# ANNEXURE A

## Sutherland Local Environmental Plan 2015 –
Compliance Table

| Sutherland Local Environmental Plan 2015 - Compliance Table | | | |
|---|---|---|---|
| Clause / Control | Requirement | Response | Compliance |
| Part 2 Permitted and prohibited development | | | |
| 2.3 Zone objectives and Land Use Table | R2 Low Density Residential<br>• To provide for the housing needs of the community within a low density residential environment.<br>• To enable other land uses that provide facilities or services to meet the day to day needs of residents.<br>• To protect and enhance existing vegetation and other natural features and encourage appropriate bushland restoration particularly along ridgelines and in areas of high visual significance.<br>• To allow the subdivision of land only if the size of the resulting lots retains natural features and allows a sufficient area for development.<br>• To ensure the single dwelling character, landscaped character, neighbourhood character and streetscapes of the zone are maintained over time and not diminished by the cumulative impact of multi dwelling housing or seniors housing. | The proposed use is not permitted with consent under the SSLEP 2015. Accordingly, this application is submitted under the SEPP (Transport and Infrastructure) 2021 as identified in this Statement. Notwithstanding, the proposal will provide for a high quality medical facility which will serve the surrounding community and wider locality.<br><br>The proposed use is not antipathetic to the objectives of the R2 Low Density Residential zone and will provide a land use that will serve the needs of residents. The proposal will also maintain the amenity of the surrounding neighbours and will not alter the existing character of the locality | Yes |
| Part 4 Principal development standards | | | |
| 4.3 Height of buildings | The height of a building on any land is not to exceed the maximum height shown for the land on the land map which is 8.5m | Due to the topography of the site, the proposal will result in a maximum height variation of 1.8m. | No. See Cl4.6 at Annexure B. |
| 4.4 Floor space ratio | The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map, which in this case is 0.55:1 | The proposal provides a FSR of 0.45:1. | Yes |
| Part 6 Local provisions | | | |
| 6.1 Acid sulfate soils | (2) Development consent is required for the carrying out of works described in the table to this subclause on land shown on the Acid Sulfate Soils Map as being of the class specified for those works. | A preliminary Acid Sulfate Soils Assessment is submitted with this application.<br><br>The Assessment concludes; | Yes |

| Sutherland Local Environmental Plan 2015 - Compliance Table | | | |
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| | Class 5<br>Works within 500 metres of adjacent Class 1, 2, 3 or 4 land that is below 5 metres Australian Height Datum and by which the watertable is likely to be lowered below 1 metre Australian Height Datum on adjacent Class 1, 2, 3 or 4 land. | *Therefore, in accordance with the Acid Sulfate Soils Assessment Guidelines, it is the opinion of the consultant that, based on the indicator results above, Acid Sulfate Soils are not present in the landscape of the Site that are likely to impact the proposed development disturbing soil no more than a maximum depth of 3.6m. It is the opinion of the consultant that the proposed development can proceed with the works without further consideration of acid sulfate soil management considerations.* | |
| 6.2 Earthworks | (3) In deciding whether to grant development consent for earthworks (or for development involving ancillary earthworks), the consent authority must consider the following matters—<br>(a) the likely disruption of, or any detrimental effect on, drainage patterns and soil stability in the locality of the development,<br>(b) the effect of the development on the likely future use or redevelopment of the land,<br>(c) the quality of the fill or the soil to be excavated, or both,<br>(d) the effect of the development on the existing and likely amenity and structural integrity of adjoining properties,<br>(e) the source of any fill material and the destination of any excavated material,<br>(f) the likelihood of disturbing relics,<br>(g) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area,<br>(h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development. | Refer to the Geotechnical Report submitted with this application. | Yes |
| 6.4 Stormwater Management | (3) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that the development:<br>(a) is designed to maximise the use of water permeable surfaces on the land having regard to the soil characteristics affecting on-site infiltration of water, and<br>(b) includes, if practicable, on-site stormwater retention for use as an alternative supply to mains water, groundwater or river water, and | Refer to Stormwater Plans submitted with this application.<br><br>Permeable surfaces have been maximised.<br><br>Noted. | Yes |

| Sutherland Local Environmental Plan 2015 - Compliance Table | | | |
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| | (c) avoids any significant adverse impacts of stormwater runoff on adjoining properties, native bushland and receiving waters, or if that impact cannot be reasonably avoided, minimises and mitigates the impact. | Stormwater runoff has been avoided as far as practicable. The proposed detention basin will assist. | |
| 6.14 Landscaped areas is certain zones | The minimum landscaped area on any land shall not be less than 35% of the site area. | The site provides 1837.16m$^2$ (31.67%) of landscaped area when including the landscaped areas above the basement. When the above basement landscaping is not included, 1567.35m$^2$ (8.9%) of landscaped area is provided, which represents a shortfall of 29.86m$^2$ (27.02%).<br>Since the landscaped area above the basement allows for a soil depth between 600mm and 800mm, it is considered reasonable to count this area as landscaped area, since it can be used for growing plants and does not constitute a building, structure or hard paved area itself.<br>As such, it requested that a variation to the development standard be granted pursuant to Clause 4.6 so as to permit a landscaped area which equates to 31.67% of the total site area and a percentage variation of 9.5%. | No. See Cl4.6 at Annexure C. |
| 6.16 Urban design—general | (1) In deciding whether to grant development consent for any development, the consent authority must consider the following:<br>(a) the extent to which high quality design and development outcomes for the urban environment of Sutherland Shire have been attained, or will be attained, by the development,<br>(b) the extent to which any buildings are designed and will be constructed to:<br>(i) strengthen, enhance or integrate into the existing character of distinctive locations, neighbourhoods and streetscapes, and<br>(ii) contribute to the desired future character of the locality concerned,<br>(c) the extent to which recognition has been given to the public domain in the design of the development and the extent to | Refer to the Design Report submitted with this application.<br>The proposal represents a high quality design and development outcome for a currently vacant site.<br>The proposal complements the existing residential character of the locality and presents a unique and desired development opportunity to meet the needs of the community. | Yes |

