

SUTHERLAND SHIRE COUNCIL ASSESSMENT REPORT

Panel Reference	PPSSSH-141
DA Number	DA23/0380
LGA	Sutherland Shire
Proposed Development:	Demolition of existing structures and construction of a residential flat building with the provision of affordable housing as provided for under the State Environmental Planning Policy (SEPP Housing) 2021
Street Address:	26 Rosebery Street, Heathcote (Lot 16 Sec A DP 2499)
Applicant/Owner:	Pacific Community Housing Pty Limited
Date of DA lodgement	20 June 2023
Number of Submissions:	First period of public notification: 124 Second period of public notification: 30
Recommendation:	Approval
Regional Development Criteria	Clause 5, Schedule 6 State Environmental Planning Policy (Planning Systems) 2021 - CIV > \$5M – Private infrastructure and community facilities (affordable housing)
List of all relevant s4.15(1)(a) matters	<ul style="list-style-type: none"> • State environmental Planning Policy (Housing) 2021 • State Environmental Planning Policy (Planning Systems) 2021 • State Environmental Planning Policy (Resilience & Hazards) 2021 • State Environmental Planning Policy (Biodiversity & Conservation) 2021 • State Environmental Planning Policy (Transport and Infrastructure) 2021 • State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004. • Apartment Design Guide (ADG) • Sutherland Shire Local Environmental Plan 2015 (SSLEP 2015). • Sutherland Shire Development Control Plan 2015 (SSDCP 2015). • Section 7.12 Development Contribution Plan 2016 - Sutherland Shire.
List all documents submitted with this report for the Panel's consideration	<ul style="list-style-type: none"> • Site Compatibility Certificate • Submissions Summary • SEPP (Housing) 2021 – Compliance Table • ADG Design Response Table • SSDCP 2015 – Compliance Table • Report from the Design Review Panel (DRP) • Clause 4.6 statement – Height of Buildings • Clause 4.6 statement – Floor Space Ratio
Report prepared by:	Alison Davidson (The Planning Co.) - Consultant for Sutherland Shire Council
Report date	7 June 2024

Summary of s4.15 matters

Have all recommendations in relation to relevant s4.15 matters been summarised in the Executive Summary of the assessment report? **Yes**

Legislative clauses requiring consent authority satisfaction

Have relevant clauses in all applicable environmental planning instruments where the consent authority must be satisfied about a particular matter been listed, and relevant recommendations summarized, in the Executive Summary of the assessment report? **Yes**
e.g. Section 4.6 of Chapter 4 of SEPP Resilience and Hazards 2021 -Clause 4.6(4) of the relevant LEP

Clause 4.6 Exceptions to development standards

If a written request for a contravention to a development standard (clause 4.6 of the LEP) has been received, has it been attached to the assessment report? **Yes**

Special Infrastructure Contributions

Does the DA require Special Infrastructure Contributions conditions (S7.24)? **Not Applicable**
Note: Certain DAs in the Western Sydney Growth Areas Special Contributions Area may require specific Special Infrastructure Contributions (SIC) conditions

Conditions

Have draft conditions been provided to the applicant for comment? **No**

REASON FOR REFERRAL TO SSPP

Schedule 6 of State Environmental Planning Policy (Planning Systems) 2021, requires this application to be referred to the Sydney South Planning Panel (SSPP) as the development constitutes affordable housing (CI 5(b)) of Schedule 6 which has a capital investment value of more than \$5 million. The application submitted to Council nominates the value of the project as \$6,097,605.00.

PROPOSAL

The application is for the demolition of existing structures and construction of a part three and part four storey residential flat building containing 18 dwellings, 9 of which will be affordable housing, under Division 5 of the Housing SEPP 2021.

THE SITE

The site is located on the eastern side of Rosebery Street in Heathcote. The site has a western frontage to Rosebery Street of 20.15m, northern and southern side boundaries of 60.3m, and yields a site area of 1,213m².

ASSESSMENT OFFICER'S RECOMMENDATION

THAT:

- 1.1 That the Sydney South Planning Panel (SSPP) acknowledges the Site Compatibility Statement (SCC) issued by the Department of Planning, Housing and Infrastructure (DPHI) on 22 February 2022. The SCC overrides the prohibition of a residential flat building on the site and requires the assessment of the proposal under Section 4.15 of the Environmental Planning and Assessment Act.
- 1.2 Pursuant to the provisions of Clause 4.6 of Sutherland Shire Local Environmental Plan 2015, the written submissions in relation to the requested variations detailed below satisfy the relevant provisions of Clause 4.6 and are therefore supported. It is recommended that the provisions of Clause 4.6 be invoked, and these development standards be varied as detailed below, in respect to this application.

Development Standards	Clause	Requirement	Proposal	% Variation
Height of Buildings	4.3	9m	13.7m	52.2%
Floor Space Ratio	4.4	0.7:1	1.13:1	62%

- 1.3 That Development Application No. DA23/0380 for Demolition of existing structures and construction of a residential flat building with SEPP (Housing) 2021 at Lot 16 Sec A DP 2499 26 Rosebery Street, Heathcote be approved, subject to the conditions contained in **Appendix "A"** of the report.

ASSESSMENT OFFICER'S COMMENTARY

2.0 DESCRIPTION OF PROPOSAL

The proposal seeks to demolish an existing dwelling and construct a part three, part four storey residential flat building. Specific details include:

- Construction of 18 apartments, comprising 13 x 1 bedroom and 5 x 2 bedroom apartments;
- Provision of 50% (9 apartments) as affordable housing units to be management by Pacific Community Housing (PHC) for a period of 15 years.
- Basement level comprising parking for 11 vehicles, residential storage, bicycle parking, waste storage area and tug room, hydrant pump room, stair, and lift access to Ground Floor Level; and
- 3 x Communal Open space Areas (105m² at Ground Level, north and south, and 244m² at roof top terrace level).

A site plan and photomontage of the proposed development are provided below at **Figures 1 and 2.**

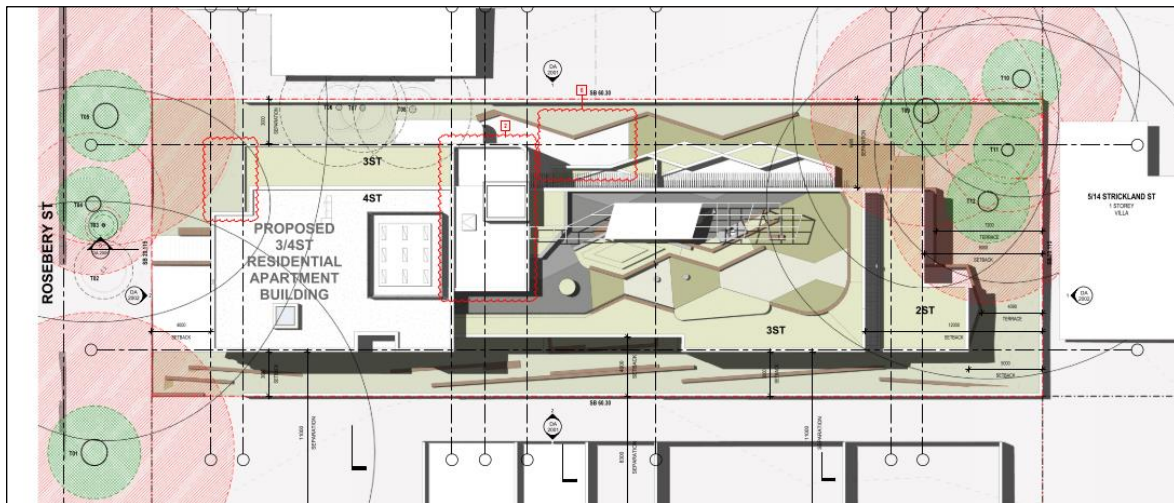


Figure 1: Site Plan of proposed development



Figure 2: Photomontage of proposed development viewed from Rosebery Street

3.0 SITE DESCRIPTION AND LOCALITY

The site is legally known as Lot 16 in DP 2499, located at No. 26 on the eastern side of Rosebery Street, Heathcote. The site is situated 59m north of its intersection with Veno Street and 39m south of its intersection with Strickland Street. Both of these connecting streets access Princes Highway. The site has a 20.115m western frontage to Rosebery Street, 60.3m side boundaries to the north and south, and a 20.115m rear boundary to the east. The total site area (by survey) is 1,213m².

Existing at the site is a 2-storey brick dwelling with a pitched metal roof. A number of trees exist at the site, predominantly in the rear north-eastern corner and to the street frontage.

The development site has a diagonal fall from the south-eastern corner to the north-western corner of approximately 2m and a crossfall from south to west of approximately 0.9m. The site shares its northern (side) boundary with No. 24B Rosebery Street, a 2-storey dwelling house. The eastern (rear) boundary is shared with the side boundary of No. 14 Strickland Street, a single storey multi-dwelling housing development. The southern side boundary is shared with No. 11 Veno Street, comprising 2 x four storey residential flat buildings.

A locality plan and an aerial photo are provided in **Figures 3 and 4** below.

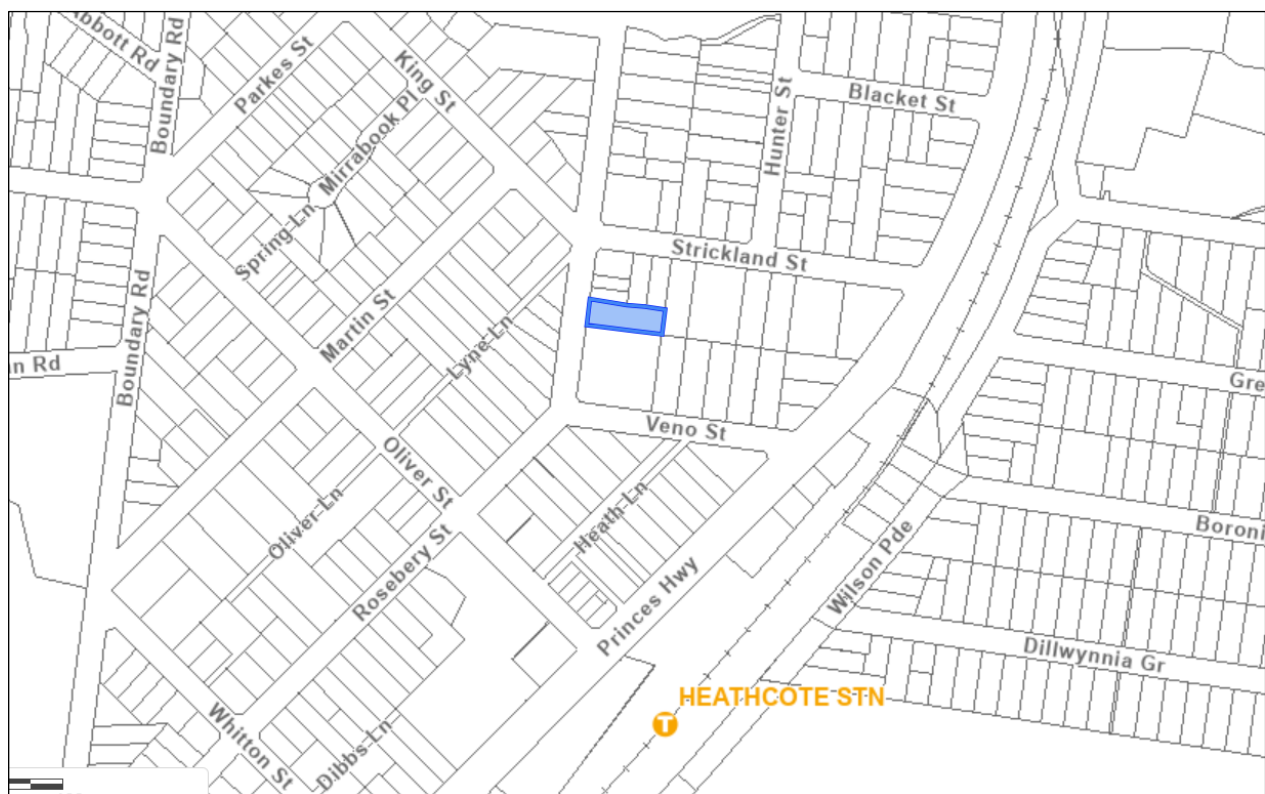


Figure 3: Locality Plan of site and surrounds [Source: SSC Maps]



Figure 4: Aerial Photograph of the site and nearby development

The site is zoned R3 – Medium Density Residential and is located close to a number of zone boundaries including R2 – Low Density Residential to the north and west, E1 – Local Centre to the south, and SP2 – Infrastructure (Educational Establishment) further south. The proximity of the site to Heathcote Public School results in overflow parking within surrounding streets including Rosebery Street. An excerpt from the SSLEP 2015 Zoning map is included in **Figure 5** below.

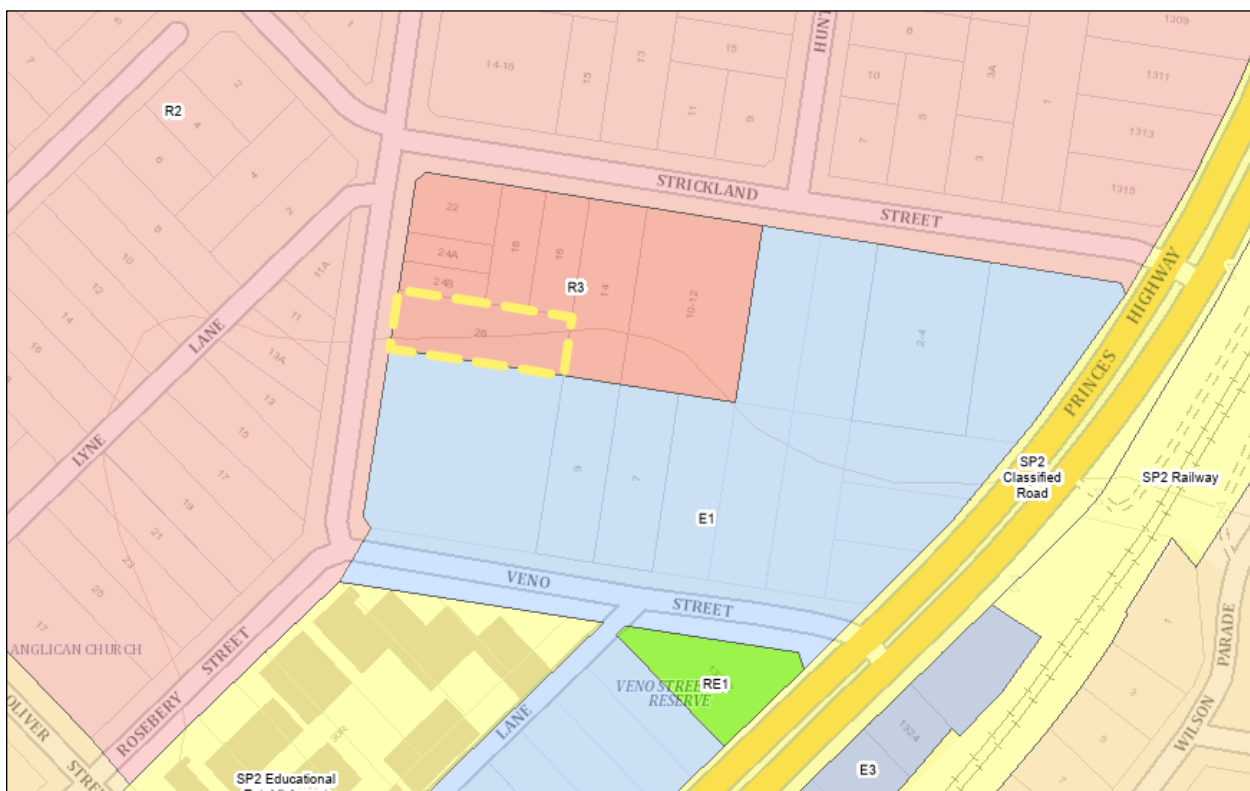


Figure 5: LEP zoning map (Site outlined yellow)

As a result of the zoning mix (illustrated above), Rosebery Street is characterised by a mix of building stock, including a dual occupancy to the north, at the intersection with Veno Street, a residential flat development, known as Horizon, and detached dwellings. A single storey multi-dwelling complex is located to the east adjoining the site with access from Strickland Street.

