

**Appendix E Clause 4.6 Variation to Clause 4.3 of the
Liverpool Local Environmental Plan 2008 –
Height of Buildings**

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

1. INTRODUCTION

This submission seeks a variation to Clause 4.3 of the Liverpool Local Environmental Plan 2008 (LLEP08), which relates to building height.

This submission has been prepared with regards to a development application over Nos. 71 – 75 Cabramatta Avenue, Miller for the demolition of all existing structures and the development of a 6 storey residential flat building comprising of 8 x 1 bedroom units and 31 x 2 bedroom units to be wholly used for the purposes of affordable rental housing.

As detailed in this written request for a variation to building height being a development standard under LLEP08, the proposed development meets the requirements prescribed under Clause 4.6 of LLEP08.

This submission is made under clause 4.6 of the LLEP08 – 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 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."*

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 the LLEP 08.

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

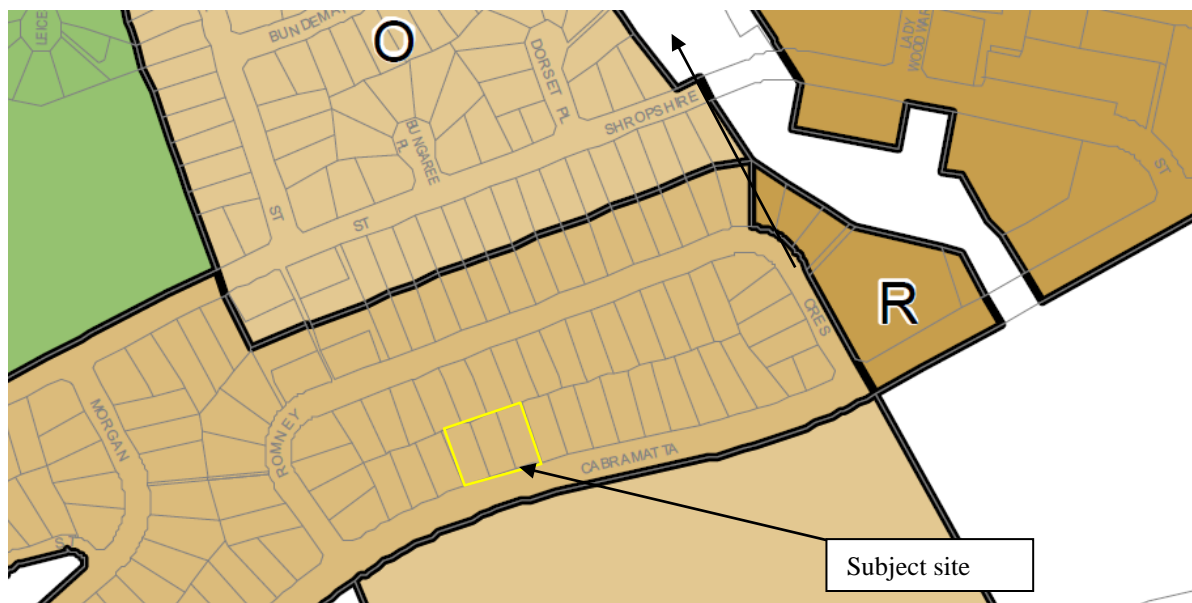
- “(1) The objectives of this clause are as follows:*
- (a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved,*
 - (b) to permit building heights that encourage high quality urban form,*
 - (c) to ensure buildings and public areas continue to receive 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 18m.

Figure 1 – Height of Buildings Map



Source: NSW Legislation, LLEP 08 map 010.

The proposed residential flat building will exceed the standard with a proposed building height of 19.80m as measured from ground level to the top of the lift overrun. The variation is equivalent to 1.80m² or 10%.

A written justification is therefore required for the proposed variation to the maximum building height 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 18m.

The current proposal seeks a maximum building height of 19.80m. The proposal therefore exceeds the standard by 1.80m or 10%.

