

Attachment I – Clause 4.6 Variation to Height

Clause 4.6 – Exceptions to Development Standards – Clause 4.3 of the Liverpool Local Environmental Plan 2008 – Height of buildings

1 Introduction

A variation pursuant to clause 4.6 *Exceptions to development standards* of Liverpool Local Environmental Plan (LEP) 2008 is provided to justify the variation to the Height of buildings development standard. This written request seeks a variation to a development standard under clause 4.3 *Height of buildings*. The site is zoned R4 High Density Residential and has a maximum height of buildings of 35m under Liverpool LEP 2008 as identified in Figure 1 below.

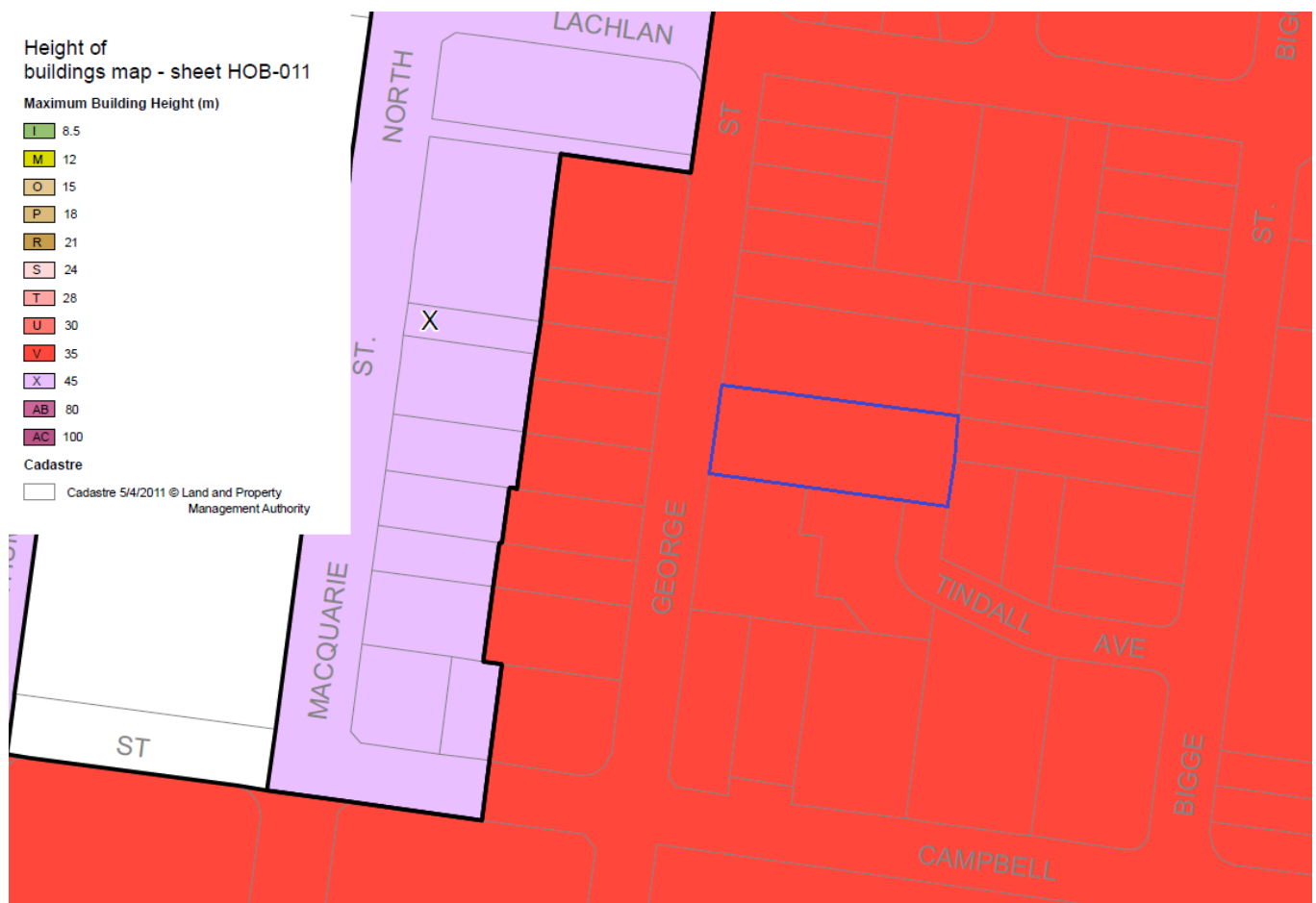


Figure 1 Extract of Height of buildings Map Liverpool LEP 2008 (Source: www.legislation.nsw.gov.au)

