



## **Clause 4.6 Variation Request**

Floor Space Ratio (Clause  
4.4) Willoughby LEP 2012




**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 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.

Therefore, this is a request prepared in accordance with Clause 4.6 of the Willoughby Local Environmental Plan 2012 to support a development application submitted to Willoughby Council for a consolidated development comprising of a registered club fronting Penshurst Street, 102 seniors independent living units (ILUs) accommodated within 3 (three) new buildings with the highest building in the centre of the site and graduating down to the boundaries, a seniors residential aged care facility (RACF) building with 45 beds, a residential flat building (RFB) comprised of 24 units with street level neighbourhood shops fronting Penshurst Street, basement car parking and publicly accessible open space fronting Crabbes Avenue at 26 Crabbes Avenue and 247-255 Penshurst Street (“the site”). A large portion of the consolidated site is the existing Willoughby Legion Ex- Services Club (also known as “Club Willoughby”).

The purpose of this Clause 4.6 variation request is to address a variation to *Clause 4.4 Floor Space Ratio* under the Willoughby Local Environmental Plan 2012 under the R3 zone.

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).

<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.

As the following request demonstrates, 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 both the R3 Medium Density Residential zone and the development standard.

### 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 the Willoughby Local Environmental Plan 2012 (WLEP).

### 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 proposed residential flat building (RFB) with neighbourhood shops at street level pursuant to the WLEP is located within the R3 Medium Density Residential zone only.

The majority of the broader consolidated 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. This Clause 4.6 request only relates to the contravention of floor space ratio standard for the land zoned R3. This area is outlined in blue in Figure 1 and Figure 2 below.

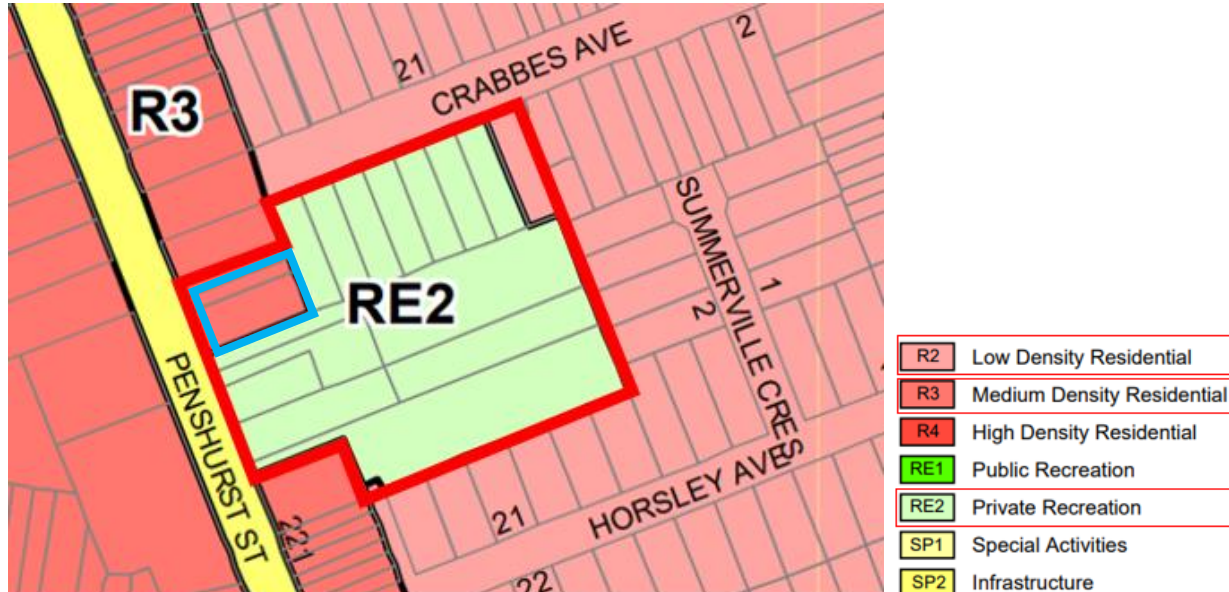


Figure 1: Extract of Land Zoning Map, consolidated site outlined in red. The part of the site subject of this cl.4.6 outlined in blue (Source: NSW Legislation) This land comprises all of the land within Lot 100 DP 858335 and Lots A and B DP 23465





Figure 2: Extract of Master Plan demonstrating location of RFB building in the R3 zone, outlined blue, relative to the consolidated development (Source: Dickson Rothschild)

### 1.3. What are the Objectives of the zones?

The objectives of the R3 zone are:

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium 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 allow for increased residential density in accessible locations, while minimising the potential for adverse impacts of such increased density on the efficiency and safety of the road network.
- To encourage innovative design in providing a comfortable and sustainable living environment that also has regard to solar access, privacy, noise, views, vehicular access, parking and landscaping.

#### 1.4. What is the development standard being varied?

The subject development standard is specified under *Clause 4.4 Floor space ratio* of the WLEP. This clause applies to specific land in a residential zone to which a maximum floor space ratio of 0.9:1 applies as shown on the 'Floor Space Ratio Map.' Refer to Figure 3 below.