The nature of development in proximity to the site is illustrated in the four images at **Figure 6** below.



Figure 6: (A) + (B): Horizon RFB to south **(C)** No. 24A & B to north **(D)** No. 11 across road to west

4.0 BACKGROUND

A history of the development proposal is as follows:

Site Compatibility Certificate (SCC)

On 21 February 2022 the Department of Planning, Housing and Infrastructure (DPHI) notified Council officers that an application for a SCC had been lodged for the subject site, and comments were invited on the proposal. The application had been made under the State Environmental Planning Policy (Housing) 2021 (SEPP (Housing)). Site compatibility certificates, under the SEPP (Housing), aim to facilitate redevelopment for residential flat buildings (RFBs) near key railway stations, without the need for a rezoning - should the proposed development be compatible with surrounding land uses.

The SCC proposal was for a *new four storey residential flat building comprising 18 apartments, of which 9 are proposed to be managed by a community housing provider for the period of at least 15 years.*

A submission was provided from Councils Strategic Planning Division to the DPHI on 7 March 2022. The submission provided the following input which has been paraphrased:

Whilst the site is a reasonable location for affordable housing, concern is raised with regards to the impacts that results from affording the narrow site the extent of additional height and floor space sought by the proponent...

...to date Council does not have a policy framework to guide the provision of affordable rental housing in Sutherland Shire.

...concern that the proposal does not appear to comply with the Apartment Design Guide's (ADG) requirements for building separation...this is in conflict with the ADG requirements for development of this scale and compromises amenity and solar access to the adjoining residents.

...Concern is also raised that the proposal is not compliant with Sutherland Shire Development Control Plan 2015 (the DCP) Chapter 5 for Multi dwelling houses in the R3 Medium Density residential zone. The DCP at Chapter 35 invokes Chapter 5 in the absence of a specific chapter for infill affordable rental housing developments in the R3 zone.

...Review of the proposed development highlights significant encroachment into tree protection zones in the rear of the property which may compromise their long-term health and stability...

While the adjoining residential flat building gives some context that supported the height and density for this site to achieve affordable rental housing, this should still be achieved in a way that results in acceptable relationships to surrounding buildings. The fact that the proposed FSR appears to result in inadequate side boundary setbacks and compromise tree retention tends to suggest that the FSR requested is excessive for such a small, narrow site.

An assessment report (Ref: SSC2022SUTHE-1) was prepared by the DPHI, and in consideration of site context and suitability of the development, the following was stated:

- *The uses immediately neighbouring the site are residential and include both multi dwelling houses and residential flat 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; and*
- *The site is of sufficient size and orientation to accommodate a residential flat building that is designed appropriately and can maintain acceptable amenity and impact to surrounding properties and their existing future use for residential purposes.*

The DPHI considered 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.

The above conclusion was made noting further detailed assessment at DA stage and further opportunity to refine the scheme under the DA process would be applied. The report concludes that the SCC should be issued subject to requirements (as included in Schedule 2), on the basis that:

- *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 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.*

On 16 June 2022, DPHI issued a SCC for the following:

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 SSC was granted subject to the satisfaction of the requirements specified in Schedule 2 of the certificate. Schedule 2 states:

1. 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.

A copy of the SCC is included at **Appendix "B"** to this report. This report provides a detailed assessment under Section 4.15 of the EP&A Act, 1979 in terms of satisfaction of (1) above under the issued SCC.

Subject Proposal

- The current application was submitted on 20 June 2023.
- The application was placed on exhibition, with the last date for public submissions being 13 July 2023. This included a 1-week extension to Council's standard Notification Policy.
- On 15 August 2023 the Sydney South Planning Panel (SSPP) requested additional information from the applicant – namely a request for a Quantity Surveyor Report and clarification around the %

requirement of affordable housing proposed. The application was considered by Council's Design Review Panel (DRP) on 24 August 2023.

- On 5 September 2023, it was confirmed by email correspondence that the Development Application would be determined by the SSPP pursuant to Schedule 6 of SEPP (Planning Systems) 2021.
- On 6 September 2023 a site meeting was held with the SSPP.
- On 18 September 2023 a briefing was held with the SSPP.
- On 10 October 2023 Council officers requested that the following additional information be addressed by the applicant via the NSW Planning Portal. Issues raised related to:
 - Character, scale, and street presentation;
 - Communal open space provision;
 - Consideration of the Apartment Design Guide (ADG);
 - Urban design elements – particularly the ground level unit design and lack of street frontage;
 - Clause 4.6 Variation Requests (Building height and FSR);
 - Zero setback basement excavation footprint;
 - Engineering matters;
 - Landscape and environmental matters;
 - Waste matters; and
 - BCA compliance;
- The following additional information was submitted by the applicant on 17, 21, 28 November, 4 and 6 December 2023:
 - Response to Assessment Officer's RFI;
 - Revised Plans and supplementary reports;
 - Legal Advice;
 - DRP Response;
 - Design Response Report; and
 - Tree and Landscape Response.
- On 20 November 2023 a progress briefing was conducted with the SSPP.
- The application was placed on re-exhibition with the last date for public submissions being 15 December 2023.
- On 26 February 2024, a progress briefing was conducted with the SSPP.
- On 29 February 2024, Council officers advised the applicant via email correspondence that the following key issues remained outstanding and requested a meeting with the project team to discuss:
 - Waste collection (proposed 'No Standing' zone not supported);
 - On-site detention (OSD) (boring under the street trees not supported);
 - Fire code compliance (outstanding information);
 - Building Design / DRP – unresolved items;
 - Plans – Clarification of vertical dimensions and
 - Updated 4.6 justification for height.
- On 13 March 2024, a meeting was conducted with the Applicant's team and Council officers to discuss outstanding issues.
- On 8 April 2024 the applicant submitted an Addendum Arborist Report regarding design of the

OSD.

- On 12 April 2024 the applicant submitted a Fire Engineer Response following consultation with Sydney Water.
- On 22 April 2024, a progress briefing was conducted with the SSPP and the Applicant to work through the remaining issues and progress to a determination meeting;
- Various email liaison occurred with the Applicant between April and May 2023;
- On 27 May 2024 the following additional information was submitted by the Applicant:
 - Updated Plans with additional details (Cover Sheet, Elevations, HOB Diagram)
 - Example Wall sections / built example of Floor to ceiling heights;
 - Revised Landscape Plan (Rev E)
 - Arborist Advice
 - Stormwater – OSD to street section
 - Fire System Compliance Report;
 - Updated BASIX set.
- On 29 May 2024 the applicant submitted the following final documentation to the NSW Planning Portal:
 - BASIX Stamped Plans
 - Revised Clause 4.6 Variation Request – Building height;
 - Revised Clause 4.6 Variation Request – Floor Space Ratio.

5.0 ADEQUACY OF APPLICANT'S SUBMISSION

In relation to the Statement of Environmental Effects, plans and other documentation submitted with the application, the applicant has provided adequate information to enable an assessment of this application. This includes written requests to vary the Height of Buildings and Floor Space Ratio development standards under Clause 4.6 of Sutherland Shire Local Environmental Plan 2015.

6.0 PUBLIC PARTICIPATION

The application was notified in accordance with the provisions of Appendix 1 of the Sutherland Shire Community Engagement Strategy 2023 (SSCES) and administrative requirements of the SSPP. Council notified 206 adjoining or affected owners of the proposal and 124 submissions were received.

Revised Plans

The applicant lodged revised plans on 17 November 2023. The revisions incorporated a response to Councils correspondence including design matters and amendments resulting from technical input. These plans were publicly notified in the same way as the original application under the SSCES to 313 adjoining or affected owners and 30 submissions were received. A summary of submissions relating to those plans are included at **Appendix "C"** to this report and are discussed throughout this assessment report.

Following further Council officer assessment and discussion with the applicant some additional supporting documentation and plan additions were provided on 4 December 2023, with final additional aspects regarding elevation detail to clearly demonstrate building height provided on 27 May 2024.

7.0 SUBMISSIONS

As indicated above, a summary of submissions to the proposed development (as amended) is provided at **Appendix “C”** to this report. The key issues raised include: permissibility, traffic and parking issues, safety, character, compatibility, insufficient / misleading supporting documentation, building height non-compliance, FSR non-compliance, amenity impacts and inappropriate development. Support has also been provided for the development with a submission recognising the need for more housing and the fact that it includes the provision of 50% affordable housing.

8.0 STATUTORY CONSIDERATIONS

The subject land is located within *Zone R3 Medium Density Residential* pursuant to the provisions of Sutherland Shire Local Environmental Plan 2015. The proposed development, being a RFB is prohibited in the zone. The applicant has obtained a SCC under the provisions of Clause 39, Division 5 of the Housing SEPP which allows a RFB on the site, subject to the satisfaction of specific requirements contained in Schedule 2 of the SCC. Further discussion regarding the Housing SEPP is provided in Section 9.1 of this report.

The following Environmental Planning Instruments (EPIs), Draft EPIs, Development Control Plan (DCP), Codes or Policies are relevant to this application:

- State Environmental Planning Policy (Housing) 2021
- State Environmental Planning Policy (Resilience and Hazards) 2021
- State Environmental Planning Policy (Biodiversity and Conservation) 2021
- State Environmental Planning Policy (Planning Systems) 2021
- State Environmental Planning Policy (Transport and Infrastructure) 2021
- State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
- Apartment Design Guide (ADG)
- Sutherland Shire Local Environmental Plan 2015 (SSLEP 2015).
- Sutherland Shire Development Control Plan 2015 (SSDCP 2015).

Section 7.12 Development Contribution Plan 2016

- Section 7.12 Development Contribution Plan 2016 - Sutherland Shire.

9.0 COMPLIANCE

9.1. State Environmental Planning Policy (Housing) 2021

State Environmental Planning Policy (Housing) commenced on 26 November 2021 under the affordable housing reforms. The SEPP has been amended since lodgement of this application and general savings provisions apply to Chapter 2 under Schedule 7A. New Chapter 4 also applies which is not subject to savings provisions, as discussed below. The SEPP facilitates affordable and diverse housing in NSW. The NSW Government is tackling the housing crisis by enabling more social and affordable housing for low-income households and essential workers. The reforms intend on delivering new social and affordable housing close to jobs, services, and transport.

Chapter 2 – Affordable Housing

The application falls within Part 2 – Development for Affordable Housing; Division 5 - Residential Flat Buildings - Social Housing providers, public authorities, and joint ventures under the SEPP. A table detailing compliance with the applicable Division 5 provisions is provided at **Appendix “D”** to this report.

Under Division 5, Clause 36 of the Housing SEPP, the subject site is land to which Division 5 applies, being located in the Greater Sydney Region, *within 800m of a public entrance to a railway station*. The subject proposal is development to which Division 5 applies (clause 37(1)(a)) being for the purposes of a RFB by Social Housing Provider (Pacific Community Housing), who is identified as the operator of the affordable housing component of the future development for a period of 15 years. Registration confirmation of the community housing provider has been provided (issued 4 December 2020 by the National Regulatory System Community Housing). The proposal is therefore for the purposes of a RFB, *by or on behalf of a public authority or social housing provider* consistent with the requirements of cl. 37(1)(a) of the SEPP.

The proposal for an RFB at the site (notwithstanding that the site is zoned R3 – Medium Density) may be carried out with consent pursuant to Clause 38(2)(a) as the Planning Secretary has certified in a SCC that, in the Planning Secretary's opinion, the residential flat building is compatible with the surrounding land uses.

The above required certification was issued by the Director General on 16 June 2022 which states that:

I certify that in my opinion, the development described in Schedule 1:

- *is compatible with the surrounding land uses, having regard to the matters specified in Clauses 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.*

Accordingly, the site location and proposed development meets the relevant criteria under Division 5 of the Housing SEPP. In accordance with Clause 38(7) of the Housing SEPP, the development for the propose of a RFB on the site, is enabled only if it satisfies specific requirements contained in Schedule 2 of the certificate. The performance of the development regarding these requirements is provided in Part 11.3 (Assessment) of this report.

Chapter 4 – Design of Residential Apartment Development

Chapter 4 of the Housing SEPP (previously State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development (SEPP 65)) now applies to all **pending** development applications, even those lodged before 14 December 2023 (i.e. the subject application). On 14 December 2023 the SEPP 65 was repealed, and a new Chapter 4 was inserted into the Housing SEPP, titled 'Design of

residential apartment development'. This new chapter contains the substance of the former SEPP 65, with some changes (previously applicable under Chapter 2, Division 5, Clause 41).

However, under the initial arrangements put in place:

- The new Chapter 4 ('Design of residential apartment development') of the Housing SEPP did not apply to development applications that had been formally 'lodged' on the NSW Planning Portal before 14 December 2023 – ie. the subject application.
- There were no express savings or transitional provisions preserving the operation of SEPP 65 (for existing development applications) beyond its repeal on 14 December 2023.

On 15 March 2024 the NSW Government published the State Environmental Planning Policy Amendment (Housing) 2024. This document revised the transitional provision set out in section 8(1) of Schedule 7A of the Housing SEPP. A new provision applies the new Chapter 4 ('Design of residential apartment development') of the Housing SEPP to any development application (or modification application), including those lodged before 14 December 2023 (i.e. the subject application – lodged 20 June 2023). This provision is section 8(2A) of Schedule 7A of the Housing SEPP.

Of note:

- The relevant design quality principles are now in Schedule 9 of the Housing SEPP.
- The provision (formerly Clause 6A of SEPP 65) overriding some aspects of development control plans is now section 149 of the Housing SEPP.

New Clause 147 is provided below, pending development applications now benefit from a new provision in the Housing SEPP that expressly says that a consent authority is not obliged to require compliance with design criteria specified in the ADG (Section 147(3)).

