



## **Clause 4.6**

### **Variation Request**

Height of Buildings (Clause  
4.3) Willoughby LEP 2012


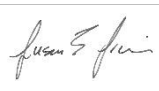
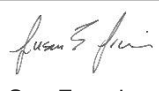
26 Crabbes Avenue & 247-255 Penshurst Street,  
Willoughby

Submitted to Willoughby Council

On Behalf of Hyecorp Property Group & Club Willoughby

JAN 2021

## REPORT REVISION HISTORY

Revision	Date Issued	Revision Description	
01	05/07/19	Draft	
		<b>Prepared by</b>	<b>Verified by</b>
		Lucy Broadwell Senior Planner	 Tina Christy Associate Director
02	11/07/19	Draft	
		<b>Prepared by</b>	<b>Verified by</b>
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03	26/07/19	Final	
		<b>Prepared by</b>	<b>Verified by</b>
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04	25/01/2021	<b>Prepared by</b> Tina Christy Associate Director	

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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.

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

The purpose of this Clause 4.6 variation request is to address a variation to Clause 4.3 Height of Buildings under the Willoughby Local Environmental Plan 2012 under the R3 zone.

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

This request has been prepared having regard to the Department of Planning and Environment’s Guidelines to Varying Development Standards (August 2011) and relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal<sup>1</sup>.

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

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)];
3. That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out [clause 4.6(4)]

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

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

As the following request demonstrates, by exercising the flexibility afforded by cl 4.6, in the particular circumstances of this application, the variation be in the public interest because it satisfies the relevant objectives of both the R3 Medium Density Residential zone and the development standard.

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

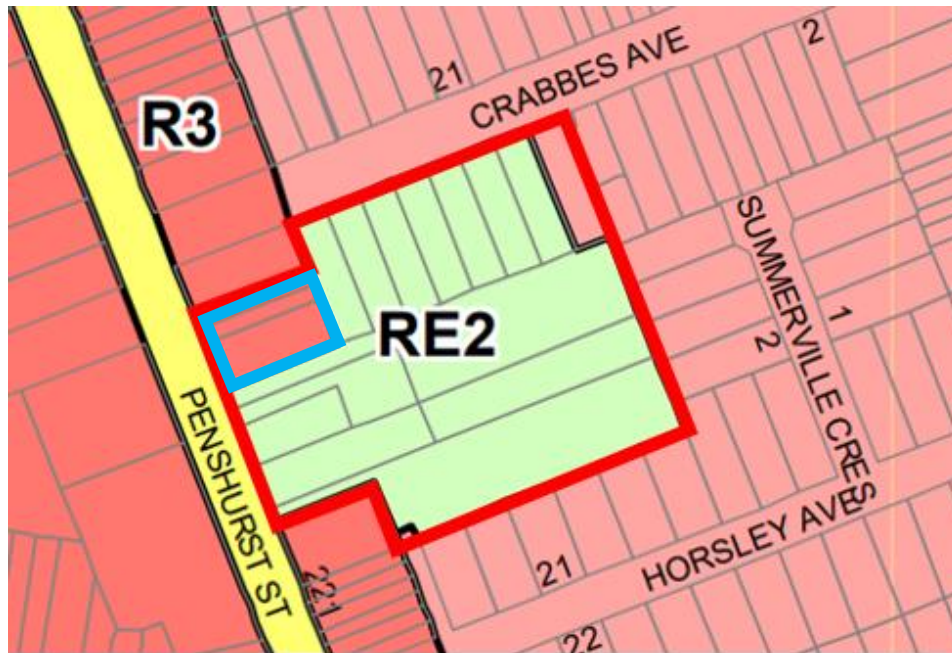
The Environmental Planning Instrument (EPI) to which this variation relates is the Willoughby Local Environmental Plan 2012 (WLEP).

### **1.2. What is the zoning of the land?**

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

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

The majority of the broader consolidated site is zoned RE2 Private Recreation with a minor portion of the site towards the north-eastern boundary zoned R2 Low Density Residential and a portion in the north-western boundary zoned R3 Medium Density Residential. This Clause 4.6 request only relates to the contravention of height standard for the land zoned R3. (outlined in blue in Figure 1. and Figure 2 below)



R2	Low Density Residential
R3	Medium Density Residential
R4	High Density Residential
RE1	Public Recreation
RE2	Private Recreation
SP1	Special Activities
SP2	Infrastructure

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





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

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

The objectives of the R3 zone are:

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To accommodate development that is compatible with the scale and character of the surrounding residential development.
- To allow for increased residential density in accessible locations, while minimising the potential for adverse impacts of such increased density on the efficiency and safety of the road network.
- To encourage innovative design in providing a comfortable and sustainable living environment that also has regard to solar access, privacy, noise, views, vehicular access, parking and landscaping.

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

The subject development standard is specified under *Clause 4.3 Height of buildings* of the WLEP. This clause applies to specific land in a residential zone to which a maximum building height of 12 metres applies as shown on the 'Height of Buildings Map.' Refer to Figure 3 below.



