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Clause 4.6 Exception to Development Standard – Floor Space Ratio

**Development Application
26 Rosebery Street, HEATHCOTE, NSW, 2233**

**Submitted to Sutherland Shire Council
Updated May 2024**

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Clause 4.6 – Exceptions to Development Standards

1.0 Introduction

1.1 Written request under clause 4.6(3) of Sutherland Shire Local Environmental Plan 2015

Standard to be varied:	Floor Space Ratio – Clause 4.4
Address:	26 Rosebery Street, Heathcote
Proposal:	The development proposal is for a part three (3) storey and part four (4) storey residential flat development that supports 18 residential apartments of which a minimum of nine (9) dwellings will be used for the purpose of affordable housing.

Table 1: Request overview

The Applicant requests under clause 4.6 of the Sutherland Shire Local Environmental Plan 2015 (LEP) that the proposal for a residential flat building described above be granted development consent notwithstanding that the approved development will exceed the development standard for maximum floor space ratio (FSR) of 0.7:1 applying under clause 4.4 of the LEP with reference to the FSR map. The proposal will have a floor space ratio of 1.13:1, which is a 62% increase on that development standard.

It is possible that the request is not required given that Section 38 of Division 5 of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP) permits development allowed for in a site compatibility certificate (SCC) issued under that SEPP to be carried out with development consent. That provision of the SEPP may override the development standard in the LEP.

In this case, the Director-General's delegate issued an SCC for the development on 16 June 2022, which permits an additional use of the land for the purpose of a residential flat building *"resulting in 18 dwellings, of which 9 dwellings are proposed to be managed by a social housing provider as affordable housing for 15 years"*, provided other requirements stated in the certificate are met.

While it may be that clause 38 of the Housing SEPP applies to override the effect of the development standard such that a clause 4.6 request is not required, this request is made for abundance of caution.

As anticipated by clause 4.6, this request sets out below:

- (a) why requiring compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, including both the planning context of the proposal and the issuing of the SCC, and
- (b) the environmental planning grounds that are sufficient to justify contravening the development standard.

Notably, Division 1 of the Housing SEPP permits development on the development site in the form of dual occupancies and multi dwelling housing (which are each nominated as permissible forms of development in

the LEP zoning table) to exceed the 0.7:1 development standard, up to a **maximum FSR of 1.2:1 for the R3 Medium Density Residential zone**.

Because the 'residential flat building' form is not directly permitted by the zoning table in the LEP for the R3 Medium Density Residential zone, **the maximum FSR of 1.2:1 fixed by Division 1 of the Housing SEPP** arguably does not strictly apply to a 'residential flat building' which only becomes permissible because a SCC has been issued under Part 2 Division 5. However, the maximum FSR of 1.2:1 does apply to a DA for a dual occupancy or multi dwelling housing on this land, as they are permitted forms of '*residential development*' nominated in the zoning table.

The FSR standard of 1.2:1 for an Environmental Planning Instrument (EPI) that applies to the land for those forms for affordable residential housing provides strong guidance as to an appropriate reasonable maximum density to be applied to an affordable residential flat building on the subject land.

Primarily, there are strong planning reasons, including environmental, social and economic (as stipulated by the Act) why an increased FSR exceeding the 0.7:1 standard (typical of a detached dwelling) is appropriate and reasonable on this site. Those reasons in summary are:

- a) The site is ideally situated next to an existing and established residential flat building and the Heathcote town zoned (E1 zoned land). The site is also within short walking distance of the Heathcote train station.
- b) The existing character of the area is already defined by the adjoining residential flat building, notwithstanding that residential flat buildings are prohibited in the zone within which the site is located (R3 Medium Density Residential). The site is also adjoined by multi-dwelling housing and a dual occupancy. The closest single dwelling houses are located to the west on the opposite side of Rosebery Street. The character of the immediate context is therefore a denser form of development and the proposal to develop a residential flat building on the subject site forms a logical extension of residential flat development that forms the edge of the Heathcote 'local centre'.
- c) The proposed development is generally within the height limit of 9 metres for the majority of the building, with part of the roof and parapet exceeding the 9 metres. The front of the development as it interfaces with Rosebery Street is four stories and rises to 13 metres. This 4 storey element is the only habitable floor space associated with the proposal that exceeds the development standard for height. The heights have been carefully considered to provide a transition from the 15-metre residential flat development to the south, to the two story development to the north.
- d) The site has a desirable long, northern orientation which will allow 2 hours of direct solar access to apartments at mid-winter with a high level of amenity. Further, the height, form and scale has been carefully considered to ensure solar access to apartments in the existing residential flat building to the south. The attached Solar Access Schedule at Appendix F demonstrates compliance and a high level of amenity of the adjoining apartments.
- e) The proposed density is 1.13:1 achieving 1,374.96m² residential GFA. The adjoining Horizon Heathcote comprises 77 apartments with a density of 1.66:1 (maximum permissible 2:1) and maximum building height of 15.8m (maximum permissible 13m). The density transition between neighbouring sites along Rosebery Street is appropriate and compatible: Horizon Heathcote (1.66:1) to multi-dwelling housing 24a-24b Rosebery Street (0.7:1) – the proposed density of 1.13:1 is lower than the average between the two neighbouring sites at 1.18:1.
- f) A variation to the density control has been considered on environmental impacts, however social and economic impacts are also required to be considered under the EP&A Act. There is a significant shortage of affordable housing, in close proximity to transport within the Sutherland Shire, and the addition of 18 apartments will provide important supply and opportunities for future residents to meet

the needs of the Sutherland Shire's population, particularly housing for older people, people with a disability or essential key workers. A key reason for the shortage is that suppliers cannot deliver housing economically to support the social need in normal market conditions. The incentivised process regulated by the application of the EPI assists to change that dynamic.

- g) The increased housing density is supported by the close proximity of the site to public transport; train station and major bus route, as well community services, shopping, jobs, community facilities and the environment at Sutherland, Wollongong and Miranda – all that can be accessed by train.

Taking those matters into account, and as expanded upon below, this variation request demonstrates the following:

- (a) that compliance with the development standards is unreasonable or unnecessary in the circumstances of the case,
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard,
- (c) the dwellings within the proposed development is consistent with the SCC issued on 16 June 2022 in relation to the site,
- (d) There are substantial public benefits of the affordable housing development proceeding, such that it is in the public interest to allow a departure from the numerical standard in this case.

1.2 The Site

The site is located at 26 Rosebery Street, Heathcote, to the north of the Heathcote train station. the site has a frontage of 20 metres to Rosebery Street and side boundaries of 60 metres to adjoining residential development. The site is legally known as Lot 16 in DP 2499. The subject land is identified in the figures below.

The site is within a developed residential urban environment. It is bound to the south by a four storey residential flat apartment development known as "Horizon Heathcote". To the north is an existing two storey attached dual occupancy at 24 Rosebery Street. To the east, and the rear of the site, is a complex of five townhouses located at 14 Strickland Street.

In terms of the broader area, the site is part of a larger block that contains a significant amount of E1 Local Centre zoned land, with residential flat development. The location of the subject site is ideally located within the context of this block, already adjoining four storey residential apartment development, and multi-dwelling housing.



Figure 1: Aerial view of the site (Source: Sixmaps)

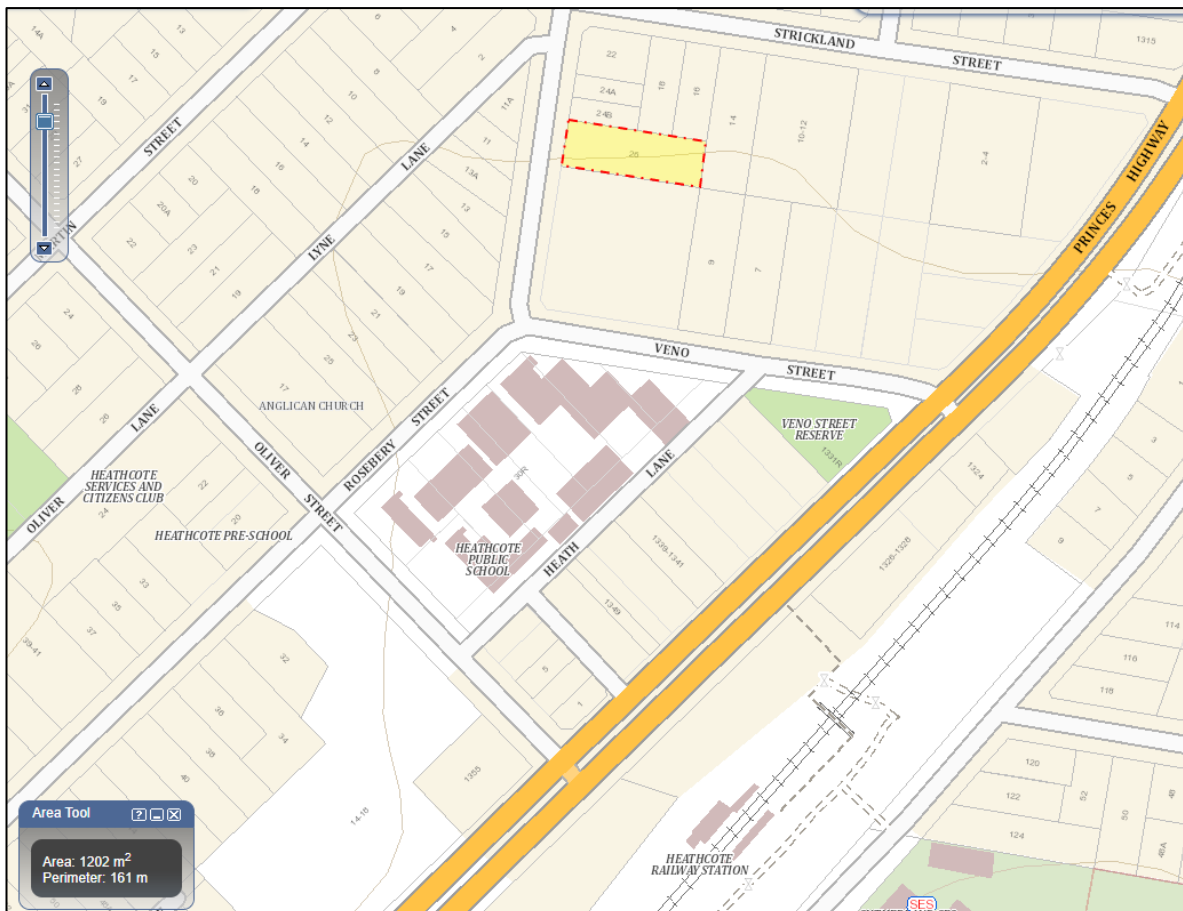


Figure 2: Site Description (Source: Sixmaps)