147 Determination of development applications and modification applications for residential apartment development

- (1) *Development consent must not be granted to residential apartment development, and a development consent for residential apartment development must not be modified, unless the consent authority has considered the following—*
- (a) the quality of the design of the development, evaluated in accordance with the design principles for residential apartment development set out in Schedule 9,*
 - (b) the Apartment Design Guide,*
 - (c) any advice received from a design review panel within 14 days after the consent authority referred the development application or modification application to the panel.*
- (2) *The 14-day period referred to in subsection (1)(c) does not increase or otherwise affect the period in which a development application or modification application must be determined by the consent authority.*
- (3) *To avoid doubt, subsection (1)(b) does not require a consent authority to require compliance with design criteria specified in the Apartment Design Guide.*
- (4) *Subsection (1)(c) does not apply to State significant development.*

Under this new Clause, it is apparent that the design criteria, including many numerical provisions, are not 'requirements'. They are merely one way of achieving the relevant objectives of the ADG. This is affirmed by NSW LEC matter of Construction *Development Management Services Pty Ltd v City of Sydney* [2023] NSWLEC 1620, whereby Commissioner Horton finds in relation to the design criteria of the ADG at [52] that "*the criteria is not, of itself, a development standard but one means of achieving the objective at 4A-1 of the ADG.*"

The ADG itself has not changed and the proposal as it performs against it is discussed below under Part 9.6. **Appendix "E"** of this report provides a summary of the design response to the ADG confirming if those responses are considered to be suitable or require conditions to meet the objectives.

9.2. State Environmental Planning Policy (Resilience and Hazards) 2021

Chapter 4 Remediation of Land (Previously SEPP 55)

Chapter 4 of State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP) requires Council to consider whether the land subject to the development proposal is contaminated; and if the site is contaminated, Council must be satisfied that the site is suitable or can be made suitable (i.e. following remediation) for the proposed land use.

A site inspection identified that the site is currently occupied by a dwelling house. A review of Council's GIS and historical aerial photos has shown residential uses have existed on the site since at least 1955. A search of Council's contaminated land register specifies that the site is not potentially contaminated.

In conclusion, the site is suitable for the proposed development in accordance with requirements of the Resilience and Hazards SEPP.

9.3. State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

State Environmental Planning Policy (Building Sustainability Index) 2004 (BASIX SEPP) aims to establish a scheme to encourage sustainable residential development across New South Wales. A BASIX certificate (No. 1346534M_03) accompanies the development application addressing the requirements for the proposed building. The proposal achieves the minimum performance levels / targets associated with water, energy, and thermal efficiency.

Whilst the BASIX SEPP was replaced by State Environmental Planning Policy (Sustainable Buildings) 2022 (the Sustainable Buildings SEPP) and commenced operation on 1 October 2023, the BASIX SEPP applies to the application being subject to the transitional provisions listed under Section 4.2 of the Sustainable Buildings SEPP, including the exclusion of development applications that were submitted on the NSW Planning Portal prior to 1 October 2023. As the subject DA was lodged on 20 June 2023, it is exempt from the Sustainable Buildings SEPP.

9.4. State Environmental Planning Policy (Biodiversity and Conservation) 2021

From 21 November 2022, new Chapter 6 of the SEPP consolidates Chapters 7-11 related to water catchments (including Georges River catchment). The Georges River Catchment is defined as a “regulated catchment.” Division 4 contains controls for development for specific purposes, including at Clause 6.21 (Stormwater Management).

Chapter 6 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and conservation SEPP) sets out the plan objectives and planning principles for the Georges River Catchment. Ch 6 includes a number of aims and objectives for the environment and water quality within the catchment. Appropriate stormwater management and water quality measures are proposed and have been reviewed and supported by Councils Engineering experts and there is likely to be minimal adverse impacts on water quality. Council is of the view that with the implementation of conditions of consent, the proposal would be consistent with the aims and objectives of the Biodiversity and Conservation SEPP 2021.

9.5. State Environmental Planning Policy (Planning Systems) 2021

State Environmental Planning Policy (Planning Systems) 2021 (Planning Systems SEPP) identifies State and Regionally Significant development in NSW. Clause 5(b), Schedule 6 of the SEPP identifies this application as regionally significant development as it is a community facility (affordable housing) \$5 million. As such, the application is referred to the SSPP for determination.

9.6. Apartment Design Guide (ADG)

The applicable design guidelines for the proposed development are contained within the ADG, which is based on the 9 design quality principles set out in Chapter 4 of the Housing SEPP. The ADG illustrates good practice, and these guidelines are largely replicated in Council's DCP. A table with a compliance checklist of the proposal against the ADG design criteria is contained **Appendix “E”** to this report.

9.7. State Environmental Planning Policy (Transport and Infrastructure) 2021

Development likely to affect an electricity transmission or distribution network (clauses 2.47 and 2.48)

Division 5, Subdivision 2 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP) relates to development that has the potential to impact on electricity supply. This application involves development carried out within 5m of an exposed overhead electricity power line per Clause 2.48(1)(b)(iii).

As such, per Clause 2.48(2)(a), Council has notified Ausgrid and invited them to provide comments about the potential safety risks. Ausgrid has advised on 29 May 2024 that the proposal does not interfere with Ausgrid assets, and no further input is required.

9.8. Biodiversity Conservation Act 2016

The Biodiversity Conservation Act 2016 and the Biodiversity Conservation Regulation 2017 outlines the framework for assessment and approval of biodiversity impacts for development that requires consent under the Environmental Planning and Assessment Act 1979. The assessment of the development has

revealed that the Biodiversity Offset Scheme (BOS) threshold is NOT triggered, and biodiversity matters have been appropriately assessed via Council's LEP and DCP objectives and controls.

9.9. Sutherland Shire Local Environmental Plan 2015

The proposal has been assessed for compliance against Sutherland Shire Local Environmental Plan 2015. A compliance table with a summary of the applicable development standards is contained below:

TABLE 1: Sutherland Shire Local Environmental Plan 2015 (Site Area – 1,213m²)			
CLAUSE	REQUIRED	PROPOSAL	COMPLIANCE
cl.4.3 Height of Building	9m	Lift overrun & plant screen – 13.7m 4 storey parapet – 12.56m Roof top COS pergola – 12m 3 storey parapet - 9.95m	No – 52.2% variation (Clause 4.6)
cl.4.4 Floor Space Ratio	0.7:1 (849.1m ²)	1.13:1 (1,374.96m ²)	No – 62% variation (Clause 4.6)
cl.6.14 Landscaped Area	30% (363.9m ²)	369.9m ² (30.5%)	Yes (NB: ADG overrides)

9.10. Sutherland Shire Development Control Plan 2015

The proposed development does not fit neatly into the development controls prescribed under SSDCP 2015. This is because SSDCP 2015 is zone based and has been drafted in anticipation of proposals that are permissible forms of development in each zone (whereas the subject proposal is prohibited in the R3 Medium Density Residential zone). The proposed RFB in the R3 – Medium Density Residential Zone, is only permissible by way of the SCC. As RFBs are not permitted in the R3 zone, the DCP does not contain any directly specific controls relevant to this development typology.

Chapter 5 of SSDCP 2015 includes provisions relating to multi-dwelling housing in the R3 Medium Density Residential Zone, whilst Chapter 6 provides RFB provisions in relation to the R4 – High Density Zone. The prelude to Chapter 6 does refer to the importance of application of the now repealed SEPP 65 and that SEPP 65 and the ADG prevail over the DCP. This is now replaced with considerations under Chapter 4 of the Housing SEPP.

Performance against the ADG design guidance is provided at **Annexure “E”**. Specifically, pursuant to Clause 149 of the Housing SEPP, the ADG prevails over any DCP in relation to:

- (a) *visual privacy,*
- (b) *solar and daylight access,*

- (c) common circulation and spaces,
- (d) apartment size and layout,
- (e) ceiling heights,
- (f) private open space and balconies,
- (g) natural ventilation,
- (h) storage.

Chapter 35 of the SSDCP 2015 includes provisions related to “Other Uses”. However, this does not include the proposed RFB use in the R3 zone. Notwithstanding, the prelude to controls under this chapter state the following which can be applied to the proposed scenario. It seeks to provide built form that is *consistent with the predominant built form and design elements of the surrounding locality and streetscape*.

It further states that:

The objectives of the controls relating to each design element (streetscape, building form, building setbacks, landform, landscaping, building layout, solar access, visual and acoustic privacy, vehicular access, parking and circulation) seek to ensure that any use that is permissible within a zone is developed in a manner that is consistent with the zone objectives and contribute to a harmonious local environment.

Given the land is zoned R3 Medium Density Residential, and the features of this zone are representative of the context applicable to the site and the expectations of the community, Chapter 5 - Multi Dwelling Housing has been considered in the assessment of the proposal. A compliance table with a summary of the Chapter 5 development controls is contained in **Appendix “F”**. Assessment of the proposal having regard to SSDCP 2015 indicates that the proposed development would be numerically deficient in regards to the fourth storey, third level side setback, the higher solar access threshold of 3 hours and parking provisions. However, as detailed in this report, the proposal is supported and recommended for approval given the balance of consideration having regard to the issuance by the DPHI of an SCC for the site, the delivery of affordable housing, merit and technical considerations pursuant to the ADG and SEPP Housing.

10.0 SPECIALIST COMMENTS AND EXTERNAL REFERRALS

The application was referred to the following internal and external specialists for assessment and the following comments were received:

Ausgrid

The application was referred to Ausgrid in accordance with Clause 2.48 of the Transport and Infrastructure SEPP as it involves per sub-clause (1)(a)(iii) development carried out within 5m of an exposed overhead powerline. Per clause 2, before determining a development application to which the clause applies, the consent authority must give written notice to the electricity supply authority, inviting comments about potential risk, and consider any response received within 21 days from such notice.

On 29 May 2024 Ausgrid confirmed via the NSW planning portal that the proposed development does not interfere with Ausgrid assets and no formal response was necessary.

Design Review Panel (DRP)

The application was considered by Council's DRP on 24 August 2023. The DRP summarised that they support well-considered design and acknowledge that care has been taken in the preparation of the development proposal. The DRP supports affordable housing in this location. However, there were numerous aspects of the proposed design that the DRP sought design changes for, such that the original scheme was not supported. The amended plans submitted by the Applicant were accompanied by a response to the DRP Report prepared by the project Architect dated 14 November 2023.

A detailed copy of the DRP report is provided at **Appendix "G"**. A summary of the report is provided below along with commentary as to the applicant's design response to these comments.

Built form and scale

- To ensure the proposed development is a good fit with its context, it is important that an appropriate transition between scales of development is provided; treatment of the side setbacks is critical.
- The Panel suggests the upper floors be re-designed to improve the scale transition between zones.
- The top-level unit A402 should be set back a minimum 6m from the side boundary to suit ADG Building Separation considerations.
- DRP recommends that, in order to reduce impacts of bulk and scale of the proposed development on the duplex, it is worth considering re-configuring the northern two units on Level 3 — studio A305 and 1 Bedroom A306 — to follow the recommended side setback of 2 Bedroom unit A402 on Level 4, as well as its layout. Panel notes that greater consideration of visual privacy across the northern boundary will be needed at this level.

Applicant response (amended plans – 17.11.23)

- Front setback increased by 2.2m to increase transition and reduce scale.
- Level 4 setback 6m from side boundary.
- Proposal incorporates design solutions in accordance with design guidance of ADG. I
- Top level unit (402) has been setback 6m from the northern side boundary.
- Unit A104 has been reconfigured with the façade setback 4m from the side boundary to allow 1m egress pathway and a palisade fence to the courtyard. Terrace has been increased to 15m² to comply with ADG.
- Unit A104 has been replanned by reducing length of fire stair and relocating living room towards north-west corner and integrated corner window.

Amenity

Various recommendations were provided by the DRP to improve:

- Solar access, private open space, outlook and street activation to the Ground Floor, street facing unit (A104);
- Reduce overlooking impacts and improve cross ventilation through layout reconfiguration to allow relocation of windows; Adjustment to screening in the gallery space to prevent visual privacy concerns, and stepping in the lobby to the north;
- Internal design changes to improve light and ventilation;
- Review floor to ceiling heights;
- Revised nominated adaptable units to avoid significant reconfiguration to provide an accessible layout;
- Design and layout recommendations to private balconies;
- Waste collection resolution to be sensitive to the streetscape interface and not follow approach taken by adjoining RFB to south.
- Additional information to demonstrate how all corner units achieve minimum guidance of ADG for cross ventilation with louvred windows.

Applicant response (amended plans – 17.11.23)

- Unit A104 reconfigured with façade setback 4m from side boundary. Allows 1m egress pathway and a palisade fence to the courtyard rather than wall. Terrace increased to 15m² (per ADG);
- Unit A104 replanned by reducing length of fire stair in front, relocating living room towards northwest corner, providing a street outlook from this unit.
- Further detail provided to illustrate how all corner units achieve minimum guidance of the ADG for cross ventilation with louvred windows. Ventilation louvres with fire dampers proposed to A101, A201, A301 over living areas. Applicant notes, they are not relied on to achieve ADG design guidance.
- Unit A305 (stack) - Screens removed from bedrooms and length of robes reduced by 1m to achieve 10m² to the bedroom.
- Unit 103 (stack) – small nib wall deleted so Units A103 and A203 receive additional solar access.
- 1:20 sections provided seeking to illustrate 2.7m ceiling heights to habitable rooms can be achieved. Applicant suggested many built examples where ceiling heights can be achieved within a 3,05m floor to floor height. These examples were later furnished to Council.
- Screen provided around roof plant to screen from view (particularly to higher level units in neighbouring building to the south).

Aesthetics

The proposed material palette is well-considered and robust, suitable for a development of mostly affordable housing. The reference to “painted finish” is unclear, but should be excluded, if possible, to reduce maintenance costs, and enhance the ongoing durability and finish of the development.

Applicant response (amended plans – 17.11.23)

The external material palette is face brick and concrete, aluminium framed windows/doors and glass. The reference to painted finish was a small section of concrete transfer slab that is to match the colour of the brickwork.

Sustainability

A full suite of well-considered sustainability measures should be designed and integrated into the proposal during design development. As a minimum this proposal should provide RWT for irrigation and WC flushing, electric systems rather than gas for domestic HW and solar PV cells. The addition of clotheslines on balconies or in communal areas is also supported, to allow affordable housing residents the opportunity to freely dry clothes without the cost of owning or operating a clothes dryer.

The Panel suggests incorporating heat pump hot water systems or offsetting instantaneous electric systems with additional solar panels. The Panel does not support the use of gas in new developments.

Applicant response (amended plans – 17.11.23)

- The proposal meets BASIX requirements.
- Clotheslines are proposed on balconies (screened by part solid balustrades).
- Electric hot water system has not been selected at this stage and the comments of the panel will be taken into consideration.
- Confirmed gas is not proposed.

Housing Diversity and social interaction

The entry lobby could be made more open as a welcoming entry to a development of mostly affordable housing. Instead, after a narrow entry 'throat', the entry lobby presents as a large enclosed ramped space with unclear pathways, an unwelcoming space that may be difficult to furnish.