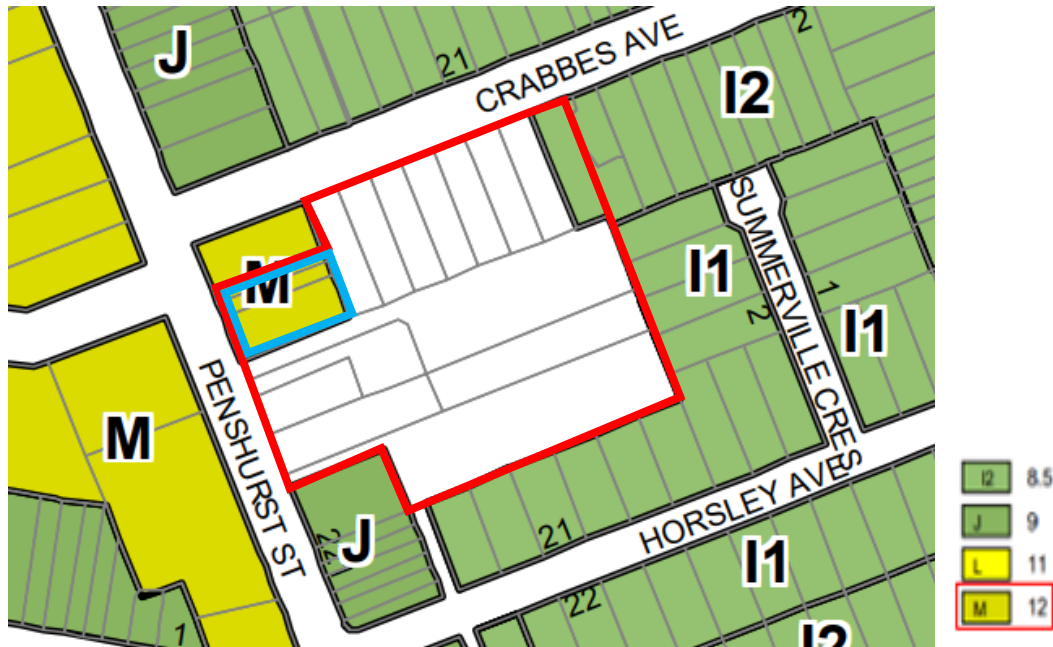


Figure 3: Extract of height of buildings map, relevant area of the site circled highlighted blue. Wider consolidated site outlined red. (Source: NSW Legislation). This land comprises all of the land within Lot 100 DP 858335 and Lots A and B DP 23465

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

The relevant objectives of Clause 4.3 of the WLEP are:

- (1) *The objectives of this clause are as follows:*
  - (a) *to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape,*
  - (b) *to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
  - (c) *to ensure a high visual quality of the development when viewed from adjoining properties, the street, waterways, public reserves or foreshores,*
  - (d) *to minimise disruption to existing views or to achieve reasonable view sharing from adjacent developments or from public open spaces with the height and bulk of the development,*
  - (e) *to set upper limits for the height of buildings that are consistent with the redevelopment potential of the relevant land given other development restrictions, such as floor space and landscaping,*
  - (f) *to use maximum height limits to assist in responding to the current and desired future character of the locality,*
  - (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 achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas.*

## 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

Development within the R3 zone on the subject site has a maximum building height standard of 12m (refer to Figure 3). The proposed RFB with neighbourhood shops at street level has a maximum height, as measured from the existing ground level, of 14.22m at (RL 114.35 to the top of the lift overrun) and 13.4m (RL 113.00 to the top of the roof), as confirmed by Hyecorp. The proposal exceeds the development standard by 850mm to the roof closest to Penshurst Street, 1.4m to the roof at the rear of the building and 2.2m to the top of the lift overrun located centrally within the building, which has been minimised by not providing access to the roof. Specifically, the portion of the building mass above the 12m height limit is a minor portion of the uppermost part of Level 4 of the building and the lift core which is located centrally within the building and is the tallest element of the structure. Therefore, importantly, the majority of the building mass is below the 12m height limit. (Refer to Figure 4 and Figure 5 below.)

The maximum extent of the variation at the parapet is 1.4metres — a 11.6% per centage variation.

The maximum extent of the variation overall, at the top of the lift overrun, is 2.2metres — a 18.3% per centage variation.