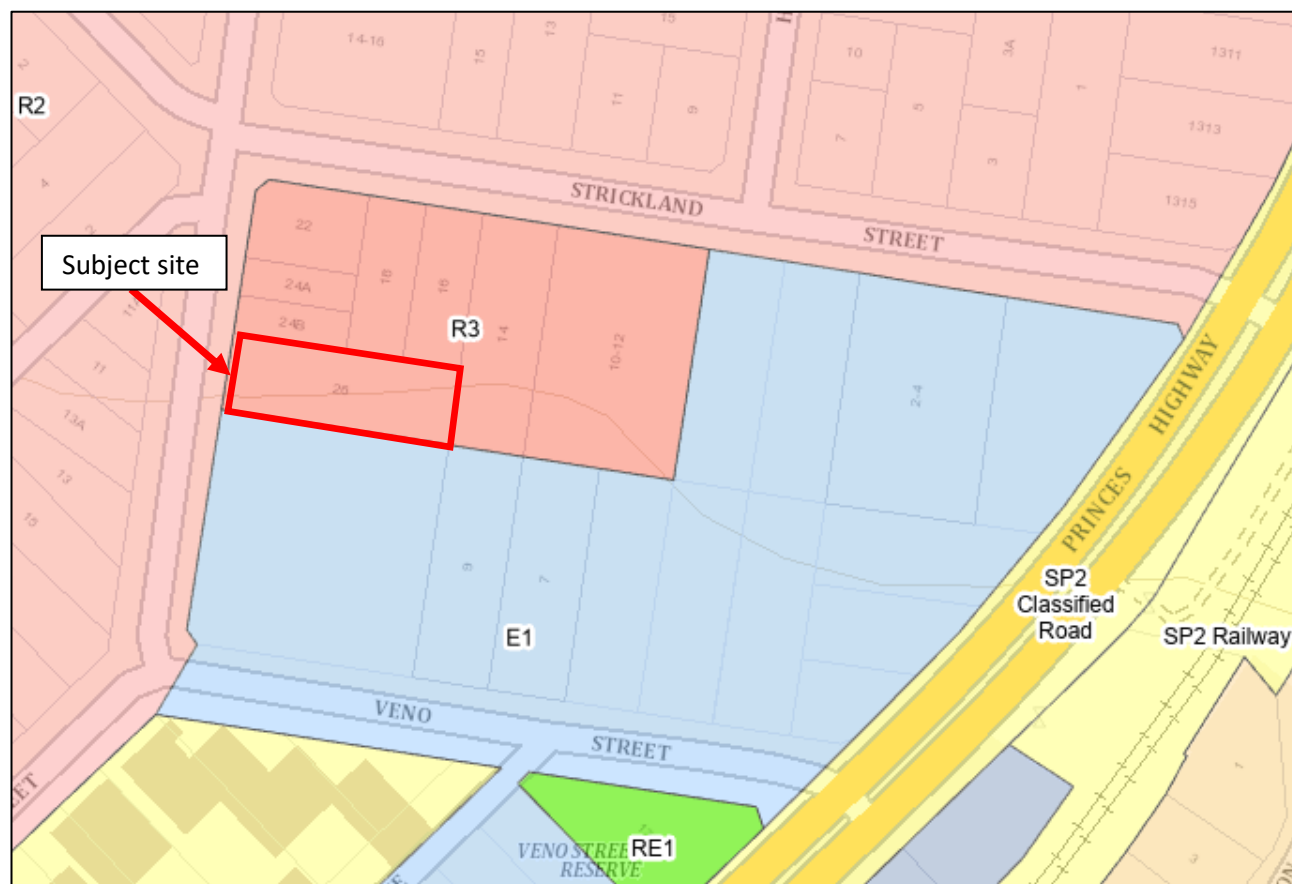


Figure 3: Zoning Map under Sutherland LEP 2015

1.3 The Proposed Development

The development proposes the demolition of the existing dwelling house and clearing of the site, followed by the construction of a mostly three-storey, with part four storey residential flat building comprising 18 dwellings of which a minimum of nine (9) dwellings will be used for the purpose of affordable housing.

The proposed development has been designed in accordance with the design principles of SEPP 65 and demonstrates compatibility within its context. In particular, the proposed development seeks to achieve the following outcomes for the site:

- A maximum height of 3 storeys for the majority of the site (approximately 9-metres), with the front part of the development supporting 4-storeys as it interfaces with Rosebery Street. While the Housing SEPP prevails where there may be an inconsistency with the principal development controls within an LEP, it is important in demonstrating compatibility with existing and future development in the surrounding area to respond to the local context.
- To provide for a minimum 6.2 metre setback to Rosebery Street, and a 4 metre street setback at Levels 2-4 as it is the predominant existing street setback on Rosebery Street for this type of development.
- There is a 3-4 metre side setback to the southern boundary achieving a building separation of 11-12 metre to the neighbouring "Horizon Heathcote".
- The side setback to the northern boundary is 3-6 metres.
- The rear setback is 8 metres (Level 1-2) and 12 metres to Level 3
- The primary external material is brickwork which has been selected as it is the prevalent material within the existing streetscape and is appropriate to a landscaped setting.

- To incorporate a design that complements a mixed residential setting and its location to the Heathcote town centre and railway station.
- To maximise articulation and solar access by incorporating deep recesses within the massing form to amplify the sun and animate the facades. The building layout is planned to capture sunlight into apartments and communal open spaces throughout the day, all year round.
- To maximise the amount of landscaping and communal open space, to be accessible to residents and planted with flowering trees, lush planting with a mix of colour and texture and low-level planting with trailing plants along the edges of planters.

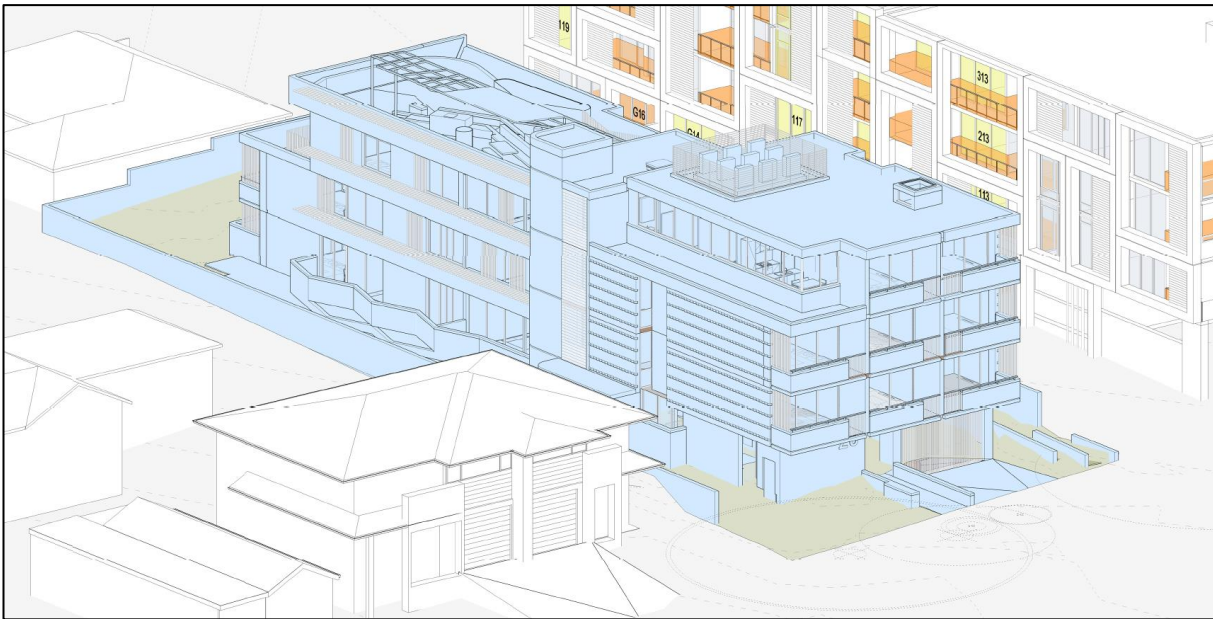


Figure 4: Development outcome



Figure 5: Visualisation

1.4 Floor space ratio under clause 4.4(2) and clause 1.9.

Under the Sutherland LEP 2015, a simple reading shows at clause 4.4(2) the maximum floor space ratio (FSR) control that applies to the subject site is 0.7:1.

- (2) *The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.*

However, the land use controls in the LEP are not specific for a built form and use that seeks to provide affordable housing.

The Sutherland LEP 2015, at clause 1.9(1) states that the LEP is subject to the provision of any State Environmental Planning Policy (SEPP) that applies to the Land. The Housing SEPP 2021 applies.

Clause 8 of the Housing SEPP states if there is an inconsistency between it and any other environmental planning instrument, the Housing SEPP prevails to the extent of the inconsistency.

Residential flat buildings are prohibited in R3 Medium Density Residential zones under the LEP. However, with the benefit of the SCC issued on 16 June 2022 under the Housing SEPP, residential flat buildings are an additional permitted use on the subject site where the development is carried out by or on behalf of a public authority or social housing provider.

The proposed development (if approved) will be carried out by Pacific Community Housing, a registered Tier 3 social housing provider and will provide a minimum of 9 dwellings for affordable housing.

