



Clause 4.6 Request for Variation to Height of Buildings Development Standards

Lot 374 & 375 DP 227167 and Lot 1 DP 796901
207, 209, 211 Hoxton Park Road, Cartwright

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David Haskew (Partner)

A: Soper Chambers – Suite 10 / 118-120 Katoomba Street, Katoomba P: 0414 407 022

E: david@hdcplanning.com.au

Gilbert de Chalain (Partner)

A: Mezzanine Level - 50 Carrington Street, Sydney, NSW 2000 Australia P: 0417 253 416

E: gilbert@hdcplanning.com.au

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1 INTRODUCTION

This report has been prepared as the Applicant's Written Request for Variation to a Development Standard and is made in accordance with the provisions of clause 4.6 of Liverpool Local Environmental Plan 2008 (LLEP 2008).

The Request for Variation is made in respect of a Development Application for the demolition of existing structures and construction of a Residential Flat Building comprising 26 apartments with basement car parking.

The Request for Variation relates to the height of buildings development standard which operates pursuant to clause 4.3(2) of LLEP 2008. The exceedance in main building height is 0.95m and 1.7m to the top of the lift overrun.

In preparing this Request for Variation, regard has been had to seminal Court decisions in relation to SEPP 1 generally and in relation to clause 4.6 specifically.

The Request for Variation has been set out generally in accordance with the structure recommended by the Department of Planning in its publication entitled Varying Development Standards – A Guide.

2 CLAUSE 4.6 REQUEST FOR VARIATION

Clause 4.6 of LLEP 2008 allows for variation to development standards. The Court has set out, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 (*Micaul*), the matters which must be adequately addressed in the preparation of a clause 4.6 Request for Variation.

From His Honor's observations at paragraph 7, I understand my task in preparing this Request for Variation is to:

- Addresses the matters required to be demonstrated by Cl 4.6(3), being;
 - that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and;
 - that there are sufficient environmental planning grounds to justify contravening the development standard.

- Demonstrate that 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,

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.

4.3 Height of buildings

(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.*

2.3 Does Clause 4.6 Permit Variation to the Development Standards Contained within Clause 4.3 and Clause 4.4?

Clause 4.6(8) itemises those clauses for which contravention of a development standard is not allowed to be made under clause 4.6. Neither Clause 4.3 nor 4.4 are included within that list.

Clause 4.6 allows for variation to development standards other than those excluded under clause 4.6(8). "Development Standard" is defined at Section 4 of the EP&A Act 1979 as:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

(a)-(b)...

(c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

(d)-(o) ...

Clause 4.3 sets a requirement in relation to the maximum height of a building and is therefore a development standard pursuant to item (c) of the definition.

Clause 4.3 therefore contains a development standard. Since neither is excluded under clause 4.6(8), request for variation is able to be made to the standards.

2.4 What is the Zoning of the Land?

The subject site is zoned R4 – High Density Residential

2.5 What Are the Objectives of the Zone?

The objectives of the zone are contained within Part 2 of the LEP:

- *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.*

It is considered that the proposed development satisfies all the objectives of the zone. Detailed analysis of the proposed height exceedance relative to the objectives of the zone is provided at Section 2.11 below.

2.6 What Are the Objectives of the Development Standard?

The objectives of clause 4.3 – Height of Buildings 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.*

In our opinion, the objectives of Clause 4.3 aim to ensure the bulk and scale of development is compatible with the character of a locality. Such restrictions also ensure that development does not adversely impact upon the amenity of adjoining properties, particularly with regard to privacy, overshadowing and building bulk.

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

Clause 4.3, together with the Height of Buildings Map, prescribes a maximum building height of 15 metres.

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

The application proposes a building height measured to the top of the lift overrun (herein referred to as the lift overrun building height) of 16.7m. In respect of the remainder of the building, the maximum building height measured to the top of the roof parapet (herein referred to as the main building height) 15.95m.

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

The percentage variation for main building height is 6.3%. The variation, incorporating the lift overrun is calculated at 11.3%.

2.10 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.

