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Clause 4.6 Variation Request to Clauses 4.3 and 4.4 of CLEP2021

Extension of Wentworthville Northside West Clinic
SSD-17899480

23-27 Lytton Street, Wentworthville
Lot 1 DP787784

Prepared by Willowtree Planning Pty Ltd
on behalf of Ramsay Health Care

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Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic

23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

TABLE OF CONTENTS

PART A	PRELIMINARY	4
1.1	INTRODUCTION	4
1.2	PROPOSED VARIATION	4
1.2.1	Summary of Proposed Development Standard Variation	4
1.2.2	Clause 4.3 Height of Buildings and the Variation Sought	5
1.2.3	Clause 4.4 Floor Space Ratio and the Variation Sought	12
PART B	THRESHOLDS THAT MUST BE MET	13
2.1	CLAUSE 4.6 OF CLEP2021	13
PART C	DEVELOPMENT STANDARDS BEING REQUESTED TO BE VARIED	16
3.1	CLAUSE 4.3 HEIGHT OF BUILDINGS	16
3.2	CLAUSE 4.4 FLOOR SPACE RATIO	16
PART D	JUSTIFICATION FOR VARIATION OF THE DEVELOPMENT STANDARDS	17
4.1	OBJECTIVES OF THE STANDARD	17
4.1.1	Clause 4.3 Height of buildings	17
4.1.2	Clause 4.4 Floor space ratio	22
4.2	OBJECTIVES OF THE ZONE	22
4.3	ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR NECESSARY	23
4.3.1	Compliance with Height of Buildings Development Standard is Unreasonable or Unnecessary	24
4.3.2	Compliance with Floor Space Ratio Development Standard is Unreasonable or Unnecessary	26
4.4	CLAUSE 4.6(3)(B) - ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?	27
4.5	PUBLIC INTEREST	30
4.6	MATTERS OF STATE OR REGIONAL SIGNIFICANCE	30
4.7	PUBLIC BENEFIT IN MAINTAINING THE STANDARD	31
4.8	OBJECTS OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979	31
4.9	SUMMARY	33
PART E	CONCLUSION	34



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

PART A PRELIMINARY

1.1 INTRODUCTION

This Clause 4.6 Variation request has been prepared in accordance with Clause 4.6 of the *Cumberland Local Environmental Plan 2021* (CLEP2021) to accompany the subject State Significant Development (SSD) Application for the proposed extension of Wentworthville Northside West Clinic. The proposed development would be located at 23-27 Lytton Street, Wentworthville (Lot 1 DP 787784).

The proposal seeks variation to the height of buildings and floor space ratio (FSR) development standards under Clauses 4.3 and 4.4 of CLEP2021. Specifically, the proposal seeks variation to the maximum building height prescribed in Clause 4.3 of CLEP2021 across relevant portions of the Site from 15m to heights of varied nature between **16.3m to 19.6m**. In addition, the proposal seeks variation to the maximum floor space ratio prescribed in Clause 4.4 of CLEP2021 from 1:1 to **1.09:1**.

This Clause 4.6 Variation request has therefore been prepared in accordance with the requirements of Clause 4.6 of CLEP2021, 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 CLEP2021, the NSW Department of Planning, Industry and Environment (DPIE) (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 Variation Request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards (Clauses 4.3 and 4.4) of CLEP2021.

1.2 PROPOSED VARIATION

1.2.1 Summary of Proposed Development Standard Variation

The proposed variation to the development standards of CLEP2021 are demonstrated in **Table 1** below.

Table 1 Proposed Development Standard Variation in Relation to CLEP2021			
CLEP2021 Clause	CLEP2021 Development Standard	Proposed Development Non-Compliance	Percentage of Variation
Clause 4.3 Height of buildings	Maximum 15 m building height	<p>The proposal seeks development consent for a maximum building height of 19.6m (RL38.70) across relevant portions of the Site.</p> <p>Note: The maximum building height is only exceeded by this amount in the rear portion of the extension (Stage 2 building); however, the built form surrounding the external courtyard comprises a maximum building height of a 16.3m, presenting a variation of 8.6%.</p>	30.7%



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic

23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

Clause 4.4 Floor space ratio	Maximum 1:1 FSR	The proposal seeks development consent for a maximum FSR of 1.09:1 for the Site.	9%
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1.2.2 Clause 4.3 Height of Buildings and the Variation Sought

Under the provisions of Clause 4.3 of CLEP2021, the Site is subject to a maximum building height of 15m. It is noted that the proposed building height sought under the subject SSD Application is **19.6m (RL38.70)** at the highest point in the northern portion of the proposed extension (Stage 2 building), with the built form surrounding the external courtyard exhibiting a building height of 16.3m only.

The maximum building height as noted above, is prescribed by the Height of Buildings Map of the CLEP2021 as illustrated in **Figure 1** below.

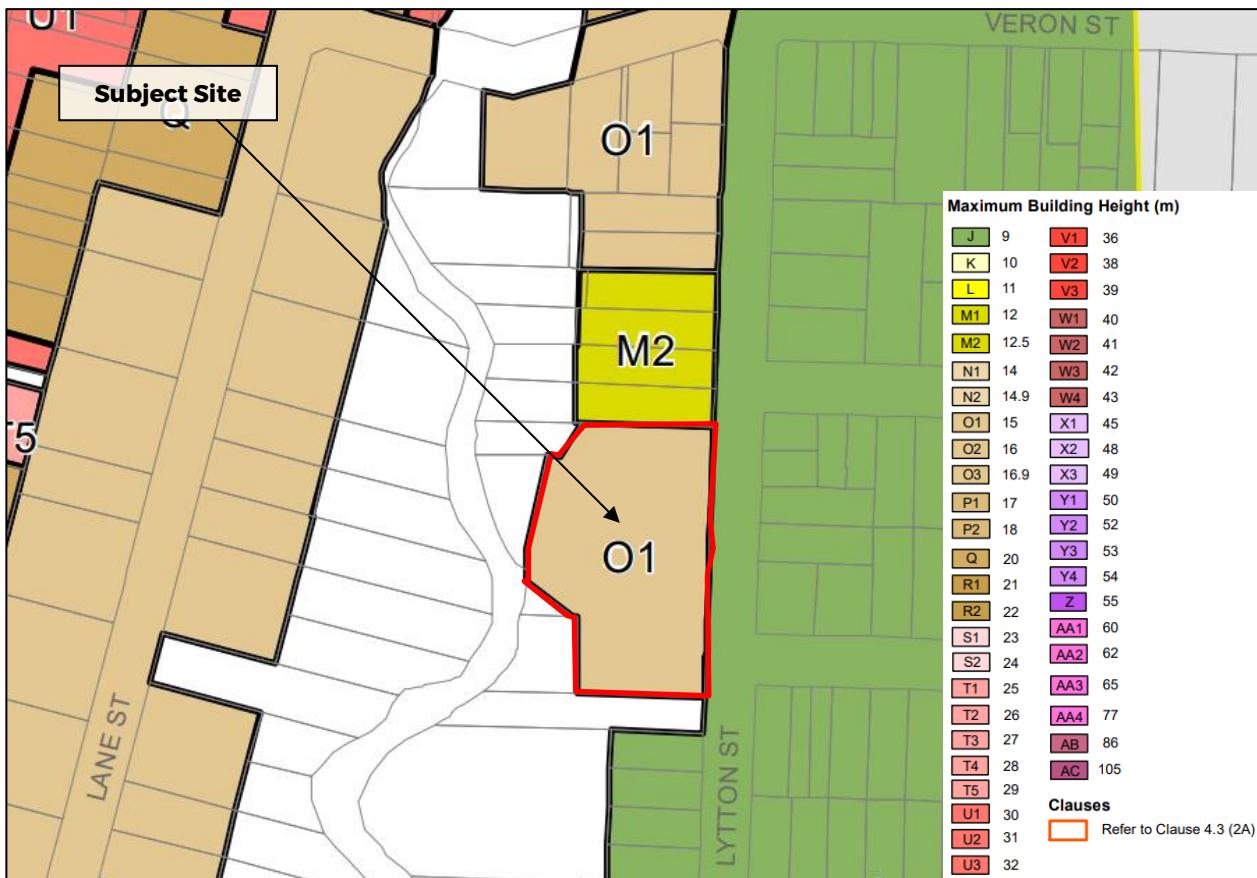


Figure 1 Height of Building Map (NSW Legislation 2021)

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 extension (Stage 2 building), in accordance with the definitions bestowed in both the CLEP2021 and the Standard Instrument. The proposed development would result in an exceedance of the 15m building height control under CLEP2021 by approximately **4.6m** (or by 30.7%).

Notwithstanding, it should be noted that the maximum building height of 19.6m (30.7% variation) only occurs in the purple portion shown in **Figure 2** below, and is measured from the level of the existing access driveway, which had previously been excavated as part of the construction of the current facility.



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic

23-27 Lytton Street, Wentworthville (Lot 1 DP787784)



Figure 2 Rear portion (purple portion) of the building exhibiting the maximum building height (Team 2 Architects 2021)

It is also noted that the built form surrounding the central courtyard comprises a building height of 16.3m only, presenting a variation of 8.6%. As measured from the East Elevation, the proposed development presents a building height of 15.9m fronting Lytton Street, which exhibits a variation of 6% only.

The proposed height variation is shown in the Sections and Height Plane Diagrams included within the Architectural Plans prepared by Team 2 Architects (refer to **Appendix 3** of the EIS). A snapshot of the height planes is copied below for ease of reference (refer to **Figures 3-6** below).

