



Clause 4.6

Variation Request



Height of Buildings
Development Standard ~
SEPP (Housing for Seniors or
People with a Disability) 2004
(Clause 40(4)(b))

26 Crabbes Avenue & 247-255 Penshurst Street,
Willoughby

Submitted to Willoughby Council
On Behalf of Hyecorp Property Group & Club Willoughby

JAN 2021

REPORT REVISION HISTORY

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1. INTRODUCTION

The subject site benefits from a Site Compatibility Certificate (SCC) issued on 24 September 2020 for *“Development for the purposes of seniors housing, consisting of a residential care facility, with approximately 36 to 72 beds, and approximately 99 to 125 self-contained dwellings as serviced self-care housing.”* It supports a development with a maximum floor space ratio (FSR) of 1.35:1 and a height of buildings varying from 8.5m to 20.5m. however, the SCC acts only to render the development type and indicative form as “permissible.” It remains that in submitting any development application the relevant provisions of any EPI, including any development standards contained therein, must be assessed and, if appropriate, varied to achieve the built form anticipated by the SCC.

Therefore, this Clause 4.6 variation is to address a variation to Clause 40(4)(b), relating to the height of buildings, in *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (Seniors SEPP); specifically *“(b) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must not be more than 2 storeys in height.”*, as it relates to a single lot of R2 zoned land on the eastern boundary of the consolidated site.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

This request has been prepared having regard to the Department of Planning and Environment’s Guidelines to Varying Development Standards (August 2011) and relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal¹.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)];
3. 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 [clause 4.6(4)]

This request also addresses the requirement for the concurrence of the Secretary as required by clause 4.6(4)(b).

The following request demonstrates that by exercising the flexibility afforded by Cl 4.6, in the particular circumstances of this application, the variation would be in the public interest because it satisfies the relevant objectives of the zone and the development standard.

¹ 1 Relevant decisions include: *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; *Moskovich v Waverley Council* [2016] NSWLEC 1015; *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 and *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

1.1. What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (Seniors SEPP). However, we note that the *Willoughby Local Environmental Plan 2012* (WLEP) also applies to the land.

1.2. What is the zoning of the land?

The zoning of the subject site is shown in Figure 1, pursuant to the Willoughby Local Environmental Plan 2012.

The development standard being varied relates **only** to the residential R2 zone and is not relevant for the RE2 Zoned land, as per Clause 40 (4) of the Seniors SEPP.

The majority of the site is zoned RE2 Private Recreation with a minor portion of the site towards the north-eastern boundary zoned R2 Low Density Residential and a portion in the north-western boundary zoned R3 Medium Density Residential. (Refer to Figure 1 and Figure 2)

The proposed seniors housing consisting of Independent Living Units (ILUs) and a Residential Aged Care Facility (RACF) pursuant to the Seniors SEPP are located within the RE2 zone and the R2 zone only and benefit from a SCC as referenced above. The proposal intends to retain the Club use on the site in a new building located fronting Penshurst Street.