Figure 4: Extract of Height Plane Diagram. Development above the blue height plane representing the extent of the contravention (Source: Hyecorp)

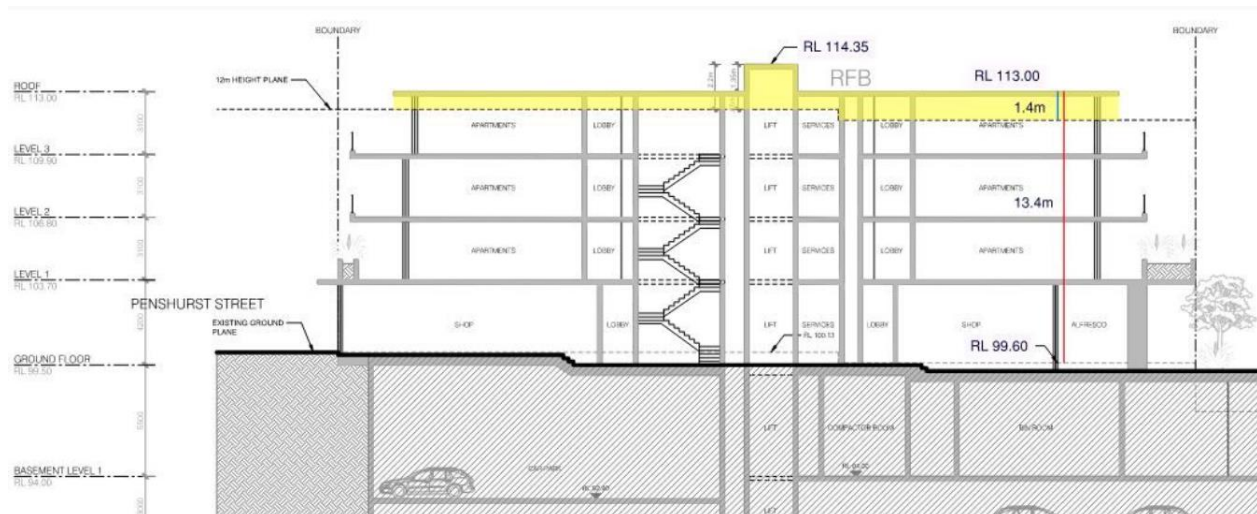


Figure 5: Extract of Section H detailing the extent of the development above the 12m height limit, shaded yellow. Measurement is taken from ground level (existing) (Source: Hyecorp/Amglen)

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

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

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

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


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

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

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

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

Table 1: Achievement of Development Standard Objectives.

Objective	Discussion
(a) to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape,	<p>Residential development fronting Penshurst Street ranges up to five (5) storeys in height. Density and height increase substantially towards Chatswood Centre, west of the site.</p> <p>The proposed RFB forms part of the Penshurst Street streetscape. The proposed RFB will be a maximum of 4 storeys in height and will be immediately adjacent to the new registered club building which is proposed to be three storeys in height and forms part of the wider development application. However, the new club building will feature floor to floor heights of between 4.2 to 4.5m to create high amenity space within the club. As such the proposed RFB will be a similar height to the adjacent new club and appearing in harmony with the bulk and scale of the immediately adjacent building, as shown in Figures 6 and 7 below, despite the contravention of the standard.</p>  <p>Figure 6: Extract of Section G demonstrating the proposed RFB (circled red) will fit in with the scale of the immediately adjacent new club (circled blue). (Source: Hyecorp/Amglen)</p>





*Figure 7: Extract of CGI of the proposed development fronting Penshurst Street. The RFB shown to the left-hand side of the image, circled red and the new club circled blue on the right-hand side of the image (Source: Hyecorp/Amglen)*

On the western side of Penshurst Street are existing residential flat buildings of up to four (4) storeys in height. The area surrounding the site is in a state of transition and the proposal seeks to maintain a similar built form of the existing and recently approved and constructed buildings in the surrounding locality and along Penshurst Street in particular. The proposed RFB will be in keeping with the bulk and scale of these buildings and in harmony with the streetscape along Penshurst street, despite the contravention of the development standard. Figure 8 to Figure 9 show the existing buildings located opposite the site on Penshurst Street, of similar scale and bulk to that proposed. The buildings have similar approved heights with:

- 260 Penshurst St approved at RL 112.54, and
- 262 Penshurst St approved at RL 112.2.



*Figure 8: Photograph of existing RFB opposite the site at 260 Penshurst Street (Source: City Plan)*



Figure 9: Photograph of existing RFB opposite the site at 262 Penshurst Street (Source: City Plan)

The proposed RFB with neighbourhood shops at street level will fit in seamlessly with the scale of the streetscape along Penshurst Street, appearing in harmony with the immediately surrounding buildings.

Immediately to the north on Penshurst Street, adjoining the site, is an existing two (2) storey building at 259 Penshurst Street. This building is currently in use as the 'Armenian Cultural Centre' and there would be zero setbacks between the proposed RFB and this building, as is currently the existing situation between this building and the existing adjoining commercial building on the subject site, see below Figure 10 and Figure 11.



Figure 10: Photograph of the existing two storey building at 259 Penshurst Street, circled blue. (Source: Google maps)





Figure 11: Photograph of the existing two storey building at 259 Penshurst Street, circled blue, and the existing buildings where the RFB is proposed, circled red. (Source: Google maps)

This building is also within the R3 zone and is therefore capable of being developed for a number of land uses permitted with consent in the R3 zone, including as a RFB to a maximum height of 12m pursuant to the WLEP. As such it is anticipated this site will achieve the maximum 12m height limit sometime in the future.