| Sutherland Local Environmental Plan 2015 - Compliance Table | | | |
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| | which that design will facilitate improvements to the public domain,<br><br>(d) the extent to which the natural environment will be retained or enhanced by the development,<br><br>(e) the extent to which the development will respond to the natural landform of the site of the development,<br><br>(f) the extent to which the development will preserve, enhance or reinforce specific areas of high visual quality, ridgelines and landmark locations, including gateways, nodes, views and vistas,<br><br>(g) the principles for minimising crime risk set out in Part B of the Crime Prevention Guidelines and the extent to which the design of the proposed development applies those principles.<br><br>(2) In this clause, **Crime Prevention Guidelines** means the publication, Crime prevention and the assessment of development applications (ISBN 0 7347 0184 5), published by the NSW Department of Urban Affairs and Planning in 2001. | Due to the sites context it is not overly visible from the public domain. Nevertheless, it will only have positive impacts on the surrounding streetscape.<br>The proposal responds to the topography of the site and enhances the existing landscaping arrangements.<br><br>As above.<br><br>The proposal has no adverse impacts on existing views. The proposed design maximises views to ensure a high level of amenity or occupants without impacting surrounding properties.<br><br>The proposal has been designed to respond to the crime risk principles and prevention guidelines.<br><br>Noted. | |
| *6.18 Urban Design – non-residential development in residential areas* | (2) Development consent must not be granted for development to which this clause applies unless the consent authority has considered the following—<br><br>(a) the extent to which any proposed non-residential accommodation and its design will integrate into the locality,<br><br>(b) the extent to which any such accommodation will respond to the local character, and relate to the scale, streetscape, setbacks and use of materials of other accommodation in the locality,<br><br>(c) the extent to which the residential amenity of the locality will be protected from detrimental traffic-related impacts and noise associated with the development. | Due to the context of the site, topography of the land, and architectural and landscape design, the proposal will integrate well within the surrounding locality.<br>The proposal will respond to the local character, through the proposed setbacks and materials used.<br><br>Refer to the Traffic and Acoustic Reports submitted with this application. | Yes |

# ANNEXURE B

## Clause 4.6 Variation Statement – Building Height

# Clause 4.6 Variation Statement – Height of Buildings (Clause 4.3)

## 1. INTRODUCTION

This Variation Statement has been prepared in accordance with Clause 4.6 of Sutherland Shire Local Environmental Plan 2015 (SSLEP 2015) to accompany an application for construction of a two (2) storey Health Services Facility over basement parking at No. 9-13 Shackel Road, Bangor ('the site').

This Clause 4.6 Written Request for Exception to a Development Standard has been prepared in accordance with the NSW Department of Planning and Environment's "Guide to Varying Development Standards" (November 2023) and relevant decisions in the New South Wales Land and Environment Court (the Court). In particular it is noted that the requirements of Clause 4.6(4) have been deleted which remove the need for the consent authority to be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the zone.

The following two Court judgments provide a clear outline of the matters required to be addressed under Clause 4.6, including the structure of such requests:

- *Brigham v Canterbury-Bankstown Council* [2018] NSWLEC 1406; and
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

The Court has established principles that are to be addressed in relation to whether a variation to a development standard should be approved by a consent authority. The relevant tests to be considered are set out in the judgement of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council [2001] 130 LGERA 79*. The relevant tests were revisited by Chief Justice Preston in the decision of *Wehbe v Pittwater Council [2007] NSW LEC 827 (Wehbe)*. Although the Winton Property Group and Wehbe judgment refer to variations to development standards submitted under State Environmental Planning Policy 1 – Development Standards (SEPP 1) the principles and tests contained therein remain applicable to a variation request under Clause 4.6 in the NSW Standard Instrument as confirmed by the Court in the following judgments:

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (Four2Five);
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386;
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245;
- *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61;
- *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191;
- *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112;
- *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115.

It is important to note at the outset that clause 4.6 of the LEP "is as much a part of [the LEP] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome." (*SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [73]).

In our opinion, the variation achieves the objectives of the development standard and has demonstrated there are sufficient environmental planning grounds to justify contravening the development standard.

## 2. PROPOSED VARIATION

Clause 4.3 of SSLEP 2015 prescribes the maximum building height for the site and refers to the Height of Buildings Map. The relevant map [sheet HOB_006] indicates that the maximum building height permitted at the subject site is 16m.