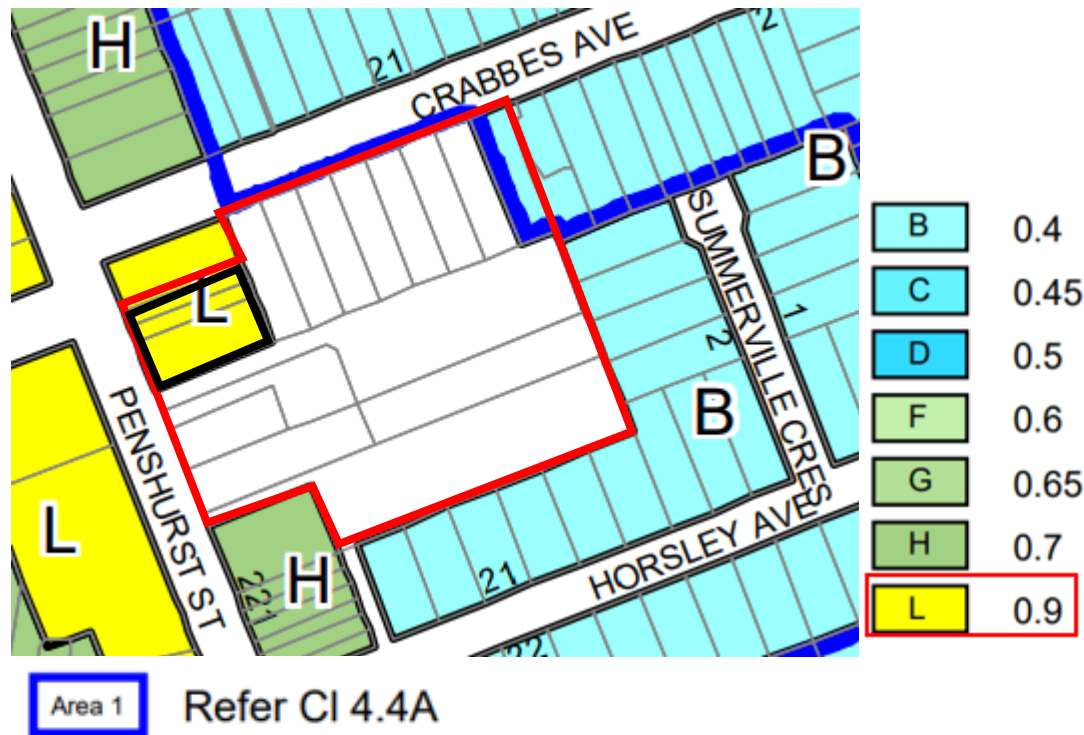


Figure 3: Extract of floor space ratio map, relevant area of the site outlined black. Broader consolidated site outlined red (Source: NSW Legislation). This land comprises all of the land within Lot 100 DP 858335 and Lots A and B DP 23465

The area outlined in blue in Figure 1 and the area outlined in black in Figure 3 are the same (being all of the land within Lot 100 DP 858335 and Lots A and B DP 23465). This is the 'site area' for the purposes of applying the 0.9:1 FSR control. This reflects the decision of the Land and Environment Court in *Mulpha Norwest Pty Ltd v The Hills Shire Council (No 2)* [2020] NSWLEC 7. In this matter the Court determined the following:

- The words of clause 4.5 must be read in context having regard to this unusual situation in which the actual site area of the development extends beyond the land shown in the FSR map (at [47] at [57]).
- The controlling words in a similar clause was 'land', not 'site' as defined in clause 4.5 (at [62]).
- Where the site area extends beyond land the subject of one FSR control into another — so as not to infringe the operative provision in the FSR for the land — it is necessary to carry out separate FSR calculations for each part of the site area. Otherwise, a breach of the operative provision will occur if the GFA on that land shown in the FSR map exceeds the permitted amount (at [45], [57] and [63])



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

The relevant objectives of Clause 4.4 of the WLEP are:

- (1) *The objectives of this clause are as follows:*
- (a) *to limit the intensity of development to which the controls apply so that it will be carried out in accordance with the environmental capacity of the land and the zone objectives for the land,*
  - (b) *to limit traffic generation as a result of that development,*
  - (c) *to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
  - (d) *to manage the bulk and scale of that development to suit the land use purpose and objectives of the zone,*
  - (e) *to permit higher density development at transport nodal points,*
  - (f) *to allow growth for a mix of retail, business and commercial purposes consistent with Chatswood's sub-regional retail and business service, employment, entertainment and cultural roles while conserving the compactness of the city centre of Chatswood,*
  - (g) *to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood,*
  - (h) *to provide functional and accessible open spaces with good sunlight access during key usage times and provide for passive and active enjoyment by workers, residents and visitors to the city centre of Chatswood,*
  - (i) *to achieve transitions in building scale and density from the higher intensity business and retail centres to surrounding residential areas,*
  - (j) *to encourage the consolidation of certain land for redevelopment,*
  - (k) *to encourage the provision of community facilities and affordable housing and the conservation of heritage items by permitting additional gross floor area for these land uses.*

## 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.

## 2. EXTENT OF VARIATION

The site area has a maximum FSR standard of 0.9:1 as specified under Clause 4.4 of the Willoughby Local Environmental Plan 2012 (WLEP) as shown in Figure 3.

As demonstrated on the plans prepared by Hycorp in association with Amglen, the proposed development has a maximum FSR of 2.48:1. Subsequently the development contravenes the 0.9:1 FSR control by 1.58:1 (i.e. 175% variation).

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

It should be noted that the size of the contravention is not, in itself, a material consideration as to whether the contravention should be allowed.

