

Attachment I – Clause 4.6 Variation to Building Separation

Clause 4.6 – Exceptions to Development Standards – Clause 7.4 of the Liverpool Local Environmental Plan 2008 – ‘Building separation in Liverpool city centre.’

1 Introduction

A variation pursuant to Clause 4.6 ‘Exceptions to Development Standards’ of Liverpool LEP 2008 is provided to justify the variation to the development standard. This written request seeks a variation to the development standard under Clause 7.4 ‘Building separation in Liverpool city centre.’

The site, 24-26 George Street is zoned R4 High Density Residential and has a maximum height of 35m.



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

As stated in Clause 7.4(2):

Development consent must not be granted to development for the purposes of a building on land in Liverpool city centre unless the separation distance from neighbouring buildings and between separate towers, or other separate raised parts, of the same building is at least:

- (a) 9 metres for parts of buildings between 12 metres and 25 metres above ground level (finished) on land in Zone R4 High Density Residential, and*
- (b) 12 metres for parts of buildings between 25 metres and 35 metres above ground level (finished) on land in Zone R4 High Density Residential, and*
- (c) 18 metres for parts of buildings above 35 metres on land in Zone R4 High Density Residential and*
- (d) 12 metres for parts of buildings between 25 metres and 45 metres above ground level (finished) on land in Zone B3 Commercial Core or B4 Mixed Use, and*
- (e) 28 metres for parts of buildings 45 metres or more above ground level (finished) on land in Zone B3 Commercial Core or B4 Mixed Use.*

There are two interpretations of the application of this clause based on the plans submitted. Tower A (the front tower) extends to a maximum building height of 38.1 metres above the existing natural ground level. The adjoining buildings to the north and south of the site extend to a 5 and 6 storey form with the highest point measuring at 22 metres.

Under the first interpretation, because neither of the adjoining buildings extends above 25 metres in height the required minimum building separation between the adjoining buildings and Tower A is 9 metres. The second interpretation would stipulate that because Tower A is 38.1 metres in height, a minimum separation distance of 18 metres is required to the north and south. The proposal provides a separation distance of 8 metres between balconies and between 9 and 10 metres between building walls from Tower A to the adjoining buildings.

2. The Proposed Development

Development consent is sought for the demolition of existing structures and construction of a new residential flat building development consisting of two towers of 96 residential apartments with ground floor lobbies and basement level car parking. The proposal now also seeks to, in part, deliver in-fill affordable rental housing under the provisions of Division of the ARH SEPP 2009. Under the revised scheme, 20% of the total GFA (1,593m²) incorporating 21 of the 96 apartments with associated lobby areas is to be dedicated specifically for the purposes of affordable rental housing.

The separation distances from the towers are identified as:

- 8 metres between the proposed balconies and the balconies of the developments at 20-22 and 28-30 George Street; and
- Between 9 and 10 metres measured between buildings walls from the towers to the walls of adjoining developments.

These building separation distances (accommodating setbacks of 4.5 metres) are similar to the levels of separation provided on the adjoining, and other surrounding sites.

Photomontages and shade diagrams of the proposed development are shown below.



Figure 2 Perspective of the proposed development from George Street



Figure 3 Perspective of the proposed development from the rear of the property



Figure 4: Shadow Diagrams

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 Department of Planning and Infrastructure's guidelines for *Varying development standards 2011* stipulate the following matters to be addressed by Applicants in support of applications where variations under clause 4.6 are sought:

- *address whether strict compliance with the standard, in the particular case, would be unreasonable or unnecessary and why, and*
- *demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard.*

The above listed points are at the core of clause 4.6 and are called up by sub-clause (3).

Written applications to vary development standards may also address matters set out in the “five-part test” established by the NSW Land and Environment Court. The five-part test sets out key considerations for authorities when considered when an application to vary a standard is well founded. The five-part test includes the following key components:

1. *the objectives of the standard are achieved, notwithstanding non-compliance with the standard;*
2. *the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *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;*
5. *the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

The guidelines developed by the Department of Planning and Infrastructure note that “a proposed variation to a development standard may, in some circumstances, achieve the underlying purpose of the standard as much as one which complies... if the development is not only consistent with the underlying purpose of the standard, but also with the broader planning objectives for the locality, strict compliance with the standard would be deemed to be unreasonable and unnecessary.” The following sections of this document will suitably justify why strict compliance with the building separation standard is, in this particular instance, unreasonable and unnecessary.