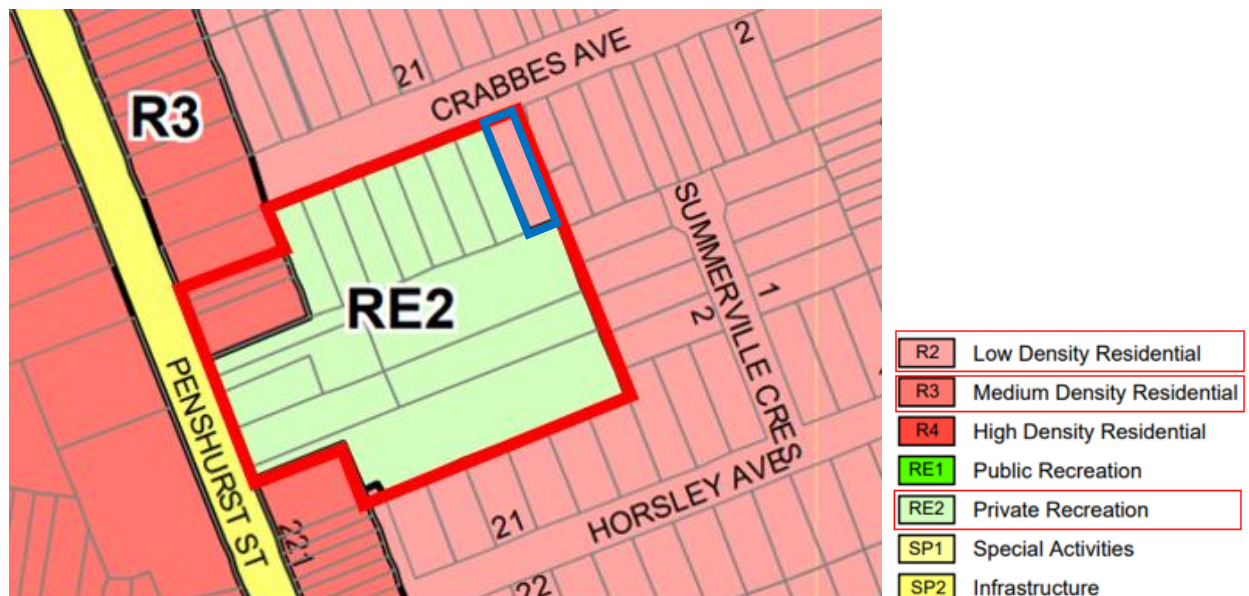


Figure 1: Extract of Land Zoning Map, subject site outlined in red (Source: NSW Legislation) blue outline shows the area of R2 Zoned land



Figure 2: Extract of Master Plan demonstrating location of ILU and RACF buildings relative to the zones in Figure 1. (Source: Dickson Rothschild) Blue outline shows approximate location of the R2 Zoned land.

1.3. What are the Objectives of the zones?

The objectives of the R2 zone are:

1 Objectives of zone

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To accommodate development that is compatible with the scale and character of the surrounding residential development.
- To retain and enhance residential amenity, including views, solar access, aural and visual privacy, and landscape quality.
- To retain the heritage values of particular localities and places.
- To encourage self sufficiency with respect to energy and food supply.

1.4. What is the development standard being varied?

The relevant development standard is the "height in zones where residential flat buildings are not permitted" standard under Clause 40(4)(b) of the Seniors SEPP. Refer below.

40 Development standards—minimum sizes and building height

(1) **General** A consent authority must not consent to a development application made pursuant to this Chapter unless the proposed development complies with the standards specified in this clause.

...

(4) *Height in zones where residential flat buildings are not permitted*

If the development is proposed in a residential zone where residential flat buildings are not permitted:

...

(b) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must not be more than 2 storeys in height,

Note.

The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape. ...

As per the note in this Clause, the intention of this is to ensure development is compatible with the scale of development in the streetscape and reflects how the development transitions with the adjoining buildings.

1.5. What are the objectives of the development standard?

The Seniors SEPP provides no express objective for the height control in Clause 40(4)(b). There is a 'Note' appearing alongside the provision in the instrument (however, this note does not form part of the instrument (clause 3(3) of the Seniors SEPP). In *Pathways Property Group Pty Ltd v Ku-ring-gai Council* [2017] NSWLEC 1486 a commissioner of the Land and Environment Court (at [61] and [78]-[81]) accepted that the objective was as follows:

- *To ensure that the development provides an appropriate relationship in storeys/scale to adjoining side boundaries and to streetscape to avoid an abrupt change in the scale.*

This interpretation was appealed and was upheld on appeal (by a judge): *Ku-ring-gai Council v Pathways Property Group Pty Ltd* [2018] NSWLEC 73 at [180]-[182].

It is therefore the intent/purpose (objective) of this control is:

- *To ensure that the development provides an appropriate relationship in storeys/scale to adjoining side boundaries and to streetscape to avoid an abrupt change in scale.*

1.6. Is the development standard excluded from the operation of Clause 4.6 of the EPI?

The development standard is not excluded from the operation of Clause 4.6 of WLEP. The clause is able to be varied under clause 4.6 (cf *Ku-ring-gai Council v Pathways Property Group Pty Ltd* [2018] NSWLEC 73 at [87]-[91]).