Figure 12 demonstrates that despite the contravention in height, this proposal still ensures the development is in harmony with the future expected bulk and scale of the northern adjoining building. Consequently, it is not considered the site at 259 Penshurst Street is rendered an isolated site by this proposal as it can be developed within the R3 controls in a similar manner.

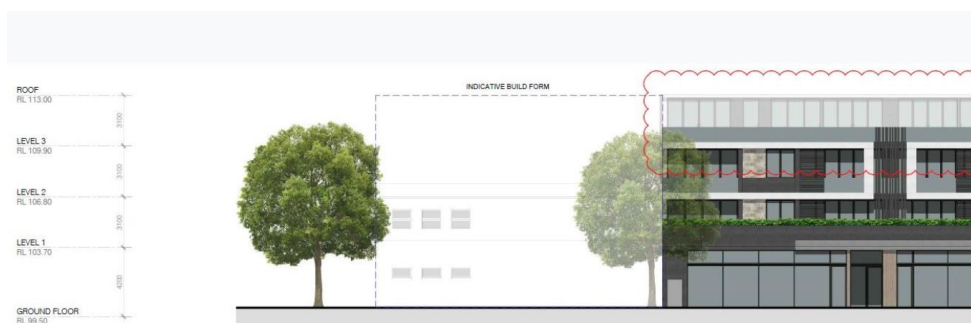



Figure 12: Extract of west elevation of RFB building fronting Penshurst Street showing the envelope of a 12m development next door at 259 Penshurst Street outlined blue (Source: Hycorp/Amglen)


### Development as a whole



The development is consistent with the approved SCC applicable to the non-R3 land that forms 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.

Objective	Discussion
	The development is consistent with — and achieves — this objective, despite the variation.
<i>(b) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,</i>	<p>The amenity of adjoining developments is a result of various factors. These are discussed separately below as views, privacy and visual intrusion and overshadowing impacts.</p> <p>For clarity, it should be noted that the ‘minimisation’ of impacts does not require that no impacts arise (<i>Initial Action Pty Ltd v Woollahra Municipal Council</i> [2018] NSWLEC 118 at [94]).</p> <p><u>Views</u></p> <p>In determining if the view loss for the adjoining or nearby properties is reasonable or unreasonable, we have given consideration to <i>Tenacity Consulting v Warringah Council</i> (2004) NSWLEC140 (Tenacity), whereby the Land and Environment Court established a set of Planning Principles on view sharing and what Councils should take into consideration in assessing view loss impacts. Those things that should be considered include an assessment of whether view impacts are negligible, minor, moderate, severe, or devastating.</p> <p>Views from surrounding properties will not be largely affected as a consequence of the contravention in height. Views in the surrounding area are generally limited to street level views, with the taller buildings along Penshurst Road having general views of the surrounding district including buildings, sky and some tree canopy.</p> <p>The minor increase in height still allows for the retention of residential and sky views, as expected within the 12m maximum height limit. The lift core is centrally located within the building and is 2.9m x 3.8m. This too, will not detrimentally impact on views expected to be achieved with the 12m maximum height limit.</p> <p>The dwellings in Crabbes Street and Horsley Avenue generally have their views oriented north/south, whereas the properties located in Summerville Crescent are not impacted due to the distance from the R3 Zone. The adjoining properties are currently built nil to boundary with views to the street. This will not alter. There are no iconic views experienced from this site, so the impact on view loss is considered to be negligible to minor and is minimised.</p> <p><b>Development as a whole</b></p> <p>The development as a whole, steps the built form down from the highest part in the centre of the site, to 3 storeys facing Crabbes Avenue and 2 storeys facing the eastern and southern boundaries. There are no iconic views with the principal views of adjoining residents being dwellings, sky and some trees. The buildings on the site have been provided with large separation between them (ranging from 8.94m to 12m). The provision of the public park and large extent of landscaping within the site ensures view vistas are maintained through the site and creates a much larger separation between the RFB building and the proposed buildings to the east, of some 40m.</p> <p>Thus, despite the variation to the FSR, the design achieves minimal disruption to views.</p> <p><u>Privacy &amp; Visual Intrusion</u></p> <p>The minor contravention in height of the upper level has no impact on privacy to the adjoining neighbours. It is only a small portion of the upper part of any window that is within the height contravention, and no privacy impacts would occur from this.</p>



Objective	Discussion
	<p>The extent of the contravention will be negligible with regards to visual intrusion. As such, the proposal does not impact on neighbouring properties in terms of loss of privacy or visual intrusion.</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>

