

# Clause 4.6 Variation Request

## Additional Building Height

### State Environmental Planning Policy (Housing) 2021

Mixed Use Development Proposal  
1 Veno Street, Heathcote NSW

Project 23-049  
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Revision A

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# 1. Introduction

## 1.1. Overview

This formal written request has been prepared in accordance with clause 4.6 of the *Sutherland Local Environmental Plan 2015* (the LEP), to vary the additional building height development standard prescribed under Chapter 2 Division 1, Section 16(3) of the *State Environmental Planning Policy (Housing) 2021* (SEPP Housing).

This report is to be read in conjunction with a separate clause 4.6 variation request that seeks to vary the height of buildings development standard prescribed under clause 4.3 of the LEP.

Together, both clause 4.6 requests are made in support of the Development Application (DA) for 1 Veno Street, Heathcote (the Site). The DA seeks consent for demolition of existing buildings and structures on the site and construction of 3 buildings comprising retail and commercial floorspace (1,300m<sup>2</sup>), and 168 residential units, of which 25 are infill affordable housing as defined under Chapter 2 Part 2 Division 1 of SEPP Housing.

### 1.1.1. The Site

The subject site is zoned E1 Local Centre in the LEP. It is located within Heathcote Town Centre and is less than 400m walking distance to Heathcote train station.

The lot has an irregular “L” shape and is 7,245m<sup>2</sup> in total area, with frontages along Veno Street, Princes Hwy, and Strickland Street.

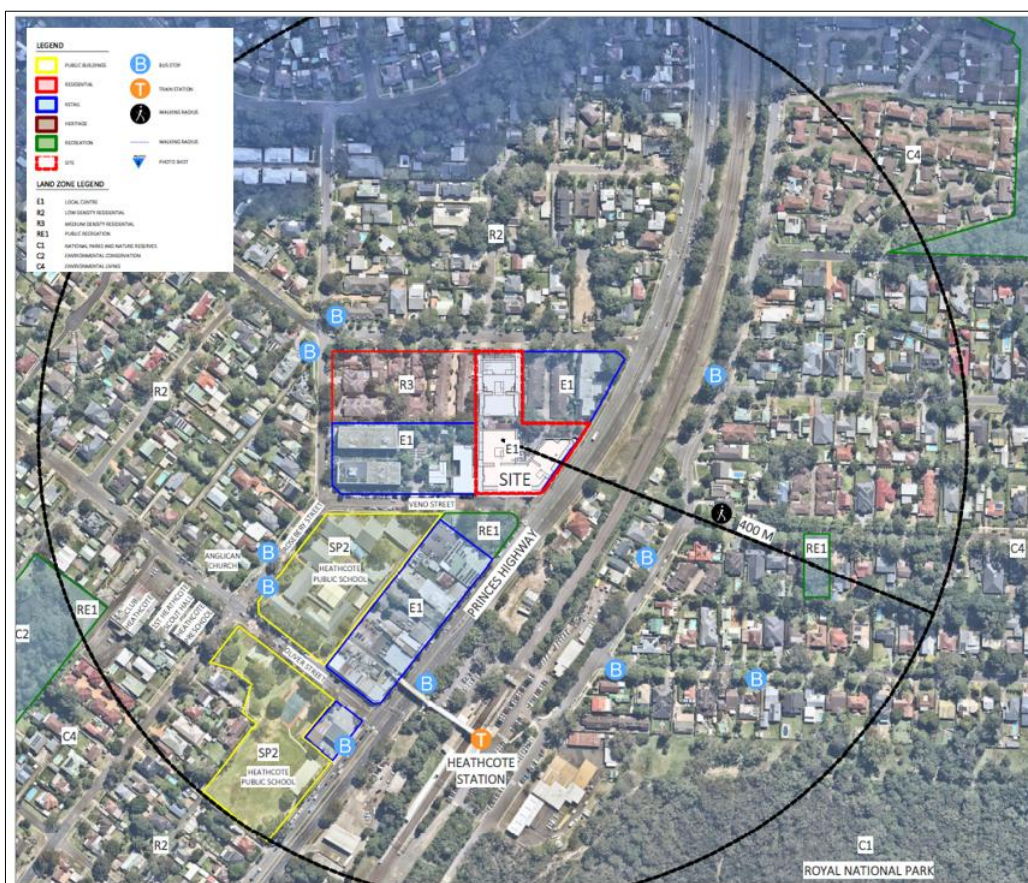


Figure 1: Site Location Plan - DA-0-101 (source: Dickson Rothschild)