Building height is defined as:

> *"building height (or height of building) means:*
>
> *(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
>
> *(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*
>
> *including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

As indicated in Figures 16 and 17 below, the proposal only exceeds the 8.5m height limit in the south western corner, where the site is at its lowest, and in the core locations, with the majority of the development falling within the 8.5m height compliance. The proposed development will comprise a maximum height of 10.3m to the south western roof form, representing a variation of 1.8m (21.17%).

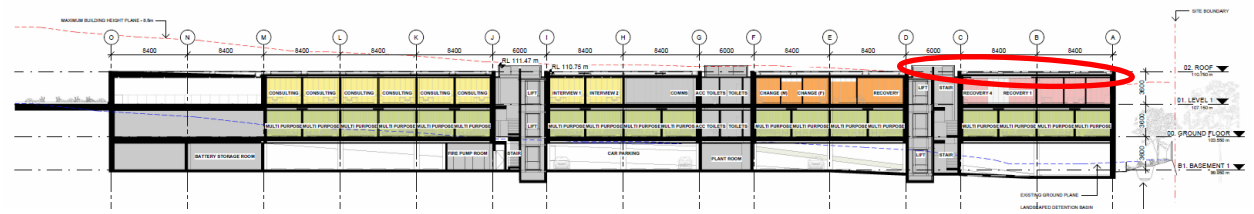

**Figure 16** Section of the proposal looking south east (non-compliance circled red)

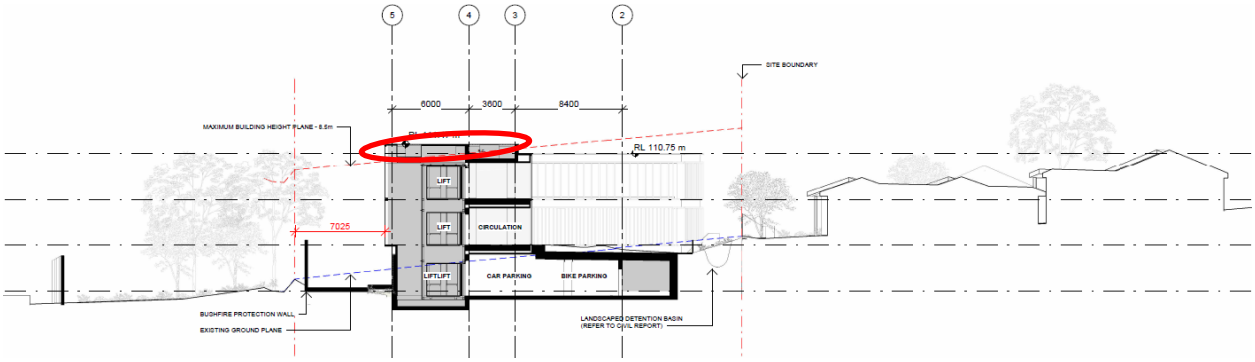


**Figure 17** Section of the proposal looking south west (non-compliance circled red)

The extent of the variation, which can largely be attributed to roof form, is also shown in Figure 18, where a height blanket diagram is provided, and the approved development on the site is also indicated. Importantly, the proposal has been designed to follow the topography of the land and minimise the bulk of the development as far as practicable. As shown in Figure 18, despite the proposed height variation at the south western corner of the built form, where the site is at its lowest, at the northern corner of the site the proposal sits 4.4m below the approved building envelope and the maximum building height limit.

