

Clause 4.6 Request for Variation to a Development Standard

*Proposal to vary Height of Buildings Development
Standard under clause 4.3 of Liverpool Local
Environmental Plan 2008*

21 Atkinson Street Liverpool

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1 INTRODUCTION

A Development Application has been lodged by Synergy Development Group P/L. The Application proposes to vary the height of buildings development standard under clause 4.3 of Liverpool Local Environmental Plan 2008 (**LLEP 2008**).

Pursuant to clause 4.6 of LLEP 2008, the Applicant may provide a written Request for Variation to the height of buildings development standard. The Request for Variation must set out why compliance with the standard is unreasonable and unnecessary in the circumstances of the case, and must additionally establish that there are sufficient environmental planning grounds to justify contravention of the development standard.

This report sets out the Applicant's Request for Variation. It has been prepared in accordance with the Department of Planning and Infrastructure publication "Varying Development Standards: A Guide" dated August 2011 (**The Guide**). Additionally, this Request for Variation takes into account seminal Court decisions relevant to SEPP 1 generally, as well as clause 4.6 specifically.

2 CLAUSE 4.6 REQUEST FOR VARIATION

Components of Clause 4.6 relevant to the preparation of a Written Request for Variation are:

4.6 Exceptions to development standards

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

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

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

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

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

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

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

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

(a) the consent authority is satisfied that:

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

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

(5) In deciding whether to grant concurrence, the 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 Secretary before granting concurrence.

(6) ...

(7) ...

(8) ...

2.1 What is the Development Standard Being Varied?

The subject Request for Variation relates to the height of buildings development standard.

2.2 Under what clause is the development standard listed in the environmental planning instrument?

The development standard is contained within clause 4.3 of LLEP 2008.

2.3 What is the Zoning of the Land?

The subject site is zoned R4 – High Density Residential.

2.4 What Are the Objectives of the Zone?

The zone objectives are:

- To provide for the housing needs of the community within a high density residential environment.*
- To provide a variety of housing types within a high density residential environment.*
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- To provide for a high concentration of housing with good access to transport, services and facilities.*
- To minimise the fragmentation of land that would prevent the achievement of high density residential development.*

2.5 What Are the Objectives of the Development Standard?

The objectives of clause 4.3 are:

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

2.6 What is the Numeric Value of the Development Standard in the Environmental Planning Instrument?

The height of buildings map specifies a maximum building height of 24m.

2.7 What is the Numeric Value of the Development Standard in the Development Application?

The proposal provides three towers referenced as Block A, Block B and Block C.

Towers B and C exceed the height of buildings development standard by varying amounts. Additionally, each of these towers includes an “architectural roof feature” which is labelled on the architectural plans as “architectural feature screen”.

The architectural feature screens are excluded from calculation of building height pursuant to clause 5.6 of LLEP 2008:

5.6 Architectural roof features

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

- (a) to permit variations to maximum building height standards for roof features of visual interest, and*
- (b) to ensure that roof features are decorative elements and that the majority of the roof is contained within the maximum building height standard.*

(2) Development that includes an architectural roof feature that exceeds, or causes a building to exceed, the height limits set by clause 4.3 may be carried out, but only with development consent.

(3) Development consent must not be granted to any such development unless the consent authority is satisfied that:

(a) the architectural roof feature:

(i) comprises a decorative element on the uppermost portion of a building, and

(ii) is not an advertising structure, and

(iii) does not include floor space area and is not reasonably capable of modification to include floor space area, and

(iv) will cause minimal overshadowing, and

(b) any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.

In respect of Tower "B" the proposed feature screens enclose the proposed rooftop communal open space. In respect of Tower "A" the purpose of the feature screen is to add to the perceived height of the development in order to achieve a more balanced distribution of building height across the site, having regard to natural topography as well as the need to provide contextual relationship with the approved south-eastern adjoining Paper Mill development.

Relative to the requirements set out in Clause 5.6 (3)(a) the proposed feature screens are situated at the uppermost portion of the building area and provide exclusively a decorative function. They do not contain advertising structures and does not nor could not be capable of modification to include floor space area. Generous separation distance is available to southern adjoining development due to proposed a setback as well as the reservation width of Atkinson Street. As such, the proposed feature screens will cause minimal overshadowing. In respect of Tower B, the proposed feature screens also conceal the lift overrun and access to the roof top open space area.

For the above reasons, the proposed feature screens are considered to be "architectural roof features" and are not required to be justified by way of clause 4.6 Written Request for Variation.

