

APPENDIX A

CLAUSE 4.6 VARIATION TO CLAUSE 4.3 – HEIGHT OF BUILDINGS

**CLAUSE 4.6 VARIATION TO CLAUSE 4.3 (HEIGHT OF BUILDINGS)
OF THE LIVERPOOL LOCAL ENVIRONMENTAL PLAN 2008**

1. Introduction

This letter seeks to address the proposed variation to Clause 4.3 of the Liverpool Local Environmental Plan 2008 (LLEP 08), which relates to the height of buildings development standard.

This submission has been prepared with regards to a development application for the construction of a new residential flat building comprising of 31 residential units and ground level parking, on land known as 9 – 11 Edgeworth Place, Cartwright.

It is sought that the subject site be developed in conjunction with land immediately to the east being Nos. 249 – 251 Hoxton Park Road, given a common ownership over both sites by social housing provider, St George Community Housing.

Nos. 249-251 Hoxton Park Road have already been developed as affordable housing, with a total of 17 units provided over four storeys. The current proposal seeks to utilise the existing driveway of this development to provide access to the new building. The existing building, including its associated car parking will not be altered by this proposal.

This submission follows a meeting with the Design Excellence Panel. The package presented to the Design Excellence Panel included two sets of architectural plans prepared by DKO Architecture P/L. Scheme 1 comprised of 28 residential units over four storeys plus mezzanine level whilst Scheme 2 (Alternative Scheme) provided for 31 units over a part six, part five storey building.

In both Schemes, all proposed units would be nominated as affordable housing to be managed by our client, St George Community Housing.

Our client's preferred position is to proceed with Scheme 2, however as the proposal will result in a breach of Clause 4.3 of the LLEP 08, it was advised by Council Officers that the proposal be presented to the Design Excellence Panel for review.

The Panel supported our rationale behind the additional height, as confirmed by the minutes of the meeting which state, *"The Panel supports the additional height in the Alternative Scheme subject to all the above issues being addressed whilst complying with the floor space ratio control"*.

The additional matters raised by the Panel include building separation, solar access, privacy, landscaping and open space. These matters have been addressed within the current Development Application.

Notwithstanding the feedback received from the Panel, Council's Planning Department have advised that, *"The additional storey proposed is unlikely to be supported and it should be removed in order to reduce the overall height of the building and provide a development which would be more consistent with the desired future character of the area"*.

We respectfully submit that our client is a not for profit organisation who strive to provide for quality affordable housing developments. As stated, all of the proposed units will be nominated as affordable housing and are of a high architectural standard promoting solar access and cross ventilation. The building itself integrates a number of sustainable features exceeding the minimum standards prescribed by BASIX. In fact, it is intended that the building be designed and built to a 4 star Green Star certification and further, that it be 7 Star NatHERS compliant.

Accordingly, in subsequent discussions with Council Officers, it was agreed between SGCH and Council Officers that a Clause 4.6 variation be submitted for review, prior to the submission of a formal Development Application.

A Clause 4.6 variation was subsequently submitted on the 26th of July 2016 and it was agreed the 31 unit scheme had value but would be subject to review under a formal development application.

Hence the submission of this development application.

The proposed development meets the requirements prescribed under Clause 4.6 of the LLEP 08, as detailed in this written request for a variation to maximum floor space ratio control.

Clause 4.6 states the following:

"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 a 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 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.*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*
- (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*
- Note.** *When this Plan was made it did not include any of these Zones.*
- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (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*
 - (ca) *clause 6.4, 6.5, 6.6, 7.22, 7.24, 7.25, 7.26, 7.26A, 7.27, 7.28, 7.29 or 7.30."*

Clause 4.6 – Exceptions to development standards, establishes the framework for varying development standards applying under a LEP. 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 is sufficient environmental planning grounds to justify contravening the development standard.

In addition, 4.6(4)(a)(i) and (ii) requires that development consent must not be granted to 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

(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

The Environmental Planning Instrument to which these variations relate to is the LLEP 08.