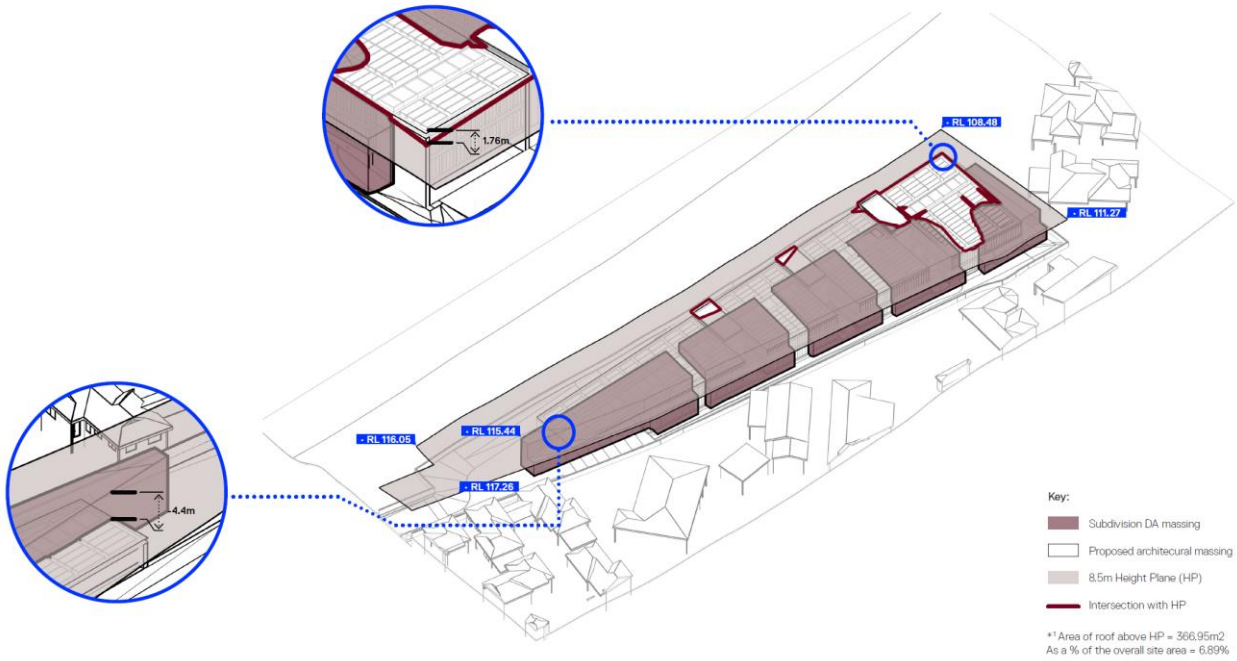


**Figure 18** Height blanket diagram

It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum building height of 10.3m which equates to a numerical variation of 1.8m and a percentage variation of 21.17%.

The maximum height control is a “development standard” to which exceptions can be granted pursuant to Clause 4.6 of the LEP.

## 3. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

The objectives and provisions of Clause 4.6 are as follows:

*4.6 Exceptions to development standards*

*(1) The objectives of this clause are as follows:*

*(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*

*(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

*(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

*(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

*(4) The consent authority must keep a record of its assessment carried out under subclause (3).*

*(5) (Repealed)*

*(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone E3 Environmental Management or Zone C4 Environmental Living if:*

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

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

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

*(7) (Repealed)*

*(8) This clause does not allow development consent to be granted for development that would contravene any of the following:*

*(a) a development standard for complying development,*

*(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*

*(c) clause 5.4,*

*(caa) clause 5.5.*

It is noted that Clause 4.3 is not "expressly excluded" from the operation of Clause 4.6.

The objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] 236 LGERA 256* (Initial Action), Preston CJ notes at [87] and [90]:

> *Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development…In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause*.

However, it is still useful to provide a preliminary assessment against the objectives of the Clause.

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

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The Clause states:

> *(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
>
> *(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
>
> *(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

This written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in the circumstances; and there are sufficient environmental planning grounds to justify the non-compliance. These matters are discussed in the following sections.

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

Of relevance to Clause 4.6(3)(a), in *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

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

The judgement goes on to state that:

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

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

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

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

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

Compliance with the maximum building height development standard is considered to be unreasonable and unnecessary as the objectives of that standard are achieved for the reasons set out in the assessment below.

> *(1) The objectives of this clause are 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 reserves,*
>
> *(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.*

In order to address the requirements of subclause 4.6(4)(a)(ii), the objectives of clause 4.3 are addressed in turn below.

***Objective (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.***

Objectives (a)(i) and (ii) are similar and refers to "compatible" with adjoining development and consistent with local character with relation to proposed building scale (height). It is considered that "compatible" does not promote "sameness" in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 191:

*"22 There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve."*

The primary reason for contravening the Height of Building control is the topography of the site. As shown in the height blanket diagrams provided, the proposed development only extends above the maximum building height limit at the core locations and at the south western corner of the site, where the ground level falls and the site is at its lowest. The remainder of the proposed development sits entirely below the building height limit.

Importantly, the proposed development sits below the height plane along the northern elevation where the site adjoins residential development. Indeed, when viewed from the adjoining residential properties to the north, the proposal will appear either one or two storeys in height, consistent with the scale of residential development within the immediate locality.

Furthermore, the proposed development has been designed and sited so that it appears as a single storey development when viewed from the street frontage and sits significantly lower than the building height plane at the street front elevation. Notably, due to the constraints of the site, being the topography and narrow site frontage, the proposal has been setback well into the rear of the site, with the bulk of the development located towards the adjoining reserve, hidden from neighbouring properties.

Overall, the proposal sits at a bulk and scale which is appropriate for the site and compatible with development within the immediate and surrounding locality. The proposal represents a highly articulated built form achieved through varied setbacks, fenestration, and materials, as well as landscaping, particularly around the site boundaries, which softens the built form and reduces the overall visual bulk of the development.

The proposal is therefore consistent with Objectives (a)(i) and (ii).

Objective (a)(iii) requires that the scale of the buildings *complements any natural landscape setting of the buildings.*

The subject site has been previously cleared and as such the proposal will enhance the landscape setting of the site through the provision of new tree plantings and native vegetation, particularly along the site boundaries. As such, redevelopment of the subject site will dramatically enhance the natural features on site and the interface of the built and natural environment.

Specifically detailed in the submitted Landscape Plan, the subject site will provide a range of landscape species, including canopy trees to achieve positive contribution to the streetscape and local environment, and replace the trees required for removal to accommodate the proposed development.

Importantly, the proposal is adjoined by the reserve to the south east, which contains large canopy trees that reach a height consistent with or greater than the height of the proposed development. As such, the proposal will sit well within the site, between the residential development to the north west and the large canopy trees to the south west, stepping down the topography and providing an appropriate transition between the development and nature reserve.

