

# WILLOWTREE PLANNING



## Clause 4.6 Variation Request to Clause 4.3 of LCLEP2009

Proposed Data Centre  
SSD - 13475973

706 Mowbray Road West, Lane Cove North  
Lot 10 DP 1179953

Prepared by Willowtree Planning Pty Ltd  
on behalf of ARUP

ACN: 146 035 707 ABN: 54 146 035 707  
Suite 4, Level 7, 100 Walker Street  
North Sydney, NSW 2060

enquiries@willowtp.com.au  
willowtreeplanning.com.au  
02 9929 6974



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## **PART A PRELIMINARY**

### **1.1 INTRODUCTION**

This Clause 4.6 Variation request has been prepared in accordance with Clause 4.6 of the *Lane Cove Local Environmental Plan 2009* (LCLEP2009) to accompany the subject State Significant Development (SSD) Application for the proposed construction and operational use of a Data Centre. The proposed Development would be located at 706 Mowbray Road West, Lane Cove North (Lot 10 DP 1197753). The Proposed Development comprises the following development particulars, including:

- Construction and operation (24/7 basis) of a Data Centre building over four (4) levels (ranging in height from 20.9 m – 29.695 m), comprising 11,338 m<sup>2</sup> Gross Floor Area (comprising 3-colos (each colo is 9.6 MW, which includes 4 x 2.4 MW cells and 12 data halls)), one (1) 132 kV electrical substation (including three (3) levels of 22 kV transformer rooms, provision for 13 diesel fuel storage tanks, 12 emergency backup generators and additional plant and equipment (on the roof level).
- Ancillary office space (1,680 m<sup>2</sup>).
- 3,068.73 m<sup>2</sup> (17.46% of the Site and 39% canopy cover) of landscaping across the Site.
- 42 car parking spaces (including two (2) accessible space).
- Associated internal access roads, hardstand and driveways.

Specifically, the proposal seeks variation to the maximum building height prescribed in Clause 4.3 of the LCLEP2009 across relevant portions of the Site from 18 m to heights of varied nature between **20.9-29.695 m**.

This Clause 4.6 Variation request has therefore been prepared in accordance with the requirements of Clause 4.6 of LCLEP2009, which includes the following objectives:

- (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.*

In accordance with Clause 4.6(3) of LCLEP2009, the NSW Department of Planning and Environment (DPE) (as the Consent Authority) are required to consider the following:

*“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 request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant Development Standard (Clause 4.3) of LCLEP2009.

### **1.2 PROPOSED VARIATION**

#### **1.2.1 Clause 4.3 Height of Buildings and the Variation Sought**

Under the provisions of Clause 4.3 of LCLEP2009, the Site is subject to a maximum building height of approximately 18 m. It is noted, that the proposed building height sought under the subject SSD Application is **29.695 m** at the highest point at the rear of the Site, with the front of the Site requiring an increase in height ranging from **20.9-25.08 m**.

The floor-to-floor heights required for Data Centre's are extremely precise, for which the storey's proposed are reflective of the internal heights required to establish the future internal layouts, whilst



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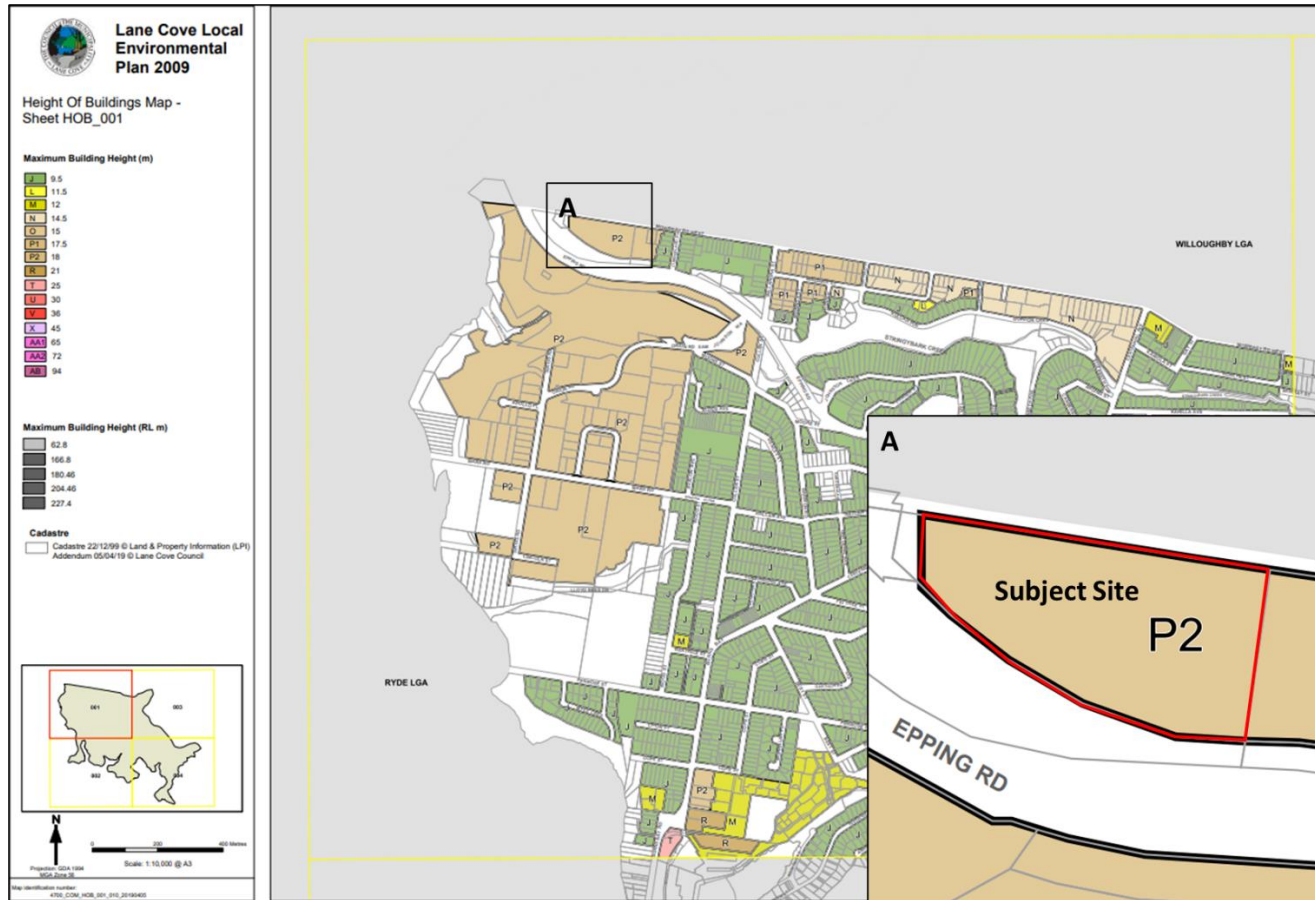
still remaining compliant with BCA Standards and fire engineering requirements, e.g. ceiling clearances and fire sprinkler systems. Accordingly, to achieve the data storage demands the building heights are necessary, for which a compliant height would not be able to achieve the data storage requirements.

The maximum building height as noted above, is prescribed by the Height of Buildings Map of the LCLEP2009 as illustrated in **Figure 1** below.

Importantly, the Site is also subject to Floor Space Ratio (FSR) of 1.5:1. The Proposal as submitted seeks an FSR of 0.64:1 which is compliant with the development standard.



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**Figure 1 Maximum Building Height of Subject Site and Surrounding Area under Lane Cove Local Environmental Plan 2009** (Source: NSW Legislation, 2022)



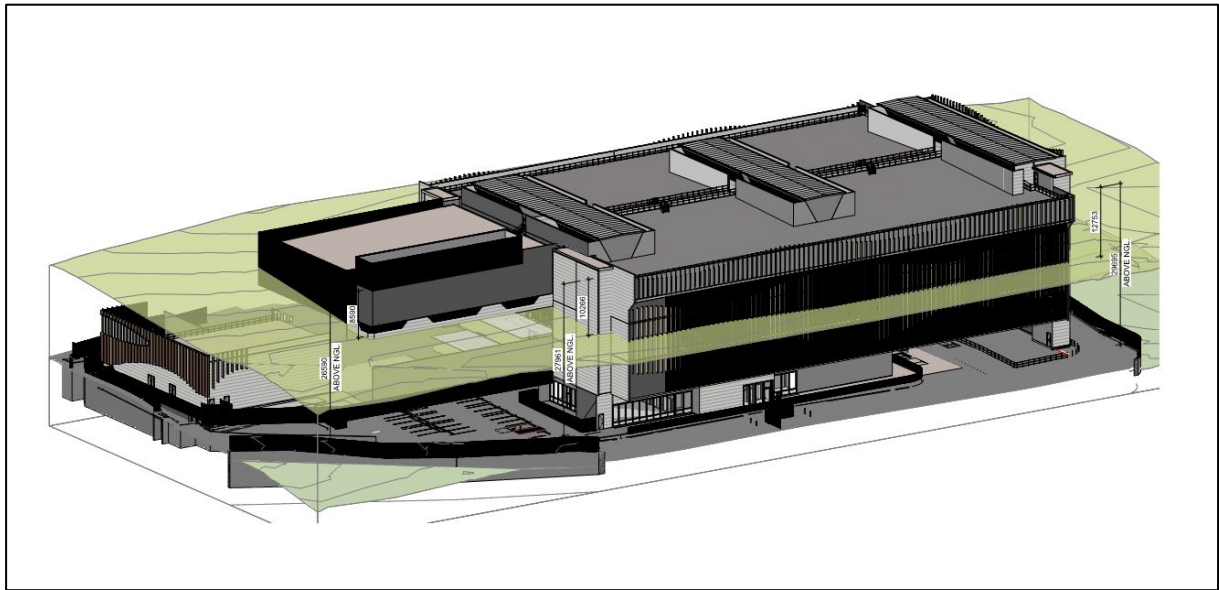
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By virtue of interpretation, the proposed building heights have been measured from the vertical distance of the ground level (existing) to the highest point (ridge height) of the proposed Data Centre building, in accordance with the definitions bestowed in both the LCLEP2009 and the Standard Instrument. The Proposed Development would result in an exceedance of the 18 m building height control under LCLEP2009 by approximately **11.695 m** (at the highest point) (or by 64.97%).

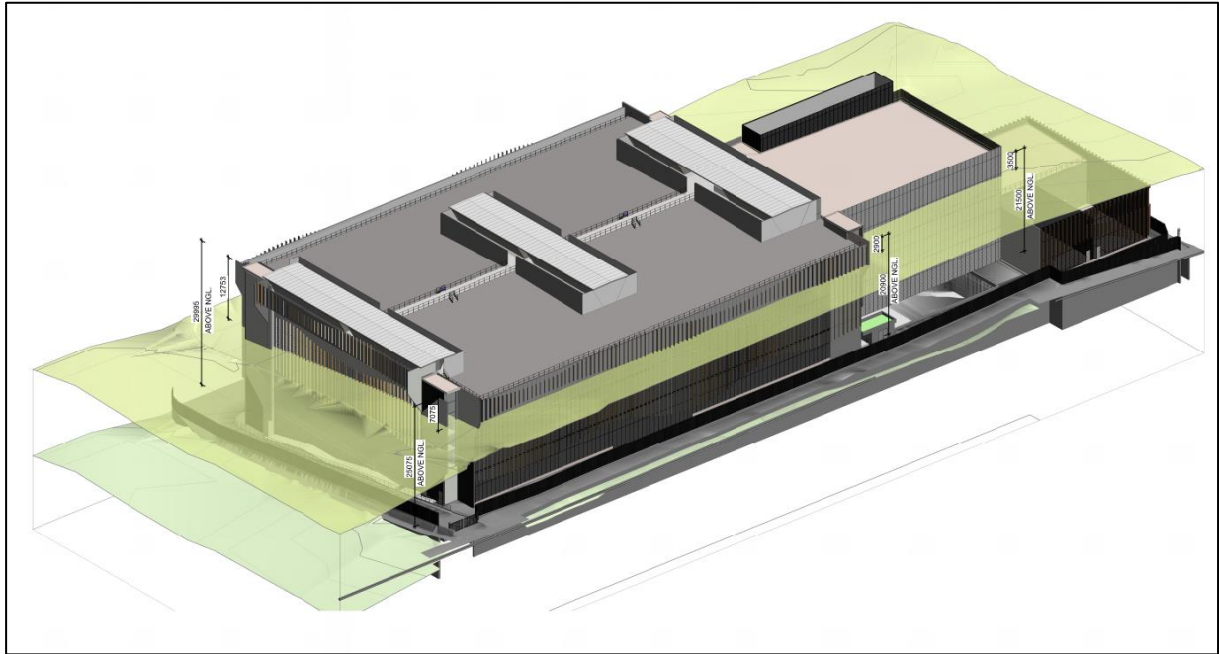
This proposed variation is shown in the Height Plane Diagram withing **Figures 2 & 3** below.

