

**CLAUSE 4.6 VARIATION TO CLAUSE 4.3 – HEIGHT OF BUILDINGS  
OF APPENDIX 8 – LIVERPOOL GROWTH CENTRES PRECINCT PLAN OF THE STATE  
ENVIRONMENTAL PLANNING POLICY (SYDNEY REGION GROWTH CENTRES) 2006**

**1. Introduction**

---

This submission seeks a variation to Clause 4.3 under Appendix 8 – Liverpool Growth Centres Precinct Plan of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (Sydney Region Growth Centres SEPP), which relates to building height.

This submission has been prepared with regards to a development application seeking demolition of existing buildings and the construction of a residential flat complex comprising four (4) x four (4) storey residential flat buildings for a total of 253 units with basement parking, associated landscaping and Torrens title subdivision at No. 484-488 Bringelly Road, Austral.

As detailed in this written request for a variation to building height being a development standard under Appendix 8 of the Sydney Region Growth Centres SEPP, the proposed development meets the requirements prescribed under Clause 4.6 within Appendix 8 of the Sydney Region Growth Centres SEPP – Liverpool Growth Centres Precinct Plan 2013.

This submission is made under Clause 4.6 within Appendix 8 of the Sydney Region Growth Centres SEPP – Exceptions to development standards. 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 Region 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 Precinct Plan was made it did not include any of these zones other than Zone E2 Environmental Conservation*

- (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."*

The use of Clause 4.6 to enable an exception to this development control is appropriate in this instance and the consent authority may be satisfied that all requirements of Clause 4.6 have been satisfied in terms of the merits of the proposed development and the content in this Clause 4.6 variation request report.

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan. 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:*

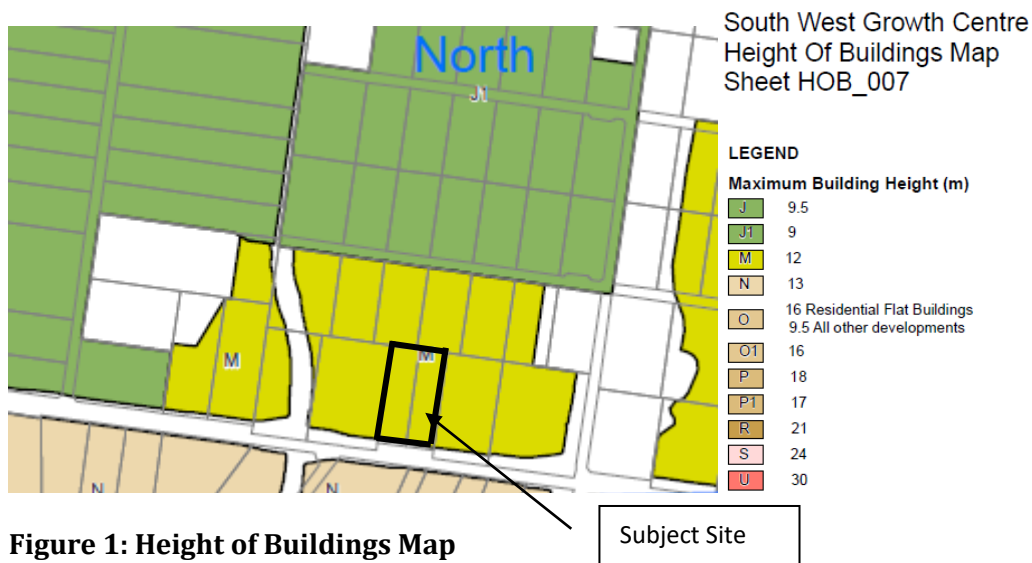
- (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
- (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

The Environmental Planning Instrument to which these variations relate to is Appendix 8 of the Sydney Region Growth Centres SEPP which relates to Liverpool Growth Centres Precinct Plan 2013.

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 of building,
  - (b) to minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space,
  - (c) to facilitate higher density development in and around commercial centres and major transport routes.
- 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.

The map identifies a maximum building height as 12m for the site. Refer to Figure 1 below.



**Figure 1: Height of Buildings Map**

Source: NSW Legislation, SEPP (Sydney Region Growth Centres) 2006

The approximate maximum proposed height is 13.1m.

A written justification is therefore required for the proposed variation to the height of buildings development standard, in accordance with Clause 4.6 of the Liverpool Growth Centres Precinct Plan 2013

## 2. Extent of Non-Compliance

As noted above, Clause 4.3 within Appendix 8 – Liverpool Growth Centres Precinct Plan 2013 of the Sydney Region Growth Centres SEPP states that a portion of the subject land is subject to a maximum building height of 12 metres.

Referring to the architectural plans submitted, it is noted that the maximum building height is approximately 13.1 metres, exceeding the maximum permitted by 1.1 metres.

Although the proposal breaches the height of buildings control, the development achieves appropriate building envelopes and separation to the adjacent future residential land. It is also worth noting that the development does comply with solar access, cross ventilation, site coverage, landscaped area, communal open space, and deep soil requirements.