Clause 4.6 of the WLEP is similar to the long-standing *State Environmental Planning Policy No 1—Development Standards* (SEPP 1). From its earliest days it was established that SEPP 1 may be applied to vary development standards even when the variation could not be regarded as minor: *Michael Projects v Randwick Municipal Council* (1982) 46 LGRA 410, 415).

The Court of Appeal considered the issue in *Legal and General Life v North Sydney Municipal Council* (1990) 69 LGRA 201. In that matter North Sydney Council had approved a SEPP 1 objection and the decision was subject to third party legal challenge.

The applicable floor space ratio control was 3.5:1, but — as a consequence of upholding the SEPP 1 objection — the approved floor space ratio was 15:1 (a variation to floor space of 329 per cent). The applicable height control was five storeys whereas the approved height was 17 storeys (a variation of 240 per cent). The Court approved the following statement by the then Chief Judge of the Land and Environment Court (in *Legal and General Life v North Sydney Council* (1989) 68 LGRA 192, 203):

*The discretion vested in councils under SEPP No 1 is wide and, subject to limitations found in the instrument itself and its relation to the Environmental Planning and Assessment Act 1979, is unconfined.*

The Court upheld the validity of the Council's decision.

Clause 4.6 of LEP is in similar terms to SEPP 1 in this respect. Relevantly, like SEPP 1, there are no provisions that make necessary for a consent authority to decide whether the variation is minor. This makes the Court of Appeal's decision equally applicable to clause 4.6. This means that there is no constraint on the degree to which a consent authority may depart from a numerical standard.

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 the chief judge of the Land and Environment Court affirmed that non-compliant development the subject of a clause 4.6 request will, by definition, not reflect the height or scale envisaged by the planning controls for new development for the site. This is, therefore, not a valid reason that a clause 4.6 request should be refused (at [47]).

It is not necessary to consider case studies in order to address the above issue, as each case ultimately turns on its own facts. However, decisions of the Land and Environment Court are informative, as they demonstrate how the flexibility offered by clause 4.6 works in practice. Some examples are as follows:

- In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003 the Court granted a development consent for a three storey shop top housing development in Woolloomooloo. In this decision, the Court approved a floor space ratio variation of 187 per cent.
- In *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583 the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75 per cent (2.63:1 compared to the permitted 1.5:1).
- In *Moskovich v Waverley Council* [2016] NSWLEC 1015 the Land and Environment Court approved a residential flat building in Bondi with a floor space ratio of 1.5:1. The development standard was 0.9:1. The exceedance was around 65 per cent.
- In *Edmondson Grange Pty Ltd v Liverpool City Council* [2020] NSWLEC 1594 the Court granted a development consent for three (3) x residential flat buildings. In this decision, the Court approved a floor space ratio variation of 59 per cent (from 0.75:1 to 1.19:1).
- In *Landco (NSW) Pty Ltd v Camden Council* [2018] NSWLEC 1252 the Land and Environment Court granted development consent for a land subdivision with clause 4.6 variations of between 47-51 per cent on the minimum 450m<sup>2</sup> lot size (allowing lots sizes ranging from 220 to 240m<sup>2</sup>).
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 the Court granted development consent to a six-storey shop top housing development with a floor space ratio exceedance of 42 per cent (3.54:1 compared to the permitted 2.5:1).

- In *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555 the Court granted development consent for a three-storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27 per cent (1.27:1 compared to the permitted 1.0:1).

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

#### **3.1. Achieves the objectives of the standard**

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.

*Table 1: Achievement of Development Standard Objectives.*

Objective	Discussion
<i>(a) to limit the intensity of development to which the controls apply so that it will be carried out in accordance with the environmental capacity of the land and the</i>	<p>The subject site is a site in transition from the current controls and anticipated uses. The environmental capacity of the site when considered in isolation as compared to being integrated with the adjoining land for a comprehensive redevelopment changes the anticipated intensity and capacity of the individual site.</p> <p>In this instance the RFB is part of a consolidated development across 17 allotments, with the overall scheme providing generous setbacks, a park available to the general public and mixed housing needs to cater for seniors and other demographics.</p> <p>The Site Compatibility Certificate (SCC) to the adjoining land states that land has capacity for a greater density. Accordingly, by integrating 247-255 Penshurst Street into that consolidated site, likewise increases the capacity of that site.</p>

Objective	Discussion
zone objectives for the land,	<p>So, despite the contravention of the standard the proposed RFB with neighbourhood shops at street level will be of compatible scale and mass with the future use of the land. In this regard the 'land' is the land in a planning sense (rather than 'land' arbitrarily defined by cadastral boundaries or line on FSR maps).</p> <p>The contravention in floorspace primarily occurs due to the building being sited to the rear boundary, which would not have been the anticipated design outcome for this site in its current configuration. The particular circumstance of this development enables that the rear of the RFB can be designed much closer to the rear boundary, as the site will be consolidated with the property to the rear providing an integrated development. The rear elevation faces onto the proposed public park as part of this consolidated design. This will be landscaped and provides an extensive separation between the proposed RFB and the eastern buildings within the site. Thus, a compliant floor space does not need to be relied upon to provide separation between this building and others to the rear. (Refer to Figure 4 below)</p> <div style="display: flex; justify-content: space-around;">  </div> <p>Figure 4: Large separation distance between the rear of the RFB and the eastern buildings. Diagram to left shows the ground floor, diagram to the right shows the upper levels. (Source: Heycorp/Anglen)</p> <p>The front of the RFB faces Penshurst Street. The proposal is consistent with this objective given it is compatible with the existing urban form in the immediate locality along Penshurst Street. There are examples of developments of similar height, bulk and scale located opposite the site at 260 and 266 Penshurst Street, which is demonstrated in Figure 5 below. These buildings are 4 storeys with approved heights of:</p> <ul style="list-style-type: none"> <li>▪ 260 Penshurst St approved at RL 112.54, and</li> <li>▪ 262 Penshurst St approved at RL 112.2.</li> </ul>