## 1.1.2. Sutherland Local Environmental Plan 2015

### 1.1.2.1. E1 Local Centre zone

The site is zoned E1 Local Centre in the LEP, and 'residential flat buildings' and 'shop top housing' are permitted with development consent. The E1 zone objectives are:

- *To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.*
- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*
- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To create an attractive, vibrant and safe public domain that has both a high standard of urban design and public amenity that is designed to cater for the needs of all ages and abilities.*
- *To provide a mix of compatible land uses and building forms that act as a transition to the surrounding residential neighbourhood.*

### 1.1.2.2. Clause 4.4 Floor Space Ratio

Clause 4.4 of the LEP and the associated 'Floor Space Ratio Map' prescribe a maximum floor space ratio (FSR) of 2.0:1 for the site.

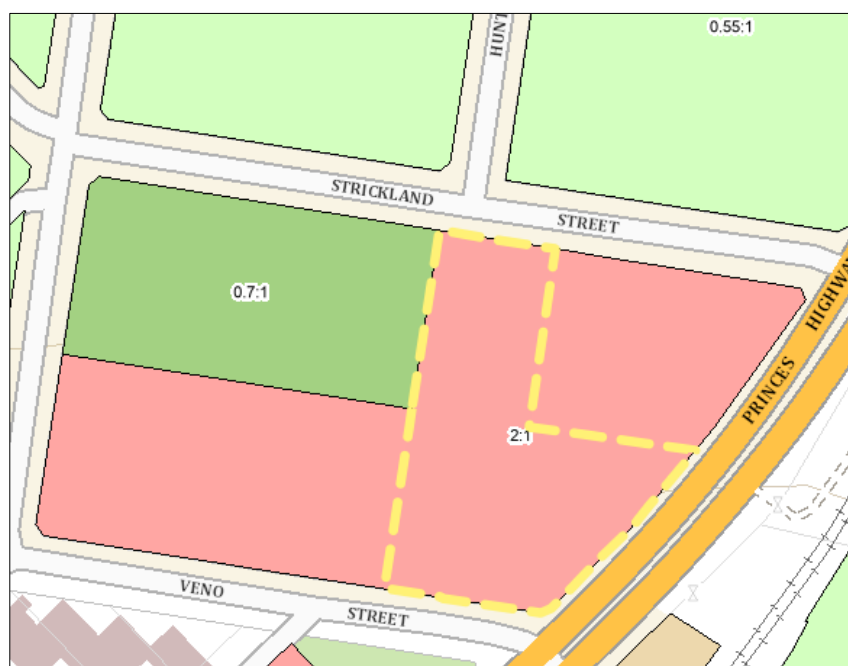


Figure 2: LEP Floor Space Ratio Map – site in yellow outline (source: NSW Spatial Planning Viewer)

### 1.1.2.3. Clause 4.3 Height of buildings

Clause 4.3 of the LEP and the associated 'Height of Buildings Map' prescribe a maximum building height of 13m for the site.



Figure 3: LEP Height of Buildings Map – site in yellow outline (source: NSW Spatial Planning Viewer)

The LEP defines 'building height' as follows:

*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*

*the vertical distance between ground level (existing) and 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.*

A separate clause 4.6 variation request seeks to vary the 'height of buildings' development standard prescribed under clause 4.3 of the LEP.

