
- Construction of a new golf clubhouse and ancillary facilities and parking areas as well as reconfiguration of the existing golf course to maintain an 18-hole course.
- Construction of a seniors housing development comprising six independent living unit buildings accommodating 234 units and a residential care facility accommodating 38 beds and ancillary café, health, wellness and consulting rooms.
- Construction of a temporary display suite and signage.
- Construction of new private internal roads and parking.
- Landscaping and associated public domain works.
- Extension and augmentation of physical infrastructure and utilities, as required.

Photomontages of the proposal are provided in **Figures 2** and **3**.



Figure 2 *Artist's impression of the proposal*

Source: Marchese



Figure 3 *Artist's impression of the proposal*

Source: Marchese

2.3 Proposed subdivision component

At present, the site comprises 29 separate allotments as shown within the cadastral plan at **Figure 5**. As part of the SSDA, the site is proposed for consolidation and re-subdivision subdivision into 4 lots as shown in **Figure 4** below. More specifically, the golf course will be consolidated into one lot, with two lots created for the seniors housing development and one lot for the golf club building and facilities. The land will continue to be owned by the Cumberland Country Golf Club and the relevant Lots 1 and 3 will be leased to Pariter for seniors housing operations.

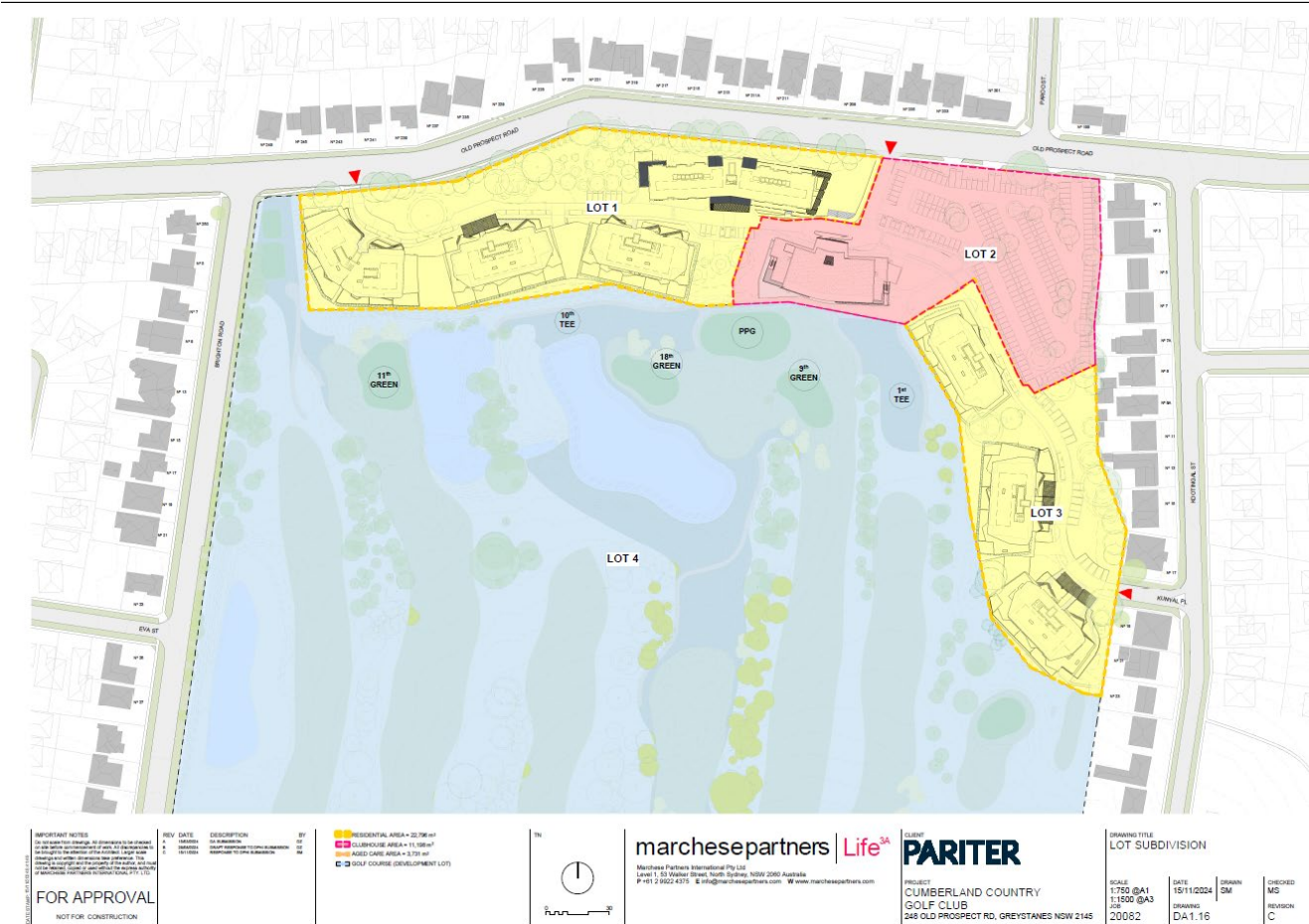


Figure 4 Proposed subdivision

Source: Marchese Partners

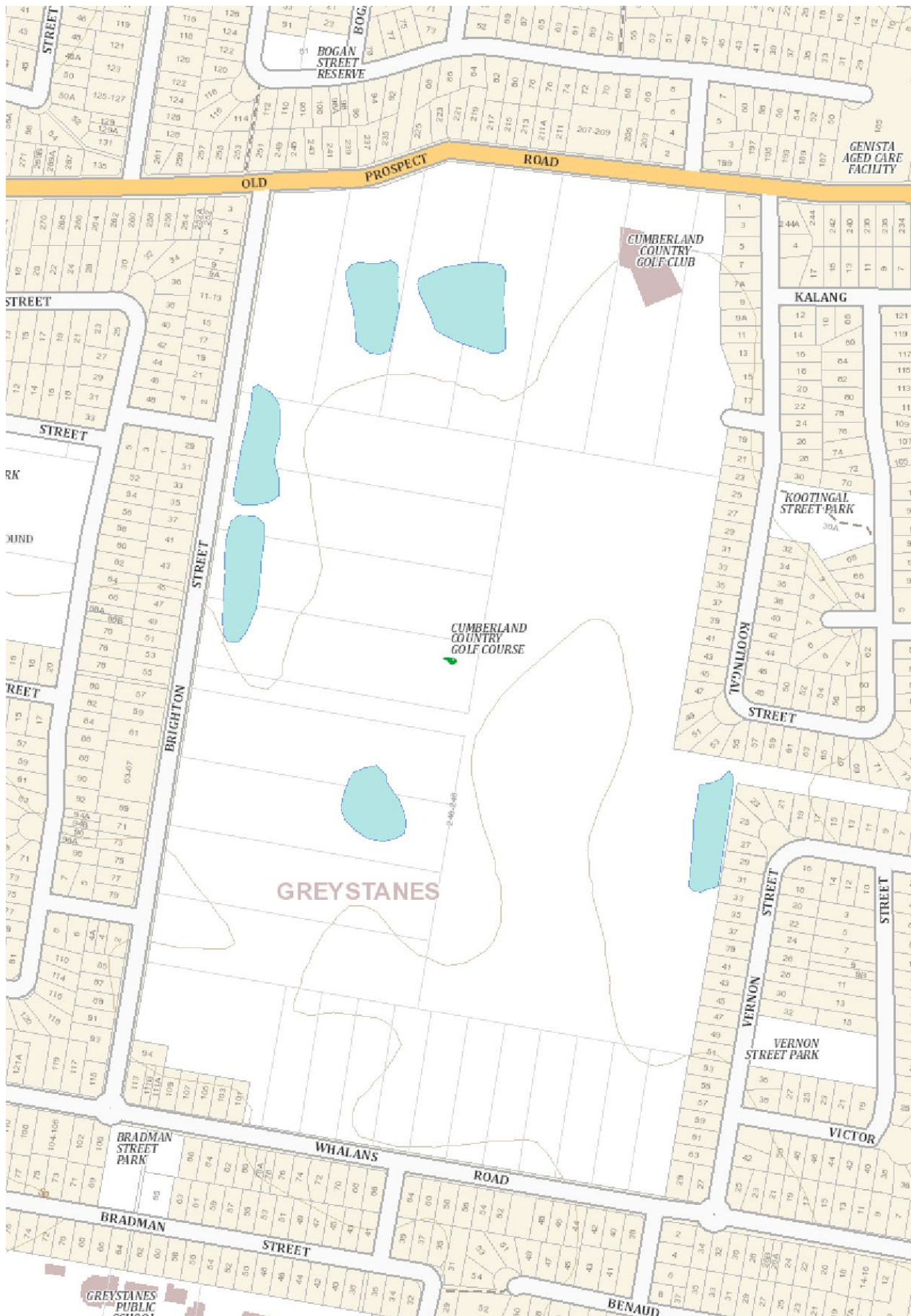


Figure 5 Cadastral Plan

Source: NSW Planning Portal Spatial Viewer

3.0 Development Standard to be Varied

3.1 Section 90 - Variation to permit subdivision before the carrying out of development

This Clause 4.6 Variation Request provides justification for the subdivision to be undertaken prior to the carrying out of the proposed seniors housing development on the site. Under the Housing SEPP, Section 90 (1) falls within *Part 5 – Seniors Housing and People with a Disability* and within *Division 3 – Development Standards*.

Section 90 (1) states the below.

90 Subdivision

- (1) *Development consent may be granted for the subdivision of land on which development has been carried out under this Part.*