*Figure 5: Existing streetscape across Penshurst Street from the proposed RFB with neighbourhood shops, demonstrating a similar bulk and scale (Source: Googlemaps)*

The site to the south and north are existing shops and the club, the subject of the consolidated allotments, with the existing building currently having a nil side boundary setback. The proposal is no different to the existing. (Refer to Figure 6 below).



*Figure 6: Existing streetscape of subject site showing nil side boundary setbacks. (Source: Googlemaps)*

Due to the unusual circumstance of the RFB being part of the consolidated site for the SCC, the resultant height, bulk and scale is consistent with the environmental capacity of the land, despite the variation in FSR.

#### **Development as a whole**

The overall FSR for the site as a whole is less than the allowable FSR for the SCC and R3 zoned land combined. The total FSR for the site is 1.27:1, whereas the allowable for the whole site is 1.31:1, (when combining the SCC provisions and the maximum R3 zoned provisions).

So, despite the contravention of the standard, the proposal will be of compatible intensity and environmental capacity as anticipated with this objective.




Objective	Discussion
	<p>The development is consistent with — and achieves — this objective, despite the variation.</p>
<p><i>(b) to limit traffic generation as a result of that development,</i></p>	<p>Traffic generation will be limited (by the nature of the land uses, the provision for car parking and the configuration of the site).</p> <p>The portion of the development which contravenes the R3 zone FSR, has two bus stops at the front in Penshurst Street which will provide multiple bus services to Sydney CBD, Chatswood and Bondi for the future users. Further, the parking generated for this RFB and ground floor neighbourhood shops will be accommodated via a basement carpark, where currently ad hoc parking is provided at grade behind the shops and there is some reliance for on-street parking. This will be an improvement to the current situation.</p> <p><b>Development as a whole</b></p> <p>As a consequence of the proposed site consolidation, vehicular access to the site can be achieved via a central entry/exit point in Crabbes Avenue. This minimises any potential conflict of vehicular activities. A Traffic Report prepared by Colston Budd Rogers &amp; Kafes Pty Ltd for the development application has assessed the proposal's impacts of the proposed development on the operation of the surrounding road network. Overall, their assessment finds that “the surrounding road network can accommodate the additional traffic generated by the proposed development...traffic flows on Crabbes Avenue will be consistent with its local road function and there will be minimal impact on the operation of the intersections of Crabbes Avenue with High Street and Penshurst Street.”</p> <p>Furthermore, the proposed site is well serviced by public transport. There are two bus stops immediately in front of the site on Penshurst Street. These bus stops have multiple buses that provide services to the surrounding area and beyond, including the Sydney City CBD, Chatswood, and Bondi Junction and will be available for use by future residents and visitors. The proposed contravention of the FSR standard does not affect the achievement of the objectives of this control.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>
<p><i>(c) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,</i></p>	<p>The amenity of adjoining developments is a result of various factors. These are discussed separately below as views, privacy and visual intrusion and overshadowing impacts.</p> <p>For clarity, it should be noted that the ‘minimisation’ of impacts does not require that no impacts arise (<i>Initial Action Pty Ltd v Woollahra Municipal Council</i> [2018] NSWLEC 118 at [94]).</p> <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 <i>Tenacity Consulting v Warringah Council</i> (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 affected as a consequence of the contravention to the floor space ratio within the proposed RFB within the R3 zone. Views in the surrounding area are generally limited to street level views, with the taller buildings along Penshurst Road having general views of the surrounding district</p>

Objective	Discussion
	<p>including buildings, sky and some tree canopy. The dwellings in Crabbes Street and Horsley Avenue generally have their views oriented north/south, whereas the properties located in Summerville Crescent are not impacted due to the distance from the R3 Zone. The adjoining properties are currently built nil to boundary with views to the street. This will not alter. There are no iconic views experienced from this site, so the impact on view loss is considered to be negligible to minor and is minimised.</p> <p><b>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. 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, of some 40m.</p> <p>Thus, despite the variation to the FSR, the design achieves minimal disruption to views.</p> <p><u>Privacy &amp; Visual Intrusion</u></p> <p>The proposed RFB will be located over 20m from the units opposite the site at 262 Penshurst Street. As such sufficient separation distance is proposed and there would be no privacy impacts or visual intrusion as a result of the contravention to this standard.</p> <p>At the rear of the proposed RFB, there will be a new civic space in the form of a landscaped park, providing ample separation distance between the proposed RFB and the western elevations of the ILU building Blocks B and C. The distance would be over 40m, therefore there will be no loss of privacy to the future residents of the development. (Refer to Figure 4 above).</p> <p>In relation to the adjoining building immediately to the north of the site at 259 Penshurst Street, at lower levels the proposed RFB would abut the existing building on the boundary. At higher levels the proposed RFB would feature no windows in the northern elevation, ensuring privacy for the building and any future development on the site should it be redeveloped in future.</p> <p><b>Development as a whole</b></p> <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 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. The balconies and units are oriented away from the adjoining lower residential zoned lands, and privacy screens or planter boxes are used to aid in reducing privacy impacts.</p>