2. EXTENT OF VARIATION

The buildings adjacent to a boundary of a site must not be more than 2 storeys in height, pursuant to Clause 40(4)(b) of the Seniors SEPP.

The definition of height within the Seniors SEPP is:

height in relation to a building, means the distance measured vertically from any point on the ceiling of the topmost floor of the building to the ground level immediately below that point.

The Seniors SEPP does not have a definition for storey.

We have considered the legal advice from Mills Oakley (dated 15 December 2020) that has been provided to the Council and the consent authority as part of the application documents. Paragraphs 2.2-2.14 deal with the definition of 'storey' under the Seniors SEPP. The Mills Oakley analysis can be relevantly summarised as follows.

There is no basis in the Seniors SEPP or the EP&A Act to apply either of the definitions of 'storey' in:

- the WLEP; or
- the standard instrument at the end of the *Standard Instrument (Local Environmental Plans) Order 2006* (the Standard Instrument).

Where the Seniors SEPP applies a provision of the Standard Instrument, it does so explicitly. That is, the only provisions of the Standard Instrument that are applied by the Seniors Housing SEPP are the names of certain zones (clause 4(2)(c)). The Standard Instrument, and its definitions, plays no other role in terms of the Seniors SEPP.

Similarly, when the Seniors SEPP relies on the provisions of 'local planning controls' (which would, in this case, include the WLEP) it does so explicitly. This is done in clause 2(a) of the Seniors SEPP, where there is a plan aim to set aside 'local planning controls'. It is also done in relation to clause 33(a), where local planning controls can be relied upon for the limited purpose of establishing the location's 'desired future character'.

In any event, the definitions in both the LEP and the Standard Instrument have nothing to say about how to measure the height of building in storeys. The only definitions in those instruments deal with the measurement of a building height in metres.

In the same vein, *Willoughby Development Control Plan 2012* exists to support the objectives and planning provisions of the LEP (as per clause A.2). It has no role to play under the Seniors SEPP, other than:

- in establishing a location's 'desired future character' under clause 33(a) of the Seniors Housing SEPP; or
- calculating a floor space ratio for a 'vertical village' in clause 45(2) of the Seniors Housing SEPP.

Clause 3(2) of the Seniors SEPP says:

In calculating the number of storeys in a development for the purposes of this Policy, a car park that does not extend above ... [the level of the site before development is carried out] by more than 1 metre is not to be counted as a storey.

Beyond that, the Seniors SEPP offers no specific guidance.

This means that it is necessary to consider the case law.

In *Leichhardt Municipal Council v Daniel Callaghan Pty Ltd* (1981) 46 LGRA 29 the NSW Court of Appeal held that a whole building 'contained' more than three storeys, where it had seven storeys, even though no more than three storeys were superimposed on each other due to the building being stepped back progressively on a sloping site (*Ferella v Otvosi* [2005] NSWSC 962 at [19]).

However, a provision that a building not exceed a certain number of storeys in height has a different way of being applied (*Ferella* at [20]). \

When holding a building to a height of, say, two storeys, it is necessary to ensure that the building is not one that rises from the ground in the vertical plane for a distance of more than two storeys (cf *Ferella* at [20] and [30]). The 'ground' is the ground where the building stands (*Ferella* at [30]).

There are two things to note:

- It is the finished ground level of the completed building that is the appropriate reference point. The reference point is not the notional ground level that may have existed before the building was erected.
- Under the EP&A Act, a reference to a 'building' may also be a reference to a part of a building (section 1.4(1)). So, when measuring the building from the finished ground level, attention should focus on the part of the building that relates to that ground level.

Additionally, the *Macquarie Dictionary* relevantly defines a 'storey' to be:

1. *a complete horizontal section of a building, having one continuous or approximately continuous floor.*
2. *the set of rooms on the same floor or level of a building.*
3. *each of the stages separated by floors, one above another, of which a building consists.*

As demonstrated Figure 3 and Figure 4 below, the relevant building adjacent to the site boundaries for the purposes of scale of development in the streetscape is:

- Building B fronting Crabbes Avenue and located within the north-eastern corner of the site.

