



## **Clause 4.6 Variation Request**

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




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

Submitted to Willoughby Council

On Behalf of Hyecorp Property Group & Club Willoughby

JANUARY 2021

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#### **4.6 Request – 8m height**

Willoughby Legion Ex-Services Club & 247-255 Penshurst  
Street, Willoughby  
P-16261  
January 2021

## 1. INTRODUCTION

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

Therefore, this Clause 4.6 variation is to address a variation to Clause 40(4)(a), relating to the height of buildings, of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (Seniors SEPP); specifically, “(a) the height of all buildings in the proposed development must be 8 metres or less.” This cl.4.6 variation relates only the residential zones at the site where Seniors Housing is proposed, as such it relates to only the R2 zoned land on the eastern boundary of the consolidated site.

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

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

As the following request demonstrates, by exercising the flexibility afforded by cl 4.6, in the particular circumstances of this application, the variation would be in the public interest because it satisfies the relevant objectives of both the zones 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 *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.

<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.

## 1.2. 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 R2 residential 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. (Refer to Figure 1 and Figure 2 below)

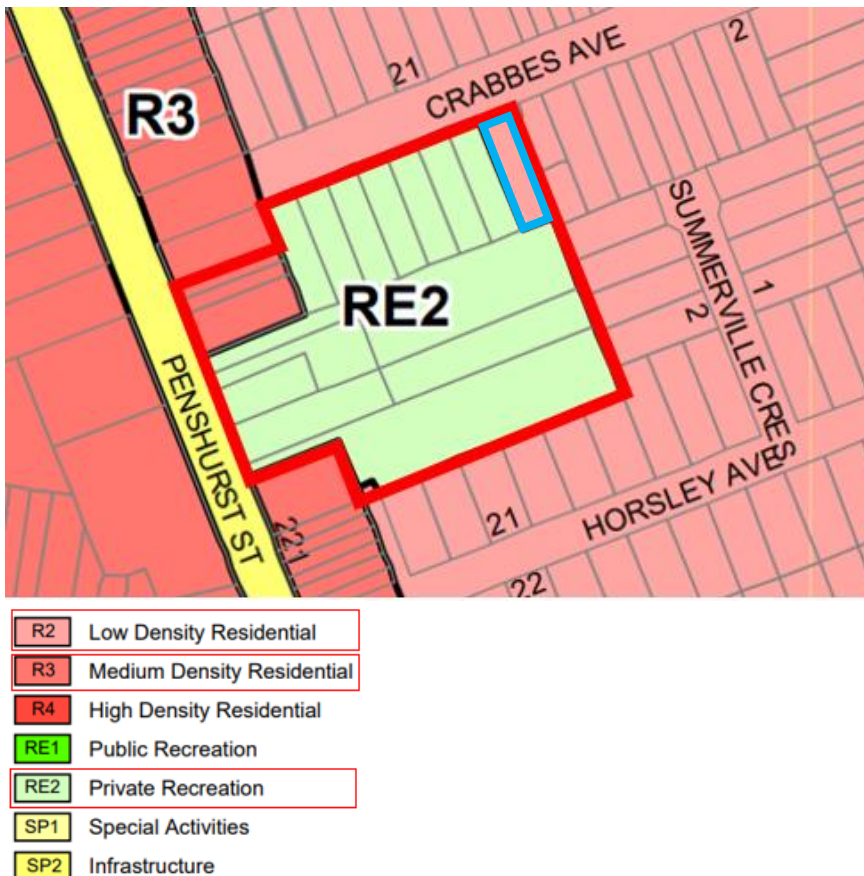


Figure 1: Extract of Land Zoning Map, consolidated site outlined red. The part of the site subject of this cl.4.6 outlined in blue.  
 (Source: NSW Legislation)





Figure 2: Extract of Master Plan demonstrating approximate location of development in the R2 zone, outlined blue, relative to the consolidated development across the site. (Source: Dickson Rothschild)

### 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)(a) 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:*

*(a) the height of all buildings in the proposed development must be 8 metres or less, and*

*Note.*

*Development consent for development for the purposes of seniors housing cannot be refused on the ground of the height of the housing if all of the proposed buildings are 8 metres or less in height. See clauses 48 (a), 49 (a) and 50 (a).*

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

The Seniors SEPP provides no express objective for the height control in Clause 40(4)(a).

