



Clause 4.6 Variation Request

Floor Space Ratio (Clause
4.4) Willoughby LEP 2012
(contingent)




**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 to achieve the built form anticipated by the SCC.

The exceedance of the FSR control under the Willoughby Local Environmental Plan 2012 (WLEP) on the R2 land is able to be dealt with on merit without the need for a clause 4.6 request.

This was explained by Justice Moore in the recent decision of *Eastern Suburbs Leagues Club Ltd v Waverley Council* [2019] NSWLEC 130 at [32], [109] and [153].

Justice Moore said (at [109]):

that there is no necessity for the Club to rely on a successful request pursuant to cl 4.6 of the WLEP to permit it to be granted consent for a development which does not otherwise comply with the building height or FSR development standards derived from cll 4.3 and 4.4 of the WLEP.

He also said (at [153]):

I have concluded that the provisions of the SEPP do have the effect of overriding both the building height development standard and the FSR development standard otherwise applicable to the site as arising from the WLEP. As a result of this conclusion, it is not necessary for me to consider whether or not the contingent requests made by the Club for dispensation utilising cl 4.6 of the WLEP from compliance with those development standards meets the relevant tests set by cl 4.6(3) and (4).

The relevant provisions of the Seniors SEPP that have this effect are as follows.

Clause 5(3):

If this Policy is inconsistent with any other environmental planning instrument, made before or after this Policy, this Policy prevails to the extent of the inconsistency.

Clause 14:

Objective of Chapter

The objective of this Chapter is to create opportunities for the development of housing that is located and designed in a manner particularly suited to both those seniors who are independent, mobile and active as well as those who are frail, and other people with a disability regardless of their age.

Clause 15:

What Chapter does

This Chapter allows the following development despite the provisions of any other environmental planning instrument if the development is carried out in accordance with this Policy—

- (a) development on land zoned primarily for urban purposes for the purpose of any form of seniors housing, and*
- (b) development on land that adjoins land zoned primarily for urban purposes for the purpose of any form of seniors housing consisting of a hostel, a residential care facility or serviced self-care housing.*

Clause 16:

Development consent required

Development allowed by this Chapter may be carried out only with the consent of the relevant consent authority unless another environmental planning instrument allows that development without consent.

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

This request is a ‘contingent’ request. It does not need to be considered as a formal clause 4.6 request if the consent authority accepts that the FSR maximum in the WLEP does not apply.

Nonetheless, the applicant intends that this request be used as part of a general merit assessment of proposed GFA on the R2 land — noting that such consideration does not require the same statutory discipline that a variation under clause 4.6 requires.

This request may also be considered as a formal clause 4.6 if the consent authority is prepared to grant development consent to the proposed development, but — despite the clear ruling of Justice Moore in *Eastern Suburbs Leagues Club Ltd v Waverley Council* — wishes to proceed on the assumption that a clause 4.6 request is required in relation to the FSR standard for the R2 land under WLP. This does not detract from the applicant’s position that no clause 4.6 request is actually required.

Therefore, this is a request prepared in accordance with Clause 4.6 of the WLEP 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”).

This cl.4.6 request relates only to a single lot of R2 zoned land on the eastern boundary of the consolidated site where there is a need to vary *Clause 4.4 Floor Space Ratio* under the Willoughby Local Environmental Plan 2012 under the R2 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 1.

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)]

¹ Relevant decisions include: *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46; *Wehbe v Pittwater Council* [2007] NSWLEC 827; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248; *Moskovich v Waverley Council* [2016] NSWLEC 1015; *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 and *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

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 be in the public interest because it satisfies the relevant objectives of both the R2 Low 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 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 only relates to the contravention of floor space ratio (FSR) standard for the land zoned R2 being Lot 11 Section C DP 6291.

A minor portion of the seniors housing (parts of the ILU buildings Block B and Block C) will be located within the portion of the site zoned R2 Low Density Residential, pursuant to the WLEP. (Refer to Figure 1 and Figure 2)