The extent of non-compliance is shown graphically in the following Figure 1.

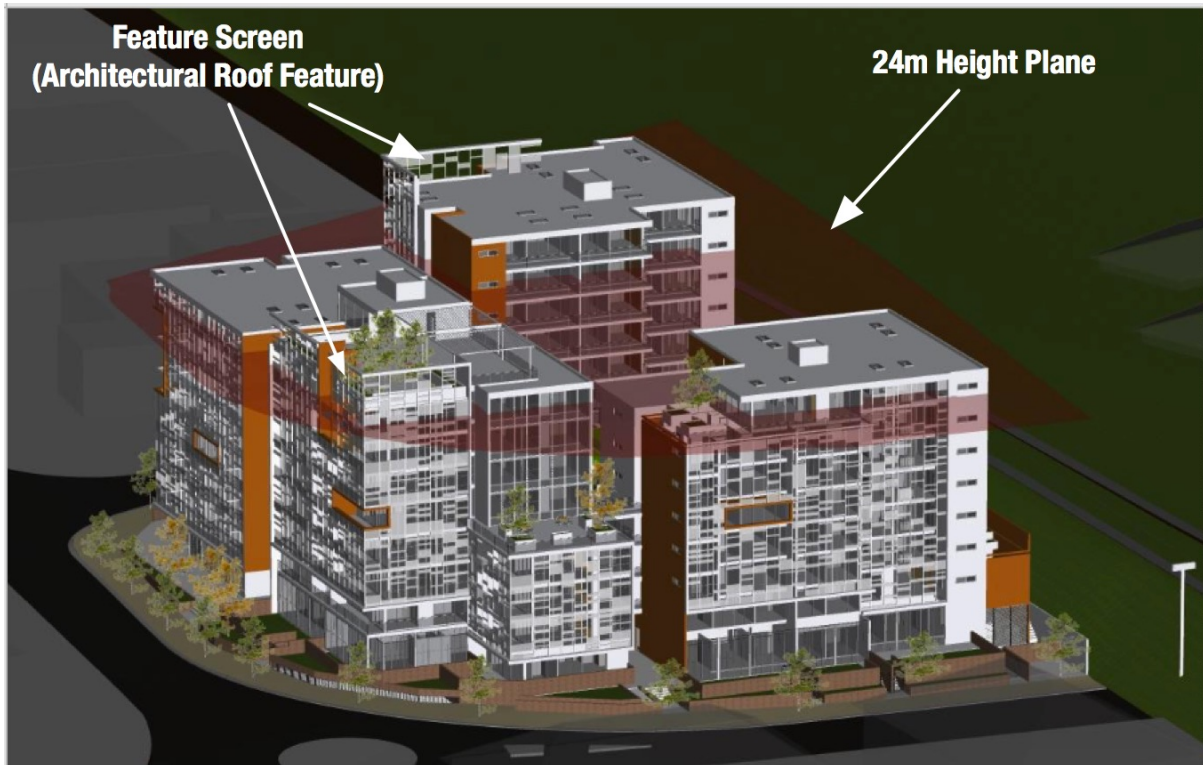


Figure 1: Massing Model Height Non-Compliance Summary

In numerical terms, the extent of non-compliance is:

Tower A	2.3m to main roof and 3.7m to lift overrun
Tower B	1.98m to the main roof line - 4.8m to the roof of the communal open space lobby 6.2m to the lift overrun
Tower C	4.2m to the main roof line 5.6m to the lift overrun.

2.8 What is the Percentage Variation Between the Proposal and the Environmental Planning Instrument?

Tower A	9.58% to the main roof line and 15.4% to the lift overrun.
Tower B	8.25% to the main roof line 20% to the roof of the communal open space lobby 25.8% to the lift overrun
Tower C	17.5% to the main roof line 23.3% to the lift overrun.

2.9 What Are the Ways in Which Strict Compliance of the Standard can be Demonstrated to be Unreasonable or Unnecessary in the Circumstances of the Case?

The matter of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (21 December 2007) sets out 5 ways in which compliance with a development standard can be demonstrated to be unreasonable or unnecessary in the circumstances of the case. The 5 ways are:

- *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)*
- *the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary*
- *the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable*
- *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*
- *the zoning of particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and that "compliance with the standard in that case would also be unreasonable or unnecessary."*

The subject application relies on the first of the Wehbe Tests being, the objectives of the standard are achieved notwithstanding non-compliance with the standard. It is also argued that since

Secondly, the subject Request for Variation relies on the fifth way in Wehbe, and asserts that the height of building development standard is unreasonable as applied to the land.

