



CLAUSE 4.6

The construction of 3 Self-Contained dwellings under SEPP (Housing for Seniors or People with a Disability) 2004 including tree removal, excavation and semi-basement parking.

27 Bellevue Avenue
Avalon Beach, NSW 2107

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REF. M190179



**Clause 4.6 Variation –
Rear Storey Height**



Clause 4.6 Variation Statement – Rear Storey Height (Clause 40(4)(c))

1. INTRODUCTION

This Variation Statement has been prepared in accordance with Clause 4.6 of Pittwater Local Environmental Plan 2014 ("PLEP 2014") to accompany Development Application at No. 27 Bellevue Avenue, Avalon Beach ("the site"). The application seeks consent for the construction of 3 Self-Contained dwellings under SEPP (Housing for Seniors or People with a Disability) 2004 ("SEPP (HSPD)") including tree removal, excavation and semi-basement parking.

2. PROPOSED VARIATION

Clause 40(4)(c) of SEPP (Seniors Housing) prescribes that a building located in the rear 25% of the site must not exceed 1 storey in height. Clause 40 states the following:

"40 Development standards—minimum sizes and building height

(1) **General** A consent authority must not consent to a development application made pursuant to this Chapter unless the proposed development complies with the standards specified in this clause...

... (4) **Height in zones where residential flat buildings are not permitted** If the development is proposed in a residential zone where residential flat buildings are not permitted:

(c) a building located in the rear 25% area of the site must not exceed 1 storey in height."

SEPP (HSPD) contains the following in relation to storey height in Clause 3:

"(2) In calculating the number of storeys in a development for the purposes of this Policy, a car park that does not extend above ground level by more than 1 metre is not to be counted as a storey."

The proposed eastern building is located at the rear of the site and is generally 1 storey in height within the rear 25% of the site. However, a small part of the undercroft parking area extends approximately 1.19m above the existing ground level at the rear of the site (refer to **Figure 1**) and is thus technically regarded as a storey under SEPP (HSPD).

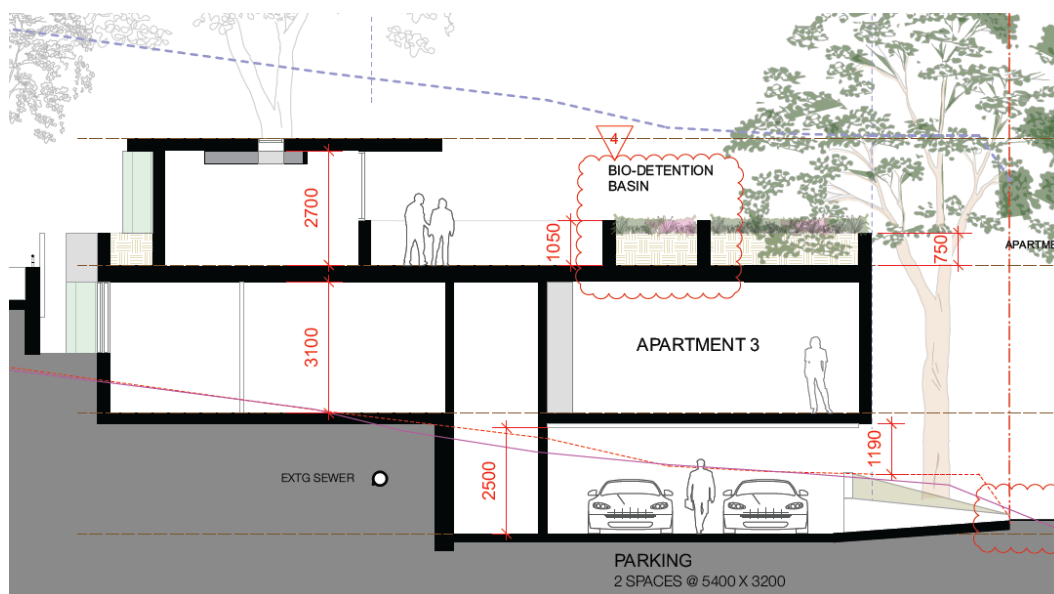


Figure 1 Proposed section through eastern building showing the height of the rear car parking area above existing ground level

The prescribed rear storey height under Clause 40(4)(c) of SEPP (HSPD) is a “development standard” to which exceptions can be granted pursuant to Clause 4.6 of PLEP 2014.

3. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

The objectives and provisions of Clause 4.6 are as follows:

4.6 *Exceptions to development standards*

(1) *The objectives of this clause are 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.*

(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.

(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.*

(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 Planning Secretary has been obtained.*

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

- (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.*

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note. When this Plan was made it did not include all of these zones.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(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.

It is noted that Clause 40(4) of the SEPP (HSPD) is not “expressly excluded” from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

4. THAT COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(a))

In *Wehbe V Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”

The judgement goes on to state that:

“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore 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 compliance with the standard is unnecessary and unreasonable;*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

"...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."

Compliance with the rear storey height development standard is considered to be unreasonable and unnecessary as the objectives of those standards are achieved for the reasons set out in Section 7 of this statement. For the same reasons, the objection is considered to be well-founded as per the first method underlined above.

Notably, under Clause 4.6(4)(a)(ii) a consent authority must now be satisfied that the contravention of a development standard(s) will be in the public interest because it is consistent with the objectives of the particular standard(s) and the objectives for development within the zone in which the development is proposed to be carried out. Clause 4.6(4)(a)(ii) is addressed in Section 6 below.

5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS (CLAUSE 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standards, the following planning grounds are submitted to justify contravening the prescribed rear storey height:

- a. Whilst the proposed eastern building does technically not comply with the rear storey height prescribed by SEPP (HSPD), the rear building will generally appear as a single storey building. The eastern building is at the lowest end of the site, with the slope of the land rising to the west. Furthermore, the proposed rear car parking area will generally be open on the southern, northern and eastern side giving the visual appearance of a building cantilevered above natural ground level, thus reducing the overall bulk of the rear building. Visual bulk is further reduced by the incorporation of deep soil zones within the rear setback area that will support dense screen planting. Consequently, the proposed rear building will typically appear as a single storey structure when viewed from surrounding roads and properties.
- b. No. 15 Old Barrenjoey Road, directly eastwards of Wickham Lane comprises of a two storey building that is located on land zoned B2 Local Centre. Therefore, the proposed eastern (rear) building responds to this context in terms of scale ensuring that the built form of the proposal will not appear visually jarring when viewed from Sanders or Wickham Lanes. Furthermore, consistency with the scale of existing development will ensure there is not an abrupt increase in height from the subject site to existing built form on the eastern side of Wickham Lane, despite the differences in zoning.

