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1. Introduction

This report seeks an exemption to a development standard prescribed by the Sutherland Shire Local Environmental Plan 2015 (LEP). The report relates to a Statement of Environmental Effects (SEE) and a Development Application (DA) proposing the restoration of the State Significant Historic Heathcote Hall and Gardens incorporating the development of townhouses and units including basement parking and storage at 1-21 Dillwynia Grove, Heathcote.

The exception is sought pursuant to Clause 4.6 of the LEP. An exception is sought in relation to the application and varying the height of building development standards applicable to the subject development site, pursuant to Clause 4.3 of the LEP. It should be noted that whilst there are parts of the proposed Building A that do not comply with the maximum building height standards, equally, there are significant areas of the proposed building which fall well under the maximum heights permitted. This is discussed in further detail in this report.

This request has been prepared in accordance with the Department of Planning & Environment (DP&E) Guideline Varying Development Standards: A Guide, August 2011, and has incorporated as relevant principles identifies in the following judgements:

1. Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46
2. Wehbe v Pittwater Council [2007] NSWLEC 827
3. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No 1')
4. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90
5. Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 ('Four2Five No 3')
6. Moskovich v Waverley Council [2016] NSWLEC 1015

In this report, we have explained how flexibility is justified in this case in terms of the matters explicitly required by Clause 4.6 to be addressed in a written request from the Applicant. This report also addresses, where relevant and helpful, additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 or the assumed concurrence of the Secretary.

2. What is the environmental planning instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the Sutherland Shire Local Environmental Plan 2015 (LEP).

3. What is the zoning of the land?

The site is zoned E4 Environmental Living pursuant to the LEP.

4. What are the objectives of the zone?

The objectives of the E4 zone are as follows:

- To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.
- To ensure that residential development does not have an adverse effect on those values.
- To allow for development that preserves and enhances the natural landscape setting of the locality.
- To protect and restore trees, bushland and scenic values particularly along ridgelines and in other areas of high visual significance.
- To ensure the character of the locality is not diminished by the cumulative impacts of development.
- To minimise the risk to life, property and the environment by restricting the type or level and intensity of development on land that is subject to natural or man-made hazards.
- To allow the subdivision of land only if the size of the resulting lots makes them capable of development that retains or restores natural features while allowing a sufficient area for development.
- To share views between new and existing development and also from public space.

5. What is the development standard being varied?

The development standard being varied is the "height of buildings" standard.

6. Under what clause is the development standard listed in the EPI?

The development standard being varied is prescribed under Clause 4.3(2) of the LEP. An extract is below.

"4.3 Height of buildings

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map."

7. What are the objectives of the development standard?

The objectives of the standard are set out below:

"4.3 Height of buildings

- "(1) The objectives of this clause are as follows:
- (a) to establish and maintain the desirable attributes and character of an area,
 - (b) to minimise overshadowing and ensure there is a desired level of solar access and public open space,
 - (c) to support building design that contributes positively to the streetscape and visual amenity of an area,
 - (d) to reinforce important road frontages in specific localities".

8. What is the numeric value of the development standard in the EPI?

The applicable numeric value of the development standard of maximum building heights is 8.5 metres.

9. What is the proposed numeric value of the development standard in the DA and the variation proposed?

The maximum variations for each building height point as measured to the roof and lift overrun as obtained from the Sections prepared by Ink Architects are:

Element	Height (m)	Variance to 8.5m Control (m)	Variance (%)
DA 11 Section B-B	9.545 m	1.045 m	12.29 %
DA 23 Section H-H	8.797 m	0.297 m	3.49 %

Please refer to Section Plans DA11 and DA 23 included with this development application which include annotations of the relevant LEP height lines to visually demonstrate the extent of height non-compliance of Building A and Building B.

- The numerical variations are indicated above and range from 12.29 % to 3.49 % depending on the where the point is measured and what building element. The three storey buildings are set back from the street frontages, screened by the 2 storey dwellings and existing mature trees, recessed to avoid any negative impact on overshadowing or loss of privacy for existing properties. The lift overrun will not create additional shadows as the shadows created by the minor additional height are falling within the shadows cast by the proposed buildings.

10. Matters to be considered under Clause 4.6

The following table provides a summary of the key matters for consideration under Clause 4.6 of the LEP and a response as to where each is addressed in this written request:

Requirement/Subclause of Clause 4.6	Response/Comment
<p>(1) The objectives of this clause are as follows:</p> <p>(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,</p> <p>(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</p>	<p>It is key to note that the objectives of the clause are to provide flexibility in applying development standards in that in so doing better development outcomes ensue.</p>
<p>(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.</p>	<p>The height standard is not expressly excluded from operation of this clause.</p>
<p>(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:</p> <p>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</p> <p>(b) that there are sufficient environmental planning grounds to justify contravening the development standard.</p>	<p>This written request justifies the variation by demonstrating (a) is achieved in Section 11, and (b) is achieved in Section 12.</p>
<p>(4) Development consent must not be granted for development that contravenes a development standard unless:</p> <p>(a) the consent authority is satisfied that:</p> <p>(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</p> <p>(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</p> <p>(b) the concurrence of the Director-General has been obtained.</p>	<p>This written request addresses all requirements of subclause (3).</p> <p>As set out in Section 13 of this written request, the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for the zone.</p> <p>Concurrence is assumed but is a matter to be determined by the Consent Authority.</p>
<p>(5) In deciding whether to grant concurrence, the Director-General must consider:</p> <p>(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and</p> <p>(b) the public benefit of maintaining the development standard, and</p> <p>(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.</p>	<p>Potential matters of significance for State or regional environmental planning is addressed in Section 14.</p> <p>Consideration of whether there is any public benefit in maintaining the development standard is considered in 13.</p>

(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.....	Does not apply as strata subdivision is proposed provided Council agrees to support the development in accordance with the provision of LEP 2015 – Clause 5.10 Heritage Conservation (10) Heritage Incentives.
(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).	This is a matter for the Consent Authority.
(8) This clause does not allow development consent to be granted for development that would contravene any of the following....	Does not apply to the site/proposed variation.

The requirement for consideration and justification of a Clause 4.6 variation necessitates an assessment of a number of criteria. It is recognised that it is not merely sufficient to demonstrate a minimisation of environmental harm to justify a Clause 4.6 variation, although in the circumstance of this case, the absence of any environmental impact is of considerable merit and is in accordance with the Conservation Management Plan supported by the NSW Heritage Council.

The proposed variation from the development standard is assessed below against the accepted "5 Part Test" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council* [2007] NSWLEC 827 and the principles outlined in *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46. Whilst the principle applied to SEPP 1, we believe that it is useful to apply in the consideration of a request under Clause 4.6 of the LEP, as confirmed in *Four2Five*.

11. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the variation. Under *Four2Five*, whilst this can still be considered under this heading, it is also necessary to consider it under Clause 4.6(3)(a) (see below).

The five ways described in *Wehbe* are therefore appropriately considered in this context, as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;

The objectives of the standard are set out in Section 7 of this report. A response to the objectives are provided below:

- (a) to establish and maintain the desirable attributes and character of an area,
- (b) to minimise overshadowing and ensure there is a desired level of solar access and public open space,
- (c) to support building design that contributes positively to the streetscape and visual amenity of an area,
- (d) to reinforce important road frontages in specific localities.

No more density is proposed for site than envisioned under the LEP, noting that compliance with the maximum FSR is achieved. The proposed development purely seeks to achieve a better planning and architectural, amenity and urban design outcome supported by the Conservation Management Plan and Heritage Impact Statement.

The objectives are achieved in a different way than envisioned under LEP, with some minor variations to the building height of Building A which are adjusted as follows:

- Lift Overrun
 - Providing the Lift overrun within the centre of the building envelope, ensuring that it is well away from the edges of the building which results in not being visible from the surrounding streets and not cause any overshadowing impacts.
 - If the lift overrun were to be reduced in height to comply with the height control, it could no longer serve the upper floor of the building which would have NCC and DDA impacts with regards to loss of disabled access to these apartments.
- Roof
 - The proposed Roof slab does not cause any overshadowing impacts and it is to maintain a consistent roof height across the building frontage, which is important to ensure a consistent visual perspective from within the development or streetscape and to maintain internal ceiling heights.

The minor variations to the height control as detailed earlier do not result in any additional overshadowing impacts or loss of views from surrounding sites. The three storey buildings are masked by 2 storey dwellings and mature existing trees. There is no adverse visual impact on the proposed building design and the proposed development elements do not adversely impact the streetscape or skyline.

Consideration of the compatibility of the proposal and its surroundings can be undertaken with regard to the Land Environment Court Planning Principle on “compatibility with context” in *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191. In order to test whether a proposal is compatible with its context, the following questions can be asked, with answers provided accordingly:

- Are the proposal's physical impacts on surrounding development acceptable?

The SEE submitted with the DA undertakes a detailed assessment of the proposal with regard to the surrounding sites concluding no adverse impact. The proposal's physical impacts on surrounding development/land are therefore acceptable.

- Has the proposed development of the site has been undertaken with due consideration of the existing and future redevelopment of neighbouring properties?

The SEE and supporting documentation submitted with the DA undertakes a detailed assessment of the proposal with regard to the existing and future redevelopment concluding no adverse impact.

The proposal's physical impacts on surrounding development/land are therefore acceptable.

To conclude, the proposal is a suitable development option for the site which renews a state significant heritage item – Heathcote Hall and is in keeping with the desired future character for this neighbourhood.

- Is the proposal's appearance in harmony with the buildings around it and the character of the street?

The proposal results in a built form outcome that is satisfactory to the Conservation Management Plan, is compatible with the desired future built form for the site and the surrounding area. As such, the proposal is capable of being in harmony with future buildings within the area and the desired future character of the street network following any potential transformation of the neighbourhood.