### 1.1.3. State Environmental Planning Policy (Housing) 2021

The SEPP principles are described in Chapter 1, section 3:

- (a) *enabling the development of diverse housing types, including purpose-built rental housing,*
- (b) *encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability,*
- (c) *ensuring new housing development provides residents with a reasonable level of amenity,*

- (d) *promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,*
- (e) *minimising adverse climate and environmental impacts of new housing development,*
- (f) *reinforcing the importance of designing housing in a way that reflects and enhances its locality,*
- (g) *supporting short-term rental accommodation as a home-sharing activity and contributor to local economies, while managing the social and environmental impacts from this use,*
- (h) *mitigating the loss of existing affordable rental housing.*

#### 1.1.3.1. In-fill affordable housing

Chapter 2, Division 1 of the SEPP contain the provisions for in-fill affordable housing. The objective of in-fill affordable housing is described in section 15A:

*The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.*

The framework under which additional FSR and building height may be achieved is described in section 16:

(1) *The maximum floor space ratio for development that includes residential development to which this division applies is the maximum permissible floor space ratio for the land plus an additional floor space ratio of up to 30%, based on the minimum affordable housing component calculated in accordance with subsection (2).*

(2) *The minimum affordable housing component, which must be at least 10%, is calculated as follows—*

$$\text{affordable housing component} = \frac{\text{additional floor space ratio}}{(\text{as a percentage})} \div 2$$

(3) *If the development includes residential flat buildings or shop top housing, the maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).*

#### **Example—**

*Development that is eligible for 20% additional floor space ratio because the development includes a 10% affordable housing component, as calculated under subsection (2), is also eligible for 20% additional building height if the development involves residential flat buildings or shop top housing.*

(4) *This section does not apply to development on land for which there is no maximum permissible floor space ratio.*

This clause 4.6 variation request seeks to vary section 16(3) the additional building height development standard.



#### 1.1.4. Nature and extent of the variation

Below, Figures 4 and 5 show the variation sought to the 13m LEP building height control at key locations of the proposed development. The building height is measured from the existing ground level (measured as per *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 158).