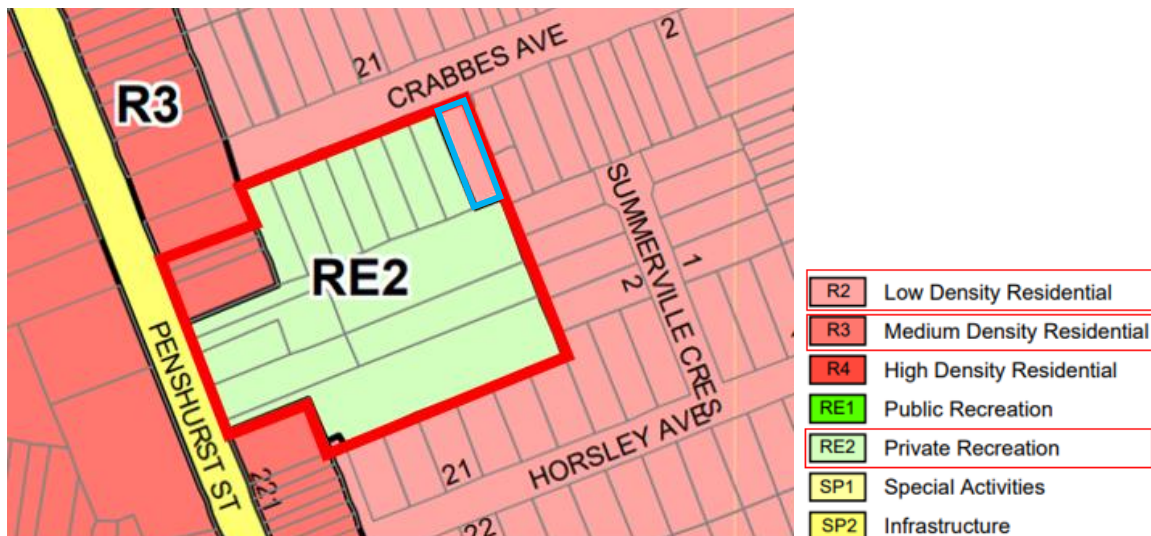


Figure 1: Extract of Land Zoning Map, consolidated site outlined red. The part of the site subject of this cl.4.6 outlined in blue (Lot 11 Section C DP 6291)(Source: NSW Legislation)



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:

- 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 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 0.4:1 applies as shown on the 'Floor Space Ratio Map.' Refer to Figure 3.

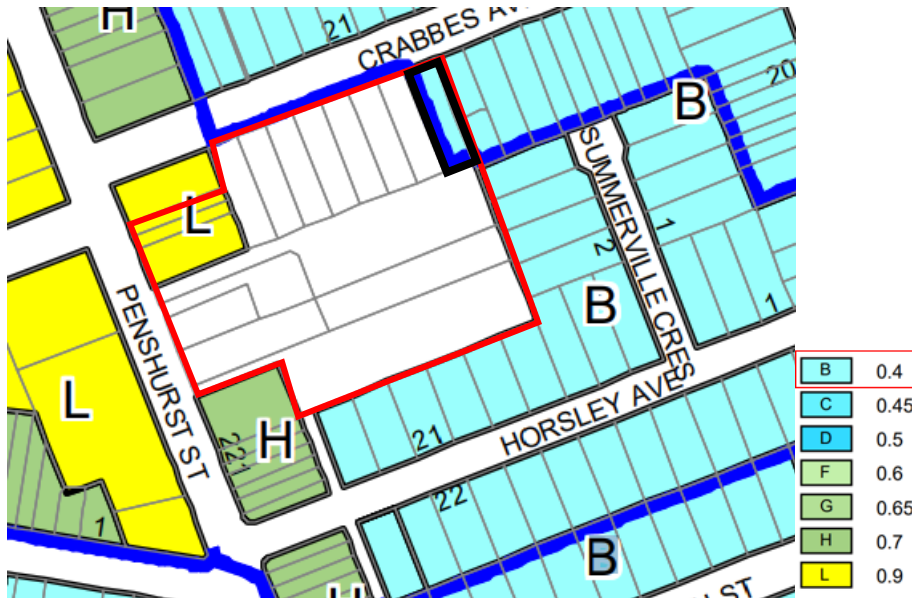


Figure 3: Extract of floor space ratio map, relevant area of the site outlined black. Broader consolidated site outlined red (Lot 11 Section C DP 6291) (Source: NSW Legislation)

The seniors SEPP under which this application is submitted does not contain a development standard in relation to FSR. Clauses 48(b) and 50(b) provide 'must not refuse' provisions for residential aged care facilities and self-contained dwellings, respectively. The proposed development does not comply with these provisions. This does not require any refusal; it merely triggers a merit consideration: *Eastern Suburbs Leagues Club Ltd v Waverley Council* [2019] NSWLEC 130 at [27].

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 11 Section C DP 6291). This is the 'site area' for the purposes of applying the 0.4:1 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 R2 zoned portion of the site adjacent to the north-eastern boundary of the site where part of the ILU seniors housing within Blocks B and C is proposed, has a maximum FSR standard of 0.4:1 as specified under Clause 4.4 of the Willoughby Local Environmental Plan 2012 (WLEP) and as shown in Figure 3.

As demonstrated on the plans prepared by Hyecorp (extract in Figure 4 below) in association with Amglen, the proposed development within the R2 zone has a maximum FSR of 1.16:1. This has been established using a site area of Lot 11 being 558m² and a GFA of the portions of Blocks B and C within the site area of Lot 11, being 652m². The development contravenes the 0.4:1 FSR control by 0.76:1 (i.e. 190% 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 and achieve the built form anticipated by the SCC.



LEGEND:-



Figure 4: Extract of GFA Plan Dwg No. DA-FSR1 A. Green line identifying the extent of the R2 zone and the development within the R2 zone over the three levels (Source: Hyecorp/Amglen)

Schedule 2 of the SCC is relevantly as follows:

Requirements imposed on determination: ...

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

Block B is the building that presents to the northern boundary. Block C is the building that presents to the eastern boundary.