The *Environmental Planning and Assessment Act 1979* (EP&A Act) defines 'development standards' as follows:

Development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of—

- (a) *the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) *the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) *the cubic content or floor space of a building,*
- (e) *the intensity or density of the use of any land, building or work,*
- (f) *the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) *the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) *the volume, nature and type of traffic generated by the development,*
- (i) *road patterns,*
- (j) *drainage,*
- (k) *the carrying out of earthworks,*
- (l) *the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) *the provision of services, facilities and amenities demanded by development,*
- (n) *the emission of pollution and means for its prevention or control or mitigation, and*
- (o) *such other matters as may be prescribed.*

The above definition specifies that its application relates to "any aspect of that development". These are notably broad terms and should be taken to include the 'subdivision of land' which is identified as 'development' at Clause 1.5 of the EP&A Act.

3.2 Nature of the Variation

This Variation Request applies to a non-numerical development standard. As detailed in *the Guide to Varying Development Standards*, non-numerical standards 'generally contain criteria or matters that need to be satisfied relating to the design and carrying out of development in certain circumstances'. Section 90 (1) contains criteria for the timing or sequencing of subdivision, to be undertaken, with the specific wording providing that this may occur when the development "has been carried out". This Variation Request seeks to vary this requirement so that the subdivision may be carried prior to the commencement of the development.

4.0 Justification for Contravention of the Development Standard

Clause 4.6 of Cumberland Local Environmental Plan 2021 (LEP) states:

4.6 Exceptions to development standards

(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

(a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

Assistance on the approach to justifying a contravention to a development standard is also to be taken for the applicable decision of the NSW Land and Environment Court (LEC) in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827 (*Wehbe*);