2. The Proposed Development:

The proposed development seeks approval for a maximum 7966.5m² of Gross Floor Area (GFA) over the entire site. With a site area of 2483.0m², the proposed Building A has an overall Height of 37.95m. Therefore the

proposed development exceeds the maximum Height of buildings development standard by 2.95m, or 8.4%. These measurements were determined using the ground level survey mark and maximum ridge height. It is also important to note that Building B complies with the maximum height development standard.

The purpose of the Height of Buildings development standard is to provide sufficient height for the anticipated development needs of the future, regulate the scale and intensity of buildings, ensure that development does not exceed the capacity of community infrastructure and respects the character and amenity of the locality. As demonstrated, the proposed development is located within walking distance to bus and train services, community facilities and retail and commercial premises and is well placed to provide the proposed built form, accommodating 96 residential units.

The proposed development (Building A) will not result in any significant adverse environmental impacts to surrounding development. The proposed density of Building A, with an overall height of 37.95m is generally consistent with the scale and nature of existing development along George Street. Strict compliance with the numeric height development standard would not result in any real planning gain, would make no difference in terms of the proposal's environmental impacts (overshadowing, views or privacy) of which the proposed development does not raise any significant issue.

Architectural Drawings (A00-A25 inclusive, dated August 2016) prepared by Algorry Zappia & Associates Pty Ltd are included at **Appendix B**. Perspectives of the proposed development are shown in Figures 2 and 3.



Figure 2 Perspective of the proposed development from George Street



Figure 3 Perspective of the proposed development from George Street

3. Principles of Exceptions to Development Standards

Clause 4.6 of the Liverpool LEP 2008 provides flexibility in the application of planning controls by allowing Council to approve a development application that does not comply with a development standard where it can be shown that flexibility in particular circumstances achieve better outcomes for and from development. It replaces SEPP 1. Subclauses (3), (4), (5) and (8) from clause 4.6 are extracted below:

- (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 Director-General has been obtained.*
- (5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following:*
- (a) a development standard for complying development,*
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) clause 5.4.*

The NSW Government guidelines for varying development standards advises that clause 4.6 was modelled along the lines of State Environmental Planning Policy – Development Standards (SEPP 1). As such the principles for assessment and determination of applications to vary development standards are relevant. In this regard the decision of Justice Lloyd in *Winten v North Sydney Council* identifies the principles for which a SEPP 1 objection must be made. These are:

- *Is the planning control in question a development standard;*
- *What is the underlying object or purpose of the standard;*
- *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;*
- *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;*
- *Is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case; and*
- *Is the objection well founded?*

The decision of Justice Preston in *Wehbe V Pittwater* [2007] NSW LEC 827 has since expanded the considerations of a SEPP 1 objection and established the five (5) part test to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

- *Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;*
- *Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;*
- *Would the underlying objective or purpose would be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;*
- *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*
- *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.*

Further, the decision in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 indicates that showing that the development achieves the objectives of the development standard will be insufficient to justify that a development is unreasonable or unnecessary in the circumstances of the case for the purposes of an objection under Clause 4.6, (and 4.6(3)(a) in particular) and the requirement in cl4.6(3)(b) to justify that there are sufficient environmental planning grounds for the variation, may require identification of grounds particular to the circumstances of the proposed development.

