



## **Clause 4.6 Variation Request (contingent)**

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



**26 Crabbes Avenue & 247-255 Penshurst Street,  
Willoughby**

Submitted to Willoughby Council

On Behalf of Hyecorp Property Group & Club Willoughby

JAN 2021

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## 1. INTRODUCTION

The subject site benefits from a Site Compatibility Certificate (SCC) issued on 30 August 2018 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)(c), relating to the height of buildings, in *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (Seniors SEPP); specifically, *“(c) a building located in the rear 25% of the site must not exceed 1 storey in height.”*, as it relates to a single lot of R2 Zoned land on the eastern boundary of the consolidated site.

However, in the context of the subject site, the application of Clause 40(4)(c) has no real work to do and does not strictly apply. Nevertheless, a Clause 4.6 variation has been submitted for abundant caution.

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 Appeal<sup>1</sup>.

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 be in the public interest because it satisfies the relevant objectives of the zone and the development standard.

<sup>1</sup> 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.

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.

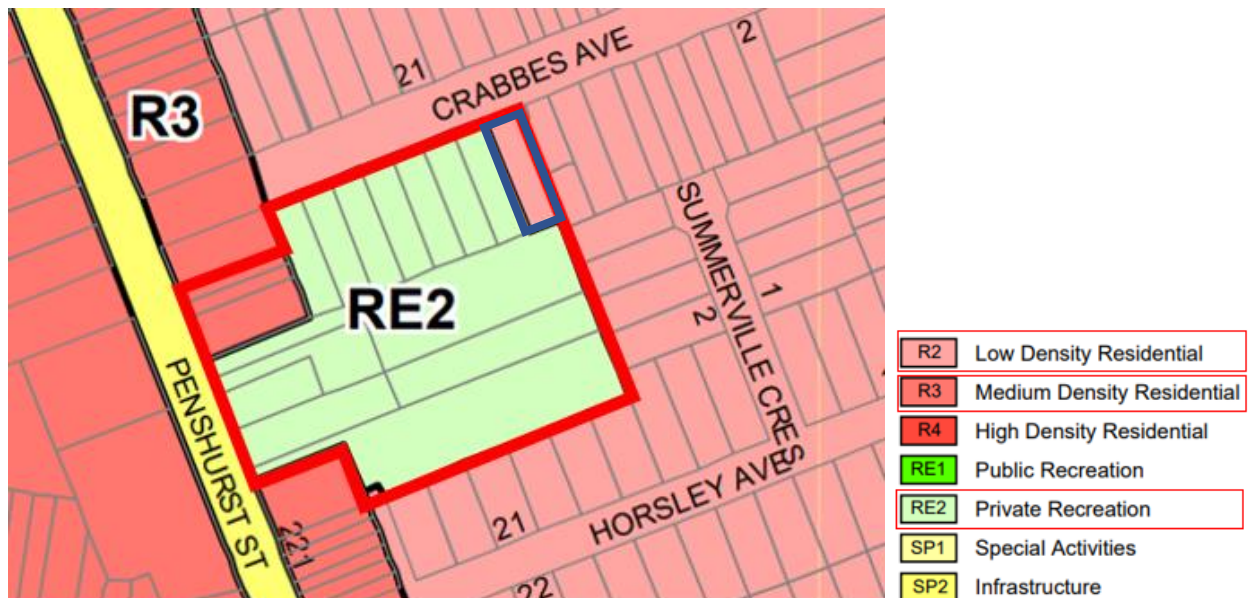


Figure 1: Extract of Land Zoning Map, subject site outlined in red (Source: NSW Legislation) The blue outlines the part of the site zoned R2, subject of this clause 4.6





Figure 2: Extract of Master Plan demonstrating location of ILU and RACF buildings relative to the zones in Figure 1. (Source: Dickson Rothschild) Approximate location of the site zoned R2, the subject of this Clause 4.6.

### 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)(c) 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:*

...

(c) *a building located in the rear 25% of the site must not exceed 1 storey in height.*

The applicant considers that there is no contravention of clause 40(4)(c) as no part of the minor part of the site zoned R2 can be regarded as the 'rear' of the site (or 'rear 25% of the site').