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 a 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 450m² lot size (allowing lots sizes ranging from 220 to 240m²).
- 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)]

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

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

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

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; and
5. The zoning of the land is unreasonable or inappropriate

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

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

3.1. Achieves the objectives of the standard

Table 1: 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 zone objectives for the land,</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 SCC applying to the land states that the land has capacity for a greater intensity. Accordingly, by integrating the R2 zoned land into the consolidated site (it is currently being used as a car park as opposed to residential), likewise increases the capacity of that site.</p> <p>The contravention in floorspace specifically within the R2 zoned land primarily occurs due to the proposed ILU buildings Block B and Block C being partly located within the R2 zone and these Blocks forming part of the broader development of the site which is proposed in accordance with the approved SCC.</p> <p>The buildings are stepped down within this R2 zone to ensure they are compatible with the existing adjoining low-density urban form in the immediate locality along Crabbes Avenue and development adjoining the eastern boundary. The building fronting Crabbes Avenue within the R2 zone is 2-storey with a marginal portion of 3</p>

storey setback 8.6m from the eastern side boundary, with the 2 storey setback 7.7m from Crabbes Avenue and the third level setback 9.19m to the wall. These setbacks are consistent with the adjoining residential buildings to the east. (Refer to Figure 5 and Figure 6 below)

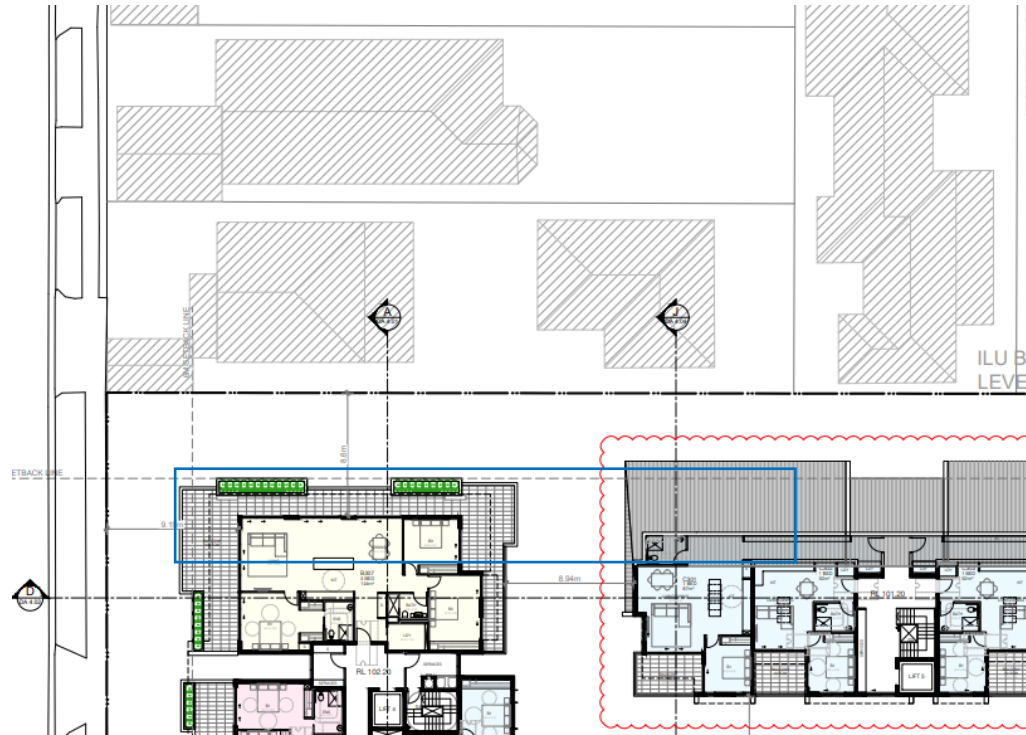



Figure 5: Level 3 floor plan showing a consistent setbacks of levels 2 and 3 with the eastern adjoining residential buildings. The portion within the R2 zoned land is outlined in blue. (Source: Hyecorp/Amglen)




Figure 6: Block B street elevation, showing the 2 storey built form within the R2 zoned land. Blue circle showing the approximate amount of Block B within the R2 zone and its relationship with adjoining site 18 Crabbes Avenue (Source: Hyecorp/Amglen)

Block C, adjacent to the eastern side boundary, is 2 levels only, setback 6m from this side boundary, and the third level has the rooms within the roof facing into the centre of the subject site. Thus, the building form facing the eastern boundary is of a low scale, 2-storey with a pitched roof; not dissimilar to surrounding residential dwellings. (Refer to Figure 7 below).

Objective	Discussion
	 <p>Figure 7: 2 storey built form of Building C facing the eastern boundary, the blue depicts the portion within the R2 zone.</p> <p>The building has been skillfully designed such that the portion which contravenes the development standard, has a built form and height of 2 storey residential dwellings, with setbacks consistent to adjoining residential dwellings. The bulk and scale and intensity of development within this zone is not dissimilar to a typical residential dwelling thus, this objective has been achieved despite the contravention in the standard.</p> <p>Development as a whole</p> <p>In this instance, the contravention would affect part of 9 units out of a total of 102 senior housing units proposed to be provided on the consolidated site. The portions of seniors housing in Blocks B and C within the R2 zone are lower in scale and height than the other seniors housing proposed over the consolidate site, ranging between two and three storeys only.</p> <p>The overall scheme provides generous setbacks, a park available to the general public, a new registered club and mixed housing to cater for seniors and other demographics, all within the approved SCC and hence in accordance with the anticipated environmental capacity of the land.</p> <p>Further to this, 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 R3 zoned provisions).</p> <p>So, despite the contravention of the standard, the proposed seniors housing development will be of compatible intensity and environmental capacity as anticipated with this objective.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>
(b) to limit traffic generation as a result of that development,	<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 current site so zoned R2 forms part of the car park for the club. The proposal results in a part of 9 units falling within the R2 zone. Accordingly, the portion of the proposal that contravenes the development standard will generate less traffic than already exists which is greater than what would be anticipated by the zoning and relevant development standard.</p> <p>Development as a whole</p> <p>As a consequence of the proposed site consolidation, vehicular access to the site can be achieved via a common entry and exit point in Crabbes Avenue. This minimises any potential conflict of vehicular activities. A Traffic Report prepared by Colston Budd Rogers & 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 <i>“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</i></p>

