

## Clause 4.6 – Exceptions to Development Standards – Height of Buildings

Address: 420 Macquarie Street, Liverpool

### 1. Introduction

This is an application to vary a development standard under Clause 4.6 – Exceptions to Development Standards, of the Liverpool Local Environmental Plan 2008 (LLEP 2008). The development standard for which the variation is sought is Clause 4.3 Height of Buildings under the LLEP 2008.

The variation relates to a proposed mixed use development located at 420 Macquarie Street, Liverpool. The development site also has frontage to Carey Street, Charles Street and Mill Road. The buildings contains 424 apartments and 396m<sup>2</sup> of retail space and consists of a six (6) storey residential flat building facing Charles Street and two mixed use residential towers towards the centre of the site of 29 storeys (25 storeys above a 4 storey podium) in height.

This application has been prepared in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline *Varying development standards: A Guide*, August 2011.

It is noted that Clause 4.6 also requires the concurrence of the Director-General to be obtained prior to the granting of consent for development that contravenes a development standard unless, concurrence from the Director-General to vary the development standard has been delegated to the Council.

### 2. Description of the planning instrument, development standard and proposed variation

#### 2.1 What is the name of the environmental planning instrument that applies to the land?

Liverpool Local Environmental Plan 2008 (LLEP 2008).

#### 2.2 What is the zoning of the land?

The zoning of the land that is the subject of the development application is part B4 Mixed Use and part R4 High Density Residential.

The two tower buildings for which a variation to the development standard is sought are located on the B4 zoned land. No variation is sought in relation to development on the R4 zoned land.

#### 2.3 What are the Objectives of the zone?

The objectives of the B4 Mixed Use zone are:

- To provide a mixture of compatible land uses.
- To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.

- To allow for residential and other accommodation in the Liverpool city centre, while maintaining active retail, business or other non-residential uses at street level.
- To facilitate a high standard of urban design, convenient urban living and exceptional public amenity.

## 2.4 What is the development standard being varied?

The development standard being varied is the building height development standard.

## 2.5 Is the development standard a performance based control?

No. The building height development standard is a numerical control.

## 2.6 Under what Clause is the development standard listed in the environmental planning instrument?

The development standard is listed under clause 4.3 of the LLEP 2008.

## 2.7 What are the objectives of the development standard?

The objectives of clause 4.3 are as follows:

- to establish the maximum height limit in which buildings can be designed and floor space can be achieved,
- to permit building heights that encourage high quality urban form,
- to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,
- to nominate heights that will provide an appropriate transition in built form and land use intensity.

## 2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3 of the LLEP 2008 establishes a maximum height control of 80m for the site as illustrated on the extract of the Height of Buildings Map included in Figure 1:

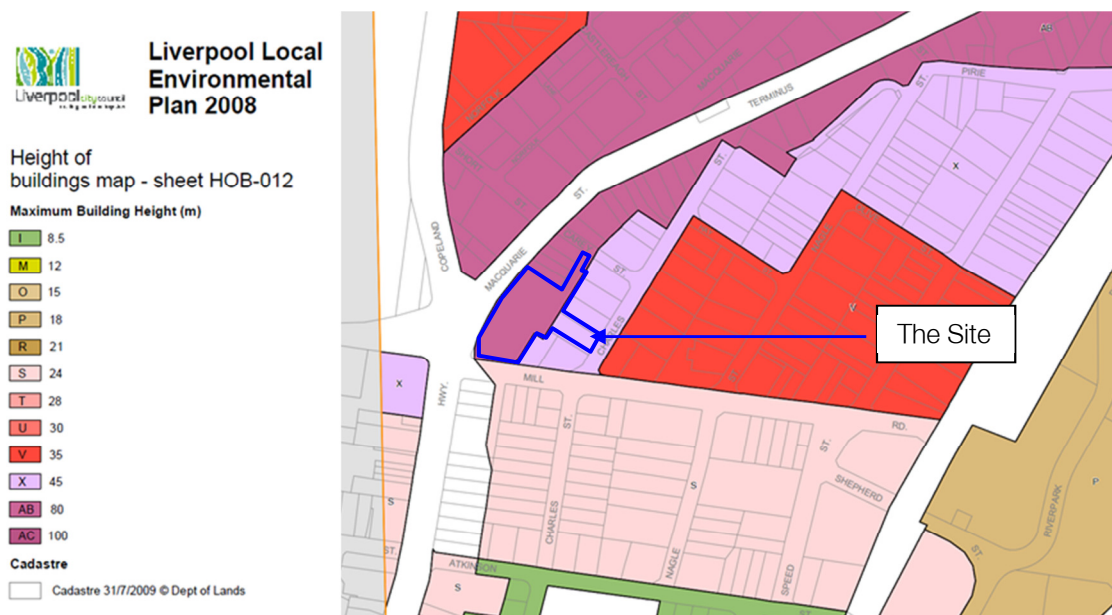


Figure 1: Extract from Height of Building Map – LLEP 2008

## 2.9 What is the proposed numeric value of the development standard in the development application?

Figures 2 to 5 illustrate the proposed non-compliances with the height standard. The height limit is shown in red.

The two towers on the site will exceed the standard to varying extents. Building A (northern tower) will vary between a minimum of 9.76m and a maximum of 13.01m due to the slope of the land. Building C (southern tower) will vary between 11.16m and a maximum of 14.16m due to the slope of the land. In both cases these calculations are to the absolute top of the building rather than the predominant roof levels.

Figures 4 and 5 also show that the building fronting Charles Street (Building B) is 26.77m lower than the maximum 45m height of buildings standard applying to this part of the site.