Nonetheless, this request has been prepared as if a clause 4.6 request is required.

This request does not need to be considered if the consent authority accepts that no part of the minor part of the site zoned R2 can be regarded as the 'rear' of the site (or 'rear 25% of the site').

This request may also be considered if the consent authority is prepared to grant development consent to the proposed development, but wishes to proceed on the assumption that a clause 4.6 request is required in relation to clause 40(4)(c). This does not detract from the Applicant's position that no clause 4.6 request is actually required.

### **1.5. What are the objectives of the development standard?**

In *Jigari Pty Ltd v City of Parramatta Council* [2018] NSWLEC 1568 (at [86]) the Court defined the objective of clause 40(4)(c) as follows:

*[T]o provide an appropriate scale of built forms at the rear of the site, to respond to the fact that areas that do not permit RFB (residential flat buildings) are typically of a lower density, and the control is to address the potential inconsistency in terms of built form relationships- the rear of sites being typically backyards with few if any structures."*

In the very recent case of *Thompson Health Care Pty Ltd v Ku-ring-gai Council* [2020] NSWLEC 1363 (at [61]) the Court adopted a slightly simpler formulation of the objective:

*[To] limit the bulk and scale of a building to protect the amenity of the rear of adjoining properties.*

This clause 4.6 request relies on the wording from *Thompson Health Care*, as the most recent Court authority (although it is submitted that it is not materially different from the wording in *Jigari*).

### **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**

A building located in the rear 25% area of the site must not exceed 1 storey in height, pursuant to Clause 40(4)(c) 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 it 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.*

The rear 25% of the R2 zoned land is shown in Figure 3 below. As the R2 zoned land fronts Crabbes Avenue the rear of the site is considered the southern end of this site (Crabbes Avenue is to the north). To determine the rear 25%, it has been calculated on the length and area of the site with the yellow portion in Figure 3 showing the building which falls within that rear portion. As demonstrated on the plans prepared by Hyecorp in association with Amglen, the proposal situated within the rear 25% of the R2 zoned part of the site consists of part of Building C (adjoining the eastern boundary), for a length of approximately 8m parallel with the eastern boundary and with a height of 2 storeys facing east and 3 storeys facing west (internal to the development). Refer to Figure 4 below.

The remainder of Building C is situated within the RE2 Zoned land and hence is not affected by this standard.