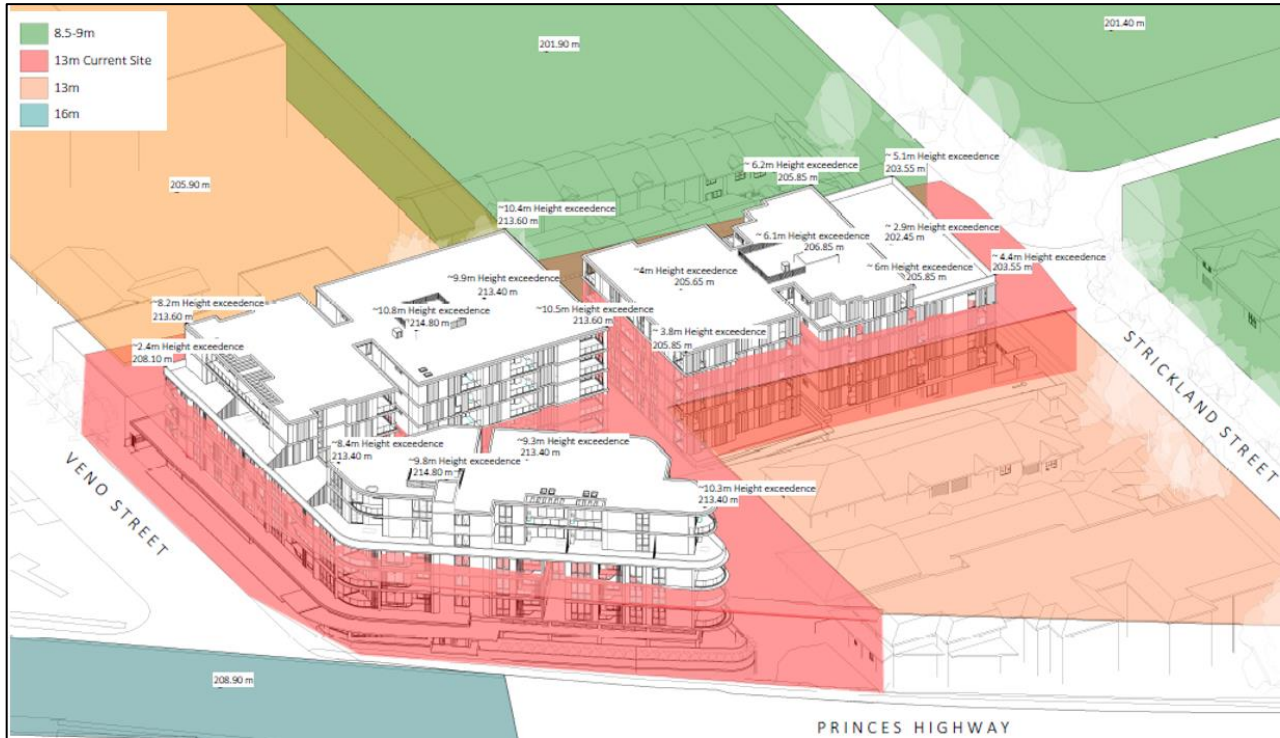


Figure 4: 3D Height Exceedance Diagram - DA-0-900 (Source: Dickson Rothschild)

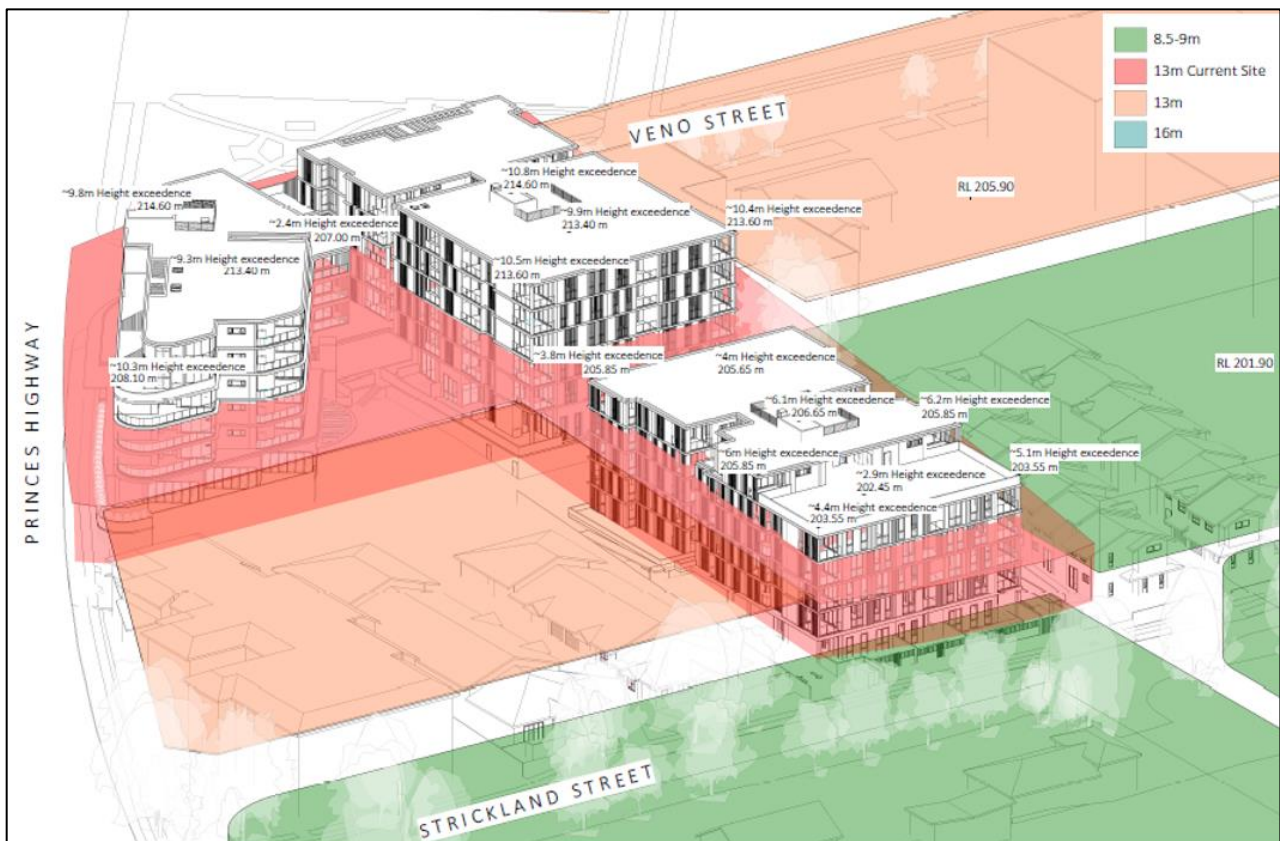


Figure 5: 3D Height Exceedance Diagram - DA-0-901 (Source: Dickson Rothschild)



The variation to the building height control under clause 4.3 of the LEP ranges from 2.4m (18.5% exceedance) at south-east corner of the site, up to 10.8m (83% exceedance) towards middle of the site. The changes in height are due primarily to the irregular shape and sloping topography of the site.