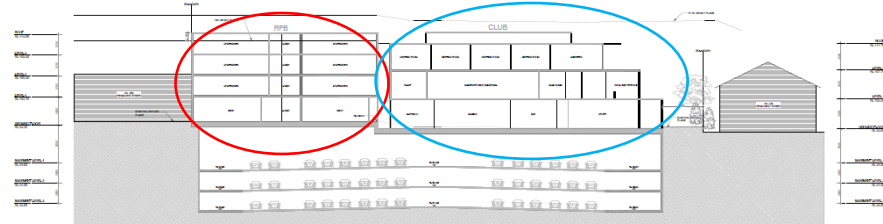

Objective	Discussion
	<p>The proposal does not impact on neighbouring properties in terms of loss of privacy or visual intrusion.</p> <p><u>Overshadowing</u></p> <p>The proposed contravention to the standard will not result in any additional overshadowing impacts to neighbouring or adjoining properties, as the club is located directly south, Penshurst Street is located to the west and the adjoining site at 259 Penshurst Street is located to the north. Refer to the shadow diagrams extracted below, which show that even with the contravention in floor space ratio the shadow does not start to impact on the proposed park until 2pm midwinter, with the shadow cast at 3pm still being minor. (Refer to Figure 7 and Figure 8 below).</p>



Figure 7: Extract of shadow diagrams. Proposed RFB circled red. Arrow in the direction of North (Source: Hycorp/Amglen)

Objective	Discussion
	 <p>1:00PM - JUNE 21<sup>st</sup>      2:00PM - JUNE 21<sup>st</sup></p> <p>3:00PM - JUNE 21<sup>st</sup></p> <p>Figure 8: Extract of shadow diagrams. Proposed RFB circled red. Arrow in the direction of North (Source: Hyecorp/Amglen)</p> <p><b>Development as a whole</b></p> <p>The design of the overall development results in minimal overshadowing on adjoining premises due to the stepped nature of the buildings. The highest building 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.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>
(d) to manage the bulk and scale of that	<p>The proposed contravention in floor space maintains (and manages) a building form to Penshurst Street that is of similar bulk and scale anticipated within the uses permitted within the zone. The proposal provides for ground floor level neighbourhood shops with</p>



Objective	Discussion
development to suit the land use purpose and objectives of the zone,	<p>the upper levels being residential units, consistent with the permissible uses within the zone.</p> <p>The proposed RFB building forms part of the Penshurst Street streetscape. The proposed RFB will be a maximum of 4 storeys in height and will be immediately adjacent to the new registered club building which is proposed to be similar in scale. As such the proposed RFB will be a similar height to the adjacent new club and appearing in harmony with the bulk and scale of the immediately adjacent building, as shown in Figure 9 and Figure 10 below, despite the contravention of the standard.</p>  <p>Figure 9: Extract of Section G demonstrating the proposed RFB (circled red) will fit in with the scale of the immediately adjacent new club (circled blue) (Source: Hyecorp/Amglen)</p>  <p>Figure 10: Extract of CGI of the proposed development fronting Penshurst Street. The RFB shown to the left-hand side of the image circled red and the new club circled blue on the right-hand side of the image (Source: Hyecorp/Amglen)</p> <p>On the western side of Penshurst Street are existing residential flat buildings of up to five (5) storeys in height. The area surrounding the site is in a state of transition and the proposal seeks to maintain a similar built form of the existing and recently approved and constructed buildings in the surrounding locality and along Penshurst Street in particular. In particular, number 260 Penshurst Street, across the road from the subject site, was recently approved with a FSR exceeding the 0.9:1. (Refer to Figure 11 below). This subject proposed RFB will be in keeping with the bulk and scale of these buildings and in harmony with the streetscape along Penshurst street, despite the contravention of the development standard. Figure 11 and Figure 12 show the existing buildings</p>

Objective	Discussion
	<p>located opposite the site on Penshurst Street, of similar scale and bulk to that proposed.</p> <div data-bbox="412 512 1219 978" data-label="Image">  </div> <p><i>Figure 11: Photograph of existing RFB opposite the site at 260 Penshurst Street (Source: City Plan)</i></p> <div data-bbox="412 1110 1219 1556" data-label="Image">  </div> <p><i>Figure 12: Photograph of existing RFB opposite the site at 262 Penshurst Street (Source: City Plan)</i></p> <p>The proposed RFB with neighbourhood shops at street level will fit in seamlessly with the scale of the streetscape along Penshurst Street, appearing in harmony with the immediately surrounding buildings. It is considered the variation of the standard is consistent with the objective.</p> <p>Immediately to the north on Penshurst Street, adjoining the site where the RFB is proposed, is an existing two (2) storey building at 259 Penshurst Street. This building is currently in use as an 'Armenian Cultural Centre' and there would be zero setbacks between the proposed RFB and this building, as is currently the existing situation</p>

Objective	Discussion
	<p>between this building and the existing adjoining commercial building on the subject site. See Figure 13 and Figure 14.</p>  <p>Figure 13: Photograph of the existing two storey building at 259 Penshurst Street, circled blue. (Source: Google maps)</p>  <p>Figure 14: Photograph of the existing two storey building at 259 Penshurst Street, circled blue, and the existing buildings where the RFB is proposed, circled red. (Source: Google maps)</p> <p>This building is also within the R3 zone and is therefore capable of being developed for a number of land uses permitted with consent in the R3 zone, including as a RFB to a maximum height of 12m pursuant to the WLEP. It is anticipated that access to that site would be from Crabbes Avenue, and it would more than likely maintain a similar scale to the existing building with additional levels and nil rear setback. As such it is anticipated this site will develop to the same bulk and scale as is proposed in this subject application.</p>