The proposal is therefore consistent with Objective (a)(iii).

Objectives (b), (c) and (d) are similar in that they seek to control amenity related impacts derived from development. They seek to:

***Objective (b): to allow reasonable daylight access to all buildings and the public domain,***

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

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

In relation to form and size of the proposed industrial development, it is evident from the plans that the building arrangement on the site complies with the setback requirements of the SSDCP 2015 and the FSR development standard under SSLEP 2015 which demonstrates that the form and building envelope can be reasonably anticipated by the relevant planning controls. The proposed height variation does not bring with it a form of development on the site that is incompatible with the scale of buildings anticipated by the controls or inconsistent with the desired future character for the locality.

In terms of objective (b), the height breach does not result in an adverse additional overshadowing and will fall predominantly over the subject site and the rooftops of surrounding developments, noting the nil side and rear setbacks. The extent of variation will create no notable overshadowing impacts.

In terms of objective (c), overshadowing and visual bulk have been considered above. With regard to privacy, the height breach does not result in any additional adverse privacy impacts. The area of height breach does not contain any habitable rooms that will allow views into neighbouring properties, whilst overlooking is limited to the rooftops of neighbouring properties only. Furthermore, the proposal has been designed to minimise acoustic impacts through materials and orientation of windows and openings away from neighbouring properties. The proposed use will be subject to operational controls and management to ensure acoustic impact to neighbouring properties is reduced as far as practicable. The additional visual and acoustic privacy impacts when compared to a height compliant building are considered to be insignificant or nil.

With regard to view loss, the height breach does not result in an adverse additional view loss. Due to the topography of the site and locality, any view loss would result from the height compliant portions of the development, which sit next to the residential properties, whilst the non-compliant elements are sited away from neighbours, towards the reserve.

The proposed development is therefore consistent with objectives (b), (c) and (d) of the development standard.

***Objective (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,***

This has been previously addressed under objectives (a)(i) and (ii).

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

To achieve an appropriate transition between the adjoining residential developments, the proposed development has been designed to located the bulk of the development towards the adjoining reserve. The proposed development sits below the height plane along the northern elevation where the site adjoins residential development. Indeed, when viewed from the adjoining residential properties to the north, the proposal will appear either one or two storeys in height, consistent with the scale of residential development within the immediate locality and providing a transition in building scale to the three storey portion of the development.

The proposed development is therefore consistent with objective (f) of the development standard.

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

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 24) states:

*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].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 whereby Justice Pain ratified the decision of Commissioner Pearson and in *Moskovich v Waverley Council* [2016] NSWLEC 1015.

The decision in Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 indicates that merely showing that the development achieves the objectives of the development standard will be insufficient to justify that a development is unreasonable or unnecessary in the circumstances of the case for the purposes of an objection under Clause 4.6. The case also demonstrates that the requirement in Clause 4.6(3)(b) of LEP 2012 to justify there are sufficient environmental planning grounds for the variation, requires identification of grounds particular to the circumstances of the proposed development and not simply grounds that apply to any similar development on the site or in the vicinity. In the Four2Five case, the Court found that the environmental planning grounds presented by the applicant in a Clause 4.6 written request must be specific to the circumstances of the proposed development on that site.

Furthermore, it is noted that whilst Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 at [24] indicated that the focus of consideration of environmental planning grounds should be on the aspect or element of the development that contravenes the development standard and not on the development as a whole, in this case, it is the design of the building as a whole that results in the contravention of the development standard and not necessarily an identified aspect of the development. In this context the proposed development must be considered holistically.

In this instance, there are sufficient environmental planning and design grounds to justify the proposed contravention of the floor space ratio development standard as follows:

1. The built form of the proposal responds, as far as practicable, to the existing topography of the site and locality, stepping down the site and achieving height compliance for the majority of the development. The proposed development only extends above the maximum building height limit at the core locations and at the south western corner of the site, where the ground level falls and the site is at its lowest. The remainder of the proposed development sits entirely below the building height limit.

2. The proposed development presents a similar bulk and scale of development as that approved on the site under DA18/0710. Indeed, the proposal will actually sit 4.4m lower than the approved building envelope at various points since it has been designed to respond better to the topography of the site, stepping down the site and locating bulk away from the residential neighbours. Furthermore, the proposal provides building setbacks which far exceed those approved under DA18/0710. Particularly with regard to the western boundary, the proposal provides a 6m building setback, compared to the 1.5m setback previously approved, which, taken up to 8.5m, would have a significantly greater impact with regard to visual bulk and amenity to the neighbouring properties than the proposed development.

3. The extent of variation sought is 1.8m or 21.17% and would be visually difficult to perceive the difference between the proposal and a building with compliant height when viewed from streetscape or adjoining properties. Indeed, when viewed from the streetscape the proposal will present as a single storey built form, sitting well below the maximum building height limit for the site. Furthermore, the proposed development sits below the height plane along the northern elevation where the site adjoins residential development. Indeed, when viewed from the adjoining residential properties to the north, the proposal will appear either one or two storeys in height, consistent with the scale of residential development within the immediate locality.