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (*Four2Five*);
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*).

4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances

In *Wehbe*, Preston CJ outlined five ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class. While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under Clause 4.6 where subclause 4.6(3)(a) uses similar language to clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the LEP is essentially the same as the language used in Clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this Clause 4.6 Variation Request.

The five methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
- 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 (**Fourth Method**).
- 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 (**Fifth Method**).

This Clause 4.6 Variation Request demonstrates that the overall objectives of the Housing SEPP are achieved notwithstanding the non-compliance with the standard, therefore the **First Method** is applicable.

4.1.1 The objectives of the standard are achieved notwithstanding non-compliance with the standard

There are no specific objectives in Clause 90(1) in relation to subdivision but the underlying objectives for this development standard can be understood in the context of the principles of the Housing SEPP as relevant to Seniors Housing.

The relevant principles of the Housing SEPP are, in summary, to enable the development of diverse housing types including seniors housing, to provide housing that meets the needs of the more vulnerable members of the community including an ageing population, and to provide housing with reasonable amenity in locations that are well serviced by existing facilities and services.

The proposed development supports the SEPP principles by providing for a diverse mix of seniors housing, including independent living units comprising a mix of one, two and three-bedroom apartments, as well as residential care facility beds. This seniors housing is provided in an accessible location, in association with ancillary health and wellness facilities, and on a site that provides for improved recreation and social facilities for the new residents and broader community.

