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Clause 4.6 Variation Request to the Height of Buildings Development Standard under Section 108(2)(a) of SEPP Housing 2021

Demolition of existing buildings, tree removal and construction of
Seniors Housing

4 Lindsay Evans Close, Dapto

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Contents

1	Introduction	1
1.1	Commission	1
1.2	Material Relied Upon	1
2	The Nature of the Variation	2
3	Clause 4.6 Assessment	5
3.1	Clause 4.6(1) - Objectives	5
3.2	Clause 4.6(2) – Consent May be Granted	5
3.3	Clause 4.6(3) – Consent Authority to Consider Written Justification	5
3.4	Clause 4.6(4)(a) – Consent Authority to be Satisfied	6
3.4.1	Clause 4.6(4)(a)(i) - Written request to adequately address the matters in cl4.6(3)	6
3.4.2	Clause 4.6(4)(a)(ii) – Public Interest	10
3.5	Clause 4.6(4)(b) –Concurrence of the Secretary	11
3.6	Clause 4.6(5) - Concurrence Considerations	11
3.7	Clause 4.6(6) – Subdivision on Certain Land	11
3.8	Clause 4.6(7) – Keeping of Records	12
3.9	Clause 4.6(8) – Restrictions on use of cl4.6	12
4	Conclusion	13

Figures

Figure 1	9.5m Building Height Diagram (Source: Plus Architecture, July 2023).	3
Figure 2	11.5m Building Height Diagram (Source: Plus Architecture, February 2024).	4
Figure 3	Photomontage of the proposed development, viewed from the Princes Highway looking north-west (Source: Plus Architecture, July 2023).	7
Figure 4	Photomontage of the proposed development, viewed from the Princes Highway looking south-west (Source: Plus Architecture, July 2023).	7
Figure 5	Photomontage of the proposed development, viewed from the Princes Highway looking west (Source: Plus Architecture, July 2023).	8
Figure 6	Photomontage of the Proposal, viewed from within the site (Source: Plus Architecture, February 2024).	8
Figure 7	Photomontage of the Proposal, viewed from within the site (Source: Plus Architecture, February 2024).	9

Tables

Table 1	Summary of Environmental Impact Management	6
Table 2	Assessment against the object of the Height of Buildings development standard	9
Table 3	Assessment against the objectives of the R2 Low Density Residential Zone	10

1 Introduction

1.1 Commission

DFP Planning Pty Ltd (DFP) has been commissioned by Anglicare to prepare a written request ("Variation Request") pursuant to cl4.6 of *Wollongong Local Environmental Plan 2021* (the LEP) for the proposed Seniors Housing development (the Proposal) at 4 Lindsay Evans Close, Dapto (the Site).

The Proposal includes:

- Demolition of some existing buildings and ancillary structures;
- Tree removal and earthworks;
- Remediation works;
- Excavation to provide for a basement parking level below a pair of residential apartments buildings;
- Construction of two x 3-4 storey residential apartment buildings containing 51 independent living apartments;
- Construction of nine (9) single storey dwellings (multi-dwelling housing) for independent living;
- Provision of internal driveways, pathways; and
- Landscaping.

The Proposal substantially complies with the 9.5m Height of Buildings development standard under s108(2)(a) of the *State Environmental Planning Policy (Housing) 2021* (SEPP Housing) and fully complies with the 11.5m height limit under s108(2)(b) of SEPP Housing however, minor portions of the roof and some rooftop solar panels exceed the 9.5m height limit. The maximum height is 11.349m which constitutes a variation of 19.5% (see **Section 2**).

Notwithstanding the contravention of the development standard, it is considered that:

- Compliance with the standard is unreasonable and unnecessary in the circumstances of the case (cl4.6(3)(a));
- There are sufficient environmental planning grounds to justify the contravention (cl4.6(3)(b)); and
- The proposed development is in the public interest because it is consistent with the objectives of the development standard and is consistent with the objectives of the R2 Low Density Residential Zone (cl4.6(4)(a)(ii)).