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

Having regard to the objectives of the development standards as well as the objectives of the R4 – High Density Residential zone, the following sets out the reasons why strict compliance with the building height and FSR development standards is unreasonable and unnecessary in the circumstances of the case.

2.11.1 Building Height

Main Building Height Exceedance

The proposed height exceedance is expressed in two parts, being the main building proper, and secondly the lift overrun. The following addresses the height of the main building proper

Reason for Variation 1 – Site constraints

- Stormwater infrastructure in the vicinity of the site is comparatively old and trunk drainage pipes have been built relatively close to the surface level of Hoxton Park Road to which the subject site drains. In order to achieve gravity fall to reticulated stormwater infrastructure, it has been necessary to modestly raise the ground level of the proposed development.

It is this proposed response to site constraints which represents the primary cause the building height exceedance insofar as it relates to the main building (excluding lift overrun). Given finished ground level of the development is fixed by stormwater infrastructure within Council's system, the only opportunity to amend the design to achieve strict compliance would be to remove a full storey from the proposed development or introduce a pump out or charged line system. Reduction in building height would offend, to an egregious extent, Objective 5(a)(ii) of the EP&A Act 1979 in that it would be an anathema to orderly and economic development in circumstances where the extent of non-

compliance is minor and the floor space ratio of the development complies with the statutory limit.

Having regard to the above, strict compliance with the standard is considered to be unreasonable and unnecessary in the circumstances of the case.

Reliance on a pump out or charged line stormwater system introduces the risk of system failure and in circumstances where gravity drainage can be achieved whilst still satisfying the objectives of the height of buildings development standard, minor variation to building height is considered to be the superior design response.

Reason for Variation 2 – Promotion of Housing Affordability

The proposed development provides 3.05m floor to floor heights which responds to a recommendation made by the Design Excellence Panel. In the case of the third floor, 3.3m floor to ceiling height is required to accommodate drainage pipes. A 3m floor to floor height can readily achieve 2.7m floor to ceiling height, however the additional 50mm (which translates to 200mm over the height of the building) affords additional opportunity for ceiling conduit and particular lighting fixtures such as flush downlights. In respect of the third floor level, external drainage pipes sensitively blended into the elevation detailing could be provided. This, together with 3m floor to floor heights would allow for a total reduction in building height of 500mm. However, even with a sensitive design treatment, external pipework should be viewed as a vastly inferior design solution. Minor increase in building height in order to avoid that outcome is preferred.

Given the site context and absence of impact (see Reason for Variation 3 below) a design which maximises amenity is preferred over a design which pursues slavish adherence to the standard.

Accordingly, strict compliance with the standard is considered to be unreasonable and unnecessary in the circumstances of the case.

Reason for Variation 3 – Site Context and Absence of Impact Supports Minor Variation to Building Height

The subject site enjoys frontage to Hoxton Park Road and is situated on its northern side. Accordingly, primary overshadowing impacts are to Hoxton Park and not to adjoining private dwellings or the private open space areas.