The development standard to which this variation relates to is Clause 4.3 – Height of Buildings, which reads as follows:

"(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,

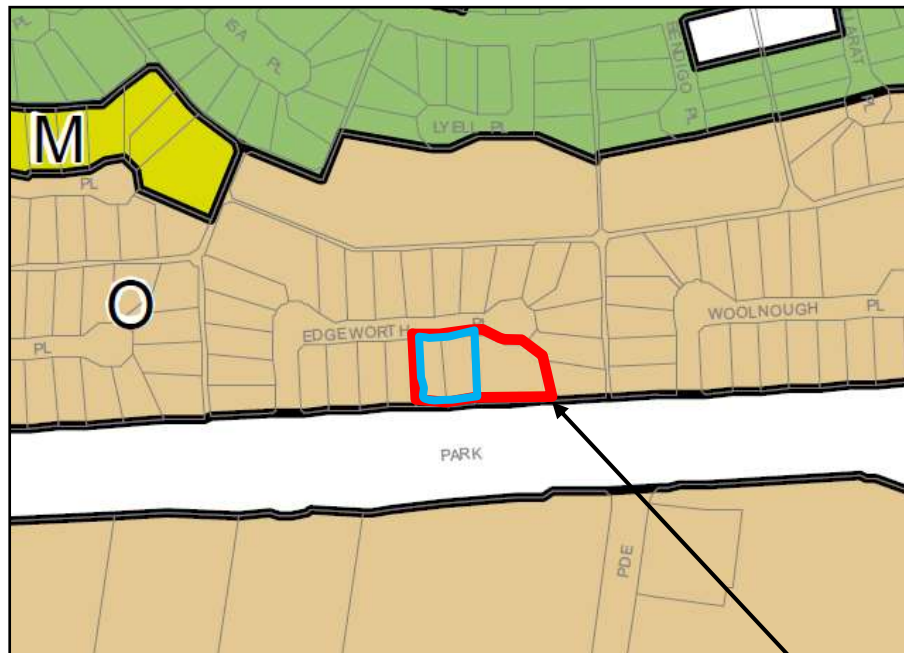
(d) to nominate heights that will provide an appropriate transition in built form and land use intensity.

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

Note. *Clauses 5.6, 7.2 and 7.5 provide for circumstances under which a building in the Liverpool city centre may exceed the maximum height shown for the land on the Height of Buildings Map".*

As demonstrated in Figure 1 below, the subject site is limited to a maximum building height of 15m.

Figure 1: Height of Buildings Map



*Entire development site highlighted in **red**
Proposed building will be sited on land highlighted in **blue***

Subject site

Source: LLEP 08.

The proposed residential flat building will exceed the standard with a proposed building height of 18.95m as measured from ground level to the ridge. The variation is equivalent to 3.95m² or 26.1%.

A written justification is therefore required for the proposed variation to the maximum floor space ratio development standard, in accordance with Clause 4.6 of the LLEP 08.

2. Extent of Non-Compliance

As noted above Clause 4.3 of the LLEP 08 states that the maximum building height for the site is 15m.

The current proposal seeks a maximum building height of 18.91m. The proposal therefore exceeds the standard by 3.95m² or 26.1%.

It is our submission that the breach to the building height control, will not impact on the amenity of the development or adjoining properties, nor will the variation compromise the architecture of the building or the bulk and scale of the development.

A degree of flexibility is considered reasonable in this instance.

3. Is Compliance With the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?

The proposed variation from the development standard is assessed against the accepted "5 Part Test" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council (2007) LEC 827*.

In the matter of Four2Five, the Commissioner stated within the judgement the following, in reference to a variation:

"...the case law developed in relation to the application of SEPP 1 may be of assistance in applying Clause 4.6. While Wehbe concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under Clause 4.6 where Clause 4.6 (3)(a) uses the same language as Clause 6 of SEPP 1."

It is therefore our submission that the Wehbe test is of relevance in the consideration of a standard to determine whether or not it is unreasonable or unnecessary in the circumstances of the case and it is evident in the Four2Five matter, the above test is relevant.

In the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, Chief Justice Preston expressed the view that there are five (5) different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out below:

First	<i>The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.</i> <i>The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.</i>
Second	<i>A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.</i>
Third	<i>A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.</i>
Fourth	<i>A fourth way is to establish that 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.</i>
Fifth	<i>A fifth way is to establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it</i>

	<i>applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary.</i>
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The following discussion is provided in response to each of the above:

i. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The objectives supporting the height of buildings control as identified by Clause 4.3 are discussed below. Consistency with the objectives and the absence of any environmental impacts, would demonstrate that strict compliance with the standards would be both unreasonable and unnecessary in this instance.

The discussion provided below demonstrates how the proposal is consistent with the objectives of Clause 4.3.