As the Mills Oakley legal advice notes, the underlying objective of Section 90(1) subdivision provision is also relevant, in that it is expressed in permissive terms, to allow the subdivision for housing in circumstances where it would otherwise not be permitted. This legal advice further notes that:

“Adopting the formula of words used in Part 5 of the Housing SEPP to express a constraint or limitation, one would expect the provision to state, ‘Development consent must not be granted for subdivision under this Part unless.....’ (see, for example, sections 88(2), 89(2), 92(1), 93 (1), and 94(1)). The fact that Section 90(1) is expressed in permissive terms speaks against its interpretation as being restrictive....”

Therefore, noting that Section 90(1) states that “Development consent may be granted....” the underlying objective of this development standard is to allow for suitably sequenced subdivision having regard to the specific circumstances of the development application.

The proposed development will create a new precinct with multiple uses and buildings, that warrants a sequenced approach, via subdivided lots that reflect and inform the sequencing, or staging, of the works. Thus, the sequencing of subdivision prior to the development being carried out is a reasonable variation to Section 90(1), as it will provide a clear framework and basis for the sequencing necessary for complex development works. Conversely, requiring the subdivision after the development has been carried out fails to enable this upfront clarity and is considered unreasonable and unnecessary in the circumstances.

The applicant requires the subdivision to occur upfront in order the commence and to realise this sequenced delivery of the seniors' housing in association with golf course reconfiguration and club redevelopment. This establishes the basis for leases affecting the land, between the Club and its development partner, Pariter. The leases are required to commence the development works on the land, which is retained in the overall club ownership.

This development thus achieves the overarching principles or objectives of the Housing SEPP notwithstanding the non-compliance with the subdivision occurring prior to rather than after the development has been carried out.

The proposal's achievement of the specific principles of Housing SEPP are discussed in further detail below:

(a) enabling the development of diverse housing types....

The proposed variation of the timing of subdivision to occur upfront with the SSDA aligns with this principle, because it enables the applicant to confirm the lot configuration and financing arrangements to enable the commencement of the seniors housing development.

(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.

The proposed variation of the timing of subdivision to occur upfront with the SSDA will unlock the potential of the site to deliver diverse housing for seniors and people with a disability to remain in their local community.

(c) ensuring new housing development provides residents with a reasonable level of amenity.

The proposed development as part of the SSDA provides a high level of amenity to residents as described in the EIS, and accompanying architectural drawings. The timing of subdivision does not impact the level of amenity afforded to future residents.

(d) promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services.

The SSDA will introduce seniors housing to the existing golf course which is the intent of Part 5 of the Housing SEPP. The delivery of seniors housing to an existing golf course will have a range of benefits, providing:

- Seniors housing in a vibrant environment.
- An active lifestyle for seniors and people with a disability.
- Access to a range of recreational facilities.
- An inbuilt community for seniors to retire within.
- A social hub for seniors and promotes mental health support as seniors age and enjoy their retirement.

The timing of the subdivision being concurrent with the SSDA does not impact the delivery of seniors housing in a suitable location, being an existing golf course.

(e) minimising adverse climate and environmental impacts of new housing development.

The SSDA included a detailed assessment of biodiversity impacts supported by the Biodiversity Development Assessment Report (BDAR) as well as an Environmentally Sustainable Development (ESD) Report which outlines the relevant ecologically sustainable design strategies and commitments made for the development. The proposed subdivision timing does not impact on the sustainability measures of the development.

(f) reinforcing the importance of designing housing in a way that reflects and enhances its locality

The SSDA has been designed to a high architectural standard and enhances both the locality and the golf course environs. The timing of subdivision does not impact the high architectural design of the SSDA.

4.1.2 Strict compliance with the development standard is unreasonable and unnecessary in the circumstances

The development standard in strict interpretation, mandates that subdivision of the land on which Seniors Living is proposed may only be completed “after” the development is carried out.