The site specific planning grounds to justify the contravention of the Height of Buildings development standard include the sloping topography, the locations of the non-compliance and the mitigation of adverse environmental amenity impacts or minimisation of impacts to an acceptable level.

The consent authority or the Court can assume the concurrence of the Secretary pursuant to the Notice issued on 21 February 2018 and can exercise its power pursuant to cl4.6(2) to grant development consent to the proposed development notwithstanding the contravention of the development standard.

Accordingly, this written request can be relied upon by the consent authority or the Court when documenting that it has formed the necessary opinions to satisfy the provisions of cl4.6(4) of the LEP.

1.2 Material Relied Upon

This Variation Request has been prepared by DFP based on the Architectural Drawings prepared by Plus Architecture dated July 2023 and February 2024.

2 The Nature of the Variation

The proposal is for Seniors Housing and accordingly, the relevant instrument for the purposes of the height of buildings development standard is SEPP Housing.

Section 108 of SEPP Housing specifies the maximum building height development standard as follows:

108 Non-discretionary development standards for independent living units—the Act, s 4.15

- (1) *The object of this section is to identify development standards for particular matters relating to development for the purposes of independent living units that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.*
- (2) *The following are non-discretionary development standards in relation to development for the purposes of independent living units—*
 - (a) *no building has a height of more than 9.5m, excluding servicing equipment on the roof of a building,*
 - (b) *servicing equipment on the roof of a building, which results in the building having a height of more than 9.5m—*
 - (i) *is fully integrated into the design of the roof or contained and suitably screened from view from public places, and*
 - (ii) *is limited to an area of no more than 20% of the surface area of the roof, and*
 - (iii) *does not result in the building having a height of more than 11.5m,*

Under SEPP Housing, 'building height' is as per the definition under the Standard Instrument, which is as follows:

- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
 - (b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*
- including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

The Dictionary to SEPP Housing defines, 'servicing equipment' as follows:

servicing equipment *includes plant, lift motor rooms and fire stairs.*

The proposed building will exceed the 9.5m limit under s108(2)(a) of SEPP Housing with the extent of the non-compliance shown in **Figure 1** and generally described as follows:

- Building A (eastern building) - Some parts of the western roof slab which overhangs the outdoor terraces on the uppermost level where the height will be as follows:
 - 10.606m at the north-western corner of the roof slab (Finished Level (FL) = RL 51.25 – EGL RL 40.644);
 - 11.349m at the kink at the middle of the western side of the roof slab (FL = RL 51.25 – EGL RL 39.901);
 - 10.2m to the top of the solar panels near the middle of the western side of the roof (FL = RL 51.7 – EGL RL 41.5);
 - 11.317m at the south-western corner of the roof slab (FL = RL 51.25 – EGL RL 39.933);
- Building B (western building) - Some parts of the western roof slab which overhangs the outdoor terraces on the uppermost level where the height will be as follows:
 - 10.132m at the north-western corner of the roof slab (FL = RL 48.1 – EGL RL 37.968);
 - 10.438m at the kink in the middle of the western side of the roof slab (FL = RL 48.1 – EGL RL 37.662); and

2 The Nature of the Variation

- 9.59m just north of the south-western corner of the roof slab (FL = RL 48.1 – EGL RL 38.51).