Applicant response (amended plans – 17.11.23)

The entry lobby has been redesigned to include a sitting area and facilitate a more welcoming space.

Landscape

The concept of a 'terrestrial' landscape is encouraged, as is the retention of the trees to the north-eastern corner of the site. It is also noted that the extent of the carpark has been reduced to this corner so that there is further allowance for the existing turpentine tree to be retained and provide a more realistic distance from its structural root zone (SRZ).

In relation to a sustainable landscape design approach the Panel does not support the lack of new endemic tree plantings, particularly to the deep soil area to the northern boundary where there is a substantial opportunity for the further tree canopy plantings that would contribute to 40% tree urban canopy cover as a Sydney wide objective. The three Ornamental Pear trees to the northern boundary can be retained as they are clear of the building works and excavation of the carpark. [NB – these are identified in Arborist Report as Yunnan Poplar trees].

Comments raised regarding treatment of outdoor areas, enhancing accessible areas, maintenance issues, utilisation of communal open space (COS) and private open space (POS), general support for roof top communal open space as best location within development, subject to privacy mitigation measures.

Applicant response (amended plans – 17.11.23)

- Species selection has been updated to include native species.
- The ground plane maximises the area for the regeneration of territorial biodiversity.
- Landscaped areas that are overlooked are provided as COS, POS will meet the ADG design guidance.
- Landscape area provided is in excess of the minimum, excluding Area 1 will still achieve the requisite 30%.
- The COS design incorporates ADG design guidance measures, including >12m setback, partial solid balustrade, screening devices, vegetation and pergolas.

Delivery

Conditions recommended to ensure the project is delivered at the level of quality as envisioned through architect involvement at post approval phases.

Applicant response

Applicant notes this recommendation. If supported, this would be incorporated within consent conditions.

Council's Architect

Following the submission of amendments in response to Council's RFI (dated 10 October 2023) which included a request to the DRP issues, Council's Architect reviewed the application. The remaining issues were provided to the Applicant via email correspondence and discussed at a meeting on 22 March 2024 between Council staff and the Applicant's project team. A number of issues were resolved through explanation or the agreement to provide further supporting information. This information (provided on 27 May 2024) included:

- Additional information and detail on building heights (including elevations, height blanket diagram – referred to by Applicant as "FOG" diagram);
- Examples of existing approved buildings with similar floor to ceiling heights;

The final elevation plans provided on 28 May 2024 were updated with height using agreed ground level markers (survey, existing dwelling FFL minus slab), which is agreed as RL 187.90.

The final elevations illustrate some key building heights and Page 9-10 of the Building Height Clause 4.6 Variation Request includes a Height Blanket diagram and corresponding table (reproduced at Part 11.1 below). It is noted that there remain some minor anomalies within the elevation plans. By way of example a measurement of 9.3m (at point "E" to height schedule table) is provided to the northern elevation 3 storey parapet (which appears from BB Section to be RL 197.46 not RL 196.75), however as calculated by Council's Architect and Assessment Officer this more accurately reflects 10m as it sits above ground line RL 187.45. In addition, the 4 storey parapet height (at point "B") indicates top RL of 187.97, notably a typo which was anticipated to be corrected, however remains on the final plans. Finally the pergola RL indicates 199.55 in the height schedule table, whereas RL199.95 on the elevation plans.

In light of some measurement anomalies (which are considered necessary to point out as the issue of inconsistencies in detail are reasonably raised in neighbour submissions), the building height at point “E” does not provide an unnecessarily high parapet and nothing turns on this regarding excess bulk or shadow impacts with the level above being setback 6m. Furthermore, an assessment has been undertaken regarding building height variation and suitability of building scale pursuant to Clause 4.6 of SSLEP 2015 below at Part 11.1 of this report.

From a statutory position the critical maximum building height (at points F, G, H, I and Q) being the lift overrun and plant screening are confirmed with calculations by Councils Assessment Officer and Architect consistent with the applicants.

Council's Architect has concluded that following the lodgement of additional information from the applicant, the proposal reasonably achieves the design guidance of the ADG subject to the imposition of conditions that require design changes relating to apartment amenity and the certification of levels.

Engineering (Assessment Team)

The application was referred to Council's Assessment Team Engineer who raised the following issues that were sought to be addressed through Council's RFI.

Traffic Report & Swept paths

The provided swept paths are not in compliance with AS2890.1. The maximum three-point-turn entry and exit maneuvering requirement is not achievable with the basement design proposed. The basement design required revision in accordance with AS2890.1 requirements. A driveway long section was also requested.

Stormwater Connection to Street and Street Trees T4 and T5

The applicant's submitted Arborist report lacked reference to the stormwater plan requirement that the stormwater connection to the street, requires a 1.2m deep trench due to the depth of the OSD tank outlet. This trench is shown dissecting the SRZ of T4 and T5 (key trees contributing to streetscape quality) and is not adequately consistent with the tree retention objective and arborist report details. The stormwater design was requested to be revised accordingly and be consistent with the arborist assessment details.

In response, the applicant advised of the intent to bore underneath the two large street trees to locate the stormwater pipe. Concerns were raised in follow up referral advice regarding risk of damage to the trees, and possibility that the connection will be difficult to achieve in practice onsite.

Through detailed discussions, additional technical information provided by the project Arborist and Stormwater Engineers and reviewed by Councils Arborist and Engineer, the proposal to under bore is supported.

Fire Code Compliance

No fire hydraulic plan was submitted with the application. The applicant was therefore requested that a NSW Fire & Rescue endorsed/registered fire engineer must provide a report and certification demonstrating compliance with AS2419.1:2021. It was sought that the report must include supporting documentation from the water authority (Sydney Water) demonstrating that the required flow rate and pressure from the street hydrant is in accordance with Clause 2.2.6 of the Australian Standard.

The applicant submitted a Fire System Design Report (prepared by Collective Engineering dated 12 April 2024) which provided necessary information to confirm outstanding aspects, including:

- *There is sufficient flow in the authority water main to meet required fire hydrant and fire sprinkler system demands;*
- *A hydrant and sprinkler booster assembly will be required for the project at the property boundary, A compliant hardstand will be required in front of the booster. The booster assemblies will not require large bore tank suction as there is sufficient pressure and flow in the main for brigade use at the booster;*
- *There is insufficient pressure in the water main to service attack hydrant needs of the AS2419.1-2021 hydrant system, meaning the system will require a pump set;*
- *The water main pressure is assumed to be insufficient in meeting the demands of the proposed AS2118.1-2017 sprinkler system Detailed calculations are required to confirm if a sprinkler set is required, however space has been nominated for this pump.*

This report provides options for the possible location of the hardstand, the final location of which will be subject to discussions with FRNSW through the FEBQ process. These include within the driveway, co-locating with two adjacent fire devices that will need a fire truck hardstand (No. 11 Rosebery Street and 11 Veno Street – referred to in error as 30 Rosebery Street).

The concluding referral from Councils Engineer was satisfied that the applicant has addressed all concerns raised through the previous referral responses and discussions held. This includes the protection of street trees, water pressure (Sydney Water) for fire fighting purposes and internal basement access. Any hardstand required by Fire NSW for the parking of a fire truck must not remove street parking and must not be created within the landscaped setback area from Rosebery Street.

Building Surveyor

The application was referred to Council's Building Officer who provided the following issues that were sought to be addressed through Council's RFI.

- A Hydraulic Assessment to verify hydrant provision compliance with AS2419.1 (2021), the NSWFR Fire Safety Guidelines – 'Access for fire brigade vehicles and firefighters'.
- A fire engineered solution is proposed in respect to the discharge point of the class 2 units fire isolated egress stair into the entry lobby rather than to a road or open space. A statement is

required from a fire engineer that confirms a solution for the fire stair discharge can be formed and the proposal is capable of compliance with the relevant performance requirement.

- The access report confirms BCA compliance capability for access to the units and carpark as required, however the report lists aspects relating to 'adaptable' DCP' matters that require design attention. The issue of most design significance is the unresolved provision of an additional 2 accessible carparking spaces and the related shared zone space within the basement carpark.
- It is noted that the BCA report relates to revision 'A' of the plans whereas the plans submitted for development assessment are revision 'B'. Confirmation is required that the BCA review was undertaken with the current plan set.

The amended submission included a Technical Note in regard to the discharge of the fire stair. The BCA Report was updated to reflect the legislative framework and correctly reference the current plans. It is accepted that parking is provided notwithstanding no parking being required pursuant to Clause 38(4) of the Housing SEPP. Therefore the 2 adaptable spaces are sufficient (as they exceed requirements), and it is confirmed that these comply with AS2890.6-2009 in terms of width and shared zones.

Council's Building Surveyor provided final advice on 7 December 2023 and is satisfied that the proposed development is 'capable' of BCA and DDA compliance using a mix of deemed to satisfy and performance-based approaches.

Landscape Architect

The application was referred to Council's Landscape Architect on three occasions. The proposed was considered in respect of the property being located within the Sydney Turpentine Ironbark Forest (STIF) and being an Endangered Ecological Community (EEC). Remnant vegetation in the road verge, on this property to the rear and also on adjoining sites are individuals that make up the forest community.

The original review sought the design changes that can be summarised as follows:

- Reduce the north-eastern corner of the proposed building to provide suitable clearance from Tree 9 and Tree 12;
- Reduce built form to ensure that required canopy pruning for Trees 1, 4, 5, 9, 11 and 12 does not exceed 10% (allowing for scaffold during construction phase);
- Investigate construction methodology of basement footprint;
- That the proposed stormwater services along the northern boundary be rerouted outside the TPZ areas for Trees 9,10,11,12.
- That depth of the proposed SW line from the OSD to kerb be confirmed;
- That proposed under boring of services be investigated and if found to be achievable, include documentation of methodology on the stormwater plans;
- Provide soil depths for the proposed landscaping to the southern side of the building over the basement carpark.

These details were included in Council's RFI dated 10 October 2023. Following design amendments which included reduction of basement footprint and clearance from significant trees, a revised referral confirmed the above issues have been adequately addressed, pending consideration of the proposed

stormwater and services within the front setback and having regard to the mature street trees.

Final Landscape support has been provided only on the basis that the driveway and OSD be located outside the prescribed structural root zone and tree protection zones street trees to be retained.

Conditions of consent have been provided relating to landscape design, tree removal and replacement planting, site management, tree protection, and landscape maintenance.

Environmental Scientist

The application was referred to Council's Environmental Scientist on two occasions. The initial referral concurred with the above stated issues raised by the original Landscape Referral to protect remnant canopy trees on site. It was also sought within the additional information request that the originally submitted Biodiversity Assessment must include consideration of the Endangered Ecological Community Sydney Turpentine Ironbark Forest (STIF) including requirements of cl 7.3 of the Biodiversity Conservation Act 2016.

Resubmission included an updated Biodiversity Assessment (dated 22 November 2022). Following design amendments which included reduction of basement footprint and clearance from significant trees, a revised referral confirmed that the revisions would result in no tree impact and on that basis (and confirmed by the updated assessment), no significant impact on the community.

Limited conditions have been requested, including having the Landscape Plan updated to include only species from the STIF in the final determination.

Waste Officer

The proposal was referred to Council's Waste Officer and following review the originally proposed kerbside waste collection method was not supported and an alternate method required. The key issues with kerbside collection method includes:

- Council does not provide a weekly service in the area;
- Fortnightly service would require twice the provision of bins; and
- There is not enough available street frontage to present all bins for Council kerbside collection.

In Council's RFI correspondence it was identified that the preferred method would be an onsite waste collection arrangement for the development. From a planning and streetscape perspective this alternate arrangement would present difficulties with the design. In order to avoid a basement height increase and poor street presentation from unsightly clearances required to accommodate larger waste vehicles on site a private waste contractor for service to occur from a Semi Rigid Vehicle (SRV) would be required. to.

Additionally, in terms of the basement layout the bulky waste storage area was required to be a dedicated room or caged area for the storage of bulky household waste awaiting collection. This was required to be

provided in addition to and adjacent to the development's waste storage area/s and the central collection area.

The Applicant engaged in a series of discussions with Council's Waste Officer (including a meeting on 31 October 2023), which resulted in discussion on various options (Council service or private contractor). As advised by Council's Waste Officer a Council service relied (amongst other aspects) on swept path diagrams showing the waste collection vehicle entering and exiting the property with one reverse movement. However, this outcome was not suitable as it would rely on creating a timed parking restriction adjacent to the driveway on waste service days to accommodate the requisite 10.2m length truck. This would reduce parking in the street by 3 spaces which is not supported.

Conversely, a private service truck at 9.2m length would not require any parking restriction. On this basis, final Waste comments on 27 February 2024 advised that the only viable option for this DA is an onsite private collection. If supported, suitable conditions are included that require a revised Waste Management Plan (WMP) that reflects this supported waste collection method. The applicant has since advised that they are accepting of a private waste collection for the future development.

Public Domain Engineer

The application was referred to Council's Public Domain Engineer who raised no objection to the proposed development subject to conditions relating to frontage related investigations, approvals and augmentation of services as required by the service authorities. It is confirmed that undergrounding of power lines is not required as the power is on the opposite side of the street and undergrounding is not required in residential zones.

11.0 ASSESSMENT

A detailed assessment of the application has been carried out having regard to the matters for consideration under Section 4.15(1) of the Environmental Planning and Assessment Act 1979. The following matters are considered important to this application.

11.1. Height of Buildings

The proposed development fails to comply with the development standard for building height. Clause 4.3(2) of SSLEP 2015 stipulates a maximum height of 9m for this site. The development proposes a maximum building height of 13.7m, which exceeds the maximum allowed by 4.7m or 52%.

It is noted that amendments were made to clause 4.6 and the Regulations which modified the requirements for applicants seeking to contravene a development standard. These changes came into effect on 1 November 2023. The subject application was lodged on 20 June 2023. Savings provisions under Schedule 6 of the Regulations provide that the new sections apply only to development applications made on or after 1 November 2023. As such, assessment below is carried out under the former Clause 4.6 format.

Council's RFI correspondence and later email correspondence raised issues with the originally submitted

Clause 4.6 Variation Request prepared by Pacific Planning (dated May 2023) as it did not to meet the threshold tests under the relevant provisions of Clause 4.6. A revised Clause 4.6 Variation Request was provided (Updated May 2024, Version 1.2) and it was found to sufficiently meet the threshold tests under Clause 4.6. The Applicant's Clause 4.6 Variation Request is located at **Appendix "H"** to this report, assessment of which is discussed below.