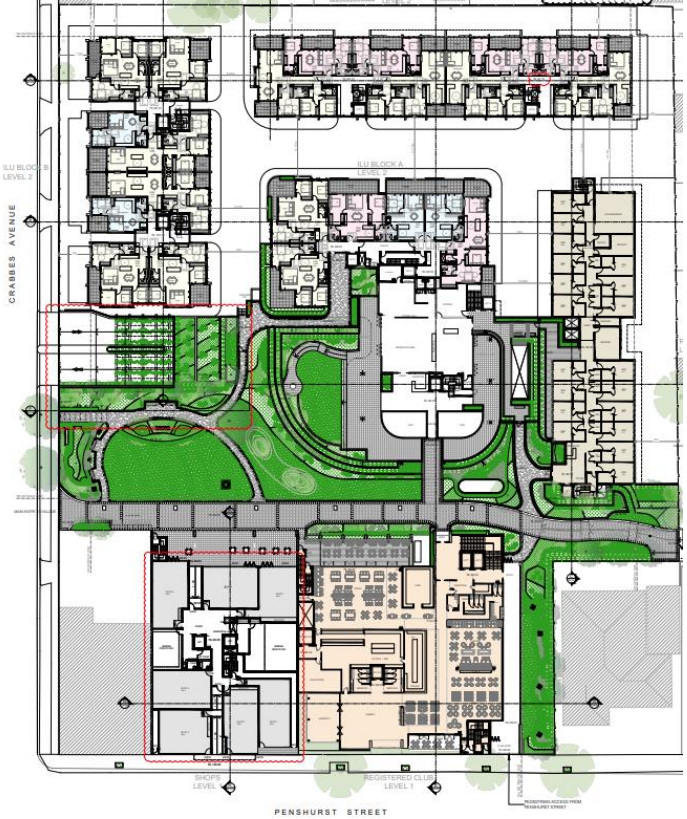
Objective	Discussion
	<p><u>Overshadowing</u></p> <p>The additional shadow cast by the contravention in height is negligible, with the shadow predominantly falling on the road and/or proposed club. The shadow does not start to impact on the proposed park until 2pm midwinter, with the shadow cast at 3pm still being minor. Refer to the shadow diagrams extracted below.</p> <div data-bbox="431 617 1398 1734">  <p>9:00AM - JUNE 21<sup>st</sup></p> <p>10:00AM - JUNE 21<sup>st</sup></p> <p>11:00AM - JUNE 21<sup>st</sup></p> <p>12:00PM - JUNE 21<sup>st</sup></p> </div> <p><i>Figure 13: Extract of shadow diagrams. Proposed RFB circled red. (Source: Hyecorp/Amglen)</i></p>

Objective	Discussion
	<div data-bbox="435 401 1370 1478">  <p>1:00PM - JUNE 21<sup>st</sup></p> <p>2:00PM - JUNE 21<sup>st</sup></p> <p>3:00PM - JUNE 21<sup>st</sup></p> </div> <p><i>Figure 14: Extract of shadow diagrams. Proposed RFB circled red. (Source: Hyecorp/Amglen)</i></p> <p><b>Development as a whole</b></p> <p>The design of the overall development results in minimal overshadowing on adjoining premises due to the stepped nature of the buildings. The highest building is kept to the middle of the site with those closest to the eastern and southern boundaries reduced to a 2-storey scale. This achieves minimal disruption of shadows to adjoining residents, with shadows not starting to affect neighbours until 1pm.</p> <p>The development is consistent with — and achieves — this objective, despite the variation</p>

Objective	Discussion
<p><i>(c) to ensure a high visual quality of the development when viewed from adjoining properties, the street, waterways, public reserves or foreshores,</i></p>	<p>The materials and finishes proposed for the section that contravenes the height will consist of smooth white concrete finish, sandstone masonry façade wall finish, and black aluminum window and door finishes. These are consistent with the surrounding developments which consists of a mixture of brick and render buildings. The extent of the contravention (being 850mm – 1.4m to the roof) will be undiscernible within the development and from the public domain. The site is not visible from waterways or foreshores.</p> <p>Thus, the contravention maintains a consistent high visual quality as expected within this locality.</p> <p><b>Development as a whole</b></p> <p>The development has been skillfully designed to taper down in height as it approaches the common boundaries. Pitched roofs and colours and materials sympathetic to the surrounding residential dwellings have been incorporated. Extensive landscaping proposed within the side setbacks and the provision of the public park will provide green vistas when viewed from the adjoining properties, creating a sense of space between the buildings. (Refer to Figure 15 and Figure 16below)</p>  <p>Figure 15: Eastern side elevation of Block C (Source: Hyecorp/Amglen)</p>  <p>Figure 16: Southern elevation of Block D (Source: Hyecorp/Amglen)</p> <p>The club renewal and provision of ground floor neighbourhood shops will improve the appearance along Penshurst Street from what currently exists. (Refer to Figure 17 and Figure 18 below which shows the current streetscape compared with the proposed.). The buildings will provide articulation and interest to the Penshurst Street frontage, which will in turn help activate this street.</p>