We note that this "way" of demonstrating compliance with the standard does not precisely follow the vernacular of the fifth Wehbe Test, however it is to be recognised that Wehbe related to a variation to a development standard under SEPP 1 and that the principal environmental planning instrument in that matter was Pittwater LEP 1993. Under that instrument, as was generally the case at that time, development standards ran with the zoning and were not applied by reference to separate maps. Accordingly, objection to the reasonableness of the development standard rather than the zone, is considered to be consistent with the principles established within the fifth Wehbe Test.

2.10 How is Strict Compliance with the Standard Unreasonable or Unnecessary in the Circumstances of the Case?

Having regard to the objectives of the development standard as well as the objectives of the B4 Mixed Use zone, the following sets out the ways in which the proposed lot size complies with both sets of objectives, notwithstanding numerical non-compliance:

2.10.1 Reason for Variation 1

Strict Application of the height of buildings development standard hinders the attainment of the floor space ratio bonuses which are applicable to the Liverpool City Centre.

The proposed development provides a FSR of 2.3:1, being 0.2:1 less than the maximum permissible. In percentage terms, the development provides 1035sqm or 7.6% less GFA than the floor space ratio control under clause 4.4(2B) permits. Nevertheless, the proposal still benefits from an FSR bonus of 0.8:1 compared with the height of buildings map baseline standard of 1.5:1.

The floor space ratio bonuses which are available under clause 4.4(2B) have been applied to promote development in the Liverpool Strategic Centre. However at the same time, objective (f) of clause 4.4 continues to apply to all development within the Liverpool City Centre. That objective specifies:

*(f) to facilitate design excellence in the Liverpool city centre by ensuring the extent of floor space in building envelopes **leaves generous space for the articulation and modulation of design.** (emphasis added).*

Generous space for the articulation and modulation of design requires space to be provided around buildings. If floor space ratio bonuses are allowed, but no increase in

height of buildings is permitted, then the outcome is the reverse of that which is required under objective (f). As such, it is argued that it is unreasonable to: a) encourage development within the Liverpool City Centre by providing floor space ratios; b) require generous space around those larger buildings; and to then not facilitate a concomitant bonus in the height of buildings development standard is unreasonable. As such, compliance with the height of buildings development standard is unreasonable in the circumstances of the case.

Further, the relationship between clause 4.4(2B) and clause 4.3 is at odds with the methodology adopted under clause 7.5(6) of LLEP 2008. Whilst the subject application does not rely on the additional bonuses afforded through the design competition process under that clause, it is instructive and relevant to note that clause 7.5(6) specifically acknowledges the close relationship between FSR and height of buildings by providing bonuses to both development standards concurrently.

The close relationship between FSR and height is also acknowledged by objective (a) of clause 4.3:

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

The way in which clause 4.3 interacts with clause 4.4(B2) is that it directs the same building height for the subject site regardless of whether the applicable FSR is 1.5:1 as per the LEP Map or 2.5:1 as per the Liverpool City Centre FSR bonuses. This is an operation which is contrary to objective (a) above which expressly aims to establish height limits in which "floor space can be achieved". Strict application of the height of buildings development standard will thwart the first objective of the standard and is therefore unreasonable in the circumstances of the case.

Council have suggested by letter of 4 November 2016 that the FSR development standard is a "theoretical maximum and as such is may not always be possible to achieve due to other controls" which need to be complied with.

This approach is incorrect for two reasons. First it is a requirement of the Apartment Design Guide (a statutory document by dint of clause 28(c) of SEPP 65 - Design Quality of Residential Apartment Buildings), that:

The controls must be carefully tested to ensure they are co-ordinated and that the desired built form outcome is achievable. They should ensure the desired density and massing can be accommodated within the building height and setback controls.

A suggestion that FSR may not be achieved on a large and generously proportioned site such as the subject is in fact a recognition that the controls are not co-ordinated, this being exactly the reason as to why strict compliance is unreasonable.