Given the primary application of the Housing SEPP to the proposed development, one of the key objectives of the proposed development is to implement the Principles in clause 3 of the Housing SEPP. Those aims are:

- (a) *enabling the development of diverse housing types, including purpose-built rental housing,*
- (b) *encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability,*
- (c) *ensuring new housing development provides residents with a reasonable level of amenity,*
- (d) *promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,*
- (e) *minimising adverse climate and environmental impacts of new housing development,*
- (f) *reinforcing the importance of designing housing in a way that reflects and enhances its locality,*
- (g) *supporting short-term rental accommodation as a home-sharing activity and contributor to local economies, while managing the social and environmental impacts from this use,*
- (h) *mitigating the loss of existing affordable rental housing.*

The primary objective of the development application is the provision of affordable housing. As such and noting the legal construction of the Sutherland LEP 2015 the appropriate comparison of the minimum development standards for development that is specifically seeking to provide new affordable housing needs to be considered via the application of the development standards that apply for that type of use under Part 2 of the SEPP:

Part 2, Division 1 of the Housing SEPP

Division 1 at Clause 17(1)(a) of the Housing SEPP provides a deemed to satisfy FSR standard of 1.2:1 for development that is permissible under another instrument. Under the LEP, in this R3 Medium Density Residential zone the following forms of development are permissible:

- (a) attached dwellings,
- (b) dual occupancies,
- (c) dwelling houses,
- (d) manor houses,
- (e) multi dwelling housing,
- (f) multi dwelling housing (terraces),
- (h) semi-detached dwellings,
- (i) shop top housing

Accordingly, the Housing SEPP allows for a variety of forms of development with an FSR up to 1.2:1.

No FSR standard addresses the appropriate FSR for residential flat buildings, but that FSR standard gives a pragmatic indication of the built density that is acceptable in the zone having regard to the objectives of the Housing SEPP.

Part 2, Division 5 of the Housing SEPP

The application benefits from a determination from the Secretary for a SCC under Division 5 of the Housing SEPP. In that determination, and in keeping with Clause 1.9 of the Sutherland LEP, an additional permitted use of Residential Flat Building is provided.

The 'residential flat building' form of development permitted by the SCC would ordinarily be typified by an FSR higher than that of detached dwellings and other forms of development permitted in the zone by the LEP.

It would be inconsistent with a rational planning scheme under the Housing SEPP for dwelling houses and dual occupancies (for example) to be permitted a 1.2:1 FSR under Division 1 of the SEPP, but for a residential flat building development for which a SCC has been issued to be restricted to 0.7:1.

To so restrict the residential flat building form for which a SCC has been issued, the objective of improved social outcomes to which Division 5 is directed would be frustrated, particularly having regard for the permissible density within the SCC of 18 dwellings (of which 9 are to be affordable).

The Apartment Design Guide (which applies to the development under the provisions of Clause 41 of the Housing SEPP) and SEPP 65 include useful guidelines for relevant aspects of a residential flat building to ensure that appropriate levels of amenity are achieved both for the proposed development and its neighbours.

The Secretary in providing consent to the SCC imposed a maximum dwelling yield of 18 apartments of which 9 are to be affordable housing. The density contemplated in the SCC application to which the Secretary approved was 1.2:1, which has been refined down through detailed design at 1.13:1.

2.0 Overview of Provisions

Summary of Legal Context and Proposed Variation	
EPI applicable:	Sutherland Shire Local Environmental Plan 2015
Zoning:	Land Use Zone R3 Medium Density Residential
Objectives of the zone:	<ul style="list-style-type: none"> To provide for the housing needs of the community within a medium density residential environment. To provide a variety of housing types within a medium density residential environment. To enable other land uses that provide facilities or services to meet the day to day needs of residents. To encourage the supply of housing that meets the needs of the Sutherland Shire's population, particularly housing for older people and people with a disability. To promote a high standard of urban design and residential amenity in a high-quality landscape setting that is compatible with natural features. To allow development that is of a scale and nature that provides an appropriate transition to adjoining land uses.
Standard being varied:	Clause 4.4 Floor Space Ratio 0.7:1
Numeric measure of variation:	Proposed FSR 1.13:1 (62%)
Objectives of development standard:	<ul style="list-style-type: none"> (a) to ensure that development is in keeping with the characteristics of the site and the local area, (b) to ensure that the bulk and scale of new buildings is compatible with the context of the locality, (c) to control development density and intensity of land use, taking into account— <ul style="list-style-type: none"> (i) the environmental constraints and values of the site, and (ii) the amenity of adjoining land and the public domain, and (iii) the availability of infrastructure to service the site, and (iv) the capacity of the road network to accommodate the vehicular and pedestrian traffic the development will generate, and (v) the desirability of retaining the scenic, visual, and landscape qualities of the area.

Table 2: Description of Planning Instrument, Development Standard and Proposed variation

2.1 Overview of Variation

The development application seeks consent for a part three-storey and part four-storey residential flat building containing 18 dwellings, of which a minimum of 50% (9 dwellings) will be designated affordable housing units, managed by PCH, a registered and accredited housing provider in accordance with the provisions of the Housing SEPP 2021.

The DA is given effect to by a SCC issued under clause 39(5) of the Housing SEPP 2021 on 16 June 2022, which provides for 18 dwellings under the description at Schedule 1.

The Principles of the Housing SEPP are:

- (a) *enabling the development of diverse housing types, including purpose-built rental housing,*
- (b) *encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability,*
- (c) *ensuring new housing development provides residents with a reasonable level of amenity,*
- (d) *promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,*
- (e) *minimising adverse climate and environmental impacts of new housing development,*
- (f) *reinforcing the importance of designing housing in a way that reflects and enhances its locality,*
- (g) *supporting short-term rental accommodation as a home-sharing activity and contributor to local economies, while managing the social and environmental impacts from this use,*
- (h) *mitigating the loss of existing affordable rental housing.*

Importantly, point (b) above seeks to provide for the housing needs of the more vulnerable members of the community including those on very low to moderate incomes. It is noted that the crisis in housing affordability has disappointingly reached levels where key workers, such as police officers, are now considered as “vulnerable”. They, like other important front line workers cannot afford to live in the communities they serve, as noted by the President of the NSW Policy Association on 24 May 2022. The Principles of the Housing SEPP and the specific application of the legal function of the EPI seeks to facilitate specific responses to this housing problem. An outcome-based approach is required, to deliver housing solutions quicker and more efficiently. At this time, the legislature has the Housing SEPP to facilitate this.

The SCC certified that *“the development described in Schedule 1 is compatible with the surrounding land uses, having regard to the matters specified in clause 39(6)(b), only if it satisfies certain requirements specified in Schedule 2 of this Certificate; and is not likely to have an adverse effect on the environment and will not cause any unacceptable environmental risks to the land, only if it satisfies certain requirements specified in Schedule 2 of this Certificate”*.

In substance, the SCC allows for the additional permitted use for the purposes of ‘residential flat building’ *“by or on behalf of a public authority or social housing provider”*. Under clause 39 of the SEPP the Planning Secretary (or in this case the delegate) could not issue the certificate unless first satisfied that the form of development described in the certificate and subject to any requirements in the certificate is *“compatible with the surrounding land uses”*.

The application which described the development is nominated in the SCC as a *“New residential flat building resulting in 18 dwellings, of which 9 dwellings are proposed to be managed by a social housing provider as affordable housing for 15 years”*.

As provided for by clause 39(7) of the SEPP, the development has been certified to be ‘compatible with surrounding land uses’ if it meets the following requirement:

“The final scheme, including the building setbacks, density and height will be subject to the consent authority undertaking a detailed assessment of the proposal as part of the development application process under section 4.15 of the Environmental Planning and Assessment Act 1979”.

The careful design of the development has been targeted to address the requirements specified in the SCC (above) and has been refined following the SCC application process and detailed design including consideration of the application against the design principles of the ADG. As the design progressed, the density was refined from 1.2:1 to 1.13:1, while retaining the social benefits associated with the proposal and dwelling endorsement within the SCC being 18 dwellings of which 9 dwellings are affordable.

The siting, form and scale of the development has been designed to fit within its surrounding context, through the application of height, density, setbacks and adjoining amenity impacts. While the height has been adjusted at the Rosebery Street interface to replicate the adjoining height of the ‘Heathcote Horizon’ apartments, the remaining GFA is generally below the 9 metre maximum height limit, with the height further stepping from 3 storeys to 2 storeys at the rear of the site. This has been carefully designed to ensure all north facing apartments within ‘Heathcote Horizon’ will continue to receive 2 hours of solar access at mid-winter and the meet the solar access guidelines of the Apartment Design Guide. In this regard, the built form has been conceived to produce a development which meets the requirements of the SCC to enable the proposed affordable housing scheme that is the subject of the certificate to proceed while being compatible with the surrounding character.

Significantly, the certificate could not have been issued under clause 37 of the SEPP unless the delegate of the Secretary had first determined that it:

- “(a) has taken into account comments, if any, received from the council within 14 days after the application for the certificate was made, and*
- (b) is of the opinion that the residential flat building is compatible with the surrounding land uses considering the following matters—*
 - (i) the existing uses and approved uses of land in the area,*
 - (ii) the impact that the residential flat building, including its bulk and scale, is likely to have on the existing uses, approved uses and uses that, in the opinion of the Planning Secretary, are likely to be the preferred future uses of the land,*
 - (iii) the services and infrastructure that are or will be available to meet the demands arising from the development, and*
- (c) is of the opinion that the development is not likely to have an adverse effect on the environment and will not cause unacceptable environmental risks to the land.*

In this context, it is the intent and objective of the Housing SEPP to facilitate expanded permissibility to achieve a social outcome where it is considered that a proposed development is compatible with the surrounding land uses, the likely preferred uses of surrounding land, and where development is unlikely to have an adverse effect on the environment.

2.2 Overview of Clause 4.6

Clause 4.6 Exceptions to Development Standards establishes the framework for varying development standards.