Pursuant to section 16(1) of SEPP Housing, the proposed development achieves an FSR of 2.216:1 (10.8% exceedance on the base FSR permitted under the LEP). It is noted however the proposed development has a comparatively low development yield given the FSR control under clause 4.4 of the LEP is 2.0:1.

Pursuant to section 16(3) of the SEPP, additional building height available for the proposed development under the scenario is 1.4m, which equates is a total building height of 14.4m (13m + 10.8%). The corresponding variation sought to the additional building height development standard under section 16(3) of SEPP Housing is up to 65.53% for the proposed development.

## **1.2. Clause 4.6 framework and relevant case law**

### **1.2.1. Clause 4.6 Exceptions to development standards**

The objectives of clause 4.6 of the LEP are described below:

- (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 to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—
  - (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
  - (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.**

**Note—**

*The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).*

- (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.*

This document constitutes the written request referred to in Clause 4.6(3) in relation to the development application's proposed breach of the height of building development standard. This request has been prepared having regard to the latest authority on Clause 4.6, contained in the following guideline judgments:

1. *Wehbe v Pittwater Council* [2007] NSWLEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130;
4. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
5. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552
6. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386;
7. *Moskovich v Waverley Council* [2016] NSWLEC 1015;
8. *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112; and
9. *Denny v Optus Mobile Pty Ltd* [2023] NSWLEC 27.
10. *Australian Unity Funds Management Ltd v Boston Nepean Pty Ltd & Penrith Council* [2023] NSWLEC 49

In summary, the principles arising from the above matters are:

**1.2.2. Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary**

**in the circumstances**

- a. Preston CJ in *Wehbe* outlined a now established approach to determining, by way of 5 methods, whether compliance with a development standard is unreasonable or unnecessary at [43]:

*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).*

- b. In applying this underlying principle, the first (and most commonly invoked) way to demonstrate compliance is 'unreasonable or unnecessary' is by proving that the objectives of the relevant standard are met, notwithstanding the non-compliance. This has also been supported by *in Initial Action and Micaul Holdings*. In *Randwick City Council v Micaul Holdings Pty Ltd* it was found that this could be effectively demonstrated by showing a lack of adverse amenity impacts.
- c. Secondly Preston CJ found in *Wehbe* that if it can be demonstrated that the underlying objective or purpose is not relevant to the development compliance will be unnecessary.
- d. Thirdly, it could be established that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.
- e. Fourthly, it could be established that 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.
- f. And finally, it can be established that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary."

**1.2.3. Clause 4.6(3)(b): Sufficient environmental planning grounds to justify contravening the development standard**

- g. In addition to the above, Preston CJ in *Initial Action* held (at paragraph 15) that for there to be power to grant development consent for a development that contravenes a development standard, it must be adequately established that there are sufficient environmental planning grounds to justify contravening the development standard.
- h. At paragraphs 23 and 24 of *Initial Action*, Preston CJ held that with respect to "environmental planning grounds", although not defined, the grounds should relate to the subject matter, scope and purpose of the EP&A Act, including the objects in s.1.3 of the Act.
- i. Further, in order that the environmental planning grounds proffered in the written request are

“sufficient”, first the focus should be on the aspect or element of the development that contravenes the development standard with any non-compliance specific to the site, rather than the development as a whole and why the contravention is justified and secondly, the environmental planning grounds must justify the contravention of the development standard, not just promote the benefits of carrying out the development as a whole (see *Four2Five v Ashfield Council*).