- "(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".*

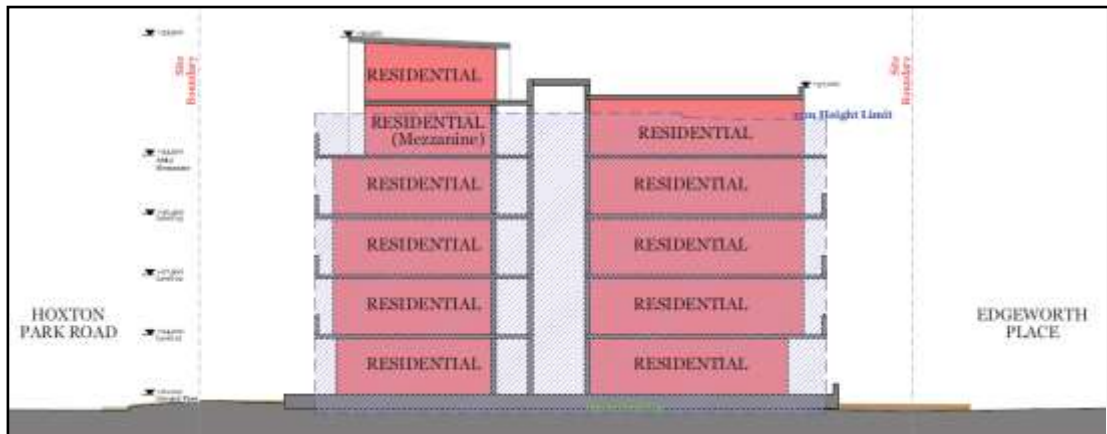
The proposed development has been designed in accordance with the provisions of State Environmental Planning Policy (Affordable Rental Housing) 2009 and is therefore entitled to a maximum floor space ratio of 1.5:1.

As stated earlier in this letter, the subject site will be developed in conjunction with Nos. 249 – 251 Hoxton Park Road, given a common ownership over both sites by social provider, St George Community Housing. The consolidated site, being Nos. 9 – 11 Edgeworth Place and 249 – 251 Hoxton Park Road, provide for a total site area of 2,424.2m².

The proposal provides for a total gross floor area of 3,649m² comprising of 1,291m² attributable to the existing residential flat building at Nos. 249 – 251 Hoxton Park Road and proposed 2,358m² over Nos. 9 – 11 Edgeworth Place. The resultant FSR is compliant at 1.5:1.

Therefore, notwithstanding the additional height being sought, the proposal will continue to comply with the FSR control.

As demonstrated in the image below, the bulk of the proposed variation occurs at proposed Level 05 which is limited to the southern portion of the building.

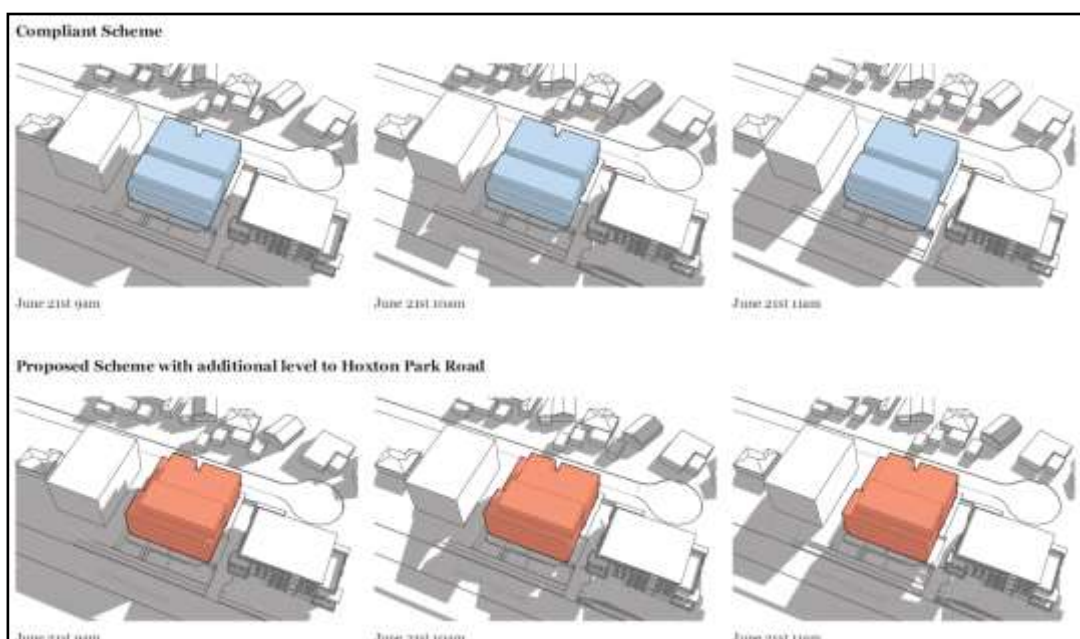


Source: Section Plan prepared by DKO Architecture

The additional bulk has been strategically located to the southern side of the building to minimise its effect to the adjoining properties. As demonstrated in the submitted diagrams, the shadows cast by the development do not significantly alter from a compliant scheme with the majority of the additional shadow cast over Hoxton Park Road itself rather than to neighbouring properties.