Objective	Discussion
	<p>Consequently, 259 Penshurst Street is not isolated by this proposal as it can be developed within the R3 controls in a similar manner, albeit probably utilising design features such as a car lift for vehicle parking.</p> <p><b>Development as a whole</b></p> <p>The development is consistent with the approved SCC for the site. The higher buildings are situated in the centre of the site with Building A stepped so that it presents as a 5 storey building on all elevations. 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 FSR over the site is less than that permissible with the SCC, and also less than that permissible over the whole site.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>
<i>(e) to permit higher density development at transport nodal points,</i>	<p>The variation to FSR on the R3 zoned land still achieves consistency with this objective. The RFB and ground floor neighbourhood shops will have direct access to public transport at the Penshurst Street frontage.</p> <p><b>Development as a whole</b></p> <p>As discussed earlier, the proposed site is well serviced by public transport. There are two bus stops immediately in front of the site on Penshurst Street. These bus stops have multiple buses that provide services to the surrounding area and beyond, including the Sydney City CBD, Chatswood, and Bondi Junction and will be available for use by future residents and visitors. The Club will also have a courtesy bus which will provide safe transport to patrons.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>
<i>(f) to allow growth for a mix of retail, business and commercial purposes consistent with Chatswood's sub-regional retail and business service, employment, entertainment and cultural roles while conserving the compactness of the city centre of Chatswood,</i>	<p>N/A. The subject site is not located within the city centre of Chatswood.</p>



Objective	Discussion
<i>(g) to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood,</i>	N/A. The subject site is not located within the city centre of Chatswood.
<i>(h) to provide functional and accessible open spaces with good sunlight access during key usage times and provide for passive and active enjoyment by workers, residents and visitors to the city centre of Chatswood,</i>	N/A. The subject site is not located within the city centre of Chatswood.
<i>(i) to achieve transitions in building scale and density from the higher intensity business and retail centres to surrounding residential areas,</i>	<p>The contravention in this standard still maintains a transition in building scale and density. Residential development fronting Penshurst Street ranges up to five (5) storeys in height. Density and height increase substantially towards Chatswood Centre.</p> <p>The development will be consistent with the existing character of the area, which is transitioning to higher density residential development along Penshurst Street with the construction of recent developments, in particular those opposite the site at 260 and 262 Penshurst Street. The proposed RFB will feature neighbourhood shops at street level and the scale of the development is consistent with existing buildings within the immediate area, along Penshurst Street, and the adjoining proposed new club.</p> <p>In relation to the adjoining building at 259 Penshurst Street, the existing building on this adjoining site is two (2) storeys and it is envisaged this site would be developed within</p>



Objective	Discussion
	<p>the R3 controls in a similar manner in the future and would add to the transition in building scale and density in the immediate locality.</p> <p><b>Development as a whole</b></p> <p>The consolidated proposed development of the broader site transitions up in height towards the centre of the site, where it is less visible to and from the surrounding area. Lower scale buildings are to be located along the boundaries of the site that adjoin the existing residential properties. The proposed buildings along Penshurst Street maintain the 4-storey built form that has been approved on the western side of Penshurst Street and will be consistent with the anticipated height under the provisions of the SCC for the club.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>
<i>(j) to encourage the consolidation of certain land for redevelopment,</i>	<p>The contravention of the development standard still maintains consistency with this objective. The site of this RFB where the contravention in FSR occurs, form part of a larger consolidated development.</p> <p><b>Development as a whole</b></p> <p>The proposed seniors housing will form part of the wider redevelopment of the former Club Willoughby site. The broader site, discussed in Section 1, will be developed as a consolidated site to provide seniors housing, a new registered club, a public park, underground car parking, landscaping and a residential flat building with neighbourhood shops at street level. The site will reinvigorate the existing club and provide additional public facilities to the immediate area.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>
<i>(k) to encourage the provision of community facilities and affordable housing and the conservation of heritage items by permitting additional gross floor area for these land uses.</i>	<p>The proposed RFB and neighbourhood shops provides for community facilities and can accommodate affordable housing.</p> <p><b>Development as a whole</b></p> <p>The development as a whole will achieve this objective. It provides for a range of housing with the residential flat building, independent living units and a Residential Aged Care Facility. A public park is being provided for the use of the community, and the existing club is being revamped and improved. This, combined with the addition of ground floor neighbourhood shops along Penshurst Street will see the provision of a number of facilities which will benefit the immediate community.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>

#### 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.

The adjacent land (that is to be developed as part of the integrated development) has been the subject of a recent detailed site-specific planning process that supported the SCC (and led to the permissible use of the overall adjacent land site for the otherwise impermissible use of seniors housing). The outcome of this planning process is reflected in Schedule 2 of the SCC.

The ILUs and residential care facility would be developed on the larger site were not (and could not have been) anticipated by the numerical FSR control in the WLEP. The numerical FSR control has been formulated on the basis that there were to be no residential uses on the two neighboring two-sides of the site area (the land zoned RE2). This would have meant, for example, that there would have been no anticipated application of *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development* or the *Apartment Design Guide*.