The Objectives of Clause 4.6 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.*

Clause 4.6(3)(a) and 4.6(3)(b) require that 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.*

Clause 4.6(4) states that 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.*

Clause 4.6(5) states that the in deciding whether to grant concurrence, the 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 Secretary before granting concurrence*

3.0 Assessment of Proposed Variation – FSR

In *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191 at [46], Moore J identified the requirements an Applicant needs to establish for consent to be granted to development that contravenes a development standard. These findings were upheld on appeal to the NSW Court of Appeal. The consent authority must be satisfied that:

- (1) The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of this proposed development (cl 4.6(3)(a) and cl 4.6(4)(a)(i)); and
- (2) The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)); and
- (3) The proposed development will be in the public interest because it is consistent with the objectives of the standard in question - set out in cl 4.4 of the LEP (cl 4.6(4)(a)(ii)); and
- (4) The proposed development will be in the public interest because it is consistent with the objectives of the R3 Medium Density Residential Zone (cl 4.6(4)(a)(ii)).

Each of those matters is addressed below. In particular, the request:

- (a) sets out why compliance is unreasonable or unnecessary in the circumstances of the DA,
- (b) explains why there are sufficient environmental planning grounds to justify contravening the development standard (as required by clause 4.6(3)); and
- (c) describes why it is in the public interest because it is consistent with the objectives of both the standard and the zone.

3.1 Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

Case law highlighted that this can be demonstrated by 5 non exhaustive means known as the Wehbe tests:

- by showing that the objectives of the development standard are achieved despite a noncompliance with the development standard;
- by establishing that the underlying objective or purpose is not relevant to the development, such that compliance is unnecessary;
- by establishing that the underlying purpose is defeated or thwarted if compliance is required, such that compliance becomes unreasonable;
- by illustrating that the Council itself has granted development consent that departs from the standard, and arguing from this that the development standard has been ‘virtually abandoned or destroyed’, rendering it unnecessary and unreasonable; and
- by establishing that the zoning area of the proposed development was ‘unreasonable or inappropriate’ such that the development standard which is appropriate to that zoning is no longer reasonable or necessary for the particular area.

Compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of this proposed development for these reasons:

- The objectives of the development standard set out in clause 4.4 are achieved notwithstanding non-compliance with the standard.
- The development facilitates affordable housing and key worker housing near major public transport. In a December 2022 study by the University of NSW City Futures Research Centre, *Quantifying Australia's Unmet Housing Need*, the estimate for the Sutherland Shire of current unmet household need was 3,400, or 4% of all households, but that 64 per cent of these were family households.
- The study also found that, if no action is taken, the unmet housing need will grow to 5,400. Further, it showed that an average growth of 6.6 per cent (or 200-300) social and affordable dwellings were needed to be built each year just to meet the need in 2041.
- There is a rental housing supply and affordability crisis in Heathcote. In April 2023, there were only 7 apartments available in Heathcote (postcode 2233) for rent. This is a vacancy rate of only 0.6 per cent (3 per cent is considered a “healthy” vacancy rate to allow for people to move between housing). Therefore, the primary objective or purpose of the development, which is to provide 9 affordable housing dwellings, would be thwarted if strict compliance with the FSR development standard were required.
- The FSR standard of 1.2:1 fixed for other forms of affordable residential housing by Division 1 of the Housing SEPP provides robust guidance as to an appropriate reasonable maximum density to be applied to an affordable residential flat building on the land. The proposal is below that comparative maximum.
- The development adjoins a 4-storey residential flat building that provides a specific urban character to the locality. The form of the design establishes compatibility of design outcome within its context between the 15 metre form to the south and adjacent 9 metre permissible heights to the north through a skilful design that shows the transition of the built form in a generalised 16, 13 to 9 metres descent.
- The density and bulk of the proposed development substantially conforms to the desired future character of the area and is of a density and bulk consistent with the established character given the adjoining residential flat development and E1 local centre zone.
- The number of dwellings identified in the SCC of 18 (of which 9 are affordable) is achieved within the proposed density, supporting the Principle of the Housing SEPP to facilitate diverse housing types. In this case, the development supports affordable rental housing, including 13 x 1 bedroom apartments and 5 x 2-bedroom apartments, with four adaptable apartments.
- There are no unacceptable amenity impacts from the proposed development. The detailed sun view analysis demonstrates that all north facing apartments within the adjoining ‘Heathcote Horizon’ residential flat building continue to receive 2 hours of solar access in mid-winter.

3.1.1 The objectives of the FSR development standard are achieved

The objectives of clause 4.4 are individually responded to as follows:

(a) to ensure that development is in keeping with the characteristics of the site and the local area.

The existing characteristics of the site and local area is already defined by the adjoining four storey residential flat building which is located within the E1 Local Centre zone and forms the edge of the Heathcote town centre (to the south). The site is also adjoined by multi-dwelling housing (east) and a dual occupancy (north). The closest single dwelling houses are located to the west on the opposite side

of Rosebery Street. The character of the immediate context is therefore a denser form of development and the proposal to develop a residential flat building on the subject site forms a logical extension of residential flat development that forms the edge of the Heathcote 'local centre', and a transition to lower density form of development.

The adjoining Horizon Heathcote comprises 77 apartments with a density of 1.66:1 (maximum permissible 2:1) and maximum building height of 15.8m (maximum permissible 13m). The density transition between neighbouring sites along Rosebery Street is appropriate and compatible: Horizon Heathcote (1.66:1) to multi-dwelling housing 24a-24b Rosebery Street (0.7:1) – the proposed density of 1.13:1 is lower than the average between the two neighbouring sites at 1.18:1.

The development is in keeping with the local characteristics, being a part four, three, and two storey building, mostly within the height limit with the exception of the Rosebery Street interface, and art of the roof parapet and lift overrun.

The future anticipated characteristics of the area is also for similar height of building (9 to 13 metres) in a medium to high density residential and town centre environment, in keeping with the location of the site next to the Heathcote town centre and close to public transport.

The proposed development has been designed in accordance with the SCC that has been issued for the site. As stated earlier, the Secretary (or their delegate) could only issue the SCC if they had formed the opinion that the development was compatible with the surrounding land uses having regard to (amongst other things), the existing uses and approved uses of land in the vicinity of the development and the impact of the development (including its bulk and scale) on other existing, approved and future land uses.

Further, in relation to character, in May 2021 in the matter of *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021], Commissioner O'Neill held at [57] that *"The desired future character of the locality can be evaluated by reference to matters other than the development standards that determine the building envelope for the site, including the existing development that forms the built context.... The desired future character of an area is not determined and fixed by the applicable development standards for height and FSR, because they do not, alone, fix the realised building envelope for a site. The application of the compulsory provisions of clause 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality"*.

Recent case law shows that 'desired future character' is determined by a range of factors including the LEP and the approved buildings neighbouring a development. In this regard, the site is bound by a residential flat building of four storeys in height. The adjoining building is 15.8 metres in height, 2.8 metres above the 13 metre height limit. The controls for the area anticipate medium to high density development to heights of 9 to 13 metres (15.8 metres existing). The proposal seeks to transition from 4 storeys to 3 and 2 storeys to reflect the existing surrounding built form and character and to minimise any amenity impacts to adjoining development.

Based on the most recent case law, the fact that a development exceeds height and FSR standards cannot be used as a carte blanche for claiming that a development is inconsistent with the desired future character of the neighbourhood. Notwithstanding, the development, while over the FSR control identified in the LEP achieves a scale that responds to the adjoining residential flat building and surrounding and nearby residential development.

(b) to ensure that the bulk and scale of new buildings is compatible with the context of the locality.

The issue of compatibility is a dominate consideration in the assessment of a project that is subject to a SCC issued for the purpose of facilitating new affordable housing in a built form made permissible through the issuing of the SCC.

The case for the social need and for that scheme to be economically stable is a deliberate function of the EPI applied. It is a relatively easy and definable logic to comprehend. There is a significant pressing social need for affordable housing to be delivered. The legislature seeks deliberately through law (in this case planning law) to stimulate stable investment into the provision of this type of housing outcome because in normal market circumstances it is not efficiently enabled to be provided to the purpose of affordable housing. That investment outcome, whilst providing an avenue for a capital market to function within legal fiduciary standards, needs to deliberately meet a social need. Thus, only a registered and (thus regulated) social housing provider can be party to the outcome of the investment with the primary and required outcome of delivery of new affordable housing.

Those desirable targeted goals of social and economic sustainability need to be balanced with an appropriate consideration of compatibility within the context of its setting to assist ascertain reasonable environmental grounds for a balanced and sustainable outcome. Typically, the consideration of environmental impact and particularly urban built form compatibility can be subjective. Thus, it is appropriate to consider the guidance provided by the court on how such compatibility should be considered.

Project Venture Development Pty Ltd v Pittwater Council [2005] NSWLEC provides guidance when considering the compatibility of a proposal within its local area. The guidance provided by the Court in *Project Venture Development* is as follows:

1. **Compatibility is different from “sameness”:** *“There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.”*
2. **Compatibility is not always desirable:** *“There are situations where extreme differences in scale and appearance produce great urban design involving landmark buildings. There are situations where the planning controls envisage a change of character, in which case compatibility with the future character is more appropriate than with the existing. Finally, there are urban environments that are so unattractive that it is best not to reproduce them.”*
3. **Where compatibility is desirable, physical and visual impacts need to be considered:**
“The physical impacts, such as noise, overlooking, overshadowing and constraining development potential, can be assessed with relative objectivity. In contrast, to decide whether or not a new building appears to be in harmony with its surroundings is a more subjective task. Analysing the existing context and then testing the proposal against it can, however, reduce the degree of subjectivity.
For a new development to be visually compatible with its context, it should contain, or at least respond to, the essential elements that make up the character of the surrounding urban

environment. In some areas, planning instruments or urban design studies have already described the urban character. In others (the majority of cases), the character needs to be defined as part of a proposal's assessment. The most important contributor to urban character is the relationship of built form to surrounding space, a relationship that is created by building height, setbacks and landscaping. In special areas, such as conservation areas, architectural style and materials are also contributors to character."