The proposed mezzanine has also been designed with a reduced floor to ceiling height (approximately 2.6m) compared to the remaining levels to reduce the overall building height without compromising the internal amenity of the unit to the future occupants.

The proposed development is considered modern in its design with a strong four storey presentation to both street frontages. The upper levels of the building have been designed to be recessive with increased setbacks and contrasting metal clad walls in a darker finish.



Excerpt of shadow diagrams, prepared by DKO Architecture.

The proposed development is considered modern in its design with a strong four storey presentation to both street frontages. The upper levels of the building have been designed to be recessive with increased setbacks and contrasting metal clad walls in a darker finish.

The proposed building has also been specifically designed to address both street frontages so as to maximise solar access/natural light and cross ventilation into the units.

In addition, the proposed development has been well articulated to both street frontages and proposes varying setbacks to both side boundaries to ensure that the actual and perceived bulk of the building is minimised not only from the street but also as viewed from the adjoining properties.

It should also be noted that the subject site has been identified as flood prone land, and accordingly it would not be feasible to reduce the proposed levels of the building.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standards. As demonstrated, the objectives of these standards have been achieved.

ii. the underlying objective or the purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in (i) above. Therefore this clause is not applicable.

iii. the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objective or purpose would not be defeated or thwarted if compliance was required.

iv. 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; and

While the standard has not been abandoned or destroyed, Liverpool Council has varied LEP standards in the past.

As demonstrated in this letter, the proposal will not result in any adverse environmental impacts to adjoining properties and will result in a high quality residential development on the site.

v. the zoning of the land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the

standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Not applicable as the zoning of the site is appropriate.

4. Are there Sufficient Environmental Planning Grounds?

The assessment above demonstrates that the resultant environmental impacts of the proposal will be satisfactory.

The proposal addresses the site constraints, streetscape and relevant objectives of both the standards and the zone. The proposal will not result in any unreasonable amenity or environmental impacts.

We respectfully submit that the proposal will result in a better planning outcome as unlike SEPP (Affordable Rental Housing) 2009, which requires that up to 50% of the dwellings be offered as affordable housing for a period of 10 years, all of the proposed 31 units will be nominated as affordable housing to be managed by our client, St George Community Housing for a period of at least 20 years.

The proposal therefore provides a social benefit to the community providing for new, affordable accommodation in an area well serviced by public transport services and local infrastructure.

Regular bus services are available along Hoxton Park Road to the rear of the site and along nearby Cartwright Avenue. The site is also located in close proximity to the retail/commercial premises sited along Hoxton Park Road with Westfield Liverpool located to the north east of the site.

The proposal also seeks to integrate Nos. 9 – 11 Edgeworth Place with Nos. 249 – 251 Hoxton Park Road. As discussed during our meeting with the Design Excellence Panel, it is sought to introduce an integrated landscaping solution between the properties including a communal rooftop terrace to be accessed by residents of both properties. As part of this strategy, communal facilities including two BBQ areas (required for 4 Star Green Rating), will also be provided on site.

The development is also notably compliant with the maximum 1.5:1 FSR prescribed by SEPP (Affordable Rental Housing) 2009.

In this case, strict compliance with the development standard for height of buildings development standard of the LLEP 08 is unnecessary and unreasonable.

5. Is the Variation in the Public Interest?

Clause 4.6 states that the development consent must not be granted for development that contravenes a development standard unless 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 to be carried out.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard under Part 4.

The development as proposed will be in the public interest as it is consistent with the objectives of Clause 4.3.

The proposed development is in our submission consistent with the desired character of the area and that the proposed development when assessed against the ADG is also compliant in terms of ventilation, amenity and the like.

Furthermore, it is important to also consider the objectives of the R4 High Density Residential zone in relation to the development, which are as follows:

Zone R4 High Density Residential

Objectives of zone

- *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.*

In response to the above the following is provided:

The proposal will provide for 31 new residential units increasing reflective of the high density zone. It is acknowledged that there is a demand for more affordable housing with the Liverpool local government area and our client is endeavouring to respond to this need by offering 100% of the dwellings as affordable housing for a period of at least 20 years far exceeding the requirements of SEE (Affordable Rental Housing) 2009. Under the requirements of the SEPP, only 50% of the units are required to be nominated as affordable housing and for a period of 10 years. Our client, St. George Community Housing is a not for profit organisation who are genuinely seeking to address a rising demand for quality affordable housing in the area.