When the numerical FSR control was formulated there would have been considerable uncertainty as to how the neighboring RE2 land may be re-developed. For example, the RE2 land is zoned for:

- centre-based child care facilities;
- community facilities;
- recreation facilities (indoor) — including buildings for the purposes of commercial squash courts, indoor swimming pools, gymnasiums, table tennis centres, health studios, bowling allies, ice rinks and the like; and
- recreation facilities (outdoor) — including a golf driving range, mini-golf centre, tennis court, paint-ball centre, lawn bowling green, outdoor swimming pool, equestrian centre, skate board ramp, go-kart track, rifle range, water-ski centre or the like.

With this much uncertainty as to any re-development of the RE2 land, it can be assumed that, in carrying out strategic planning, a conservative approach to the numerical FSR was adopted for the site area.

However, the decision to proceed with an integrated development for the whole consolidated site (including the site area) removes that uncertainty. The proposed building form on the adjacent land will be resolved. The new buildings on that adjacent land (other than the club building itself) will generally be in the form and appearance of residential flat buildings.

This creates an opportunity to provide for a gross floor area within the site area that recognizes the broader use of the land and, in doing so, better achieves important planning goals (when compared with a compliant development). These planning goals are as follows:

- The relevant objects of the EP&A Act:
  - Section 1.3(a) —  
*to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources ...*

The provision of additional housing, with greater floor space, is an opportunity to better contribute to the social and economic welfare of the community. This is particularly relevant to this location for the reasons that follow.

Firstly, the site is well serviced by public transport. There are two bus stops immediately in front of the site on Penshurst Street. These bus stops have multiple buses that provide services to the surrounding area and beyond, including the Sydney City CBD, Chatswood, and Bondi Junction.

Secondly, because of the close proximity of the site to the proposed retirement village and ILUs there will be greater provision of an under-supplied form of housing, being compact,

easy-to-maintain residential apartments. This will allow, for example, grandparents to live in close proximity to their children/grandchildren.

Further, the diversity of the local community will be improved through the increased availability of housing better adapted towards single-person households, seniors and families who need more affordable accommodation by providing a range of housing types for single person households who are able to stay in the area close to family (an important social benefit in itself);

To the extent that the dwellings allow seniors who chose to live in the locality to live in closer proximity to other seniors, there is an opportunity for public services (for seniors) to be provided more efficiently (when compared with the alternative of providing such accommodation across a larger, more spread-out, portfolio of single dwelling houses in the locality).

- Section 1.3(b) —

*to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment ...*

Every additional housing opportunity in area that is well-served by public transport is likely to correlate with a reduction, at a metropolitan scale, of car-use. Reduced car use means lower carbon and particulate emissions, reduced traffic congestion and more efficient energy usage. This is reflected in objective 33 of the Greater Sydney Region Plan 'A Metropolis of Three Cities':

*A low-carbon city contributes to net-zero emissions by 2050 and mitigates climate change*

On page 170 of the plan (under this objective) it says:

*Developing the metropolis of three cities and aligning land use with transport planning will help slow emissions growth by planning the location of new homes near public transport, walkways and cycling paths. I*

- Section 1.3(c) —

*to promote the orderly and economic use and development of land ...*

The proposed residential flat building form (as envisaged if the contravention is allowed) represents, in the context of the entire consolidated site, an efficient use of the site area to deliver housing choice in an approach consistent with the intent of the zone and relevant planning controls as they apply.

In the absence of the contravention being allowed, more land would need to be consumed elsewhere, in less appropriate locations, to make up for the housing that is not able to be provided within the overall site.

Further, an opportunity to provide additional meaningful social infrastructure (compact, easy-to-maintain housing suitable for single person households and seniors' households) will be lost.

- Section 1.3(d) —

*to promote the delivery and maintenance of affordable housing...*

'Affordable housing' is defined to include housing for moderate income households (being households with incomes up to 120 per cent of the median household income for Greater Sydney. Such households are more likely to be able to be accommodated in a residential flat building than the single dwelling houses that are already commonplace in the area.

- Section 1.3(g) —

*to promote good design and amenity of the built environment...*

As discussed earlier, the contravention in the FSR standard primarily occurs due to the building being sited boundary to boundary, which is not a usual design outcome, and something not anticipated by the control.

However, in this instance the RFB with street level neighbourhood shops is part of a consolidated development across the broader site consisting of 17 allotments. The overall scheme provides a development that is compatible with the bulk and scale of the area, with generous setbacks, a park available to the general public and mixed housing to cater for seniors and other demographics. As discussed in Section 3, there are no adverse environmental impacts associated with additional overshadowing, view loss or overlooking as a result of the proposed variation of the standard.

As explained (in Section 3 above) the contravention in floorspace primarily occurs due to the building being sited to the rear boundary. When the numerical control was developed, it would have been assumed that the site area would be developed separately from the adjacent land.

The particular circumstance of this consolidated development enables that the rear of the RFB can be designed much closer to the rear boundary, as the site will be form part of an integrated development on a larger site. The rear elevation faces onto the proposed public park as part of this consolidated design. This will be landscaped and provides an extensive separation between the proposed RFB and the eastern buildings within the site. Thus, a compliant floor space does not need to be relied upon to provide separation between this building and others to the rear (section 3 above sets out more detail in this regard, and this detail is relied upon here).