### **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 required tests in Clause 4.6. In addition, in addressing the requirements of Clause 4.6(3), the accepted five possible approaches for determining whether compliances are unnecessary or unreasonable established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council (2007) LEC 827 are considered*.

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.”*

In the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, Preston CJ summarised the five (5) different ways in which an objection under SEPP 1 has been well founded and that approval of the objection may be consistent with the aims of the policy. The five possible ways are as set out below:

<b>First</b>	<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>
<b>Second</b>	<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. (not applicable)</i>
<b>Third</b>	<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. (not applicable)</i>
<b>Fourth</b>	<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. (not applicable)</i>
<b>Fifth</b>	<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 applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary. (not applicable)</i>

In respect of the building height standard, the first method is invoked.

The objectives supporting the maximum building height control identified in 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 of buildings,*
- (b) to minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space,*
- (c) to facilitate higher density development in and around commercial centres and major transport routes.*

The maximum height proposed is approximately 13.1m, as measured from existing ground level, resulting in a numerical breach of 1.1m.

The site is located within the South West Growth Centre in an R3 Medium Density Residential zoned area. The subject site and its surrounds are to be the subject of extensive development in accordance with new land releases over the next 20 years. It is worth noting other applications at Council within R3 Medium Density Residential zoning in the same Precinct that are also for similarly sized residential flat buildings.

Residential flat buildings are permissible with consent in the zone. The proposal is in accordance with the Indicative Layout Plan in terms of density. A 12m building height establishes a potential four storey maximum height, given a 3m floor to floor height. The proposal is for such a development.

The proposed development has had regard to the surrounding potential land uses and meets all separation requirements. Refer to the architectural plans and shadow diagrams. Much of the shadows caused by the development falls to the south across the access road parallel to Bringelly Road that will be constructed as part of this proposal. Future adjoining development will not be unreasonably impacted by the proposed development.

The subject site is located within 1.4km of Leppington Station and currently fronts Bringelly Road, the major through road in the area toward Liverpool. As such, the development is a medium density development within the vicinity of major transport routes.

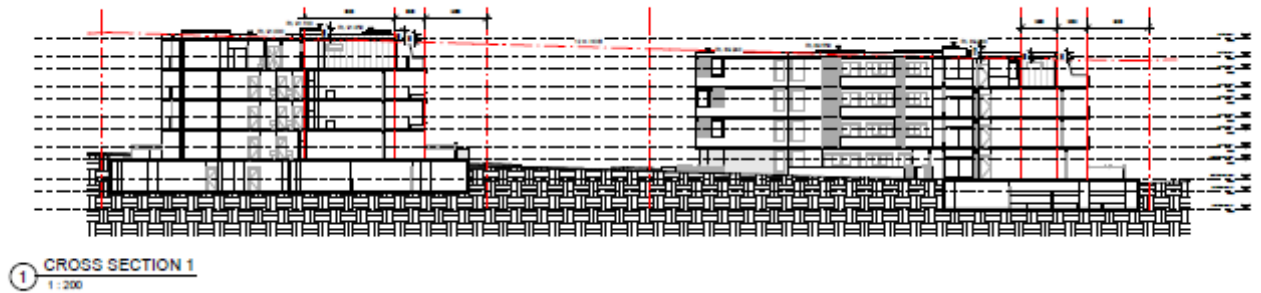
As such, the development meets the objectives of Clause 4.3.

#### **4. Are there Sufficient Environmental Planning Grounds?**

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

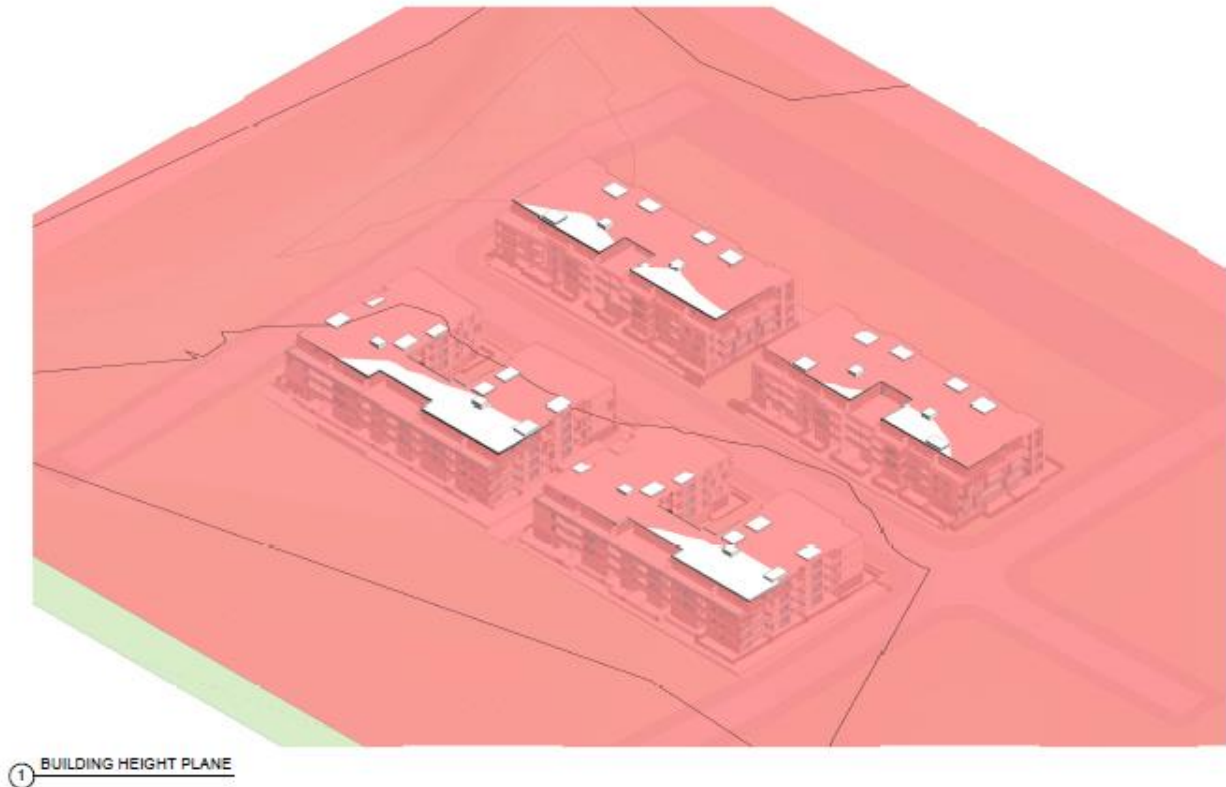
The proposed variation is for a maximum of 13.1m, which is only at the highest point and not a consistent breach along the roof form. Refer to Figure 2 on the following page.