In *De Stoop v Ku-ring-gai Council* [2010] NSWLEC 1019 at [60] the Court concluded that the underlying purpose of the standard in cl 40(a) is:

*to provide a development that will be compatible with the adjoining residential area and not create adverse impacts having regard to the desirable elements of the location and character of the area.*

In *Nanevski Pty Limited v Rockdale City Council* [2010] NSWLEC 1220 at [25] and [47] the Court said that the objectives from the Seniors *Living Policy; Urban Design Guidelines for Infill Development* are **(the Guidelines)** are relevant to determining the underlying objectives of the subclauses of cl 40(4) of the Seniors SEPP. This document is referenced in clause 31 of the Seniors SEPP. The relevant objectives of the Guidelines the Court relied on were:

- *to minimise impacts on the privacy and amenity of existing neighbouring dwellings,*
- *to minimise overshadowing of existing dwellings and private open space by new dwellings,*
- *to retain neighbours' views and outlook to existing mature planting and tree canopy,*
- *to reduce the apparent bulk of development and its impact on neighbouring properties,*
- *to provide adequate building separation.*

These decisions were subsequently applied by the Court at *Jigari Pty Ltd v City of Parramatta Council* [2018] NSWLEC 1568 at [86].

On this basis, the clause 4.6 request is prepared on the basis that the objectives of clause 40(4)(a) that must be addressed are as follows:

- *To provide a development that will be compatible with the adjoining residential area and not create adverse impacts having regard to the desirable elements of the location and character of the area;*
- *To minimise impacts on the privacy and amenity of existing neighbouring dwellings,*
- *To minimise overshadowing of existing dwellings and private open space by new dwellings,*
- *To retain neighbours' views and outlook to existing mature planting and tree canopy,*
- *To reduce the apparent bulk of development and its impact on neighbouring properties, and*
- *To provide adequate building separation.*

## 1.6. -To provide adequate building separation. 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 (*Ku-ring-gai Council v Pathways Property Group Pty Ltd* [2018] NSWLEC 73 at [87]-[91]).

## 2. EXTENT OF VARIATION

The maximum allowable height is 8m, pursuant to Clause 40(4)(a) 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.

**ground level** means the level of the site before development is carried out pursuant to this Policy.

As demonstrated in Figure 3, Figure 4 and Figure 5 in the plans prepared by Hyecorp in association with Amglen, portions of the seniors housing proposed within the R2 zoned land are within proposed ILU Blocks B and C. The proposal seeks to provide a maximum height of 9.28m (RL 105.00) to the portion of Block B within the R2 zoned land and a maximum height of 8.81m (RL 103.90) to the portion of Block C within the R2 zoned land above existing ground level, as confirmed by Hyecorp. The contravention occurs at Level 3 only.

Figures 3 to 5 give an understanding of the contravention of the standard.