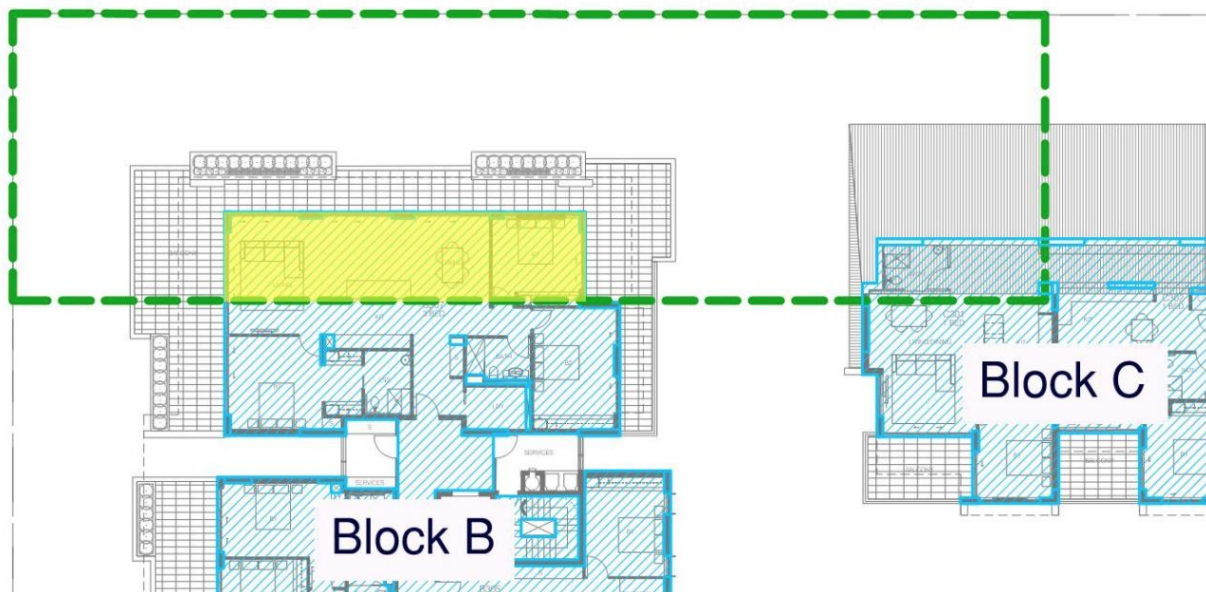


Figure 3: Extract of GFA Plan showing extent of contravention in yellow (Source: Hyecorp/Amglen)



Figure 4: Extract of North Elevation Plan of Block B fronting Crabbes Avenue showing extent of contravention in yellow (Source: Hyecorp/Amglen)

The northern elevation of Building B which fronts Crabbes Avenue is part 2-storey and part 3-storeys at this elevation, with the balcony recessed. (Refer to Figure 4 above). The eastern elevation of Building B steps down to 2 storeys adjoining Numbers 18 and 18A Crabbes Avenue.

The eastern elevation of Building C is a 2-storey building with a pitched roof. (Refer to Figure 9 below). One toilet/bathroom is within the R2 zoned land and there are no windows in the roof.

The proposed development seeks a variation to the height standard to ensure that the proposal delivers an appropriate built form that is consistent with the desired future character as outlined in the SCC.

Schedule 2 of the SCC is relevantly as follows:

Requirements imposed on determination: ...

2. *The final layout, building construction and on-site facilities in the proposed seniors housing development is subject to the resolution of; ...*
 - b. *a transition of building heights from five storeys at the centre of the site, graduating down to **three storeys at the northern boundary** ...*

Block B is the building that presents to the northern boundary. The SCC anticipates that this building may present as three storeys to that boundary.

The extent of the variation is one storey.

3. COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THIS CASE. [CL.4.6 (3)(A)]

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the LEP.

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The five ways of establishing that compliance is unreasonable or unnecessary are:

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

2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
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 the standard is unreasonable and unnecessary; and
5. The zoning of the land is unreasonable or inappropriate

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (Wehbe v Pittwater Council [2007] NSWLEC 827, Initial Action Pty Limited v Woollahra Municipal Council [2018] NSWLEC 118 at [22] and RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [28]) and SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 at [31].