The following section addresses the local provisions of clause 4.6 of Liverpool LEP 2008 together with principles of *Winten v North Sydney Council* and the relevant principles of the expanded 5 part test established by *Wehbe V Pittwater* [2007] NSW LEC 827 and the need to identify grounds particular to the circumstances of the proposed development as established in *Four2Five Pty Ltd v Ashfield Council*.

3.1 Is the Planning Control in question a development standard?

The planning control is a development standard affecting height of buildings under clause 4.3 of the Liverpool LEP 2008. Council may consider the variation to the height control as the site is not excluded from consideration under clause 4.6 (8). Clause 4.3 nominates a maximum height of 35m for the site. The height of buildings control is a numerical development standard capable of being varied under the provisions of Clause 4.6 of the Liverpool LEP 2008.

3.2 What is the underlying objective of the Standard?

The objectives for the height of buildings development standard under Liverpool LEP 2008 state the following:

4.4 Building Height

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

- (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.*

The proposal is considered consistent with the relevant objectives of Clause 4.3 for the following reasons:

- improves the appearance of the site when viewed from the public domain;
- will improve the housing choice and mix within the Liverpool city centre;
- will not detract from the heritage significance of George Street;
- will provide landscaped areas;
- does not cause any significant environmental impacts to adjoining properties or the public domain in terms of overshadowing, privacy, access to daylight and ventilation; and
- the upper most storeys of the proposed development are setback approximately 3 m from George Street. Views to the upper most levels not readily available from the public domain. A person walking or travelling in a vehicle along the street would not notice the additional 2.95m or appreciate the proposed departure from the height development standard.

The development is consistent with the planning and environmental objectives of the development standard.

3.3 What is the numeric value of the development standard in the environmental planning instrument? What is proposed numeric value of the development standard in the development application? What is the percentage variation (between the proposal and the environmental planning instrument)?

The proposal has a height of 37.95m and exceeds the maximum 35m development standard by 2.95m. The proposed height is consistent with the scale and nature of existing development along George Street and the desired future character of the local area.

3.4 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

The aims and objectives of SEPP No.1 are as follows:

“To provide flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or necessary or tend to 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:

- “(a) *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...”*

The development is generally consistent with the objects of the Act, in respect to the following:

- The site is located within an established urban environment and is presently used for residential purposes. The redevelopment of the site will incorporate residential uses, which will contribute to urban consolidation and renewal.
- The development reflects orderly and economic use of the land insofar as that the proposed exception does not contribute to an unreasonable or quantifiable loss of amenity to adjacent land or contribute to an inconsistent streetscape profile. The delivery of new housing and jobs within an established urban environment located near public transport options without significant or unreasonable environmental impact is considered to be both orderly and economic use of urban land.

3.5 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The proposed development will not result in any significant adverse environmental impacts to surrounding area. The proposed density of the development, with an overall height of 37.95m is generally consistent with the scale and nature of existing development along George Street and desired future character for the northern end of Liverpool City Centre. The upper most storeys of the proposed development are setback approximately 3 m from the site's George Street boundary and views to these levels will not readily be available from the public domain. A person walking or travelling in a vehicle along George Street would not notice or perceive the additional 2.95m or appreciate the proposed departure from the height development standard.

Strict compliance with the numeric height of buildings development standard would not result in any real planning gain, would make no difference in terms of the proposal's environmental impacts (overshadowing, views or privacy) of which the proposed development does not raise any significant issue.

Compliance with the development standard is considered unreasonable and unnecessary in the circumstances. It improves the appearance of the site when viewed from the public domain; will improve the housing choice and mix within the Liverpool city centre; will not detract from the heritage significance of George Street; and does not cause any significant environmental impacts to adjoining properties or the public domain in terms of overshadowing, privacy, access to daylight and ventilation.

Based on the insignificant nature of impacts arising from the proposed variation, numerical compliance would not contribute to an improved outcome. As such it is considered that compliance with the development standards is neither reasonable nor necessary in the circumstances.

3.6 Is the development standard a performance based control?

The development standard under Clause 4.3 is not a performance based control.

3.7 Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.