Application of Clause 4.6 of Environmental Planning & Assessment Act 1979

Clause 4.6 allows a variation to a development standard subject to a written request by the applicant justifying the variation. It must be demonstrated as follows:

- *Clause (3)(a)- that compliance with the standard is unreasonable or unnecessary in the circumstances of the case, and*
- *Clause (3)(b)- that there are sufficient environmental planning grounds to justify the variation.*

In considering the applicant's submission, the consent authority must be satisfied that:

- *Clause 4(a)(i)- the applicant's written request is satisfactory in regards to addressing subclause (3) above, and*
- *Clause 4(a)(ii)- the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives of the relevant zone.*
- *Clause 5(a)- The consent authority must also consider whether contravention of the development standard raises any matter of significance for State or Regional environmental planning, and*
- *Clause 5(b)- the public benefit of maintaining the development standard.*

In *Wehbe v Pittwater Council* [2007] NSW LEC 827 the Court set out 5 different ways of which to establish that compliance with a development standard is unreasonable or unnecessary, as follows:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

In the assessment of this application consideration has been given to the above and further to LEC judgment *Four2Five v Ashfield* [2015] NSWLEC 90 where it was established that justification was required in order to determine whether the development standard was unreasonable or unnecessary on grounds

other than where the development achieved the objectives of the development standard. Consideration is to be given based on specific site circumstances.

Finally, consideration has been given to the principles established by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* where it was observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.

The applicant is seeking to vary the building height development standard resulting from the requisite measurement being taken from the existing ground level (by SSLEP 2015 height definition) to a maximum height of 13.7m to the lift overrun and plant screening (see “F” and “Q” in table 2 below). This results in a variation of 52.2%. Furthermore, key areas of height include:

- Lift overrun – 13.70m (52%) – Maximum breach
- 4 storey component – 12.85m (39.5%)
- Roof top plant screening – 13.7m (52%) – Maximum breach
- 3 storey component – 9.95m (10.5%)

These are demonstrated in table form and in visual representation below.

Item	Element	RL at ground	RL at top	Height (m)	Height exceedance
A	Parapet (4 storey)	187.98	200.30	12.32	+3.32
B	Parapet (4 storey)	187.76	200.30	12.33	+3.33
C	Parapet (4 storey)	187.74	200.30	12.85	+3.85
D	Parapet (4 storey)	187.84	200.30	12.46	+3.46
E	Parapet (4 storey)	187.45	196.75	9.30	+0.30
F	Lift overrun	187.90	201.60	13.7	+4.70
G	Lift overrun	187.90	201.60	13.7	+4.70
H	Lift overrun	187.90	201.60	13.7	+4.70
I	Lift overrun	187.90	201.60	13.7	+4.70
J	Parapet (3 storey)	188.40	198.15	9.75	+0.75
K	Parapet (3 storey)	188.60	198.15	9.95	+0.95
L	Parapet (3 storey)	188.86	197.55	8.69	-0.31
M	Parapet (2 storey)	189.32	194.15	4.83	-4.17
N	Parapet (2 storey)	188.75	194.15	5.40	-3.60
O	Pergola	187.95	199.55	11.66	+2.66
P	Pergola	187.55	199.55	12.00	+3.00
Q	Plant screen	187.90	201.60	13.70	+4.70

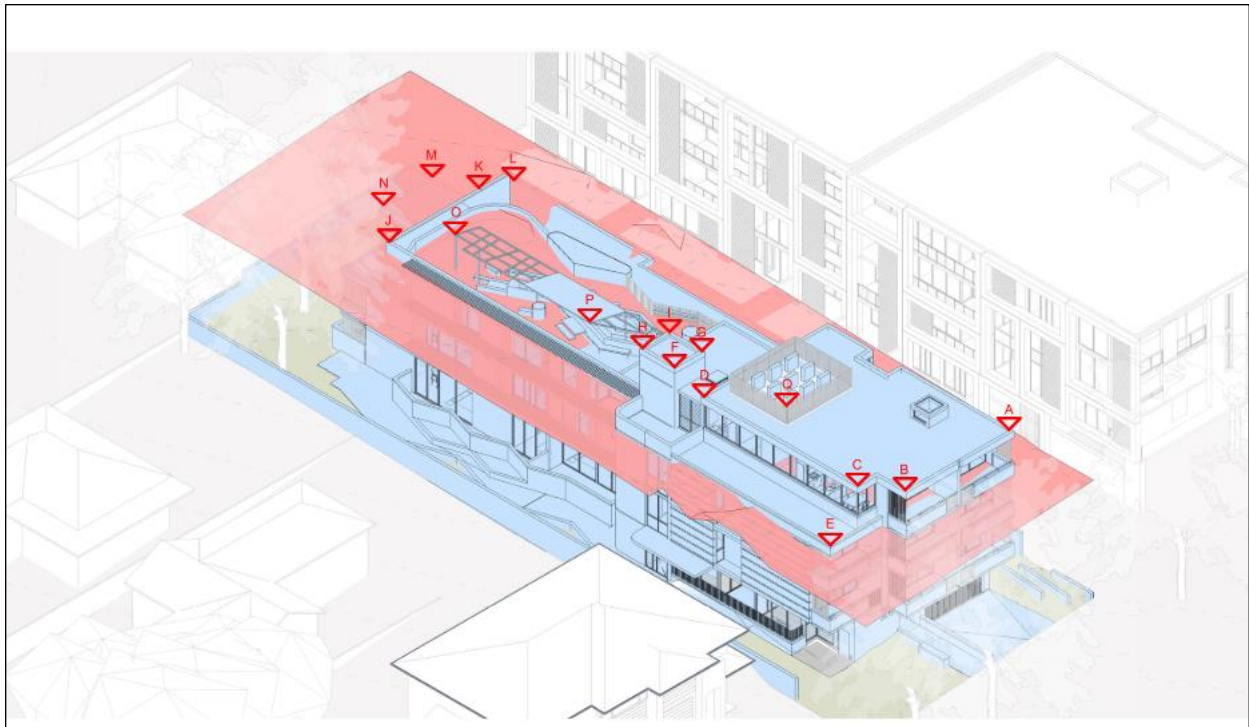


Figure 7: Applicant's Height of Building 'FOG' diagram

The Applicant's Clause 4.6 Variation Request highlights that... *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. It states that...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 following is a step through of the relevant criteria under Clause 4.6 including the Applicant's response and Assessing Officer's assessment.

Clause 4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

As referred to above, the applicant's written request refers to caselaw (*Wehbe v Pittwater Council* [2007] NSW LEC 827) and repeated in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSW LEC 118 that highlights this can be demonstrated by 5 non exhaustive means known as the Wehbe tests. Noting it may be sufficient to establish only 1 "way" (*Initial Action* at [22]).

Applicant's Comment:

Below is an extract of the applicants' response in respect to Cl. 4.6(3)(a):

Compliance with the height of building control 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 4.3 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 height development standard were required.*
- *The site adjoins E1 Local Centre zoned land which forms the edge of the Heathcote town centre. Established development adjoining the site is the four storey 'Heathcote Horizon' development, containing 77 apartments. 'Heathcote Horizon' 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. Therefore, a clause 4.6 request for height has already been supported for the adjoining development. It would therefore seem unreasonable not to support a variation on the subject site given the significant social benefits being facilitated.*
- *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.*
- *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.*
- *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.*
- *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.*

Point 1 above refers to the objectives of the development standard being met. The Objectives of Clause 4.3 are stated as follows:

- (a) *to ensure that the scale of buildings—*
 - (i) *is compatible with adjoining development, and*
 - (ii) *is consistent with the desired scale and character of the street and locality in which the buildings are located or the desired future scale and character, and*
 - (iii) *complements any natural landscape setting of the buildings,*
- (b) *to allow reasonable daylight access to all buildings and the public domain,*
- (c) *to minimise the impacts of new buildings on adjoining or nearby properties from loss of views, loss of privacy, overshadowing or visual intrusion,*
- (d) *to ensure that the visual impact of buildings is minimised when viewed from adjoining properties, the street, waterways and public reserve*

- (e) *to ensure, where possible, that the height of non-residential buildings in residential zones is compatible with the scale of residential buildings in those zones,*
- (f) *to achieve transitions in building scale from higher intensity employment and retail centres to surrounding residential areas.*

Below is the Applicant's address of how the proposal is consistent with the objectives of the Clause 4.3 Height of Buildings development standard:

- (a) *To ensure that the scale of buildings -*
 - (i) *Is compatible with adjoining development, and*

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 context of the locality is significantly defined by the 'Heathcote Horizon' residential flat development adjoining the subject site. 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.

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.

(ii) Is consistent with the desired scale and character of the street in which the buildings are located or with the desired future scale and character, and

The existing and desired scale and character of the street and the 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 1.17:1 is approximately 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 part 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 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 height control identified in the LEP achieves a scale that responds to the adjoining residential flat building and surrounding and nearby residential development.

(iii) complements any natural landscape setting of the buildings.

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".

(b) to allow reasonable daylight access to all buildings and the public domain.

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.

(c) to minimise the impacts of new buildings on adjoining or nearby properties from loss of views, loss of privacy, overshadowing or visual intrusion.

It is noted that there is an existing dwelling house on the subject site with a side setback to the existing residential flat building to the south of approximately a metre. Further, with a 9-metre height limit, the visual and overshadowing impacts could be exacerbated under compliant controls.

However, due to the additional permitted use of a residential flat building, a more creative and carefully considered design approach has been required to ensure the built form and scale is sensitive to the built form context and surrounding development, particularly having regard to the requirements of the ADG.

Greater setbacks have therefore been required to ensure adequate building separation, the height and scale designed to minimise overshadowing and visual impacts and design and elevation treatments introduced to maintain visual privacy and overlooking. This has been extensively discussed throughout this request report.

(d) to ensure that the visual impact of buildings is minimised when viewed from adjoining properties, the street, waterways and public reserves.

It is noted that the development is not visible from a waterway or public reserve, however does adjoin residential development to the north, south and east. In this regard, the proposal has been designed to minimise visual impacts through massing, design and aesthetics.

The four storeys at the Rosebery Street interface replicates the adjoining 'Heathcote Horizon' and replicates the existing situation (i.e. 4 storeys adjoining 2 storeys). However, the proposal then transitions to three stories and two stories, reducing visual impacts and providing a transition of built form and scale that currently does not exist. This provides a better response to the visual and built environment than currently exists, which includes a four storey residential flat building to dwelling houses and villas.

- (e) *to ensure, where possible, that the height of non-residential buildings in residential zones is compatible with the scale of residential buildings in those zones.*

The proposal is for a residential flat building in the R3 Medium Density Residential zone. It is noted that shop top housing is a permissible form of development in the zone and therefore adjoining land could support non-residential uses in the future.

The subject residential flat building 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. The height, while exceeding the height limit, is generally focussed to the Rosebery Street interface and the lift overrun, while the remaining development transitions in height to three and two storeys to the east. Therefore, the scale of the development is compatible with existing adjoining heights and existing and future potential heights to the north and east.

- (f) *to achieve transitions in building scale from higher intensity employment and retail centres to surrounding residential areas.*

The site adjoins E1 Local Centre zoned land which forms the edge of the Heathcote town centre. Established development adjoining the site is the four storey 'Heathcote Horizon' development, containing 77 apartments. 'Heathcote Horizon' 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. Therefore, a clause 4.6 request for height has already been supported for the adjoining development. It would therefore seem unreasonable not to support a variation on the subject site given the significant social benefits being facilitated.

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. It is also noted that shop top housing is a permissible form of development in the R3 Medium Density residential zone, and forms of retail could occur on land surrounding the site.

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.

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.

It is noted that the Department, in its assessment of the SCC concluded:

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 Clause 4.6 Request also provides additional commentary immediately following the objectives of the development standard which covers:

- The primary purpose of providing affordable housing would be thwarted;
- Are there better planning pathways to deliver affordable housing?

As these considerations are not required specifically to meet the threshold test under Clause 4.6, they have not been reproduced here. Refer to **Appendix “H”** for full Clause 4.6 Request.

Officer's Comment:

Amongst other reasons, the applicant's written request justifies the contravention of the height of buildings development standard on the basis that compliance is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. This addresses 1 of the 5 common ways established in Wehbe to address Clause 4.6(4(a)(i).

Regarding the objectives of compatibility / desired scale and character, whilst it is disagreed as advanced by the applicant, that the context of the locality is “significantly” defined by the Heathcote Horizon RFB adjoining the site, it does provide a contextual reference to be considered in the round, in addition to the lower scale of built form including detached dwellings and dual occupancy. There is also no discounting that the very issuance of the SCC by the Department demonstrates that the development meets the notion of compatibility.

The proposal has been reviewed and found to provide an acceptable response to the landscape setting of the site through tree retention and additional species, suitable clearance from critical trees, compliant landscape areas and integration of the landscape design with built form.

The proposal will provide the requisite 2 hours solar access to adjoining properties between 9am and 3pm in mid-winter. Furthermore, design measures around setbacks, window placement, location of habitable versus non-habitable areas, trafficable zones, and management of communal open space have been incorporated to minimise amenity impacts from the development.

Tree retention and protection within the front setback, as proposed, will greatly contribute to the presentation of the development to Rosebery Street. The form of the development (as amended) is part 3 and 4 storey which provides a transition between the 4 storey RFB to the south to the lower 2 storey dual occupancy to the north. The architectural merit and address of the ADG is recognised through the design and the elevational treatment through setbacks, window positioning and screening will provide an acceptable outlook from adjoining properties, in light of the scale of development.

It is therefore found that compliance with the height development standard is unreasonable or unnecessary in the circumstances of this proposed development given the objectives of the standard are met with satisfaction.

Clause 4.6(3)(b)- Are there sufficient environmental planning grounds to justify contravening the development standard?

Applicant's Comment:

Below is an extract of the applicants' response in respect to Cl. 4.6(3)(b):

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 height of the proposal which exceeds the 9 metre standard in the LEP as discussed above. In particular:

- *The objectives of the development standard set out in clause 4.3 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 height development standard were required.*

- *The site adjoins E1 Local Centre zoned land which forms the edge of the Heathcote town centre. Established development adjoining the site is the four storey 'Heathcote Horizon' development, containing 77 apartments. 'Heathcote Horizon' 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. Therefore, a clause 4.6 request for height has already been supported for the adjoining development. It would therefore seem unreasonable not to support a variation on the subject site given the significant social benefits being facilitated.*
- *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.*
- *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.*
- *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.*
- *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.*

Officer's Comment:

The key planning grounds advanced by the Applicant are accepted and can be considered under the following headings:

- Consistent with development standard;
- Contextual fit and future character;
- Delivery of affordable housing; and
- Absence of adverse impacts.

The grounds relied on by the applicant in their written request must be “environmental planning grounds” by their nature. Chief Justice Preston (Initial Action) at [23] notes 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 s1.3 of the EPA Act.

WZSydney Pty Ltd v Ku-ring-gai Municipal Council [2023] NSWLEC 1065 is a relevant recent case that considers the application of environmental planning grounds and is endorsed by the Departments Guide to Varying Development Standards for this particular threshold test.

In that case, Commissioner Dickson at [78] noted that the avoidance of impacts may constitute sufficient environmental planning grounds “as it promotes good design and amenity of the built environment”, one of the objectives of the EPA Act”. Specifically, Clause 1.3(g).

Further, Commissioner Dickson accepted that achieving consistency in the streetscape and fit with character is an environmental planning ground established under *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [90].

Similarly, and more specifically, the delivery and maintenance of affordable housing also constitutes an environmental planning ground – a specific object under Clause 1.3(d) of the EP & A Act.