In this case, it is demonstrated below that Test 1 has been satisfied.

3.1. Achieves the objectives of the standard

Table 1 below discusses the development standard and whether the intent/purpose of the development standard is achieved, notwithstanding non-compliance with the standard:

Table 1: Achievement of Development Standard Objective.

Objective	Discussion
<i>To ensure that the development provides an appropriate relationship in storeys/scale to adjoining side boundaries and to streetscape to avoid an abrupt change in scale.</i>	<p>The contravention of the standard occurs on the Crabbes Avenue frontage for a length of 6.5m and technically for one bathroom in Block C.</p> <p>The building fronting Crabbes Avenue appears as 3 storeys, however the eastern elevation is stepped to 2 storeys and complies.</p> <p>The streetscape of Crabbes Avenue is presently low scale dwellings between one to two storeys in height and all dwellings along Crabbes Avenue are within the R2 zone. This zone has a maximum height limit of 8.5m under the WLEP 2012 and as such, two storey dwellings are the desired outcome for this streetscape under the WLEP 2012.</p> <p>To Crabbes Avenue the proposed ILU building, shown on the plans as Block B, will present as two storeys. The third storey is setback 1.49m from the level below to the front wall and the architectural vertical elements of the two-storeys is emphasized. From the eastern side boundary, the third level is recessed 2.6m from the level below. (Refer to Figure 5 and Figure 6 below).</p>

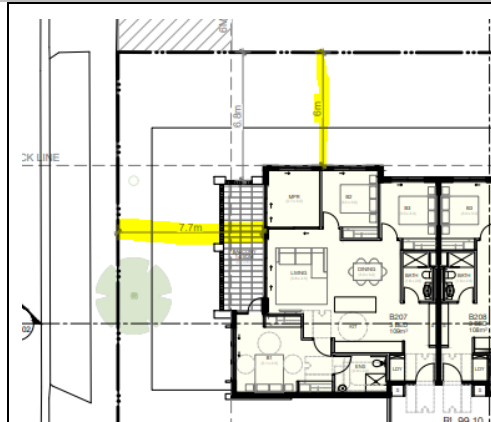


Figure 5: Level 2 of the north-eastern corner of Block B showing 7.7m front setback and 6m side setback. (Source: Hyecorp/Amglen)

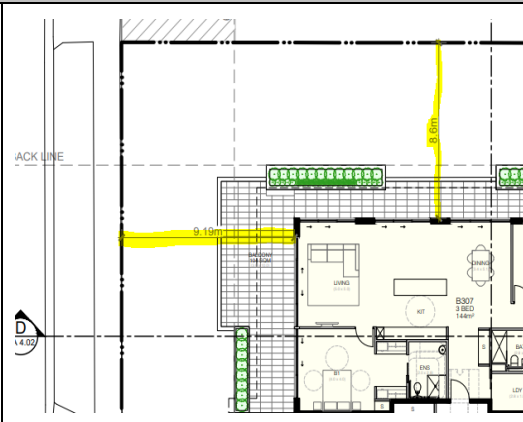


Figure 6: Level 3 of the north eastern corner of Block B showing the increased setbacks to the front and side. (Source: Hyecorp/Amglen)

This provides a stepped building effect as it moves closer to the eastern side boundary and ensures the building will avoid an abrupt change in the scale in the streetscape as it moves towards the adjoining R2 Zone. (Refer to Figure 7 below).