4. Assessment of Considerations

4.1 Is the Planning Control in question a development standard?

The planning control is a development standard affecting building separation in the Liverpool city centre under Clause 7.4 of the Liverpool LEP 2008. Council may consider the variation to the building separation requirements as the site is not excluded from consideration under Clause 4.6 (8). Clause 7.4 nominates a minimum separation distance of 9m or 18m for the site and development.

4.2 What is the underlying objective of the Standard?

Clause 7.4 establishes the minimum building separation distances for developments in the Liverpool City Centre. The underlying intent of the standard is to ensure sufficient separation distances between tower forms are provided in line with the ADG separation distances to encourage heightened visual appearances of buildings viewed from the public domain and neighbouring buildings, protection of privacy and improved solar access. These intents are made very clear in the objective of this standard provided below:

7.4 Building separation in the Liverpool city centre

The objective of this clause is to ensure minimum sufficient separation of buildings for reasons of visual appearance, privacy and solar access.

The proposal is considered consistent with the relevant objectives of Clause 7.4 for the following reasons:

- As shown in Figures 2 and 3, the closer separation distance will not compromise the visual appearance of the development. The sitting and separation distances provided to Tower A at the front of the site will appear to be consistent when viewed in the broader context of surrounding sites and separation distances provided between neighbouring tower developments.
- Privacy will also not be affected by a departure from the numerical standard for building separation. As shown in the drawings included in Figures 2 and 3, privacy screens have been included to the outer faces of balconies to the northern and southern aspects of the towers. These will ensure visual privacy is maintained to adjoining properties, while still creating a suitable habitable space for future residents.
- Solar access will also not be drastically compromised by an exception to this standard. The shade diagrams included in Figure 4 demonstrate that all surrounding development will receive substantial amounts of sunlight for approximately two thirds of the day: an outcome that comfortably meets environmental planning requirements. Spaces of habitation in the development itself will also have good solar access, with high-mounted windows designed to maximise sunlight exposure. The section of the building with the smallest separation distance also has uninterrupted access to northern sunlight, a key advantage that many buildings subject to this clause may not have.

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

4.3 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 extent of the non-compliance depends upon the interpretation of the required minimum separation distance. If the minimum separation distance is taken to be 9 metres pursuant to provision (2)(a) of Clause 7.4 then the proposed separation distances between the balconies with adjoining buildings is 8 metres, representing a 1 metre non-compliance. This represents a variations of 12.5% which is considered to be numerically minor. If this requirement is measured between building walls and not balconies then the development technically complies with the requirements of provision (2)(a).

By contrast, if the interpretation of the development standard is taken to require a 18 metre separation distance between balconies due to the 38.1 metre height of Tower A then the extent of the non-compliance is 10 metres, which represents a 55.5% variation which is significant.

4.4 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 objects 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 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, especially higher density ones similar to the proposed development. The proposed development will contribute to high quality urban consolidation within the Liverpool area, providing housing for the needs of the growing community.
- The development reflects orderly and economic use of the land. 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 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.

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

The proposal achieves the underlying intent and objectives of the building separation development standard, more so than a development which would adhere strictly to an 18 metre separation distance. Inclusion of an 18 metre separation distance on this particular site would effectively prohibit a residential flat building on this site and therefore compliance with the standard is considered to be unreasonable in the circumstances.

Similar building forms and heights in the surrounding neighbourhoods within the city centre have been approved by Council and the Joint Regional Planning Panel with reduced separation distances to allow for the orderly economic use and redevelopment of sites for residential flat buildings. The proposal would maintain similar separation distances and would effectively fill-in the missing piece of the streetscape with a compatible building form.

Imposition of a 9 metre separation distance could be achievable, however this would result in a slightly narrower building form which would create significant issues in terms of apartment sizes, lobby configurations and the achievement of accessible spaces rather than an overall loss of apartments. Strict compliance with a 9 metre building separation distance is considered unreasonable and unnecessary in that the 8 metre separation distance between balconies is generally in accordance with the standard and allows for the creation of higher quality spaces which do not impede drastically upon the visual privacy or solar access of adjoining properties to the north or south.