The building is generally compliant in terms of building up to the ceiling of the top floor, with minor non-compliances due to the slope of the land. However, once the lift overruns and roof elements are taken into account, the building does result in a breach in height. Refer to Figure 3 on the following page.



**Figure 2 Cross Section**

No unreasonable additional floor space is proposed above the height limit, nor are any additional storeys sought beyond what the height controls for the site permit. The variation proposed is a result of the slope of the site and the necessary provision of lift overruns.



**Figure 3 Building Height Plane**

Notwithstanding the above, the design of the building has been to comply as best as possible for height while attempting to meet the possible density prescribed to the site. Consequently, as the variation does not result in additional floors and is subject to the topography of the site, the breach in height is considered to be an acceptable variation to the height control.

The additional building height allows for the efficient and economic use of the land. Given the site's orientation, location and context it is considered that the site is well suited for the proposed residential flat complex.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard. As demonstrated, the objectives of the standard

have been achieved. Therefore, strict compliance with the development standard for building height in the Liverpool Growth Centres Precinct Plan 2013 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 building contextually has regard to its surrounding properties and the potential future development and provides sufficient private open space and landscaping for the amenity of future residents.

Furthermore, it is important to also consider the objectives of the R3 Medium Density Residential zone in relation to the development, which are as follows:

### ***Zone R3 Medium Density Residential***

#### ***Objectives of zone***

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To support the well-being of the community by enabling educational, recreational, community, religious and other activities where compatible with the amenity of a medium density residential environment

In response to the above the following is provided:

- The provision of additional residential accommodation in the Austral & Leppington North Precinct fulfils the purpose of the land release, to provide for the housing needs of Sydney residents in the future. The proposed residential flat buildings are at a medium density scale in a medium density area.
- 1, 2 and 3 bedroom units are provided with the residential flat buildings, offering a variety of options.
- The proposal is only for residential use.

The proposed development meets the objectives of the zone.

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 the public benefit will not be undermined by varying the standard. The proposal provides for residential flat buildings, keeping with the R3 Medium Density Residential zoning.

The proposal provides for the orderly and economic development of the site. Given the site's orientation, location and context it is considered that the site is well suited for the development.

The development is generally consistent with the current planning controls.

The provision of a basement level for parking will remove the burden of on-street parking in the area.

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

The departure from the building height control within the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 allows for the orderly and economic development 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 under Appendix 8 of the Sydney Region Growth Centres SEPP 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 (building height) and objectives of the R3 Medium 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 or Region Significance; and
- ❑ The development submitted aligns with the predominantly residential nature of the desired future character of the neighbourhood.

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

## 8. General

---

Clause 4.6 also states that:

*"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 Precinct Plan was made it did not include any of these zones other than Zone E2 Environmental Conservation*

- (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."*

This variation does not relate to the subdivision of land in the stated land use zones. The variation sought is 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 has been prepared in relation to the proposed development and is submitted under separate cover.

Clauses 5.4 are not applicable in this instance.

## **9. Conclusion**

---

The proposal does not strictly comply with the maximum building height controls as prescribed by Clause 4.3 of Appendix 8 – Liverpool Growth Centres Precinct Plan of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006.

Having evaluated the likely affects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of the Appendix 8 – Liverpool Growth Centres Precinct Plan of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 are satisfied as the breach to the controls does not create any adverse environmental impacts.

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 Appendix 8 – Liverpool Growth Centres Precinct Plan of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 to vary this development controls is appropriate in this instance.

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

Darren Laybutt  
**GAT & Associates**  
Plan 3060