The development provides for a mix of units, in terms of size, layout, orientation and number of bedrooms. The proposed development is consistent with other high density residential development in the Liverpool precinct.

There are no other land uses proposed.

Regular bus services are available from Hoxton Park Road (to the rear of the site) and nearby Cartwright Avenue. As stated above, retail/commercial facilities are also located within proximity of the site along Hoxton Park Road with Westfield Liverpool also located to the north-east.

The proposal seeks to consolidate the subject site with the neighbouring property at No. 249 – 251 Hoxton Park Road. The adjoining western property is capable of amalgamating with its neighbouring western property, ensuring no property is left isolated.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standards, noting the development will be in the public interest.

6. Public Benefit of Maintaining the Standard

It is considered that there is no benefit to the public or the community in maintaining the development standards. The proposed development will allow for the creation of a high quality residential development which as stated above meets the desired objectives of the standard.

Housing affordability in Sydney is becoming increasingly difficult. Our client is a not for profit organisation seeking to address a prevalent issue in Sydney's housing market. Our client is committed to providing a development that is 100% affordable housing for a period of 20 years far surpassing the requirements of State legislation. The additional height sought on the site will enable an additional three units to be provided on the site benefiting the local community.

As part of the proposed works, the subject site seeks to consolidate Nos. 9 – 11 Edgeworth Place with Nos. 249 – 251 Hoxton Park Road. As stated above, an integrated landscape design including communal rooftop terrace and at least two BBQ areas being provided, would be included on site benefiting both the existing occupants within the Hoxton Park Road property and future residents on the Edgeworth Place property.

The proposed development provides additional residential development within an established area, which is located near public infrastructure. The area can support an increase in density and this is encouraged by Council.

It is not considered that the variation sought raises any matter of significance for State or regional environmental planning.

The departure from the height of buildings control within the LLEP 08 allows for the orderly and economic use of the site in a manner which achieves the outcomes and objectives of the relevant planning controls.

7. Is the Variation Well Founded?

It is considered that this has been adequately addressed in Parts 4 and 5 of this submission. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 of the LLEP 08 in that:

- ❑ Compliance with the development standards would be unreasonable and unnecessary in the circumstances of the development;

- ❑ There are sufficient environmental planning grounds to justify the departure from the standards;
- ❑ The development meets the objectives of the standard to be varied (height of buildings) and objectives of the R4 High Density Residential zoning of the land;
- ❑ The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- ❑ The breach does not raise any matter of State of Regional Significance; and
- ❑ The development submitted aligns with the revitalisation of the formerly industrial precinct.

Based on the above, the variation is considered to be well founded.

8. General

Clause 4.6 also states that:

"(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note. *When this Plan was made it did not include any of these zones.*

- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (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,*
 - (ca) clause 6.4, 6.5, 6.6, 7.22, 7.24, 7.25, 7.26, 7.26A, 7.27, 7.28, 7.29 or 7.30."*

This variation does not relate to the subdivision of land. The variation sought is thus not contrary to subclause (6).

Should the exception to the development standard sought under this submission be supported by Council, the Council must retain a record of the assessment of this submission.

The development proposed is not complying development.

A BASIX certificate was provided for the development.

Clause 5.4 of the LLEP 08 does not apply to the proposal.

Clause 4.3 (2A), 4.4 (2A), 2(b), 2(c) or 2(d) of the LLEP 08 do not apply to the site.

9. Conclusion

The proposal does not strictly comply with the maximum building height control as prescribed by Clause 4.3 of the LLEP 08. Having evaluated the likely affects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of the LLEP 08 are satisfied as the breach to the controls does not create any adverse environmental impacts.

As reiterated throughout this report, the proposal seeks to provide for a development comprising of entirely affordable housing units for a period of 20 years. The development will address a rising social issue in Sydney's housing market whereby rising prices are making affordable accommodation increasingly difficult to come by.

The proposed development will be managed by our client, St George Community Housing with all units used for the purposes of affordable housing for at least a 20 year period.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular instance and that the use of Clause 4.6 of the LLEP 08 to vary this development controls appropriate in this instance.

Based on the above, it is sensible to conclude that strict compliance with the maximum building height control is not necessary and that a better outcome is achieved for this development by allowing flexibility in the application.

Should you have any questions regarding the proposed development, please do not hesitate to contact me.

Kind regards,

Melissa Rodrigues
GAT & Associates
Plan 2804