Secondly, Council's suggestion that FSR may not be achievable because of the presence of other controls is incorrect because it directly contradicts a fundamental purpose of the controls being imposed – certainty to the community and landowners. Council's attention is drawn to its Business Paper of 5 May 2008, in which Council considered Draft LEP 2008 subsequent to its public exhibition. Page 55 of that report states:

*LLEP 2008 prescribes **residential floor space** ratios consistent with the Department of Planning aims for 'implementing strategic planning objectives and **providing certainty to the community and land owners about the acceptable bulk and scale of development**' (emphasis added)*

In summary:

- Clause 4.4(2B) aims to promote development within the Liverpool City Centre by providing FSR bonuses;
- Objective (f) of clause 4.4 aims to promote generous space around buildings
- The relationship between clause 4.3 and clause 4.4(2B) is inconsistent with height and FSR bonuses available under clause 7.5(6)
- Strict application of the static height of buildings control where floor space ratio is dynamic under clause 4.4(2B) leads to an outcome which is directly contrary to the first objective of the height of buildings standard.
- SEPP 65 requires that FSR and height of buildings controls are to be carefully tested to ensure they are coordinated;
- A primary purpose of FSR controls is to provide certainty to the community and land owners. Encouraging development by offering dynamic floor space ratio bonuses but then preventing the attainment of those bonuses by virtue of static height controls is the antithesis of certainty

In these circumstances, it is unreasonable to apply primacy to the height of buildings development standard over the floor space ratio bonuses available under clause 4.4(B2)

2.10.2 Reason for Variation 2:

The proposed development remains consistent with the Objectives of the R4 – High Density Residential zone and does not derogate from the Objectives of clause 4.3 of LLEP 2008

With regard to the zone objectives it is fair to say that the proposed development remains consistent with the first, second and fourth listed and that the third and fifth listed are not relevant to the subject application. Pursuant to the Guide, for the Request for Variation to be supported, it is necessary that this be the case. However consistency with the zone objectives alone does not establish a particularly compelling reason for variation to the standard. A development which complied with the height of buildings development standard would equally satisfy the zone objectives.

Of significantly greater import is that the proposed development does not offend the objectives of the height of buildings development standard and further, that in the circumstances of the subject application a development which complied with the standard would offend the first objective of the standard.

Referencing each of the objectives of the standard we note:

- The proposed development provides GFA at 7% less than the maximum applicable FSR. Strict application of the height of buildings standard would result in an outcome in which floor space *cannot* be achieved. That outcome would be exactly opposite to that which is directed by the objective. We note in this regard that the design does not propose communal open space or building separation which vastly exceed LEP or ADG requirements. On the contrary, building separation requirements are also not met. The cause of the height non-compliance rests squarely with the fact that the development relies on FSR bonuses available under clause 4.4(B2) of LLEP 2008.

Given that the proposed development is consistent with objective (a) of the standard and that a development which complied with the standard would offend that objective, strict compliance with the standard is considered to be unreasonable and unnecessary in the circumstances of the case.

- The proposed development delivers a high standard of urban design. The following lists those units together with their gross floor area, which are located in non-complying areas of the building:

Tower	Unit	Gross Floor Area (sqm) of non-compliant building element
B	B7.06	82.85
	B7.05	90.31
	B7.07 (partial) And B7.08 (partial)	114.40
	B7.01	75.14
	B7.02	80.5
	B7.03	77.86
	B7.04	96.63

C	C7.01	82.74
	C7.02	51.86
	C7.03	83.31
	C7.04	83.77
	C7.05	78.62
	C7.06	62.61
Subtotal		1060.6
Corridors, lifts and fire stairs	+20%	212.12
Total		1272.72

Conceptually therefore, it would be possible to redistribute the proposed floor space to provide 1272 sqm GFA as additional floor space elsewhere below the 24m height plane. Over 5 residential levels, this would require 254.4 sqm GFA per level.

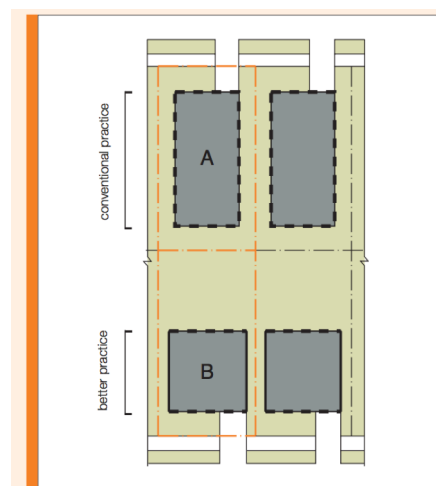
Such additional floor space could conceivably be located at the western end of the communal open space area as a fourth tower as per Figure 2.



Figure 2: Hypothetical Design Which Redistributes Floor Space to Comply with Building Height

Through exclusively east facing balconies and the use of highlight windows, privacy outcomes could be achieved to a satisfactory level. However this alternative design is clearly vastly inferior in urban design terms to the proposed development. The integrity of communal open space area and dimension is severely compromised. Outlook from proposed dwellings within Tower A and C would also be severely reduced.