4. The proposal complies with the FSR development standard of 0.55:1, with a proposed 0.45:1 FSR. The proposed height variation will not result in any additional GFA which will increase the perceivable visual bulk and will be consistent the desired character of the locality with minimum impacts onto the amenity of adjoining properties.

5. The proposal delivers a high quality urban and architectural design which clearly exhibits design excellence, despite the non-compliance. That is, the proposal has undergone in-depth site analysis, numerous iterations and refinement to reach the proposed outcome. The arrangement of bulk and scale and subsequent building height non-compliance have been informed by the topography of the site and the nature and character of surrounding development. As such, the proposed non-compliance is considered the most appropriate response to the site and its context, whilst protecting the amenity of neighbouring properties and public domain.

6. The maximum extent of non-compliance is appropriately integrated into the overall building form. The non-compliance is located to the rear of the site, where the site adjoins the nature reserve, and as such will not be visually jarring as the built form is situated within a well-articulated mass. The non-compliant elements are incorporated into the contemporary architectural character and will be finished in materials that is compatible with the character of the locality.

7. It is considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:

    a. The extent of the additional height creates no adverse additional overshadowing impacts to adjoining properties when compared to a compliant building envelope. The additional shadowing cast by the non-compliance is relatively minor, noting surrounding development continue to achieves the solar access requirements under the SSDCP 2015. As such, any additional overshadowing created by the non-compliance is considered to be insignificant or nil;

    b. The height breach does not result in any adverse additional privacy impacts. The proposal has been oriented away from the adjoining residential properties as far as practicable, and louvres have been provided to avoid overlooking or direct sightlines. This is considered to reduce as far as practicable, the aural and visual privacy impacts; and

    c. The height of building breach does not result in any view loss. The proposed development will not result in any material loss of views or outlook when compared to a building with a compliant height, or when compared to the approved development on the site. The extent of view loss caused by the non-compliant element would be insignificant or nil.

8. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

   a. To facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment (1.3(b));
   b. To promote the orderly and economic use and development of land (1.3(c));
   c. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the height variation will ensure the development responds, as far as practicable, to the topography of the site. Strict compliance with the development standard is considered a disproportionate outcome given the limited amenity impacts to surrounding development. Architectural detailing and choice of materials, as well as the location of the non-compliant portions of the development, ensure the minor additional height is not visually jarring from the public domain or neighbouring properties, and not immediately obvious.

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

> *86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*
>
> *87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

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

**6. CONCLUSION**

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

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

# ANNEXURE C

## Clause 4.6 Variation Statement – Landscaped Area

# Clause 4.6 Variation Statement –

## 6.14 Landscaped areas in certain residential, business, industrial and environment protection zones

### 1. INTRODUCTION

This Variation Statement has been prepared in accordance with Clause 4.6 of Sutherland Shire Local Environmental Plan 2015 (SSLEP 2015) to accompany an application for construction of a two 23) storey Health Services Facility over basement parking at No. 9-13 Shackel Road, Bangor ('the site').

This Clause 4.6 Written Request for Exception to a Development Standard has been prepared in accordance with the NSW Department of Planning and Environment's "Guide to Varying Development Standards" (November 2023) and relevant decisions in the New South Wales Land and Environment Court (the Court). In particular it is noted that the requirements of Clause 4.6(4) have been deleted which remove the need for the consent authority to be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the zone.

The following two Court judgments provide a clear outline of the matters required to be addressed under Clause 4.6, including the structure of such requests:

- *Brigham v Canterbury-Bankstown Council* [2018] NSWLEC 1406; and
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

The Court has established principles that are to be addressed in relation to whether a variation to a development standard should be approved by a consent authority. The relevant tests to be considered are set out in the judgement of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council [2001] 130 LGERA 79*. The relevant tests were revisited by Chief Justice Preston in the decision of *Wehbe v Pittwater Council [2007] NSW LEC 827 (Wehbe)*. Although the Winton Property Group and Wehbe judgment refer to variations to development standards submitted under State Environmental Planning Policy 1 – Development Standards (SEPP 1) the principles and tests contained therein remain applicable to a variation request under Clause 4.6 in the NSW Standard Instrument as confirmed by the Court in the following judgments:

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (Four2Five);
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386;
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245;
- *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61;
- *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191;
- *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112;
- *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115.

It is important to note at the outset that clause 4.6 of the LEP "is as much a part of [the LEP] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome." (*SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [73]).

In our opinion, the variation achieves the objectives of the development standard and has demonstrated there are sufficient environmental planning grounds to justify contravening the development standard.

## 2. PROPOSED VARIATION

Clause 6.14 of the SSLEP 2015 relates to the minimum percentage of landscaped area across certain land zones. A minimum percentage of landscaped area is identified as 35% of the site area.

Landscaped Area is narrowly defined as:

> ***landscaped area*** *means a part of a site used for growing plants, grasses and trees, but does not include any building, structure or hard paved area.*

The site provides 1837.16m$^2$ (31.67%) of landscaped area when including the landscaped areas above the basement. When the above basement landscaping is not included, 1567.35m$^2$ (8.9%) of landscaped area is provided, which represents a shortfall of 29.86m2 (27.02%).