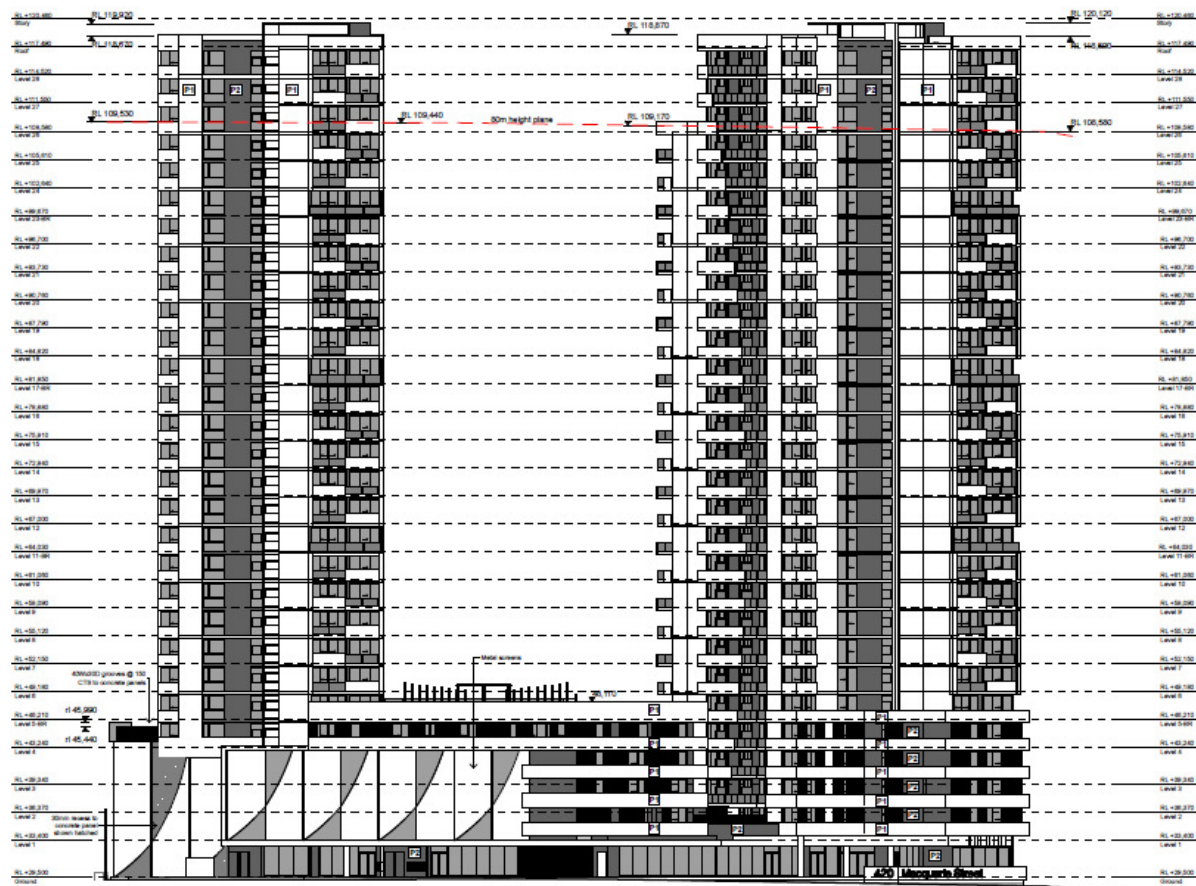


Figure 2: Non-compliance with 80m height limit

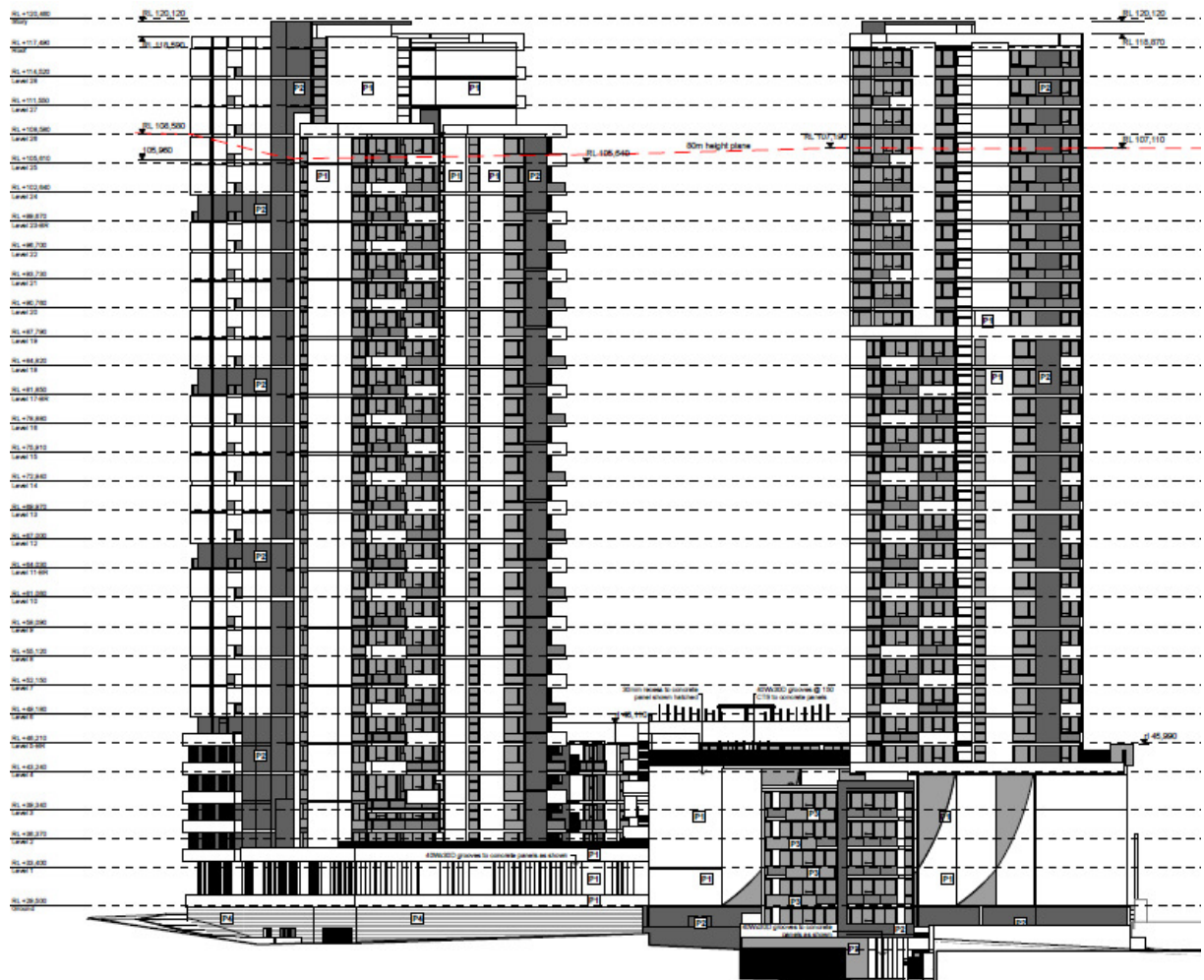


Figure 3: Non-compliances with 80m height limit

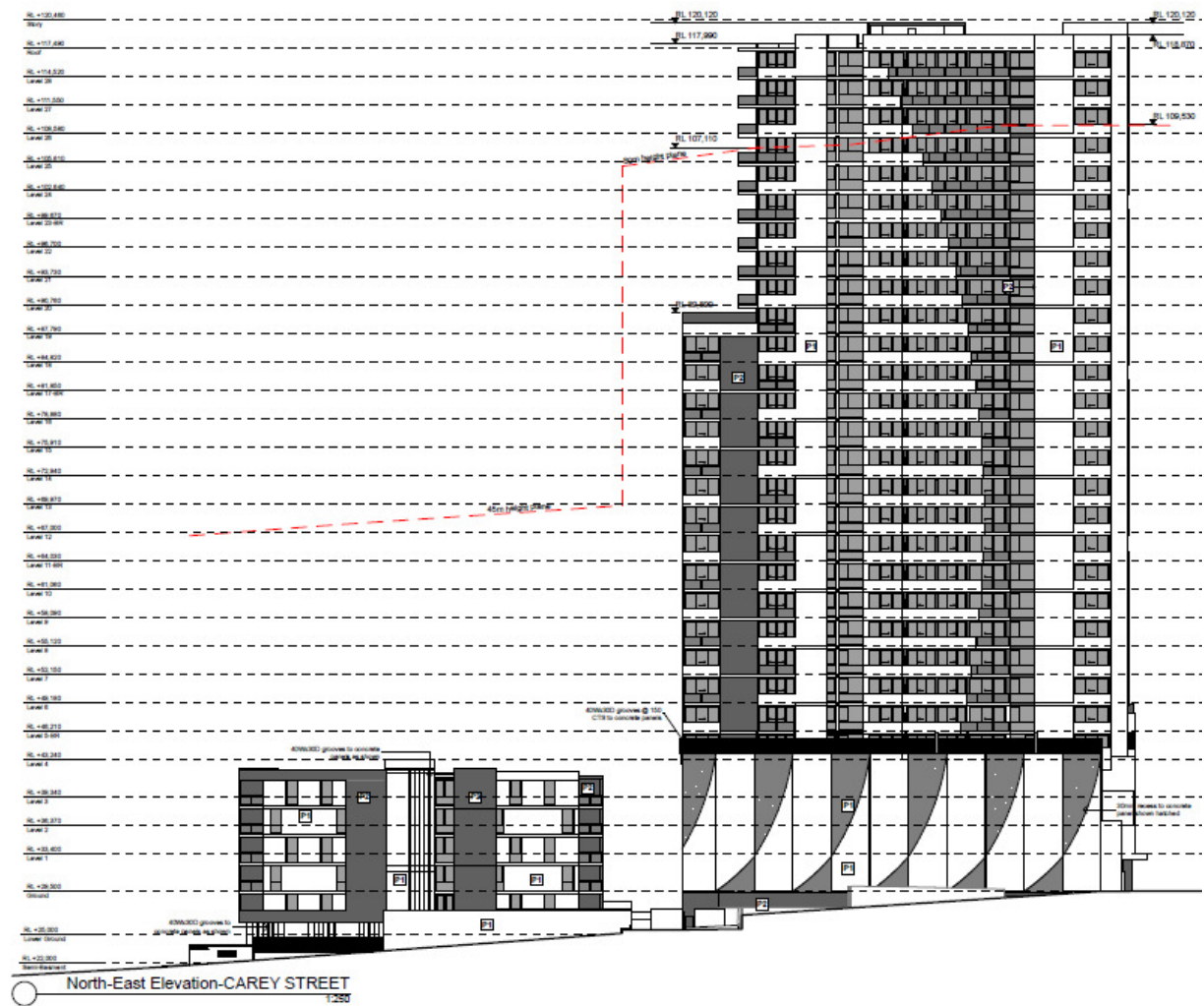


Figure 4: Partial non-compliance and partial compliance with height limits

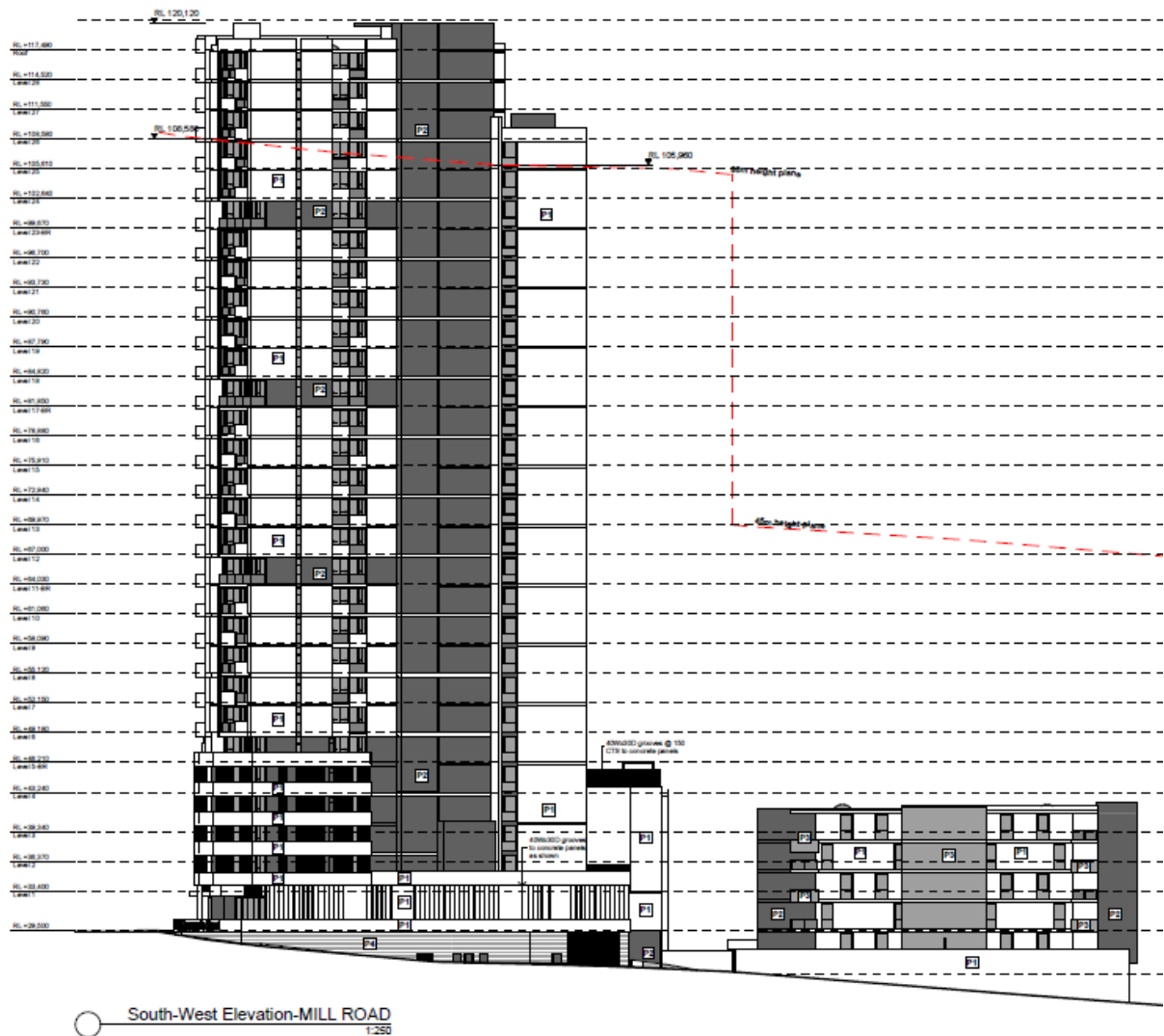


Figure 5: Partial non-compliance and partial compliance with height limits

## 2.10 What is the percentage variation (between the proposal and the environmental planning instrument)?

In the case of Building A the percentage variation varies between a minimum of 12.2% and a maximum of 16.2%. Building C varies between 13.9% and 17.7%. It should be noted that Building B is 59.4% below the relevant 45m height standard.

It is also noted that slender towers are proposed and that any forced compliance with the 80m height standard may result in a broader floor plate, reduced setback between the towers and a wider shadow being cast.

## 3. Assessment of the Proposed Variation

### 3.1 Overview

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan.



Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

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

*4.6(3)(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

In addition the 4.6(4)(i) requires that development consent must not be granted for a development that contravenes a development standard unless the:

*(a) the consent authority is satisfied that:*

*(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and..*

An assessment of the building height variation is provided below in accordance the requirements of Clause 4.6. In addition, this variation has also been prepared in accordance with the Guidelines, which identifies matters to be addressed in an application to vary a development standard. The matters identified in the Guideline are consistent with the SEPP 1 objection principles identified in the decision of Justice Lloyd in *Winten v North Sydney Council* outlined below:

1. Is the planning control in question a development standard;
2. What is the underlying object or purpose of the standard;
3. Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the *EP&A Act 1979*;
4. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;
5. Is a development which complies with the development standard unreasonable or unnecessary; and
6. Is the objection well founded.

In accordance with the Guideline, the assessment also addresses the 'five part test' established by the NSW Land and Environment Court. The five part test was established in the decision of Justice Preston in *Wehbe V Pittwater [2007] NSW LEC 827* to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

1. Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives;
2. Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;
3. Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
4. Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
5. Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.

### 3.2 How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

In the circumstances of this case, the provision of strict numerical compliance would be unreasonable due to the following:

1. The proposal remains consistent with the objectives of the B4 Mixed Use zone, despite the non-compliance with the height control as demonstrated in the assessment of the objectives below:

*(a) To provide a mixture of compatible land uses.*

The proposal provides a mixture of compatible land uses with retail space at ground level.

*(b) To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

The site is within a highly accessible location within the defined Liverpool city centre and includes non-residential and residential floor space.

*(c) To allow for residential and other accommodation in the Liverpool city centre, while maintaining active retail, business or other non-residential uses at street level.*

The development includes non-residential uses at street level.

*(d) To facilitate a high standard of urban design, convenient urban living and exceptional public.*

The design of the development has been determined with urban design advice provided by the Council.