4. There are other contributing factors, including height, setbacks and landscaping:

"Buildings do not have to be the same height to be compatible. Where there are significant differences in height, it is easier to achieve compatibility when the change is gradual rather than abrupt. The extent to which height differences are acceptable depends also on the consistency of height in the existing streetscape.

Front setbacks and the way they are treated are an important element of urban character. Where there is a uniform building line, even small differences can destroy the unity. Setbacks from side boundaries determine the rhythm of building and void. While it may not be possible to reproduce the rhythm exactly, new development should strive to reflect it in some way.

Landscaping is also an important contributor to urban character. In some areas landscape dominates buildings, in others buildings dominate the landscape. Where canopy trees define the character, new developments must provide opportunities for planting canopy trees."

5. To assess the matters above, two questions should be considered:

"In order to test whether a proposal is compatible with its context, two questions should be asked. Are the proposal's physical impacts on surrounding development acceptable? The physical impacts include constraints on the development potential of surrounding sites.

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

The context of the locality is significantly defined by the 'Heathcote Horizon' residential flat development adjoining the subject site (refer to below figure). The development comprises 77 apartments across two key building footprints with a density of 1.66:1 (maximum permissible 2:1). The adjoining residential flat development is four storeys in height with a maximum height of 15.8 metres, which is 2.8 metres above the 13 metres height limit.

The setback of the adjoining residential flat building at 4 metres (3.65 surveyed) has also established the predominant existing setback along Rosebery Street. A similar 4 metre street setback has been adopted at Levels 2-4 of the proposed development with a 6.2 metre setback established at the ground level to provide a transition to the neighbouring multi-dwelling housing development to the north.

The adjoining site is zoned E1 Local Centre and forms the edge of the Heathcote town centre, which includes the Heathcote railway station. The proposed built form provides a transition in bulk, scale, height and form between the dominate form of development on the street, being the adjoining residential flat development, and the medium density form of development to the east and north.

Careful skill in architectural design has been applied in consideration of how the proposed built form sits harmoniously between the higher density forms to the south and the lower form to the north. Currently it could be considered that the 15.8 metre difference to that of 9 metres between the zone boundaries is acceptable because of the change in land use categorisation, however the current

situation is one of a step and immediate difference in height between two built forms not because of a considered harmonising design consideration as the primary objective, such is due to land use changes. Comparatively, the proposed building form in seeking to apply the additional permitted use of a residential flat building, establishes compatibility of design outcome within its context between this 15.8 metre high built form to the south and adjacent 9 metre (permissible height) to the north through a skilful design that shows the gradual transition of the built form in a generalised 16, 13 to 9 metre descent. The resulting outcome is an urban design context that will see an improved difference in form that led by considered design shows these forms together in harmony.

The design outcome as proposed in seeking to achieve a compatible outcome in terms of built form, is sensible and appropriate in its context and is therefore a reasonable and acceptable outcome. Planning decisions on surrounding development show that the location is essentially a residential area despite the employment zoned land adjacent. Transitioning of height across a gradual plane of built form is considered a better design outcome rather than seeking a continuance of a built form of either adjoining form to this scheme.



Figure 6: Horizon Heathcote as viewed from Veno Street

There are no unacceptable amenity impacts from the proposed development. The detailed sun view analysis demonstrates that all north facing apartments within the adjoining 'Heathcote Horizon' residential flat building continue to receive 2 hours of solar access in mid-winter. The landscaping elements to the east are maintained and combined with setbacks provide a high quality amenity to those neighbouring dwellings.

The layout of the built form seeks to provide a street, side and rear setbacks to ensure that the existing landscape amenity and standard will be maintained with opportunities for it to be enhanced post construction. Compatibility of the landscape of the adjoining context is considered to harmoniously respond via careful placement of basement design that maintains compliance with the minimum required landscape ratio in the LEP standard. Design is achieved to enable existing trees of merit to be maintained and new trees and plants to be grown to ensure canopy cover of the precinct is maintained.

In conclusion and in answering the Courts guide on compatibility, the proposal's physical impacts on surrounding development is acceptable. The physical impacts include reasonable constraints on the

development setbacks at both ground and upper levels to ensure acceptable amenity of surrounding sites and a compliance with landscaping standards to ensure ecological amenity is met.

Finally, the proposal's appearance through skilful architectural and landscape design is in harmony with the buildings around it and the character of the street and locality. That harmony of design outcome is achieved by applying land use controls of density and height that seek to establish a suitable social and economic outcome as also being key to providing a high-quality built form environmental outcome that on the test and questions provided by the guidance of the court is compatible. It would thus be unreasonable to apply a numerical rigid development standard as it would undermine the required and desirable sustainable outcome.

(c) to control development density and intensity of land use, taking into account—

(i) the environmental constraints and values of the site, and

A SCC has been issued for the site which certified that the development *“is not likely to have an adverse effect on the environment and will not cause any unacceptable environmental risks to the land”*.

In coming to the conclusion that the development is compatible, the department in making its recommendation concluded in part:

- *the development will not have an adverse impact on the environment or cause unacceptable risks to the natural environment.*

The site is listed as environmentally sensitive land on the terrestrial biodiversity map. The site is part of a block of eight parcels bound by Strickland Street, Rosebery Street, Veno Street and the Princes Highway, the majority of which is subject to the terrestrial biodiversity map. Existing vegetation associated with this land include remnant street trees, native and exotic street plantings, including Jacarandas, gardens that include a mixture of native and exotic species and maintained lawns. None of the trees on the site are listed within the Councils Significant Tree Register or are endangered species, however nine trees are part of an indigenous plant community.

In the area mapped as environmentally sensitive land, it is noted that the majority of mature trees are present within the existing road reserves, the development of the subject site not affecting the presence of these plants. The proposed development would only impact planted native and exotic species that are present within the existing garden beds, noting that a Banksia located in the street which is 3 metres in height will require removal.

A Biodiversity Assessment Report has been prepared by Lesryk Environmental to undertake an ecological investigation and an Arboricultural Impact Assessment Report has been prepared by Sturt Noble Arboriculture to assess and review the condition of existing trees and advise on each individual tree's suitability to be retained.

In summary, the reports and assessment found that:

“The construction of 18 affordable rental housing apartments would not have a significant effect on the flora and fauna recorded within, or in proximity to, 26 Rosebery Street, Heathcote, NSW. The development of the site would include the retention of the existing mature native plants, and

supplement the loss of horticulturally produced garden species through the establishment of native plantings. Whilst having a larger footprint compared to the existing dwelling, the establishment of the apartment block would primarily remove maintained lawns, this being off-set through the inclusion of landscaped rooftop garden areas”.

(ii) the amenity of adjoining land and the public domain, and

The development has been carefully designed and sited to ensure minimal impacts to neighbouring development and ensuring a compatible development within its context.

Of particular relevancy to compatibility and amenity impacts is overshadowing of the development on adjoining and nearby development. During the SCC assessment process, council raised concerns with the impact of overshadowing to the adjoining residential flat building to the south in its submission to the Department: *“Given the proposal extends to a fourth storey, this non-compliance contributes to unacceptable overshadowing impacts on private open space and living areas of adjacent dwellings”.*

In response and consideration of the siting of the development, the design has been refined and detailed sun eye view diagrams prepared at the winter solstice to illustrate the existing and proposed conditions. These diagrams confirm that all apartments at Horizon Heathcote will continue to receive 2 hours of solar access at mid-winter and the proposal meets the solar access guidelines of the Apartment Design Guide and as a consequence the proposed impact is not adverse.

Existing sun eye view diagrams between 9am and 3pm are illustrated between DA 5001 and DA 5013 of the attached architectural plans design set. The impact of the proposal is illustrated between DA 5201 and DA 5213. This is also supported by a detailed table analysis. The table demonstrates the impact of the development on Building B of 5 Vino Street which confirms that all apartments at Horizon Heathcote will continue to receive 2 hours of solar access at mid-winter.

In this context, given the minimal impact between the existing, compliant and proposed development, it would be unreasonable to enforce compliance with the existing controls when the social benefits are so significant.

(iii) the availability of infrastructure to service the site, and

As recognised in the issuing of the SCC, the property is ideally located for the proposed use because of the nearby train station and nearby town centre shopping and services. All relevant infrastructure is available.

(iv) the capacity of the road network to accommodate the vehicular and pedestrian traffic the development will generate, and

As addressed in the traffic report accompanying the DA there will be no significant impacts on the local road network. Further, the Department in its SCC Assessment Report raised no concerns with the capacity of the road network. It is also noted that council, in its submission to the SCC application consultation dated 7 March 2022, did not raise any issues in regards to parking and traffic.

(v) the desirability of retaining the scenic, visual, and landscape qualities of the area.

There will be no significant impacts on the visual catchment and landscaping of the surrounding area.

Other FSR controls for affordable housing development are complied with:

The primary objective of the development application is the provision of affordable housing. The SCC issued under Part 2, Division 5 of the Housing SEPP has made development for the purpose of a residential flat building permissible on the site on the basis that it will be carried out by or on behalf of a social housing provider.

Other provisions in Part 2 of the Housing SEPP contain development controls relating to affordable housing (e.g. Part 2, Division 1 of the Housing SEPP which relates to in-fill affordable housing). While Part 2 Division 1 does not apply to the subject development because residential flat buildings are not permitted with consent under another environmental planning instrument, it is appropriate to compare the development controls. If residential flat buildings were permitted with consent under another environmental planning instrument (e.g. the LEP), the FSR controls in clause 17 of the Housing SEPP would apply.

The proposed development would satisfy the affordable housing requirements of Division 1 in that 50% of the new dwellings are proposed to be affordable housing leased through a registered social housing provider.

The enhanced land use controls that apply to in-fill affordable housing are to encourage “the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability” and “promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services”, consistent with the Principles of the Housing SEPP.

Unless these Principles are enabled and provided for through the provisions of the Housing SEPP, then the social benefits will not be realised and the direct actions of the Sutherland Shire’s Local Strategic Planning Statement to “collaborate with Community Housing Providers” and “facilitate affordable housing” will not be realised.