Since the landscaped area above the basement allows for a soil depth between 600mm and 800mm, it is considered reasonable to count this area as landscaped area, since it can be used for growing plants and does not constitute a building, structure or hard paved area itself.

As such, it requested that a variation to the development standard be granted pursuant to Clause 4.6 so as to permit a landscaped area which equates to 31.67% of the total site area and a percentage variation of 9.5%.

The minimum landscaped area control is a “development standard” to which exceptions can be granted pursuant to Clause 4.6 of the LEP.

## 3. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

The objectives and provisions of Clause 4.6 are as follows;

> *(1) The objectives of this clause are as follows:*
>
> *(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
>
> *(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
>
> *(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
>
> *(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
>
> *(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
>
> *(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*
>
> *(4) The consent authority must keep a record of its assessment carried out under subclause (3).*

*(5) (Repealed)*

*(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if:*

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

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

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

*(7) (Repealed)*

*(8) This clause does not allow development consent to be granted for development that would contravene any of the following:*

*(a) a development standard for complying development,*

*(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*

*(c) clause 5.4,*

*(caa) clause 5.5.*

It is noted that Clause 4.3 is not "expressly excluded" from the operation of Clause 4.6.

The objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] 236 LGERA 256* (Initial Action), Preston CJ notes at [87] and [90]:

> *Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development…In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause*.

However, it is still useful to provide a preliminary assessment against the objectives of the Clause.

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

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The Clause states:

*(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

This written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in the circumstances; and there are sufficient environmental planning grounds to justify the non-compliance. These matters are discussed in the following sections

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

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

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

The judgement goes on to state that:

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

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

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

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

*3. The underlying object 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.*

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

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

Compliance with the minimum landscaped area development standard is considered to be unreasonable and unnecessary as the objectives of that standard are achieved for the reasons set out in the assessment below.

The objectives and relevant provisions of Clause 6.14 are as follows;

> *(a) to ensure adequate opportunities exist for the retention or provision of vegetation that contributes to biodiversity and, in the case of trees, enhances the tree canopy of Sutherland Shire,*
>
> *(b) to minimise urban run-off by maximising permeable areas on the sites of development,*
>
> *(c) to ensure that the visual impact of development is minimised by appropriate landscaping and that the landscaping is maintained,*
>
> *(d) to ensure that landscaping carried out in connection with development is sufficient to complement the scale of buildings, provide shade, screen parking areas and enhance workforce amenities.*

Clause 6.14 nominates a minimum landscaped area of 35% for the site. It is requested that an exception to this development standard be granted pursuant to Clause 4.6 so as to permit a minimum landscaped area of 9.5%.

In order to address the requirements of subclause 4.6(4)(a)(ii), the objectives of Clause 6.14 are addressed below.

**Objective (a) –**

The proposal will require the removal of select trees on the site and adjoining reserve to accommodate the proposed development, however, these trees will be adequately replaced with new habitat tree plantings on both the subject site and the reserve. The proposal will ensure that there is no loss of canopy cover and that the replacement tree plantings will be appropriate native species that contribute to the biodiversity of the locality.

Importantly, a Flora and Fauna Impact Assessment has been prepared by *Kingfisher* and is submitted with this application. The Assessment concludes that the proposal will not have a significant impact on threatened species or ecological communities, or their habitats, and as such will not have any adverse impacts in terms of the biodiversity of the site and locality. Furthermore, as stated within the Assessment, the proposal does not trigger entry into the Biodiversity Offsets Schemed (BOS) under the NSW Biodiversity Conservation Regulation 2017.

Overall, the proposal will provide an enhanced landscape setting across the site when compared to the existing site conditions, most notably the fact that the site has been largely cleared, in accordance with a previous development consent. As per the Landscape Plan submitted with this application, the proposal incorporates landscaped setbacks with native plantings for stabilisation, as well as to create new habitats and add visual interest to the development through breaking up, and in some case, screening the built form.

The submitted Landscape Plan details the proposed species across the site that will enhance the landscaped character of the site and local environment.

**Objective (b) –**

The proposed development has been designed to maximise permeable areas of the site as far as practicable. Due to

the irregular shape of the site and the need to provide suitable vehicle access and a bushfire protection buffer, a large driveway is required along the south eastern boundary of the site, however, permeable spaces have been maximised elsewhere through landscaped setbacks and permeable paving to reduce stormwater runoff.

Furthermore, the proposed development includes a detention basin along the northern and western side of the development which will assist with stormwater runoff from nearby areas.

**Objective (c) –**

The site has been previously cleared in accordance with the approved DA which allowed for the removal of the majority of trees existing on the site. The proposed development will enhance the existing landscape arrangements on the site through the provision of new trees, shrubs and plantings to soften the built form and minimise the visual impact of the development.

The proposed landscape design will complement the built form and enhance the visual aesthetic of the development when viewed from adjoining properties and the street. From the street frontage, the development will not be overly visible due to the shape of the site and topography of the land, however, new landscaping proposed at the street frontage will improve the landscape character and streetscape presentation of the site.

The proposed boundary landscaping and courtyard gardens provide a level of screening to the development, whilst also adding to the visual interest of the facility when viewed from the adjoining sites.