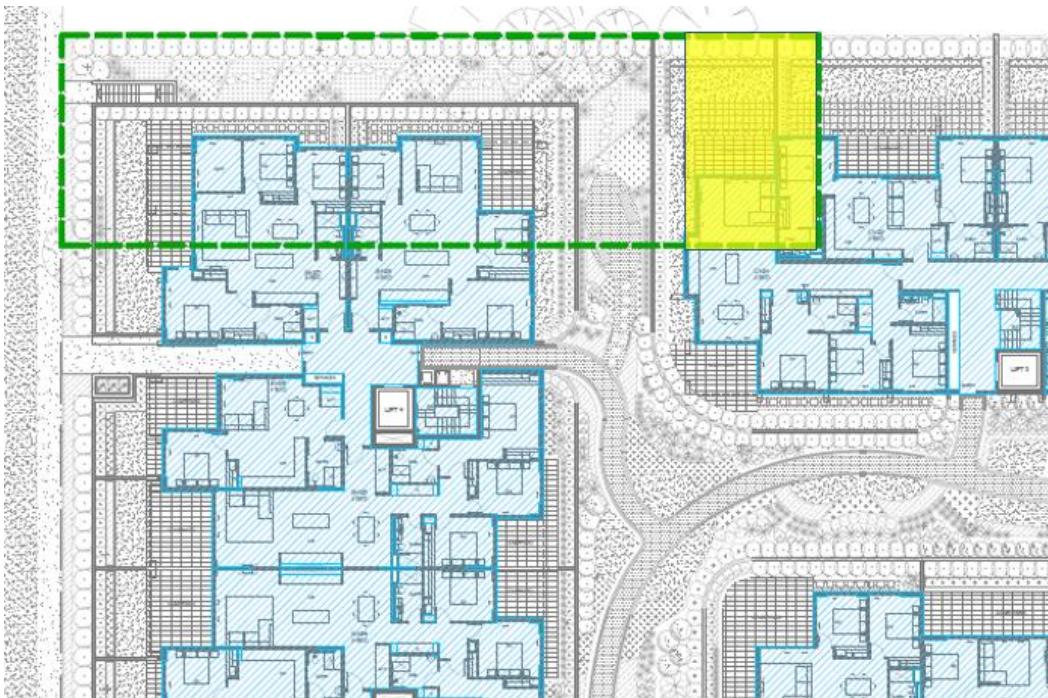


Figure 3: Extract of GFA Plan showing the building within the rear 25% of the R2 zone portion of the site highlighted yellow (Source: Hyecorp/Amglen/City Plan)



Figure 4: Extract of ILU Block C Elevations Plan. Length of building situated within the rear 25% of the R2 Zoned land is highlighted in yellow. (Source: Hycorp/Amglen/City Plan)

The extent of the variation is one storey.

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 and two storeys at the eastern and southern boundaries ...*

Block C is the building that presents to the eastern boundary. The SCC anticipates that this building may present as two storeys to that boundary. If any part of the site is regarded 'rear' it would have to be the southern boundary. The SCC anticipates that a building presenting to the southern boundary would have a height of two storeys.

### **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 Objectives.*

Objective	Discussion
<i>[To] limit the bulk and scale of a building to protect the amenity of the rear of adjoining properties.</i>	In relation to the adjoining development to the east, No 18 Crabbes Avenue, this property can achieve two-storey buildings with pitched roofs under the R2 zone to within 0.9m of the side boundary, (ie the eastern boundary of Lot 11 Sec C DP 6291). To the rear of 18 Crabbes Avenue, is 18A Crabbes, again a single storey dwelling house capable of being 2 storeys. (Refer to Figure 5 below)



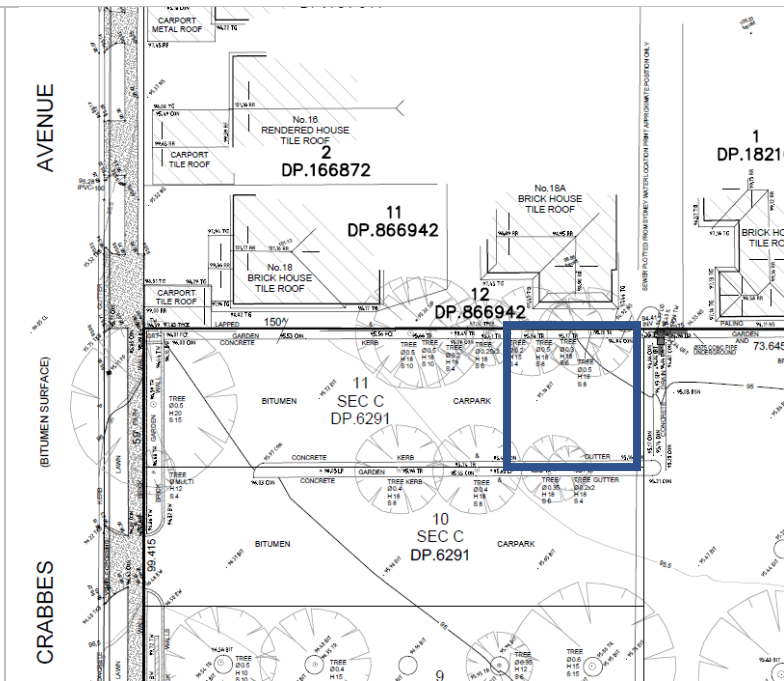


Figure 5: Approximate location of the rear 25% of the R2 zoned land shown in blue in relation to the northern adjoining sites at 18 and 18A Crabbes Avenue (Source: Survey prepared by C.M.S Surveyors Pty Limited dated 11/03/13 & City Plan)

The extent of Building C which contravenes this standard is for a length of approximately 8m parallel with the eastern boundary (as shown in Figure 3). The amenity of adjoining developments is a result of various factors. The reduction in height at the rear of the site is generally so as to reduce the impacts from a development, particularly in relation to privacy, overshadowing, visual impact and views. These will be discussed below:

### Privacy

The proposed Blocks B and C within the R2 zone, will be setback from the boundaries of the site by a generous 6m, twice the minimum requirement under the Willoughby Development Control Plan 2016. This together with landscaping, privacy screens and view angles ensure that privacy will not be adversely impacted.