The proposed FSR is less than that considered in the SCC and consistent with the dwelling yield in the SCC

The application which described the development is nominated in the SCC as a “New residential flat building resulting in 18 dwellings, of which 9 dwellings are proposed to be managed by a social housing provider as affordable housing for 15 years”.

As provided for by clause 39(7) of the SEPP, the development has been certified to be ‘compatible with surrounding land uses’ if it meets the following requirement:

“The final scheme, including the building setbacks, density and height will be subject to the consent authority undertaking a detailed assessment of the proposal as part of the development application process under section 4.15 of the Environmental Planning and Assessment Act 1979”.

The careful design of the development has been targeted to address the requirements specified in the SCC (above) and has been refined following the SCC application process and detailed design including consideration of the application against the design principles of the ADG. As the design progressed, the density was refined from 1.2:1 to 1.13:1, while retaining the social benefits associated with the proposal and dwelling endorsement within the SCC being 18 dwellings of which 9 dwellings are affordable.

The primary purpose of providing affordable housing would be thwarted

There is a rental housing supply and affordability crisis in Heathcote. In April 2023, there were only 7 apartments available in Heathcote (postcode 2233) for rent. This is a vacancy rate of only 0.6 per cent (3 per cent is considered a “healthy” vacancy rate to allow for people to move between housing). In the previous year, rents have increased by 22.2 per cent.

Across Sutherland Shire, there are only 5 available listings for the 26,301 households on an income of \$1,499 and below. The affordable rent for someone on 80 per cent of the median income for the area is \$549, just below the median weekly rent in Heathcote in April 2023. Even at 120 per cent of the median income for Sutherland Shire (\$142,740 per household per year), there were fewer than 138 listings available in April 2023 that were affordable to them. The housing crisis is not just affecting the poor and very poor, but is reaching into households that, until recently, were considered, if not well off then at least comfortable.

Recent academic studies have shown that there is too little affordable and social housing available. In 2021, AHURI published the Housing Key Workers study, showing that no inner and few middle ring areas have median rents for a two-bedroom property that is affordable to key workers earning low (third quintile) incomes, including early career nurses and midwives and tram and train operators. The study found that key workers are more likely to reside in outer suburbs and to commute 30kms or more to work.

The University of NSW City Futures Research Centre’s study Quantifying Australia’s Unmet Housing Need (2022) showed that there were 3,400 households in Sutherland Shire with unmet housing needs (4 per cent of all households), but that 64 per cent of these were family households. The study also found that, if no action is taken, the unmet housing need will grow to 5,400. Further, it showed that an average growth of 6.6 per cent (or 200-300) social and affordable dwellings were needed to be built each year just to meet the need in 2041. The NSW Council for Social Service (NCOSS) released a report in 2023 showing disadvantage by tenure type. This study showed that 12.3 per cent of households in Heathcote were living in disadvantage at the time of the 2021 Census. This is 13 per cent fewer than in 2016, but is more than places such as Woollooware, Caringbah and Woronora Heights.

Are there better planning pathways to deliver new affordable housing?

Noting the dire social calamity due to a serious lack of new affordable housing, it is illogical to reject any planning process available that seeks to sustainably deliver new affordable housing. It is however reasonable to consider which available planning pathway is best placed to do so in a particular set of circumstances.

This application seeks to apply the incentive provisions of the Housing SEPP and additional permitted use opportunity to deliver a sustainable outcome. Encouragingly the Sutherland Council has progressed a policy development process to consider the introduction of an affordable housing contributions scheme as part of the development of a revised housing strategy as considered required in the LSPS.

Consultation with council senior staff by the CHP progressing this project, advise the recommended planning actions include preparing a 3%, 5% and 7.5% contribution levy test to determine the impact on development viability and delivery of affordable rental housing. Further the policy seeks consideration of changes to FSR and DCP provisions to support affordable rental housing and priority social housing projects. Specifically, the proposed Affordable Housing Contributions Scheme seeks to target areas that benefit from significant planning uplift in key centres and will be implemented through the new comprehensive Local Environmental Plan. Current forecast is this draft policy will be exhibited in late 2023.

Hypothetically if a council levy was to be applied, the volume of the apartment developments suggests that total reliance on the proposed policy will not provide a substantial delivery of new affordable housing. The number of apartment approvals is extremely low (579 in 2022-23 on an extrapolation basis from a Year-To-Date count in February). The council policy seeks to apply a levy to the additional planning gain achieved in a certain locality in centres, further narrowing the levy base because it is selective to where new development is targeted and accessible.

An analysis on an averaging provision and keeping a simplistic value level of approved apartments shows a comparison of the proposed levy effectiveness to that of the incentive provisions on the Heathcote project (see Table below).

	Housing SEPP	Levy
2021/22-23 Average	N/A	789
Price Per Unit	850,000	850,000
Value	N/A	670,650,000
Uplift (20%)	0	134,130,000
Levy (5%)	0	6,706,500
Apartments	9	7.89

Table 3: The Tax Base and Levies Raised Assuming 5% On Uplift On the Value of All Apartments (Source: Pacific Economics and Sustainability)

This proposal will deliver 9 affordable units to the Sutherland Shire's affordable housing stock immediately at no cost to the community and without the significant administration cost of a levy system (which has not been allocated to the cost base in the model).

The alternative is for council to impose a levy on uplift to fund council's acquisition of affordable housing units. Council would have to (implement the policy and then) wait until it has raised enough money to purchase units with these funds. Calculations suggest that, on current approvals, council would be likely to only raise enough money through a levy to fund 7 apartments at \$850,000 each in the future.

Any suitable proposition to sustainably deliver new affordable housing is desirable. The progression of a policy is encouraged, however, the cost of time, resources and effort applied to a limited public purse tax base shows that total reliance on such a policy is not a sound ethical solution. Further and conclusively, if a view was given that it was reasonable for reliance on a levy policy to be justified as grounds for rejecting an affordable housing scheme outcome that has reliance on sustainable consideration of variations to development standards such a view would be completely unreasonable.

The low level of affordable rental properties available and the housing stressed caused by inappropriate housing outcomes provides an imperative for all levels of governments in the Commonwealth to act

immediately on improving the situation by approving worthy affordable developments. The tools are provided by the Housing SEPP, encouraging private sector development, for this to be done. To delay, when the economic and social need is clear is unreasonable and inappropriate.

Applying an assessment outcome that rejects the sensible consideration of a variation to development standards to enable a sustainable social and economic outcome would implement an assessment methodology that is juxtaposed to the requirement of the EPA Act for sustainable development outcomes and would be an unreasonable outcome.

To therefore apply rigidly the LEP controls that apply to the site, without regard to the flexible provisions of clause 4.6 and the incentive provisions of the Housing SEPP, would thwart the delivery of significant social benefits of the proposal and thwart the object of the EP&A Act to integrate “*relevant economic, environmental and social considerations in decision-making about environmental planning and assessment*”.

3.1.2 Requirements of Site Compatibility Certificate

The Secretary in issuing the SCC enabled the additional permitted use of a Residential Flat Building for the R3 Medium Density Residential zone. It is without surprise that this additional use was permitted by the Secretary in consideration of the current existing character of the area.

It is noted that if not for the SCC issued by the Secretary, a residential flat building would not be permissible in the zone. However, rather than the presence of a residential flat building in the R3 Medium Density Residential zone being a unique form of building, it is more in alignment with the existing character than if other forms of R3 zone development were considered, noting the site is located adjacent to two four-storey residential flat buildings.

The preceding SCC process specifically considered the issue of compatibility. The principles of compatibility were considered through the indicative concept provided with the SCC application, which was endorsed subject a detailed assessment of the final scheme.

In relation to compatibility of the proposal with the surrounding land uses, the department’s assessment considered the merits of the application against the ability of the site to accommodate a compatible residential development with a social need. The department in determining compatibility and appropriateness of the proposal commented as follows:

The uses immediately neighbouring the site are residential and include both multi dwelling housing and residential flat building developments.

To the immediate south (B2 zoned land), a recently constructed four storey residential flat building provides a clear transition to the existing low and medium density to the north and east.

The site is of sufficient size and orientation to accommodate a residential flat building that if designed appropriately can maintain acceptable amenity and impacts to surrounding properties and their existing future use for residential purposes.

That when viewed from the street the proposed built form massing steps down from 4 storeys at 30 Rosebery Street, to 3 storeys on the site down to two storey residential development directly north of the

site. This allows for a suitable graduation of building scale down to the lower density development norther of the site.

While the proposed scheme will be assessed in more detail at the Development Application stage of the process, the Department considers that the development concept scheme's proposed bulk and scale demonstrates a residential flat building is compatible with existing and approved uses surrounding the site.

In coming to the conclusion that the concept is compatible, the department in making its recommendation-concluded:

It is considered that an SCC should be issued, subject to requirements, because:

- the proposed use will assist in providing additional housing choice and opportunities for affordable housing in the Sutherland LGA;*
- the proposed residential flat building is consistent with the land uses permitted, or constructed on adjoining land in the vicinity of the site;*
- the proposal will provide affordable housing within walking distance of well-connected public transport, helping to provide access to services and jobs;*
- the site is suitable for more intensive use for the purposes of affordable housing, having regard to the criteria set out in clause 39(6) of the Housing SEPP and more detailed design considerations being undertaken as part of any development application;*
- matters regarding traffic and parking, heritage, building height, bulk, scale, setbacks, compliance with SEPP 65 can be further assessed as part of a development application; and*
- the development will not have an adverse impact on the environment or cause unacceptable risks to the natural environment.*

A SCC was subsequently issued for a “New residential flat building resulting in 18 dwellings, of which 9 dwellings are proposed to be managed by a social housing provider as affordable housing for 15 years”.

The certificate certified that “*the development described in Schedule 1 is compatible with the surrounding land uses, having regard to the matters specified in clause 39(6)(b), only if it satisfies certain requirements specified in Schedule 2 of this Certificate; and is not likely to have an adverse effect on the environment and will not cause any unacceptable environmental risks to the land, only if it satisfies certain requirements specified in Schedule 2 of this Certificate*”.