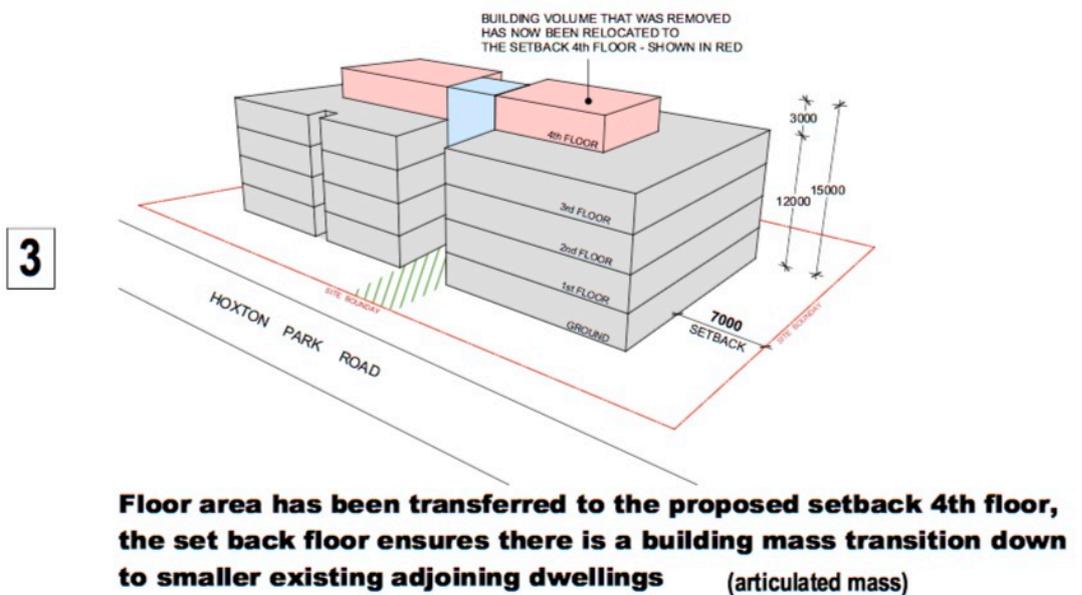
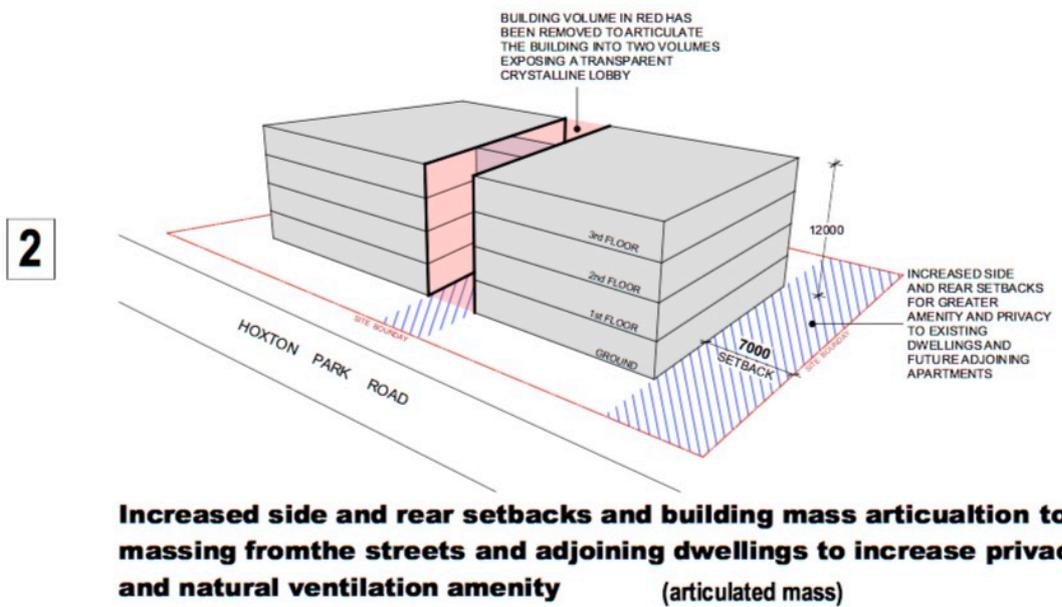
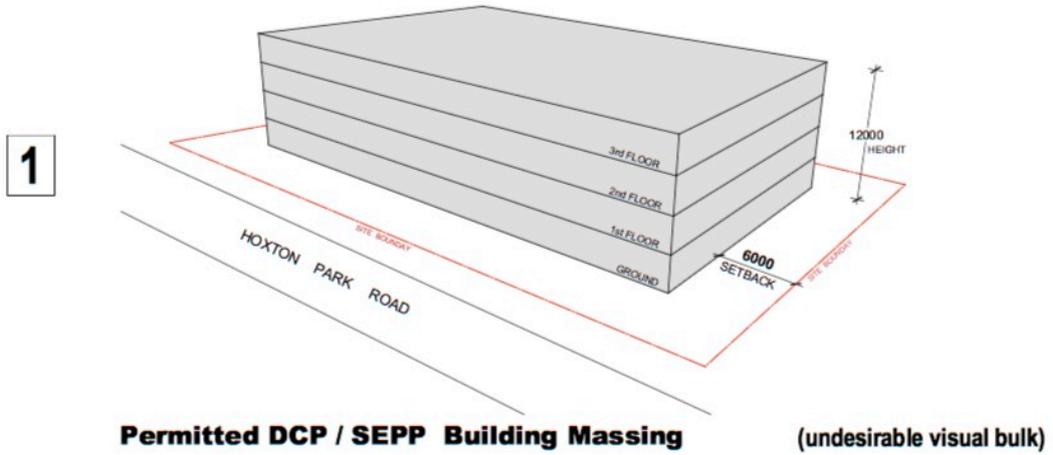
and is a north south orientated site. The effect of these two site characteristics is twofold. First, additional shadow caused by the height exceedance is cast to Hoxton Park Road.