The distribution of floor space to provide greater height and lesser site coverage is fundamental to good design. This principal was promoted since the commencement of SEPP 65 in the former Residential Flat Design Code by a simply graphic appearing on Page 35 (inset right). The convention practice (Building A) was a 3 storey building with 1:1 FSR. The better practice (Building B) achieves 1:1 FSR but over 4 storeys instead of 3.



Whilst a crude analysis, the hypothetical alternative compliant development shown in Figure 2 encapsulates all of the problems associated with

the "Conventional Practice". The proposed height exceedance, necessary to deliver lower site coverage, greater landscaped area and generous podium level communal open space is entirely consistent with the "Better Practice".

- The proposed height non-compliance results in negligible difference in terms of exposure to the sky and access to sunlight compared with a development which hypothetically complied with the height of buildings development standard.
- The subject site is situated in close proximity to the approved Paper Mill Development. We acknowledge and understand that the 48m approved building height on that site was predicated on heritage incentives. No assertion is made that the subject site should accommodate the same proposed building height. Rather, our observation is that the Paper Mill will be a new building within the immediate visual and contextual catchment of the subject site. Objective (4) of the standard seeks to achieve a transitioning in building height. The circumstances in which the subject site finds itself, is that there is an approved 48m high building adjoining to the south east.

The development plans show massing diagrams of adjoining buildings, including the Paper Mill as well as other adjoining buildings. These diagrams demonstrate the attainment of a transition of building height. Indeed it is specifically for the purposes of delivering a better transitioning with the paper mill that perceived building height has been purposefully increased through the use of feature screens at the parapet edge. The proposed development is squarely consistent with the objective of transitioning building heights. This is an outcome which the objective of the standard requires and is a relevant objective irrespective of heritage controls.

Having regard to the above, the proposed development is consistent with all relevant zone objective and is also squarely aligned with all of the objectives of the development standard.

2.10.3 Reason for Variation 3

The proposed building height exceedance is satisfactory having regard to the Planning Principles established within PDE Investments No 8 Pty Ltd v Manly Council [2004] NSWLEC 355

PDE investments is a Planning Principle decision which deals with tensions which exist between FSR and building envelopes. Whilst there is no explicit building envelope control for the subject site, setback and height of building controls operate in concert to produce essentially a building envelope control.

The Planning Principle is detailed at paragraph 48 of the judgment.

48 The question of whether a building envelope can be filled when the FSR control would produce a smaller building is one that arises from time to time in Court proceedings. The following planning principles are therefore of assistance:

- i. FSR and building envelope controls should work together and both controls and/or their objectives should be met.*
- ii. A building envelope is determined by compliance with controls such as setback, landscaped area and height. Its purpose is to provide an envelope within which development may occur but not one which the development should necessarily fill.*
- iii. Where maximum FSR results in a building that is smaller than the building envelope, it produces a building of lesser bulk and allows for articulation of the building through setbacks of the envelope and variation in building heights.*
- iv. The fact that the building envelope is larger than the FSR is not a reason to exceed the FSR. If it were, the FSR control would be unnecessary.*

With regard to the subject application, it has been established that the FSR and building envelope controls do not work together. This is a natural consequence of FSR bonuses being applied without concomitant height bonuses. The fact that the two controls do not work together means that one should take primacy over the other. In the case of LLEP 2008, the first Objective of clause 4.3 clearly establishes that FSR should take primacy because the objective of the height of buildings control is to establish a height limit in which floor space can be achieved.

In the case of the subject application, consideration of principles (ii) to (iv) above also support the conclusion that FSR should take primacy. Just as a large building envelope does

not justify exceedance of the FSR control, an inadequate building envelope does not justify curtailment of the FSR control.

For the above reasons strict compliance with the height of buildings development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

2.10.4 Reason for Variation 4

The height of the proposed development is acceptable when assessed against the planning principles for height and bulk and set out within Veloshin v Randwick Council [2007] NSWLEC 428

Paragraph 32 of the Senior Commissioner's judgment sets out the Planning Principles in relation to height and bulk:

Planning principle: assessment of height and bulk

· The appropriateness of a proposal's height and bulk is most usefully assessed against planning controls related to these attributes, such as maximum height, floor space ratio, site coverage and setbacks. The questions to be asked are:

Are the impacts consistent with impacts that may be reasonably expected under the controls? (For complying proposals this question relates to whether the massing has been distributed so as to reduce impacts, rather than to increase them. For non-complying proposals the question cannot be answered unless the difference between the impacts of a complying and a non-complying development is quantified.)