2. The proposal remains consistent with the objectives of the building height standard outlined in subclause 4.3(1) despite the non-compliance demonstrated below:

*(a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved*

The development standard clearly contemplates tower forms of development in the location.

The subject site is very large (6,158 sqm) and capable of accommodating a significant scale of development, while at the same time mitigating potential impacts on adjoining and surrounding sites.

While large in size, the site does contain two “fingers” of land extending into Carey Street and Charles Street respectively. These sections of the site are the most sensitive in terms of proximity and relationship to residential neighbours.

The underlying design principle adopted for the development is to redistribute building height and floor space away from the Carey Street and Charles Street sections of the site to the central and western sections of the site. This redistribution results in a low scale and discrete residential flat building in Charles Street (5 storeys) that is consistent with the scale of buildings in this street but nonetheless well below the allowable floor space ratio and building height standard associated with this section of the site. The Carey Street section of the site, which could accommodate a residential flat building, is proposed to be used for deep soil landscaping and pedestrian access so as to mitigate potential impacts of development on the adjoining sites.

The overall height of the towers arises in part due to the design including above ground parking in the form of a multi-storey podium, with the residential towers of 25 storeys each sitting above the podium. The design of the car parking in this form is consistent with Liverpool Development Control Plan 2008 controls and a conscious decision that provides for natural ventilation of the space as well as reduced



excavation and associated environmental impacts such as land-fill. The provision of podium car parking rather than an excavated basement several levels deep also goes to the overall feasibility of development in this location.

The scale and form of tower development is consistent with that anticipated in this location in the Liverpool city centre.

*(b) to permit building heights that encourage high quality urban form,*

The urban form of development for the large site is based on the underlying principle mentioned above – to redistribute the built form away from the sensitive locations next to existing residential development and to concentrate the height and floor space in the central and western parts of the site.

*(c) to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight*

The variation in height will not compromise the opportunity for buildings receiving exposure to the sky and sunlight. The redistribution of height and floor space towards the central and western parts of the site will ensure that sunlight access to adjoining and nearby residential development is maximised.

*(d) to nominate heights that will provide an appropriate transition in built form and land use intensity*

The proposal variations in height will be largely indiscernible as they relate to adjoining sites.

This section of the Liverpool city centre will undergo significant change to the built environment as a result of the significant increases in building height controls in comparison to the existing scale. The redistribution of building height and floor space away from Charles Street and Carey Street achieves the objective of an appropriate transition.

Given the circumstances of the case, the provision of a strict numerical compliance would be unreasonable on the basis that the proposed development achieves compliance with the objectives of the standard, and is compatible with the anticipated scale of new development within this section of the Liverpool city centre.

### **3.3 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?**

The objects set down in Section 5(a)(i) and (ii) are as follows:

*“to encourage:*

- (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- (ii) the promotion and co-ordination of the orderly and economic use and development of land...”*

Compliance with the standard would hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act, which are to encourage development that promotes the social and economic welfare of the community and a better environment, and to promote and coordinate orderly and economic use and development of land.

As mentioned under section 3.2 above, the overall height of the towers arises in part due to the design including above ground parking in the form of a multi-storey podium, with the residential towers of 25 storeys each sitting above the podium. The provision of podium car parking rather than an excavated basement several levels deep also goes to the overall feasibility of development in this location. Moreover

the naturally ventilated podium car parking will have environmental benefits, will result in less land fill and no impact on the water table, consistent with Object of 5(a) (ii). Community benefits will result from a shorter construction period.

Strict compliance with the development standard would not result in discernible benefits to the amenity of adjoining sites or the public. Further, the proposal satisfies the zone and development standard, and principally achieves the anticipated tower form in the Liverpool city centre while at the same time redistributing floor space and building height away from sensitive neighbours. The development as proposed is consistent with the provisions of orderly and economic development. Strict compliance with the standard is not required in order to achieve compliance with the objectives.