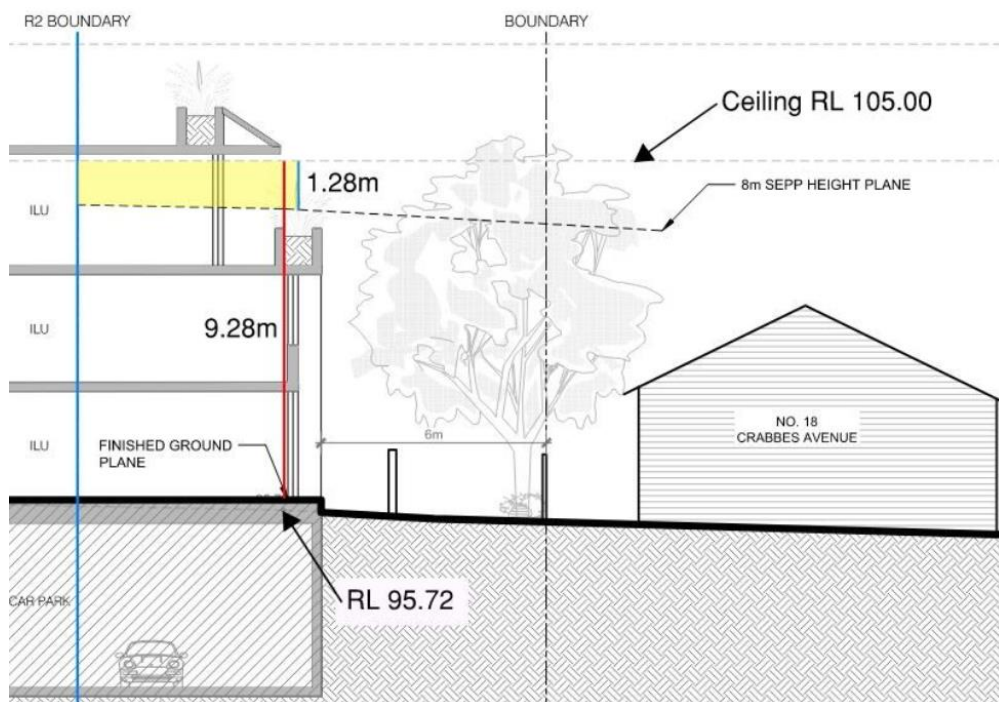
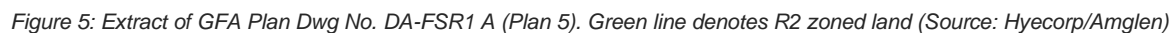
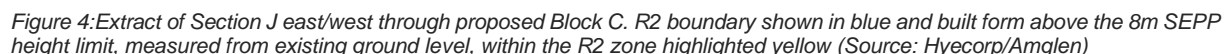


Figure 3: Extract of Section A east/west through proposed Block B. R2 boundary shown on the section as blue and built form above the 8m SEPP height limit, measured from existing ground level, within the R2 zone highlighted yellow. (Source: Hyecorp/Amglen)



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; ...*
  - a. *a maximum floor space ratio of 1.35:1 over the entire site;*
  - 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 B is the building that presents to the northern boundary. The SCC anticipates that this building may present as three storeys.

Block C is the building that presents to the eastern boundary. The SCC anticipates that this building may present as two storeys.

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 also forms part of this clause 4.6 request (and is relied upon in relation to the proposal's strict compliance with the requirements of the SCC).

### **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**


As noted in Section 1.5 earlier, Court decisions have concluded the objectives from the *Seniors Living Policy; Urban Design Guidelines for Infill Development* are **(the Guidelines)** are relevant to determining the underlying objectives of the subclauses of cl 40(4) of the Seniors SEPP.


Table 1 below discusses whether the relevant objectives are achieved, notwithstanding non-compliance with the standard:

*Table 1: Achievement of Development Standard Objectives.*



Objective	Discussion
<i>To provide a development that will be compatible with the adjoining</i>	The contravention of the standard occurs within the R2 zoned land which is located within the north eastern part of the consolidated site. The extent of contravention extends for a width of 3.67m fronting Crabbes Avenue and for a