In relation to the adjoining dwellings at 18 and 18A Crabbes Avenue, these dwellings are presently single storey within the R2 zone. They have their principal views to the north and south with limited windows to their side western elevations, fronting the eastern boundary of the R2 site. Currently there exists a paling fence on the boundary (approximately 2.2m measured from the site) protecting their privacy from the proposed units at ground floor level. (Refer to Figure 6 below)





Figure 6: Photograph showing the existing boundary treatment between the R2 zoned portion of the site and the adjoining dwellings at 18 & 18A Crabbes Avenue. (Source: City Plan)

At Level 2 of Block C, the area of the variation includes part of a living room and bedroom and the recessed balcony for the subject unit. The windows to the main habitable room being the lounge are recessed and therefore setback further, approximately 8.6m from the boundary with the adjoining neighbouring dwelling as shown in Figure 7 below. Additionally, privacy screening is proposed to the balcony to ensure no unacceptable overlooking to the adjoining 18A Crabbes Avenue. (Refer to Figure 3 above)

The Willoughby DCP 2016 allows a minimum side setback of 0.9m for walls 1 – 2 storeys in height and a minimum of 1.5m for walls in excess of 2 storeys.

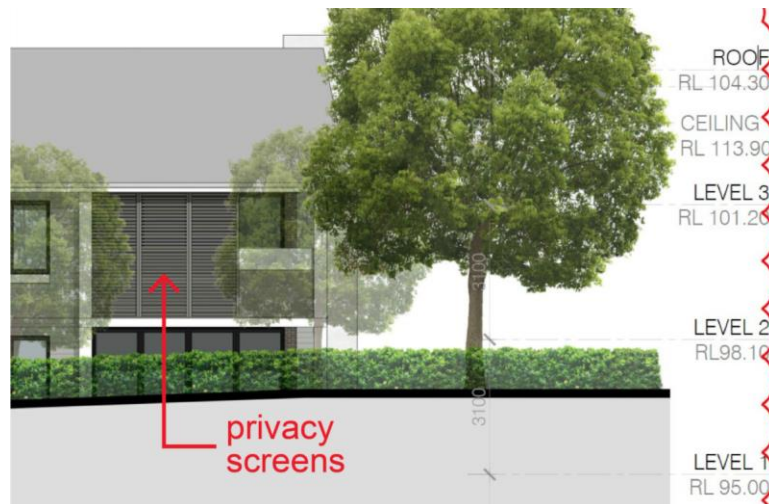


Figure 7: Extract from architectural plans detailing privacy screening to Block C where the contravention occurs. (Source: Hyecorp)

#### Development as a whole


Objective	Discussion
	<p>The proposed development as a whole will be visually consistent in terms of design and materials in that it represents fine grain urban form with large landscaped setbacks to the northern, eastern and southern boundaries responding to the existing lower residential character of the adjoining properties.</p> <p>Adequate separation is provided between the proposed buildings within the site ensuring privacy between them, and the provision of the landscaped public park towards the centre of the site aids in reducing any privacy or visual intrusion from the development.</p> <p>Buildings which adjoin the eastern and southern boundaries have been designed to represent 2 storey buildings with pitched roofs. 6m setback is provided to the eastern boundary and 8m to the southern boundary, which will be landscaped. Privacy screens or planter boxes are used to aid in reducing privacy impacts.</p> <p>The proposal does not impact on neighbouring properties in terms of loss of privacy or visual intrusion.</p> <p><u>Overshadowing</u></p> <p>Hyecorp in association with Amglen have prepared detailed shadow diagrams for the proposal. The shadow diagrams demonstrate the closest adjoining properties along the east boundary will receive in excess of 3hrs direct sunlight between 9am and 3pm mid-winter. The majority of the shadows will fall on the site itself throughout the day and the proposed development does not overshadow any rear yard to any adjoining development until approximately 3pm at which time the shadow impact is only partial. Refer to Figure 8 and Figure 9, extract of the shadow diagrams provided below.</p> <div style="text-align: center;">  <p>12:00PM - JUNE 21<sup>st</sup>      1:00PM - JUNE 21<sup>st</sup></p> </div> <p><i>Figure 8: Extracts of shadow diagrams 12pm-1pm mid-winter. Location of the R2 zoned land circled in red. (Source: Hyecorp/Amglen)</i></p>