Objective	Discussion
	<p><i>be minimal impact on the operation of the intersections of Crabbes Avenue with High Street and Penshurst Street.”</i></p> <p>Furthermore, the proposed site is well serviced by public transport. There are two bus stops immediately in front of the western boundary 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.</p> <p>The development is consistent with — and achieves — this objective, despite the variation.</p>
<p>(c) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,</p>	<p>The amenity of adjoining development 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 variation to the floor space ratio within the portions of Blocks B and C within the R2 zone. Views in the surrounding area are generally limited to street level views, and views of other dwellings, sky and some tree canopy.</p> <p>Substantial landscaping is proposed to the side boundaries. The closest adjoining dwelling houses to the portions of Blocks B and C within the R2 zoned land are 18 and 18A Crabbes Avenue, also within the R2 zone, and these 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. 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>Development as a whole</p> <p>The development as a whole, steps the built form down from the highest part in the centre of the site, to 3 storeys facing Crabbes Avenue and 2 storeys facing the eastern and southern boundaries. This combined with minimum 6m setbacks, results in minimal impact to views on the adjoining premises. There are no iconic views with the principal views of adjoining residents being dwellings, sky and some trees. The buildings on the site have been provided with large separation between them (ranging from 8.94m to 12m). The provision of the public park and large extent of landscaping within the site ensures view vistas are maintained through the site and creates a much larger separation between the RFB building and the proposed buildings to the east.</p> <p>Thus, despite the variation to the FSR, the design achieves minimal disruption to views.</p> <p><u>Privacy & Visual Intrusion</u></p> <p>The proposed setbacks 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</p>

Objective	Discussion
	<p>the variation of the floor space ratio within the R2 zone. The proposed Blocks B and C within the R2 zone, will be setback from the boundaries of the site by a generous 6m, twice the minimum requirement under the Willoughby Development Control Plan 2016. This together with landscaping, privacy screens and view angles ensure that privacy will not be adversely impacted.</p> <p>In relation to the adjoining dwellings at 18 and 18A Crabbes Avenue, these dwellings are presently single storey within the R2 zone. They have their principal views to the north and south with limited windows to their side western elevations, fronting the eastern boundary of the R2 site. Currently there exists a paling fence on the boundary (approximately 2.2m measured from the site) protecting their privacy from the proposed units at ground floor level (Level 1). Refer to Figure 8 below.</p>  <p><i>Figure 8: Photograph showing the existing boundary treatment between the R2 zoned portion of the site and the adjoining dwellings at 18 & 18A Crabbes Avenue.</i></p> <p>Block B:</p> <p>At Level 2 the windows to the eastern elevation of Block B will not be full length and will be partly recessed, being 6.6m from the boundary with No. 18 Crabbes Avenue. Furthermore, the majority of these windows are to bedrooms only. Where there are windows to the proposed living room to the rear unit at Level 2 in Block B, these would overlook the rear of 18 Crabbes Avenue only and would be secondary windows, with main views from this room oriented towards the south, towards Block C. (Refer to Figure 9 below.)</p>

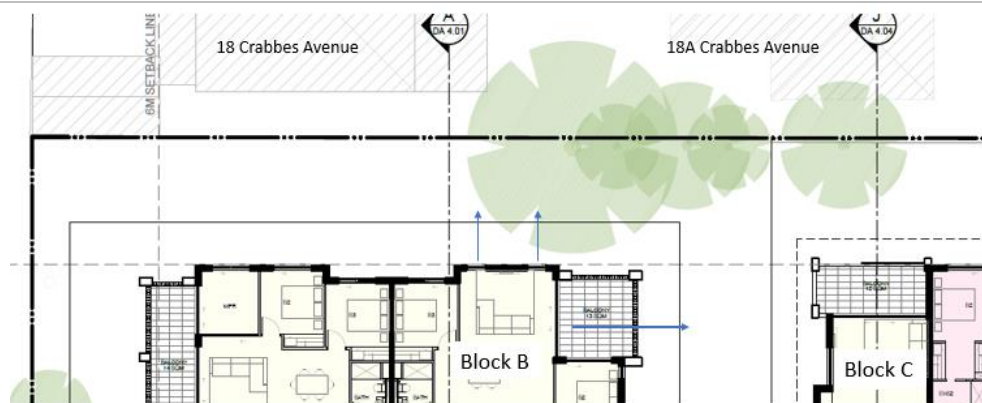


Figure 9: Extract of Level 2 showing primary view southwards to Block C from living room of proposed rear unit at Level 2 in Block B. (Source: Hyecorp/Amglen)

Level 2 of Block B has also oriented the balconies to the north and south, away from the adjoining dwellings at 18 and 18A Crabbes Avenue, to further protect privacy.