The height plane diagrams demonstrate that the Data Centre is broken down into one (1) main building, with the heights (varying from 26.59 m - 29.695 m) being positioned at the rear of the Site to ensure that potential visual impacts are further mitigated by positioning the built form as far away from the streetscape as possible. The front of the Site (varying from 20.9 m - 25.08 m) is much closer to the streetscape; however, is coupled with increased landscaping to assist in screening the bulk and scale of the Proposal.



**Figure 2 Height Plane Diagram from the Southwest Aspect** (Source: Greenbox Architecture, 2022)





**Figure 3 Height Plane Diagram from the Northeast Aspect** (Source: Greenbox Architecture, 2022)

As can be seen from **Figures 2 & 3** above, the highest points of the proposed built form are positioned at the rear of the Site. Along Mowbray Road West, the highest points will be between 20.9 m (16.11% variation) and 25.08 (39.33% variation).

### 1.2.2 Calculation of Ground Level (Existing) and Height Exceedance

The height limit has been calculated using the vertical distance between the 'lowest' point on the Site, through to the highest point on the proposed built form.

The existing topography of the Site has a steep gradient encountering a 6.5 m slope running downhill from north to south. As this is not indicative of the ground level (existing) relative to the surrounding topography, the ground level (existing) has been measured in accordance with the principles in *Bettar v City of Sydney* [2014] NSWLEC 1070. That is, using the RLs of the ground along the Site's perimeters to extrapolate across the Site to the RL on the opposite perimeter (north and south), to obtain the average of the two (2) surveyed points. This approach was similarly endorsed in *Stamford Property Services Pty Ltd v City of Sydney* [2015] NSWLEC 1189.

It is noted, the RLs of the ground level on the Site's perimeters were obtained from the survey.

The Elevations on Drawings SYD04\_A-H-0091 and SYD04\_A-H-0092, Issue 3 prepared Greenbox Architecture provides a dotted line denoting the 18 m height line relative to the ground level (refer to **Figures 4 & 5** below).



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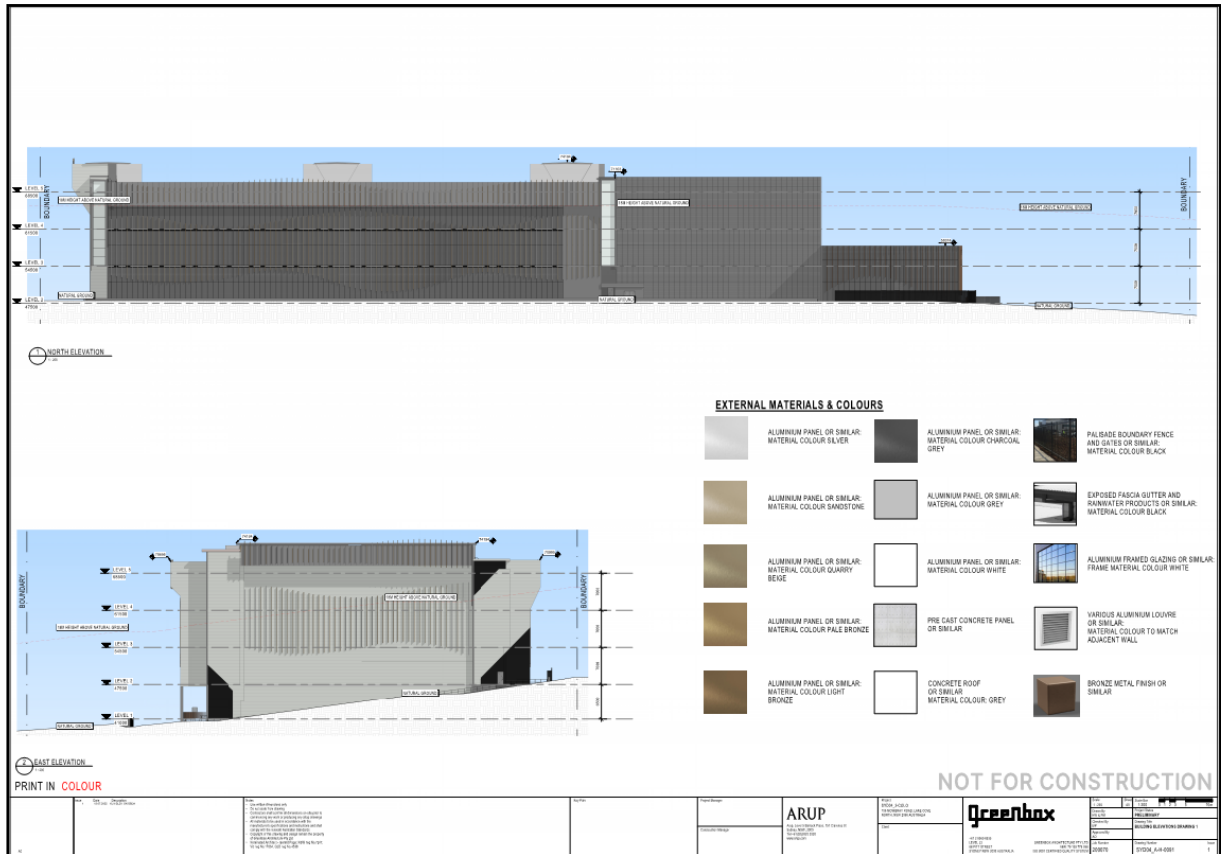
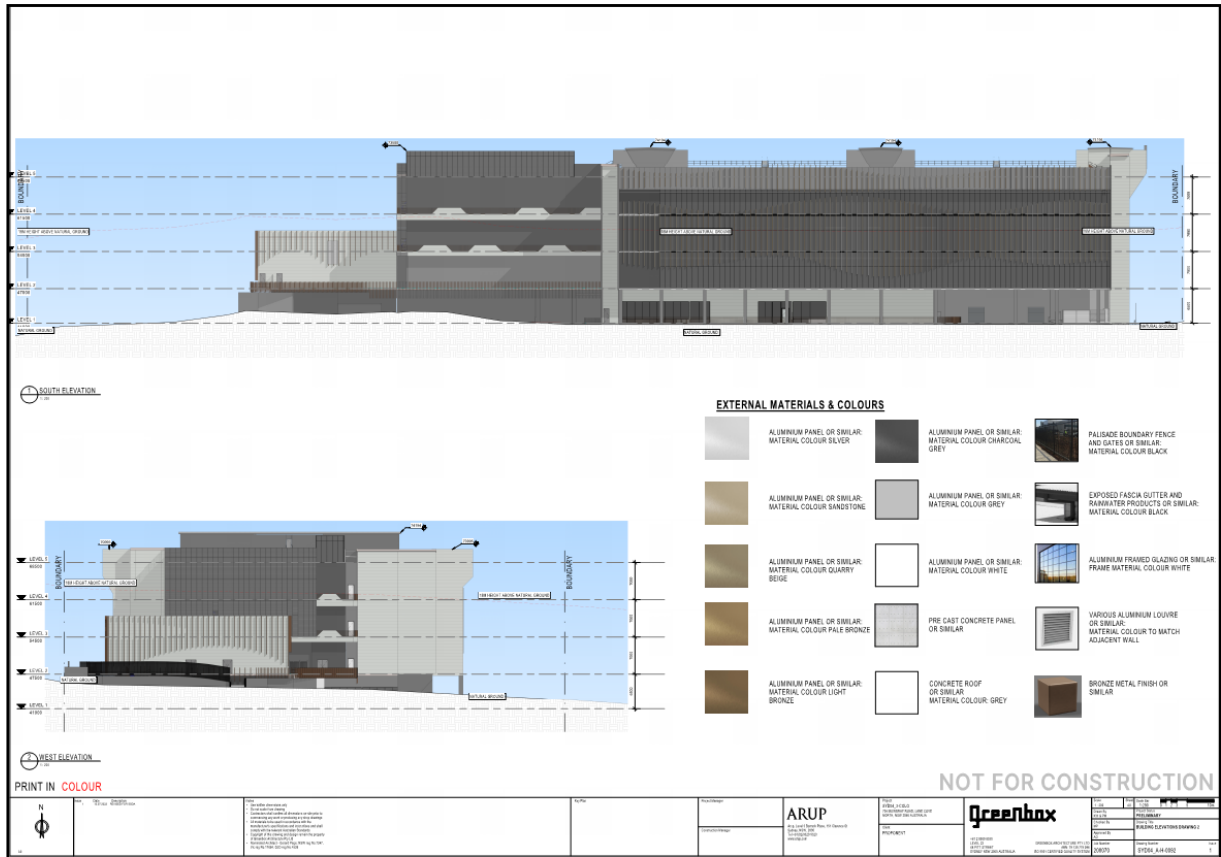


Figure 4 Proposed Northern and Eastern Elevations (Source: Greenbox Architecture, 2022)



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**Figure 5 Proposed Southern and Western Elevations (Source: Greenbox Architecture, 2022)**



## **PART B THRESHOLDS THAT MUST BE MET**

### **2.1 CLAUSE 4.6 OF LCLEP2009**

In accordance with Clause 4.6 of LCLEP2009, the NSW DPE is required to consider the following Subclauses of Clause 4.6.

Subclause 4.6(3) 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.*

In addition, Subclause 4.6(4) states that (our emphasis added):

- (4) Development consent must not be granted for development that contravenes a development standard unless—*
- (a) the consent authority is satisfied that—*
    - i. the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - ii. the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
  - (b) the concurrence of the Planning Secretary has been obtained.*

Further to the above, Subclause 4.6(5) states the following:

- (5) In deciding whether to grant concurrence, the Planning Secretary must consider—*
- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - (b) the public benefit of maintaining the development standard, and*
  - (c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

The development standards in Clause 4.3 are not “expressly excluded” from the operation of Clause 4.6.

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 addresses 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 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).

The matters are responded to in **Part D** of this Clause 4.6 Variation.

Accordingly, a successful clause 4.6 variation must satisfy three limbs explained in detail below:

#### *First Limb – cl 4.6(4)(a)(i)*

Clause 4.6(4)(a)(i) provides that the consent authority must be satisfied that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3).

These matters are twofold:



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- a. that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)); and
- b. that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). To this end the environmental planning grounds advanced in the written request must justify the contravention, not simply promote the benefits of carrying out the development as a whole: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15].

In the decision of *Rebel MH v North Sydney Council* [2019] NSWCA 130 (**Rebel**) Payne JA held (our emphasis added):

*“Although it was unnecessary finally to decide the correct construction of cl 4.6(4) in Al Maha, I agree with the construction advanced in that case by Basten JA, with whom Leeming JA agreed, at [21]-[24]. **Properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).** Clause 4.6(3) requires the consent authority to have “considered” the written request and identifies the necessary evaluative elements to be satisfied. To comply with subcl (3), the request must demonstrate that compliance with the development standard is “unreasonable or unnecessary” and that “there are sufficient environmental planning grounds to justify” the contravention. It would give no work to subcl 4.6(4) simply to require the consent authority to be satisfied that an argument addressing the matters required to be addressed under subcl (3) has been advanced.”*

Accordingly, a consent authority must be satisfied:

- a) that the clause 4.6 variation application addresses the matters in clause 4.6(3); and
- b) of those matters itself which means that there is greater scope for a consent authority to refuse a clause 4.6 variation.

The matters identified in the First Limb are addressed in **Sections 4.3** and **4.4** of this Clause 4.6 Variation Request.

### Second Limb – clause 4.6(4)(a)(ii)

Clause 4.6(4)(a)(ii) provides that the consent authority must be satisfied that the proposed development will be in the public interest because it is consistent with:

- a. the objectives of the particular development standard; and
- b. the objectives for development within the zone in which the development is proposed to be carried out.