#### **1.2.4. Reference must be had only to the clause 4.6 variation request**

- j. In *RebelMH*, the Court found that in exercising its functions, the consent authority must “in fact” be satisfied of the above matters. The satisfaction that compliance is “unreasonable or unnecessary” and that there are “sufficient environmental planning grounds” to justify the contravention must be reached only by reference to the clause 4.6 request.
- k. The evidence cannot supplement what is in the request, although the evidence may assist in understanding the request and in considering its adequacy. On the other hand, the satisfaction that the proposed development is consistent with the relevant objectives, can be reached by considering the evidence and is not limited to what is contained in the clause 4.6 request.

The requirements for a written clause 4.6 request in accordance with relevant case law as against the proposal are outlined and addressed in the following pages.

## 2. Justification for Clause 4.6 Variation

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### 2.1. Compliance with the development standard is unreasonable or unnecessary in the circumstances - Clause 4.6(3)(a)

The principle set out in *Wehbe v Pittwater Council* (2007) (Wehbe) provides an accepted method for justifying that compliance with the development standard is unreasonable or unnecessary. This request relies on method 1 in Wehbe which requires an applicant to demonstrate that the objectives of the relevant development standard will be achieved, despite the non-compliance with the numerical standard.

Compliance with the additional building height development standard under section 16(3) of SEPP Housing is unreasonable and unnecessary in the circumstances of this proposal as the objectives of the development standard under Division 1 are achieved, notwithstanding the non-compliance. The proposed variation achieves the objectives of the development standard contained at section 15A of the SEPP, as outlined below.

Further, the height non-compliance itself is related to achieving a better planning outcome than what would otherwise be achieved by a building that strictly complied with the height limit. This is also discussed below in Section 3.

#### 2.1.1. Objective of Division 1 of SEPP Housing

The objective of this division, as defined in section 15A is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

The proposed development includes more than 10% affordable housing component. Of the 168 residential units, 25 are for in-fill affordable housing. If the variation to building height were not possible, the affordable housing component could not be delivered due to constraints of the site achieving the additional FSR required.

The objectives of the additional building height development standard under section 16(3) of the SEPP are achieved notwithstanding non-compliance with the standard. Therefore, compliance with the development standard in this instance is unreasonable or unnecessary.

The variation to the additional building height development standard achieves a better design outcome for the site and has minimal environmental impacts. The proposed design consistent with the objectives of the E1 Local Centre zone, compatible with the adjoining development, and reflects the desired local streetscape character.

For detailed discussion about the variation to building height control under clause 4.3 of the LEP, refer to the separate clause 4.6 request, accompanying this report.

### 2.2. Sufficient environmental planning grounds to justify the contravention of the development standard - Clause 4.6(3)(b)

The strength of the relevant grounds ought to be a balancing factor when assessing the reasonableness of the variation to a standard. This is because the word "sufficient" is included in clause 4.6(3)(b). Environmental planning grounds will be "sufficient" having regard to the



circumstances of each case such that matters will have different weight in different circumstances.

A large breach with significant impacts must have strong environmental planning grounds. A relatively minor breach with minimal impacts, such as that proposed in this application, will require a different weighing of factors and therefore a different approach to what may constitute that which is “sufficient” (see *Initial Action* at paragraphs 23 and 24).

Notwithstanding the non-compliance with the additional building height standard, the proposed development supports the relevant principles under Chapter 1, section 3 of SEPP Housing:

*(a) enabling the development of diverse housing types, including purpose-built rental housing*

The proposal includes for a mix of affordable rental units within the proposed mixed-use development.

*(b) encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability*

The affordable rental units will meet the needs of very low to moderate income households, made available through a community housing provider.

*(c) ensuring new housing development provides residents with a reasonable level of amenity*

The proposed mixed-use development provides a high level of compliance with the Apartment Design Guide.

*(d) promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services*

The proposed mixed-use development is located with Heathcote local centre, in close proximity to existing services and amenities, including the train station.

*(e) minimising adverse climate and environmental impacts of new housing development*

The proposed development is on an urban renewal site. The design provides for retention of significant tree and extension of the existing canopy, in addition to sufficient landscaping provision.

*(f) reinforcing the importance of designing housing in a way that reflects and enhances its locality*

The design is compatible with the adjoining development, and reflects the desired streetscape character for the Heathcote Town Centre locality.