The Sections and Height Plane Diagrams demonstrate that the proposed extension has been strategically designed to locate the maximum height exceedance in the south western portion of the building facing Lytton Street Park to ensure that potential visual impacts are further mitigated by positioning the built form as far away from the streetscape as possible. It should be noted that the proposed height variation is primarily due to the sloping topography of the Site. The proposed extension has been designed to respect the natural topography of the Site with minimal excavation works on ground level, which would otherwise disrupt the drainage pattern and soil stability of the Site, as well as the amenity of the adjacent Lytton Street Park and surrounding residential properties.

Given the positioning of the building, the height exceedance is not considered to be visually dominant as it is visually screened by the built form in the front portion of the building. High quality landscape design has also been incorporated to introduce generous landscaping to the Site to visually screen the built form of the proposed extension. The proposed height variations are depicted in **Figures 3-6** below.



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)



Figure 3 Section A-A (Team 2 Architects 2021)

Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

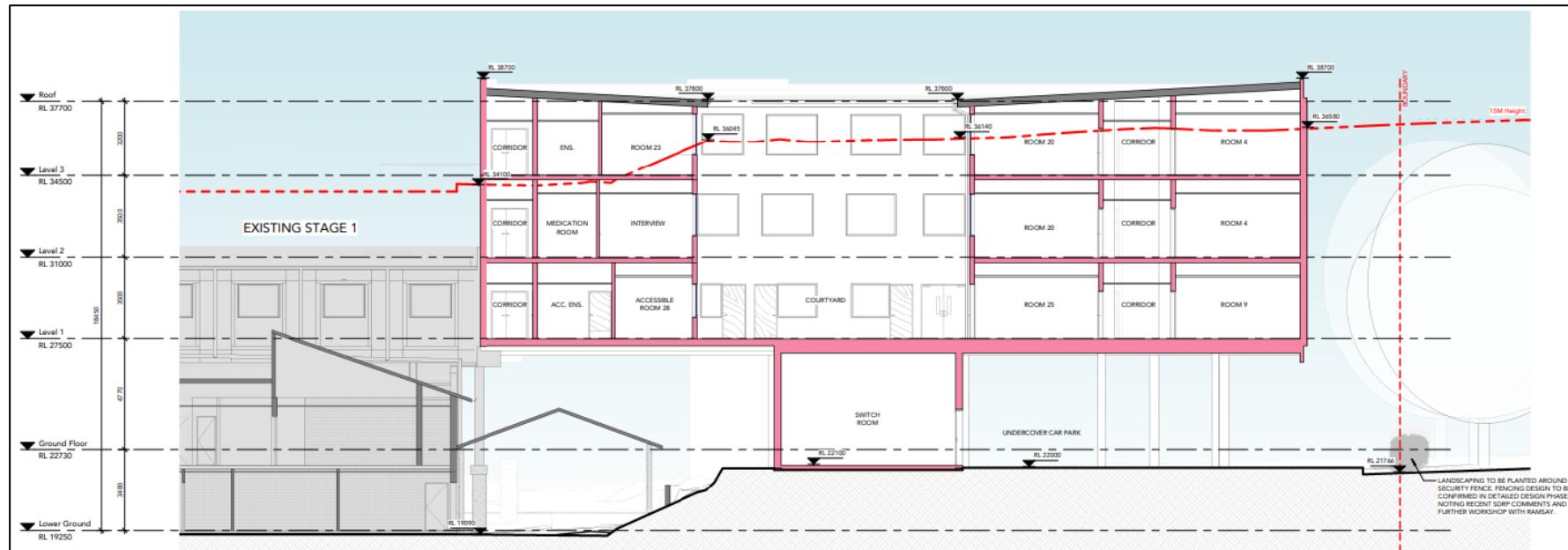


Figure 4 Section B-B (Team 2 Architects 2021)

Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)



Figure 5 Height Plane Diagram - Lytton Street South View (Team 2 Architects 2021)



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

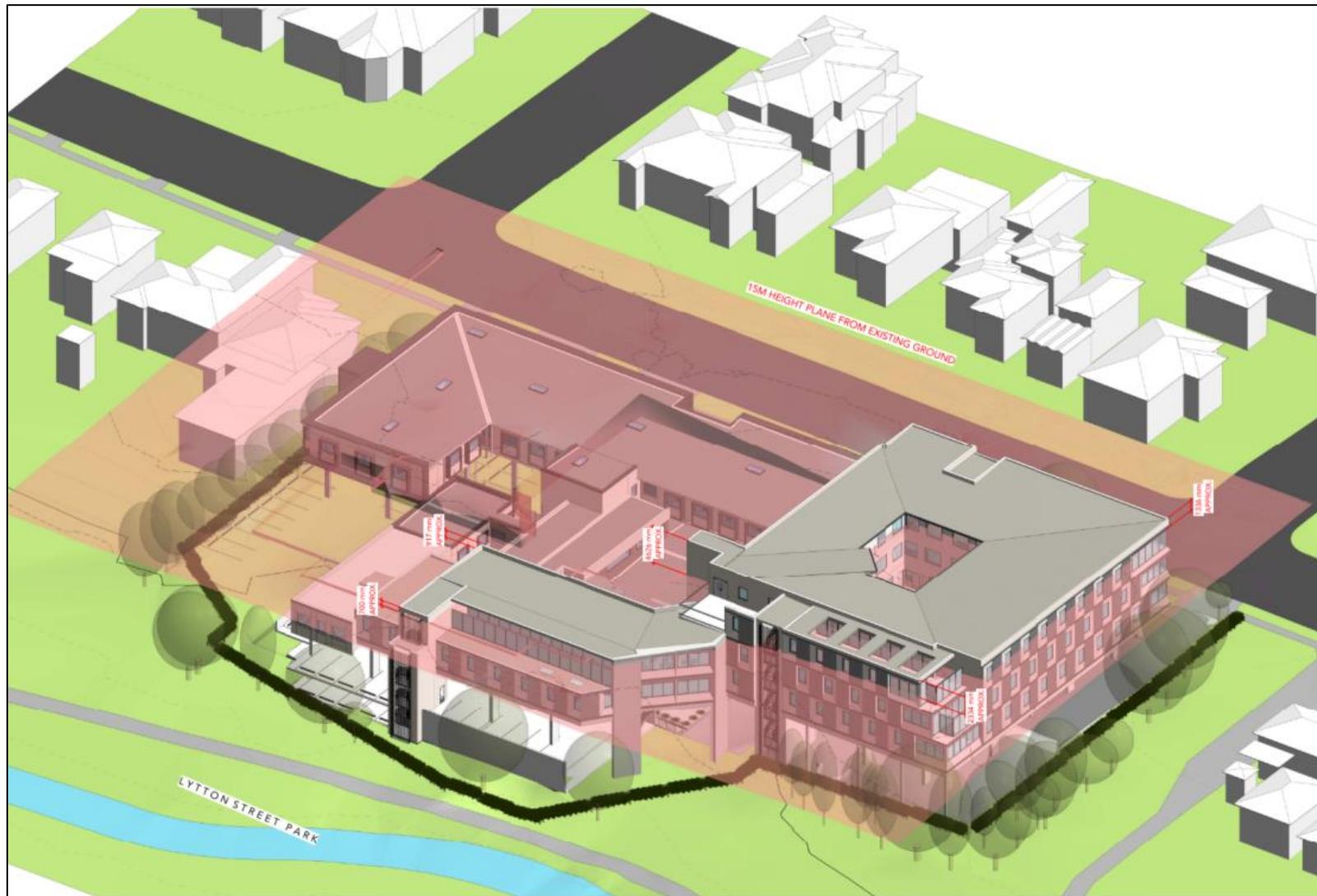


Figure 6 Height Plane Diagram - Lytton Street South West (Team 2 Architects 2021)



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)



Figure 7 Height Plane Diagram - Lytton Street North View (Team 2 Architects 2021)



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic

23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

As can be seen from **Figures 2-7** above, the highest points of the proposed built form are positioned at the rear of the Site. Further, as illustrated in the Sections in **Figures 3 and 4**, the maximum RL of the proposed extension is at RL 38.70 across the proposed Stage 2 building. Notwithstanding, due to the sloping topography, the proposed building exhibits a variable building height of 16.3m to 19.6m. In addition, due to the skillion roof form of the proposed extension, the building exhibits a height of 16.3m in the central portion surrounding external courtyard. The western portion of the proposed extension has also been designed to visually and physically stepped down to harmonise with the scale of the surrounding residential properties and public domain.

1.2.3 Clause 4.4 Floor Space Ratio and the Variation Sought

The Site is subject to a maximum FSR of 1:1 under Clause 4.4 of CLEP2021 (refer to **Figure 8**). As the proposal would provide a FSR of **1.09:1** with a gross floor area (GFA) of **7,284m²**, the development would exceed the FSR control by **9%**. It is noted that the proposed four-storey extension with three levels of consulting suites and inpatient units has been designed with the intent to increase the operational capacity of the existing Wentworthville Northside West Clinic as a mental health facility. As demonstrated in the Economic Impact Assessment (**Appendix 15**), the proposed development will contribute to the supply of mental health services to meet the projected and unmet demand whilst complimenting the existing and future mental health facilities within Greater Sydney and New South Wales (NSW). It is considered that the proposed additional capacity of mental health care services in Wentworthville will alleviate pressure from other higher order hospitals and specialist clinics.