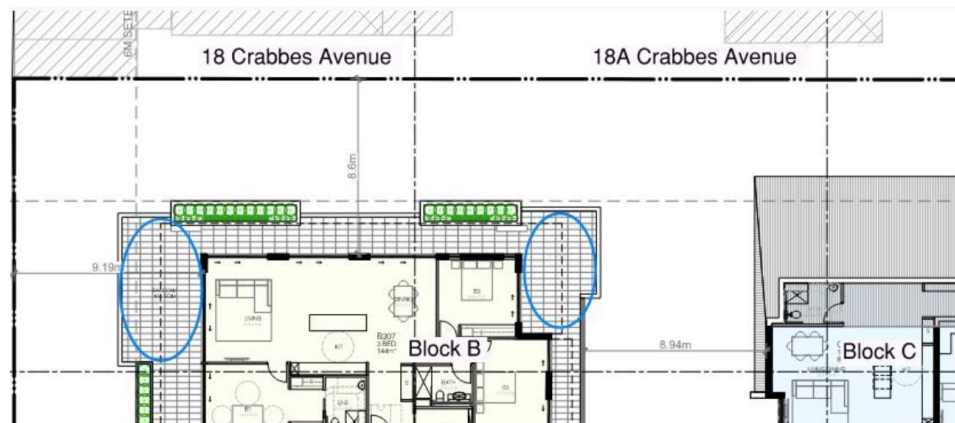


Figure 10: Extract of Level 3 showing main balcony areas oriented north and south away from adjoining dwellings (Source: Hyecorp/Amglen)

At Level 3 of Block B on the eastern elevation, the primary usable balconies have been oriented to the north and south, away from the adjoining dwellings at 18 and 18A Crabbes Avenue. While it is proposed to have balcony area connecting the two main balcony areas, this would have limited depth (approximately 1.2m) and as such is unlikely to be used to the same extent as the balconies oriented to the north and south which are larger in area. Additionally, the third-floor level has been further recessed (setback 8.6m), to reduce the angle of overlooking and windows at this level. (refer to Figure 10).

Block C:

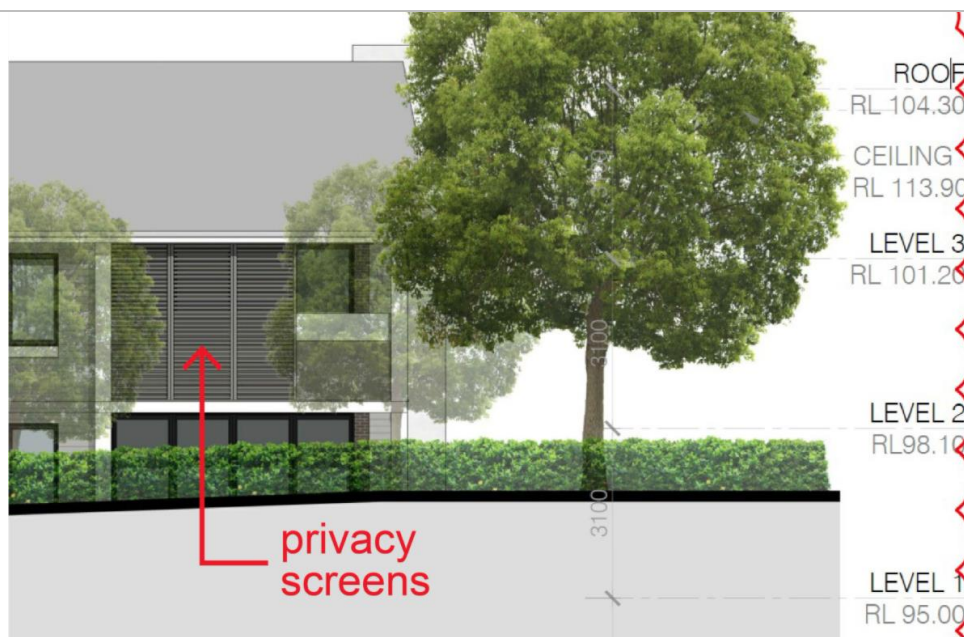


Figure 11: Extract from architectural plans detailing privacy screening to Block C where the contravention occurs and no windows in roof. (Source: Hyecorp)

At Level 2 of Block C, the area of the variation includes part of a living room and bedroom and the recessed balcony for the subject unit. (Refer to Figure 9.) The windows to the main habitable room being the lounge are recessed and therefore setback further, approximately 8.6m from the boundary with the adjoining neighbouring dwelling as shown in Figure 9. Additionally, privacy screening is proposed to the balcony to ensure no unacceptable overlooking to the adjoining 18A Crabbes Avenue. (Refer to Figure 11)

Level 3 of Block C has provided rooms in the roof however has oriented them away from the adjoining properties, providing no windows or openings. From the neighbouring properties it appears as a normal 2-storey building with a pitched roof. Refer to Figure 10, Figure 11, Figure 12 and Figure 13 which show the angle of the roof and the rooms recessed into that roof with no openings ensuring there is no overlooking to adjoining dwellings.