For the above reason, strict compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case.

Reason for Variation 4: The design actively mitigates against bulk and scale impacts by the use of progressive setbacks, truncation of the top level floor plate and the use of visually lighter weight materials.

The above listed characteristics of the top elements of the design coordinate to deliver a visually recessive top storey. This in turn, mitigates bulk, scale and other visual impact impacts which might otherwise arise from a less sophisticated and sensitive design response.

It is further noted that the top storey of the proposed development constitutes a redistribution of floor space in order to increase side setbacks and building separation to side adjoining future development. This situation has been graphically communicated in the development plans, of which we provide an extract below.



Having regard to the particular design skill and care with which the top storey of the development has been design, strict compliance with the standard is considered to be unreasonable and unnecessary in the circumstances of the case.

Reason for Variation 5 - The proposed development exceedance in maximum building height and FSR does not derogate from the attainment of the R4 – High Density Residential zone objectives

Particular attention is drawn to the first, second and fourth zone objectives. In this regard:

Drainage design requirements aside, the minor exceedance in building height creates an opportunity for two additional apartments to be provided on the fourth level. The two units comprise 3 bedrooms with generously proportioned living spaces and outdoor balconies. The provision of three bedroom units maximizes the development's market potential by being accessible to larger household groups or families. Such an outcome is directly consistent with the second zone objective in that it provides a variety of housing types within a high density residential environment.

Lift Overrun

The following reasons for variation deal specifically with the proposed lift overrun.

- The provision of lift access to each floor level is an integral feature of the building and is consistent with the first zone objective. In this regard, the lift, including its overrun is essential for residential development to provide for the variety of housing needs of the community.
- The proposed lift overrun, does not derogate from the design quality of the building and indeed it is not visible from the public domain at ground level. Accordingly, the left overrun does not offend the objectives of the height of buildings development standard.
- The overrun structure itself measures 3m x 2.8m and is centrally located within the building's roof top. It is set back 7m from the Hoxton Park Road building edge. This placement, together with the overall height of the building results in the lift overrun having negligible visibility from ground level at Hoxton Park Road. In essence, the lift overrun delivers negligible contribution to the overall bulk and the building.
- Given the lift overrun will have negligible visibility at ground level, together with its extremely minor contribution to overall bulk of the building, bulk and scale impacts are considered to be satisfactory.

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

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

The term “environmental planning grounds” is not defined in LLEP2008 nor any other environmental planning instrument. It is also not defined in the Department of Planning’s Guide to Varying Development Standards

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)*

30. On Appeal in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 (3 June 2015), the Court considered whether the Commissioner had erred in law in confining

environmental planning grounds to those particular to a site or proposed development. The Court held at [29] and [30] that this was a matter which the Commissioner was entitled to consider in her exercising of discretion:

Turning to the first ground of appeal, it refers to a finding of the Commissioner at [60] in relation to the environmental planning grounds identified in the written request, as required by cl 4.6(3)(b). The Commissioner concluded that the grounds referred to were not particular to the circumstances of the proposed development on the particular site. Firstly, it is debatable that this ground of appeal couched as the misconstruction of subclause (4)(a)(i) does identify a question of law. The Commissioner's finding, that the grounds relied on in the written report were not particular to the circumstances of the proposed development on this particular site, is one of fact. That informed her finding of whether the grounds put forward were sufficient environmental planning grounds.