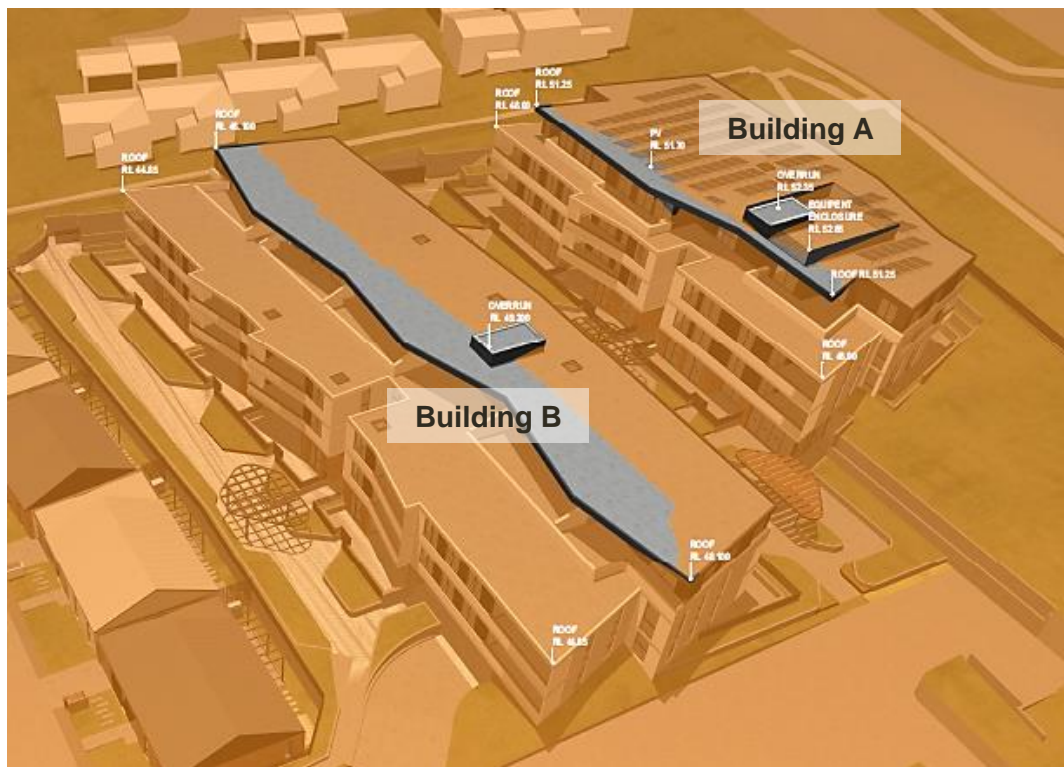


Figure 1 9.5m Building Height Diagram (Source: Plus Architecture, July 2023).

The proposal fully complies with the 11.5m height limit under s108(2)(b) of SEPP Housing with the servicing equipment limited to 10.4% (Building A) and 1.8% (Building B) of the respective roof areas (see **Figure 2**).