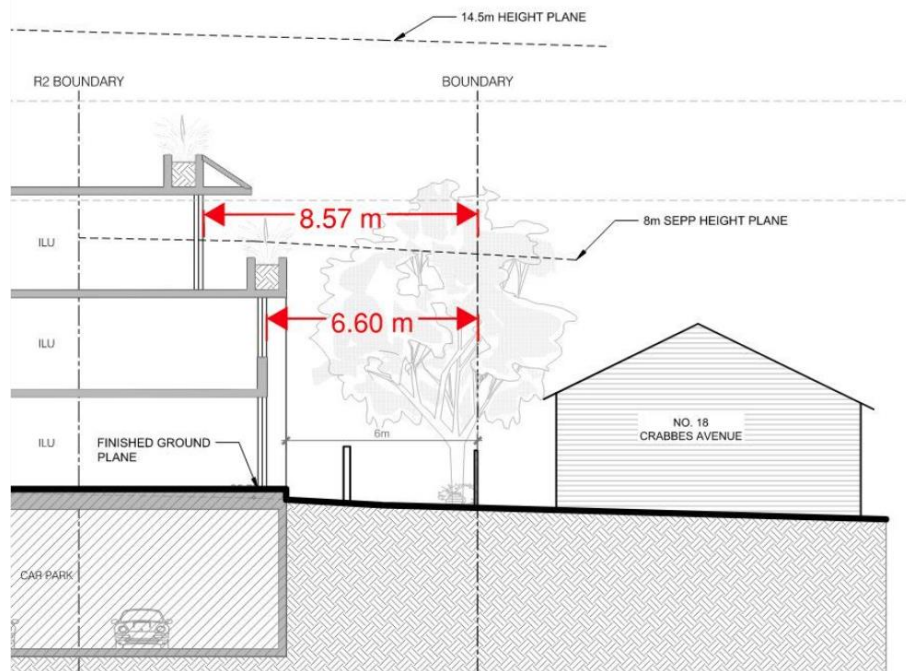


Figure 12: Extract of Section A for Block B showing setback from adjoining dwelling 18 Crabbes Avenue. (Source: Hyecorp/Amglen)

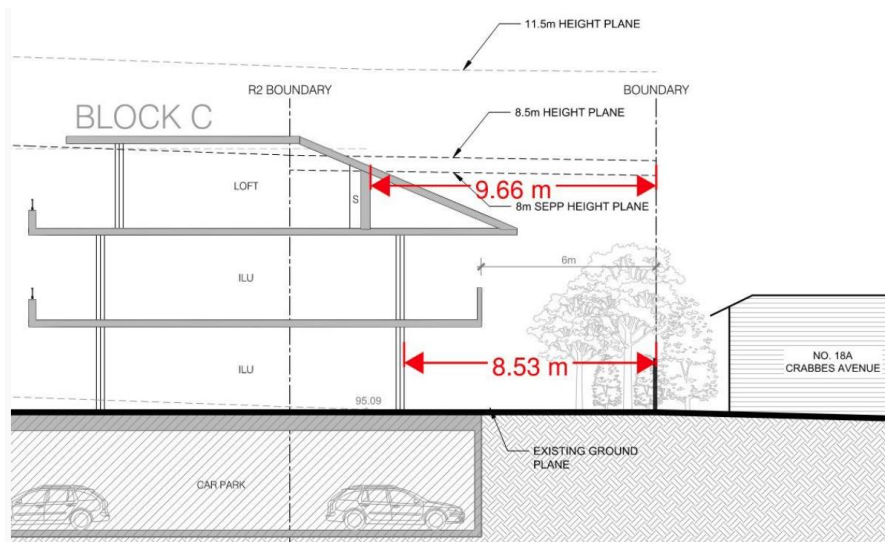




Figure 13: Extract of Section J showing setback from adjoining dwelling 18 A Crabbes Avenue. R2 boundary in blue (Source: Hyecorp/Amglen)


The extra floor space ratio will have some minimal visual impact, but this will not be detrimental. As discussed previously, the proposed Blocks B and C within the R2 zone respond to the existing lower residential character of the adjoining properties by reducing the bulk. They do not appear overly dominant because of design features such as setbacks, materials and associated landscaping.

Development as a whole

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

Objective	Discussion
	<p>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><u>Overshadowing</u></p> <p>Hyecorp in association with Amglen have prepared detailed shadow diagrams for the proposal. The shadow diagrams demonstrate the proposed seniors housing within Blocks B and C in the R2 zone, would protect the amenity of neighbouring properties in relation to sunlight, despite the noncompliance with the FSR standard. The proposal has allowed for substantial 6m setbacks from the site boundaries and as such, the shadows do not start to impact on the eastern adjoining neighbours until 3pm mid-winter. The closest adjoining properties along the northern and eastern boundaries will receive in excess of 3hrs direct sunlight between 9am and 3pm mid-winter. (Refer to Figure 14 and Figure 15, for extracts of the shadow diagrams.)</p> <div style="text-align: center;">  </div> <p><i>Figure 14: Extracts of shadow diagrams 12-1pm mid-winter. Approximate location of development within the R2 zone circled red. Arrow in the direction of North (Source: Hyecorp/Amglen)</i></p>