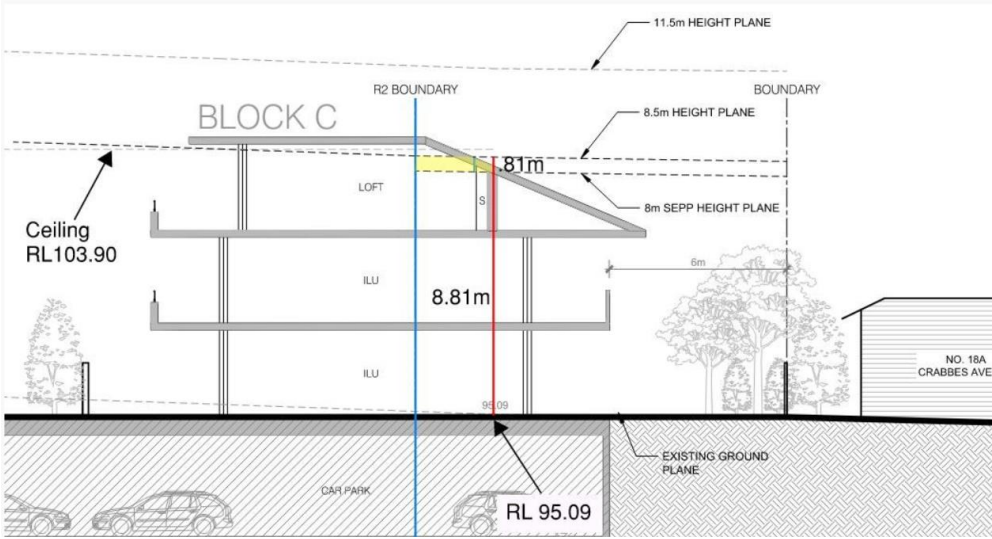



Figure 7: Extract of north elevation showing transition in heights (Source: Dickson Rothschild)

Furthermore, the use of neutral tones, with simple cladding of the upper storeys minimises the building's visual impact. The proposed building achieves compatibility with the existing and desired future streetscape to Crabbes Avenue in terms of bulk and scale

Buildings on the opposite side of Crabbes Avenue are a mixture of one and two-storey dwellings. The adjoining properties to the east at Numbers 18 and 18A both currently have single storey dwellings. However, Crabbes Avenue has a maximum height limit of 8.5m under the WLEP and as such, both sites could achieve two-storey buildings with pitched roofs under the R2 zone to within 0.9m of the common side boundary with the subject site. Currently, the 6m setback to the eastern boundary is greater than what would normally be achieved within the portion of R2 Zone on the subject site, should the site be developed with the existing subdivision pattern. Under the current controls, the development could be a two storey building with a pitched roof and side setbacks between 0.9m – 3m.

The result for Block B is a building that provides an appropriate relationship as it transitions to a lower scale at the closest point with the eastern adjoining neighbours.

Objective	Discussion
	<p>Block C has the upper-level rooms within the roof along the eastern elevation, however, only one bathroom exists within the R2 zoned land. In doing so it will appear as a two-storey building with a pitched roof. (Refer to Figure 8 and Figure 9 below).</p>  <p>Figure 8: Section showing the upper level rooms within the roof. (Source: Heycorp/Amglen)</p>  <p>Figure 9: 2-storey built form of Building C facing the eastern boundary, the blue depicts the portion within the R2 zone. (Source: Hyecorp/Amglen)</p> <p>This is not dissimilar to other buildings in the residential zone of the immediate area which generally are one and/or two storey scale, with pitched roofs.</p> <p>The WDCP requires a 6m rear setback for this site, (the rear being the southern boundary), to ensure low scale residential development has sufficient landscaping and open space and to minimize overshadowing and provide adequate separation between buildings. Although the proposed Block C extends within the rear portion of the R2 zone, Lot 11 DP6291, it is proposed to have a 6m setback to the adjoining common boundary with Numbers 18 and 18A Crabbes Avenue. This will allow for a variety of deep soil landscaping, including mature trees and will be an improvement from the existing club carpark that is currently on the site (Refer to Error! Reference source not found. above). Further, Number 18 Crabbes currently sits 5.76m from its rear boundary and Number 18A Crabbes currently is located 5.6m from its rear boundary. Thus, the bulk and scale of the proposed Building C will be compatible with the existing and future character of the area.</p>

Objective	Discussion
	<p>The stepping down in height of the buildings towards the boundaries reduces the bulk and scale while also transitioning the bulk and form to the existing lower scale residential areas to the north and east.</p> <p>Development as a whole</p> <p>The development satisfies the approved SCC for the site. The buildings are designed so that the highest part is situated in the centre of the site, with Building A stepped so that it presents as a 5 storey building. The buildings taper down to be small-scale, providing a maximum 3 storeys along Crabbes Avenue and 2 storeys along the eastern and southern boundaries. The buildings along the northern, eastern and southern boundaries provide pitched roofs and large setbacks to allow for extensive landscaped areas.</p> <p>The FSR of the development as a whole based on the whole site is 1.27:1 which is less than that permissible with the allowable SCC and R3 zoned land combined (maximum 1.31:1). It is also less than what is permitted under the SCC itself (maximum 1.35:1).</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>

The proposed height and massing of the building within the R2 Zone ensures that:

- the building avoids abrupt change in the scale of development in the streetscape.

Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case because the objective of the standard is achieved notwithstanding the non-compliance.

4. THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE STANDARD. [CL. 4.6(3)(B)]

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole.

A height-compliant development may result in a lesser height, but in this case the level of the building B that contravenes the standard does not cause any adverse impacts to surrounding residential properties and is set back greater than twice the anticipated requirement. Therefore, it can be concluded that the proposal does not result in any unreasonable environmental impacts. Moreover, the proposal would result in a better planning outcome. Block B is for seniors housing been designed in accordance with the approved SCC and to the height anticipated by the SCC as a consequence of detailed site-specific planning consideration.

However, there are some additional specific environmental grounds to justify the contravention of the standard as follows:

- The proposed contravention does not detract from the development's satisfaction of the objective of the standard and the objectives of the zone;
- The contravention does not result in any reduced quality of the design of Building B (that is a design that incorporates generous setbacks, stepping away from the site boundaries and with the use of skillful materials enforces the vertical element of the two-storey portion and recesses the third level). This contravention does affect the Building B's perceived reduction in the scale of the development when viewed from public and private domain ensuring the contravention has no material adverse amenity impact and is compatible with the surrounding area in terms of bulk and scale;

- The contravention would result in a better planning outcome than if compliance were to be achieved, as it allows for the co-ordinated redevelopment of the site in accordance with the detailed site-specific planning that supported the SCC (and led to the permissible use of the overall site for the otherwise impermissible use of seniors housing). The overall intent of the SCC is to locate the bulk of the development and greatest height towards the centre of the site, provides generous setback from the boundaries with existing neighbouring properties. The contravention achieves the objective of the standard and the development envisaged by the approved SCC;
- The contravention appropriately facilitates development of additional quality housing options for seniors in a highly desirable location;
- The contravention positively contributes to important planning goals, namely:
 - two keys aims of the Seniors SEPP (as set out in clause 2(1) of the SEPP):
 - (a) *increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and*
 - (b) *make efficient use of existing infrastructure and services ...; and*
 - two key aims of the WLEP (as set out in clause 1.2(2)(f) of the WLEP):
 - (i) *to provide opportunities for a range of housing choice in Willoughby to cater for changing population needs in accessible locations, and*
 - (ii) *to facilitate the provision of adaptable and affordable housing, and*
- The development allows for the rhythm of the street and the acknowledgement of the corner to be recognized by reinforcing greater height towards Penshurst Street, where higher buildings are permitted.

5. THE PROPOSAL WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE STANDARD AND THE OBJECTIVES OF THE ZONE. [CL.4.6(4)(A)(II)]

In Section 3 (above), it was demonstrated that the proposal achieves (and is consistent² with) the objectives of the development standard. The proposal is also consistent with the objectives of the residential zone as explained in **Table 2** (below).

Table 2: Consistency with RE2 Zone Objectives.

Objective	Discussion
R2 Zone	
To provide for the housing needs of the community within a low-density residential environment.	The proposed development will provide additional housing within the locality of Willoughby, nearby to a range of local services, facilities and amenities in accordance with the approved SCC.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The wider proposal includes a new registered club and neighbourhood shops and new public park. Furthermore, the proposal for seniors housing is permissible under the Seniors SEPP and the SCC.