In addition, the proposed development will support the local economy and complement other health care facilities within the local and wider catchment by providing more employment floorspace and promoting industry diversification. Specifically, the proposed development will support the viability of Wentworthville as a local centre by providing additional health care infrastructure in the locality and create job opportunities for the local community. The proposed development will also generate employment opportunities during the planning, construction and operational stage.

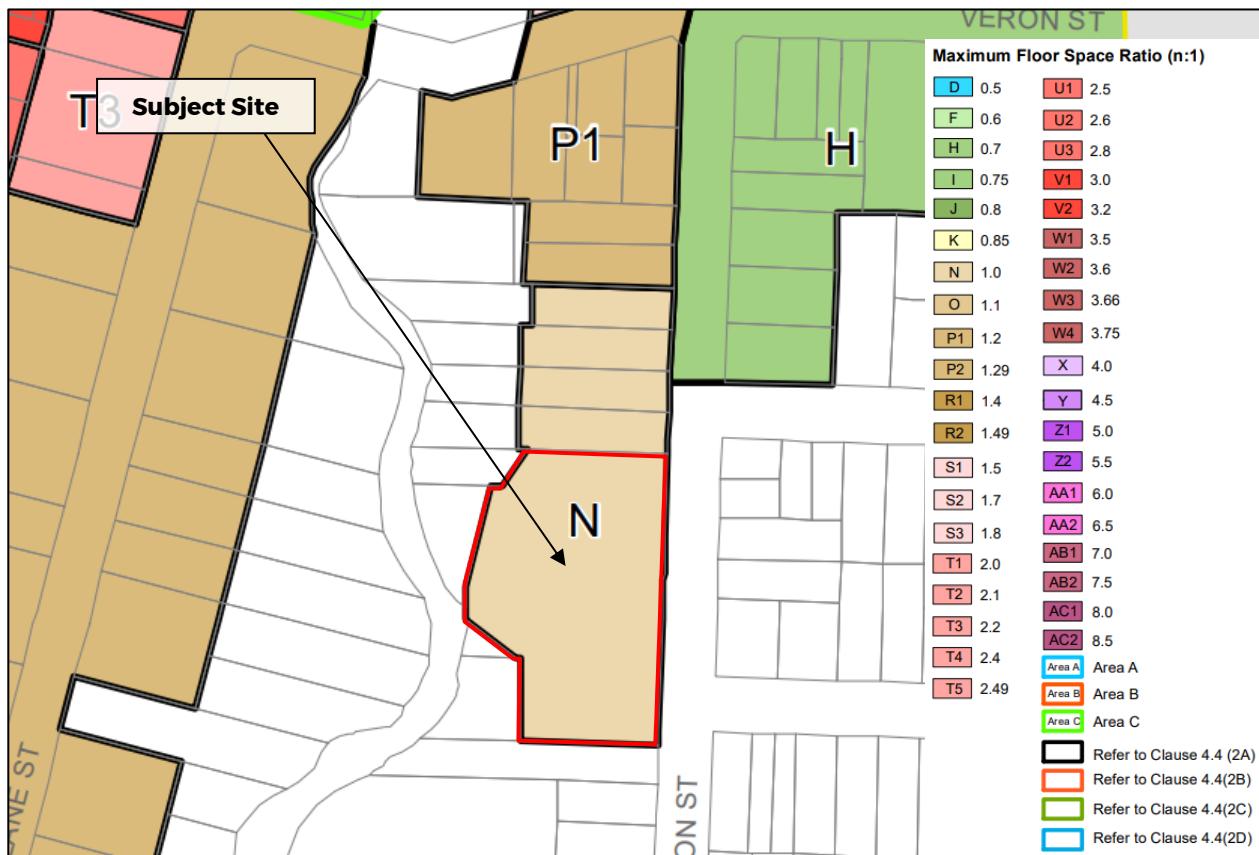


Figure 8 Floor Space Ratio Map (NSW Legislation 2021)

Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

PART B THRESHOLDS THAT MUST BE MET

2.1 CLAUSE 4.6 OF CLEP2021

In accordance with Clause 4.6 of CLEP2021, the NSW DPIE is required to consider the following Subclauses of Clause 4.6.

Subclause (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) states that (our emphasis added):

(4) *Development consent must not be granted for development that contravenes a development standard unless—*

- (1) *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 (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.*

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause (2) and the limitations to that discretion contained in Subclauses (3) to (8). This Variation Request addresses the requirements of Subclauses (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 (2) is not numerically limited, in contrast with the development standards referred to in, Subclause (6).

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

Accordingly, a successful Clause 4.6 Variation Request 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).



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

These matters are twofold:

- 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 DPIE has been obtained.

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

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

Other relevant legal matters



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

This Variation Request has been prepared having regard to the principles established by the Court when considering the assessment of Clause 4.6 variation 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 Variation 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):

"43 The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)." Wehbe V Pittwater Council [2007] NSWLEC 827 Preston CJ

This Variation Request 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 frontage demonstrate that compliance with a height and FSR 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.
- In *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".

Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

PART C DEVELOPMENT STANDARDS BEING REQUESTED TO BE VARIED

This Variation Request involves variations to Clause 4.3 Height of Buildings and Clause 4.4 Floor space ratio development standards. The objectives of each development standard are addressed in the ensuing sections.

3.1 CLAUSE 4.3 HEIGHT OF BUILDINGS

The first development standard requested to be varied is Clause 4.3 Height of buildings of CLEP2021, which provides the following:

4.3 Height of Buildings

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

- (a) *to establish a maximum height of buildings to enable appropriate development density,*
- (b) *to ensure that the height of buildings is compatible with the character of the locality,*
- (c) *to minimise the visual impact of development,*
- (d) *to ensure sufficient solar access and privacy for neighbouring properties.*

(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.*

...

Pursuant to Clause 4.3, the proposed development seeks exception to the maximum permissible building height of 15m prescribed for the Site as identified on the Height of Building Map (**Figure 1**) and particularised in **Table 1** and **Section 1.2.2**.

3.2 CLAUSE 4.4 FLOOR SPACE RATIO

The second development standard requested to be varied is Clause 4.4 Floor space ratio of CLEP2021, which provides the following:

4.4 Floor space ratio

(a) *The objectives of this clause are as follows—*

- (a) *to establish a maximum floor space ratio to enable appropriate development density,*
- (b) *to ensure that development intensity reflects its locality.*

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

...

Pursuant to Clause 4.4, the proposed development seeks exception to the maximum FSR of 1:1 prescribed for the Site on the Floor Space Ratio Map (**Figure 8**) and particularised in **Table 1** and **Section 1.2.3**.

Clause 4.6(8) sets out circumstances in which exceptions to development standards cannot be made. Clause 4.3 relating to building heights and Clause 4.4 relating to floor space ratio are not expressly excluded from the operation of clause 4.6 of the CLEP2021 and hence a Clause 4.6 Variation Request can be made and granted in relation to non-compliance with the building height and floor space ratio controls.

The Site is zoned R4 High Density Residential pursuant to CLEP2021, noting permissibility for the proposed development for the purposes of a health services facility is achieved under Clause 57(1) of the *State Environmental Planning Policy (Infrastructure) 2007* (SEPP Infrastructure), whereby the R4 High Density Residential 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, Clause 4.4 Floor space ratio and the R4 High Density Residential zone objectives of CLEP2021 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 development standards and the R4 High Density Residential zone.



PART D JUSTIFICATION FOR VARIATION OF THE DEVELOPMENT STANDARDS

4.1 OBJECTIVES OF THE STANDARD

A key determinant of the appropriateness of a Clause 4.6 Variation Request 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 under Clause 4.3 and FSR under Clause 4.4, 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 Clause 4.3 Height of buildings

The objectives of Clause 4.3 of CLEP2021 are responded to as follows:

- (a) to establish a maximum height of buildings to enable appropriate development density,*

The proposed development with height and FSR variations is considered to provide appropriate scales and intensities that are compatible with the surrounding area. The proposed development has been designed with the intent to increase the operational capacity of the current health services facility and overall supply of mental health care services in the Cumberland LGA and the wider region. As addressed in **Section 1.2.3** of this Variation Request, the proposed development is necessary to address the projected and unmet demand for mental health facilities within Greater Sydney and NSW. While the proposed development exhibits an increase in scale and density, it is noted that the proposed built form and building envelope have been designed to minimise the potential visual, overshadowing and privacy impacts on the surrounding residential properties and the adjacent Lytton Street Park through the incorporation of well-articulated landscape design and adequate separation distances. The proposed extension has also been designed to step down in the western portion in response to the downward slope towards the west facing the Lytton Street Park to preserve the open and recreational setting of the adjacent public open space.

In addition, it is noted that the proposed extension has been strategically configured to position the maximum height exceedance as far away from the Lytton Street frontage as possible. Given the positioning of the maximum height exceedance in the rear portion of the Site, the height variation will be visually screened by the built form in the front portion of the building. This design approach has been adopted to preserve the scale and character of Lytton Street in consideration of the surrounding residential properties. As demonstrated in **Section 1.2.2**, the maximum RL of the proposed extension is at RL 38.70 across the proposed Stage 2 building. The variable building height of 16.3m to 19.6m is a result of the natural sloping topography of the Site, in which the subject development has been designed to preserve through incorporating minimal earthworks and no underground structures or basement levels.

Therefore, the proposed development is considered to be present appropriate scales and intensities of the development through the proposed height variation and thus is consistent with objective (a).