2 The Nature of the Variation

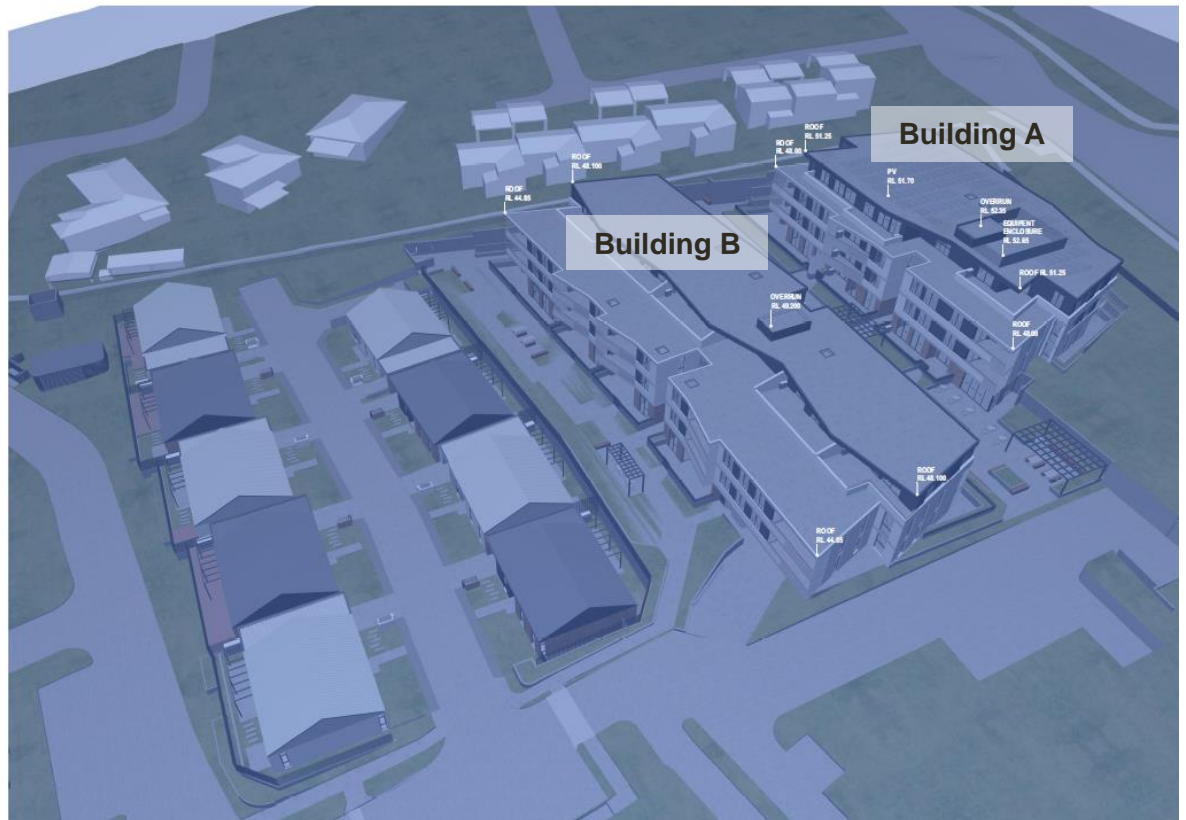


Figure 2 11.5m Building Height Diagram (Source: Plus Architecture, February 2024).

3 Clause 4.6 Assessment

3.1 Clause 4.6(1) - Objectives

Clause 4.6(1) of the LEP states the objectives of the clause as follows:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”), Preston CJ ruled that there is no statutory provision that requires the applicant to demonstrate compliance with these objectives or that the consent authority be satisfied that the development achieves these objectives. Furthermore, neither cl4.6(3) nor cl4.6(4) expressly or impliedly requires that development that contravenes a development standard “*achieve better outcomes for and from development*”.

Accordingly, the remaining subclauses of cl4.6 provide the preconditions which must be satisfied before a consent authority or the Court may grant development consent to a development that contravenes a development standard imposed by an environmental planning instrument. These preconditions are discussed hereunder.

3.2 Clause 4.6(2) – Consent May be Granted

Clause 4.6(2) provides that:

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

The height of building control in s108 of the SEPP Housing is a development standard, defined in Section 1.4 of the EP&A Act as follows (underline emphasis added):

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- ...
- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work*

Furthermore, the height of buildings development standard is not expressly excluded from the operation of cl4.6 (see **Section 3.7** and **Section 3.9**).

3.3 Clause 4.6(3) – Consent Authority to Consider Written Justification

Clause 4.6(3) relates to the making of a written request to justify an exception to a development standard and states:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

This report and information referred to herein, constitute a written request for the purposes of cl4.6(3) and the following subsections address the justifications required under that subclause.

It will be a matter for the consent authority to consider this written request prior to granting development consent to the DA and when determining the DA, to enunciate that it has satisfied itself of the matters in cl4.6(4) as discussed in the Judgment of *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (“Al Maha”).

3 Clause 4.6 Assessment

3.4 Clause 4.6(4)(a) – Consent Authority to be Satisfied

Clause 4.6(4) provides that consent must not be granted for development that contravenes a development standard unless:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *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, and*
 - (b) *the concurrence of the Secretary has been obtained.*

The following subsections of this written request address these matters.

3.4.1 Clause 4.6(4)(a)(i) - Written request to adequately address the matters in cl4.6(3)

Clause 4.6(4)(a)(i) requires the consent authority to be satisfied that this written request adequately address the matters in cl4.6(3) as follows:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.

Compliance is Unreasonable or Unnecessary

In his Judgment of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* ('Micaul') Preston CJ confirmed that an established means of demonstrating that compliance with a development standard is unreasonable or unnecessary is to establish that a development would not cause environmental harm and is consistent with the objectives of the development standard. It is considered that the environmental impacts of the proposed development are appropriately minimised or mitigated as described in **Table 1**.