The opinion of satisfaction under Clause 4.6(4)(a)(ii) differs from the opinion of satisfaction under Clause 4.6(4)(a)(i) (i.e. the first limb) in that the consent authority must be directly satisfied that the Proposed Development will be in the public interest because it is consistent with the objectives of the development standard and the zone, not indirectly satisfied that the applicant’s written request has adequately addressed those matters.

The matters identified in the Second Limb addressed in **Sections 4.1, 4.2** and **4.5** of this Variation Request.

### Third Limb – clause 4.6(4)(b)

Clause 4.6(4)(b) requires that concurrence of the Secretary of the NSW Department of Planning and Environment (DPE) has been obtained.

Clause 4.6(5) outlines the matters to be considered by the Planning Secretary in deciding whether to grant concurrence.



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The matters identified in the Third Limb are addressed in **Sections 4.6** and **4.7** of this Variation Request.

### Other relevant legal matters

This request has been prepared having regard to the principles established by the Court when considering the assessment of Clause 4.6 requests (including applicable principles adopted from consideration of SEPP 1 requests), contained in the following guideline judgments:

- *Wehbe v Pittwater Council [2007] NSWLEC 827*
- *Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118*
- *RebelMH Neutral Bay Pty Ltd v North Sydney Council [2019] NSWCA 130*

In summary, the principles adopted and applied in this clause 4.6 request include:

- In *Wehbe V Pittwater Council (2007) NSWLEC 827* Preston CJ held that, it can be demonstrated that the objectives of the development standard are achieved notwithstanding non-compliance with the standard, as below (emphasis added):

*“4.3 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).” *Wehbe V Pittwater Council (2007) NSWLEC 827* Preston CJ*

This variation adopts 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. The factual circumstances surrounding the existing ground level across the Site and its presentation to the Street frontages demonstrate that compliance with a height control is unreasonable in the circumstances.

- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* held (at paragraph 15) that for there to be power to grant development consent for a development that contravenes a development standard, cl 4.6(4)(a) requires that the Court, in exercising the functions of the consent authority, be satisfied that the written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) and adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)). The Court must also be satisfied that the proposed development will be consistent with the objectives of the zone and with the objectives of the standard in question, which is the measure by which the development is said to be in the public interest (cl 4.6(4)(a)(ii)).
- At paragraphs 23 and 24 in *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. Further, in order that the environmental planning grounds proffered in the written request are “sufficient”, firstly the focus should be on the aspect or element of the development that contravenes the development standard, 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.



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- *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 the Court, in exercising the functions of the consent authority, must “in fact” be satisfied of the above matters. The state of 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 cl 4.6 request. The evidence in the proceedings 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 state of satisfaction that the proposed development is consistent with the relevant objectives, and therefore in the public interest, can be reached by considering the evidence before the Court and is not limited to what is contained in the cl 4.6 request.

The underlying purpose of Clause 4.6, as stated at Clause 4.6(1)(a) is “to provide an appropriate degree of flexibility in applying certain development standards to particular development”.



**PART C DEVELOPMENT STANDARD**

**3.1 CLAUSE 4.3 (HEIGHT OF BUILDINGS) UNDER LANE COVE LOCAL ENVIRONMENTAL PLAN 2009**

The Development Standard being requested to be varied is Clause 4.3 Height of Buildings of LCLEP2009, which provides the following:

***“4.3 Height of Buildings***

- (1) *The objectives of this clause are as follows—*
  - a) *to ensure development allows for reasonable solar access to existing buildings and public areas,*
  - b) *to ensure that privacy and visual impacts of development on neighbouring properties, particularly where zones meet, are reasonable,*
  - c) *to seek alternative design solutions in order to maximise the potential sunlight for the public domain,*
  - d) *to relate development to topography.*
- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.”*

In accordance with the definitions bestowed under the LCLEP2009 and Standard Instrument:

***“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.*

***ground level (existing) means the existing level of a site at any point.”***

Clause 4.6(8) sets out circumstances in which exceptions to development standards cannot be made. Clause 4.3 relating to building heights is not expressly excluded from the operation of clause 4.6 of the LCLEP 2009 and so a Clause 4.6 request can be made and granted in relation to non-compliance with a building height.

Details of non-compliance

The LCLEP2009 map referred to in Clause 4.3 identifies the Site as being subject to a maximum building height of 18 m. Pursuant to the provisions of Clause 4.6, the Proposed Development seeks exception to the 18 m building height Development Standard prescribed by Clause 4.3.

**Table 1** outlined below considers the proposed variation sought to Clause 4.3 of LCLEP2009.

<b>Table 1: Proposed Development Standard Variation in Relation to LCLEP2009</b>			
LCLEP2009 Clause	LCLEP2009 Development Standard	Proposed Development Non-Compliance	Percentage of Variation
Clause 4.3(2) Height of Buildings	Maximum 18 m building height	The Proposal seeks development consent for a 29.695 m maximum building height (11.695 m exceedance) at the	64.97%



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		highest point of the Site.  <b>Note:</b> the maximum building height is only exceeded by this amount on the rear part of the Site; however, the front part of the Site comprises a maximum building height of 25.08 m resulting in a variation 39.33%.	
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The Site is zoned IN2 Light Industrial pursuant to the provisions of LCLEP2009, noting permissibility for the Proposed Development for the purposes of a Data Centre (for Data Storage) is achieved under *State Environmental Planning Policy (Infrastructure) 2007* (ISEPP), whereby the IN2 Light Industrial zone is identified as a Prescribed Zone. This Variation Request has been prepared in accordance with the objectives of Clause 4.3 Height of Buildings and the IN2 Light Industrial zone objectives of LCLEP2009 as required in Clause 4.6(4)(a)(ii).

This SSD Application therefore relies upon what is reasonably concluded to be the underlying objectives of the standard and the IN2 Light Industrial zone.



## **PART D PROPOSED VARIATION TO CLAUSE 4.3 HEIGHT OF BUILDINGS**

### **4.1 OBJECTIVES OF THE STANDARD**

A key determinant of the appropriateness of a Clause 4.6 Variation to a Development Standard is the Proposed Development's compliance with the underlying objectives and purpose of the Development Standard.

Therefore, while the Site is subject to a specified numerical control for building height (Clause 4.3(2)), the objectives and underlying purpose behind these Development Standards are basic issues for consideration in the development assessment process, for which require due consideration is required.

#### **4.1.1 LCLEP2009 – Clause 4.3 Height of Buildings**

Clause 4.3 of LCLEP2009 sets out specific objectives. Those objectives under LCLEP2009 are responded to as follows:

- (a) to ensure development allows for reasonable solar access to existing buildings and public areas,*

The Proposed Development is considered to satisfy this objective as follows:

#### **Reasonable solar access to existing buildings**

The Site is surrounded by a range of existing built form typologies, which are considered as follows:

##### Residential Receivers

Residential typologies are scattered throughout Lane Cove North along Mowbray Road, including its connecting road networks, particularly Fitzsimmons Avenue which affords the most direct views towards the Site. The closest properties are 26 m north of Subject Site, comprising single-storey residential dwellings along Mowbray Road West and Fitzsimmons Avenue (refer to **Figure 6** below).



**Figure 6 Proximity of Residential Dwellings in Proximity to the Subject Site (Source: Nearthmap, 2022)**



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Due to the positioning of the Site and the nature of the sun rising from the east and setting in the west, there are no adverse overshadowing or solar access impacts as a result of the Proposal (including parameters such as the additional height sought) on adjoining residential receivers to the north and northeast of the Site, as illustrated in the shadow diagrams in **Figures 7-10** below. Additionally, there would be no overshadowing with respect to the Arise Apartment Towers to the southwest of the Site, which would be shadowed on the lower levels by existing bushland adjoining the Site to the south.

Accordingly, it is considered that the solar access provided to the residential receivers is adequate and supportable in terms of remaining consistent with the objective of Clause 4.3(1)(a), as well as Section E.4, Provision C of the *Lane Cove Development Control Plan 2009* (LCDCP2009) which requires development to consider potential impacts on adjoining residential receivers.

### Commercial / Industrial Receivers

Existing commercial and industrial receivers directly adjoin the Subject Site to the east and west. The Proposed Development's built form outcomes would not compromise these land portions in terms of overshadowing or solar access (refer to **Figure 7** below).



**Figure 7 Proximity of Commercial and Industrial Receivers in Proximity to the Subject Site** (Source: Nearthmaps, 2022)

It is noted, that there would be minor overshadowing towards the western portion of the Site adjoining the existing childcare centre; however the overall operation is not considered to be compromised as there will be retention of solar access to the centre to provide sufficient amenity. The premises located at 702 Mowbray Road West, Lane Cove North would not be adversely impacted by overshadowing or solar access as a result of the Proposal (including the increase in height proposed) due to the nature and orientation of the Site. In the late afternoon there would be slight overshadowing; however, this would not impact upon the existing operations of the Site, noting the existing built form on the Subject Site given its primary industrial operation. Therefore, the additional heights proposed would not compromise solar access affording to the existing commercial and industrial land uses.

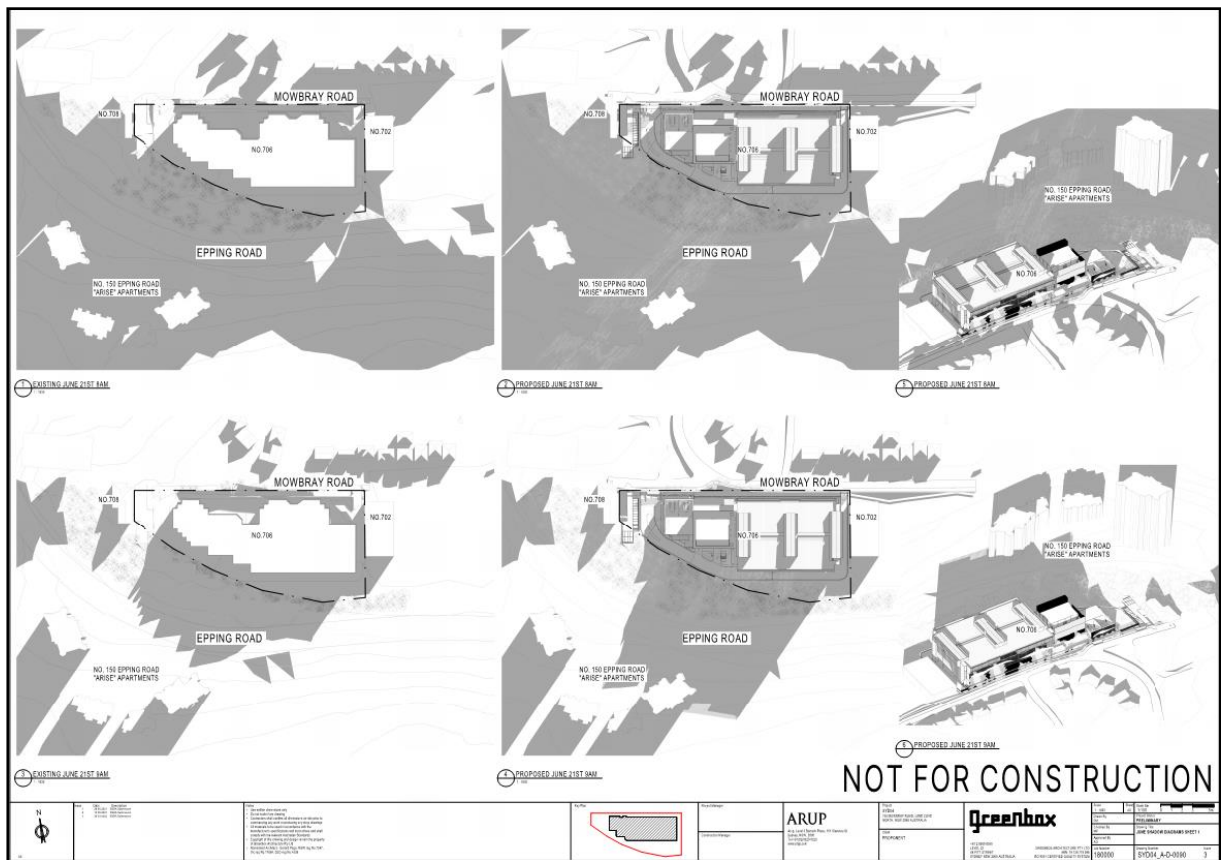
Accordingly, it is considered that the solar access provided to the commercial and industrial receivers is adequate and supportable in terms of remaining consistent with the objective of Clause 4.3(1)(a). It is noted, that the LCDCP2009 does not contain any provisional controls pertaining to overshadowing on industrial receivers.