- The timing requirement set out in cl 90(1) is considered unreasonable in the circumstances on the basis that the site on which Seniors Living development is proposed is already comprised of 29 individual lots and the subdivision will in fact rationalise the lots rather than create additional allotments as a result of the subdivision. In those circumstances, the requirement to consolidate a disorderly mix of cadastral alignment until after a development has been carried out, across existing lot boundaries, is considered unreasonable and unnecessary.
- It is unreasonable to require strict compliance with the timing requirements set out in cl 90(1) as the subdivision of the allotments will create a more rational development outcome that seeks to resolve a disorderly historical titling anomaly to facilitate the delivery of the Seniors Living development.
- It is unnecessary to require strict compliance with the development standard as the proposed subdivision seeks to clarify and rationalise the number of total allotments on which the development will be carried out through consolidation.
- It is unreasonable to require compliance with the standard in circumstances where the redevelopment of the land relies on a clear subdivision pattern to support funding arrangements for separate buildings and purposes which in this case, straddle multiple lot boundaries.

4.1.3 Conclusion on Clause 4.6(3)(a)

This required timing of subdivision under Section 90(1) after the development has been carried out is considered to be unreasonable and unnecessary in the circumstances given that:

- The proposal is consistent with the relevant principles of the Housing SEPP which set the overarching framework for the development standards. As there are no specific objectives in Clause 90(1) in relation to subdivision, the underlying objectives for this development standard can be understood in the context of the principles of the Housing SEPP as relevant to Seniors Housing.
- To this effect, the proposal supports the relevant Housing SEPP principles which, are, in summary, to enable the development of diverse housing types including seniors housing, to provide housing that meets the needs of the more vulnerable members of the community including an ageing population, and to provide housing with reasonable amenity in locations that are well serviced by existing facilities and services.
- The proposal thus satisfies the underlying objective of Section 90(1) which is to allow for suitably sequenced subdivision having regard to the specific circumstances of the development application.

- The proposed development will create a new precinct with multiple uses and buildings, that warrant a sequenced approach, via subdivided lots that reflect and inform the proposed sequencing, or staging, of the works. Thus, the sequencing of subdivision prior to the development being carried out is reasonable as it will provide a clear framework and basis for the sequencing necessary for complex development works. Conversely, requiring the subdivision after the development has been carried out fails to enable this upfront clarity and is considered unreasonable and unnecessary in the circumstances.
- The applicant requires the subdivision to occur upfront in order to commence and to realise this sequenced delivery of the seniors housing in association with golf course reconfiguration and club redevelopment. This establishes the basis for leases within the land, between the Club and its development partner, Pariter, required to commence the development works on the land, which is retained in the overall club ownership.
- The proposed subdivision will consolidate the lots rather than create additional allotments as a result of the subdivision. In these circumstances, the requirement to consolidate a disorderly cadastral alignment until after a development has been carried out, across existing lot boundaries is considered to be unreasonable and unnecessary.
- The subdivision of the allotments will create a more rational development outcome which will facilitate the delivery of the Seniors Living development, which relies on a clear subdivision pattern to support funding arrangements for separate buildings and purposes.

4.2 Clause 4.6(3)(b) Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the LEP requires the consent authority to be satisfied the applicant has demonstrated that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60]. There are sufficient environmental planning grounds to justify the contravention of the timing of subdivision in this specific instance, as described in the relevant headings below.

4.2.1 Subdivision upfront has no adverse environmental planning impacts

The sequencing of the subdivision upfront rather than upon completion of the development has no environmental or physical impacts on the development as a whole. As noted earlier in this Clause 4.6 Variation Request, the subdivision of the site is for a paper subdivision, effectively an administrative process allowing for the clear separation of operational responsibility between the Golf Club as owner and seniors housing provider as lessee and does not involve any physical works or environmental implications for the development.

4.2.2 Subdivision upfront clarifies and simplifies the lot configuration

Further, undertaking the proposed subdivision prior to the carrying out of development is reasonable on planning grounds because it will provide a clear upfront delineation of the lots within the land, ensuring clarity of the responsibilities of the applicant, Pariter, and owner, Cumberland Golf Club, for the continuing operation of the club facilities at the same time as the proposed development proceeds on the site. In this way, the proposed sequencing promotes the orderly and economic use and development of the land, in accordance with the objects of the EP&A Act 1979.