Objective	Discussion
	 <p>Figure 15: Extracts of shadow diagrams 2-3pm mid-winter. Approximate location of development within the R2 zone circled red. Arrow in the direction of North (Source: Hyecorp/Amglen)</p> <p>Development as a whole</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>
<p>(d) to manage the bulk and scale of that development to suit the land use purpose and objectives of the zone,</p>	<p>The proposed variation in floor space within the R2 zone maintains a building form that is of similar bulk and scale anticipated within the uses permitted within the zone. The proposal provides for seniors housing which is a form of residential development, consistent with the permissible uses within the zone.</p> <p>Land zoned R2 adjoining and opposite the site to the north and east predominantly consists of single storey detached dwellings with pitched roofs, however the maximum height of 8.5m would envisage two storey scale development in the future.</p> <p>The proposed seniors housing within Blocks B and C within the R2 zone will be between two to three storeys in height, and setback from the boundaries by a minimum 6m. 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>Refer to Figure 16 which demonstrates the stepping nature and reduced bulk and scale of the development to the north eastern boundary.</p> <p>The upper level of Block B is setback further than the lower 2 levels. As such the bulk of the development within the R2 zone will appear less and will be of a compatible scale anticipated by the controls.</p>

Objective	Discussion
	 <p><i>Figure 16: Extract from Urban Design Report showing the transition in heights towards the boundary. Blue circle showing the approximate amount of Block B within the R2 zone and its relationship with adjoining site 18 Crabbes Avenue (Source: Hyecorp/Amglen)</i></p> <p>Block C has provided the upper-level rooms in the roof; thus, the building will appear as a two storey building. This, combined with the generous setback to the eastern boundary, creates a building of compatible bulk and scale as what is anticipated within the surrounding R2 zoned land.</p> <p>Development as a whole</p> <p>The development is consistent with the approved SCC for the site. The higher buildings are situated in the centre of the site and the buildings taper down to be small-scale 2 – 3 storeys along the boundaries. 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>
(e) to permit higher density development at transport nodal points,	<p>The variation to FSR on the R2 zoned land still achieves consistency with this objective. The units affected are within 250m from bus stops in Penshurst Street which provide multiple buses that range in services to the surrounding area and beyond, including the Sydney City CBD, Chatswood, and Bondi Junction.</p> <p>The variation in floor space ratio still maintains consistency with this objective. The proposed site is well serviced by public transport. There are two bus stops immediately in front of the site on Penshurst Street to the western boundary. These bus stops will be available for use by future residents and visitors of the seniors housing, as well as patrons of the Club itself. 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>
(f) to allow growth for a mix of retail, business and commercial purposes consistent with Chatswood's sub-regional retail and business	N/A. The subject site is not located within the city centre of Chatswood.

Objective	Discussion
<i>service, employment, entertainment and cultural roles while conserving the compactness of the city centre of Chatswood,</i>	
<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</i>	N/A. The subject site is not located within the city centre of Chatswood.

Objective	Discussion
<i>and active enjoyment by workers, residents and visitors to the city centre of Chatswood,</i>	
<i>(i) to achieve transitions in building scale and density from the higher intensity business and retail centres to surrounding residential areas,</i>	<p>Blocks B and C within the R2 zone, being a maximum of two to three storeys in height and setback at least 6m from the boundaries to the north and east, ensure a compatible transition in height despite the variation of standard, and promote the two-storey element. Due to the stepping nature and reduced bulk and scale of the proposal within the R2 zone it achieves a suitable transition in building scale and density, thus achieving this objective. (Refer to Figure 16)</p> <p>Development as a whole</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, including the north eastern boundary where the R2 zoned land adjoins 18 and 18A Crabbes Avenue, which are existing single storey residential houses.</p> <p>Thus, this objective is achieved.</p>
<i>(j) to encourage the consolidation of certain land for redevelopment</i>	<p>The proposed units in Block B and C, where the contravention in FSR occurs; form part of a larger consolidated development. The variation in FSR for these components maintains consistency with this objective.</p> <p>Development as a whole</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</i>	<p>The proposed units in Block B and C will provide for a community facility in the form of specifically designed seniors housing independent living.</p> <p>Development as a whole</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>

Objective	Discussion
these land uses.	

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 118, 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, not on 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 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 R2). This would have meant, for example, that any intense development of the site area might have failed to make an appropriate transition from the R2 land generally to what might ultimately have been open recreational space on the RE2 land.

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 (ILUs), 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, the ILUs will form part of a retirement village and 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 seniors contributing to a wider range of housing types. This assists seniors 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 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 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 an ILU 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 elements of the development that contravene the FSR standard relate to portions of the buildings referred to on plan as Block B and Block C

and affect only development on the north eastern boundary. Despite the variation of the standard this element of the proposed seniors housing will be of compatible scale and mass to its neighbour. In this regard, 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. (The text of Section 3 is adopted here in this regard.)

Additionally, Block B and Block C are 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.

The particular circumstance of this consolidated development enables that the R2 land to be built more intensely than envisaged by the numeric FSR control, as the site will be form part of an integrated development on a larger site.

Land zoned R2 adjoining and opposite the site to the north and east predominantly consists of single storey detached dwellings with pitched roofs, however the maximum height of 8.5m would envisage two storey scale development in the future.

The proposed seniors housing within Blocks B and C within the R2 zone will be between two to three storeys in height, and setback from the boundaries by a minimum 6m. 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.

Figure 16 above demonstrates the stepping nature and reduced bulk and scale of the development to the north eastern boundary.

The upper level of Block B is setback further than the lower 2 levels. As such the bulk of the development within the R2 zone will appear less and will be of a compatible scale anticipated by the controls.