Reasonable solar access to existing public areas

There is a small portion of RE1 Public Recreation zoned land 100 m to the west of the Site; however, the remaining visible public areas in close proximity to the Site are located along the public access path adjoining the Site's northern boundary which will be suitably landscaped as a result of the Proposal. Accordingly, there are no overshadowing or solar access impacts associated with these areas as a result of the Proposed Development.

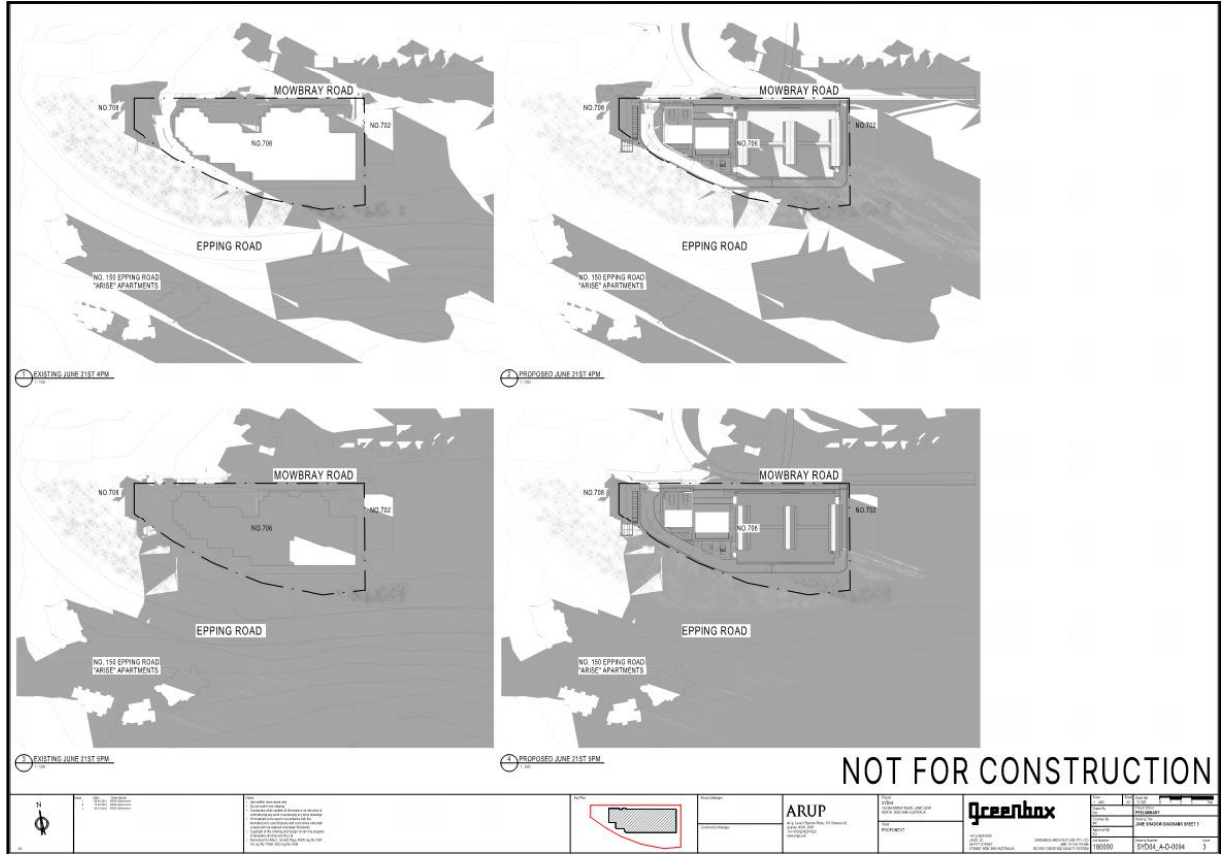
Accordingly, the urban built form outcomes proposed have factored the Proposal's potential to impact on solar access as a whole. Due to location of the Site and positioning of the sun throughout the year, there are minimal impacts imposed on adjoining buildings and public areas as clearly articulated within the solar analysis - forming part of the wider Architectural Plans prepared by Greenbox Architecture (refer to **Appendix 5** of the EIS and **Figures 8-11** below) which convey the existing building's (and surrounding building's) overshadowing impacts compared to the potential overshadowing impacts as a result of the Proposal.



**Figure 8 Solar Analysis of 21 June - 8AM-9AM of the Existing and Proposed Development (Source: Greenbox Architecture, 2022)**



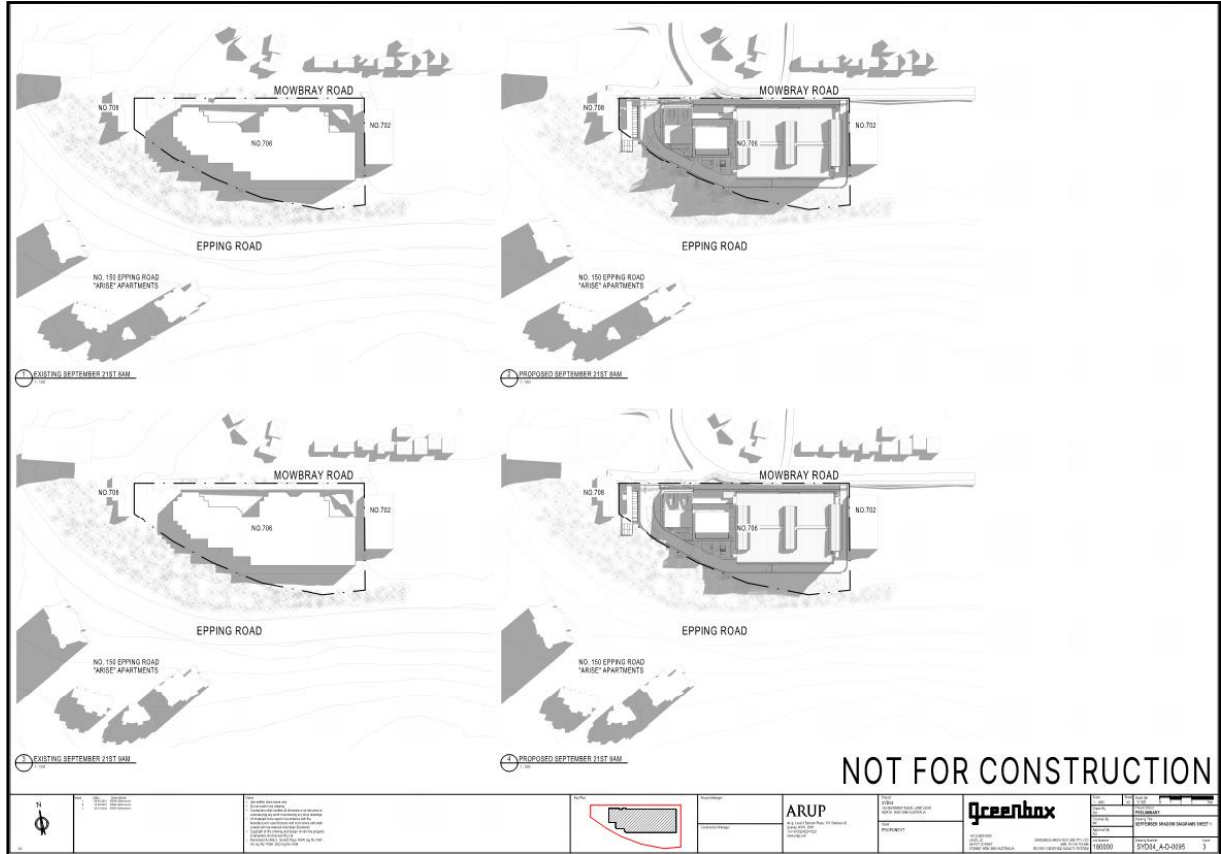
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**Figure 9 Solar Analysis of 21 June - 4PM-5PM of the Existing and Proposed Development** (Source: Greenbox Architecture, 2022)

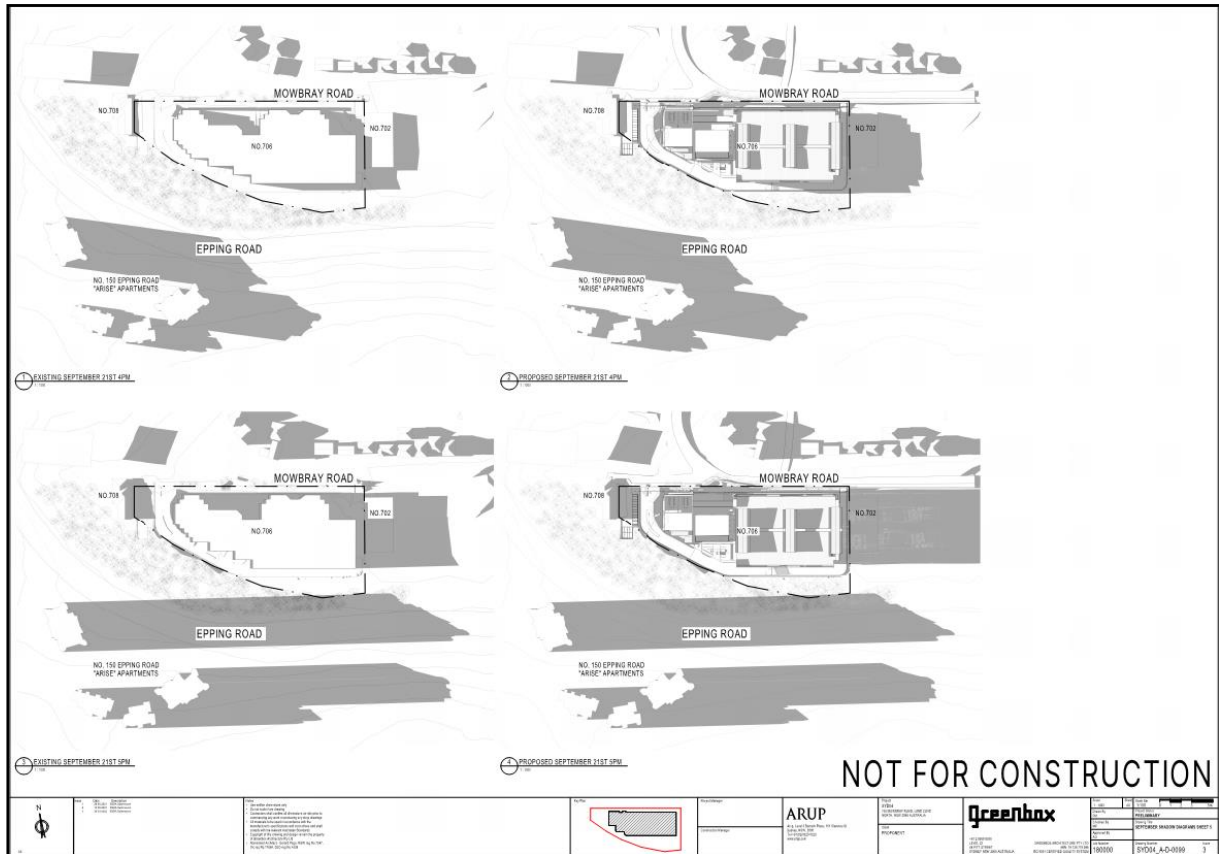


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**Figure 10 Solar Analysis of 21 September - 8AM-9AM of the Existing and Proposed Development**  
 (Source: Greenbox Architecture, 2022)





**Figure 11 Solar Analysis of 21 September - 4PM-5PM of the Existing and Proposed Development**  
 (Source: Greenbox Architecture, 2022)

Accordingly, there would be no adverse or undesirable impacts pertaining to solar access on existing buildings (particularly residential dwellings), nor would there be adverse solar impacts on the public domain areas..

- (b) to ensure that privacy and visual impacts of development on neighbouring properties, particularly where zones meet, are reasonable,

The neighboring properties adjoining and adjacent to the Site are considered as follows with respect to privacy:

Residential Receivers:

The proximity of residential receivers in relation to the Subject Site is clearly articulated in **Figure 6** above. It is important to note, that existing privacy and visual amenity of adjoining residential receivers would not be compromised as a result of the Proposal (including the additional height beyond the maximum permitted building height) as a data centre is not utilised for habitable purposes (i.e. residential living).