These reasons were also supported as environmental planning grounds by Commissioner O'Neill in the matter of *Big Property Pty Ltd v Randwick City Council* [2021]. Not unlike the subject application, it was established that there as a unique character in the vicinity of the site created by four storey RFBs adjoining the site which contributed to a higher density “character” for the sub-precinct.

The caselaw suggests that the exceedance of height and FSR standards resulting from the provision of affordable housing in a form compatible with the character of the locality were environmental planning grounds. That is, the additional building height (and FSR) would facilitate both the delivery and continued maintenance of affordable housing with suitable contextual fit, otherwise not able to be facilitated through a height compliant scheme.

The applicant's written request (under environmental planning grounds commentary) lightly touches on the existing SCC which too is an environmental planning ground within the meaning identified by Preston CJ in *Initial Action* at [23] as it relates to the subject matter and scope. To elaborate, the SCC was issued by DPHI, and it is this planning aspect specific to the site that will permit the proposed RFB to facilitate the above stated object of the EP & A Act in the delivery and maintenance of affordable housing.

In conclusion, the elements for consideration of satisfaction as to sufficient environmental planning grounds are identified by Commissioner Dickson at [74] in *WZSydney Pty Ltd v Ku-ring-gai Municipal Council* [2023] NSWLEC 1065 as:

- *firstly, whether the grounds advanced are environmental planning grounds,*
- *secondly, whether the environmental planning grounds advanced in the written request focus on the aspect or element of the development that contravenes the standard, or in the alternative promote the benefits that will be realised by the development as a whole,*
- *thirdly, I must be satisfied that the environmental planning grounds are “sufficient” to justify, or inform, the aspect or element that contravenes the development standard.*

Following assessment of the application and the applicants written request, it is concluded that the grounds advanced do reflect environmental planning grounds, those grounds reflect the aspect that contravenes the standard, and are sufficient in nature, thereby, reasonably satisfying Clause 4.6(3)(b).

Clause 4.6(4)(a)(i)- Consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

An assessment of Clause 4.6(3) as outlined above has been undertaken. The justification has satisfactorily addressed each point relating to planning grounds and unreasonableness.

Clause 4.6(4)(a)(ii)- Consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

The applicant's written request provides that the proposed development will be in the public interest because it is consistent with both the objectives of Clause 4.3 and the above stated zone objectives.

An extract of the applicant's response to consistency with the objectives of the standard was provided earlier in this assessment, and the proposal is found to meet those objectives notwithstanding the variation. The proposed development is located within the Zone R3 – Medium Density. The applicant's response to the consistency with the zone objectives is provided below.

Applicant's Comment

Zone R3 – Medium Density Residential	Applicant's Response
To provide for the housing needs of the community within a medium density residential environment.	<i>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.</i>
To provide a variety of housing types within a medium density residential environment.	<i>The scheme facilitates the objective and provides a range of dwellings specially targeted to the social need.</i>
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	<i>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.</i>
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.	<i>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.</i>
To promote a high standard of	<i>The design scheme promotes a high quality urban design response to</i>

urban design and residential amenity in a high-quality landscape setting that is compatible with natural features.	<i>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 exiting 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.</i>
To allow development that is of a scale and nature that provides an appropriate transition to adjoining land uses.	<i>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. 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.</i>

Officer's Comment

The reasons advanced in the Applicant's written request support that the proposed development, notwithstanding numerical non-compliance would be consistent with the objectives of the R3 – Medium

Density zone. The key to this being that the proposal will provide for the housing needs of the community, which has been established as needing affordable housing. The development will also facilitate the delivery of diverse housing, including market, affordable and adaptable options.

The proposal will in no way prohibit the ability for other land uses (i.e. nearby commercial) to provide services to residents of the community. A reasonable standard of urban design, (as supported by the DRP) that is delivered in a landscape compliant setting, will provide acceptable clearance from existing important vegetation and foster enhanced landscape treatment.

Lastly, through design amendments and as supported by architectural input from both the DRP and Council's Architect, it is reasonable to accept that the additional height of the development will facilitate transition from the RFB to the south to the dual occupancy to the north.

This assessment therefore reaches the necessary satisfaction that the proposal is in the public interest because it is consistent with the objectives of Clause 4.3 and the *R3 – Medium Density Zone*.

Clause 4.6(5) – Other Considerations

The proposed variation does not raise any matters of state or regional environmental planning significance therefore also satisfying Clause 4.6 (5).

Officer's conclusion to assessment of the applicants' Clause 4.6 Variation request

In conclusion the contravention of the height development standard satisfies all relevant parts of Clause 4.6. Therefore, the variation can be supported.

11.2. Floor Space Ratio

The proposed development fails to comply with the development standard for building density. Clause 4.4(2) of SSLEP 2015 stipulates a maximum floor space ratio (FSR) of 0.7:1 for this site. The development proposes a FSR of 1.13:1, which exceeds the maximum allowed by approximately 62%. Assessment of the applicant's Clause 4.6 Variation Request is discussed below.

As discussed under 11.1 above, amendments were made to clause 4.6 and the Regulations which modified the requirements for applicants seeking to contravene a development standard. These changes came into effect on 1 November 2023. The subject application was lodged on 20 June 2023. Savings provisions under Schedule 6 of the Regulations provide that the new sections apply only to development applications made on or after 1 November 2023. As such, assessment below is carried out under the former Clause 4.6 format.

Council's RFI correspondence and later email correspondence raised issues with the originally submitted Clause 4.6 Variation Request prepared by Pacific Planning (dated May 2023) as it did not to meet the threshold tests under the relevant provisions of Clause 4.6. A revised Clause 4.6 Variation Request was provided (Updated May 2024, Version 1.2) and it was found to sufficiently meet the threshold tests under Clause 4.6. The Applicant's Clause 4.6 Variation Request is located at **Appendix "I"** to this report,

assessment of which is discussed below.

Application of Clause 4.6 of Environmental Planning & Assessment Act 1979

Clause 4.6 allows a variation to a development standard subject to a written request by the applicant justifying the variation. It must be demonstrated as follows:

- *Clause (3)(a)- that compliance with the standard is unreasonable or unnecessary in the circumstances of the case, and*
- *Clause (3)(b)- that there are sufficient environmental planning grounds to justify the variation.*

In considering the applicant's submission, the consent authority must be satisfied that:

- *Clause 4(a)(i)- the applicant's written request is satisfactory in regards to addressing subclause (3) above, and*
- *Clause 4(a)(ii)- the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives of the relevant zone.*
- *Clause 5(a)- The consent authority must also consider whether contravention of the development standard raises any matter of significance for State or Regional environmental planning, and*
- *Clause 5(b)- the public benefit of maintaining the development standard.*

In a similar approach undertaken in the consideration of the height of building contravention in this report, the principles in ***Wehbe V Pittwater Council (2007) NSW LEC 827*** are adopted and the satisfaction of underlying objectives specified at clause 4.4(1) being appropriate and relied upon in this instance.

In the assessment of this application consideration has been given to the above and further to LEC judgment *Four2Five v Ashfield* [2015] NSWLEC 90 where it was established that justification was required in order to determine whether the development standard was unreasonable or unnecessary on grounds other than where the development achieved the objectives of the development standard. Consideration is to be given based on specific site circumstances.

Finally, consideration has been given to the principles established by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

The Applicant's Clause 4.6 Variation Request highlights that... *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. It states that...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".* As indicated by the Applicant, 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.

The following is a step through of the relevant criteria under Clause 4.6 including the Applicant's response and Assessing Officer's assessment.

Clause 4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,

As referred to above, the applicant's written request refers to caselaw (*Wehbe v Pittwater Council* [2007] NSW LEC 827) and repeated in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSW LEC 118 that highlights this can be demonstrated by 5 non exhaustive means known as the Wehbe tests. Noting it may be sufficient to establish only 1 "way" (*Initial Action* at [22]).

Applicant's Comment:

Below is an extract of the applicants' response in respect to Cl. 4.6(3)(a):

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.*

Point 1 above refers to the objectives of the development standard being met. The Objectives of Clause 4.4 are stated as follows:

(1) The objectives of this clause are as follows—

- (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—*
 - (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.*

Below is the Applicant's address of how the proposal is consistent with the objectives of the Clause 4.4(2) Floor Space Ratio development standard:

(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 adjoining 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 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 part 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 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 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.

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 relevance 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.

The Clause 4.6 Request also provides additional commentary immediately following the objectives of the development standard which covers:

- Other FSR controls for affordable housing are complied with;
- The proposed FSR is less than that considered in the SCC and consistent with the dwelling yield in the SCC;
- The primary purpose of providing affordable housing would be thwarted; and
- Are there better planning pathways to deliver affordable housing?
- Requirements of the SCC.

As these considerations are not required specifically to meet the threshold test under Clause 4.6, they have not been reproduced here. Refer to **Appendix "I"** for full Clause 4.6 Request.

Officer's Comment:

Amongst other reasons, the applicant's written request justifies the contravention of FSR development standard on the basis that compliance is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. This addresses 1 of the 5 common ways established in *Wehbe* to address Clause 4.6(4(a)(i).

There is no denying the locality is made up of varied character through typology, form and scale. Whilst not accepted as raised by the applicant that local characteristics are “defined” by the adjoining 4 storey RFB, this scale and form of this building establishes part of the realised built character of the locality. This is in concert with other less dense forms of development being multi-dwelling, dual occupancy and detached dwellings. The Applicant in their written request has assumed the dual occupancy to the north achieves the maximum 0.7:1 density at that site (rather it is 0.55:1:) to then suggest the proposed density reflects less than an averaging of the 2 adjoining developments. Nonetheless the difference in density between the RFB and proposal and dual occupancy are similar (0.53 and 0.58 respectively).

Other characteristics of the site and locality include the residential and landscape nature – each of which will be key components of the development. The proposed development will provide a built form that is residential in nature, provides a quality landscaped outcome (importantly retaining mature trees within the frontage) and reflects that of a denser typology.

Regarding the objectives of compatibility this notion has been discussed above under the height variation request and the same position is provided. It is not necessary to repeat the above commentary other than to purport again that whilst it is disagreed that the context of the locality is “significantly defined” by the Heathcote Horizon RFB adjoining the site, it does provide a contextual reference to be considered in addition to the lower scale of built form. It is emphasised that the DPHI have issued an SCC for the site which further supports the sentiment on compatibility of the proposal.

Objective (c) in seeking to control density and intensity contemplates environmental constraints, amenity for adjoining properties and public domain, road network capacity and retention of scenic, visual and landscape qualities of the area. The proposed FSR variation facilitates greater intensity of the site – more units, residents, and vehicles. The key considerations for this objective are met as it is evident that the site and locality is capable of accommodating additional intensity given retention of trees, compliance with applicable controls that measure amenity, satisfactory building performance and servicing.

It is therefore found that compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of this proposed development given the objectives of the standard are met with satisfaction.

Clause 4.6(3)(b)- Are there sufficient environmental planning grounds to justify contravening the development standard?

Applicant's Comment:

Below is an extract of the applicants' response in respect to Cl. 4.6(3)(b):

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 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.*

Officer's Comment:

The key planning grounds advanced by the Applicant are essentially the same as addressed above under the height variation assessment. It is a reasonable proposition that environmental planning grounds for both height and FSR are interrelated. It is not necessary to repeat the Officer's comment other than to identify the grounds are accepted and can be considered under the following headings:

- Consistent with development standard;
- Contextual fit and future character;
- Delivery of affordable housing; and
- Absence of adverse impacts.

Following assessment of the application and the applicants written request, it is concluded that the grounds advanced do reflect environmental planning grounds, and that those grounds reflect the aspect that contravenes the standard (that is, the additional density facilities affordable housing with acceptable impacts and compatibility). Lastly, the environmental planning grounds advanced are sufficient in nature. As such, the reasonable satisfying under Clause 4.6(3)(b) is met.

Clause 4.6(4)(a)(i)- Consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

An assessment of Clause 4.6(3) as outlined above has been undertaken. The justification has satisfactorily addressed each point relating to planning grounds and unreasonableness.

Clause 4.6(4)(a)(ii)- Consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

The applicant's written request provides that the proposed development will be in the public interest because it is consistent with both the objectives of Clause 4.4 and the R3 zone objectives.

An extract of the applicant's response to consistency with the objectives of the standard was provided earlier in this assessment, and the proposal is found to meet those objectives notwithstanding the variation. The proposed development is located within the Zone R3 – Medium Density. The applicant's response to the consistency with the zone objectives is provided below.

Applicant's Comment

Zone R3 – Medium Density Residential	Applicant's Response
To provide for the housing needs of the community within a medium density residential environment.	<i>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</i>

	<i>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.</i>
To provide a variety of housing types within a medium density residential environment.	<i>The scheme facilitates the objective and provides a range of dwellings specially targeted to the social need.</i>
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	<i>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.</i>
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.	<i>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.</i>
To promote a high standard of urban design and residential amenity in a high-quality landscape setting that is compatible with natural features.	<i>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 exiting 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.</i>
To allow development that is of a scale and nature that provides an appropriate transition to adjoining land uses.	<i>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</i>

	<p><i>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.</i></p>
--	--

Officer's Comment

The reasons advanced in the Applicant's written request support that the proposed development, notwithstanding numerical non-compliance would be consistent with the objectives of the R3 – Medium Density zone. Key to this being the proposal will provide for the housing needs of the community which has been established as needing affordable housing. The development will also facilitate the delivery of diverse housing, including market, affordable and adaptable options.

The proposal will in no way prohibit the ability for other land uses (i.e. nearby commercial) to provide services to residents of the community. A high standard of urban design, as supported by the DRP, that is delivered in a landscape compliant setting that will provide acceptable clearance from existing important vegetation and foster enhanced landscape treatment.

Lastly, through design amendments and as supported by architectural input from both the DRP and Council's Architect, it is reasonable to accept that the additional FSR will facilitate transition from the RFB to the south to the dual occupancy to the north.

This assessment therefore reaches the necessary satisfaction that the proposal is in the public interest because it is consistent with the objectives of Clause 4.4 and the *R3 – Medium Density Zone*.

Clause 4.6(5) – Other Considerations

The proposed variation does not raise any matters of state or regional environmental planning significance therefore also satisfying Clause 4.6 (5).

Officer's conclusion to assessment of the applicants' Clause 4.6 Variation request

In conclusion the contravention of the FSR development standard satisfies all relevant parts of Clause 4.6. Therefore, the variation can be supported.

11.3. Site Compatibility Certificate

On 16 June 2022, DPHI issued a SCC for the following:

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.

This then enabled the lodgement of the subject application for a RFB otherwise prohibited within the R3 – Medium Density Residential Zone.

The SSC was granted subject to the satisfaction of the requirements specified in Schedule 2 of the certificate. Schedule 2 states:

1. 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.

In supporting the SCC, DPHI considered 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.

Importantly, the final scheme the subject of this assessment has been refined both prior to the original lodgement with Council and following design changes during the DA assessment process. The result being a reduction in FSR from 1.2:1 (1,455.516m²) to 1.13:1 (1,374.96m²).