The proposed upfront subdivision of the site will reduce the number and complexity of lots. The legal title of the site currently comprises 29 lots in various deposited plans. The proposed subdivision comprises three lots for the development area (i.e. two seniors housing lots and one clubhouse lot) and with one lot for the golf course itself. This will provide for the clear delineation of the cadastral base for both the current and future uses on the site including seniors housing, the golf course and the golf club.

The proposed upfront subdivision of the site will align with the development proposal and reduce the complexity of the current cadastral boundaries. The legal title of the site currently comprises 29 lots in various deposited plans. The proposed subdivision comprises three lots for the development area (i.e. two seniors housing lots and one clubhouse lot) and with one lot for the golf course itself. This will provide for the clear delineation of the

cadastral base for both the current and future uses on the site including seniors housing, the golf course and the golf club.

4.2.3 Subdivision upfront facilitates the orderly development of the land

At present, the Site contains 29 individual allotments. The cadastral patterns bear no relationship to the proposed built form and design of the Seniors Living development proposed. In this regard, if strict compliance with the development standard were required it would create a situation where works, access ways, driveways and buildings would straddle across existing cadastral boundaries. This form of development is undesirable and would create a worse planning outcome. Permitting the subdivision to occur initially, by way of rationalisation into 4 lots, would facilitate the orderly development of the land and reflect the sequencing of development works, and avoiding potential works issues (such as in relation to BCA and right of way) which could arise should the development be carried out across existing cadastral boundaries.

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (*Initial Action*), His Honour Preston CJ confirmed at [23] that with respect to “environmental planning” grounds, although not defined, the grounds should relate to the subject matter, scope and purpose of the EP&A Act, including the objects in s.1.3 of the Act. The promotion of the *orderly and economic development of land* is an express object of the *Environmental Planning and Assessment Act 1979* at s.1.3(c) and accordingly, the proposed variation which seeks to permit the initial subdivision of land to facilitate that outcome is an environmental planning ground sufficient to justify the contravention. Subdivision upfront better provides for the orderly and economic sequencing of development

The proposed subdivision layout has been structured to clearly align with the proposed sequencing of the development application as is suitable and necessary for a development of this scale (3.8-hectare area) and complexity, with multiple uses and new buildings to proceed to construction while the golf club and course remain operational throughout.

The SSDA provides for the sequenced construction and ongoing operational/management requirements of the proposed development, which are designed in line with the proposed subdivision plan. Completion of the subdivision upfront is reasonable and preferable, as it aligns with the commencement phase (financing and compliance with consent conditions), and then enables the orderly construction phases to proceed and lead seamlessly onto the operational phases of the development.

This upfront completion of the subdivision will underpin and support the orderly and economic use and development of the land consistent with the objects of the EP&A Act 1979 and with the intent and principles of the Housing SEPP.

4.2.4 Subdivision upfront supports housing delivery

The subdivision is a pre-requisite for the development works to commence in accordance with development arrangements between the Club and Pariter. It is common practice for developments to proceed only upon subdivision which provides for clear, accurate and specific lots upon which to finance and implement a development consent.

The subdivision of the site addresses potential land use conflicts and facilitates simplification of the management of the different land uses proposed at the site as clear delineation will be achieved. This will result in the Seniors Living component and the new Club being completed on separate allotments on the land. This is common practice and does not offend any requirements of the Seniors Housing under Part 5 of the Housing SEPP and, in fact, supports the SEPP Section 92 considerations for suitable separation of the club and seniors housing functions, as detailed by the Mills Oakley legal advice in **Attachment A**.

4.2.5 Subdivision after development has been completed will create unnecessary delay and uncertainty

If the current Section 90(1) is to be applied in its strictest interpretation, with the subdivision occurring only after the development has been carried out, this would create unnecessary complexity, uncertainty and delay for implementing any development consent and associated conditions. The timing of when the development “has been carried out” for the purpose of the Housing SEPP could likely be the subject of confusion and uncertainty, in whether it comprises the seniors housing component only or could apply to the entire development, including all golf club and course works. Even if the project was able to proceed without the upfront subdivision, this delay and uncertainty of the final timing of the subdivision is unreasonable and unnecessary in light of there being no identifiable planning grounds for delaying the subdivision and would create an unnecessary barrier to delivering the housing that is sought to be delivered, consistent with the purpose of the Housing SEPP