Table 1 Summary of Environmental Impact Management

Issue	Discussion
Solar Access	<p>The rooftop solar panels that exceed the 9.5m height limit will not cast adverse shadow with these being only 300mm above the top of the roof slab with any shadow being cast on that roof slab.</p> <p>Whilst the eaves and upper portion of roof that exceed the 9.5m height limit will cast shadows, the diagrams prepared by Plus Architecture demonstrate that the additional shadow is minimal and will only fall on areas within the site at times between 9am and 3pm, with those areas attaining extensive direct solar access throughout other parts of the day.</p>
Visual and Acoustic Privacy	<p>The areas of non-compliance with the height development standard are primarily eaves, roof elements and solar panels which will not give rise to adverse overlooking of surrounding properties and will not generate adverse acoustic impacts as assessed in the Acoustic Impact Assessment report that accompanies the DA.</p>
Visual Impact and Views	<p>The areas of non-compliance with the height of buildings development standard are minor areas along the western edges of Building A and Building B with these sides of the building not being highly visible from the public domain in or near the Princes Highway to the east of the site as demonstrated in the photomontages prepared by the project architect (see Figures 3-5).</p> <p>Furthermore, these areas will not result in any significant reduction of views across the site given their location behind the compliant parts of the buildings when viewed from the Princes Highway, their height above existing surrounding dwellings and the primary view outlook which is to the west rather than south across the site.</p> <p>In addition, the roof overhangs are integrated components of, and will be compatible with, the overall design and materiality of the proposed buildings (see Figures 6-7) such that they will not appear as obtrusive elements when viewed from outside of or from within the site.</p>

3 Clause 4.6 Assessment

Table 1 Summary of Environmental Impact Management

Issue	Discussion
Traffic	The height exceedance does not give rise to any significant quantum of traffic generating floorspace, being primarily an eave overhang for solar protection and rooftop solar panels to meet sustainability objectives and hence, does not significantly contribute to the traffic generated by the proposed development, which has been assessed as being acceptable in the Traffic and Parking Assessment which accompanies the DA.



Figure 3 Photomontage of the proposed development, viewed from the Princes Highway looking north-west (Source: Plus Architecture, July 2023).



Figure 4 Photomontage of the proposed development, viewed from the Princes Highway looking south-west (Source: Plus Architecture, July 2023).

3 Clause 4.6 Assessment



Figure 5 Photomontage of the proposed development, viewed from the Princes Highway looking west (Source: Plus Architecture, July 2023).



Figure 6 Photomontage of the Proposal, viewed from within the site (Source: Plus Architecture, February 2024).

3 Clause 4.6 Assessment



Figure 7 Photomontage of the Proposal, viewed from within the site (Source: Plus Architecture, February 2024).

Furthermore, the proposed development is considered to be consistent with the object of the height of buildings development standard under s108(1) of SEPP Housing as described in Table 2.

Table 2 Assessment against the object of the Height of Buildings development standard

Objective	Assessment
The object of this section is to identify development standards for particular matters relating to development for the purposes of independent living units that, if complied with, prevent the consent authority from requiring more onerous standards for the matters	<p>The object seeks to permit a consent authority to consider whether the height of a building, if above the height limit, is acceptable but not to impose a lower height limit.</p> <p>The proposed non-compliance does not offend this objective as it does not preclude the consent authority from considering the impacts of the proposed height non-compliance and coming to its own conclusion with respect to whether those impacts are acceptable.</p> <p>As demonstrated in this report and in the documentation accompanying the DA, the environmental impacts of the height non-compliances are considered to be minimal and acceptable.</p>

Accordingly, for the reasons identified above it is considered that strict compliance with the height of buildings development standard is unreasonable or unnecessary as the non-compliance will not cause environmental harm and the proposed development is consistent with the objectives of the development standard, notwithstanding the non-compliance.

Sufficient Environmental Planning Grounds

In the Judgment of *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (“Four2Five”) Pearson C indicated there is an onus on the applicant to demonstrate, through the written request, that there are “sufficient environmental planning grounds” such that compliance with the development standard is unreasonable or unnecessary. Furthermore, that the environmental planning grounds must be particular to the circumstances of the proposed development rather than public benefits that could reasonably arise from a similar development on other land.