Comment: The subject site is surrounded by public road and the railway line. This is a rare site attribute which has the effect of producing a significantly larger building separation distance than would typically be available for traditional midblock sites. As a consequence of this site characteristic, the distribution of massing produces less apparent height and bulk on adjoining land than would be the case if only SEPP 65 building separation between buildings were provided. As mentioned above, the proposed height has been purposefully distributed to achieve a better scale relationship with The Paper Mill development than would be the case for a development which complied with the standard. So significant is this design outcome, that the design actively increases height to Atkinson Street and Shepherd Street through the use of architectural feature screen.

How does the proposal's height and bulk relate to the height and bulk desired under the relevant controls?

Comment: The height of parts of the development excluding roof top communal open space lobby and lift overruns marginally exceeds the controls, the FSR is marginally under the controls. Communal open space. Relative to the wording of the Principle, height is a lineal vertical measure. Bulk is a volumetric measure which is most closely aligned with FSR. The fact that the proposal is below the statutory FSR is therefore significant to the assessment

of the proposed height. As will be discussed below, the communal open space lobby and lift overruns are substantially obscured from ground level public view by the primary roof line.

· Where the planning controls are aimed at preserving the existing character of an area, additional questions to be asked are:

Does the area have a predominant existing character and are the planning controls likely to maintain it? Does the proposal fit into the existing character of the area?

Comment: In the case of the subject site, the planning controls are not aimed at preserving existing character.

· Where the planning controls are aimed at creating a new character, the existing character is of less relevance. The controls then indicate the nature of the new character desired. The question to be asked is:

Is the proposal consistent with the bulk and character intended by the planning controls?

Comment: The bulk and character intended by the planning controls is influenced by FSR and SEPP 65. Specifically, this principle does not expressly reference height, other than that it is a contributing factor to character. In the case of the subject site, the bulk and character intended by the planning controls must be filtered through the lens of the approved Paper Mill development. The heritage incentives which support that departure from the otherwise applicable planning controls are understood and not disputed. However the bulk and character of that development is immediately referable to the subject site. It is desirable and indeed critically important, that the bulk and character of the proposed development should relate to the bulk and character of its immediately contextual neighbours. The proposed development achieves this. Indeed additional height, above that which is required to be addressed by the clause 4.6 Request for Variation is specifically proposed in the form of architectural roof features in order to achieve that outcome.

· Where there is an absence of planning controls related to bulk and character, the assessment of a proposal should be based on whether the planning intent for the area appears to be the preservation of the existing character or the creation of a new one. In cases where even this question cannot be answered, reliance on subjective opinion cannot be avoided. The question then is:

Does the proposal look appropriate in its context? Note: the above questions are not exhaustive; other questions may also be asked.

Comment: Not applicable. However it is our opinion that the proposed development is appropriate in its context.

The height of the proposed development is considered to be satisfactory having regard to the Planning Principles set out in Veloshin. As such, strict compliance with the standard is unreasonable and unnecessary in the circumstances of the case.

2.10.5 Reason for Variation 5

The provision of communal open space lobby leads to access roof top communal open space leads to a higher level of amenity than would be the case for a development which did not provide a communal open space lobby.

The largest extent of proposed non-compliance is in respect of the roof top communal open space lobby situated at the centre of Block "B". This element of the design could be readily removed. Roof top communal open space could be accessed via unroofed stairs supported by a disabled access stair climber chair lift. Alternatively, the roof top communal open space could be relocated to Building "A" such that the extent of non-compliance would be reduced. However both alternatives are far less desirable than what is proposed.

The first alternative would produce a significantly inferior level of amenity for users of the roof top open space. The second alternative would increase the apparent height of the building because the communal open space lobby would not be located behind the architectural feature screen. As mentioned, the feature screen is a desirable component of the design because it adds to perceived building height and thereby delivers a better contextual relationship with the Paper Mill development.

Accordingly, the proposed development delivers a better design outcome than would alternative arrangements which either removed or reduced the extent on non-compliance.

2.10.6 Reason for Variation 6

The proposed lift overruns, irrespective of the use of architectural feature screens, would only be visible from the public domain when view from a considerable distance.

To illustrate this point, we have constructed a simple massing model of Tower C using Google Earth aerial photography and topographic information as a base. See Figure 3.