4.2.6 Conclusion on Clause 4.6 (3)(b)

In conclusion, there are sufficient environmental planning grounds to justify contravening the development standard as summarised below:

- The timing of the subdivision upfront rather than upon completion of the development has no environmental or physical impacts on the development as a whole. The subdivision of the site is for a paper subdivision, effectively an administrative process allowing for the clear separation of operational responsibility between the Golf Club as owner and seniors housing provider as lessee, and does not involve any physical works or environmental implications for the development.
- Subdivision upfront provides a clear delineation of the lots within the land, ensuring clarity of the responsibilities of the applicant, Pariter, and owner, Cumberland Golf Club, for the continuing operation of the club facilities at the same time as the proposed development proceeds on the site.
- The variation facilitates the orderly development of land by simplifying and rationalising the number of lots to better reflect the development proposal. The subdivision of the existing 29 lots into 4 lots will result in the clear delineation of the uses on the site including seniors housing, the Golf Course and the Club. This has no impact on the zoning or the capacity to carry out development on the site under the EP&A Act. The variation is driven by the need and benefits of facilitating orderly, sequenced development at the site. Aligning the proposed sequencing of the development application is suitable and necessary for a development of this scale (3.8 hectare area) and complexity, with multiple uses and new buildings to proceed to construction while the golf club and course remain operational throughout.
- The subdivision supports housing delivery as it is a pre-requisite for the development works to commence in accordance with development arrangements between the Club and Pariter. It is common practice for developments to proceed only upon subdivision which provides for clear, accurate and specific lots upon which to finance and implement a development consent.
- Conversely, the subdivision occurring only after the development has been carried out, would create unnecessary complexity, uncertainty and delay for implementing any development consent and associated conditions. The timing of when the development “has been carried out” for the purpose of the Housing SEPP could likely be the subject of confusion and uncertainty, in whether it comprises the seniors housing component only or could apply to the entire development, including all golf club and course works.
- The proposed development, inclusive of the variation, will promote the orderly and efficient use of land, good design and the social welfare of the community in accordance with the objects of the EP&A Act.

5.0 Conclusion

The assessment above demonstrates that compliance with Section 90(1) development standard contained in the Housing SEPP is unreasonable and unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify the contravention. The variation allows for the orderly and economic use of the land, whilst also allowing for a better outcome in planning terms.

This Clause 4.6 Variation demonstrates that notwithstanding the non-compliance with Section 90(1) Subdivision:

- The proposed subdivision is consistent with the underlying objectives of the Housing SEPP, and of the Section 90(1) provision within the SEPP which is expressed as a permissive provision.
- The proposed subdivision upfront seeks to reduce (not increase) the number of lots on which the development will be carried out.
- The proposed subdivision of the site rationalises the number of lots on the site, simplifying and clarifying the cadastral base to be applied to the sequencing of a complex development with multiple uses and buildings. The legal title of the site currently comprises 29 lots in various deposited plans. The proposed four lots will result in a clear delineation of the uses on the site including seniors housing, the golf course and the club.
- The upfront subdivision will facilitate the orderly and economic development of the land by resolving a disorderly historical titling arrangement.
- The upfront timing of subdivision has no physical or environmental impacts. It should be noted that there is no merit in requiring subdivision after the delivery of the development.
- The subdivision of the site being undertaken prior to the carrying out of development provides a clear pathway for the applicant to proceed with the development. This is intended to serve as an administrative function as it will allow for a clear separation of operational responsibility between the use of the site for seniors housing and the use of the site as a Club and Golf Course.
- The subdivision is required as a prerequisite for delivering the development works to commence in accordance with development arrangements between the Club and Pariter. It is common practice for developments to proceed only upon subdivision which provides for clear, accurate and specific lots upon which to finance and implement a development consent.
- This Clause 4.6 Variation Request will support the principles of the Housing SEPP for providing diverse seniors housing options, as part of the revitalisation of Cumberland Country Club into a modern facility that will maximise public benefits for the community and introduce seniors' housing to the site.

In light of the above, the consent authority can be satisfied that there is sufficient justification for the variation to the development standard, as proposed in accordance with the flexibility allowed under Clause 4.6 of the Cumberland LEP 2021. The subdivision of the land to reflect separate uses and support an orderly and economic development of the land can be carried out and is permissible with consent.