Importantly the built form above the maximum building height would comprise generally of data halls with limited to nil openings due to the data centre’s own safety and security requirements pertaining to overarching future site operations. This is clearly articulated within the Northern Elevation of the Subject Site (refer to **Figure 2** above), whereby residential receivers afford views towards the Site.

Accordingly, there is considered to be minimal opportunity for overlooking onto the Subject Site; therefore, the height breach is considered to be acceptable in accordance with Clause 4.3(1)(b) pertaining to residential receivers.



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### Commercial / Industrial Receivers:

As noted above, the Subject Site directly adjoins existing commercial and industrial receivers towards the western portion of the Site noted as the existing childcare centre and premise located at 702 Mowbray Road West, Lane Cove North towards the east, both of which would not be adversely impacted by privacy and visual amenity impacts as a result of the Proposal (including the increase in height proposed) as a data centre is not utilised for habitable purposes.

As illustrated in **Figure 7** above, the adjoining commercial and industrial receivers would be afforded a complementary architectural design that mitigates any potential visual impacts by virtue of a contemporary and conducive built form outcome that goes above and beyond the traditional built form outcomes of industrial development.

Accordingly, there is considered to be minimal opportunity for overlooking onto adjoining sites from the Subject Site; therefore, the height breach is considered to be acceptable in accordance with Clause 4.3(1)(b) pertaining to commercial / industrial receivers.

### Public Open Space:

For the reasons outlined above, it is noted, that public open space areas would not be compromised as a result of the Proposed Development due to increased landscaping provision planned along the landscape setbacks of the Site that will enhance the deep soil planting scenario encountered along the northern boundary of the Site for passersby. Therefore, the height breach is considered to be acceptable in accordance with Clause 4.3(1)(b) pertaining to public open space.

- (c) *to seek alternative design solutions in order to maximise the potential sunlight for the public domain,*

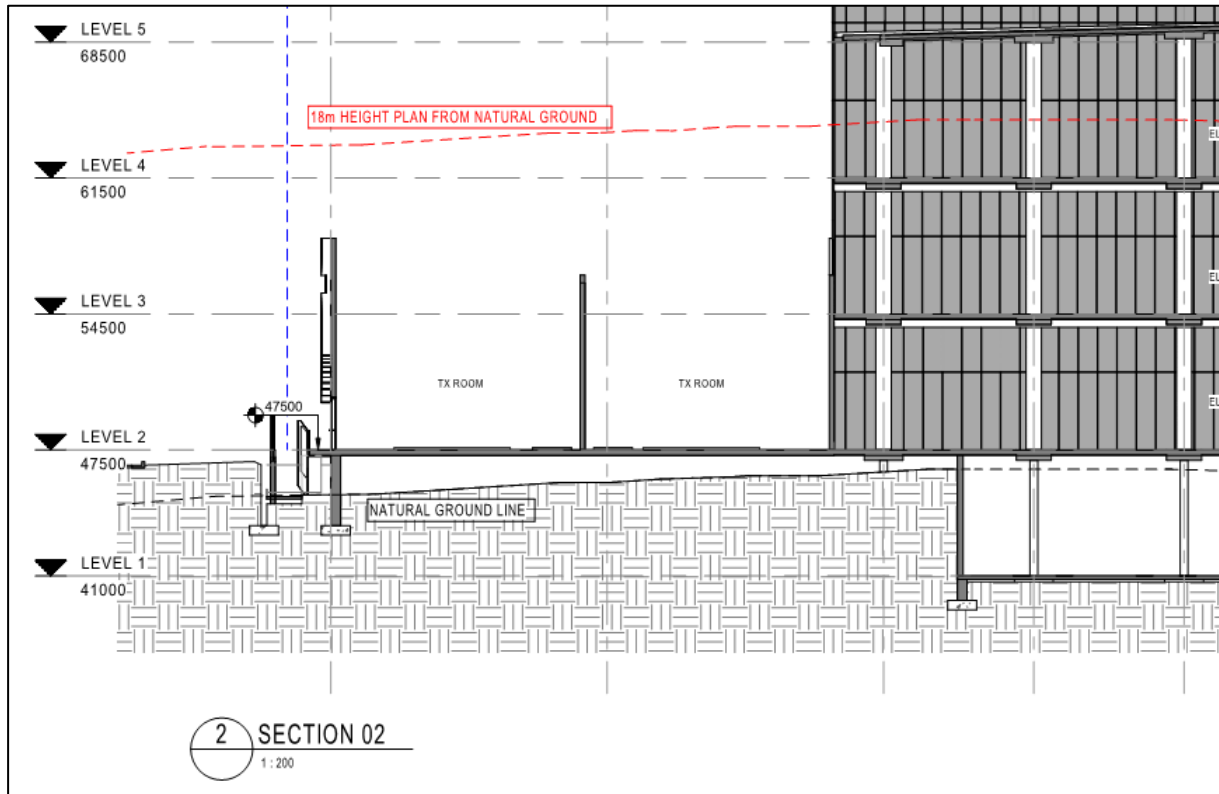
The Sites public domain aspects traverse the northern boundary of the Site along Mowbray Road West in an east to west trajectory. It is noted, that the built form proposed, including the additional height would not compromise the public domain features, or adjoining sites. Rather, through increased landscaping provision the public domain would be revitalised improving the overall aesthetic and wellbeing of this portion of Mowbray Road West, by including deep-soil landscaping to balance the vibrancy intended for the Site by virtue of trees, shrubs and plant species. This would act as a natural screening mechanism for any unwarranted views held towards the Site from eye level. Accordingly, the public domain features of the Site will take advantage of sunlight throughout the daytime, which proposed landscaping will be able to reach full maturity over a 15-year period which is considered acceptable.

In accordance with the objective, it is not considered that there are any such unwarranted impacts on the public domain as a result of the Proposal (including the height breach).. Therefore, a compliant height scheme compared to that of a non-compliant height scheme would have no such material impact on the public domain features of the Site and surrounding sites. It is considered that the proposed height would not undermine the intent of Clause 4.3(1)(c).

- (d) *to relate development to topography.*

The overall scale of the Proposed Development seeks to provide a transition from the existing industrial developments along the eastern and western interfaces comprising developments of similar nature, in terms of built form typology and scale. Additionally, the topography of the Subject Site is on a gradual slope, for which the Proposed Development's architectural design responds appropriately to, by factoring in the steep gradient of the Site which slopes by 6.5 m from the northern boundary to the southern boundary (refer section extract in **Figure 12** below).





**Figure 12 Extract of Section 02 (Drawing SYD04\_A-I-0091)** (Source: Greenbox Architecture, 2022)

Detailed geotechnical investigations and combined civil engineering analysis confirms the topography of the Site can be made suitable for the Proposed Development. The levels and balance of cut and fill (approximately 31,000 m<sup>3</sup> of net cut volume) across the Site have been designed and proposed to respond to the Subject Site and adjoining sites, so as to not exhibit any adverse visual impacts on nearby receiver locations. The earthworks volumes and geotechnical constraints on-site require precise levels to ensure that the proposed data halls can operate at their optimum operational efficiencies; therefore, the Site cannot be tiered to accommodate the future data centre.

The Proposed Development (specifically the post-development scenario) has considered flooding requirements including the 1%, 2%, 5% and PMF Flood Extents and responds appropriately to current and proposed site conditions; thereby, improving the Site's topography by deviating stormwater effectively throughout the Site as part of the overall stormwater management strategy prior to discharge.

Additionally, due to the slope of the Site from the northern boundary to the southern boundary, the geotechnical profile and proposed earthworks have been limited to the degree proposed due to the existing infrastructure constraint pertaining to the Lane Cove Tunnel. The Proposal includes provision for diesel fuel storage, which from a safety perspective has been proposed internally to the data centre building, further ameliorating risks to nearby receivers, resulting in the increased heights applied to the Site. Should further depths of excavation be proposed there would be a high probability risk of impacting the Lane Cove Tunnel asset whereby extensive consultation with Transurban has included analysis of as-built drawings to inform the proposed design.

Therefore, the Proposal, including the additional height, is considered suitable for the site's topography thereby satisfying Clause 4.3(1)(d).



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### 4.2 OBJECTIVES OF THE ZONE

The Subject Site is zoned IN2 Light Industrial under LCLEP2009, which the Proposed Development (Data Centre) achieves permissibility within the IN2 Light Industrial zone pursuant to Part 3, Division 3 of *State Environmental Planning Policy (Infrastructure) 2007* (ISEPP) identified as a Prescribed Zone. Accordingly, the Proposed Development is considered consistent with the IN2 Light Industrial zone objectives as follows:

- *To provide a wide range of light industrial, warehouse and related land uses.*

The Proposed Development provides a Data Centre that is wholly permissible with consent and contributes to the variety of land uses provided in the locality. It is therefore consent with this zone objective.

- *To encourage employment opportunities and support the viability of centres.*

The Proposed Development would facilitate and support the future construction and operation of an employment-generating development; thereby, allowing the Site to meet the strategic land use objectives of the IN2 Light Industrial zone within the Lane Cove LGA.

It is estimated that the Data Centre would employ 56 full time staff and generate up to 150 jobs during the construction stage.

It is important to note, that if the maximum building height proposed is not able to be achieved, an alternate site would have to be chosen; thereby, forgoing new employment opportunities on the Site. Additionally, the contravention in height is also design driven which is an emerging trend in industrial-related and data centre developments that require increased building heights to ultimately improve the operational efficiencies of the end user involved. The height is considered to consistent with the heights currently being explored by the NSW DPE pertaining to Data Centre heights able to be achieved under Complying Development (anticipated to be up to and including 45 m under future policy).

The maximum building height established on sites across NSW and the wider Sydney Metropolitan Area are considered to be a major factor driving employment lands. Should these heights not be able to achieved, not only will the specific LGA suffer, tenants will begin sourcing employment lands in other more affordable states, thereby compromising and sterilising development and built form potential, which would be considered State-of-the-Art and in line with market demand and operational needs and requirements.

- *To minimise any adverse effect of industry on other land uses.*

The Proposed Development is positioned on land that is designated for industrial purposes, and thus would ensure that support is met for the desired outlay, as well as the wider locality. Consideration has also been given to surrounding land uses, for which the Proposed Development is further complemented by existing industrial developments along the eastern and western boundaries. Additionally, the northern and western boundaries are densely vegetated. Therefore, there are no such impacts anticipated on the existing surrounding land uses. Notwithstanding, future built form is expected to incorporate and implement any mitigation measures proposed under the subject SSD Application, as well as any project-specific measures required to be implemented to minimise any adverse impacts from occurring on nearby residential (R2 Low Density Residential) and environmental receivers (C2 Environmental Conservation).

The Subject Site is located within the Lane Cove LGA, forming part of an extension to the closely and indirectly linked (separated by Epping Road) to Lane Cove West Business Park, which comprises predominantly IN2 Light Industrial (and pockets of C2 Environmental Conservation) zoned land. Accordingly, the Site context may be described as part of an employment-generating industrial 'precinct' as such, which the proposed Data Centre would positively contribute to. Given the existing industrial character of the Site's surrounds, no such land use conflict is expected to occur.



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There are a range of land uses which surround the Site, all of which have been given due consideration in the design of the Proposed Development. Of particular relevance, the following land uses are noted within the vicinity of the Site:

- **East & West** - To the east and west there are a range of other industrial land uses comprising warehouse and distribution centres, which gives rise to future industrial-related development that would complement the employment-generating nature of the Proposal. There is also an existing childcare centre to the west of the Site; however, appropriate acoustical and landscaping provision and mitigation measures will be implemented to appropriately screen this Site.
- **North** - North of the Subject Site comprises existing residential land uses (positioned within the Willoughby LGA), whereby the Site will be appropriately screened and mitigated to prevent any adverse impacts occurring on nearby receiver locations.
- **South** - south of the Site is land zoned C2 Environmental Conservation which the Proposal intends to adopt and implement the recommendations from both the BDAR and Bushfire Impact Assessment to protect and preserve this bushland. Further south includes the Lane Cove West Industrial Precinct, for which the Subject Site and surrounding industrial sites (east and west) represent an extension of, providing for further employment-generating land uses to a locality surrounded by existing residents.