² In *Dem Gillespies v Warringah Council* [2002] LGERA 147 and *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC the term 'consistent' was interpreted to mean 'compatible' or 'capable of existing together in harmony'

<p>To accommodate development that is compatible with the scale and character of the surrounding residential development.</p>	<p>The surrounding residential development is generally a mixture of one and two-storey buildings in the R2 zone, with residential flat buildings along Penshurst Street. The proposal has been designed to have the bulk in the centre of the site, with the buildings closest to the lower density residential transitioning down to two storeys. This, combined with the extensive landscaping, building separation and park proposed, will result in a development that is compatible with the scale and character of the surrounding residential development.</p>
<p>To retain and enhance residential amenity, including views, solar access, aural and visual privacy, and landscape quality.</p>	<p>As previously discussed, the proposal will not result in any adverse environmental impacts that would have a detrimental impact upon the amenity of the locality with particular reference to solar, views, and visual privacy.</p> <p>The provision of a public park and substantial landscaping throughout the site will enhance the residential amenity from the existing carpark that currently sits on the site.</p>
<p>To retain the heritage values of particular localities and places.</p>	<p>The proposed contravention of the standard does not affect consistency with this objective. The built form relative to the boundaries of the site which are a conservation area have been maintained at a height and scale consistent with the character of the Conservation Area.</p> <p>The buildings which adjoin the Conservation Area are 2-storey in built form with generous setbacks allowing for substantial landscaping and minimal solar impacts. The Heritage Impact Statement (HIS) states: <i>“The design of the new development is considered to be sympathetic to the neighbouring conservation area. The façade design of the proposed buildings adjacent to the conservation area boundaries includes articulation to reduce the perceived bulk of the buildings and respond to the finer grain subdivision pattern of the adjoining properties in the Horsley Avenue HCA.”</i></p> <p>The form/massing expected within the HCA is that of 2-storey with pitched roofs, surrounded by open well vegetated front gardens. The proposal is consistent with this.</p> <p>The HIS concludes that the proposed development will not have an adverse impact on the established heritage significance or setting of the Horsley Conservation Area. The proposal seeks to improve the amenity of the site while also ensuring there is no adverse impact on the Conservation Area.</p>

<p>To encourage self-sufficiency with respect to energy and food supply.</p>	<p>The proposed contravention of the standard does not affect consistency with this objective.</p> <p>There are numerous initiatives incorporated within the development that will encourage self-sufficiency in regards to energy and food supply. These include but are not limited to:</p> <p>Food and Water</p> <ul style="list-style-type: none"> ▪ Communal vegetable gardens to be used by residents ▪ Communal composting ▪ Irrigation systems with timers ▪ Selected plants to be native or drought resistant ▪ Showers will flow rates under 7 litres per minute ▪ Minimum 5-star performance rating for tapware ▪ Minimum 4-star performance rating for toilets ▪ Metering and monitoring of major water uses <p>Energy</p> <ul style="list-style-type: none"> ▪ Windows and doors with large opening sashes allowing natural ventilation as well as covered and generously sized balconies to provide shade ▪ Minimum R1.0 insulation to the external envelope ▪ Central gas fired hot water plant ▪ LED lighting Throughout ▪ Air-conditioning to be day / night zoned and have a minimum heating and cooling Energy Efficiency Rating (EER) performance rating of 3.25 - 3.5 ▪ The uses of sensors and timers for common area lighting <p>For completeness, the lack of relevance of the zone objectives to the variation of a height development standard should not be a matter that acts in a negative way so pursuant to cl 4.6(4)(a)(ii) of the WLEP: <i>Pathways Property Group Pty Ltd v Ku-ring-gai Council</i> [2017] NSWLEC 1486 at [44]; <i>Ku-ring-gai Council v Pathways Property Group Pty Ltd</i> [2018] NSWLEC 73 at [149].</p>
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As can be seen from **Table 1** and **Table 2**, the proposal is consistent with the objective of the standard and the objectives of the zone and is therefore considered to be in the public interest.

6. STATE OR REGIONAL ENVIRONMENTAL PLANNING

This section considers whether contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

7. CONCLUSION

This Clause 4.6 variation request demonstrates, as required by Clause 4.6 of the Willoughby Local Environmental Plan 2012, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The proposal meets the objectives of the development standard and is consistent with the objectives of the R2 zone and is therefore in the public interest;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

The concurrence of the Secretary can be assumed in accordance with Planning Circular 20-002 'Variations to development standards', dated 5 May 2020. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given. The circular provides for assumed concurrence.

On this basis, therefore, it is submitted that it is appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.