Objective	Discussion
residential area and not create adverse impacts having regard to the desirable elements of the location and character of the area;	<p>length of approximately 15.7m along the adjoining eastern boundary, at Level 3 only at Block B.</p> <p>The future character of the area may, in part, be identified through the relevant planning controls. While the planning controls typically comprise the LEP and the associated development control plan, in this case the planning controls also include paragraph 2 of the schedule 2 of the SCC (These identify requirements that must be satisfied for a development to be compatible with the surrounding land uses under clause 25(7) of the Seniors SEPP.)</p> <p>. “Compatibility” as established in <i>Project Ventrue Developments Pty Ltd v Pittwater Council [2005] NSWLEC191 at 22-31</i>, does not mean “sameness” but rather “capable of existing together in harmony”.</p> <p>Further to this, the Desired Future Character of a neighbourhood or area can be shaped not only by the provisions of the LEP, including the development standards themselves, but also other factors including approved development that contravenes the development standard. (<i>Woollahra Municipal Council v SJD DB2 Pty Ltd [2020] NSWLEC 115 at 63</i>).</p> <p>The contravention in height for Block C is maximum 0.81m and extends for a length of approximately 7.3m on the eastern boundary, at the upper level only and within the roof of the building.</p> <p>Buildings on the opposite side of Crabbes Avenue are a mixture of one and two-storey dwellings. The adjoining properties to the east at Numbers 18 and 18A both currently have single storey dwellings. However, Crabbes Avenue has a maximum height limit of 8.5m under the WLEP and as such, both sites could achieve two-storey buildings with pitched roofs under the R2 zone to within 0.9m of the common side boundary with the subject site.</p> <p>Fronting Crabbes Avenue the proposed ILU building Block B will present as two storeys to the street, with a recessed third level, and the design has emphasised the two storey element by the use of colours and materials. (Refer to Figure 6 below). The proposed seniors housing within Block B within the R2 zone will be between two to three storeys in height, and setback from the boundary by 6m.</p>  <p>Figure 6: Extract of north elevation showing transition in heights to two storeys. Approx. R2 zone boundary yellow. Approx. portion of the building above the contravention shaded green. Approx. two storey dwelling on adjacent site shown blue. (Source: Dickson Rothschild)</p> <p>To the eastern side boundary within the R2 zoned land where the contravention in height occurs to the third level only of Block B, this level is setback further than the lower two levels at 8.6m from the boundary. Refer to Figure 3 and Figure 10</p> <p>The result for Block B is a building that is compatible in bulk and scale with the existing and expected future character of the area, as it transitions to a lower scale at the closest point with the eastern adjoining neighbours.</p> <p>Block C at the rear of the R2 zoned portion of the subject site is designed to appear as a two-storey building with the third level containing rooms in the roof</p>

Objective	Discussion
	<p>facing into the centre of the subject site. No windows will face towards the adjoining residential dwellings. The contravention in height for this building is less than in Block B, being maximum 0.81m.</p> <p>The building will appear as a two-storey building when viewed from the eastern boundary, not dissimilar to surrounding residential dwellings. (Refer to Figure 7 below)</p>  <p><i>Figure 7: 2 storey built form of Building C facing the eastern boundary, the blue depicts the portion within the R2 zone. (Source: Hyecorp/Amglen)</i></p> <p>The WDCP requires a 6m rear setback for this site, (the rear being the southern boundary), to ensure low scale residential development has sufficient landscaping and open space and to minimize overshadowing and provide adequate separation between buildings. Although the proposed Block C extends within the rear portion of the R2 zone, Lot 11 DP6291, it is proposed to have a 6m setback to the adjoining common boundary with Numbers 18 and 18A Crabbes Avenue. This will allow for a variety of deep soil landscaping, including mature trees and will be an improvement from the existing club carpark that is currently on the site (Refer to Figure 4 above). Further, Number 18 Crabbes currently sits 5.76m from its rear boundary and Number 18A Crabbes currently is located 5.6m from its rear boundary. Thus, the bulk and scale of the proposed Building C will be compatible with the existing and future character of the area.</p> <p>The stepping down in height of the buildings towards the boundaries reduces the bulk and scale while also transitioning the bulk and form to the existing lower scale residential areas to the north and east.</p> <p><b>Development as a whole</b></p> <p>The development satisfies the approved SCC for the site. The buildings are designed so that the highest part is situated in the centre of the site, with Building A stepped so that it presents as a 5 storey building. The buildings taper down to be small-scale, providing a maximum 3 storeys along Crabbes Avenue and 2 storeys along the eastern and southern boundaries. The buildings along the northern, eastern and southern boundaries provide pitched roofs and large setbacks to allow for extensive landscaped areas.</p> <p>The FSR of the development as a whole based on the whole site is 1.27:1 which is less than that permissible with the allowable SCC and R3 zoned land combined (maximum 1.31:1). It is also less than what is permitted under the SCC itself (maximum 1.35:1).</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>
<p><i>To minimise impacts on the privacy and amenity of existing</i></p>	<p>The proposed setbacks of 8.6m to Block B and 9.7m to Block C to where the variation occurs within the R2 zoned land; together with the considered design of the proposed buildings ensures there would not be an unreasonable impact in terms of privacy as a result of the scheme. The Willoughby DCP 2016 allows a minimum side setback of 0.9m for walls 1 – 2 storeys in height, and a</p>