Objective	Discussion
	 <p><i>Figure 17: Existing Streetscape along Penshurst St. (Source: Googlemaps)</i></p>  <p><i>Figure 18: Proposed Penshurst Street elevation with the RFB on the left and the Club on the right. (Source: Hyecorp/Amglen)</i></p> <p>The development is consistent with — and achieves — this objective, despite the variation</p>
<p><i>(d) to minimise disruption to existing views or to achieve reasonable view sharing from adjacent developments or from public open spaces with the height and bulk of the development,</i></p>	<p>As discussed in part (b) above, disruption to views from surrounding properties will be minimised as a consequence of the minor contravention in height to this building.</p> <p><b>Development as a whole</b></p> <p>The separation between the buildings and the provision of the public park will create view vistas and extensive landscaped open space. This, combined with the higher buildings located in the centre and then tapering down to the boundaries, will allow reasonable view sharing from adjacent developments and public open spaces. (Refer to Figure 19 below which demonstrates the ground floor and the extent of separation between the buildings).</p>

Objective	Discussion
	 <p><i>Figure 19: Ground level showing the separation between buildings and extent of the public park area which will contribute to minimizing the disruption of views. (Source: Hyecorp/Amglen)</i></p> <p>The development is consistent with — and achieves — this objective, despite the variation</p>
<p>(e) to set upper limits for the height of buildings that are consistent with the redevelopment potential of the relevant land given other development restrictions, such as floor space and landscaping,</p>	<p>As previously discussed, the proposed RFB within the R3 zone will be consistent with existing and future development within Penshurst Street in terms of height and also with the proposed adjacent new club (the subject of the SCC). While there would be a minor contravention of 850mm – 1.4m to the height standard for the roof, the majority of the proposed building mass would be under the height limit.</p> <p>It is relevant to consider that whilst the 12m height limit would be assumed to allow for a four (4) storey development, the control established in the WLEP in 2012 has not been updated to address the requirements of the 3.1m floor to floor height requirement of the Apartment Design Guide (ADG), published in 2015. The Residential Flat Design Code, which the ADG replaced, did not stipulate a floor-to-floor height and 3m was the norm prior to the ADG. Therefore, the proposal at 3.1m floor to floor heights for the residential floors results in approximately 300mm additional height required to satisfy this ADG requirement over the three residential levels.</p> <p>Additionally, the height contravention is also contributed to by the changes in the Building Code Australia (BCA) standards requiring sprinkler systems in all buildings greater than three (3) storeys in height. As above, prior to the ADG being published in 2015, developments could show that services did not require as much space to be</p>

Objective	Discussion
	<p>fitted between floors, reducing the space required for services compared to what is now required under the ADG. These changes in standards and requirements have occurred after the WLEP height control was established in 2012. Therefore, the anticipated four (4) storeys built form within the 12m height control, together with compliance with the necessary BCA and ADG requirements, is difficult to achieve without a technical contravention to the control. Further to this, the ground floor provides neighbourhood shops which have a higher floor to ceiling height than that expected for a typical residential development. This contributes to the overall contravention of 850mm – 1.4m.</p> <p>The lift core itself is only 2.9m x 3.8m. This contravention in height will be centrally located within the building and not easily seen from the street, adjoining buildings and/or proposed park to the east. This is not uncommon within residential flat buildings and creates no detrimental impacts.</p> <p>The minor contravention in height still allows the RFB to maintain a four storey building as envisaged within the height controls and is consistent with the expectant redevelopment potential of the site.</p> <p><b>Development as a whole</b></p> <p>The provision of the SCC for the development site, has allowed for a design that recognises the development potential of the immediate area. The bulk and higher built form is restricted to the centre of the site, with the buildings tapering down to 2 and 3 storeys adjacent to lower scale residential development. The RFB building has a 4 storey component which is consistent with other buildings on the western side of Penshurst Street and also with the anticipated height of the new club. The proposal is consistent with the SCC and this objective, despite the variation in height for the R3 zoned land.</p> <p>The development is consistent with — and achieves — this objective, despite the variation</p>
<p><i>(f) to use maximum height limits to assist in responding to the current and desired future character of the locality,</i></p>	<p>The minor contravention in height maintains a four storey building, consistent with what is expected with the maximum 12m height limit for this site. As previously discussed, the proposal is similar in bulk and scale to existing developments and the desired future character of the locality, including the site to the immediate north which is expected to be redeveloped in the future.</p> <p>The desired future character of the area is envisaged through the relevant planning controls. “Compatibility” as established in <i>Project Ventrue Developments Pty Ltd v Pittwater Council</i> [2005] NSWLEC191 at 22-31, 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</i> [2020] NSWLEC 115 at 63).</p> <p>The current Penshurst Street frontage is undergoing a change with the western side of the road having 4 storey built form constructed, whilst the eastern side is currently lower in height due to a lack of recent redevelopment. The WLEP anticipates a 4 storey built form by providing the maximum height of 12m, as does the SCC for the adjoining club building. The proposed RFB achieves the 4 storey built form, and provides a co-</p>