Block C has provided the upper-level rooms in the roof; thus, the building will appear as a two storey building. This, combined with the generous setback to the eastern boundary, creates a building of compatible bulk and scale as what is anticipated within the surrounding R2 zoned land.

- The relevant objects 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.

The contravention would result in a better planning outcome than if compliance were to be achieved, as it allows for the coordinated redevelopment of the site in accordance with the detailed site-specific planning that supported the SCC (and led to the permissible use of the overall site for the otherwise impermissible use of seniors housing). The overall intent of the SCC is to locate the bulk of the development and greatest height towards the centre of the site, provides generous setback from the boundaries with existing neighbouring properties. The contravention achieves the objective of the standard and the development envisaged by the approved SCC; 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 grounds to justify the variation of the standard as follows:

- The proposed contravention does not detract from the development's stratification 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, privacy designs and rooms within the roof to complement the built form and assisting in reducing the scale of the development when viewed from the eastern adjoining property). This ensures that the contravention results in no material adverse impact and is compatible with the surrounding area in terms of bulk and scale;
- The variation of the standard allows for a development that provides a variety of seniors housing, in a built form that is sympathetic to the adjoining residential uses,
- The proposal would result in a better planning outcome than if compliance were to be achieved, as it provides a consolidated development that meets the objective 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 consistent² with the objectives of the development standard. In this section it is explained how 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. This is required by Clause 4.6(4)(a)(11) of the LEP. **Table 2** (below).

Table 2: Consistency with R2 Zone Objectives.

Objective	Discussion
R2 Zone	
To provide for the housing needs of the community within a low-density residential environment.	The proposed development will provide additional housing within the locality, 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 development is consistent with this objective as it provides a selection of independent living units of various sizes for seniors living. Furthermore, the proposal for seniors housing is a permissible use under the Seniors SEPP and the SCC. Also, the development provides a public park, a renewed Club, improved basement parking and some ground floor neighbourhood shops which will all meet the day to day needs of local residents.
To accommodate development that is compatible with the scale and character of the surrounding residential development.	The surrounding residential development is generally a mixture of one and two-storey buildings in the R2 zone, with residential flat buildings along Penshurst Street. The proposal has been designed to have the bulk in the centre of the site, with the buildings closest to the lower density residential transitioning down to two storeys. This, combined with the extensive landscaping, building separation and park proposed, will result in a development that is compatible with the scale and character of the surrounding residential development.
To retain and enhance residential amenity, including views, solar access, aural and visual privacy, and landscape quality.	As previously discussed, the proposal 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

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'

	residential amenity from the existing carpark that currently sits on the site.
To retain the heritage values of particular localities and places.	<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: <i>“The design of the new development is considered to be sympathetic to the neighbouring conservation area. The façade design of the proposed buildings adjacent to the conservation area boundaries includes articulation to reduce the perceived bulk of the buildings and respond to the finer grain subdivision pattern of the adjoining properties in the Horsley Avenue HCA.”</i></p> <p>The form/massing expected within the HCA is that of 2-storey with pitched roofs, surrounded by open well vegetated front gardens. The proposal is consistent with this.</p> <p>The HIS concludes that the proposed development will not have an adverse impact on the established heritage significance or setting of the Horsley Conservation Area. The proposal seeks to improve the amenity of the site while also ensuring there is no adverse impact on the Conservation Area.</p>
To encourage self-sufficiency with respect to energy and food supply.	<p>There are numerous initiatives incorporated within the development that will encourage self-sufficiency in regards to energy and food supply. These include but are not limited to:</p> <p>Food and Water</p> <ul style="list-style-type: none"> ▪ Communal vegetable gardens to be used by residents ▪ Communal composting ▪ Irrigation systems with timers ▪ Selected plants to be native or drought resistant ▪ Showers will flow rates under 7 litres per minute ▪ Minimum 5-star performance rating for tapware ▪ Minimum 4-star performance rating for toilers ▪ Metering and monitoring of major water uses <p>Energy</p> <ul style="list-style-type: none"> ▪ Windows and doors with large opening sashes allowing natural ventilation as well as

	<p>covered and generously sized balconies to provide shade</p> <ul style="list-style-type: none"> ▪ Minimum R1.0 insulation to the external envelope ▪ Central gas fired hot water plant ▪ LED lighting Throughout ▪ Air-conditioning to be day / night zoned and have a minimum heating and cooling Energy Efficiency Rating (EER) performance rating of 3.25 - 3.5 ▪ The uses of sensors and timers for common area lighting <p>For completeness, the lack of relevance of the zone objectives to the variation of a height development standard should not be a matter that acts in a negative way so pursuant to cl 4.6(4)(a)(ii) of the WLEP: <i>Pathways Property Group Pty Ltd v Ku-ring-gai Council</i> [2017] NSWLEC 1486 at [44]; <i>Ku-ring-gai Council v Pathways Property Group Pty Ltd</i> [2018] NSWLEC 73 at [149].</p>
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As can be seen from **Table 1** and **Table 2**, the proposal is consistent with the objectives of the standard and the objectives of the zones and is therefore considered to be in the public interest.

6. STATE OR REGIONAL ENVIRONMENTAL PLANNING

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

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

As demonstrated already, the proposal is consistent with the objectives of the zone and the 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 Low 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 R2 Low 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 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.