In accordance with the zone objective, the Proposal has considered all potential environmental and amenity impacts (including visual amenity, traffic generation, noise and air quality) whereby nearby receivers have the potential to be impacted. Based on the four (4) aspects outlined above. These parameters are considered with respect to industry and other land uses below:

### Visual Amenity:

Throughout the LVIA, Habit8 note that the Proposed Development will result in a change of view for many residential properties along Mowbray Road West and for some residential apartments in the 'Arise' residential tower on Epping Road. Additionally, road user's, pedestrians and cyclists have been identified as being impacted at a low visual sensitivity; however, the overall visual sensitivity incurred would be very high.

Notwithstanding the potential visual impacts, views from residential dwellings located across Mowbray Road West will be mitigated with a large turf verge creating distance from the development and landscape setback in which tall native canopy trees, screening shrubs and groundcovers are planted. Following maturity, these planted buffers will provide a dense screen to help soften and screen the Proposal.

Habit8 note, that the Proposed Development includes provision for substantial landscape planting to offset the visual impact in the form of an 8 m setback which includes dense tree and shrub planting. This planting strategy will be most effect after 10 years with respect to the visual receptors encompassing direct views toward the Site. Despite potential visual impacts for these receiver locations, the Proposed Development will be significantly screened at ground level assisting in further screen protection via means of increased landscaping. For context, the existing views include minimal landscaping and a significant expanse of built form emitted by the existing industrial building on the Site and surrounding industrial development, for which the Proposal will look to enhance the streetscape character of the Site.

Within the Visual Impact Assessment, Habit8 have prepared a series of images whereby the existing baseline snapshot is juxtaposed alongside the development in accordance with a photomontage set 15 years from the construction of the development (refer to **Figures 13-19** below). Note, the Figures provided below are those whereby potential visual impacts can occur on nearby residents.





**Existing Baseline**



**Photomontage-15 years**

**Figure 13 Viewpoint B Photomontage of the Proposed Development** (Source: Habit8, 2022)

Viewpoint B:

Viewpoint B comprises a viewpoint location from the Arise Apartment Block – West – looking east towards the Site. As can be seen from **Figure 13** above, the Proposed Development would be heavily concealed by the existing bushland to the south of the Site, with only the upper half of the building being visible. The viewpoint is taken from a building much taller and visually dominant than the Proposed Development. It is noted, the lower levels of the apartment block will experience high visual



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sensitivity views of the Proposal, whilst the significance of impact on the upper levels would be considered to be major.



**Existing Baseline**



**Photomontage – 15 years**

**Figure 14 Viewpoint C Photomontage of the Proposed Development** (Source: Habit8, 2022)

Viewpoint C:

Viewpoint C comprises a viewpoint location from the Arise Apartment Block – East – looking north towards the Site. As can be seen from **Figure 14** above, the Proposed Development would be heavily concealed by the existing bushland to the south of the Site, with only the upper half of the building being visible. Similar to viewpoint B, the viewpoint is taken from a building much taller and visually dominant than the Proposed Development. It is noted, the lower levels of the apartment block will experience a high visual sensitivity of views of the Proposal, whilst the significance of impact on the upper levels would be considered to be major.





**Existing Baseline**



**Photomontage – 15 years**

**Figure 15 Viewpoint F Photomontage of the Proposed Development** (Source: Habit8, 2022)

Viewpoint F:

Viewpoint F comprises a viewpoint location from the Possums Corner Childcare drop-off point, viewing the Site from the southeast (refer to **Figure 15** above). The topography in this location allows for some of the Proposal to be sunken below street level. The proposed setbacks are densely vegetated with feature trees and colourful planting and provide screening to the data centre building. It is noted, that the proposed Data Centre will be prominent in view with no overshadowing or overlooking. The significance of the Proposal in terms of potential visual impacts is considered to be major.





**Existing Baseline**



**Photomontage-15 Years**

**Figure 16 Viewpoint G Photomontage of the Proposed Development** (Source: Habit8, 2022)

Viewpoint G:

Viewpoint G comprises a viewpoint location from the western corner of Mowbray Road West (refer to **Figure 16** above). Passersby comprising motorists, cyclists and pedestrians are considered to have a low visual sensitivity and a very high magnitude of change, resulting in an overall visual impact pertaining to a moderate significance.





**Existing Baseline**



**Photomontage- 15 years**

**Figure 17 Viewpoint H Photomontage of the Proposed Development** (Source: Habit8, 2022)

Viewpoint H:

Viewpoint H comprises a viewpoint location from Fitzsimmons Avenue looking back towards the Subject Site (refer to **Figure 17** above). Habit8 note that the built form will protrude into the skyline; however, the dense screen tree planting proposed, coupled with the finished floor levels will assist in mitigating the impact of the Proposed on the surrounding landscape for those at street or ground level. This viewpoint has been assigned a visual sensitivity of medium and a magnitude change of high, for which the overall significance of viewpoint H is noted as moderate.





**Existing Baseline**



**Photomontage- 15 years**

**Figure 18 Viewpoint J Photomontage of the Proposed Development** (Source: Habit8, 2022)

Viewpoint J:

Viewpoint J comprises a viewpoint location from the corner of Hinkler Crescent and Mowbray Road (refer to **Figure 18** above). It is noted, that the existing building can be seen from this location. The Proposal would be prominent from this viewpoint; however, the proposed landscaping will mitigate views from eye level. Furthermore, existing light industrial buildings within the foreground would detract attention from the proposed data centre from this location. Due to the distance from this viewpoint, it is considered to have a low visual sensitivity, as well as a very high magnitude, resulting in a moderate significance of potential visual impact.





**Figure 19 Viewpoint M Photomontage of the Proposed Development** (Source: Habit8, 2022)

Viewpoint M:

Viewpoint M comprises a viewpoint location from 160 Orion Road, Lane Cove West, looking north towards the Subject Site across Stringybark Creek, whereby the Proposed Development will penetrate above the horizon line and dominate regional views (refer to **Figure 19** above). The existing bushland will add a visual buffer to mitigate some of the façade; however, it is categorised as having a very high visual sensitivity due to the building protruding above the horizon line, as well as a very high magnitude of change, resulting in a substantial significance of potential visual impact.



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Habit8 note, that the value of the Site itself has been assessed based on the character and context in which it is located. Habit8 conclude that the significance of the impact upon the landscape at the Subject Site as a result of the Proposal is 'moderate-high', which is in part due to the existing character surrounding the Site being heavily influenced by industrial development (east and west); and, in part due to the bushland context in which it sits.

In terms of the Site's perception from the public domain, Mowbray Road West is the main vantage point which affords direct views of the Site. Vehicles passing the Site would afford a direct view of the proposed Data Centre; however, this is consistent for vehicles passing along key infrastructure routes (Epping Road) along the regional road network which bypasses through the area. It is therefore noted, with significant emphasis, that the design of the Proposed Development responds suitably to the surrounding context. Proposed materials, design innovation, architectural articulation and deep soil landscaping, remodels the visual amenity of the Site. The proposed architectural design treatment and landscaping approach would further reduce any conflicts with adjoining landowners and limit any visual obtrusiveness occurring with regard to passers-by.

### Traffic:

Due to the low traffic generation of the Site, the increased heights will not result in additional parking or traffic flows anticipated on the wider local and regional road networks, as clearly articulated within the Traffic Impact Assessment prepared by ARUP (refer to **Appendix 11** of the EIS). Rather, the Traffic Impact Assessment confirms that the Proposal would have a net reduction in overall traffic generation on-site compared to that of the existing development. Accordingly, the traffic generation as a result of the Proposal would not cause any adverse impacts upon the adjoining industrial / commercial receivers, nor will it cause any adverse impacts to the adjoining residential receivers in close proximity to the Site. This would be the case should a compliant scheme have been proposed.

### Noise:

Noise impacts would be managed accordingly throughout both the construction and operational phases of development, by virtue of implementing a series of recommendations and mitigation measures in order to comply with the industry, commercial and residential noise emission criteria as a result of the Proposal. Feasible and reasonable mitigation measures have been proposed, including the installation of acoustic screening on Level 4 of the Roof Level of the building, to ensure any worst-case scenario noise impacts can be appropriately mitigated in accordance with complying with the *Noise Policy for Industry* noise criteria established by the NSW Environment Protection Authority (EPA). All potential noise impacts on adjoining receivers are carefully analysed and considered within the qualitative and quantitative Noise and Vibration Impact Assessment (NVIA) prepared by ARUP (refer to **Appendix 16** of the EIS).

### Air Quality

Potential air quality impacts are expected to comply with the relevant air quality emission criteria established by the NSW EPA, which the qualitative and quantitative Air Quality Impact Assessment (AQIA) considers the potential impacts on adjoining receivers by measurable emissions pertaining to nitrogen dioxide, particulate matter (PM<sub>10</sub> and PM<sub>2.5</sub>) and a combination of 'other pullatants'. The AQIA finds that as a result of the Proposal (including the increase in height), that there would be no adverse air quality impacts on adjoining receivers, which includes worst-case operational scenarios including the emergency maintenance routines regarding generator testing.

- *To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.*

Whilst the IN2 Light Industrial zone allows for a range of non-industrial land uses, the Proposed Development has been designed for the purposes of being consistent with existing industrial-related development, comprising warehousing, freight logistics and industrial-related typologies, for which the proposed Data Centre would complement the existing built form and any future built form surrounding the Site.



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The Proposal itself will not provide direct facilities or services to meet the day to day to day needs of workers in the area as it will be a highly secure operation with controlled access, used wholly for data storage. Notwithstanding, the Proposal would not preclude other nearby land uses from successfully continuing to operate given the separation distances proposed and the relevant design measures and mitigation measures proposed to be implemented. The Proposed Development would provide employment-generating opportunities to the immediate community, as well as the wider locality contribution to overall employment targets.

- *To support and protect industrial land for industrial uses.*

The Proposal supports industrial land for industrial uses for the following key reasons:

1. Provides a land use that is consistent with the IN2 Light Industrial zone objectives and is wholly permissible as a Prescribed Zone pursuant to the provisions of Part 2.3, Division 3, Clause 2.31 of *State Environmental Planning Policy (Transport and Infrastructure) 2021* (Transport and Infrastructure SEPP), which is a state led planning direction to ensure such operations can exist in industrial and commercial zones due to their low impact nature.
2. Provides for a built form outcome that sets a new and desirable precedent that will inform the desired character of the industrial land, including the built form typologies intended for data centres, by virtue of a state-of-the-art design.
3. Is a long-term multi-generational land use that will ensure the Site is only ever used for such purposes, further justifying the breach in height to provide data storage provision both now and into the future.
4. Reinforces the industrial character of the Site, thereby it does not encourage rezoning or the like.

The Proposal protects industrial land for industrial uses for the following key reasons:

1. Provides for a form of development that will mitigate impacts in terms of traffic, noise, air quality, solar access and ensures a high-quality architectural and landscaped design:
  - Traffic: traffic generation as a result of the Proposal will result in a net reduction across the Site compared to that of the existing development;
  - Noise: acoustic impacts could be mitigated on-site (including emergency maintenance testing scenarios) by virtue of the mitigation measures proposed to be implemented within the Noise and Vibration Impact Assessment (refer to **Appendix 16** of the EIS), including complete compliance with the *Noise Policy for Industry* (NPI) document;
  - Air Quality: the Proposal will comply with all NSW EPA air emission guidelines as a result of the Proposal for which the increased height will not result in increased air emission dispersion to occur with respect to nitrogen dioxide, particulate matter and other pollutants as assessed within the Air Quality Impact Assessment (refer to **Appendix 15** of the EIS);
  - Architecture: the architectural design intends to achieve a harmonious synergy of various elements, amalgamated to reinvent and reenergize the design of data centres. A simple, yet effective mix of gradient colour change from the ground floor to roof (via a horizontal pattern) broken up with vertical sections provides a unique character to the building, which is aimed to improve the aesthetic of the Site and the surrounding area.
2. Thus, this ensures that surrounding industrial land will not be precluded from operating, including provision to provide additional car parking spaces to the northwestern portion of the Site which will serve to benefit the existing childcare centre, as well as not by any means compromising the existing industrial development towards the east of the Site at 702 Mowbray Road West, Lane Cove North.