Objective	Discussion
	<p>ordinated building frontage to adjoin the club as part of this proposal. The RFB marginally exceeds the 12m height limit of 850mm – 1.4m for the rooftop and 2.2m to the centrally located lift overrun however these will not be discernible from the public domain.</p> <p>The RFB is responding to the current and desired future character of the locality.</p> <p><b>Development as a whole</b></p> <p>The proposed development as a whole is consistent with the current and desired future character. The SCC granted for the site anticipates a Seniors Housing Development with the main bulk and scale in the centre of the site, tapering down to 3 storeys at Crabbes Avenue and 2 storeys at the eastern and southern boundaries to respect the adjoining lower density residential zones, including the Heritage Conservation Area to the south. The buildings provide articulated elevations along the streets, with materials and colours that are sympathetic to the existing. Large setbacks are provided and separation between buildings, with the provision of the public park. These areas allow for extensive landscaping to create a sense of space surrounding the buildings.</p> <p>The proposed FSR for the development is less than the allowable aggregate FSR for the entirety of the site, (ie the SCC allowable FSR and the R3 zoned land combined) despite varying the height. Hence the additional height is not a “grab” for increased density.</p> <p>The buildings fronting Penshurst Street have been designed to fit within the 4 storey existing and future streetscape, with the upper level of the RFB recessed.</p> <p>Therefore, the development is considered to be consistent with the desired future character.</p> <p>The development is consistent with — and achieves — this objective, despite the variation</p>
<p><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></p>	<p>N/A. The subject site is not located within the city centre of Chatswood.</p>

Objective	Discussion
<i>(h) to achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas.</i>	<p>The contravention in this standard still maintains a transition in building scale and density. Residential development fronting Penshurst Street ranges up to five (5) storeys in height. Density and height increase substantially towards Chatswood Centre.</p> <p>The development will be consistent with the existing character of the area, which is transitioning to higher density residential development along Penshurst Street with the construction of recent developments, in particular those opposite the site at 260 and 262 Penshurst Street. The proposed RFB will feature neighbourhood shops at street level and the scale of the development is consistent with existing buildings within the immediate area, along Penshurst Street, and the adjoining proposed new club.</p> <p>In relation to the adjoining building at 259 Penshurst Street, the existing building on that site is two (2) storeys and it is envisaged this site would be developed within the R3 controls in a similar manner, thus increasing intensity and height.</p> <p>The minor contravention to the height standard of 12m does not affect the achievement of this objective, as it maintains a building height consistent with the expected four storeys in the immediate locality.</p> <p><b>Development as a whole</b></p> <p>The consolidated proposed development of the broader site transitions up in height towards the centre of the site, where it is less visible to and from the surrounding area. Lower scale buildings are to be located along the boundaries of the site that adjoin the existing residential properties. The proposed buildings along Penshurst Street maintain the 4 storey built form that has been approved on the western side of Penshurst Street and will be consistent with the anticipated height under the provisions of the SCC for the club.</p> <p>Together with the wider consolidated development, the proposal will contribute to creating a sense of place and community and a suitable transition in built form from the taller built form in Penshurst Street to the surrounding residential areas in streets such as Crabbes Avenue and Horsley Avenue. The development is consistent with — and achieves — this objective, despite the variation</p>

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

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

The adjacent land (that is to be developed as part of the integrated development) has been the subject of a recent detailed site-specific planning 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 height control in the WLEP. The numerical height control has been



formulated on the basis that there were to be no residential uses on the two height two-sides of the site area (the land zoned RE2).

When the numerical height 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 height 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. There will be a new club building and the form of the club building will be a known quantity.

This creates an opportunity to provide for a building height that recognises 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 is an opportunity to better contribute to the social and economic welfare of the community. This is particularly relevant to this location for the reasons that follow.

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

Secondly, because of the close proximity of the site to the proposed retirement village and ILUs there will be greater provision of an under-supplied form of housing, being compact, easy-to-maintain residential apartments. This will allow, for example, grandparents to live in close proximity to their children/grandchildren.

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

To the extent that the dwellings allow seniors who chose to live in the locality to live in closer proximity to other seniors, there is an opportunity for public services (for seniors) to be provided more efficiently (when compared with the alternative of providing such



accommodation across a larger, more spread-out, portfolio of single dwelling houses in the locality).

- Section 1.3(b) —

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

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

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

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

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

- Section 1.3(c) —

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

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

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

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

- Section 1.3(d) —

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

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

- Section 1.3(g) —

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

As discussed earlier, the elements of the development that contravene the height standard relate to the roof and uppermost parts of the fourth-floor level of the building only. The majority of the building mass, however, sits below the maximum height limit. In this regard the environmental impacts are negligible. 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.

In this instance the RFB with street level neighbourhood shops is part of a consolidated development across the broader site consisting of 17 allotments. The overall scheme provides a development that is compatible with the bulk and scale of the area, with generous setbacks, a park available to the general public and mixed housing to cater for seniors and other demographics.