- c. Seniors Housing by its very nature has functional requirements that will mean that it does not necessarily look the same as single dwellings, or other permitted uses. Furthermore, the requirements for level floorplates on sloping sites does not allow the built form to follow the topography with the use of stairs like a typical dwelling-house. Despite this, the proposal follows sound design principles that in essence seeks to nestle the building into the site and generally follow the topography of the site with a high degree of modulation and articulation, particularly on the street front elevations. The built form, whilst marginally greater than a single storey at the rear is integrated with existing and new site landscaping to minimise the visual impact. The design of the proposal carefully responds to the site characteristics and surrounding development to deliver a development that is consistent with the site context.
- d. Despite the rear storey height non-compliance, the proposed development complies with the majority of local building envelope controls under SEPP (HSPD), PLEP 2014 and PDCP, despite the aims of SEPP (HSPD) setting aside local controls. In fact, the proposal respects local controls by providing a compliant maximum building height, FSR, front and side setbacks, wall height plane, and deep soil and landscaped areas. The scale, bulk and height of the development is therefore consistent with the building envelope that is anticipated by the majority of planning controls that apply to the site.
- e. There will be no adverse impacts on solar access to neighbouring properties as a result of the non-compliance. The proposed development will not give rise to additional adverse impacts on solar access to neighbouring private open space or living areas between 9am and 3pm on 21 June, consistent with the relevant provisions under SEPP (HSPD) and Pittwater 21 DCP. The rear part of the development that breaches the prescribed rear storey height development standard is located towards the rear and thus shadows from the non-compliance will generally fall on Sanders and Wickham Lanes, and not neighbouring residences.
- f. The rear storey height breach does not result in any additional privacy impacts. The proposed development is setback 12.8m from the nearest residential building across Wickham Lane which provides adequate building to building separation in an urban environment. Furthermore, the building design and retention of existing landscaping on the northern boundary will minimise the privacy impacts on surrounding properties.
- g. The rear storey height breach facilitates the car parking areas to provide compliant levels of off street parking for the proposed development. By providing a separate car parking area at the rear, the proposal requires less excavation and will have a lessened impact on the natural topography and vegetation to be retained on the site. Reducing excavation will also assist in protecting mature trees located on and adjacent to the site. Thus, the development provides a better long-term social and environmental impact.
- h. The proposed development meets the objectives of the development standards and meets the objectives of the R2 Low Density Residential zone (as further detailed in Section 7 below).
- i. The storey height non-compliance is partially a function of the approximately 9m steep fall across the site from west to east. Reducing the height, without adversely impacting the full development potential of the site, would require additional excavation and would likely result in an adverse impact on the high levels of design excellence exhibited by the proposed development.
- j. The proposed development achieves the objects in Section 1.3 of the EP&A Act, specifically:
- The development facilitates ecologically sustainable development by providing much needed, well-designed Seniors Housing in an appropriate and accessible location. Furthermore, the development will have a positive economic and environmental impact on the locality (1.3b);
 - The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for an appropriate residential use (1.3c);

- The proposed development has been designed to respond to, protect and enhance the natural environment of the site, including a number of mature trees on and adjacent to the site (1.3e);
- The development has been designed to be compatible with the surrounding built form and despite the rear storey height non-compliance, will appear as a low density development and will not adversely impact neighbouring amenity. The development will provide excellent levels of amenity for prospective occupants and exhibits design excellence (1.3g).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development relating to Seniors Housing and the context of the local area. The additional storey height will facilitate compliant car parking on site and assist in providing a high quality development with excellent levels of internal amenity that does not prejudice the character or appearance of the local streetscape or levels of residential amenity enjoyed by neighbouring properties.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

6. CLAUSE 4.6(4)(a)

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in 7a below). Clause 4.6(3)(b) is addressed in Section 5 above.



The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

7. 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)(a)(ii))

7a. Objectives of Development Standard

There are no specific objectives in SEPP (HSPD) listed in Clause 40(4)(c) and no objectives elsewhere in the relevant sections of SEPP (HSPD) relating to rear storey height. Notwithstanding, the Land and Environment Court in the case of *Winten Group Architects Pty Ltd v Kuringai Council* [2005] NSWLEC 546 has identified objectives for building height standards as:

"To control impacts on neighbours and to ensure that the proposed development is not overbearing in terms of bulk, scale and height and also in terms of overshadowing impacts and privacy concerns."

The note to Clause 40(4) states that the purpose of the development standard is to "avoid an abrupt change in the scale of development in the streetscape".

It is considered that these objectives are appropriate objectives for the development standards for rear storey height and are therefore included and addressed for the purposes of this request. The proposal's compliance with these objectives and the objectives for development in the zone are demonstrated below.

Objective (a): "To control impacts on neighbours and to ensure that the proposed development is not overbearing in terms of bulk, scale and height and also in terms of overshadowing impacts and privacy concerns."

As set out in Section 5 above, the proposed non-compliance will not give rise to any adverse impacts on neighbouring properties in terms of visual bulk, overshadowing or privacy.

The site has three street frontages, including an eastern rear frontage to Wickham Lane. As such, the proposed rear building that is the subject of the non-compliance does not directly adjoin a neighbouring property to the rear (east) or the south. Wickham Lane provides a physical separation to No. 15 Old Barrenjoey Road to the east which will be separated by some 12.8m from the eastern wall of the proposed rear building. This separation, along with the extensive screen planting provided in deep soil pockets within the rear setback will ensure that direct views towards No. 15 Old Barrenjoey Road will be limited and building will not appear visually obtrusive when viewed from neighbouring apartments to the east.