Schedule 2 provides for requirements to be addressed during the development application process. This is not to detract from the issues of compatibility, but requirements as would normally be considered and addressed under 4.15 of the Environmental Planning & Assessment (EP&A) Act 1979. In that context, Schedule 2 required:

“The final scheme, including the building setbacks, density and height will be subject to the consent authority undertaking a detailed assessment of the proposal as part of the development application process under section 4.15 of the Environmental Planning and Assessment Act 1979”.

Compatibility is not a question of how well the proposed development measures up against the standards and requirements of the LEP for the subject land. Rather, it is a comparison between the proposed development and the surrounding land, including existing and future uses. In that context following the issuing of the SCC, careful consideration has been given to the requirements of Schedule 2.

In summary, the following is noted in response to the requirements of the SCC:

Setbacks

The neighbouring “Horizon Heathcote” applied a 4m street setback control from an earlier draft of the SSDCP 2015 and was supported by Council. A similar 4m street setback has been adopted at Level 2-4 as it is the predominant existing street setback on Rosebery Street for this type of development and the ADG recommends that the street setbacks give consideration to the existing and future street setbacks and building use. At Level 1 (Ground) the massing form is setback 6.2m and is a suitable transition to the neighbouring multi-dwelling housing to the north.

There is a 3-4m side setback to the southern boundary achieving a building separation of 11-12m to the neighbouring “Horizon Heathcote”. Windows that are less than 12m will be angled to look away from existing dwellings and exceed 12m separation to maintain visual privacy as recommended by the ADG.

The side setback to the northern boundary is 3-6m. Where the side setback is 3m, walls are blank and windows are angled to look away from existing dwellings to meet ADG guidelines. Where the side setback is 6m, neighbouring dwellings are setback 11.2-13.5m, achieving separation of 17.2-19.5m which exceeds the guidelines of the ADG which recommend 12m-15m separation.

The rear setback is 8m (Level 1-2) and 12m Level 3 and outlook is to existing large tree canopies. Setbacks have been established on a merit basis to protect the ongoing health of these trees. Due to the topography, the rear facing apartments are approximately 1m below the natural ground level, presenting as a 1.5 storey building adjacent to the existing 1 storey villa. The rear setback is double the required setback within the SSDCP 2015, anticipating buildings that are 1-2 storeys in height. The increased Level 3 setback meets the recommended separation of the ADG.

The proposed development does not restrict development on the neighbouring site in any way, noting that the multi-dwelling house has been recently completed on this site. It would also not restrict any development under the Housing SEPP 2021, Part 2, Division 5 or any other division as setbacks meet the recommended guidelines of the ADG for visual privacy.

Density

The proposed density is 1.13:1 achieving 1,374.96sq.m residential GFA. Through the design process the density has been reduced from that contemplated under the SCC application process. The scheme contemplated by the SCC included a proposed density of 1.2:1 achieving a residential GFA of 1,455.516sq.m.

A residential apartment development was recently completed on the neighbouring site to the south at 30 Rosebery Street comprising 77 apartments with a density of 1.66:1 (maximum permissible 2:1).

The proposed density is compatible with its context due to its close proximity to Heathcote Railway Station, jobs, community facilities and adjoining E1 Local Centre zoned Horizon Heathcote. The density transition between neighbouring sites along Rosebery Street is also appropriate: Horizon Heathcote (1.66:1) to multi-dwelling housing 24a-24b Rosebery Street (0.7:1) – the proposed density of 1.13:1 is lower than the average between the two neighbouring sites at 1.18:1.

Building Height

The LEP provides for a maximum height of building of 9 metres. Horizon Heathcote, a 4 storey development to the south, has a height of 15.8 metres which is 2.8 metres higher than the maximum height of building control permitted by the LEP of 13 metres.

The proposed built form responds to the scale of adjacent developments, being 3 storeys adjacent to existing multi-dwelling housing to the north-west and single storey villas to the east. The taller form of 4 storeys is directly adjacent to Horizon Heathcote which is also 4 storeys.

The proposed maximum height of building is 12.56 metres, except for the lift overrun which is 13.7 metres. The 12.56 metres only applies to the 4 storeys at the front of the development at the interface with Rosebery Street. This has been carefully designed and located to ensure solar access to the apartment development to the south. Sun eye view diagrams have been prepared at the winter solstice and illustrate the existing and proposed conditions. These diagrams confirm that all apartments at Horizon Heathcote will continue to receive 2 hours of solar access at mid-winter.

Towards the centre of the site, the proposed built form is generally below the maximum Height of building control, except for the parapet and roof slab i.e. no GFA is above the maximum height of building control of 9 metres. Along the eastern boundary, the built form is well below the maximum Height of building control, with Level 3 setback 12 metres from the rear boundary, and 8 metres at Levels 1-2. Therefore, the only height exceedance with habitable floor space is at the Rosebery Street interface, where there is no solar impact and the design replicates the adjoining residential flat building.

ADG/DCP Compliance

While there are apartment buildings already existing within the immediate context, The Sutherland DCP 2015 Chapter 5 - Multi-Dwelling Housing only provides guidance, as residential apartments are a prohibited use, noting that the proposed development is permitted by the SCC.

Furthermore, the Sutherland DCP 2015 Chapter 6 – Residential Flat Buildings is identified to only apply to “Residential Flat Buildings in the R4 Zone” (page 2) noting that this site is located in an R3 Medium Density Residential Zone. It is noted that the R3 zone does permit shop top housing as a use, yet the DCP is somewhat silent on that form of development. Statutorily, SEPP 65 is the primary legislation referenced in Division 5 and is therefore applicable to the land and the development. Thus Sutherland DCP 2015, Chapter 5 – Multi-Dwelling Housing, whereas useful, can and has been considered to provide guidance to assist in the consideration of compatibility, it is not the primary planning legislative instrument. Appendix E of the lodgement package includes an ADG Compliance Table at Part 4.

3.1.3 Consideration of the R3 Zone Objectives and the Application of the Housing SEPP Principles

Zone R3 Medium Density Residential		
1 Objectives of zone	Achieve the objective?	Summary of Response
<ul style="list-style-type: none"> To provide for the housing needs of the community within a medium density residential environment. 	Yes.	The scheme supports the zone objective with the provision of 18 new dwellings (13 x 1 bed and 5 x 2 bed) of which a minimum of 50% will be required to be managed by a CHP. The proposed built form

		responds to the scale of adjacent developments, being 3 storeys adjacent to existing multi-dwelling housing to the north-west and single storey villas to the east. The taller form of 4 storeys is directly adjacent to Horizon Heathcote which is also 4 storeys.
<ul style="list-style-type: none"> To provide a variety of housing types within a medium density residential environment. 	Yes.	The scheme facilitates the objective and provides a range of dwellings specially targeted to the social need.
<ul style="list-style-type: none"> To enable other land uses that provide facilities or services to meet the day to day needs of residents. 	Yes.	The scheme does not seek to promote additional land uses above that of residential. The site is in close proximity to the Heathcote town centre. The subject RFB has been designed in such a way to ensure surrounding land to the north and east can redevelop in the future with compatible residential and non-residential uses should this be desired or proposed.
<ul style="list-style-type: none"> To encourage the supply of housing that meets the needs of the Sutherland Shire's population, particularly housing for older people and people with a disability. 	Yes.	The scheme meets the objective. The use is residential and with the application of the SCC that provides the additional permitted use of a RFB an additional variety of dwellings. An amount of the dwellings in the scheme accord with the silver level design standard that promotes a dwelling typology for people with a disability. The scheme design promotes dwelling types that can provide homes for seniors.
<ul style="list-style-type: none"> To promote a high standard of urban design and residential amenity in a high quality landscape setting that is compatible with natural features. 	Yes.	The design scheme promotes a high quality urban design response to the site that meets the design guidance objective of the ADG. The site exceeds the landscape requirements and specific design treatment has been applied to maintain existing large mature trees. The layout of the built form seeks to provide a street, side and rear setbacks to ensure that the existing landscape amenity and standard will be maintained with opportunities for it to be enhanced post construction. Compatibility of the landscape of the adjoining context is considered to harmoniously respond via careful placement of basement design that maintains compliance with the minimum required landscape ratio in the LEP standard. Design is achieved to enable existing trees of merit to be maintained and new trees and plants to be grown to ensure canopy cover of the precinct is maintained.
<ul style="list-style-type: none"> To allow development that is of a scale and nature that provides an appropriate transition to adjoining land uses. 	Yes.	Careful skill in architectural design has been applied in consideration of how the proposed built form sits harmoniously between the higher density forms to the south and the lower form to the north. Currently it could be considered that the 15.8 metre difference to that of 9 metres between the zone boundaries is acceptable because of the change in land use

		<p>categorisation, however the current situation is one of a step and immediate difference in height between two built forms not because of a considered harmonising design consideration as the primary objective, such is due to land use changes. Comparatively, the proposed building form in seeking to apply the additional permitted use of a residential flat building, establishes compatibility of design outcome within its context between this 15.8-metre-high built form to the south and adjacent 9 metre (permissible height) to the north through a skilful design that shows the gradual transition of the built form in a generalised 16, 13 to 9 metre descent. The resulting outcome is an urban design context that will see an improved difference in form that led by considered design shows these forms together in harmony. There are no unacceptable amenity impacts from the proposed development. The detailed sun view analysis demonstrates that all north facing apartments within the adjoining 'Heathcote Horizon' residential flat building continue to receive 2 hours of solar access in mid-winter. The existing context has a residential character of detached dwellings, multi-dwelling housing and apartment buildings ranging in height from 1 to 4 storeys. Existing front setbacks vary with directly adjacent sites achieving 3.6m and 8.6m. The scheme transitions between these variances to promote a compatible transition.</p>
Housing SEPP 2021		
3 Principles of Policy		
The principles of this Policy are as follows—	Achieve the principle?	Response.
(a) enabling the development of diverse housing types, including purpose-built rental housing,	Yes.	The number of dwellings identified in the SCC of 18 (of which 9 are affordable) is achieved within the proposed building envelope, with a height of part four storeys and part three storeys, supporting the Principle of the Housing SEPP to facilitate diverse housing types. In this case, the development supports affordable rental housing, including 13 x 1-bedroom apartments and 5 x 2-bedroom apartments, with four adaptable apartments.
(b) encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability,	Yes.	The scheme is classified by the SCC as a RFB affordable rental development scheme. The scheme has a requirement that a minimum of 50% of the dwellings must be managed by a CHP for a minimum of 15 years.