Figure 9: Extracts of shadow diagrams 2pm-3pm mid-winter. Location of the R2 zoned land circled in red. (Source: Hyecorp/Amglen)

### Development as a whole

The design of the overall development results in minimal overshadowing on adjoining premises due to the stepped nature of the buildings. The highest building bulk is kept to the middle of the site with those closest to the eastern and southern boundaries reduced to a 2-storey scale. This achieves minimal disruption of shadows to adjoining residents, with shadows not starting to affect neighbours until 1pm. Therefore, despite the variation in height, this objective is achieved.

### Visual Impact

The portion of building that contravenes the one storey height limit will have some minimal visual impact, but this will not be detrimental. The additional height as a result of the contravention does not cause the buildings to appear overly dominant or bulky because of the design features such as large setbacks, neutral colours and materials and associated landscaping. The second storey is setback 6m to the balconies and further for the main wall of the building, providing a larger side setback to No. 18 and 18A Crabbes than what is permissible under the provisions of the WDCP. This larger setback will provide a variety of deep soil landscaping including mature trees and is an improvement on the existing club carpark that is currently on the site.

### Development as a whole

The proposed development as a whole will be visually consistent in terms of design and materials. The proposed development will be fine grain urban form with large landscaped setbacks to the northern, eastern and southern boundaries responding to the existing lower residential character of the adjoining properties. Vertical elements are used reinforcing the two-storey nature of the buildings and ensuring they appear compatible with the surrounding one and two-storey dwellings. The upper level is within the roof space for the eastern elevation, thus limiting the building's visual dominance. Significant landscaping is proposed as part of the development and extensive setbacks which provide considerable separation between this building and the adjoining.

Objective	Discussion
	<p><u>Views</u></p> <p>In determining if the view loss for the adjoining or nearby properties is reasonable or unreasonable, we have given consideration to Tenacity Consulting v Warringah Council (2004) NSWLEC140 (Tenacity), whereby the Land and Environment Court established a set of Planning Principles on view sharing and what Councils should take into consideration in assessing view loss impacts. Those things that should be considered include an assessment of whether view impacts are negligible, minor, moderate, severe, or devastating.</p> <p>Views from surrounding properties will not be largely affected as a consequence of the contravention of the development standard and the redevelopment of the site within the R2 zoned land. Views in the surrounding area are generally limited to street level views, sky and some canopy trees and do not include iconic views.</p> <p>Views from surrounding properties will not be largely affected as a consequence of the portion of building that contravenes the one storey height limit.</p> <p>The closest adjoining dwelling houses to the portions of Blocks B and C within the R2 zoned land are 18 and 18A Crabbes Avenue. These dwellings are also within the R2 zone and are presently single storey with principal views towards the north and south. The proposal, located due west of these existing dwellings, will not impact views currently enjoyed from these dwellings given their principal views are north/south. The western boundary of 18 and 18A Crabbes Avenue, adjoining the site and between the proposed development and the adjoining dwellings, has a high paling fence limiting any existing views towards the site (approximately 2.2m measured from the site). (Refer to Figure 6 above).</p> <p>After considering the existing situation and assessing the design and separation proposed with the development, the impact on view loss is considered to be negligible to minor and is minimized, consistent with this objective.</p> <p><b>The development as a whole</b></p> <p>The development as a whole, steps the built form down from the highest part in the centre of the site, to 3 storeys facing Crabbes Avenue and 2 storeys facing the eastern and southern boundaries. This combined with minimum 6m setbacks, results in minimal impact to views on the adjoining premises. There are no iconic views with the principal views of adjoining residents being dwellings, sky and some trees. The buildings on the site have been provided with large separation between them (ranging from 8.94m to 12m). The provision of the public park and large extent of landscaping within the site ensures view vistas are maintained through the site and creates a much larger separation between the RFB building and the proposed buildings to the east.</p> <p>Thus, despite the variation to the height, the design achieves minimal disruption to views.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>

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.