The development site is situated within the Liverpool City Centre, for which the provisions of Part 7, Division 1 of the LEP apply. The objectives for development in the Liverpool City Centre are provided below:

- (a) to preserve the existing street layout and reinforce the street character through consistent building alignments,*
- (b) to allow sunlight to reach buildings and areas of high pedestrian activity,*
- (c) to reduce the potential for pedestrian and traffic conflicts on the Hume Highway,*

- (d) to improve the quality of public spaces in the city centre,*
- (e) to reinforce Liverpool railway station and interchange as a major passenger transport facility, including by the visual enhancement of the surrounding environment and the development of a public plaza at the station entry,*
- (f) to enhance the natural river foreshore and places of heritage significance,*
- (g) to provide direct, convenient and safe pedestrian links between the city centre (west of the rail line) and the Georges River foreshore.*

Whilst the proposal generally aligns with all of the above listed broader provisions applicable to development in the city centre, it is considered that the proposed scheme, inclusive of the separation distance breach is consistent with the overriding objectives for development in the city centre. The proposal preserves the existing streetscape and street character developed along George Street by consistent separation distances of between 8 and 10 metres for developments up to 9-11 storeys. The reduced separation distances in this instance do not result in significant overshadowing impacts and the proposed apartments will receive good solar access. Because the proposal achieves the intent of the overriding objectives for development in the city centre, strict enforcement of the building separation distances is unreasonable and unnecessary in this context.

4.6 Is the development standard a performance based control?

The development standard under Clause 7.4 is not a performance based control.

4.7 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 diminish the development potential of adjacent land and represents the orderly economic redevelopment of the subject site;
- The development achieves good internal amenity including compliance with SEPP 65 separation distances (generally), good access to sunlight and natural cross ventilation, private open space and apartment sizing and dimensions as per the Apartment Design Guide (ADG);
- The setbacks and separation distances provided are commensurate to that of existing and approved residential flat building developments in the surrounding neighbourhood and as such will ensure a consistent streetscape along George Street is maintained;
- The variation does not result in adverse amenity impacts on adjacent land in terms of overshadowing, impacts to visual or acoustic privacy or visual appearance (i.e. through building proportioning or bulk and scale appearance);

4.8 Is the objection well founded?

It is considered that this objection is well founded. The variation to the minimum building separation requirements has architectural merits which have been generally supported by Council's Design Excellence Panel. Put simply, a 9 metre separation distance provided between balconies to the adjoining properties would compromise the internal layouts, accessibility, apartment sizes and the quality of the internal configurations which is considered unreasonable. Imposition of 18 metre separation distances would make a residential flat building development

unachievable on this site in any form which is obviously unreasonable and unnecessary. Notwithstanding the variation proposed the development protects the privacy of adjoining neighbours, ensures good solar access to all dwellings and adjoining properties is achieved. The separation distances provided will also deliver a consistent streetscape, aligning with the character of existing developments which exhibit reduced separation and setback distances.

The proposed exception to the building separation development standard will help 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.

As outlined in Section 4.2, 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 GFA, 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.

4.9 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.

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

The proposed exception to the building separation 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 closer positioning of buildings 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 it is considered that there is no public benefit in maintaining the planning control standard.

5 Conclusion

The development does not meet the building separation distance by up to 10m, however this is dependent upon the reading of Clause 7.4's provisions (2)(a) and (c). The proposed separation distance of 8 metres measured between balconies 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 event that an 18 metre separation distance was required, redevelopment of the site for the purposes of a residential flat building would not be possible given the sites' width.

In the context of the locality it would be unreasonable for strict compliance to be enforced, as positioning and bulk of the proposed development is compatible with surrounding existing and likely future development. As evidenced by photomontages, plans and shadow diagrams the proposed development will still offer good visual amenity, privacy and solar access: the key objectives behind the clause in question. Furthermore the development, as demonstrated in the SEE, is consistent with Council's key development objectives for the R4 High Density Residential zone and 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.