(c) ensuring new housing development provides residents with a reasonable level of amenity,	Yes.	The scheme in seeking a design that meet needs of the community accords with the design guidance of the ADG as outlined in the Architectural Design Report appendices to the SEE supporting the development application. The development provides excellent amenity to all residents with a northern orientation with 18 x affordable rental apartments in 1 bedroom and 2 bedroom configurations. The plan has been organised with livings to the north (sun), east or west and open gallery access to the south (shade). The lift and stair core, is contained within the overall form of the building.
(d) promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,	Yes.	The site is within a short walking distance to the Heathcote town centre, major rail station and other community facilities.
(e) minimising adverse climate and environmental impacts of new housing development,	Yes.	The design archives the BASIXs standard and promotes high level of environmental amenity with the retaining of significant trees and promotes a landscape setting. The development is capable of implementing efficient use of natural resources, energy and water throughout its full life cycle. It is required to meet the benchmarks of 25% energy reduction and 40% water reduction set out in the Building and Sustainability Index (BASIX). Green planted walls provide added insulation by shading the facade.
(f) reinforcing the importance of designing housing in a way that reflects and enhances its locality,	Yes.	The building height, density and bulk of the proposed development substantially conforms to the desired future character of the area and is of a height, density and bulk consistent with the established character given the adjoining residential flat development and E1 local centre zone.
(g) supporting short-term rental accommodation as a home-sharing activity and contributor to local economies, while managing the social and environmental impacts from this use,	N/A	The scheme is targeted under a Division 5 scheme for longer term stable rental housing options. Adjoining land is not compromised in delivering development in the future that may respond to this objective if the EPI is applied in that case.
(h) mitigating the loss of existing affordable rental housing.	Yes.	The scheme promotes additional new affordable housing and promotes new housing supply.

Table 4: Summary of Zone Objectives and Housing SEPP Principles.

3.2 There are sufficient environmental planning grounds to justify contravening the development standard.

Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 gives a good overview of what is required to meet this jurisdictional test:

“23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

24. The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].”

Consistent with the assessment encouraged by that Court directive, there are strong planning grounds to support the density of the proposal which exceeds the 0.7:1 standard in the LEP as discussed above. In particular:

- The objectives of the development standard set out in clause 4.4 are achieved notwithstanding non-compliance with the standard.
- The development adjoins a 4-storey residential flat building. The development facilitates affordable housing and key worker housing near major public transport. In a December 2022 study by the University of NSW City Futures Research Centre, *Quantifying Australia’s Unmet Housing Need*, the estimate for the Sutherland Shire of current unmet household need was 3,400, or 4% of all households, but that 64 per cent of these were family households.
- The study also found that, if no action is taken, the unmet housing need will grow to 5,400. Further, it showed that an average growth of 6.6 per cent (or 200-300) social and affordable dwellings were needed to be built each year just to meet the need in 2041.
- The FSR deemed to satisfy standard of 1.2:1 fixed for other forms of affordable residential housing by Division 1 of the Housing SEPP provides strong guidance as to an appropriate maximum reasonable maximum density to be applied to an affordable residential flat building on the land. The proposal is well below that maximum.
- The density and bulk of the proposed development substantially conforms to the desired future character of the area and is of a density and bulk consistent with the established character given the adjoining residential flat development and E1 local centre zone.

- The number of dwellings identified in the SCC of 18 (of which 9 are affordable) is achieved within the proposed density, supporting the Principle of the Housing SEPP to facilitate diverse housing types. In this case, the development supports affordable rental housing, including 13 x 1 bedroom apartments and 5 x 2-bedroom apartments, with four adaptable apartments.
- There are no unacceptable amenity impacts from the proposed development. The detailed sun view analysis demonstrates that all north facing apartments within the adjoining 'Heathcote Horizon' residential flat building continue to receive 2 hours of solar access in mid-winter.
- There is a rental housing supply and affordability crisis in Heathcote. In April 2023, there were only 7 apartments available in Heathcote (postcode 2233) for rent. This is a vacancy rate of only 0.6 per cent (3 per cent is considered a "healthy" vacancy rate to allow for people to move between housing). Therefore, primary objective or purpose of the development, which is to provide 9 affordable housing dwellings, would be thwarted if strict compliance with the FSR development standard were required.

3.3 The Public Interest

Variation of the FSR standard is in the public interest because it will facilitate this affordable housing development proceeding without unacceptable planning impacts in a manner that is consistent with the locality and surrounding density for the reasons discussed above.

The site is ideally suited to that form of development given its location immediately adjoining a four-storey residential flat building, which forms part of the E1 Local Centre zoned Heathcote town centre.

Significantly, the delivery of 9 affordable dwelling homes will be thwarted. As discussed, there is a rental crisis in Heathcote. This is supported by the AHURI *Housing Key Workers study*, showing that no inner and few middle ring areas have median rents for a two-bedroom property that is affordable to key workers earning low (third quintile) incomes, including early career nurses and midwives and tram and train operators. The study found that key workers are more likely to reside in outer suburbs and to commute 30kms or more to work.

Further, the University of NSW City Futures Research Centre's study *Quantifying Australia's Unmet Housing Need (2022)* showed that there were 3,400 households in Sutherland Shire with unmet housing needs (4 per cent of all households), but that 64 per cent of these were family households. The study also found that, if no action is taken, the unmet housing need will grow to 5,400. Further, it showed that an average growth of 6.6 per cent (or 200-300) social and affordable dwellings were needed to be built each year just to meet the need in 2041.

The NSW Council for Social Service (NCOSS) also released a report in 2023 showing disadvantage by tenure type. This study showed that 12.3 per cent of households in Heathcote were living in disadvantage at the time of the 2021 Census. This is 13 per cent fewer than in 2016, but is more than places such as Woollooware, Caringbah and Woronora Heights.

In that context, and based on the most recent case law, the fact that a development exceeds height and FSR standards cannot be used as a carte blanche for claiming that a development is inconsistent with the desired future character of the neighbourhood. Notwithstanding, the development, while over the FSR control identified in the LEP achieves a scale that responds in harmony within the context of the surrounding locality and is compatible and an acceptable and reasonable outcome.

4.0 Conclusion

In conclusion, the variation of the development standard is necessary in this case to give effect to the SCC and its requirements and encourage this publicly beneficial form of development in such an ideal location. The proposal is permissible pursuant to the Housing SEPP and consistent with the objects of the EP&A Act 1979, particularly to integrate *“relevant economic, environmental and social considerations in decision-making about environmental planning and assessment”*.

In addition, as required under clause 4.6 of the LEP, this written request has:

- (1) Demonstrated that compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of this proposed development; and
- (2) Established sufficient environmental planning grounds to justify contravening the FSR development standard; and
- (3) Explained how the proposed development will be in the public interest because it is consistent with the objectives of the FSR development standard; and
- (4) Explained how the proposed development will be in the public interest because it is consistent with the objectives of the R3 Medium Density Residential zone.

There are strong planning reasons why an increased FSR exceeding the 0.7:1 standard (typical of a detached dwelling) is appropriate on this site. Those reasons in summary are:

- a) The site is ideally situated next to an existing and established residential flat building and the Heathcote town zoned (E1 zoned land). The site is also within short walking distance of the Heathcote train station.
- b) The existing character of the area is already defined by the adjoining residential flat building, notwithstanding that residential flat buildings are prohibited in the zone within which the site is located (R3 Medium Density Residential). The site is also adjoined by multi-dwelling housing and a dual occupancy. The closest single dwelling houses are located to the west on the opposite side of Rosebery Street. The character of the immediate context is therefore a denser form of development and the proposal to develop a residential flat building on the subject site forms a logical extension of residential flat development that forms the edge of the Heathcote 'local centre'.
- c) The proposed development is generally within the height limit of 9 metres for the majority of the building, with part of the roof and parapet exceeding the 9 metres. The front of the development as it interfaces with Rosebery Street is four stories and rises to 13 metres. This 4 storey element is the only habitable floor space associated with the proposal. The heights have been carefully considered to provide a transition from the 15 metre residential flat development to the south, to the two story development to the north.
- d) The site has a desirable long, northern orientation which will allow 2 hours of direct solar access to apartments at mid-winter with a high level of amenity. Further, the height, form and scale has been carefully considered to ensure solar access to apartments in the existing residential flat building to the south. The attached Solar Access Schedule at Appendix F demonstrates compliance and a high level of amenity of the adjoining apartments.
- e) The proposed density is 1.13:1 achieving 1,374.96m² residential GFA. The adjoining Horizon Heathcote comprises 77 apartments with a density of 1.66:1 (maximum permissible 2:1) and maximum building height of 15.8m (maximum permissible 13m). The density transition between neighbouring sites along Rosebery Street is appropriate and compatible: Horizon Heathcote (1.66:1) to multi-dwelling housing

24a-24b Rosebery Street (0.7:1) – the proposed density of 1.13:1 is lower than the average between the two neighbouring sites at 1.18:1.

- f) A variation to the density control has been considered on environmental impacts, however social and economic impacts are also required to be considered under the EP&A Act. There is a significant shortage of affordable housing, in close proximity to transport within the Sutherland Shire, and the addition of 18 apartments will provide important supply and opportunities for future residents to meet the needs of the Sutherland Shire's population, particularly housing for older people, people with a disability or essential key workers.
- g) The increased housing density is supported by the close proximity of the site to public transport; train station and major bus route, as well community services, shopping, jobs, community facilities and the environment at Sutherland, Wollongong and Miranda – all that can be accessed by train.

Accordingly, the FSR development standard for the proposed development should be varied so as to permit the proposed FSR of 1.13 and 18 dwellings in accordance with the issued SCC.