- (b) to ensure that the height of buildings is compatible with the character of the locality,*

The proposed development is compatible with the existing and desired future character of the locality. Particularly, the proposed development relates to the extension of the existing Wentworthville Northside West Clinic which responds architecturally to the current Stage 1 building and has been carefully considered to sit within its context having regard for the historic and cultural significance of the locality as well as the specific site context and topography. It is noted that the locality currently comprises low density residential development to the north, east and south of the Site. The scale of the proposed extension is considered to be contextually appropriate in that adequate separation will be provided from the surrounding residential properties and present a sensible transition to the residential environment. The design approach for the proposed extension demonstrates due consideration to the Site and its contextual relationships by providing a diverse and well-articulated built form which responds to the existing scale and streetscape along Lytton Street.

Furthermore, a Planning Proposal (PP-2020-2448) was approved on 25 May 2017 to rezone the Site to R4 High Density Residential and increase the building height and FSR controls applicable to the Site. Land to



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

**Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)**

the north and north east of the Site along Lytton Street and Veron Street is also zoned R4 High Density Residential and R3 Medium Density Residential respectively. While the surrounding area is predominantly characterised by low to medium density residential development, it is noted that the locality is envisaged to promote higher density development in the future. In addition, the proposed development will facilitate the expansion of the existing mental health facility, which plays a significant role in providing specialist clinical care and in-patient residential services in the community. Therefore, the proposed additional floorspace is considered to complement the envisaged future character in the area as well as increase supply of health care infrastructure to address the projected demand for the much-needed mental health care services in the region.

Overall, the proposed building envelope is considered to be conducive to the existing residential environment in close proximity to the Site through the incorporation of separation distances and landscaping, whilst being compatible with the future character of the area which seeks to promote higher density development. Hence, the proposed height variation is consistent with objective (b).

(c) to minimise the visual impact of development,

The proposed development exhibits a maximum building height of 19.6m in the rear portion of the Site. Adequate separation and setbacks have been provided to the surrounding residential properties and the adjacent Lytton Street Park. It is noted that existing Stage 1 building will remain unchanged and continue to provide adequate separation distance from the residential property to the north. It is noted that the proposed development is generally consistent with the setback controls prescribed in Part F4 of the *Cumberland Development Control Plan 2021* (CDCP2021), with the exception of the 6m setback requirement along the western boundary. The proposed development will provide a variable setback of 0m-6m along the western boundary due to the design requirements of the proposed western building and the irregular shape of the Site.

Notwithstanding, the proposed extension has been designed to incorporate high quality landscape design comprising generous landscaping and a landscaped open space in the south western portion of the Site, which will provide visual screening to the soften the interface of the built form with the adjacent open space and surrounding residential properties (refer to **Figures 9-11**). The proposed landscaping will also significantly improve the amenity of the health services facility and enhance the visual interest of the streetscape along Lytton Street.



Figure 9 Proposed Landscape Design (Acadia 2021)

Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic

23-27 Lytton Street, Wentworthville (Lot 1 DP787784)



Figure 10 View from Lytton Street Park showing undercroft landscaped courtyard (Hatch RobertsDay 2021)

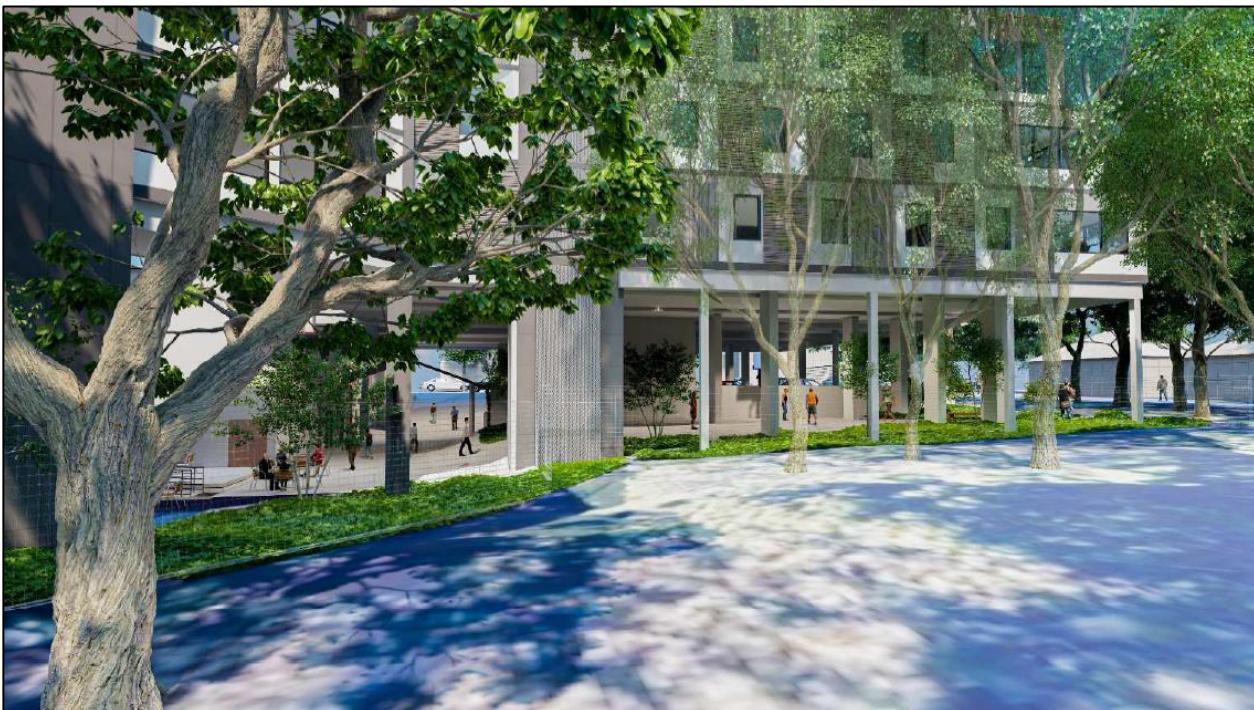


Figure 11 View from Lytton Street Park showing undercroft landscaped courtyard and stepped facade at south west corner (Hatch RobertsDay 2021)

In addition, landscaping will be planted along the fencing on the western and southern boundaries to provide visual screens for the security fence and soften the built form of the proposed facility when viewed from Lytton Street Park and the adjoining property to the south. The proposed landscaping is also considered to seamlessly integrate the proposed built form with the adjacent open space whilst facilitating biophilia by maximising opportunities for providing live planting within the Site to mitigate the associated visual impact and enhance the experience of patients. **Figure 11** below illustrates the proposed landscaping on the security fencing.



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic

23-27 Lytton Street, Wentworthville (Lot 1 DP787784)



Figure 12 Proposed landscaped fencing on West Elevation (Team 2 Architects 2021)

Further, the proposed extension has been designed to visually and physically step down in the western portion to harmonise with the existing low density scale of the locality and the public domain. Importantly, as demonstrated in the Visual Impact Assessment (**Appendix 5**), the visual assessed from multiple viewpoints surrounding the Site result in impacts considered to be in the none to moderate/low ranges. This is largely due to the proposed development's integration with the existing building and retention of the existing vegetation on Site.

There are limited public open views towards the Site that are not already screened by landscape detectors. Where visible, the proposed extension is consistent with the surrounding residential character and the proposed architectural design is considered to facilitate the integration of the proposal into its setting and enhance the visual interest of the surrounding area. The provision of adequate separation and high quality landscaping on Site also help to maintain the visual privacy and amenity of the surrounding residential properties to the east and south.

Accordingly, the proposed development has been designed to minimise visual impact and is consistent with objective (c).

(d) to ensure sufficient solar access and privacy for neighbouring properties.

The development with the proposed height variation has been designed to retain solar access for the surrounding residential properties and green open space. As demonstrated in **Figures 13** and **14**, the residential properties located directly south and south east of the Site (31 Lytton Street and 48 Haig Street) will continue to receive a minimum of three hours of solar access during winter solstice and unobstructed solar access throughout the day during summer solstice. Additionally, Lytton Street Park will also receive a minimum of three hours of solar access during winter solstice. As such, the proposed development is not anticipated to result in any adverse overshadowing impacts to the surrounding residential properties and open space.

Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic

23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

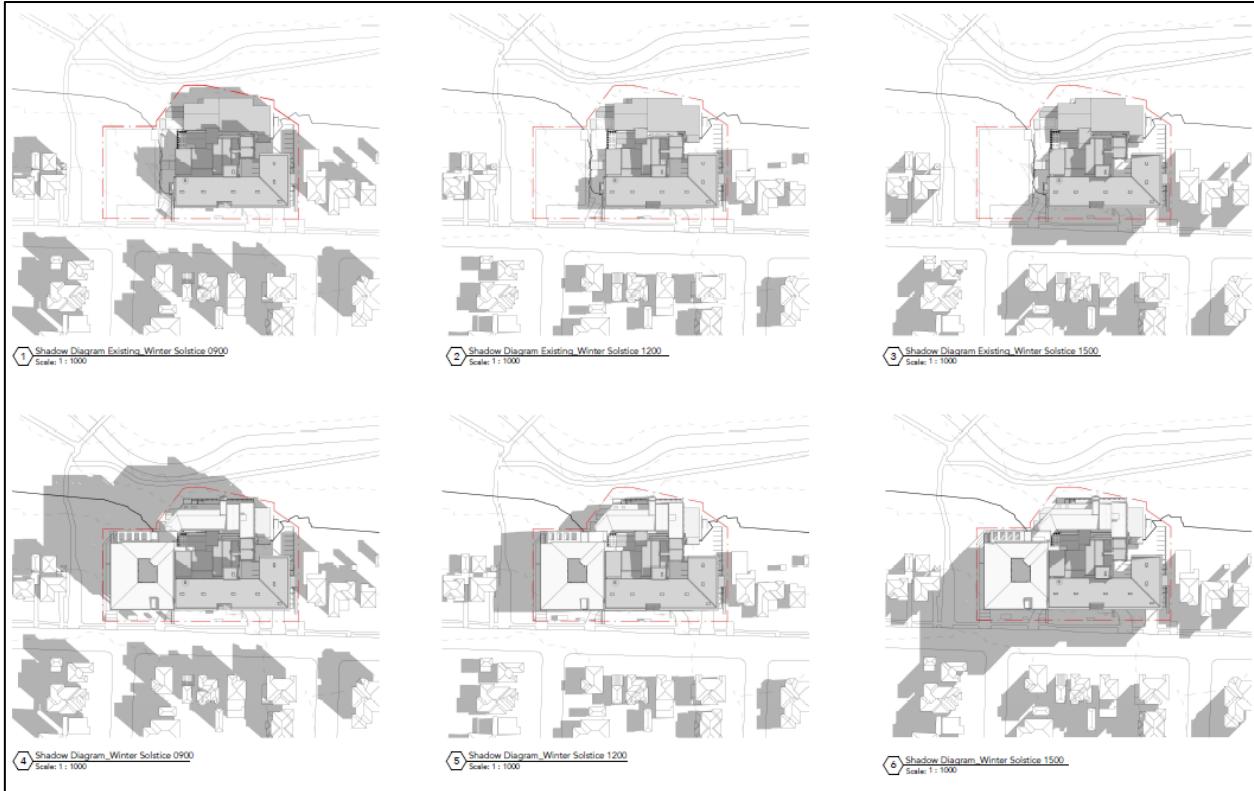


Figure 13 Shadow Diagrams during winter solstice (Team 2 Architects 2021)

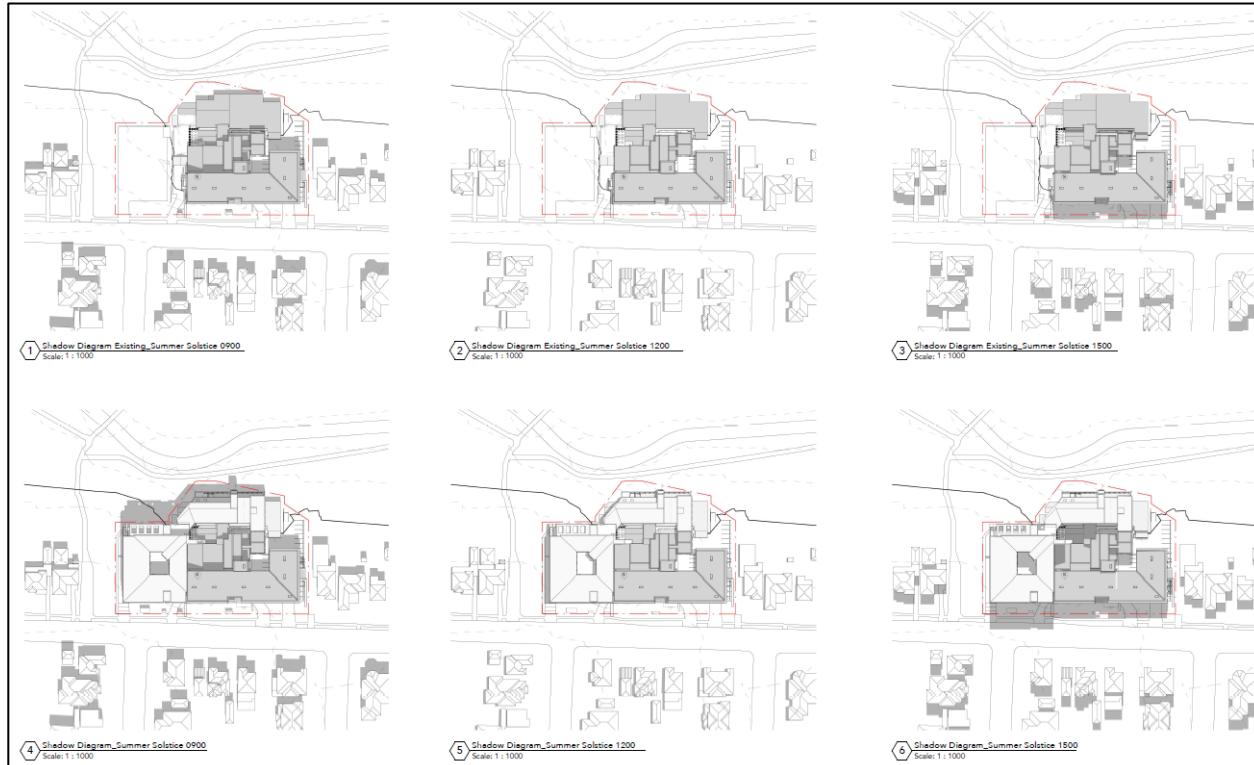


Figure 14 Shadow Diagrams during summer solstice (Team 2 Architects 2021)

In relation to privacy, the proposed development has been designed to preserve visual privacy of the neighbouring properties. Adequate separation distances have been provided to prevent direct overlooking into the adjoining residential properties to the north and south. Specifically, the Site is separated by the Lytton Street Park access laneway to the south, existing mature trees and vegetation to the north and Lytton Street to the east, which provide adequate visual buffers to the neighbouring residential properties. All

Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

balconies and courtyards have also been strategically sited to be located away from the adjoining residential properties to the north and south. Further, high quality landscaping will also be provided along the southern and western boundaries to provide visual screening and mitigate the visual impact for the proposed development.

Accordingly, there would be no adverse or unacceptable impacts relating to visual amenity, solar access or privacy for the neighbouring residential properties or the adjacent Lytton Street Park, and thus is consistent with objective (d).

4.1.2 Clause 4.4 Floor space ratio

The objectives of Clause 4.4 are responded to as follows:

- (a) *to establish a maximum floor space ratio to enable appropriate development density,*

This objective has been addressed in **Section 4.1.1** of this Variation Request. In addition, as demonstrated in the Floor Space Ratio Map, land to the north and north east of the Site along Lytton Street and Veron Street are eligible for a maximum FSR of 1.2 and 1.5 respectively, which indicates that higher density developments are expected to occur in the locality. Therefore, the proposed FSR of 1.09:1 is considered to be exhibit an appropriate development density, which is necessary to increase the supply of mental health care services in the Cumberland LGA and Greater Sydney.

Accordingly, the proposal is considered to align with objective (a).

- (b) *to ensure that development intensity reflects its locality.*

The Site is located within the R4 High Density Residential zone. While the proposed development does not include any residential use, the development presents a multi-storey built form, which is consistent with the envisaged built form of the surrounding locality. It is noted that a number of multi-storey residential flat buildings are identified along Veron Street to the north, which corresponds to the designated R3 and R4 zoning of the land.

While area to the east of the Site is predominantly zoned R2 Low Density Residential, it is noted that the existing residential properties to the east are adequately separated from the proposed development by Lytton Street, which preserves the low density residential amenity of the existing properties.

Hence, the proposed development with three levels of consulting suites is considered appropriate in context and is sympathetic to the existing and envisaged development intensity in the locality.

As such, the proposed FSR variation is consistent with objective (b).

4.2 OBJECTIVES OF THE ZONE

The Subject Site is zoned R4 High Density Residential under CLEP2021, which the proposed development (health services facility) achieves permissibility within the R4 High Density Residential zone pursuant to Part 3, Division 10 of the SEPP Infrastructure identified as a prescribed zone. Accordingly, the proposed development is considered consistent with the R4 High Density Residential zone objectives as follows:

- *To provide for the housing needs of the community within a high density residential environment.*

The proposed development does not involve residential components. Notwithstanding, the proposed development will not inhibit the provision of residential development in the R4 zone.

- *To provide a variety of housing types within a high density residential environment.*

The proposed development does not involve residential components. Notwithstanding, the proposed development will not inhibit the provision of residential development in the R4 zone.

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

The Site has been established for a health services facility which provides health care services to meet the day to day needs of residents. The proposed extension of the Wentworthville Northside West Clinic would



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

increase the operational capacity of the existing health care facility in response to the projected and unmet demand for mental health services in the Greater Sydney and NSW. It is also noted that the increase in supply of community mental health care services in Wentworthville will alleviate pressure from other higher order hospitals and specialist clinics in the area. Therefore, the proposed development is considered to meet the health care services needs of the residents in the local community.

- *To ensure that non-residential land uses are located in a setting that minimises impacts on the amenity of a high density residential environment.*

The proposed development has been designed to minimise impacts on the amenity of the surrounding residential environment. As demonstrated previously, the proposed development will provide adequate separation distances from the surrounding residential properties to the north, south and east. Generous landscaping and vegetation will be provided along the site boundaries to provide visual buffer and mitigate the visual impact of the proposed built form when viewed from the neighbouring properties and the public domain.

In addition, the proposed development has also been designed to preserve solar access for the neighbouring properties. As demonstrated previously, the private open space and habitable rooms of the adjoining properties will continue to receive a minimum of three hours of solar access during winter solstice and unobstructed solar access during summer solstice.

Further, as demonstrated in the Noise and Vibration Impact Assessment (**Appendix 8**), the traffic noise impacts associated with the proposed development is anticipated to be insignificant and is expected to meet the requirements of the NSW Road Noise Policy. While some construction works are expected to exceed the noise management criteria in accordance with the Interim Construction Noise Guideline (ICNG), compliance with the relevant construction noise criteria can be achieved through specific noise mitigation measures. Site specific mitigation measures will also be implemented to mitigate and manage the associated noise impacts.