For the reasons set out above, the objectives of the standard are satisfied and in many cases, are better satisfied than a strictly compliant development.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

Not applicable. The underlying objective or purpose of the standard is relevant to the development and is achieved.

3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

Not applicable.

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;

Not applicable.

5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

The zoning of the land is appropriate for the site.

We have addressed a "Wehbe test" additional to "compliance with the objectives of the standard" to demonstrate that compliance with the standard is unreasonable or unnecessary in the circumstances (refer to Four2Five).

Consistent with subsequent case law (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC90), in addition to demonstration that Wehbe way "1" is satisfied, it is not necessary to find other Wehbe "ways" to demonstrate "unreasonable and unnecessary" but rather, to find other additional reasons rather than simply relying on Wehbe way "1".

Strict compliance with the standard is considered to be unreasonable and unnecessary in the circumstances of this case for the following additional reasons:

- No Additional Density
 - The minor additional height above the height standard to select portions of Building A and B within site will not result in any additional GFA/density. Therefore, the height variations are not attributed to any additional density on the site but rather a direct response to the specific site attributes (i.e. CMP, Heritage Impact Assessment, street orientation, block form and drainage) and to achieve a better planning outcome.
- Better Residential Amenity
 - Based on the above, we contend that the proposed variations in height and the nature of a sloping site topography, results in a better outcome for residential amenity in terms of solar access and views/outlook.

For the reasons as set out above, compliance with the standard can be demonstrated to be unreasonable and unnecessary in the circumstances of this case.

12. Sufficient environmental planning grounds to justify the contravention

The particular circumstances of this case distinguishes it from others for the following key reasons:

- As addressed earlier in this report and in the documentation prepared by Ink Architects for the DA, the massing achieves a better streetscape and amenity outcome for the public domain, as well as a better residential amenity outcome and the design response has been guided by the CMP, Heritage Impact Statement, Site Analysis and Heritage Landscape Plans and Arboricultural Report.
- The SEE and supporting documentation that has been prepared for DA provides a holistic environmental planning assessment of the proposed development and demonstrates that subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the development. In particular, the SEE and supporting documentation demonstrates that the contravention of the height standard enables the planned density for the site under the LEP to be achieved in a dwellings and apartments therein with higher levels of amenity achieved than a strictly height compliant development.

The above points are environmental planning grounds that warrant the exceedance, which are not "generic", but rather, specific to the site and circumstances of the development.

13. Is the variation in the public interest?

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless 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.

The objectives of the standard have been addressed in Section 11 and are demonstrated to be satisfied. The objectives of the zone are addressed below.

Objectives of E4 Zone	Response/Comment
<ul style="list-style-type: none">• To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.• To ensure that residential development does not have an adverse effect on those values.• To allow for development that preserves and enhances the natural landscape setting of the locality.• To protect and restore trees, bushland and scenic values particularly along ridgelines and in other areas of high visual significance.• To ensure the character of the locality is not diminished by the cumulative impacts of development.• To minimise the risk to life, property and the environment by restricting the type or level and intensity of development on land that is subject to natural or man-made hazards.• To allow the subdivision of land only if the size of the resulting lots makes them capable of development that retains or restores natural features while allowing a sufficient area for development.• To share views between new and existing development and also from public space.	<p>The proposed minor variation to height standard will not conflict with these objectives. The proposed minor height variation does not result in any impact to the planned density for the site. The envisaged development will complement the desirable attributes and character of the area by providing a better amenity outcome than a height complying scheme or non-restored heritage item.</p> <p>The proposal in accordance with the CMP, Heritage Impact Statement, Heritage Landscape Plans and Arboricultural Report ensures restoration and protection of existing mature trees and gardens which promotes better site lines, streetscape and views</p> <p>The proposed variation to the height standard will not conflict with these objectives as the proposed strata subdivision will fund the restoration of the heritage item and natural features, promote view sharing between new and existing development, incorporate communal spaces which will enhance and define the streetscape in a positive manner.</p>

The objectives of zone and standard have been adequately satisfied, where relevant. Therefore, the variation to the height of buildings standard is in the public interest.

14. Matters of state or regional significance (cl. 4.6(5)(a))

There is no prejudice to planning matters of State or Regional significance resulting from varying the development standard as proposed by this application.

15. The public benefit of maintaining the standard (cl. 4.6(5)(b))

Pursuant to case law of *Ex Gratia P/L v Dungog Council* (NSWLEC 148), the question that needs to be answered is “whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development”.

There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the maximum height of buildings standards, whilst better planning outcomes are achieved.

We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will be in the public interest.

16. Is the variation well founded?

This Clause 4.6 variation request is well founded as it demonstrates, as required by Clause 4.6 of the LEP, 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, which results in a better planning outcome than a strictly compliant development in the circumstances of this particular case;
- The development meets the objectives of the development standard and where relevant, the objectives of the E4 zone, notwithstanding the variation;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard; and
- The contravention does not raise any matter of State or Regional significance.

The variation is therefore considered appropriate in the circumstances of the case.