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3. Provides a landscape strategy that enhances the amenity and ensures that it is highly desirable as viewed from surrounding properties and the public domain
  - *To ensure that landscaping is a significant element in development viewed from the public domain and neighbouring properties.*

A carefully selected landscape setting has been chosen for the Site, comprising a mix of native and endemic plant species, shrubs, trees and grasses which will help to improve the aesthetic for workers and visitors, as well as exhibit an appropriate landscaping treatment for motorists traversing Mowbray Road West. Additionally, it will significantly reduce the potential visual amenity impacts experienced by nearby residential typologies to the north of the Site. Landscaping will aid the Proposed Development by virtue of screening that will ultimately improve the visual amenity of the Site and reducing the overall potential impacts of the Urban Heat Island Effect within the immediate microclimate of the Subject Site.

The Proposed Development would utilise an underperforming site, zoned for such permissible industrial development. The Proposed Development includes 17.46% of the Site as a landscaped area. Accordingly, 3,068.73 m<sup>2</sup> of landscaping has been proposed for the Site. Upon maturity (10-15 years), canopy trees (20 m) and screening trees (8-10 m) will satisfactorily screen and protect the amenity of the streetscape as demonstrated within the Landscape Plans prepared by Habit8 (refer to **Appendix 7**).

The landscaping strategy for the Site is considered to be consistent with the Government Architect NSW (GANSW) *Greener Places* principles; Council's plant and tree species list; and the considers the future operational requirements of the Site, through careful spaces consideration that achieve all safety and security concerns. The indicative species schedule is noted within the Landscape Plans (refer to **Appendix 7**) on Drawings SYD04\_L-C-0001 & SYD04\_L-C-0002.

- *To recognise the close proximity of this zone to adjoining residential areas and seek to mitigate potential conflict between industrial and residential uses.*

The Proposed Development would support the viability of an existing industrial area. As described above, the provision of the proposed Data Centre proposed on the Subject Site would positively contribute to the desired industrial character of the Site.

The Landscape and Visual Impact Assessment prepared by Habit8 (2022) confirms that the Proposed Development will create visual impacts pertaining to an overall significance for receptors in close proximity to the Site as very high. Notwithstanding, the Site will be appropriately landscaped to mitigate any potential visual amenity impacts on residents in close proximity to the Subject Site (refer to **Appendix 8** of the EIS).

Through generous landscaping and peripheral amenities to help activate the Site, the Proposed Development can achieve a suitable fit within the existing public realm, with positive economic, social and environmental benefits for the wider community. Accordingly, in order to facilitate a high quality resolution of the building envelope and to enable the best outcome for transitional relationships with the adjoining sites, the Proposed Development comprises a legible and efficient floor plan with façade articulation, as well as material and colour selections to complement the aesthetic, that is not considered to be visually adverse or obtrusive.

As mentioned above, the Site would be complemented via an aesthetically pleasing architectural landscape design with regard to the Proposed Development, which would contribute to enhancing the vegetated character of the Site and reinforce the character and importance of the bushland and residential receivers adjoining the Site.

The Proposed Development, with respect to future built form can be progressed without significant visual or overshadowing impacts to surrounding sensitive land uses as confirmed earlier in this Clause 4.6 variation. The future built form proposed under this SSD Application would be designed so as to have a suitable façade interfacing and appropriate colours as noted above, so as to achieve a suitable level of urban design.



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Overall, it is considered that the Proposed Development would not unduly detract from the amenity of surrounding land users in an unsightly or unpleasant manner. Coupled with a conducive and aesthetically pleasing architectural and landscaped design; and implementation of recommended mitigation measures, the Proposed Development would allow for future built form to achieve a modernised, contemporary industrial built form development within an industrial zone that would set a desirable precedent for future industrial developments (particularly Data Centres) within the wider locality and Sydney Metropolitan Region, whilst not impacting on the amenity and functionality of residential land uses within close proximity to the Subject Site.

### 4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that those types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis is of assistance to variations made under clause 4.6.

The five methods outlined in *Wehbe* include:

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).*
- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).*
- *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).*
- *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 (Fourth Method).*
- *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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Method).*

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary, is the First Method (refer to **Section 4.3.1** below).

#### 4.3.1 Height of Buildings

When considering whether a Development Standard is appropriate and / or necessary, one must take into account the nature of the proposed variation; the Site context; and the design of the Proposed Development.

Compliance with the Development Standard would be unreasonable and unnecessary as it would provide for a building that is unable to fulfil the objectives of the zone and provide optimal operational capacity within an area that is highly suitable for data centre operations. A compliant scheme in this respect would require greater site coverage at ground level, causing building setbacks to be reduced substantially and landscaped outcomes compromised.

Following the decision in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, it can be noted that Clause 4.6 does not require that a proposed development which relies on a variation to a development standard must have a better (or neutral) environment planning outcome than one which is compliant with the standard.



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By providing a building at the height proposed, a site layout is achieved that enables: plant and equipment to be located away from public view that can be screened; landscaping throughout the site that integrates and reduces the visual presence of the ground plane; car parking and access/agrees provision which improve the road safety outcomes; and provides opportunity for architectural treatment at the upper levels that will contribute to set a desirable precedent for future development in the locality. Overall, the building height also mitigates encroachment on the C2 land at the rear and ensures suitable separation from existing bushland.

The standard is unreasonable and unnecessary in the circumstances of the case on the following basis:

- It is noted, that the density and scale of the future built form proposed would remain generally consistent with the built form typologies in terms of footprint pertaining to existing industrial buildings surrounding the Site and the built form and scale of Data Centres emerging through the immediate locality and nearby throughout Macquarie Park; Additionally, the Proposed Development has accounted for activating an aesthetically pleasing street frontage along Mowbray Road West to create a vibrant and welcoming landscape setting.
- It is important to note, that the Proposal's density is relatively minor, noting the Floor Space Ratio (FSR) proposed comprises only 0.64:1 on a site able to achieve an FSR of 1.5:1. The additional height of the proposed development is therefore not due to a desire to increase FSR. Rather, it represents the best outcome for the site and the streetscape, improves traffic flows and distributes GFA to the most suitable areas of the Site, as well as providing a compliant provision of landscaping across the Site.
- The heights proposed are considered to be representative of market needs and demands for modernised Data Centre facilities, for which increased heights are required to be able to meet the operational needs and requirements of the end users involved, which assists in improving operational efficiencies and reducing the amount of building footprint required for developments.
- Importantly, the floor-to-floor heights required for Data Centre's are extremely precise, for which the storey's proposed are reflective of the internal heights required to establish the future internal layouts, whilst still remaining compliant with BCA Standards and fire engineering requirements, e.g. ceiling clearances and fire sprinkler systems.
- The Proposed Development would respond to the existing industrial development on the eastern and western interfaces. There are known residential sensitive receptors in close proximity to the Subject Site; however, consideration of solar access, privacy, overshadowing and view loss has been considered with respect to the R2 Low Density Residential zone along Mowbray Road West along the northern interface of the Subject Site, with regard to the future built form proposed, that would have the potential to impact some views experienced from residents. This has been coupled with significant landscaping provisions to assist in mitigating potential views towards the Site.
- The Proposed Development's built form outcome is considered a key attribute in creating an internal building environment for the end users on the Site, that would ensure the delivery of space and amenity that is required to support the operations of the end users involved; thereby, enabling the productive use of the Site.

Reducing the height to strictly meet the LCLEP2009 Development Standard is considered unreasonable, as this would result in a less efficient use of the Site and require additional GFA, as well as being operationally unsound for future end users. Furthermore, a reduced height may result in a building design that does not respond as well to the Site's prevailing topography; market and tenant demands; and current socio-economic demand following the impacts of COVID-19, which the proposed heights to allow future built form have been strategically based upon.

Accordingly, the abovementioned justifications are considered valid and, in this instance, the proposed Clause 4.6 Variation is considered to be acceptable. The objectives of the relevant clauses and the IN2 Light Industrial zone would be upheld as a result of the Proposed Development.



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### 4.4 CLAUSE 4.6(3)(B) - ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

Clause 4.6(3)(b) of the LCLEP 2009 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that Site at [60].

*Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* found that it is not necessary to demonstrate that a development will result in a “better environmental planning outcome for the site” relative to a development that complies with the height development standard. However, in relation to this objective the consent authority must be satisfied there is a ‘preservation’ of amenity. In this case, the environmental amenity of the Site and neighbouring properties is preserved as follows:

- The Proposed Development is entirely consistent with the underlying objective(s) or purpose of the building height standard, as demonstrated in **Section 4.1** above.
- The Proposed Development fully achieves the objectives of LCLEP2009 for the IN2 Light Industrial zone, as described in **Section 4.2** above.
- Compliance with the standard would be *unreasonable and unnecessary* for the reasons outlined in **Section 4.3** above.
- The proposed breach to the height control facilitates a built form which accommodates the basement level (housing the diesel fuel storage area), whereby the design does not intrude upon the Lane Cove Tunnel asset which traverses directly below the Subject Site.

The design of the Proposed Development has been finalised to ensure that the Lane Cove Tunnel is not impacted or interfered with, which has set a maximum level for the earthworks and finished floor levels for the basement, above which the data centre building is located.

- The proposed breach in height is also attributed to existing bushfire constraints requiring the Proposal to implement relevant Asset Protection Zones (APZs) across the Site in order to comply with the provisions pertaining to the *Planning for Bushfire Protection 2019* (PBP 2019) document. As a result of the APZs the development footprint had to reduce, whereby the verticality of the Site increased via a product of data storage requirements being needed to be supplied to the Site. If a compliant height was proposed, the Data Centre would not be able to optimise a feasible outcome in terms of data storage potential.
- The Proposed Development would integrate with both the local and regional context, specifically the IN2 Light Industrial zone that surrounds the Subject Site. The relationship of the development as proposed, with respect to height, would remain consistent due to the transition offered between the surrounding sites.
- Materials and finishes for future built form proposed would activate and provide a visual outcome that seamlessly integrates with the surrounding industrial character. Additionally, colour and material direction would be utilised (where possible) to blend with the varied architectural forms. Proposed ancillary offices have been proposed to integrate various volumetric shapes and materials, conducive to transparency of function and respond to sustainable building practices.
- The Proposed Development would provide a compliant development with respect to traffic and parking planning grounds; and compliance with the noise emission and air quality emissions governed by the NSW EPA.



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- The Proposed Development, particularly the proposed height would integrate with the local context, specifically the IN2 Light Industrial zone that surrounds the Subject Site. The relationship of the Proposed Development, with respect to height, would remain consistent via the gradual transition offered between sites.
- Existing densely populated vegetation to the south offers additional landscape screening, which softens the industrial treatment of the Subject Site, which will be further supplemented by increased landscaping provisions along the northern boundary of the Site to offer screening in relation to nearby residential receivers. Further, the additional height would not result in any significant adverse impacts on the amenity of the neighbouring industrial and residential buildings in terms of overshadowing and privacy. The increased landscaping will take place within the landscape setback proposed which comprises an 8 m building setback (comprising the landscaping to the road verge) along the northern boundary. This will include deep-soil planting which will achieve maximum maturity after 15 years, assisting as a further screening mechanism with respect to the built form proposed.

Accordingly, the proposed height variation facilitates the orderly development of the land by allowing generous landscaped setbacks around the Site and car parking area, which are all located above the relevant flood planning levels, allowing for a compatible stormwater management outcome in terms of runoff.

- The Proposed Development responds to the existing topography of the Site and results in a superior planning outcome by minimising excavation (where possible) and maintaining existing site levels surrounding the Site and the current relationship with Mowbray Road West. Were the overall height of the building reduced, this would create significant risks to the Lane Cove Tunnel, or require an increased development footprint, impacting upon bushfire prone bushland. It is considered that the breach to the height control generates a far superior outcome in a planning sense that is consistent with the built form outcomes of existing Data Centres throughout the State, whilst providing an asset that could service the immediate locality and wider Sydney Metropolitan Region in close proximity to the Sydney CBD. Additionally, the avoidance of the environmental constraints on the Site constitute sufficient environmental planning grounds to justify the contravention.

For the reasons outlined above, it is considered that the proposed variation to the building height control under Clause 4.3 is entirely appropriate and can be clearly justified having regard to the matters listed within Clause 4.6 of LCLEP2009.

