

December 2022

Clause 4.6 – Request for Variation of Height Standard
Proposed Seniors Housing Development
15B, 17, 19, 19A & 21 Penrhyn Avenue & 579 Pennant Hills Road,
West Pennant Hills

1.0 INTRODUCTION

This is a written request that has been prepared in accordance with Clause 4.6 of *Hornsby Local Environmental Plan 2013 (HLEP 2013)* to justify a variation from the 2 storey building height standard for buildings adjacent to a boundary in residential zones where residential flat buildings are not permitted contained in Clause 40(4)(b) of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (the SEPP)*.

Clause 4.6(2) of *HLEP 2013* provides that development consent may be granted for development even though it would contravene a development standard imposed by the *Plan* or any other environmental planning instrument.

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

The height standard contained in the *SEPP* is not excluded from the operation of Clause 4.6 by Clause 4.6(8).

This request:

- has been prepared having regard to the Department of Planning & Environment's *Varying Development Standards: A Guide, August 2011*, and relevant decisions in the Land and Environment Court of NSW and the NSW Court of Appeal; and
- demonstrates that exercising the flexibility afforded by Clause 4.6, in the particular circumstances of this application, is not only in the public interest because the proposal satisfies the relevant objectives of both the R2 Low Density zoning applying to the land and the standard, but also it results in a better planning outcome for the development.

2.0 HEIGHT STANDARD

2.1 The Standard

Clause 40(4)(b) of the *SEPP* provides that the height of a buildings is not to exceed 2 storeys adjacent to a boundary of the site in residential zones where residential flat buildings are not permitted.



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2.2 Extent of Variation

The proposed 2-storey town house building is to comply with the standard where it is adjacent to the northern boundary of the site.

However, due to the topography of the site, parts of the car park under the town houses in their southern section will project more than 1m above ground level.

Under the terms of the *SEPP*, where these projections occur, the building will be regarded to contain 3-storeys.

These 3-storey elements will not be visible adjacent to, or visible from, the northern boundary or in the Penrhyn Avenue streetscape.

3.0 CLAUSE 4.6(3) CONSIDERATIONS

3.1 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

One of the ways of establishing that a development standard is unreasonable or unnecessary in the circumstances of the case identified by Preston CJ in *Wehbe v Pittwater Council* is to establish that the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

In this instance, there are no objectives stated in the *SEPP* for this standard.

However, the note in the *SEPP* relating to the standard states that the purpose of this standard is to avoid an abrupt change in the scale of development in the streetscape.

When viewed in the streetscape, the building adjacent to the northern boundary will be viewed as a 2-storey building setback a significant distance from the street with extensive landscaping in the setback area.

The 3-storey elements of the town houses will only be evident on their internal southern elevation within the site.

They will not be visible adjacent to, or from, the northern boundary.

The height of the town houses, measured to the ceiling of their topmost floors, is to vary between 4.4m and 7.5m and will generally be significantly below the non-discretionary height standard of 8m.

Consequently, the proposal is one which could not be refused under the terms of the *SEPP* on the basis of its height.

In addition, the northern boundary of the site represents its common boundary with the public pathway linking Penrhyn Avenue to Pennant Hills Road.

The pathway is 4.5m wide and, together with a minimum 2.55m setback of the town houses and 1m setback of the 2-storey house on 20 Penrhyn Avenue, will provide a minimum distance of separation of some 8m between these buildings.

The proposal:

- will establish an appropriate juxtaposition between the adjacent buildings in this area in terms of their height, separation, landscape setting and streetscape presentation;
- will be consistent with the scale of development in Penrhyn Avenue; and
- will not result in any abrupt change in the scale of development in the streetscape.

The town houses do not result in any adverse effects on the amenity enjoyed by residents of surrounding properties in terms of:

- privacy;
- overshadowing;
- view loss; or
- visual impact.

The standard is, therefore, unreasonable and unnecessary because its stated purpose is achieved despite non-compliance with its numerical value.

3.2 Are there sufficient environmental planning grounds to justify contravening the development standard?

The aim of the *SEPP* is to encourage the provision of housing that will:

- (a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability;
- (b) make efficient use of existing infrastructure and services; and
- (c) be of good design.

The proposal provides an appropriate design response to the opportunities and constraints offered by the site and its setting to achieve the aims of the *SEPP* by:

- satisfying a community need for appropriately designed seniors housing in this locality;
- leading to a better use of the existing physical and social infrastructure serving this area;
- increasing housing supply and improving housing choice to suit different needs and lifestyles;
- leading to positive social and economic outcomes by providing additional housing opportunities without any adverse environmental effects; and
- being compatible and consistent with the established and desired future character of development and streetscape in this locality.

The proposal promotes the orderly and economic use and development of the land in accordance with Section 1.3(c) of the *Environmental Planning and Assessment Act 1979* (*EP&A Act*).

The height of the town houses, measured to the ceiling of their topmost floors, is to vary between 4.4m and 7.5m and will generally be significantly below the non-discretionary height standard of 8m .

The town houses will not result in any adverse effects on the amenity enjoyed by residents of surrounding properties in terms of privacy, overshadowing, view loss or visual impact.

Consequently, there are sufficient environmental planning grounds to justify the variation from the standard as proposed.

4.0 OBJECTIVES OF STANDARD

An assessment of the proposal in terms of the stated purpose of the height standard contained in Clause 40(4)(b) of the *SEPP* is contained in Section 3.1.

The proposal is consistent with this purpose.

5.0 OBJECTIVES OF ZONE

A summary assessment of the proposal in terms of the objectives for development in the R2 Low Density Residential zoning of the land is as follows.

Zone Objective	Proposal's Response	Consistency
To provide for the housing needs of the community within a low density residential environment	The proposal will provide for the housing needs of the community within this zone in the manner contemplated by the <i>SEPP</i> and the non-discretionary scale and density standards contained in it	✓
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	Not applicable to this application	✓

The proposal is consistent with the objectives for development in the R2 Low Density Residential zone.

6.0 OTHER MATTERS

6.1 Concurrence of the Secretary of the Department of Planning & Environment

The Secretary's concurrence to a variation of a standard by more than 10% may be assumed by Council's independent hearing and assessment panel in accordance with the Department's Circular PS 18-003, issued on 21 February 2018.

6.2 Does the contravention of the development standard raise any matter of significance for State or regional environmental planning?

The variation from the standard for the development does not raise any matter of State or regional environmental planning significance.

6.3 The public benefit of maintaining the development standard

There is no identifiable public benefit in maintaining the standard as the proposal is consistent with the stated purpose of the standard and the existing and desired future character of development in this locality.

6.4 Any other matters required to be taken into consideration by the Secretary before granting concurrence

There are no other relevant matters required to be taken into consideration relating to the Secretary's concurrence.

7.0 CONCLUSION

The height standard is both unreasonable and unnecessary in the circumstances of this case and there are sufficient environmental planning grounds to justify variations from it.

The proposal is in the public interest because it is consistent with:

- the stated purpose of the standard; and
- the objectives for development in the R2 Low Density Residential zone.

The development, with the variation from the standard as proposed:

- will not result in any adverse environmental impacts;
- will not have any adverse effect on the amenity enjoyed by occupiers or residents of surrounding properties in terms of privacy, solar access, visual impact or view loss; and
- will promote the orderly and economic use and development of the land in accordance with Section 1.3(c) of the *EP&A Act*.

The proposal is, therefore, suitable for approval under the terms of Clause 4.6(2) of *HLEP 2013*, despite its variation from the numerical value of the standard contained in Clause 40(4)(b) of the *SEPP*.

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