To the extent the issue raised can be described as a question of mixed fact and law, the Commissioner is exercising a discretion under subclause (4)(a)(i) in relation to the written report where the terms in subclause (3)(b) of sufficient environmental planning grounds are not defined and have wide import,

From this we interpret that particular circumstances of the site or development is an appropriate (although not exclusive) filter through which to view the sufficiency of environmental planning grounds.

In the absence of a legislative or other definition we adopt a definition for "environmental planning grounds" as 'any matter arising from consideration of either Section 79C of the EP&A Act 1979 or its Objectives contained within Section 5 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 grounds which support variation to the standard in this instance are:

2.12.1 Height of Buildings

Environmental Planning Ground 1 – Drainage Infrastructure Constraints

The particular topographic characteristics of the site are that it is constrained by minimal natural fall to the kerbside and that reticulated drainage infrastructure is closer to the road surface level than modern drainage design practice would have delivered. This particular site characteristic has prevented the proposed building from being partially excavated into the site, and in fact has resulted in finished surface level needing to be raised to a minor degree. This in turn causes the proposed non-compliance with the height of buildings development standard.

Environmental Planning Ground 2 – Generous Floor to Floor Heights Maximise Amenity and Building Design Flexibility

The particular design exacerbates height of buildings non-compliance by approximately 500mm as compared to a design which provided typically observed 3m floor to floor heights. The proposed floor to floor height responds to a direct recommendation for the same made by the Design Excellence Panel. Whilst a more compliant design could achieve 2.7m floor to ceiling heights, the Panel's recommendation provides additional design flexibility for roof cavity conduit and flush mounted downlights. This in turn allows for greater residential amenity and is therefore supported as a particular aspect of the design, notwithstanding that it exacerbates non-compliance with the height of buildings development standard.

Environmental Planning Ground 2 – The particular design in the context of this particular site means that the non-complying building height and FSR is not visible from the public domain and therefore does not have any adverse effects on the streetscape or urban form otherwise anticipated by the controls.

As presented above, a contravention in development standards in this case does not undermine the objectives or reasons for the standards or of the R4 – High Density Residential zone. The encroachment of the building height and lift over run has negligible visual impact and does not contribute to building bulk when viewed from the public domain.

Environmental Planning Ground 3 – The particular orientation of the site is such that the most significant overshadowing effects caused by the building are over Hoxton Park Road, rather than to adjoining properties or to the public domain.

The natural conclusion of this particular site characteristic is that for a degree of non-compliance as minor as that which is proposed, the subject site's orientation makes it particularly well suited to accommodate minor non-compliance in building height without imparting adverse impact as a consequence.

Environmental Planning Ground 4 - The particular part of the building which most significantly breaches the height limits is inaccessible, does not add to floor space and does not introduce any privacy impacts

It is relevant that the majority of the non-compliant element of the building is specifically a lift overrun and building parapet. This element of the built form will not contribute to impacts relevant to Section 79C(1)(b) save extremely minor additional overshadowing in the afternoon period. However, in respect of overshadowing, the lift overrun and overall building height does not prevent full compliance with ADG solar access requirements being achieved for likely future adjoining developments.

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

There are no issues of State significance associated with the proposed variation to the development standard.

2.14 What is the Public Benefit of Maintaining the Standard?

Having regard to the specific circumstances of the subject site, the proposed development and the fact that the non-compliant elements of the design are limited largely to the lift overrun and a well justified exceedance of floor area, it is considered that there is no public benefit in maintaining strict compliance with the standard in this instance. On the contrary, to do so would undermine several important public benefit outcomes, particularly those associated with maximising public transport patronage and maximising housing supply within the subject R4 – High Density Residential zone.

Additionally, and as demonstrated in this Report, the proposed exceedance of the maximum building height and FSR development standards in this instance will not derogate from the attainment of the objectives of the R4 – High Density Residential zone or the objectives of clause 4.3 of LLEP 2008.

Signed,



David Haskew (B.T.P Hons 1)

Senior Partner