As discussed earlier, the development site is unusual in that a small portion of the development site is affected by this standard, where the majority of the site is zoned RE2. The length of building which contravenes this development standard is approximately 8m parallel to the eastern boundary.

Furthermore, 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 outcome of this planning process is reflected in Schedule 2 of the SCC.

Block C is the building that presents to the eastern boundary. The SCC anticipates that this building may present as two storeys to that boundary. If any part of the site is regarded 'rear' it would have to be the southern boundary. The SCC anticipates that a building presenting to the southern boundary would have a height of two storeys.

Essentially, a non-complaint development better responds to the whole-of-site land use planning exercise that has been carried out. This is a tailored, more nuanced and localised planning control the clause 40(4)(c) which has a coarse statewide application. A better planning outcome is achieved via the implementation of the SCC's planning approach (and departure from the approach otherwise required by clause 40(4)(c)). A compliant development would result in a lesser built form, but in this case the part of the building that contravenes the standard does not cause any adverse impacts to surrounding residential properties and is setback approximately twice the anticipated requirements. Therefore, it can be concluded that the proposal does not result in any unreasonable environmental impacts and it is considered there are sufficient environmental planning grounds to justify the contravention.

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 stratification of the objective of the standard and the objectives of the zone;
- The contravention does not result in any reduced quality of the overall design of the proposal (that is, the generous setbacks, recessed balconies, privacy designs and rooms within the roof to complement the built form and assisting in reducing the scale of the development when viewed from the eastern adjoining property). This ensures that the contravention results in no material adverse impact and is compatible with the surrounding area in terms of bulk and scale;
- The contravention of the standard allows for a development that is consistent with the existent and desired future character of the area;
- The additional height will not have a detrimental visual impact on the surrounding area;
- There are no adverse environmental impacts such as unacceptable additional overshadowing or overlooking as a result of the contravention of the standard;
- The proposal 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;
- 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 will facilitate development of additional quality housing options for seniors in a highly desirable location consistent with a carefully considered and nuanced set of controls in the SCC.

## 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 consistent<sup>2</sup> 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
<b>R2 Zone</b>	
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. Also, the development provides a public park, a renewed Club, improved basement parking and some ground floor neighbourhood shops which will all meet the day to day needs of local residents.
To accommodate development that is compatible with the scale and character of the surrounding residential development.	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.
To retain and enhance residential amenity, including views, solar access, aural and visual privacy, and landscape quality.	As previously discussed, the proposal within the rear 25% of the R2 Zoned site has been skilfully designed such that it 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.  The provision of a public park and substantial landscaping throughout the site will enhance the

<sup>2</sup> 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'

	residential amenity from the existing carpark that currently sits on the site.
To retain the heritage values of particular localities and places.	<p>The proposed variation 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>
To encourage self-sufficiency with respect to energy and food supply.	<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"> <li>▪ Communal vegetable gardens to be used by residents</li> <li>▪ Communal composting</li> <li>▪ Irrigation systems with timers</li> <li>▪ Selected plants to be native or drought resistant</li> <li>▪ Showers will flow rates under 7 litres per minute</li> <li>▪ Minimum 5-star performance rating for tapware</li> <li>▪ Minimum 4-star performance rating for toilers</li> <li>▪ Metering and monitoring of major water uses</li> </ul> <p>Energy</p>

	<ul style="list-style-type: none"> <li>▪ Windows and doors with large opening sashes allowing natural ventilation as well as covered and generously sized balconies to provide shade</li> <li>▪ Minimum R1.0 insulation to the external envelope</li> <li>▪ Central gas fired hot water plant</li> <li>▪ LED lighting Throughout</li> <li>▪ 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</li> <li>▪ The uses of sensors and timers for common area lighting</li> </ul> <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 zones 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 objective 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 objective 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 consent authority can be satisfied to the above and that the development achieves the objective of the development standard and is consistent with the objectives of R2 Low Density Residential Zone notwithstanding non-compliance with Clause 40(4)(c) of the SEPP (Housing for Seniors or People with a Disability) 2004 standard and is therefore in the public interest.

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.