No neighbour directly adjoins the site to the south, with Sanders Lane providing separation to Avalon Public School.

No. 29 Bellevue Avenue contains a single storey dwelling house that adjoins the subject site to the north. However, the non-compliant eastern building is located adjacent to the very rear of their garden which does not serve as the main private open space to that dwelling. Instead it mainly contains driveway access and parking areas, landscaping and bin storage. The rear windows and main outdoor entertaining area of No. 29 are located some 30m upslope (westwards) of the non-compliant part of the rear building. Extensive areas of deep soil and tree screen planting are also proposed along the northern boundary of the site, in addition to existing mature trees located on the neighbouring site. As such,



the non-compliant eastern building will not appear visually bulky when viewed from No. 29. Further, the building will not afford any direct, unfiltered cross views towards No. 29 Bellevue Avenue. Given the orientation of the site, no shadows from the proposed eastern building will fall on the private open space or habitable windows of No. 29 Bellevue Avenue.

In light of the above, it is demonstrated that the proposed non-compliant eastern building will not give rise to any prejudicial impacts on neighbouring properties and will not be overbearing in terms of bulk, scale and height and also in terms of overshadowing impacts and privacy concerns. The development is therefore consistent with Objective (a), despite the non-compliance.

Objective (b): “to avoid an abrupt change in the scale of development in the streetscape”

No. 15 Old Barrenjoey Road located on the eastern side of Wickham Lane is a two storey residential building that is located in the B2 Local Centre zone. This adjacent zone is characterised generally by two storey buildings with a variety of residential and non-residential land uses. The proposed eastern building responds to the scale and height of this neighbouring built form and will provide a transition from the B2 zone to the east to the lower scale R2 zone west of Wickham Lane.

The scale and design of the proposed eastern building is compatible with the streetscape in this part of Avalon the non-compliance with the rear storey height development standard will not result in abrupt change in scale of development within the streetscape. When viewed from the street, given the numerically minor scale of the non-compliance, open design of the lower parking area, and extensive screen planting in the rear setback area, the proposed eastern building will generally appear single storey when viewed from Wickham and Sanders Lane.

Therefore, despite the non-compliance, the proposed development remains consistent with Objective (b).

7b. Objectives of the Zone

Clause 4.6(4)(a)(ii) also requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of Zone R2 are as follows:

- *To provide for the housing needs of the community within a low density residential environment.*

The proposed development will provide high quality self-contained Seniors Living housing in an appropriate accessible location that will be compatible with the low density character of the streetscape. There is a clear need for additional seniors housing in the locality and the proposed development will be surrounded by compatible land uses.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposal will not prejudice any land uses that provide facilities or services to meet the day to day needs of residents in the zone or wider locality. The development will give rise to positive social, economic and community outcomes by providing high quality housing to meet a demonstrated need in the locality.

- *To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.*

The development will not adversely affect other land uses in the zone or vicinity. The proposed development will be compatible with surrounding land uses in the zone, being residential in character and comprising a number of similar low density housing developments. The scale, bulk, form and design of the proposed development will also be compatible with the general built form in the locality.



The proposed development is consistent with the objectives of Zone R2 in that it will result in the development of residential use in an accessible area. The use will be compatible with the mix of uses in the zone and will be compatible with the existing environmental and built character of the locality.

The rear storey height variation is not antipathetic to the objectives for the zone and for that reason the proposed variation is acceptable.

8. THE CONCURRENCE OF THE SECRETARY HAS BEEN OBTAINED (CLAUSE 4.6(4)(b))

The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

9. WHETHER CONTRAVENTION OF THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING (CLAUSE 4.6(5)(a))

Contravention of the rear storey height development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

10. THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD (CLAUSE 4.6(5)(b))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the rear storey height. As such, there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed rear storey height marginally exceeds the maximum permitted for the rear 25% of the site pursuant to Clause 40(4)(c) of SEPP (HSPD), the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standards and the objectives of the zone that make the proposed development in the public interest.

11. CONCLUSION

Having regard to all of the above, it is our opinion that compliance with the rear storey height development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with the standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation should be supported.