- The relevant aims of the WLEP:
  - Clause 1.2(b) —  
*for sustainability—*
    - (i) *to conserve and enhance, for current and future generations, the ecological integrity, environmental heritage and environmental significance of Willoughby, and*
    - (ii) *to promote an appropriate balance between development and management of the environment, that will be ecologically sustainable, socially equitable and economically viable, and*
    - (iii) *to better manage the risks associated with climate change through mitigation and adaptation, and*
    - (iv) *to reduce resource consumption through the planning and control of land use and development, and*
    - (v) *to reduce potential energy and water consumption and waste materials during the construction, occupation, utilisation and lifecycle of buildings...*

The matters raised in relation to EP&A Act objects section 1.3(a), (b) and (c) are relevant here.

- Clause 1.2(d) and (e) —
  - (d) *for urban design—*
    - (i) *to ensure development embraces the principles of quality urban design, and encourages innovative, high quality architectural design with long-term durability and environmental sustainability, and*
    - (ii) *to promote development that is designed and constructed—*
      - (A) *to enhance or integrate into the natural landform and the existing character of distinctive locations, neighbourhoods and streetscapes, and*
      - (B) *to contribute to the desired future character of the locality concerned, and*

*(iii) to ensure development design contributes positively to, and wherever possible facilitates improvements to, the public domain, and*

*(iv) to preserve, enhance or reinforce specific areas of high visual quality, ridgelines and landmark locations, including significant gateways, views and vistas, and*

*(v) to ensure that development design takes into consideration crime prevention principles,*

*(e) for amenity—*

*(i) to maintain and enhance the existing amenity of the local community, and*

*(ii) to reduce adverse impacts from development on adjoining or nearby residential properties...*

The matters raised in relation to EP&A Act objects section 1.3(g) are relevant here.

- Clause 1.2(f) —

*for housing—*

*(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...*

The matters raised in relation to EP&A Act objects section 1.3(a) and (d) are relevant here.

Essentially, a non-complaint development better responds to the whole-of-site land use planning exercise that has been carried out under the SCC.

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

- The contravention does not detract from the proposed development's satisfaction of the objectives of the standard and the objectives of the zone;
- The contravention of the standard allows for a type and scale of development that is consistent with the existing and desired future character of the area;
- As demonstrated by the shadow diagrams accompanying the DA, the variation of the floor space ratio standard does not result in any overshadowing impacts to adjoining residential dwellings and will not impact on the availability of solar access to adjoining and nearby neighbours;
- The contravention of the floor space ratio limit does not result in any additional overlooking, loss of privacy for neighbouring properties, or loss of views;
- The additional floor space will not have a detrimental visual impact on the surrounding area;
- The contravention would not result in any 'isolation' of 259 Penshurst Street; and
- The proposal (with its contravention) would result in a better planning outcome than if compliance were to be achieved, as it provides a consolidated development that meets the objectives of the standard.

## **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 is consistent<sup>2</sup> with the objectives of the development standard. The proposal is also consistent with the objectives of the zone as explained in **Table 2** (below).

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'



Table 2: Consistency with R3 Zone Objectives.

Objective	Discussion
<b>R3 Zone</b>	
To provide for the housing needs of the community within a medium density residential environment.	The proposed development will in provide additional housing within the locality, nearby to a range of local services, facilities and amenities.
To provide a variety of housing types within a medium density residential environment.	<p>The development is consistent with this objective as it provides for a selection of independent living units of various sizes for seniors as well as a Residential Aged Care Facility. Further, it provides other residential units in the form of an RFB.</p> <p>The contravention in floor space ratio does not prevent the proposal from complying with this objective.</p>
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	<p>The proposed RFB will include neighbourhood shops at street level and will provide an active frontage to the street. The neighbourhood shops will attract a mix of tenures to support the viability of the area and provide valuable services to help meet the day to day needs of residents in the community.</p> <p>Further to this the development will provide a public park, a renewed Club and improved basement parking which will all meet the day to day needs of local residents.</p>
To accommodate development that is compatible with the scale and character of the surrounding residential development.	As previously discussed, the proposal will result in a development that is compatible with the scale and character of the surrounding residential development by the stepped nature of the height of the buildings, the retention of modest building separations and the provision of landscaping and a public park; and will not render the adjoining site, 259 Penshurst Street, an isolated site.
To allow for increased residential density in accessible locations, while minimising the potential for adverse impacts of such increased density on the efficiency and safety of the road network.	The Traffic Report prepared for the DA by Colston Budd Rogers & Kafes Pty Ltd has assessed the proposal's impacts of the proposed development on the operation of the surrounding road network. Overall, their assessment finds that the surrounding road network can accommodate the additional traffic generated by the proposed development. Traffic flows on Crabbes Avenue will be consistent with its local road function and there will be minimal impact on the operation of the intersections of Crabbes Avenue with High Street and Penshurst Street. Furthermore, the proposal will result in all vehicle parking and associated noises and functions being located underground.

To encourage innovative design in providing a comfortable and sustainable living environment that also has regard to solar access, privacy, noise, views, vehicular access, parking and landscaping.	The proposal represents a high-quality urban design outcome and 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
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As can be seen from **Table 1** and **Table 2**, the proposal is consistent with the objectives of the standard and the objectives of the zone and is therefore 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 assumed objectives of the development standard and is consistent with the objectives of the R3 Medium Density Residential Zone;
- 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 objectives of the development standard and is consistent with the objectives of R3 Medium Density Residential Zone notwithstanding non-compliance with Clause 4.4 – Floor Space Ratio 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.