### **3.4 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?**

A development that strictly complies with the 80m height standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The subject site is very large (6,158 sqm) and capable of accommodating a significant scale of development, while at the same time mitigating potential impacts on adjoining and surrounding sites.
- While large in size, the site does contain two “fingers” of land extending into Carey Street and Charles Street respectively. These sections of the site are the most sensitive in terms of proximity and relationship to residential neighbours.
- The underlying design principle adopted for the development is to redistribute building height and floor space away from the Carey Street and Charles Street sections of the site to the central and western sections of the site. This redistribution results in a low scale and discrete residential flat building in Charles Street (6 storeys) that is consistent with the scale of buildings in this street but nonetheless well below the allowable floor space ratio and building height standard associated with this section of the site. The Carey Street section of the site, which could accommodate a residential flat building, is proposed to be used for deep soil landscaping and pedestrian access so as to mitigate potential impacts of development on the adjoining sites.
- There are no unacceptable additional impacts arising from the variation. No views will be impacted by the additional height. The extent of overshadowing that impacts on the surrounding does change but is still acceptable. A development that concentrated greater height and floor space towards the Carey Street and Charles Street sections of the site – built form consistent with that allowable under the planning controls, would have a greater and likely unacceptable impact.
- The two towers sit on top of a 5 storey podium containing above ground car parking and it is this design approach that contributes to the breach of the height standard. Deletion of the podium and replacement with a multi-level excavated basement, in order to lower the height of the development, would impact on the feasibility of the development.
- The scale and form of tower development is consistent with that anticipated in this location in the Liverpool city centre.

### **3.5 Are there sufficient environmental planning grounds to justify contravening the development standard?**

Yes. In the circumstances of the case, there are sufficient planning grounds to justify contravening the development standard being:

- The proposal satisfies the objectives of the B4 Mixed Use zone and the objectives of the building height standards as described in Section 3.2 above;

- The non-compliance with the standard does not contribute to unacceptable adverse environmental impacts in terms of overshadowing, visual impacts or view loss;
- The variation actually improves the relationship and potential impacts to adjoining properties, by concentrating building height and floor space away from sensitive boundaries;
- The proposed non-compliances with the height controls will not contribute to a discernible increase in the overall bulk and height of the proposed buildings when viewed from the neighbouring and surrounding area;
- The non-compliance with the standard does not result in a scale of building that is out of character with the anticipated future character of this section of Liverpool city centre;
- The proposed development is generally compliant with the controls, or the intent of the controls, contained in the Liverpool Development Control Plan 2008; and
- The development as proposed is consistent with the provisions of orderly and economic development.

### 3.6 Is the variation well founded?

Yes. For reasons outlined in the preceding sections of this submission, the variation to the height control is well founded as compliance with the standard is unreasonable as the development does not contravene the objects specified within 5(a)(i) and (ii) of the Act and B4 Mixed Use zone.

A development that strictly complies with the standard is unnecessary in this circumstance as no appreciable benefits would result by restricting the development to the height limit.

## 4. Conclusion

Development standards are a means of implementing planning purposes for a development or area.

The building height is considered appropriate to the context and circumstances of the site, and does not result in a scale of development that is out of character with the intended future character of this section of Liverpool city centre.

A development strictly complying with the numerical standard would not discernibly alter the scale of the building or improve the amenity of surrounding development or the public domain. On the contrary, if floor space and building height were to be distributed towards the sensitive boundaries of the site, and in particular Carey Street and Charles Street in compliance with the applicable development standards, the resultant built form would have a much greater environmental impact.

This submission satisfies the provisions of 4.6(3)(a), 4.6(3)(b) and 4.6(4)(a)(i) of the LLEP as it has been demonstrated that compliance with the height development standard is both unnecessary and unreasonable in the circumstances of this case and there is sufficient planning grounds to justify contravening the standard.