Yes, there are sufficient environmental planning grounds to justify the contravening development. These include:

- The variation does not result in adverse amenity impacts on adjacent land;
- The variation does not diminish the development potential of adjacent land;
- The development achieves suitable internal amenity including compliance with SEPP 65 separation distances;
- The development provides all necessary supporting facilities and infrastructure within the site
- The scale of development along George Street is comparable;
- the upper most storeys of the proposed development are setback from the level below and street boundaries. Views to the upper most levels not readily available from the public domain. A person walking or travelling in a vehicle along the street would not notice the additional 2.95m or appreciate the proposed departure from the height development standard.

3.8 Is the objection well founded?

The proposed exception to the height of buildings development standard will, in part, facilitate the delivery of additional housing located within an established urban area within proximity to public transport connections. This presents a positive environmental planning outcome.

Crucially, this development application is in accordance with Liverpool Council's vision for Liverpool city centre and addresses the need for additional housing as identified in recent research undertaken by MacroPlan Dimasi and the Property Council of Australia, *Missing the Mark - An Audit of Housing Targets* (2014).

This research entailed a comprehensive audit of housing target performance across metropolitan Sydney, the Lower Hunter and Illawarra local government areas (LGAs). All councils were benchmarked in relation to approvals against housing targets by LGA assigned in the relevant subregional and regional strategies.

Based on actual population growth and household formation it was found that *the majority of councils across metropolitan Sydney had not delivered housing where it is needed, nor have the allotted targets reflected actual demand... Fringe suburbs (i.e. Blacktown, The Hills, Penrith, Camden and Liverpool) remain central sources of housing supply, but a lesser reliance on new estate locations in delivering Sydney's housing needs is anticipated in the projections.*

South West subregions have lagged behind their allocated targets, as the contribution from the Growth Centres has not occurred at the rate expected. Housing production in these areas has ramped up, but only in the latter years i.e. since 2010 onwards. It considered that Liverpool has underperformed but has experienced high population growth, indicating the need for additional housing.

As outlined in section 3.2, the development is consistent with the objectives of the development standard. Moreover, the proposal is consistent with the aims of the policy to allow flexibility in the application of development standards where to require compliance would hinder the objectives. Compliance in this circumstance would not improve the outcome. Rather it would necessitate the loss of housing by reducing the height, for no better outcome

than compliance itself. It is our view that to force compliance in the circumstance would be antipathetic to the intent of the policy, thereby hindering the attainment of its objectives and thwarting housing supply in Liverpool city centre.

3.9 Would non-compliance raise any matter of significance for State or Regional Planning?

The non-compliance will not raise any matter of State or Regional Significance.

3.10 Is there a public benefit of maintaining the planning control standard?

The proposed exception to the height of buildings development standard will, in part, facilitate the delivery of additional housing located within an established urban area within proximity to public transport connections.

The development is considered to offer a positive environmental outcome (social, economic or biophysical). In particular the variation does not diminish the redevelopment potential or amenity of any adjoining land.

The development provides all necessary services and facilities required by Council's planning controls including common and private open space, parking, storage, servicing and waste areas. In this regard the additional development area imposes no unreasonable pressure on the broader public to facilitate or support the development.

Based on the above and the matters outlined in this written request there is considered to be no public benefit in maintaining the planning control standard.

4 Conclusion

The development exceeds the permissible height by 2.95m. The proposed density of the development, with a height of 37.95m would not be out of keeping with the large scale residential development which surrounds the site. A development strictly complying with the numerical standard would not significantly improve the amenity of surrounding land uses. In the context of the locality it would be unreasonable for strict compliance to be enforced, as the height and scale of the proposed development is compatible with surrounding existing and likely future development. The upper most storeys of the proposed development will not be readily available from the public domain. A person walking or travelling in a vehicle along the street would not notice the additional 2.95m or appreciate the proposed departure from the height development standard. The height over the development standard represents an increase of 8.4%, and supports this notion. Furthermore, the proposed development is consistent with the zone objectives and will make a positive contribution to the built form within the Liverpool City Centre. On the basis of reasons provided within this written request it is concluded that the objection is well founded as compliance with the standard is both unnecessary and unreasonable.