In addition, there are sufficient environmental planning grounds to justify contravening the additional building height development standard, as outlined below:

- Irregular L-shaped of site and proximity of existing buildings on adjoining properties constrain the development potential.

- Due to the permissible FSR of 2.0:1 (2.6:1 under SEPP Housing), a complying building height would result in a development that sprawls over a larger area of the site.
- Whilst a lower, squatter building form could be achieved, it would lead in a poorer design and planning outcome.
- Height noncompliance allows the built form to respond to the particular site context and on-site constraints.
- Height noncompliance allows a better design response to the irregular shape and topography of the site by limiting the building footprint to achieve high quality communal open space and retention of substantial trees on the site.
- Height noncompliance provides a better design outcomes as it limits the building site coverage, whilst achieving the permissible FSR, with minimal impacts on amenity of adjoining properties.
- Proposed bulk and scale provide consistency with desired future character and streetscape of Heathcote town centre locality. The design supports appropriate transition to lower scale buildings on adjoining properties with the upper-level setbacks and by including adequate setbacks to the site boundaries, and by limiting the perceived bulk and scale from the street level.
- Design incorporates substantial landscaping internally and along the site perimeter to mitigate perceived impacts, which provides better amenity for the site and the locality by retaining significant trees and expanded canopy cover with new planting.
- Proposed development better supports the E1 Local Centre zone by providing a mix retail, commercial and residential uses, including in-fill affordable housing. The height responds to the unique setting of the site within the town centre, adjacent to the existing amenity such as local parks and the train station.
- The development responds to the site's unique transitional location within Heathcote town centre, the town core along Princes Hwy, south of Veno Street, and the medium-lower density residential developments adjoining the site on Veno Street and Strickland Street.
- Height noncompliance results in a development that better meets the objectives of the zone than one with a complying height. In particular this proposal maximises housing, including in-fill affordable housing, supported by retail and commercial uses in close proximity of the train station.
- Being in close proximity to train station, the strategic location means the site well placed for proposed density and scale. The transport assessment supporting the proposal concluded the development will not have an adverse impact on the road network.

### 3. Other Considerations

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#### 3.1. Heathcote Local Centre

The site is zoned E1 Local Centre. The zone objectives are:

- *To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.*
- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*
- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To create an attractive, vibrant and safe public domain that has both a high standard of urban design and public amenity that is designed to cater for the needs of all ages and abilities.*
- *To provide a mix of compatible land uses and building forms that act as a transition to the surrounding residential neighbourhood.*

The proposed development is consistent with the objectives of the E1 Local Centre zone, as outlined below:

- The development will provide retail and commercial floorspace that will service the needs of residents and workers locally, as well visitors to the area.
- The mixed-use development will be a catalyst for local investment and economic growth by generating local jobs and demand for secondary services through the construction phase, and by creating additional demand for local goods and services resulting from the residential and non-residential uses in the building occupation phase.
- The residential density of the development will contribute to a vibrant and active local centre that consistent with the strategic planning objectives for Heathcote Town Centre.
- The development will provide active retail and commercial uses at ground floor of the building along the frontages of Veno Street and Princes Hwy.
- The development will create an attractive, vibrant and safe public domain that has both a high standard of urban design and public amenity that is designed to cater for the needs of all ages and abilities.

- The development includes an in-fill affordable housing component, and also provision for adaptable housing and liveable housing (to a silver level of service).

In summary, the proposed development provides consistency of the objectives of the E1 Local Centre zone, the height non-compliance notwithstanding.

## 4. Conclusion

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This clause 4.6 variation request to the height of buildings development demonstrates, as required by the LEP, that:

- Compliance with additional buildings height development standard Section 16(3) of SEPP Housing would be unreasonable and unnecessary in the circumstances of this development; and
- There are sufficient environmental planning grounds to justify the contravention; and
- The proposed development achieves the objectives of the development standard and is consistent with the objectives of Section 15A under Chapter 2 Division 1 of SEPP Housing, notwithstanding the variation.

Therefore, it would be appropriate to exercise the flexibility provided by clause 4.6 of the LEP in the circumstances of this proposal.