Objective	Discussion
neighbouring dwellings,	<p>minimum of 1.5m for walls in excess of 2 storeys. Blocks B and C have larger setbacks of 8.6m and 9.7m. This is demonstrated in Figure 8 below.</p> <p>Furthermore, the contravention occurs only to the uppermost parts of Level 3 in Block B and within the roof area of Block C within the R2 zone.</p>  <p>Figure 8: Extract of Plan 5 showing the setbacks to the boundaries with 18 and 18A Crabbes Avenue. Area of contravention highlighted yellow. (Source: Hyecorp/AmglenCity Plan)</p> <p>Block B is proposed to be setback approximately 8.6m from the adjoining eastern boundary where the variation occurs at Level 3 and has its balconies oriented north and south away from the adjoining properties as 18 and 18A Crabbes Avenue. While there would be balcony area connecting the two main balcony spaces, this would have a limited depth (approximately 1.2m) and as such is unlikely to be used to the same extent as the balconies to the north and south which are larger in area (circled blue in Figure 9). Additionally, the third-floor level has been recessed to reduce the angle of overlooking, and windows at this level would be setback 8.6m from the common boundary, much greater than a standard development within the R2 zone. (Refer to Figure 10 below)</p>  <p>Figure 9: Extract of Level 3 showing main balcony areas oriented north and south away from adjoining dwellings (Source: Hyecorp/Amglen)</p>

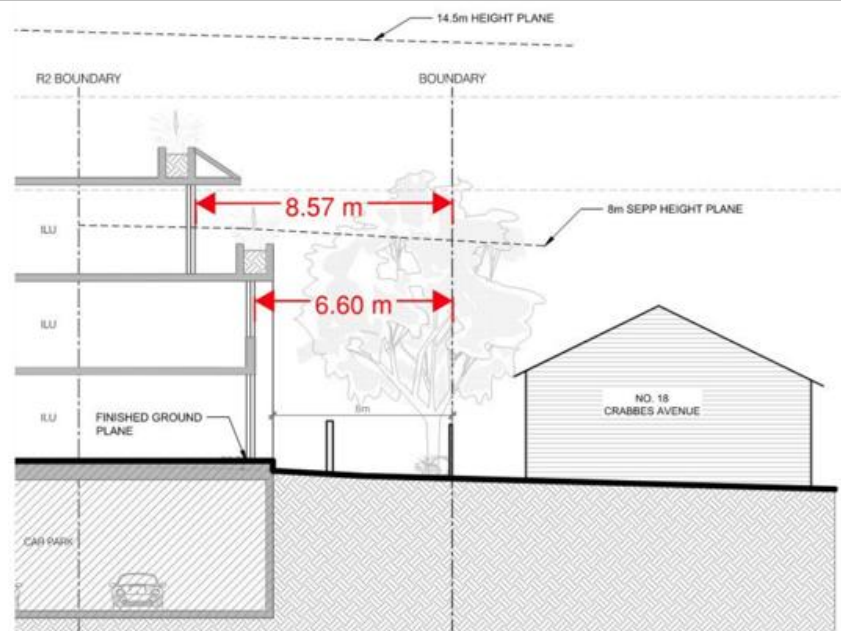


Figure 10: Extract of Section A for Block B showing setback from adjoining dwelling 18 Crabbes Avenue. (Source: Hycorp/Amglen)

Block C is proposed to be setback 9.7m from the adjoining eastern boundary where the contravention occurs at the upper level. The upper level has rooms within the roof with their principal living areas oriented to the west. No windows are proposed in this roof, so there would be no overlooking as a result of this area of the contravention within Block C.

The substantial setbacks, together with landscaping to the boundaries, will ensure the proposal does not result in sightlines that would result in a loss of privacy to these adjoining dwellings on the eastern boundary. (Refer to Figure 11 below).