Figure 3: Massing Model of Tower C

He have then taken a pedestrian eye height view of the tower from a variety of vantage points. The nearest point from which the proposed lift overrun becomes visible is at the intersection of Charles Street and Atkinson Street, some 340m west of the site. This is shown in Figure 4.



Figure 4: View Analysis Showing Nearest Point at which the Lift Overrun becomes Partially Visible from Pedestrian Eye Height (1.6m)

The positioning of the lift overruns, centrally to the roof plan ensures that the main parapet line obscures the additional height created by the lift overrun. Accordingly, the lift overrun does not introduce a significant visual impact despite the fact that it exacerbates the numerical extent of non-compliance. For this reason, strict compliance with the standard is considered to be unreasonable and unnecessary in the circumstances of the case.

2.11 What are the Environmental Planning Grounds to Justify Contravening the Development Standard?

Neither the LEP, nor any other environmental planning instrument provides a specific definition of the term "environmental planning grounds". Similarly, the Department of Planning and Infrastructure's August 2011 document entitled "Varying Development Standard: A Guide" does not attempt to define "environmental planning grounds". Nevertheless, given that demonstration of sufficient environmental planning grounds is a separate test under clause 4.6(3) to the test of "unreasonable or unnecessary in the circumstances of the case"; and that case law relevant to SEPP 1 such as *Wehbe v Pittwater Council* [2007] NSWLEC 827 (21 December 2007) and *Winten Property v North Sydney* (2001) 130 LGERA 79 deal with demonstration of "unreasonable and unnecessary in the circumstances of the case, it must therefore be concluded that "environmental planning grounds" are a different test which cannot necessarily rely on the same methodology as laid down in SEPP 1 relevant Court decisions.

The matter of *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (30 January 2015) provides some helpful guidance on the subject of "environmental planning grounds", however it is in fact limited to defining some factors which are *not* environmental planning grounds. Paragraph 60 of Commissioner Pearson's decision states:

*The environmental planning grounds identified in the written request are the public benefits arising from the additional housing and employment opportunities that would be delivered by the development, noting (at p 5) the close proximity to Ashfield railway station, major regional road networks and the Ashfield town centre; access to areas of employment, educational facilities, entertainment and open space; provision of increased employment opportunities through the ground floor retail/business space; and an increase in the available housing stock. I accept that the proposed development would provide those public benefits, however any development for a mixed use development on this site would provide those benefits, as would any similar development on any of the sites on Liverpool Road in the vicinity of the subject site that are also in the B4 zone. **These grounds are not particular to the circumstances of this proposed development on this site.** To accept a departure from the development standard in that context would not promote the proper and orderly development of land as contemplated by the controls applicable to the B4 zoned land, which is an objective of the Act (s 5(a)(ii)) and which it can be assumed is within the scope of the "environmental planning grounds" referred to in cl 4.6(4)(a)(i) of the LEP. (emphasis added)*

In accordance with Commissioner Pearson's comments, we therefore acknowledge that "environmental planning grounds" must be grounds which are particular to the circumstances of the proposed development on the subject site", rather than more generic circumstances which might apply more broadly within the local context. In the absence of a legislative or other definition, we adopt a definition of any matter arising from consideration of either Section 79C of the EP&A Act 1979 or its Objectives contained within Section 5.

Hence, an "environmental planning ground" is a matter arising from either Section 79C of the EP&A Act 1979 or its Objectives, which in the circumstances of the particular development on the particular site warrants variation from the development standard.

Based on that methodology, the environmental planning ground which support variation to the standard in this instance are:

1. The subject site is very large and generously proportioned. It is an island site which is separated from all other adjoining properties by public road and the railway corridor. These specific site attributes facilitate a much large separation distance from adjoining buildings and properties than would otherwise be the case for a midblock situation were separation was governed only by setback controls under the DCP and separation controls under the ADG. This large separation from other development means that the visual impacts of additional height are reduced. As such, minor exceedance of the height of buildings development standard can be entertained on this site, without resulting in unreasonable impact on the amenity of adjoining properties.
2. The relationship of the subject site to the railway line requires a site planning response which minimises direct interface with the railway line. An alternative massing arrangement could be provided which redistributes that part of the floor space situated above the 24m height plane, to a location adjacent to the western boundary. However despite delivering numerical compliance, this would represent a vastly inferior design outcome in the specific circumstances and characteristics of the subject site. Aside from eroding the quality of podium level open space, such an alternative design would significantly increase the number of dwellings having direct interface with the railway line.
3. The subject site is situated in close proximity to the Paper Mill development. The approved development on that site contemplates a doubling of the permissible height limit. This has been supported by Council on the basis of heritage conservation incentives. Such incentives do not apply to the subject site, and nor are they posited as a reason for variation to the development standard. Rather, it is merely the physical presence of the future adjoining Paper Mill development, not the reasons for its height, which necessitates a responsive design outcome for the subject site. The submitted plans provide considerable detail in relation to the