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 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:

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| 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</i> |
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| | <i>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. (not applicable)</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. (not applicable)</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. (not applicable)</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 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 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".*

With respect to objective (a), the subject site is afforded a maximum building height limit of 18 metres and floor space ratio control of 1.2:1 under LLEP08. As the current proposal is made under State Environmental Planning Policy (Affordable Rental Housing) 2009, a bonus 0.5:1 is afforded, enabling a maximum floor space ratio of 1.7:1 to be achieved on the site.

The proposal is notably compliant with the maximum floor space ratio control, however seeks a variation to the maximum height control as described in this letter. In a decision of the Land Environment Court, *Abdul-Rahman v Ashfield Council* [2015] NSWLEC 1122, Commissioner O'Neil stated,

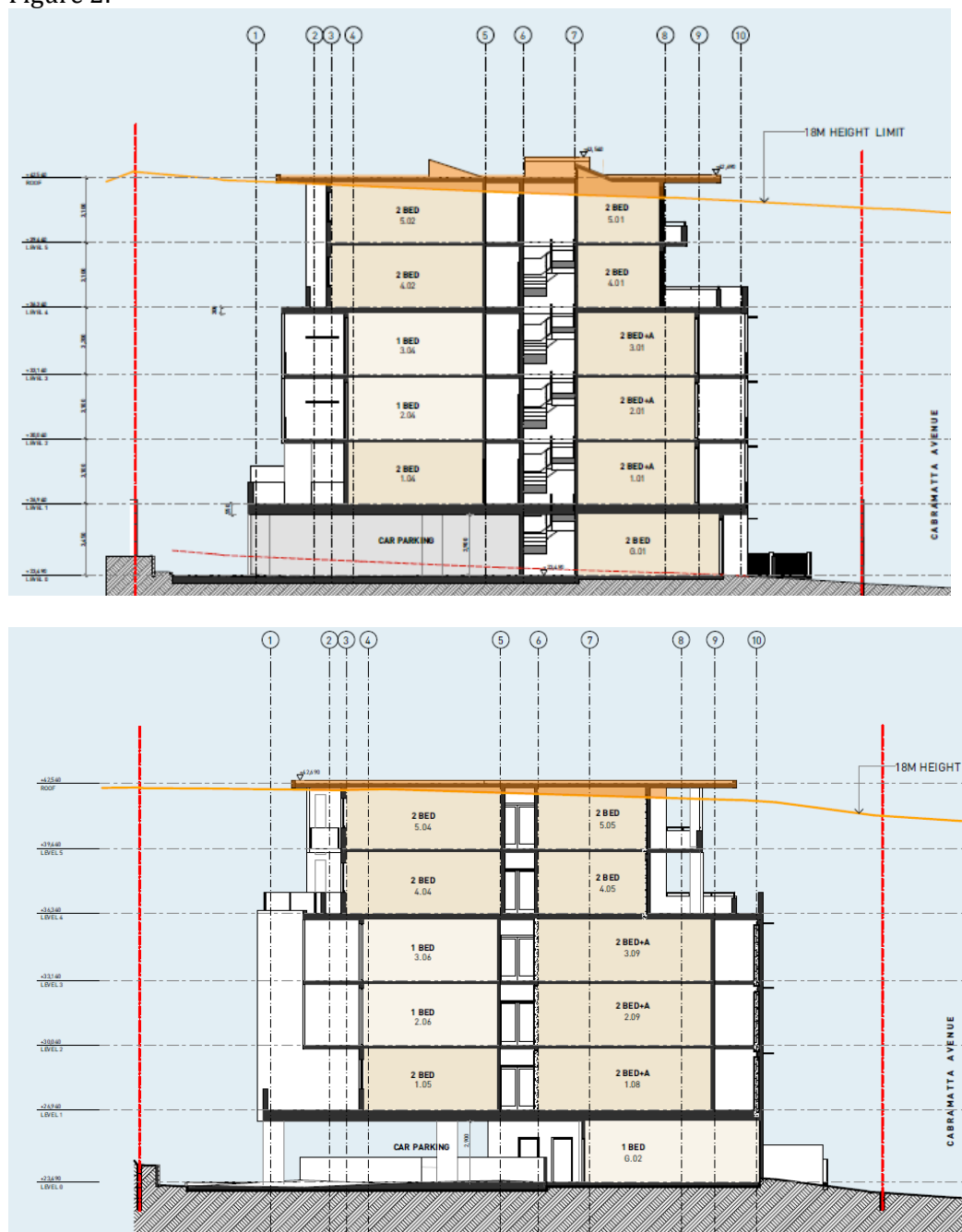
"I accept the argument put by the applicant that the consequence of the SEPP ARH incentives, which seek to facilitate the effective delivery of new affordable rental housing by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards, is to expand the permissible building envelope for a site in some way, although pursuant to cl 16A of SEPP ARH, any increase of the building envelope has to be compatible with the character of the local area. In this matter, the proposal complies with the FSR