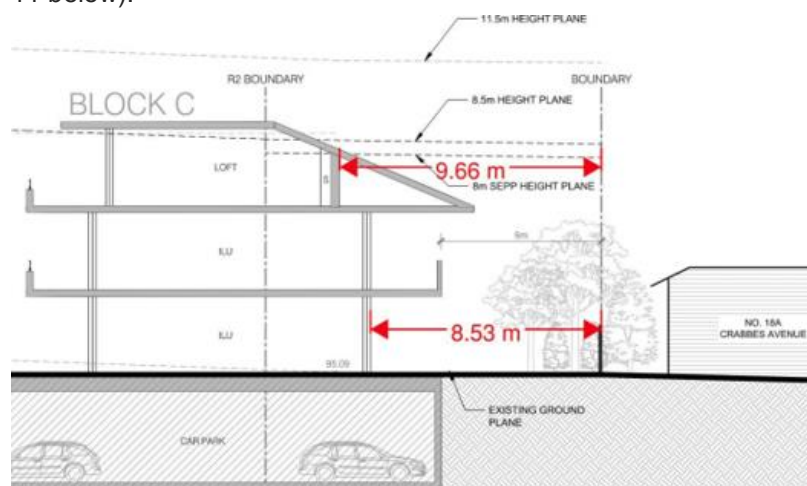





Figure 11: Section showing the setbacks and roof design ensuring the eastern elevation of Block C will appear as a 2 storey building and result in minimal privacy impacts. (Source: Hycorp/Amglen)

Fronting Crabbes Avenue, the proposed units to the northern boundary within ILU building Block B will be located at a distance of approximately 31.4m from the front elevations of dwellings on the opposite side of the road. The generous

Objective	Discussion
	<p>setbacks and design of the building will ensure there are no unreasonable amenity impact to dwellings opposite in Crabbes Avenue, in terms of privacy.</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 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. 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> <p>The proposal does not impact on neighbouring properties in terms of loss of privacy or visual intrusion.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>
<i>To minimise overshadowing of existing dwellings and private open space by new dwellings,</i>	<p>Hyecorp in association with Amglen have prepared detailed shadow diagrams for the proposal. These demonstrate the proposed seniors housing development above the 8m height standard within the R2 zoned land would protect the amenity of neighbouring properties in relation to sunlight, despite the noncompliance with the height standard.</p> <p>The closest adjoining properties along the north, east and south boundaries 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 within the R2 zoned land that contravenes the height standard does not overshadow any rear yard to the adjoining dwellings at 18 and 18A Crabbes Avenue until approximately 3pm at which time the shadow impact is only partial. Refer to Figure 12 and Figure 13, extracts of the shadow diagrams provided below.</p>

Objective	Discussion
	 <p>Figure 12: Extracts of shadow diagrams 12-1pm mid-winter. Approximate location of development within the R2 zone circled red. Black arrow in the direction of North (Source: Hyecorp/Amglen)</p>  <p>Figure 13: Extracts of shadow diagrams 2-3pm mid-winter. Approximate location of development within the R2 zone circled red. Black 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 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.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>
To retain neighbours' views and outlook to existing mature	<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</p>