- The relevant aims of the WLEP:

- Clause 1.2(b) —

*for sustainability—*

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

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

- Clause 1.2(d) and (e) —

*(d) for urban design—*

- (i) to ensure development embraces the principles of quality urban design, and encourages innovative, high quality architectural design with long-term durability and environmental sustainability, and*
- (ii) to promote development that is designed and constructed—*
  - (A) to enhance or integrate into the natural landform and the existing character of distinctive locations, neighbourhoods and streetscapes, and*
  - (B) to contribute to the desired future character of the locality concerned, and*
- (iii) to ensure development design contributes positively to, and wherever possible facilitates improvements to, the public domain, and*
- (iv) to preserve, enhance or reinforce specific areas of high visual quality, ridgelines and landmark locations, including significant gateways, views and vistas, and*
- (v) to ensure that development design takes into consideration crime prevention principles,*

*(e) for amenity—*

- (i) to maintain and enhance the existing amenity of the local community, and*
- (ii) to reduce adverse impacts from development on adjoining or nearby residential properties...*

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

- Clause 1.2(f) —

*for housing—*

- (i) to provide opportunities for a range of housing choice in Willoughby to cater for changing population needs in accessible locations, and*
- (ii) to facilitate the provision of adaptable and affordable housing...*

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

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

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

- The contravention does not detract from the proposed development's satisfaction of the objectives of the standard and the objectives of the zone;
- The contravention of the standard allows for a development that is consistent with the existing and desired future character of the area;
- As demonstrated by the shadow diagrams accompanying the DA, the variation of the height standard does not result in any overshadowing impacts to adjoining residential dwellings and will not impact on the availability of solar access to adjoining and nearby neighbours;
- The contravention of the height limit does not result in any additional overlooking or loss of privacy for neighbouring properties;
- The additional height does not change the overall bulk and scale of the development;
- The additional height in the ground floor will facilitate neighbourhood shops to serve the community;
- The proposed non-compliance with the maximum height limit for the site maintains the orderly and economic use of the land;
- The proposed varied height is compatible with the existing development in the immediate context of the site and with the emerging pattern of development in the locality. The tallest part of the building that exceeds the development standard, namely the lift overrun, has been located in the centre of the building to reduce its visual appearance when viewed from the public domain; and
- The contravention would not result in any 'isolation' of 259 Penshurst Street, an 'isolated site'.

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

In section 3 (above), it was demonstrated that the proposal is consistent<sup>2</sup> with the objectives of the development standard. The proposal is also consistent with the objectives of the zone as explained in **Table 2** (below).

*Table 2: Consistency with R3 Zone Objectives.*

Objective	Discussion
<b>R3 Zone</b>	
To provide for the housing needs of the community within a medium density residential environment.	The proposed development will provide additional housing within the locality, nearby to a range of local services, facilities and amenities.
To provide a variety of housing types within a medium density residential environment.	The development is consistent with this objective as it provides for a selection of independent living units of various sizes for seniors as well as a Residential Aged Care Facility. Further, it provides other residential units in the form of an RFB.  The contravention in height does not affect the proposal from complying with this objective.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The development allows for the provision of ground floor shops and upper-level residential units which comply with the ADG floor to floor requirements. The proposed RFB will include neighbourhood shops at street level and will provide an active frontage to the street. The neighbourhood shops will attract a mix of tenures to support the viability of the area and provide valuable services to help meet the day to day needs of residents in the community.  Further to this the development will provide a public park, a renewed Club and improved basement parking which will all meet the day to day needs of local residents.
To accommodate development that is compatible with the scale and character of the surrounding residential development.	As previously discussed, the proposal will result in a development that is compatible with the scale and character of the surrounding residential development by the stepped nature of the height of the buildings, the retention of modest building separations and the provision of landscaping and a public park; and will not render the adjoining site, 259 Penshurst Street, an isolated site.

<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 allow for increased residential density in accessible locations, while minimising the potential for adverse impacts of such increased density on the efficiency and safety of the road network.</p>	<p>It does not result in additional residential density on the site. The Traffic Report prepared for the DA by Colston Budd Rogers &amp; Kafes Pty Ltd has assessed the proposal's impacts of the proposed development on the operation of the surrounding road network. Overall, their assessment finds that the surrounding road network can accommodate the additional traffic generated by the proposed development. Traffic flows on Crabbes Avenue will be consistent with its local road function and there will be minimal impact on the operation of the intersections of Crabbes Avenue with High Street and Penshurst Street. Furthermore, the proposal will result in all vehicle parking and associated noises and functions being located underground.</p>
<p>To encourage innovative design in providing a comfortable and sustainable living environment that also has regard to solar access, privacy, noise, views, vehicular access, parking and landscaping.</p>	<p>The proposal represents a high-quality urban design outcome and as previously discussed; the proposal will not result in any adverse environmental impacts that would have a detrimental impact upon the amenity of the locality.</p>

As can be seen from **Table 1** and **Table 2**, the proposal is consistent with the assumed 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 assumed objectives of the development standard and is consistent with the objectives of the R3 Medium Density Residential Zone;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

The consent authority can be satisfied to the above and that the development achieves the objectives of the development standard and is consistent with the objectives of R3 Medium Density Residential Zone notwithstanding non-compliance with Clause 4.3 – Height of Buildings standard and is therefore in the public interest.

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

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