development standard in LEP 2013 and does not seek the benefit of the FSR incentive of SEPP ARH at cl 13, however the principle of an expanded building envelope in recognition of the contribution of affordable rental housing made by the proposal is still relevant”.

In keeping with the above, we submit that the proposed variation is attributable to the increased density available on the site. In view of the context of the site, it was not considered feasible to further encroach upon the setbacks of the adjoining developments and consequently the proposed height has exceeded the maximum standard.

It is worthy to note, that the greatest variation to the height control is achieved only over the lift overrun with only minor variations (0.35m – 0.93m) sought in respect to Level 4 itself. This is demonstrated in the images below.

Figure 2:



Source: Smith & Tzannes

The tallest component of the building therefore spans a relatively short area of the proposed building, and relates to an element of the design (lift overrun) that has been centred over the site to reduce its visual prominence. Where the greatest variation is sought in relation to habitable floor area at level 4, we note that this is to the southern side of the building where any additional shadow cast would fall across Cabramatta Avenue rather than impact upon the amenity of the adjoining neighbours.

The proposed development has been carefully designed to project a highly articulated appearance to each of the facades. The depth of the units has been limited allowing for breaks in each elevation and steps in the overall design. The use of balconies to the front and rear of the building provides for visual relief from solid external walls and aids to break up the building mass. The use of varied building materials ranging from light and dark face brick and pre-cast concrete panels to provide for visual interest and creates vertical lines to the development to minimise the appearance of a long façade. The proposal therefore satisfies objective (b).

The proposed development has also been designed to maximise solar access with 69.2% of the proposed units across the entire development achieving a minimum of 2 hours solar access. A total of 61% of units across the development will be naturally cross ventilated in keeping with objective (c).

In addition, the proposed development has been well articulated to the street frontage 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.

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 39 units will be nominated as affordable housing to be managed by our client, St George Community Housing.

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 Cabramatta Avenue. The site is also located in close proximity to the retail/commercial premises sited along Hoxton Park Road and the recent development approval issued for the redevelopment of the Miller Shopping Centre.

The development is also notably compliant with the maximum 1.7:1 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 building contextually has regard to its surrounding properties and provides sufficient open space and landscaping for the amenity of future residents.

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 proposed residential flat building will replace the existing three dwellings on the site with 39 proposed units to provide for the housing needs of the community within a high density environment.

The proposal comprises of a mix of 1 and 2 bedroom units, including adaptable designs ensuring a variety of housing types are available.

No other land uses are proposed.

The site is readily accessible by public transport with a bus stop located just 40m from the development. The site is also located in proximity to Miller Shopping Centre to the north-east of the site

The proposal will not result in the fragmentation of land.

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 far surpassing the requirements of State legislation. The additional height sought on the site will enable additional units to be provided to the benefit of the local government area. 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 or Regional Significance; and
- ❑ The development submitted aligns with the revitalisation of the formerly low density 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.

Clauses 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. 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. 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 10 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 3033