Therefore, the proposed development is not anticipated to result in any unacceptable impacts on the surrounding high density residential environment and will preserve the residential amenity of the locality.

- *To encourage residential development that maintains the amenity of the surrounding area.*

The proposed development does not involve residential development. Notwithstanding, the proposed development does not inhibit residential development in the area. Rather, the proposed development will provide a health services facility that supports the health and social infrastructure needs of the local community.

4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR NECESSARY

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**).



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

- 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 **Sections 4.3.1 and 4.3.2** below).

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 standards 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.

4.3.1 Compliance with Height of Buildings Development Standard is Unreasonable or Unnecessary

By providing a building at the height proposed, a site layout is achieved that enables: maximum height exceedance to be located away from public view that can be screened; landscaping throughout the Site that integrates and reduces the visual presence of the building bulk; preservation of the natural landform; and provides opportunity for architectural treatment at the currently underutilised Site that will contribute to set a desirable precedent for future development in the locality.

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

- The proposed development seeks to co-locate services which provides a superior outcome for health services as it prevents an alternate development site from occurring elsewhere for the much-needed services.
- The resultant building height provides for a design that creates synergies with the existing Stage 1 and an optimal outcome for health care planning purposes by ensuring that it can integrate with the Stage 1 building.
- Of particular note, the proposed development as a mental health facility with the resultant building height has been designed in accordance with the prescriptive design requirements set out in the Australasian Health Facility Guidelines (AHFG's) which must be fulfilled to obtain a private license. Mental health facilities are a highly specific health proposition and must be designed to straddle the operational and patient safety requirements, while simultaneously being inviting and imbuing a sense of comfort and domesticity.
- The proposed development with the height variation is considered to be of appropriate bulk and scale as the proposal would provide three levels of consulting suites and inpatient units as part of the development to cater for the much-needed mental health infrastructure in the Cumberland LGA and the Greater Sydney. Due to structural and building requirements, Level 1 of the proposed extension has been designed to be situated on the same level at RL 27.50 in order to facilitate the physical connection with the existing Stage 1 building. This configuration is also necessary to ensure operational connectivity, which was unable to be provided in the previously scheme (refer to **Figure 15**). Providing different floor levels will require Stage 1 and Stage 2 to be operated separately and will essentially double the staff numbers required to support the operation of the facility. The unaligned levels would also have major impacts on accessibility compliance and fire egress paths. Variation to the 15m height plane is therefore required to accommodate the three levels of health facilities in the proposed Stage 2 building. This is depicted in **Figure 16** below.

Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic

23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

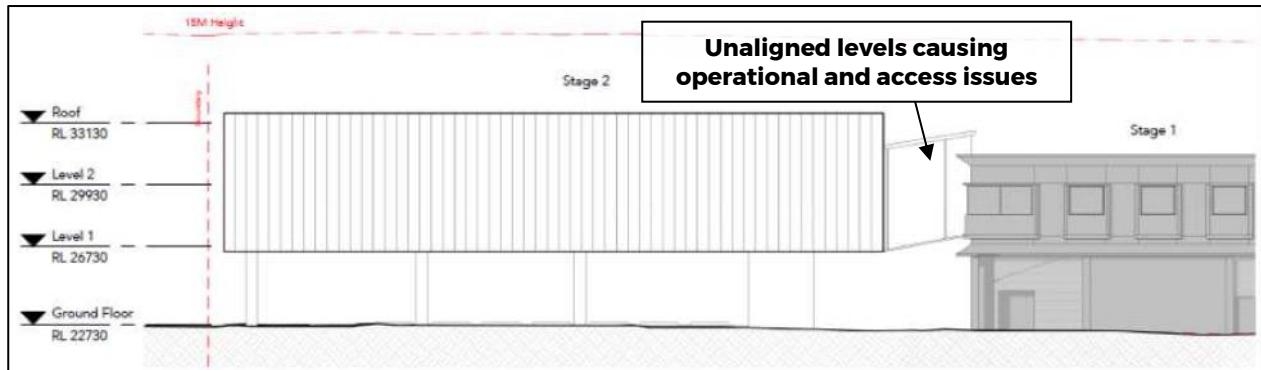


Figure 15 Previously tested scheme dated 5 July 2020 illustrating ongoing issues with levels and carparking (Team 2 Architect 2021)

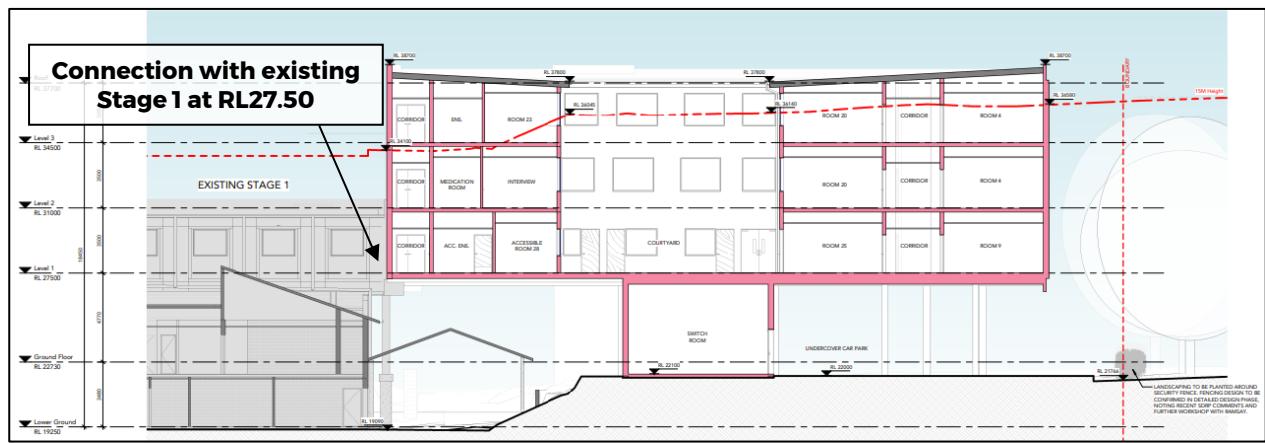


Figure 16 Physical connection with Stage 1 building (Team 2 Architects 2021)

- The proposed building height has been developed with respect to the site constraints, being the sloping topography of the Site. The proposed building height variation results from the gradient of the sloping landform of the Site. Particularly, as demonstrated in the Survey Plan (Appendix 29), the Site exhibits a sloping topography from east to west, with a maximum level difference of 3.77m from the highest to lowest point in the southern portion. Notwithstanding, the proposed development has been designed to preserve the natural landform of the Site rather than undertaking extensive bulk earthworks to create a flat pad on the Site for construction of the Stage 2 building. It is noted that original scheme approved under the Planning Proposal (PP-2020-2448) comprised a two-level basement carpark. Notwithstanding, the basement carpark was deleted from the design as the flood studies undertaken have suggested that an underground carpark would be impractical from a flooding perspective. The creation of basement levels would require extensive excavation and earthworks, which is likely to cause disruption to the existing drainage pattern and soil stability of the Site and the adjacent open space. The excavation and earthworks required for the basement would also adversely impact on the amenity of the neighbouring properties.
- In addition, the provision of basement levels would also result in loss of landscaping opportunities, which are already limited within the site due to physical constraints. The currently proposed external courtyard with a pocket garden and a basketball court in the south western portion of the Site would not be able to be provided if the proposal were to include basement levels. This would result in a loss of outdoor recreation space, which would impact on the amenity and experience of the patients on Site. Therefore, the provision of at-grade carpark with three levels of consulting suites involving minimal earthworks is considered to be the most configuration for the proposed development.
- The proposed development is compatible with the existing and desired character of the Site and the surrounding area. The proposed building envelope and built form have been carefully developed to present an appropriate transition from the surrounding residential properties through the incorporation of building setbacks and generous landscaping. As demonstrated in **Figure 2**, the maximum height exceedance has been strategically positioned in the rear portion of

Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

the Site in order to alleviate the visual impacts of the building when viewed from the residential properties along Lytton Street. It is noted that the height exceedance along the Lytton Street frontage range from 1.336m to 1.877m, representing a variation of 8.9% to 12.51% only. As depicted in **Figure 2**, the height variation increases as the Site slopes downwards to the east, resulting in a maximum height variation of 30.6% at a height of 19.6m. As the maximum height exceedance occurs in the rear western portion of the Site, it will be adequately screened by the built form fronting Lytton Street and landscaping. Given the adequate separation distances, effective building configuration and generous landscaping, the portion with the maximum height exceedance will not present as an obtrusive built form to the neighbouring properties. Rather, the built form integrates with the site context, landscape design and the adjacent open space with an appropriate bulk and scale.