**Objective (d) –**

The proposed landscaping within the site boundaries has been provided to reduce the perceived bulk and scale of the development, providing a soft transition to the built environment.

The at-grade parking area is to be screened by landscaping to the north, whilst the bulk of parking on the site is provided within the basement to ensure the parking on the site does not dominate the development. Furthermore, the basement parking level will not be visible to the adjoining residential properties due to the topography of the site and landscaping proposed around the facility.

The proposed development has been designed to ensure a high level of amenity is enjoyed by both employees and patients. Consultation suites and multi-purpose rooms have been designed to maximise views towards the proposed landscaped areas to improve the experience within these spaces.

The proposed development thus meets the objectives of Clause 6.14 of the SSLEP 2015.

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

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 24) states:

> *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].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 whereby Justice Pain ratified the decision of Commissioner Pearson and in *Moskovich v Waverley Council* [2016] NSWLEC 1015.

The decision in Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 indicates that merely showing that the development achieves the objectives of the development standard will be insufficient to justify that a development is unreasonable or unnecessary in the circumstances of the case for the purposes of an objection under Clause 4.6. The case also demonstrates that the requirement in Clause 4.6(3)(b) of LEP 2012 to justify there are sufficient environmental planning grounds for the variation, requires identification of grounds particular to the circumstances of the proposed development and not simply grounds that apply to any similar development on the site or in the vicinity. In the Four2Five case, the Court found that the environmental planning grounds presented by the applicant in a Clause 4.6 written request must be specific to the circumstances of the proposed development on that site.

Furthermore, it is noted that whilst Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 at [24] indicated that the focus of consideration of environmental planning grounds should be on the aspect or element of the development that contravenes the development standard and not on the development as a whole, in this case, it is the design of the building as a whole that results in the contravention of the development standard and not necessarily an identified aspect of the development. In this context the proposed development must be considered holistically.

In this instance, there are sufficient environmental planning and design grounds to justify the proposed contravention of the landscaped area development standard as follows:

1. The proposed development fails to meet the minimum landscaped area as a result of the need to provide level driveway access to the basement car park in response to the difficult topography of the site. The proposed driveway covers a large portion of the site as a result of the irregular shape of the allotment and the site topography, which have been carefully considered in the design of the proposed driveway and overall built form. To allow for basement parking to be accommodated within the site whilst limiting the extent of excavation, the proposed driveway continues along the south eastern boundary of the site to the basement entry, where vehicles can enter the car park entry which sits relatively close to the existing ground level.

2. The proposed driveway along the south eastern boundary of the site also provides a bush fire protection buffer for the development, which is important to ensure the safety of occupants of the facility.

3. The proposal will enhance the existing landscaping on the site. The bulk of trees on the site were removed in accordance with the previous DA approval on the site. The proposal will provide a new landscape scheme which complements the built form, whilst also enhancing the variety of trees and plants on the site through new native plantings. Where the proposal does require tree removal, replacement trees will be planted, both on the site and adjoining reserve.

4. The proposal will improve permeability on the site thereby reducing stormwater runoff through the provision of permeable landscaped areas, including permeable pathways, and a detention basin to prevent runoff and reduce flood impacts.

5. The proposed development will include the provision of new canopy trees, shrubs and ground covers across the site, including within the front setback area. The proposed landscaping detailed in the submitted Landscape Plan will ensure the landscaped character of the site and locality will be enhanced. That is, as the density of the site increases, so does the quality of the landscaped area and quantity of plantings.

6. The non-compliance is not caused as a result of excessive density, noting that the floor space ratio is well within the 0.55:1 maximum allowable for this site.

7. The social benefits of providing a health services facility and additional employment opportunities for the community should be given weight in the consideration of the variation request. It would be a loss to the community (and contrary to the public interest) to deny the variation and require the removal of floor space or parking within a well located and well-designed development, particularly considering the proposal achieves compliance with the maximum FSR for the site and extent of parking required actually falls short of Councils requirements. This is a disproportionate response to the relatively minor impacts created by the landscaped area non-compliance.

8. The proposed variation will not have an adverse impact on the amenity of adjoining properties but will provide an improved landscaped setting for the occupants and streetscape. The proposal provides for a significantly superior landscape scheme which screens and softens the proposed development, whilst providing visually interesting landscaped outlooks from the facility.

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly given the minor extent of variation, topography of the site, and the irregular shape of the allotment. The minor landscaped area non-compliance does not significantly impact the amenity of the neighbouring properties (when compared to a compliant development) and the proposed landscaping on the site is considered sufficient to soften and screen the built form, and will not have any impact on the biodiversity values of the site or locality.

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

> *86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*
>
> *87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

As outlined above, notwithstanding numerical non-compliance, it is in any case considered that the proposal will provide a better outcome due to the improvements in site utility and landscape design and the public benefits of providing a health services facility for the community.

To insist on strict compliance would result in a lesser outcome in terms of reduced floor space with no measurable

benefits to streetscape composition of the environment. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard given the enhancement of the site.

## 6. CONCLUSION

Having regard to all of the above, it is our opinion that compliance with the minimum landscaped area development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives and will result in a suitable environmental outcome for the site and locality. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

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