In Initial Action, Preston CJ indicated that it is reasonable to infer that “environmental planning grounds” as stated in under cl4.6(3)(b), means grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s1.3 of the EP&A Act.

3 Clause 4.6 Assessment

The site-specific environmental planning grounds that support the proposed variation to the height of buildings development standard in this circumstance include the following:

- **Topography** – That portion of the Site upon which the building which is proposed to exceed the height limit is sited, has a level change of approximately 5-6m from east down to west and a level change of approximately 5-6m from north down to south. This slope contributes to the height exceedance which is evident in **Figure 1** above, where it can be seen that the eastern parts of the uppermost building are below the height limit. It is not considered desirable from a design perspective, or necessary, to step the building any further to address this change in topography. In addition, there are several existing man-made terraces with retaining structures within the footprint of the proposed buildings where cut into the previous natural topography exacerbates the height non-compliance; and
- **Context** – The maximum height to the rooftop slab is on the western side of the building and is unlikely to be highly perceptible from public domain areas along the Princes Highway in proximity to the Site as demonstrated by **Figures 3-5** or from locations within the Site as demonstrated **Figures 6 and 7**. Furthermore, the exceedance due to the rooftop solar panels is minor and a pedestrian at street level or from within the Site would not readily discern that these exceed the height limit or reasonably consider that they would be offensive from a visual impact perspective.

In Micaul and Initial Action, Preston CJ also clarified that sufficient environmental planning grounds may also include demonstrating a lack of adverse amenity impacts. As summarised in **Table 1**, the proposal satisfactorily manages or mitigates adverse amenity impacts.

Accordingly, it is considered that there are sufficient environmental planning grounds to justify the contravention of the height of buildings development standard in this instance.

3.4.2 Clause 4.6(4)(a)(ii) – Public Interest

Pursuant to cl4.6(4)(a)(ii) and as discussed by Preston CJ in Initial Action, if the development is consistent with the objectives of the development standard and the objectives of the zone, the consent authority can be satisfied that the development will be in the public interest.

An assessment of the proposal against the object of the height of buildings development standard is provided at **Table 2** and an assessment of the proposed development against the objectives of the R2 Low Density Residential Zone is provide at **Table 3**.

Table 3 Assessment against the objectives of the R2 Low Density Residential Zone	
Objective	Assessment
• <i>To provide for the housing needs of the community within a low density residential environment.</i>	The proposal provides for additional housing to meet the needs of the community in building forms (i.e. residential flat building and attached dwellings) that are permitted in the R2 Low Density Residential Zone and is consistent with the scale and form of other recently approved residential buildings within the Site and with appropriate separation from lower scale buildings to the north of the Site.
• <i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	This objective is not relevant to the proposal as it is purely a residential development.

These assessments demonstrate that the proposed development is consistent with the object of the development standard to be varied and the relevant objective of the zone within which the development is to be carried out. Accordingly, it follows that the proposed development is in the public interest.

3 Clause 4.6 Assessment

3.5 Clause 4.6(4)(b) –Concurrence of the Secretary

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under cl64 of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under cl4.6 of the *Standard Instrument – Principal Local Environmental Plan* or SEPP 1 subject to conditions.

The LEP adopts cl4.6 of the SILEP and therefore, that prerequisite of the Notice is met.

Condition 1 of the Notice is not relevant in this instance as the request does not seek to vary a development standard relating to minimum lot size.

Condition 2 of the Notice provides that concurrence may not be assumed by a delegate of the consent authority (i.e. a Council Officer) if the development will contravene a development standard by more than 10%. The Proposal has a maximum variation of 19.5% and accordingly, in this instance, the Southern Regional Planning Panel may assume concurrence in respect of the variation requested to the height of buildings development standard.

Alternatively, the Court has power to grant development consent to the proposed development even though it contravenes the height of buildings development standard, without obtaining or assuming the concurrence of the Secretary by reason of s39(6) of the *Land and Environment Court Act 1979* (the Court Act).