As required by Schedule 2 of the SCC, a detailed assessment has been undertaken regarding setbacks, density and height. Height and density are supported, having established that notwithstanding an uplift in both that the site will address key objects of the EP&A Act, 1979. This will be achieved through facilitating the delivery of affordable housing in a manner that allows for the meeting of zone objectives, objectives of that particular development standard, deliver a form of development that is compatible within the locality, achieves acceptable building performance, and on balance will result in acceptable amenity impacts.

Building setbacks have been contemplated in light of the design guidance provided under the ADG and found acceptable as discussed below under Part 11.4.

11.4. Building Separation / Visual Privacy

Part 3F of the ADG provides design guidance on visual privacy by providing separation distances from buildings to the side and rear boundaries based on building height. Up to 12m (4 storeys) the nominated separation is: 6m habitable rooms/balconies and 3m non-habitable rooms. The objective under 3F-1 being

‘adequate building separation distances area shared equitably between neighbouring sites, to achieve reasonable levels of external and internal visual privacy.

A large number of submissions have raised the issue of reduced privacy. Whilst it is recognized that the subject development will accommodate dwelling stock above that anticipated within the R3 – Medium Density Zone, the site has been identified through the certification by DPHI to be capable of accommodating the scale and number of dwellings proposed within a RFB. On balance, and contemplating the design guidance, development proposal and site context, the proposal is considered to provide acceptable privacy for adjoining properties. This is achieved through the provision of solid walls at 3m setbacks and introducing openings to habitable units above ground level with 6m or more setback from shared boundaries.

Adjoining the site to the north is a 2-storey dual occupancy at No. 24 Rosebery Street. This building locates several windows to habitable and non-habitable uses facing the subject site. The ground and first floors of the proposed development will sit approximately 1m above No. 24, such that the FFL of unit A104 will sit close to the sill height of the bathroom (red line below). Boundary fencing available at 1.8m height would screen up to the ceiling height (blue line below).

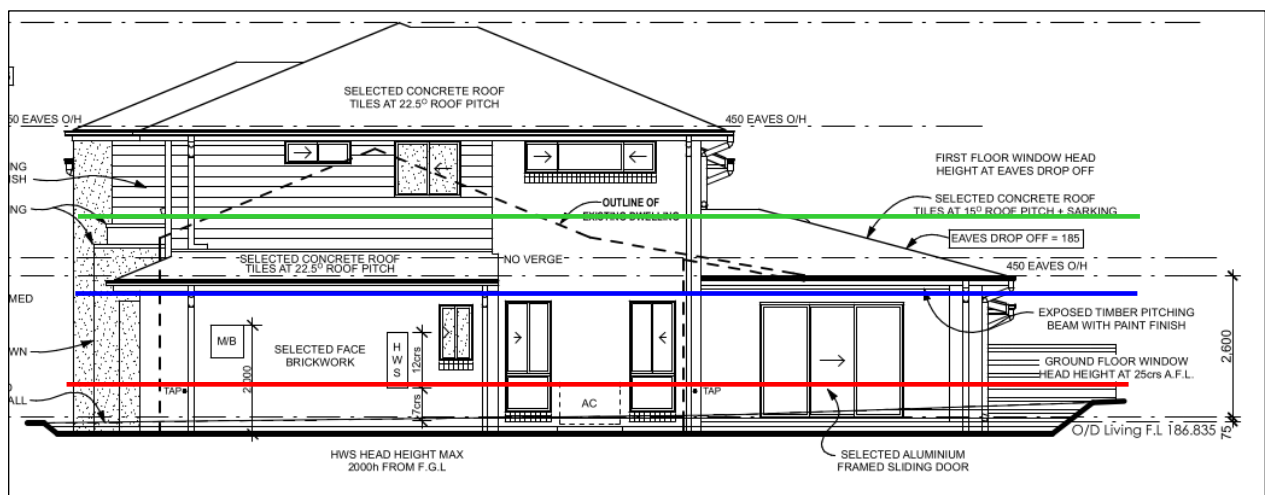


Figure 8: Southern elevation of existing dual occupancy adjoining site to the north

Likewise, the proposed Level 2 will sit approximately 1m above the First Floor FFL of No. 24 (green line in Figure 8 above) and whilst the proposed building is setback 3m from the boundary, only blank walls (with the exception of the lobby window, discussed below) face north.

There are 3x existing Yunnan Poplar trees at the site along the northern boundary (T6, T7 and T8) which are identified for removal. Whilst not native, retention would provide benefit to No. 24 by improving outlook and providing visual relief. The submission includes a request by occupants of No. 24 that these trees be retained. Furthermore, the DRP specifically notes that these trees can be retained as they are clear of the building works and excavation of the carpark. Retention of these trees has been included in the draft consent conditions.



Figure 9: No. 24 (left) and Poplars along shared boundary

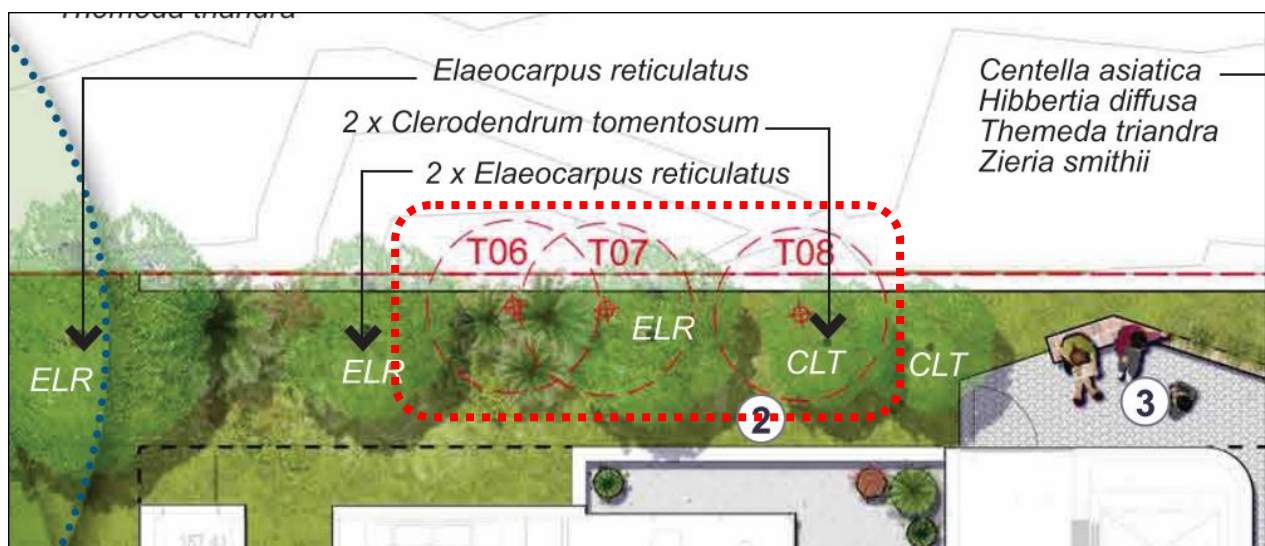


Figure 10: Excerpt from Landscape Plan showing location of T6-9 along northern boundary

Beyond the lift the building observes a 6m setback to the northern boundary with suitable separation distances. The rear portion of the building (i.e. Bed 1 A201 (stack)) aligns with rear boundaries to dwellings facing Strickland Street, providing building separation of 16m and 20m.

Along the northern elevation, the lobby area in front of the lift extends an opening with a 3m setback to the shared boundary to the north where it lines up with a service room. This locates an opening to a trafficable lobby area unnecessarily close to the side boundary with potential overlooking into the rear of the adjoining property to the north. It is raised as a valid privacy issue in the submissions. As such it is a reasonable proposition to require this opening on Levels 1-3 be set in 4m (just beyond door to service room door). This is supported by Council's Architect and provides a dual purpose of privacy and breaking up the built form through further articulation. It is noted that the proposal as amended, relocated the

service room northern elevation and adjoining lobby window from a 3m to 6m setback at Level 4 - a significant design improvement.

To the south, benefit is taken from the 8m setback of the existing RFB. The DRP on review recognised the southern neighbour being set well back from the side boundary, so the proposal capable of reducing overlooking impacts with windows oriented parallel to the side boundary.

Where 3m setbacks are provided the elevation is a blank wall and openings are provided within the façade articulation to achieve east/west facing openings rather than side facing. The south located gallery is located 4m from the shared boundary to the south and as per the ADG such spaces are considered as habitable spaces the larger setback is recommended. The material treatment to the gallery at Levels 1-3 is unclear, stating per AL4 – “*aluminum batten gate with solid backing panel*”, yet the southern elevation (excerpt below) shows this trafficable area as relatively open. It is considered most appropriate (and similar issue was raised by DRP) to require the gallery elevation to be treated with a more solid screening (non-transparent) up to 1.8m and open beyond to avoid direct reciprocal viewing between adjoining properties, as has been raised in submissions. This is further supported by Council’s Architect and is managed through consent conditions.



Figure 11: Extent of gallery to southern elevation presenting to No. 11 Veno Street RFB

Habitable balconies (width 2m) are provided to the north and south from front unit balconies (Levels 2-3), and south at Level 4, however balconies have solid balustrades, and stub walls are provided along with privacy screening above to side elevations. Material treatment of the screening is noted as AL4 – which refers to (and looks visually consistent with the description) “*aluminum batten gate with solid backing*”

panel". These balconies are also located at the front of the site with a public domain interface. It is likely screening will be managed to facilitate internal privacy.

The proposed building steps from 4 storeys at the front to 3 storeys beyond the lift overrun and 2 storeys at 5m from the rear (eastern) boundary. To the rear is a single storey villa forming part of a multi-dwelling complex accessed from Strickland Street. The villa is setback approximately 1.5m from the shared boundary with an eave height at RL 191.52 which is approximate to proposed Level 2 FFL (at RL 190.8). This results in Level 2 sitting 700mm below the eave and remaining Level 3 and roof terrace sitting above and viewing over the roof line. The Level 2 balcony (A201) is setback 5m from the eastern (rear) boundary. Within the setback is retention of high quality mature trees to the north-eastern corner and new planting of a Turpentine tree capable of generous height.

The setbacks are 4m (Ground/L1), 5m (L2), 11.2m (L3), and 12m (L4) which satisfy the DCP setback (and storeys) requirements.

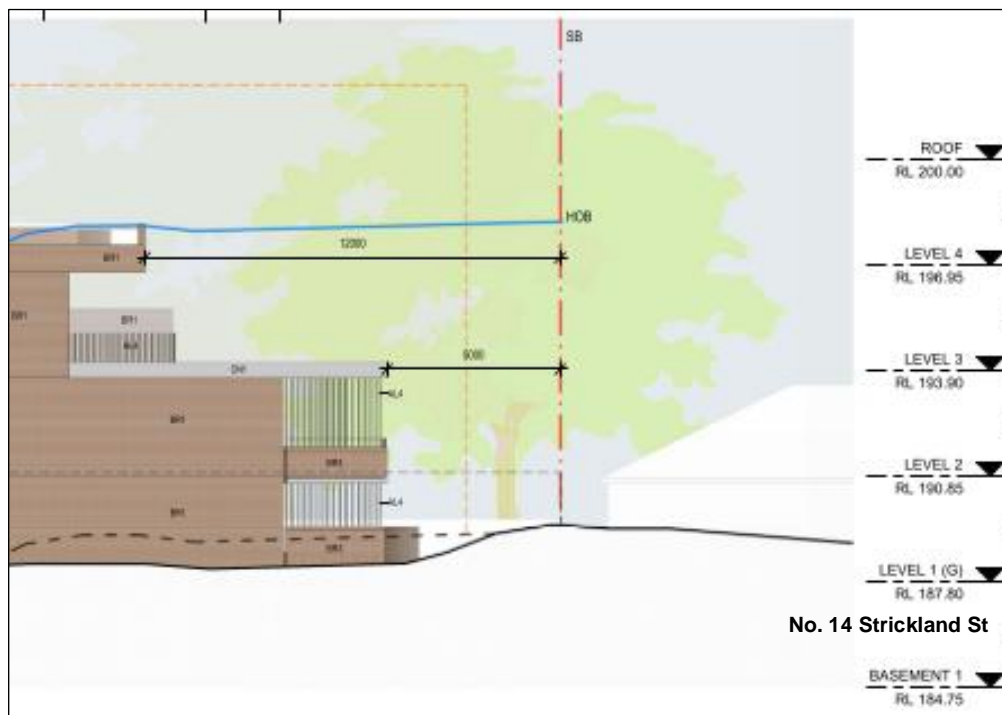


Figure 12: Relationship between rear of development and No. 14 Strickland Street

11.5. Landscaping

This subject site is located within an area containing STIFF (Sydney Turpentine Ironbark Forest) which is an Endangered Ecological Community (EEC). Remnant vegetation in the road verge, on the site to the rear and also on adjoining sites, are individuals that make up this forest community.

The Arboricultural Impact Assessment identifies 19 trees which may be impacted upon by the proposed RFB. Of these 19, seven are remnant individuals typically found in the STIFF and all are high quality specimens worthy of retention.

These trees of high quality are:

Tree 1 – Angophora costata – Smooth Barked Apple – Road Reserve
Tree 4 – Corymbia gummifera – Red Bloodwood – Road reserve
Tree 5 - Angophora costata – Smooth Barked Apple – Road Reserve
Tree 9 – Syncarpia glomulifera – Turpentine – Rear yard
Tree 10 - Syncarpia glomulifera – Turpentine – Adjoining property
Tree 11 – Eucalyptus fibrosa – Ironbark – Rear yard
Tree 12 – Eucalyptus botryoides – Bangalay – Rear yard

Trees 4 and 5 in the Council verge in front of the site are key to the street presentation and retention of the natural landscape setting of the site. The proposal to under bore beneath these trees for the new stormwater system has been an issue of concern throughout the assessment process. The applicant's final Arboreal advice (dated 2 April 2024) referred to GPR service mapping being carried out to ensure that there would be no clashes with existing services in the verge area. The applicant's stormwater engineer has advised that an invert level of 0.9-1.4 will ensure the under bore is clear of the major proportion of tree roots. The civil engineer provided further advice which indicates service levels have been designed at a minimum 1155mm deep at the pit on the property and 815 deep at the kerb side service.

Where root mapping was suggested by Council officers for increased clarity, the applicant stated that such investigation would be counterproductive as it is highly invasive and that under boring is the most appropriate way forward (this position has been accepted by Council's Tree Officer). Notwithstanding, there remains a risk. As such, the proposed boring will require supervision to ensure no structural roots are damaged when the boring occurs. Noting, the technical advice provides that reaching structural roots at the depths nominated (815-1155mm) in the shallow soils found in the location are highly unlikely.

Council's Tree Officer is in general agreement with the final arborist advice but on the basis that the driveway and the OSD tank / system of pipes is outside the SRZ and TPZ of street trees to be retained.