- While the proposed development is located within the R4 High Density Residential zone, the proposed health services facility is sympathetic to the residential character of the locality. As demonstrated in **Section 4.2**, the proposed development will not result in unacceptable noise impacts during construction and operation stages with the implementation of site-specific mitigation measures. The proposed site configuration is also designed to respond to the existing low density residential scale and streetscape along Lytton Street. Therefore, the proposed height variation is deemed to be appropriate in that the visual and acoustic amenity of the residential properties will be suitably maintained.
- Based on the R4 High Density Residential and R3 Medium Density Residential zoning of the Site and the properties along Lytton Street and Veron Street, it is noted that the locality is envisaged to promote higher density development in the future. Therefore, the proposed additional height is considered to be consistent with the future character of the area.
- The proposed development is generally consistent with setback requirements of CLEP2021. The proposed setbacks are considered to provide adequate separation from the surrounding residential properties and adjacent open space. In areas where the setbacks are below the requirements prescribed in CLEP2021, adequate landscaping and vegetation would be provided to visually screen and soften the built form which would mitigate the associated visual and privacy impacts of the building.
- In relation to overshadowing, the proposal has been designed to ensure adequate solar access will be provided for the surrounding residential properties during winter solstice. As illustrated in the Shadow Diagrams, the proposal will preserve a minimum of three hours of solar access for the surrounding residential properties and Lytton Street Park during mid-winter.
- The proposed development's built form outcome is considered a key attribute in creating a state-of-the-art, purpose-built health services facility on the Site, which would ensure the delivery of health facilities and amenity that are required to support the functionality of the facility; thereby, enabling the productive use of the Site.

Reducing the height to strictly meet the CLEP2021 Height of building development standard is considered unreasonable, as this would result in a less efficient use of the Site and require further increase in GFA, as well as being operationally unsound for health services facility. Furthermore, a reduced height may result in a building design that does not respond as well to the Site's prevailing topography; projected demands for mental health services; and current socio-economic demand following the impacts of COVID-19, specifically in relation to mental health impacts resultant from the pandemic, which the proposed heights to allow future built form have been strategically based upon.

In light of the reasons set out above, the proposal achieves the objectives of the maximum building height standard set out in Clause 4.3 and the R4 zone objectives. Therefore, pursuant to the First Method of Wehbe, compliance with the Height of buildings development standard pursuant to Clause 4.3(2) of CLEP2021 is unreasonable or unnecessary.

4.3.2 Compliance with Floor Space Ratio Development Standard is Unreasonable or Unnecessary

By providing a building with the proposed FSR, the proposal would deliver a health services facility on an underutilised site with the additional operational capacity identified as needed to address the emerging demand for mental health services in the Cumberland LGA and the Greater Sydney.

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



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

- The proposed development with the FSR variation is considered to be contextually appropriate in the site context as it has been designed to be sympathetic to the residential and recreational setting of the surrounding area. The proposed development has incorporated appropriate setbacks and high quality landscape design to mitigate the potential visual impacts and preserve the amenity of the surrounding residential properties and Lytton Street Park.
- The additional floorspace is necessary to accommodate the projected and unmet demand for mental health services in the Greater Sydney whilst alleviating the pressure from other hospitals and clinics. The expansion of the existing health services facility to provide additional specialised mental health hospital beds will be a significant attribution to the existing shortfall of mental health hospital beds in NSW.
- The proposed additional floorspace will support the economic development of Wentworthville by creating employment opportunities close to home and in the vicinity of the Wentworthville local centre. The proposed extension will support the local economy by increasing employment floor space and generate job opportunities during the planning, construction, operation and maintenance stages.
- Similar to the height variation, the proposed FSR variation is compatible with the existing and desired future character of the locality. The proposed extension has been carefully developed to present an appropriate scale and density for the facility by having regard to the existing low density residential character of the Wentworthville. The proposed additional floor space is also considered to complement the envisaged future development in the area and address the existing shortfall in mental health hospital beds in NSW. It is also noted that the proposed additional FSR will not impact on the development potential of the adjoining R4 zoned land to the north.
- In addition, the incorporation of articulated architectural and landscape design is considered to enhance the visual interest of the Site and mitigate the visual impact of the proposed built form. Particularly, a pedestrian path with high quality landscaping will be provided along the southern boundary to facilitate access to the external courtyard in the south western portion of the Site. Tree Fern (*Cyathea cooperi*) with a mature height of 5m will be planted along the southern boundary, which is considered to provide visual screening for the existing single storey dwelling directly to the south at 31 Lytton Street. It should be noted that the Lytton Street Park access laneway also provides additional separation and visual buffer for 31 Lytton Street from the proposed built form. Furthermore, the use of a rhythmic and modulated façade treatment pays homage to the existing residential character of the area. It should be noted that the proposed balconies and courtyards have also been strategically positioned to be located away from the residential interface on the southern boundary to prevent overlooking and preserve the visual privacy of the neighbouring properties.
- Strict compliance with the FSR development standard will inhibit the provision and operation of the purpose-built health services facility that is designed to accommodate the projected demand for mental health services in the Wentworthville area. It will also impact on the efficient and functional operations of the Site to deliver high standards of health care services.
- The proposed development seeks to co-locate services which provides a superior outcome for health services as it prevents an alternate development site from occurring elsewhere for the much-needed services.
- The resultant FSR provides for a design that creates synergies with the existing Stage 1 building and an optimal outcome for health care planning purposes by ensuring that it can connect with the Stage 1 building.

In light of the reasons set out above, the proposal achieves the objectives of the FSR standard set out in Clause 4.4 and the R4 zone objectives and therefore, pursuant to the First Method of Wehbe, compliance with the Floor Space Ratio Development Standard pursuant to Clause 4.4(2) of CLEP2021 is unreasonable or unnecessary.

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



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

Clause 4.6(3)(b) of CLEP2021 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 and FSR standards, as demonstrated in **Section 4.1**.
- The proposed development is consistent with the objectives of CLEP2021 for the R4 High Density Residential zone, as described in **Section 4.2**.
- Compliance with the standards would be unreasonable and unnecessary for the reasons outlined in **Section 4.3**.
- The proposed variation to the height and FSR controls facilitates a built form which accommodates a purpose-built health services facility, whereby the design is sympathetic to the existing and future character of the area and involves minimal site preparation works which would otherwise require extensive earthworks that may disrupt the existing drainage pattern and soil stability.

The design of the proposed development has been finalised to ensure that the surrounding residential properties and the adjacent Lytton Street Park are not impacted or interfered with, which involves a four-storey built form with no basement levels or underground structures.

- The proposed development would integrate with both the local and regional context, specifically the R4 High Density zone that surrounds the Subject Site. The relationship of the development as proposed, with respect to height and FSR, 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 residential and recreational character. Additionally, colour and material direction would be utilised (where possible) to blend with the varied architectural forms. The texture and modelling will make the appearance of the elevations change throughout the day as the sun moves around the building which will create a high dynamic façade.
- The building envelope of the building has been designed to provide modulation and has been carefully considered with respect to the streetscape and surrounding residential properties on Lytton Street.
- The proposed development would provide a compliant development with respect to traffic and parking planning grounds; and compliance with the noise emission governed by the NSW EPA. As demonstrated in the Traffic and Accessibility Impact Assessment (**Appendix 9**), the proposed development will only result in a minor increase in traffic during both peak hour periods. Both the Lytton Street/Veron Street and Lytton Street/Fullagar Road intersections experience no reduction in Level of Service (LoS) or intersection delay as a result of the proposed development in both periods in the 2021 scenario. Both intersections would also continue to experience a LoS of 'A' in the 2031 scenario, with the proposed development resulting in no reduction to the LoS, and hence will continue to operate satisfactorily with acceptable delays and no external improvements required to support the proposed development.
- The proposed development, particularly the proposed height and FSR would integrate with the local context, specifically the R4 High Density Residential zone that surrounds the Subject Site. The relationship of the proposed development, with respect to height and FSR, would remain consistent via the gradual transition offered between sites. Importantly, both the proposed height and FSR variations are not highly noticeable as compared to a compliant scheme when viewed

Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

from the streetscape due to the positioning of the maximum height exceedance in the rear portion, provision of appropriate building setbacks and incorporation of generous landscaping to provide visual screening.

- Existing landscaping and mature trees offer additional landscape screening, which softens the building bulk and mitigate the visual impact of the Site. The proposed development will be further supplemented by increased landscaping provisions along the western boundary of the Site to offer screening in relation to adjacent open space. Specifically, tree planting will be undertaken along the western boundary comprising *Corymbia citriodora* (Lemon Scented Gum) and *Magnolia grandiflora 'Little Gem'* (Dwarf Magnolia), which have a mature height of 20m and 8m respectively. While the proposed development provides a 0m-6m setback to the western boundary, the proposed setback will be fully landscaped with carefully selected native species and a well-designed landscaped open space, which provides a communal space for outdoor recreation. Further, the additional height would not result in any significant adverse impacts on the amenity of the neighbouring residential buildings in terms of overshadowing, privacy, outlook and amenity with regard to any of the built form proposed. The increased landscaping will take place within the landscaped setback proposed which is generally consistent with the requirements of CDCP2021. Overall, the proposed landscape strategy is considered to provide an effective screening measure for the proposed building bulk and result in a superior outcome to what presently exists on the Site.
- The exceedance of the Height of Buildings Development Standard (by 4.6m) and Floor Space Ratio Development Standard by 9% would have an acceptable impact on the streetscape, on visual privacy and solar access of neighbouring development due to a strategically implemented architectural treatment, which integrates an aesthetically pleasing architectural landscape design, which offers suitable vibrant screening throughout the Site, via a careful selection of native and exotic tree, plant, shrubs and grass species to be strategically planted across the Site. This is suitable addressed within the Landscape Plans and Visual Impact Assessment prepared by Arcadia and Hatch RobertsDay respectively (refer to **Appendix 6 & 5** of the EIS).
- The proposed development responds to the existing topography of the Site and results in a superior planning outcome by minimising excavation and maintaining existing site levels surrounding the Site and the current relationship with Lytton Street. Were the overall height of the building reduced, this would reduce the proposed supply of health facilities on the Site, or require an increased development footprint, which would result in a further increase in GFA. It is considered that the variation to the building height and FSR controls as proposed generates a far superior outcome in a planning sense that is consistent with the built form outcomes of existing health services facilities throughout the State, whilst providing an asset that could service the immediate locality, Greater Sydney and NSW.
- The proposed development would support the productive economic use of the Site that is ideally located within an area zoned for such permissible health-related use, as well as being located within close proximity to the Wentworthville local centre, GPOP and nearby transport infrastructure, such as rail and bus networks and the wider regional road network, providing enhanced connectivity to the wider Sydney Metropolitan Area.
- Importantly, curtailing the proposal to comply with the 15m height limit, 1:1 FSR control would prevent the proposal from delivering the much-needed health care services in response to the projected demand for mental health care infrastructure in Wentworthville and the Greater Sydney.
- The proposal therefore represents a more efficient use of the Site when compared to a hypothetical development which is entirely compliant with the Height of buildings and FSR controls applicable to the Site.
- The proposal would not create significant visual, overshadowing or amenity impacts for surrounding sensitive land users. Limiting the building height and FSR to a strict compliant scenario would not deliver any measurable environmental or amenity benefits nor would this supply sufficient health services facilities to cater for the projected and unmet demand for mental health services in the locality and the wider region.