3.6 Clause 4.6(5) - Concurrence Considerations

Notwithstanding that concurrence can be assumed pursuant to the Notice and notwithstanding the Court's powers under s39(6) of the Court Act, in Initial Action, Preston CJ clarified that the Court should still consider the matters in cl4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

The matters to be considered under cl4.6(5) are:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

The proposed contravention of the height of buildings development standard has been considered in light of cl4.6(5) as follows:

- The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is specific to the design of the proposed building for this particular Site and the nature of the variation and the scale of the proposed development are minor and do not trigger any requirement for substantial augmentation of regional or State infrastructure or services;
- As indicated above, the proposed contravention of the height of buildings development standard is considered to be in the public interest because it is consistent with the objectives of the zone and the object of the development standard. Accordingly, there would be no significant public benefit in maintaining the development standard in this instance; and
- It is considered that there are no other matters of relevance that need to be taken into consideration by the Court.

3.7 Clause 4.6(6) – Subdivision on Certain Land

Clause 4.6(6) is not relevant to the proposed development as it does not relate to subdivision of land.

3 Clause 4.6 Assessment

3.8 Clause 4.6(7) – Keeping of Records

Clause 4.6(7) is an administrative clause requiring the consent authority to keep a record of its assessment under this clause after determining a development application.

3.9 Clause 4.6(8) – Restrictions on use of cl4.6

Clause 4.6(8) of the LEP states as follows:

- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
 - (a) *a development standard for complying development,*
 - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) *clause 5.4,*
 - (caa) *clause 5.5,*
 - (ca) *clause 4.2A, 6.1 or 8.3.*

Clause 4.6(8) is not relevant to the proposed development as it is subject to a DA and does not constitute Complying Development, does not seek to vary any BASIX commitments and does not relate to a standard under cl4.2(A), cl5.4, cl5.5, cl6.1 or cl8.3.

4 Conclusion

The proposed development contravenes the Height of Buildings development standard under s108(2)(a) of SEPP Housing 2021.

This written request to vary the development standard has been prepared in accordance with cl4.6(3) of the LEP and demonstrates that the preconditions under cl4.6 for granting of development consent have been met.

The Height of Buildings control under s108(2)(a) of SEPP Housing is a development standard and is not excluded from the application of cl4.6 (cl4.6(2)).

Strict compliance with the development standard is unreasonable and unnecessary (cl4.6(3)(a)) because, notwithstanding the contravention of the Height of Buildings development standard, the proposed development:

- will not result in environmental harm that cannot be mitigated or minimised to an acceptable level; and
- is consistent with the object of the development standard pursuant to s108(1) of SEPP Housing as it does not preclude the consent authority from considering the impacts of the proposed height non-compliance and coming to its own conclusion with respect to whether those impacts are acceptable, noting that this assessment concludes that the impacts are acceptable.

There are sufficient environmental planning grounds (cl4.6(3)(a)) to justify the contravention of the Height of Buildings development standard including the sloping topography, the location of the non-compliances upon the building and the mitigation of adverse environmental amenity impacts or minimisation of impacts to an acceptable level.

Furthermore the proposed development is in the public interest (cl4.6(4)(a)(ii)) because the proposed development is consistent with.

- the objectives of the development standard (as outlined above); and
- the relevant objective of the R2 Low Density Residential Zone, as it provides for additional housing to meet the needs of the community in building forms (i.e. residential flat building and attached dwellings) that are permitted in the R2 Low Density Residential Zone and are consistent with the scale and form of other recently approved residential buildings within the Site and with appropriate separation from lower scale buildings to the north of the Site.

The consent authority or the Court can assume the concurrence of the Secretary pursuant to the Notice issued on 21 February 2018 and can exercise its power pursuant to cl4.6(2) to grant development consent to the proposed development notwithstanding the contravention of the development standard.

Accordingly, this written request can be relied upon by the consent authority when documenting that it has formed the necessary opinions of satisfaction under cl4.6(4) of the LEP.