massing of adjoining buildings, including but not limited to the Paper Mill. The design intent is both clear and highly appropriate. That is, the design seeks to achieve a transitioning of building height. Such transitioning is a specific objective of clause 4.3. The relationship of the Paper Mill is a unique site attribute which warrants a design outcome different to that which is expressed by the height of buildings development standard. On very few if any other sites would substantial floor space ratio bonus be available and the site also adjoin an approved development which so significantly exceeds the height of buildings development standard.

4. Strict compliance with the standard would tend to hinder the attainment of Objectives 5(a)(i) and 5(a)(ii) of the Environmental Planning and Assessment Act 1979, which relate to proper management of development as well as the orderly and economic development of land. Strict compliance with the standard, in circumstances where, based on the particular design and the particular relationship to surrounding development, the proposed non-compliance does not result in any unreasonable environmental planning impacts, would constitute a disorderly and uneconomic development outcome. This is particularly the case in circumstances where the proposed development benefits from FSR bonuses which have been specifically applied to encourage development within the Liverpool CBD, but without concomitant variation to the static height of buildings development standard, either the bonuses could not be achieved or a vastly inferior design outcome would be forced.

2.12 Does contravention of the development standard raise any matter of significance for State or Regional Environmental Planning?

Liverpool CBD is a Strategic Centre under the Metropolitan Plan "A Plan for Growing Sydney (Dec 2014). The Plan states (page 49) that "The Government will: recognise Penrith, Liverpool and Campbelltown-Macarthur as important strategic centres and regional city centres for additional housing, and additional employment and services benefiting local areas and the North West and South West Growth Centres". Action 2.1.1 (page 65) states:

The most suitable areas for significant urban renewal are those areas best connected to employment and include:

- *in and around centres that are close to jobs and are serviced by public transport services that are frequent and capable of moving large numbers of people; and*
- *in and around strategic centres.*

In respect of the South West Subregion, within which Liverpool is located, the Plan sets the following relevant priorities:

Accelerate housing supply, choice and affordability and build great places to live

- *Identify suitable locations for housing, employment and urban renewal – particularly around established and new centres and along key public transport corridors including the Cumberland Line,*

The subject site is located within the Liverpool Strategic Centre, is within an urban renewal area and is situated within close proximity to Liverpool Station. It is clearly a suitable location for housing.

From a State and Regional Planning level, the subject site is highly suited to high-density residential development. Clearly this is also recognised by the LEP through the FSR bonus provision which apply under clause 4.4(2B). As such, the attainment of FSR bonuses in circumstances where the proposed non-compliance with the height of buildings development standard does not result in any demonstrative impacts or derogate from the objectives of the standard or the zone, is wholly consistent with State and Regional Planning directions.

2.13 What is the Public Benefit of Maintaining the Standard?

The environmental planning grounds which justify departure from the height of buildings development standard are both highly specific to the site and also highly unusual. These characteristics would set the subject application apart from others, such that there would be no competent argued made that approval of the subject application would set a precedent for variation to the height of buildings development standard in other locations.

However the subject Request for Variation also deals with the interplay between static height controls and dynamic FSR controls available as to large sites. This is a more generic situation for which similar tensions would conceivably arise for other applications in the Liverpool City Centre. Variation to the standard in that regard would give meaning and purpose to objective 4.3(1)(a) of the LEP by specifically recognising that the height of buildings development standard is intended to allow floor space to be achieved. Strict compliance with the static height of buildings control in circumstances where floor space ratio bonuses are applied is unreasonable in the sense of the fifth Wehbe Test. Such an approach leads to poorer design outcomes by promoting larger site coverage and reduced communal open space / landscaped area. Alternatively such an approach thwarts the attainment of FSR bonuses and therefore operates contrary to Council's stated intention for FSR controls, being "to provide certainty to the community and land owners" (Business Paper of 5 May 2008). Given that both alternatives lead to poor, inappropriate and less than orderly and economic outcomes, it is submitted that there is no benefit in maintaining the standard where these circumstances are the case.

Signed,



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