For the reasons outlined above, it is considered that the proposed variation to the building height and FSR controls under Clauses 4.3 and 4.4 is entirely appropriate and can be clearly justified having regard to the matters listed within Clause 4.6 of CLEP2021.



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

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-17899480**) 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 Clauses 4.3 and 4.4 and the R4 High Density Residential zone under CLEP2021. Accordingly, the proposed development is considered to be in the public interest, as it is consistent with the overarching height and FSR objectives. It would also contribute towards meeting the demand for employment opportunities and health care facilities within the Cumberland LGA, as identified within *A Metropolis of Three Cities* and the *Central City District Plan*. Specifically, the proposed development would be of social benefit to the immediate community groups and wider Cumberland LGA as it would increase the supply of health care services to the local community and improve the amenity of the existing health services facility, 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 Clauses 4.3 and 4.4 of CLEP2021 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 DPIE, requires that all Development Applications including a variation to a standard of more than 10% be considered by Council (in this instance NSW DPIE as the consent authority), rather than under delegation. The proposed development would result in exceedances of the relevant planning controls as follows:

- CLEP2021, Clause 4.3 Height of buildings by 4.6m / 30.6%; and
- CLEP2021, Clause 4.4 Floor space ratio by 9%.

This non-compliance with Clause 4.3 Height of buildings is more than the 10% prescribed in the stipulated Planning Circular – PS 08-014.

Furthermore, by including the non-compliance with Clauses 4.3 and 4.4 of CLEP2021, 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 and FSR 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 and infrastructure delivery in the health sector.
- *Central City District Plan*:
 - By providing a greater height and FSR at the Site, the proposed development can better respond to the Greater Sydney Commission's vision for infrastructure and collaboration and productivity priorities across the Central City District.



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

- *Greater Parramatta and the Olympic Peninsula (GPOP) Vision*
 - By providing a greater height and FSR at the Site, the proposed development would align growth with already committed infrastructure and support job creation in Greater Parramatta and new development in line with the Greater Sydney Region Plan.

4.7 PUBLIC BENEFIT IN MAINTAINING THE STANDARD

Given that strict compliance with Clauses 4.3 and 4.4 of CLEP2021 would result in:

- Not contribute towards meeting the demand for employment-generating opportunities within the Cumberland Local Government Area (LGA), as identified within *A Metropolis of Three Cities* and the *Central City District Plan*, by potentially resulting in a reduction in available building footprint and consequently inhibiting the effective delivery of health services facilities on the Site, that support the provision of health services infrastructure in Greater Sydney and NSW;
- Threaten the viability of the Subject Site for future built form, by reducing the overall achievable maximum height and FSR across the Site, which would impact on operational and capacity requirements of the facility;
- Not be able to achieve a height and FSR, that are being driven due to the emerging need for mental health services and alleviating pressure from other hospitals and clinics;
- Create fewer full-time equivalent jobs during the construction and operational (including maintenance) phases of development due to a decrease in footprint and building height; 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.

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:

- Increasing the overall supply health care infrastructure (particularly mental health services) in the Cumberland LGA;
- Contributing positively to the residential character of the R4 High Density Residential zone by improving the amenity of the area and preserve the amenity of the residential properties;
- Enabling an opportunity for increased employment due to increased capacity of health facilities;
- Stimulating a development outcome that is compatible with the existing and emerging residential area, as well as an evolving style of development comprising health services facilities, for which have been identified by both the Federal and State Government as being an infrastructure that is in high demand and essential as population dynamics expand within NSW and Australia;
- Provisions to revitalise an underutilised land portion coupled with increased landscaping that will form a synonymous relationship with the adjoining open space; and
- Facilitating development that is a permissible land use and consistent with the R4 High Density Residential 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.

Table 2 Objects of the Act - EP&A Act	
Object	Proposed Development Compliance
<p>The objects of this Act are as follows:</p> <p>(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,</p>	<p>The proposed development will promote the social and economic welfare of the community as it would contribute towards meeting the demand for increased health services facilities and employment opportunities within the Cumberland LGA and the Greater Sydney, as identified in <i>A Metropolis of Three Cities</i>, and the <i>Central City District Plan</i>. Specifically, the proposed development would be of social benefit to the</p>



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic

23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

	<p>community, as it would provide employment-generating opportunities and additional health care services for the immediate locality.</p>
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,	<p>The proposed development (including built form potential) has been assessed against the principles of Ecologically Sustainable Development as set out in the <i>Environmental Planning and Assessment Regulation 2000</i> (EP&A Regulation) as follows.</p> <p>The proposed development would not create the risk of serious or irreversible damage to the environment.</p> <p>Ultimately, the proposed development would not create any threats of serious or irreversible environmental damage which would require further scientific study to fully ascertain.</p> <p>The proposed development would not impact on the conservation of biological diversity or the ecological integrity of the locality.</p>
(c) to promote the orderly and economic use and development of land,	<p>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.</p>
(d) to promote the delivery and maintenance of affordable housing,	<p>Not relevant to the proposed development.</p>
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	<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 Construction Management Plan (CMP) for any future built form. These include:</p> <ul style="list-style-type: none"> ▪ Pre-Clearance Protocols: <ul style="list-style-type: none"> ○ On-site supervision of habitat tree felling and relocation of fauna; and ▪ CMP <p>Excluding the requirement for a CMP, 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 provisions for a Biodiversity Development Assessment Report (BDAR) at Appendix 17.</p>
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	<p>As no archaeological finds have been discovered in the study area, the impact of the proposed development has been assessed as having no harm or cumulative impacts to the Aboriginal heritage of the region. 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.</p>
(g) to promote good design and amenity of the built environment,	<p>Section 4.1 satisfactorily addresses how the proposed development responds to the character of the locality in terms of urban design.</p>
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,	<p>The proposed development can be undertaken and maintained without health and safety risks to patients and employees.</p>



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

<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 development represents an SSD Application, for which it will be assessed and determined by the NSW DPIE.
<i>(j) to provide increased opportunity for community participation in environmental planning and assessment.</i>	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 variation to Clauses 4.3 and 4.4 CLEP2021 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 variation is considered to be well-founded for the following reasons, as outlined within Clause 4.6 of CLEP2021:

- Compliance with the Development Standards is unreasonable and unnecessary in the circumstances;
- There are sufficient environmental planning grounds to justify contravening the Development Standards;
- 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 R4 High Density Residential 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

It is furthermore submitted, that:

- Strict compliance with the Development Standards 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 Cumberland LGA and wider Sydney Metropolitan Area, as identified within *A Metropolis of Three Cities* and the *Central City District Plan*;
- No unreasonable impacts are associated with the proposed development; and
- There is no material public benefit in maintaining the development standards.

Overall, it is considered that the proposed Clause 4.6 Variation to Clause 4.3 Height of buildings and Clause 4.4 Floor space ratio pursuant to CLEP2021 is entirely appropriate and can be clearly justified having regard to the matters listed with Clause 4.6 of CLEP2021.



Clause 4.6 Variation Request to Clause 4.3 and 4.4 of CLEP2021

Proposed Extension of Wentworthville Northside West Clinic
23-27 Lytton Street, Wentworthville (Lot 1 DP787784)

PART E CONCLUSION

It is requested that NSW DPIE (and Council) exercise their discretion and find, that this Clause 4.6 Variation adequately addresses the matters required to be demonstrated by Clause 4.6(3) of the CLEP2021 (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 Cumberland LGA, as identified within *A Metropolis of Three Cities* and the *Central City District Plan*, by potentially resulting in a reduction in available building footprint and consequently prohibiting future health-related land uses on the Site, that support the provision of health services facilities in the Cumberland LGA and Greater Sydney;
- Threaten the viability of the Subject Site for future built form, by reducing the overall achievable maximum height and FSR across the Site, which would impact on operational and capacity requirements of the facility;
- Not be able to achieve a height and FSR, that is being driven due to the emerging need for mental health services and alleviating pressure from other hospitals and clinics;
- Create fewer full-time equivalent jobs during the construction and operational (including maintenance) phases of development due to a decrease in footprint and building height; 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 DPIE (and Council) supports the proposed variation to Clause 4.3 Height of buildings and Clause 4.4 Floor space ratio under CLEP2021 for the following reasons:

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

Given the justification provided above, this Clause 4.6 Variation under CLEP2021 is well founded and should be favourably 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).