### 4.5 PUBLIC INTEREST

As outlined in **Section 2.1**, *Four2Five Pty Ltd v Ashfield Council* emphasised that it is for the proponent to demonstrate that the proposed non-compliance with the development standard is in the public interest. Subclause 4.6(4)(a)(ii) requires the proposed development be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

In *Lane Cove Council v Orca Partners Management Pty Ltd (No 2)* [2015] NSWLEC 52, Sheahan J referred to the question of public interest with respect to planning matters as a consideration of whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development.

It is noted, that Subclause 4.6(4)(a)(ii) requires the Proposal (SSD 13475973) to be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

**Sections 4.1** and **4.2** have already demonstrated how the Proposed Development is consistent with the objectives of Clause 4.3 and the IN2 Light Industrial zone under LCLEP2009. Accordingly, the Proposed Development is considered to be in the public interest, as it is consistent with the overarching height objectives. It would also contribute towards meeting the demand for employment opportunities within



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the Lane Cove LGA, as identified within *A Metropolis of Three Cities* and the *North District Plan*. Specifically, the Proposed Development would be of social benefit to the immediate community groups and wider Lane Cove LGA as it would revitalise and maximise the built form potential on a site zoned for industrial land use, for which it would provide employment-generating opportunities during the construction and operational phases of development.

There are no significant public disadvantages which would result from the Proposed Development.

The Proposed Development is therefore considered to be justified on public interest grounds.

#### **4.6 MATTERS OF STATE OR REGIONAL SIGNIFICANCE**

The proposed non-compliances with Clause 4.3 of LCLEP2009 would not raise any matters of significance for State or Regional environmental planning. It would also not conflict with any State Environmental Planning Policies or Ministerial Directives under Section 9.1 of the EP&A Act.

It is noted, that Planning Circular – PS 08-014 – issued by the NSW Department of Planning, Industry and Environment (DPE), requires that all Development Applications including a variation to a standard of more than 10% be considered by Council (in this instance NSW DPE as the consent authority), rather than under delegation. The Proposed Development would result in exceedances of the relevant planning controls as follows:

- LCLEP2009, Clause 4.3 Height of Buildings by 11.695 m / 64.97%.

This non-compliance is more than the 10% prescribed in the stipulated Planning Circular – PS 08-014.

Furthermore, by including the non-compliance with Clause 4.3 of LCLEP2009, the Proposed Development would be more susceptible to being able to meet the objectives of the following State Government planning policies:

- *A Metropolis of Three Cities:*
  - By providing a greater height at the Site, the Proposed Development can respond to the Greater Sydney Commission's vision and NSW Government's aim of increasing the availability of employment opportunities in a range of industry sectors.
- *North District Plan:*
  - By providing a greater height at the Site, the Proposed Development can better respond to the Greater Sydney Commission's vision for continued job growth and economic prosperity across the Eastern Harbour City.

#### **4.7 PUBLIC BENEFIT IN MAINTAINING THE STANDARD**

Given that strict compliance with Clause 4.3 of LCLEP2009 would result in:

- Not contribute towards meeting the demand for employment-generating opportunities within the Lane Cove Local Government Area (LGA), as identified within *A Metropolis of Three Cities* and the *North District Plan*, by potentially resulting in a reduction in available building footprint and consequently prohibiting future industrial-related land uses on the Site, that support employment in the Lane Cove West Business Park (including the Subject Site forming an extension to this area);
- Not be able to achieve a height, that is being driven due to securing economic employment lands for a secured end user – that is of a size that is surrounded by existing built form requiring increased heights rather than land mass;
- Create fewer full-time equivalent jobs during the construction and operational (including maintenance) phases of development due to a decrease in footprint and potential disinterest in the Site due to preferred end user ceiling heights not being able to be achieved reducing the potential amount of data halls, thus reduction in data storage potential; and
- Fail to meet the Objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act) by making orderly and economic use of the Site for its full planning potential.



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As such, there is no genuine public benefit in maintaining this strict height of building control at the Subject Site. Accordingly, by allowing for the Proposal to proceed with the height variation, this would result in the following positive attributes:

- Attracting a greater number and diversity of industrial uses into the locality of Lane Cove;
- Contributing positively to the industrial character of the IN2 Light Industrial zone via a modernised and State-of-the-Art design philosophy;
- Enabling an opportunity for increased employment due to increased provision of Data Storage provision;
- Stimulating a development outcome that is compatible with the existing and emerging industrial area, as well as an evolving style of development comprising Data Centres, for which have been identified by both the Federal and State Government as being a service that is going to become much more prevalent and required as population dynamics expand within NSW and Australia;
- Provision to revitalise an underutilised land portion and redevelop a site coupled with increased landscaping that will form a synonymous relationship with the adjoining bushland;
- Low-generating traffic output in terms of the operational performance of the Proposal, as opposed to standardised warehousing and distribution which currently exists on-site and is permissible within the zone should the development not proceed; and
- Facilitating development that is a permissible land use and consistent with the IN2 Light Industrial zone objectives.

The proposed development is therefore considered to be justified on public interest grounds and there is no material public benefit in maintaining the standard.

**4.8 OBJECTS OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979**

All planning determinations made under the EP&A Act are required to be made with regard to the Objectives of the Act in accordance with Section 1.3 of the EP&A Act. **Table 2** below assesses the Proposed Development against the Objects of the Act.

<b>Table 2: Objects of the Act - EP&amp;A Act</b>	
Object	Proposed Development Compliance
The objects of this Act are as follows:	
<i>(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,</i>	The Proposed Development is considered to be in the public interest as it would contribute towards meeting the demand for increased employment opportunities within the Lane Cove LGA, as identified in <i>A Metropolis of Three Cities</i> , and the <i>North District Plan</i> . Specifically, the Proposed Development would be of social benefit to the community situated within nearby community groups, as it would provide employment-generating opportunities for the immediate locality.
<i>(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,</i>	The Proposed Development (including built form potential) has been assessed against the principles of Ecologically Sustainable Development as set out in the <i>Protection of the Environment Operations (General) Regulation 2009</i> as follows.  The Proposed Development would not create the risk of serious or irreversible damage to the environment.  Ultimately, the Proposed Development would not create any threats of serious or irreversible environmental damage which would require further scientific study to fully ascertain.



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Table 2: Objects of the Act – EP&A Act	
Object	Proposed Development Compliance
	<p>The Proposed Development would not impact on the conservation of biological diversity or the ecological integrity of the locality.</p> <p>The Proposed Development would not require an Environment Protection Licence or other mechanism to compensate for any pollution generating activities at the Site.</p>
<i>(c) to promote the orderly and economic use and development of land,</i>	The Proposed Development would make use of a site that is currently considered to be underutilised, for which it would result in orderly and economically beneficial development, without resulting in any unacceptable economic, environmental or social impacts.
<i>(d) to promote the delivery and maintenance of affordable housing,</i>	Not relevant to the Proposed Development.
<i>(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,</i>	<p>It is important to note, that several measures will be implemented to reduce impacts, where possible, such as appropriate pre-clearance protocols and a CEMP for any future built form. These include:</p> <ul style="list-style-type: none"> <li>▪ Pre-Clearance Protocols: <ul style="list-style-type: none"> <li>○ On-site supervision of habitat tree felling and relocation of fauna; and,</li> <li>○ Soft felling operations.</li> </ul> </li> <li>▪ Vegetation Management Plan (VMP)</li> <li>▪ CEMP</li> </ul> <p>Excluding the requirement for a CEMP, no additional adaptive management measures are proposed.</p> <p>It is noted, that all potential ecological impacts have been considered, for which this SSD Application includes provision for a BDAR Waiver Request.</p>
<i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),</i>	The Site has been previously disturbed and is therefore subject to significant levels of disturbance. The potential for the Proposed Development to uncover any unrecorded items of Aboriginal Cultural Heritage significance is therefore considered to be low. In the unlikely event that potential Aboriginal Cultural Heritage items or human remains are uncovered at the Site, works in the vicinity of the find would cease, and the NSW OEH (now EES Group) and NSW Police would be contacted as appropriate.
<i>(g) to promote good design and amenity of the built environment,</i>	<b>Section 4.1</b> satisfactorily addresses how the Proposed Development responds to the character of the locality in terms of urban design.
<i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,</i>	The Proposed Development can be undertaken and maintained without health and safety risks to future tenants.
<i>(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,</i>	The Proposed Developments represents an SSD Application, for which it will be assessed and determined by the NSW DPE.



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Table 2: Objects of the Act – EP&A Act	
Object	Proposed Development Compliance
(j) to provide increased opportunity for community participation in environmental planning and assessment.	The SSD Application would be subject to the relevant notification requirements. Additional stakeholder engagement and community consultation has been undertaken leading up to the exhibition of the Proposal. Ongoing consultation would be undertaken by the Proponent throughout the Project's lifecycle to ensure expectations are considered and met where required.

### 4.9 SUMMARY

For the reasons outlined above, it is considered that the objections to Clause 4.3 of the LCLEP2009 are well-founded in this instance and the granting of Clause 4.6 Variations to these Development Standards are appropriate in the circumstances. Furthermore, the objection is considered to be well-founded for the following reasons, as outlined within Clause 4.6 of LCLEP2009:

- Compliance with the Development Standard is unreasonable and unnecessary in the circumstances;
- There are sufficient environmental planning grounds to justify contravening the Development Standard;
- The Proposed Development is in the public interest;
- The Proposed Development is consistent with the objectives of the particular standard;
- The Proposed Development is consistent with the objectives for development within the IN2 Light Industrial zone;
- The objectives of the standard are achieved notwithstanding the non-compliance with the standard;
- The Proposed Development does not negatively impact on any matters of State or Regional significance; and
- The public benefit in maintaining strict compliance with the Development Standard would be negligible.

It is furthermore submitted, that:

- Strict compliance with the Development Standard would hinder the achievement of the Objects of the Act in accordance with Section 1.3 of the EP&A Act (refer to **Table 2** above);
- The Proposed Development would contribute toward employment contribution within the Lane Cove LGA and wider Sydney Metropolitan Area, as identified within *A Metropolis of Three Cities* and the *North District Plan*; and
- No unreasonable impacts are associated with the Proposed Development.

Overall, it is considered that the proposed Clause 4.6 Variation to Clause 4.3 Height of Buildings pursuant to LCLEP2009 is entirely appropriate and can be clearly justified having regard to the matters listed with Clause 4.6 of LCLEP2009.



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### PART E CONCLUSION

It is requested, that the NSW DPE (and Council) exercise their discretion and find, that this Clause 4.6 Variation adequately addresses the matters required to be demonstrated by Subclauses 4.6(3) of the LCLEP2009 (refer to **Section 2.1**).

This is particularly the case, given that a hypothetical compliant design at the Site would:

- Not contribute towards meeting the demand for employment-generating opportunities within the Lane Cove LGA, as identified within *A Metropolis of Three Cities* and the *North District Plan*, by potentially resulting in a reduction in available building footprint and consequently prohibiting future industrial-related land uses on the Site, that support employment in the Lane Cove West Business Park (including the Subject Site forming an extension to this area);
- Threaten the commercial viability of the Subject Site for future built form, by reducing the overall achievable maximum height across the Site, which would impact on end user operational requirements;
- Not be able to achieve a height, that is being drive due to securing economic employment lands for a secured end user – that is of a size that is surrounded by existing built form requiring increased heights rather than land mass;
- Create fewer full-time equivalent jobs during the construction and operational (including maintenance) phases of development due to a decrease in footprint and potential disinterest in the Site due to preferred end user ceiling heights not being able to be achieved reducing the potential amount of data halls, thus reduction in data storage potential; and
- Fail to meet the Objects of the EP&A Act by making orderly and economic use of the Site for its full planning potential.

It is requested, that the NSW DPE (and Council) supports the proposed variation to Clause 4.3 Height of Buildings under LCLEP2009 for the following reasons:

- Consistency with the objectives of the standard and zone is achieved.
- Compliance with the Development Standard is unreasonable and unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the Development Standard.
- No unreasonable environmental impacts are introduced as a result of the Proposed Development.
- There is no public benefit in maintaining strict compliance with the standard.

Given the justification provided above, this Clause 4.6 Variation under LCLEP2009 is well founded and should be favorably considered by the determining authority. As each of the relevant considerations are satisfied for the reasons outlined elsewhere in this Report, concurrence can be assumed under Clause 4.6(5).