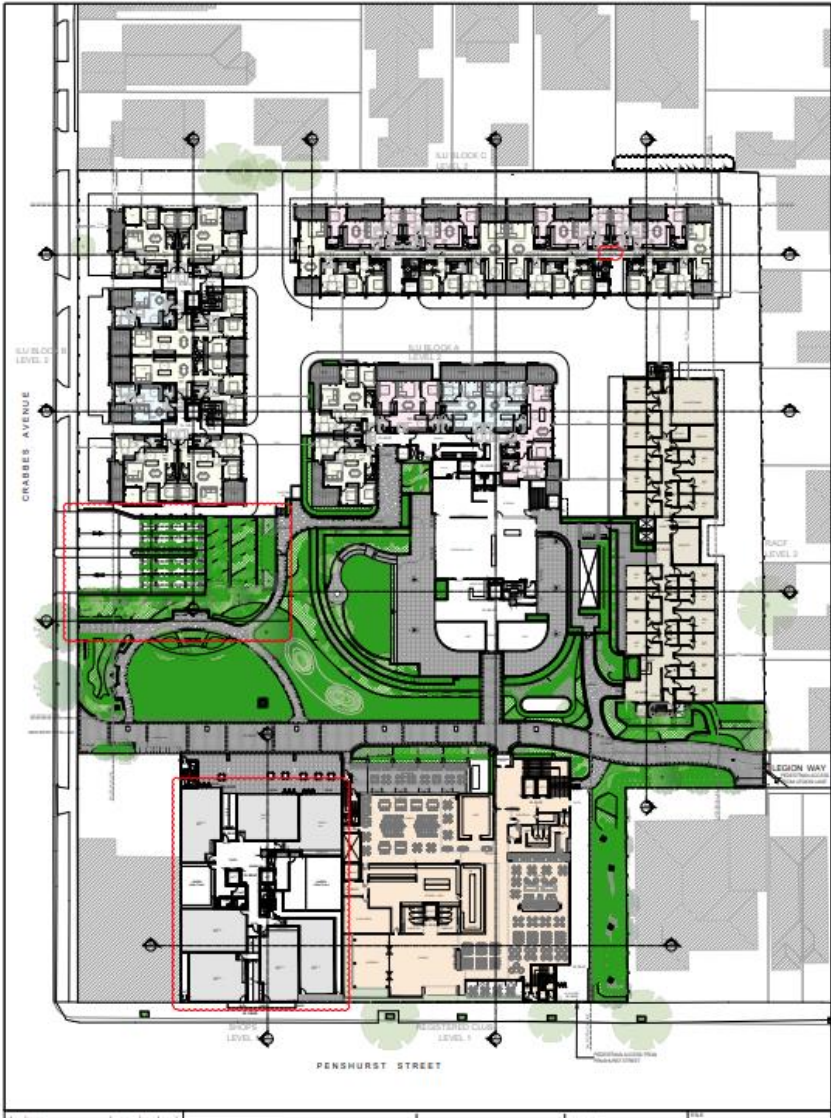


Objective	Discussion
<i>planting and tree canopy,</i>	<p>loss impacts. Those things that should be considered include an assessment of whether view impacts are negligible, minor, moderate, severe, or devastating.</p> <p>Views from surrounding properties will not be largely affected as a consequence of 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>The proposed Blocks B and C will be setback from the adjoining boundaries by at least 6m. Furthermore, Blocks B and C are designed to achieve a sensitive transition to the existing low-density residential development on the northern and eastern boundaries. The upper level to Block B is recessed further than the two levels below, enabling the gradual stepping of the building. Block C is designed as a 2 storey building with a pitched roof facing the adjoining residential zone. Further, substantial landscaping is proposed to the side boundaries of the development within the 6m setback</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 14 below)</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 minimised, consistent with this objective.</p> <div data-bbox="464 1384 1385 1883" data-label="Image">  </div> <p><i>Figure 14: Photograph of the existing high paling fence limiting any views. (Source: City Plan)</i></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. This combined with minimum 6m</p>

Objective	Discussion
	<p>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>The park and generous boundary setbacks will allow for additional planting of substantial trees, which will improve the current situation consisting of a building, lawn bowls area and carpark with limited tree canopy. (Refer to street view below in Figure 15)</p>  <p><i>Figure 15: View of the site from Crabbes Avenue. (Source: Googlemaps)</i></p> <p>Thus, despite the variation to the height, the design achieves minimal disruption to views and maintains the outlook to existing mature trees.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>
<p><i>To reduce the apparent bulk of development and its impact on neighbouring properties,</i></p>	<p>The extra height which forms the variation in height will have some minimal visual impact, but this will not be detrimental. As discussed above, the proposed Block B where the contravention occurs at the third level, responds to the existing lower residential character of the adjoining properties by reducing the bulk to limit the building's visual dominance. Block C has been skillfully designed such that the appearance from the neighbours is that of a 2 storey building with a pitched roof. The additional height is within the roof form so will not be discernible from the adjoining neighbours.</p> <p>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 generous setbacks (as discussed above), materials and associated landscaping. Given the majority of Blocks B and C are within the height limit, the bulk of the development has been reduced in this section and the contravention would not result in a detrimental visual impact, over and above the visual impact caused by a compliant development.</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. This provides considerable separation between the proposed buildings where the variation to height occurs on each Block, and the adjoining low-density development.</p> <p>Buildings which adjoin the eastern and southern boundaries have been designed to represent 2 storey buildings with pitched roofs. All the buildings</p>