11.6. Solar Access – adjoining RFB to south

The ADG provides measures for internal solar access to the proposed development. The SSDCP 2015 is referred to for solar considerations to adjoining properties. It requires that between 9am and 3pm in mid-winter (June 21), 10m² of private open space and northern adjoining openings are to receive solar access for 2 hours (in the case of RFB) and 3 hours (in the case of multi-dwelling development).

As identified in the DRP review, the southern neighbour is an apartment building set well back from the side boundary, so the proposal is able to comply with the SSDCP 2015 overshadowing requirements. The subject application is supported by suns eye diagrams showing solar access to the southern adjoining RFB, which accommodates 23 units along the northern elevation (Building B). These diagrams demonstrate that all 23 units will have 2 hours solar access and 22 units will have 3 hours solar access. Unit G11 is the westernmost ground floor unit and as demonstrated by the compliant height suns eye diagrams, 2 hours would similarly be achieved by a 3 storey built form at the site (as permitted for multi-

unit development). It is also acknowledged that there are mature trees along the northern boundary to this property within the 3m deep soil areas.

A large number of submissions from the adjoining RFB to the south have raised concerns regarding reduced solar access. However, the very issuance of the SCC took significant cues from this particular building and both the DPHI and the DRP have reached a level of acceptance that the site and adjoining southern property are capable of accommodating the subject proposal. As demonstrated by the suns eye diagrams, solar access performs sufficiently and the setback from the southern boundary is considered an acceptable response to the southern interface.

11.7. Traffic and parking

As proposed, the development includes 11 parking spaces within a basement garage accessed from Rosebery Street. As a development pursuant to Chapter 2, Division of the Housing SEPP, under Clause (38) parking is not required. Sub-clause (4) specifically states:

(4) Car parking is not required to be provided in relation to development to which this Division applies other than in relation to the tenanted component of a residential flat building used as build-to-rent housing.

Notwithstanding, the scheme includes parking for future occupants and this provision is encouraged given the known parking demand in the area. It is noted that the ADG defers parking rates to the RMS Guide to Traffic Generating Development. In the event that parking was required the rates would be 0.6 spaces per 1 bed (6) and 0.9 per 2 bed (5) = 11 spaces as proposed.

Many submissions have raised issues with traffic congestion, insufficient parking and related safety implications for the area, particularly given the proximity to a primary school. The application is supported by a Traffic Report which has been reviewed by Council's Engineer and found to provide acceptable conclusions on traffic generation. From the analysis, the increase in traffic generation of the development is defined as "very low" increasing from 2 spaces to 11 spaces. Noting that a low volume traffic generator Category 1 is identified as less than 30 trips per hour per AS 2890.1-2004. The development is complemented with 9 secure bike racks and a Green Travel Plan as well as being located in walking proximity to Heathcote Railway Station. In terms of intersection performance, these have been analysed using SIDRA Version 9.1, 2022 and summary report provided. The identified traffic volumes in Strickland Street near the site are less than 100 vehicles per AM and PM peak hour. Having regard to the above, the proposal is acceptable with respect to potential traffic impacts.

11.8. Noise / light impacts

A number of submissions have raised issues around noise generated from the proposed development from plant equipment, vehicular movement and general noise from the proposed number of units and roof top communal open space. Noise generated from plant equipment is subject to noise criteria restrictions by conditions. As discussed, above, the traffic generated by the development is considered to be low and movement is limited to entering the basement level which is enclosed and below ground level. Waste will

be contained within the garage until collection by private waste contractor on a weekly basis which is considered to reflect typical residential waste collection practices.

The roof top private open space is not designed as one large open space that would accommodate large groups of people. Rather its design is heavily landscaped and compartmentalised through a variety of zones and employs various ADG encouraged design elements to manage the interrelationship of adjoining built form – non-trafficable zones to create good separation, solid balustrades, vegetation and a pergola. Acoustic impacts from individual units are considered to be suitably managed through separation of habitable rooms and balconies and blank wall treatment. The addition of privacy screening and windows located with front/rear orientation rather than side facing into properties will also assist.

On balance the anticipated noise generated from the proposed development is considered to be acceptable and whilst residential occupation of the site will increase noise generation, the design aspects and mitigation measures will facilitate acceptable noise levels. Construction management conditions would be imposed to manage the construction phase of the development in terms of permitted work hours, phasing, site access and noise management.

In terms of light pollution raised in the submissions, the elevational treatment of the building is such that significant light spill is not anticipated beyond that of a typical residential environment.

11.9. Loss of bushland outlook

Neighbour submissions have raised a concern of view loss from upper-level units in the adjoining RFB to the south. The view loss is stated as being of a north, north-easterly view to the Royal National Park. These views are better described as “outlook” rather than a primary view and are very distant measuring over 800m from the site and adjoining land as demonstrated below in **Figure 13**.

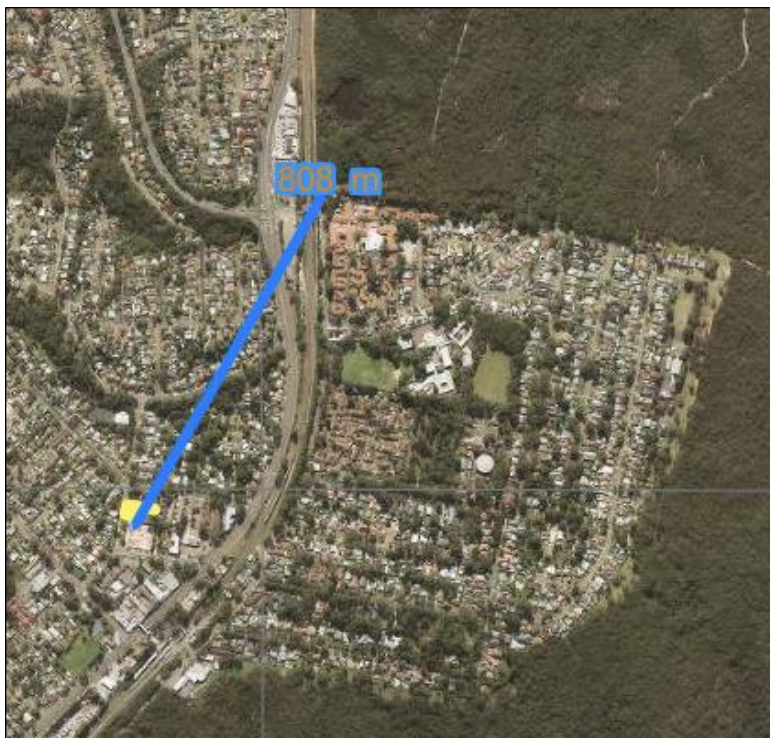


Figure 13: Aerial view showing southern adjoining site and distance from bushland outlook

It is acknowledged, that outlook across the site will be reduced from development. **Figure 14** below shows the elevational treatment along the shared boundary with the adjoining RFB to the south. It is noted that outside the SCC process, a 3 storey townhouse would be permitted at this site up to 9m with the same rear setback, such that reduction in outlook would occur for the adjoining units at Ground, Level 1 and Level 2. It is necessary to balance all planning aspects of this proposal and whilst there will be a reduction in outlook (and more compared to a compliant scheme), they are not primary views and the height at the rear is close to the maximum limitation of 9m (for 62% of the building length). The rooftop COS does sit in this level however, is well set in from southern boundary, includes a light pergola structure on the northern side and low bench / planter treatment at 600mm height.

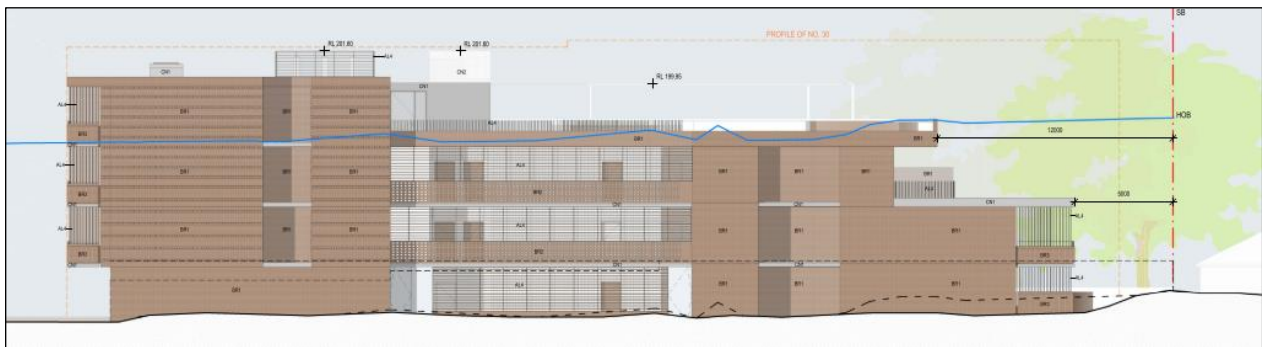


Figure 14: South elevation of proposed development showing HOB and storeys at rear (viewed from adjoining RFB)

11.10. Earthworks

The proposal includes earthworks and therefore Clause 6.2 of SSLEP 2015 is applicable. Clause 6.2 requires certain matters to be considered in deciding whether to grant consent. These matters include impacts on drainage; future development; quality and source of fill; effect on adjoining properties; destination of excavated material; likely disturbance of relics; impacts on waterways; catchments and sensitive areas and measures to mitigate impacts. The relevant matters have been considered and the application is acceptable subject to conditions.

11.11. Stormwater Management

Clause 6.4 of SSLEP 2015 requires Council to be satisfied of certain matters in relation to stormwater management prior to development consent being granted. These matters include maximising permeable surfaces; on-site stormwater retention minimising the impacts on stormwater runoff. These matters have been addressed to Council's satisfaction as discussed earlier in this report under the Engineering referral commentary.

11.12. Terrestrial biodiversity

The subject land is identified as containing "Biodiversity" on the Terrestrial Biodiversity Map and therefore Clause 6.5 of SSLEP 2015 is applicable.

Clause 6.5 requires Council's assessment to consider certain matters. Council must consider the potential adverse impact of the development on vegetation/ flora, fauna, biodiversity and habitat. Of further consideration is the conservation and recovery of flora and fauna and their habitats and the potential to

fragment or diminish the biodiversity structure, function and connectivity of the land. The relevant matters have been considered as part of the assessment of this application and the proposal is acceptable in this regard.

11.13. Urban Design (Residential Buildings)

Clauses 6.16 and 6.17 of SSLEP 2015 contain certain matters of consideration relating to urban design. The relevant matters have been considered as a part of the assessment of the application and the proposal is considered to be acceptable. Detailed discussions around the DRP review and input, design changes and further architectural consideration are provided through this report, including at Part 10, **Appendix “D”** where the Design Principles under Schedule 9 of the Housing SEPP are addressed, **Appendix “E”** where the ADG is addressed, and **Appendix “G”** which contains the DRP Report.

Design changes have incorporated increased setbacks, improved internal unit arrangement, elevational design changes, building performance centrally locating the lift overrun and improving the street address of the development. On balance, the proposal is acceptable having regard to Clause 6.16 and 6.17 and subject to the recommended conditions will result in an acceptable development within the streetscape.

11.14. Archaeological Sensitivity

Council records indicate that the subject site is rated medium in terms of Archaeological Sensitivity. A site inspection did not reveal any evidence of shell material or significant sandstone features within the development zone. The site is substantially developed, and the position and scale of the proposed works raises no concerns in terms of unearthing or disturbing archaeological artefacts. The proposal does not warrant an Aboriginal Archaeological Study being undertaken.

12.0 DEVELOPMENT CONTRIBUTIONS

The development has a value of greater than \$100,000, however is exempt from the payment of contributions under the Section 7.12 Contributions Plan being development for the purpose of Affordable Housing undertaken by a social housing provider as defined by the SEPP (Housing) 2021.

13.0 DECLARATIONS OF AFFILIATION, GIFTS AND POLITICAL DONATIONS

Section 10.4 of the Environmental Planning and Assessment Act, 1979 requires the declaration of donations/gifts in excess of \$1000. In addition, the development application form requires a general declaration of affiliation. In relation to this development application no declaration has been made.

14.0 CONCLUSION

The delivery of affordable housing has significant community benefits as a consequence of the provision of low-cost rental accommodation for 9 of the 18 apartments for 15 years. The aim of SSLEP 2015 under sub-clause (i) seeks *to meet the future housing needs of the population of Sutherland Shire*. Furthermore, zone objectives aspire *to provide for the housing needs of the community*. This applies to R2, R3 and R4 zones (albeit with slightly different caveats applied) but forms an underlying intention of the LEP.

The subject land is located within Zone R3 – Medium Density Residential pursuant to the provisions of SSLEP 2015. The proposed development, being a RFB is prohibited in the zone. However, the SCC enables such a use on the site, subject to the satisfaction of specific requirements contained in Schedule 2. As required by Schedule 2 of the SCC, a detailed assessment has been undertaken regarding setbacks, density and height. The form of the development (as amended) is part 3 and 4 storey which provides a transition between the 4 storey RFB to the south to the lower 2 storey dual occupancy to the north, as anticipated by the SCC.

The proposal includes numerical variation to Clause 4.3 (Height of Buildings) and Clause 4.4 (Floor Space Ratio) for which sufficient environmental planning grounds have been established to support both variations. Uplift in height and FSR will facilitate the delivery of much needed affordable housing at a site that can accommodate the scale and form of development required to achieve key principles under the Housing SEPP and the EP&A Act, 1979.

The application was publicly notified, and submissions were received from initially 124 households, and following notification of revised plans 30 further submissions were received. The matters raised in these submissions have been discussed in this report and a number of design change conditions are sought.

It is appreciated that the subject application is a sensitive land use through the permissibility pathway of a SCC. However, as identified in the assessment by DPHI, *the site is of sufficient size and orientation to accommodate a residential flat building that if designed appropriately can maintain acceptable amenity and impact to surrounding properties and their existing future use for residential purposes.* The development demonstrates that adequate regard has been given to the design quality principles listed in Schedule 9 the Housing SEPP and the objectives specified in the ADG for the relevant design criteria.

The proposal provides an acceptable response to the landscape setting of the site through tree retention and additional appropriate native species, suitable clearance from critical trees, compliant landscape areas and integration of the landscape design with built form.

The proposal will provide the requisite 2 hours solar access to adjoining properties between 9am and 3pm in mid-winter. Furthermore, design measures around setbacks, blank walls, window placement, location of habitable versus non-habitable areas, trafficable zones, and management of communal open space have been incorporated to minimise amenity impacts from the development.

Key issues through the assessment process have been the protection of existing mature street trees and ensuring that the quality of the streetscape is not compromised through prioritising servicing over tree protection. The issues of fire code compliance and stormwater trenching within the front setback have required lengthy discussion and technical input to reach a reasonable level of satisfaction with each requiring further refinement through consent conditions.

The application has been assessed having regard to the matters for consideration under Section 4.15 of the Environmental Planning and Assessment Act 1979. The application will not result in any significant

impact on the environment or the amenity of nearby residents. Following assessment, Development Application No. DA23/0380 may be supported for the reasons outlined in this report.

The officer responsible for the preparation of this Report is the Senior Manager, Development Services who can be contacted on 9710.0333.