Objective	Discussion
	<p>have the balconies and units oriented away from the adjoining lower residential zoned lands, and planter boxes are used to aid in reducing the visual intrusion.</p> <p>The proposal does not impact on neighbouring properties in terms of bulk.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>
<i>To provide adequate building separation</i>	<p>As discussed above, the proposed setbacks are 8.6m to Block B and 9.7m to Block C to where the variation occurs within the R2 zoned land. At the lower levels, the buildings maintain a minimum 6m separation to the eastern boundary and Crabbes Avenue frontage. These generous setbacks, allow for landscaping and ensure view vistas between buildings are maintained.</p> <p><b>Development as a whole</b></p> <p>The development is strategically designed as 5 separate buildings around a principal park. (Refer to Figure 16 below). 6m and 8m setbacks are provided to the eastern and southern boundaries where they adjoin lower density dwellings. The frontage to Penshurst Street is nil boundary, consistent with the existing and adjoining buildings which front this street.</p>

Objective	Discussion
	 <p><i>Figure 16: Ground floor plan showing location of the buildings and the park, with generous separation between the buildings. (Source: Heycorp/Anglen)</i></p> <p>Within the development, generous building separation is achieved with buildings being between 10.68m and 14.15m apart. This achieves greater landscaping, view vistas between buildings (including from neighbouring buildings), and provides a sense of openness, despite the number of buildings within the site. The proposal does not impact on neighbouring properties in terms of bulk and minimises shadow impacts to an acceptable level.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>

The proposed height and massing of the buildings ensure that:

- the development is compatible by virtue of its bulk and scale with the existing and future character of the area; and
- the development does not cause unreasonable amenity impacts on adjoining properties.

Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case because the objectives of the standard are 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 ILU buildings, Blocks B and C, for seniors housing have been designed in accordance with the approved SCC and to greater heights anticipated by the SCC as a consequence of detailed site-specific planning consideration.

Nevertheless, the contravention of the height standard is limited to only a small portion of the third levels within each building. A compliant development would clearly result in a lesser built form for Block B, but in this case the parts of the buildings that contravene the standard do not cause any adverse impacts to surrounding residential properties.

Block C has the additional height within the pitched roof, so a compliant height would have the same built form for that building.

Therefore, 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 additional specific environmental grounds to justify the contravention of the standard as follows:

- The proposed contravention does not detract from the development's satisfaction of the objectives 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 to Building B and rooms within the roof to Building C, stepping away from the site boundaries and with the use of skillful materials enforces the two-storey portion and recessed third level; to complement the built form and assist in reducing the scale of the development when viewed from public and private domain). This ensures the contravention has no material adverse amenity impact and is compatible with the surrounding area in terms of bulk and scale;
- 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 proposed building for seniors housing and contravention of the standard;
- The contravention would result in a better planning outcome than if compliance were to be achieved, as it allows for the co-ordinated redevelopment of the site in accordance with the detailed site-specific planning that supported the SCC (and led to the permissible use of the overall site for the otherwise impermissible use of seniors housing),
- The contravention positively contributes to important planning goals, namely:
  - two key 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 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 which will all meet the day to day needs of local residents. Furthermore, the proposal for seniors housing is permissible under the Seniors SEPP and the SCC.
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.	The proposal will not result in any adverse environmental impacts that would have a detrimental impact upon the amenity of the locality, with particular reference to solar, views, and visual privacy.  The provision of a public park and substantial landscaping throughout the site will enhance the residential amenity from the existing carpark that currently sits on the site.

<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'

<p>To retain the heritage values of particular localities and places.</p>	<p>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: “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.”</p> <p>The form/massing expected within the HCA is that of 2-storey with pitched roofs, surrounded by open well vegetated front gardens. The proposal is consistent with this.</p> <p>The HIS concludes that the proposed development will not have an adverse impact on the established heritage significance or setting of the Horsley Conservation Area. The proposal seeks to improve the amenity of the site while also ensuring there is no adverse impact on the Conservation Area.</p>
<p>To encourage self-sufficiency with respect to energy and food supply.</p>	<p>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</li> </ul>

	<p>covered and generously sized balconies to provide shade</p> <ul style="list-style-type: none"> <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-rng-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 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 objectives of the development standard and is consistent with the objectives of the R2 zone and is therefore in the public interest; and
- The variation does not raise any matter of State or Regional Significance.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 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.