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## CLAUSE 4.6 VARIATION REQUEST

Proposed Residential Flat Buildings for Affordable Housing  
61-65 Lucas Avenue, 36 McKay Avenue & 31 Harvey Avenue  
Moorebank NSW 2170

Project 16/007 | 16 October 2020 | Rev B

# 1 Introduction

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## 2 Overview

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This is a formal written request that has been prepared in accordance with clause 4.6 of the *Liverpool Local Environmental Plan 2008 (the LEP)* to justify a variation to the Height of Buildings development standard imposed by clause 4.3(2) of the LEP sought in the subject application. The applicable height of buildings standard is 18 m.

This request is part of the Statement of Environmental Effects supporting the proposed development of shoptop housing at 61-65 Lucas Avenue, 36 McKay Avenue & 31 Harvey Avenue.

The proposed development exceeds the height limit at lift overrun, the wall adjacent to the roof garden access stair and stair lift, balustrades and some planter boxes. The greatest height non-compliance occurs at the lift overrun which extends to the proposed accessible roof gardens. At this location, the height is 20.515 m, an exceedance of 2.515 m. This represents a variation of 14%. It is noted that an architectural roof feature is proposed which doubles as a shading device and is thus not included in building height for the purposes of Clause 4.3. This architectural roof feature largely masks the overrun, screening it from view.

The proposed additional height is directly linked to the amenity of the building, the particular attributes of the site and the site's context and strategic location as follows:

1. The site has an irregular topography which rises near Lucas Avenue where the proposed building entrances are located and falls to the north west and south west. Setting the ground floor levels to be similar to the boundary levels near the entrances results in the floor levels rising above the existing ground level at the western parts of each building. This contributes to the increased height of the building.
2. Three out of four of the site's boundaries are street frontages. This limits the area of private communal open space that can be provided behind the front building line. To address this, accessible landscape rooftop communal open spaces are proposed. Advice from the Design Excellence Panel sought to extend the lift overrun to each roof garden rather than using a stair climber to enhance the convenience of access to the communal open space for people with a mobility impairment.
3. The subject site is located such that it interfaces with the B2 local centre zone to the south which has a height limit of 21 m and allows a range of business uses. The subject site is also a key site and as such under the LEP, entertainment and food and drink premises are permitted as part of a mixed-use development. Given the R4 zone contemplates mixed use outcomes and the site is adjacent to the B2 zone, the proposed development employs a 3.6 m floor-to-floor height at the ground level. This is consistent with ADG criteria 4C-1 which suggests increased floor to ceiling heights of 3.3 m in mixed use areas. It is reasonable in the case of the subject site given its size and land use context, to allow for future flexibility of use at the ground level through increased ceiling heights.
4. The proposed development includes rooftop gardens which add significant amenity to future residents. The structures for access and the balustrades for the roof gardens exceed the height limit by a small degree but they allow for this large additional common area.
5. The proposed development seeks to achieve a public benefit via the provision of affordable housing. The affordable housing SEPP sets out a floor space bonus as an incentive. The proposed development has distributed the additional floor space while retaining a high level of façade articulation. Rather than creating a squat and bulky built form to remain below the height limit.
6. While few high-density developments have yet to be constructed in the area, the two most notable within a block of the subject site are both six storey developments and thus, the height non-compliance is not inconsistent with the scale of other existing residential flat buildings in the area. Similarly, the

proposed development interfaces with the 21 m height limit zone directly to the south and is thus in a transitional position. The proposed height is in keeping with the desired future character of the area. It is also noted the recently consented development directly west of the subject site exceeded the height limit and also proposed a roof garden.

7. The elements which exceeds the height limit are minor. The overrun which has a more substantial height non-compliance is very well setback from the roof edge. The elements exceeding the height limit do not have adverse visual or overshadowing impacts.
8. The southern edges of each building are well below the height limit, mitigating potential overshadowing impacts.

The height non-compliance therefore represents a better development than one that complied with the height limit.

This written request justifies why compliance with the development standard in Clause 4.3 pertaining to Height of Buildings is unreasonable or unnecessary in the circumstances of the case and demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard.

This request also explains how the proposed development will be in the public interest because it is consistent with the objectives of the Height of Buildings standard and the objectives for development within the R4-High Density Residential Zone in which the development is proposed to be carried out.

For the reasons set out, contravention of the development standard raises no matter of significance for State or regional environmental planning and there is no public benefit in maintaining the development standard in this particular case.

## 2.1 Clause 4.6

Clause 4.6 of LEP 2008 states the following:

(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.*

### **1.1.1 Clause 4.6 Variation Criteria**

This document constitutes the written request referred to in Clause 4.6(3) in relation to the Development Application's proposed breach of the height of building development standard. This request has been prepared having regard to the latest authority on Clause 4.6, contained in the following guideline judgments:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118
- *RebelMH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130

There are two key elements which must be demonstrated to justify contravening a development standard. The first element set out in Clause 4.6 (3)(a) states:

- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

The planning principle set out in *Wehbe v Pittwater Council* (2007) provides an accepted method for justifying that compliance with the development standard is unreasonable or unnecessary. This method is to demonstrate that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard ("...development standards are not ends in themselves but means of achieving ends") is undertaken.

To this end, a justification of both the objectives of the Height standard as well as the objectives of the Zone are provided below. This also satisfies Clause 4.6 (4)(a)(ii).

Additionally, further planning principles established by the decision in *Four2Five Pty Ltd v Ashfield Council* (2015) means that merely showing that the proposed development achieves the objectives of the development standard is insufficient to justify that the proposal is unreasonable or unnecessary under an objection under Clause 4.6, (3)(a) specifically.

The second element to be satisfied which is set out in Clause 4.6(3)(b) states:

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

After demonstrating that the proposed development meets the relevant objectives of the LEP, environmental planning grounds are set out to justify contravening the development standards.

In deciding whether to grant concurrence, Council must consider whether contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence.

We are not aware of any “other matters” required to be taken into consideration under subclause (5)(c) and assume there are none. It is assumed that the concurrence of the Secretary is delegated to the relevant consent authority, in this instance Liverpool City Council but this is subject to confirmation from the consent authority.

### **3 Standard from Which Variation is Sought**

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This request for variation is submitted in relation to the Height of Buildings standard contained in Clause 4.3 of the Liverpool Local Environmental Plan 2008.

The maximum Height of Buildings control is 18m.

#### **3.1 Deviation from the Standard**

The proposed development does not exceed the height limit over the entire length of the proposed building. The height noncompliance are minor structures above the roof of the building and include the lift overrun, a part of the roof parapet and parts of the roof garden balustrade.

The greatest height non-compliance occurs at the lift overrun at Building 2. At this location, the height is 20.515 m, an exceedance of 2.515 m. This represents a variation of 14%. The proposed architectural roof feature associated with the roof garden is not included in the reported height of the building as per Clause 5.6 of the LEP.

### **4 Grounds for Clause 4.6 Variation**

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In accordance with *Wehbe v Pittwater Council* (2007), justification is set out below demonstrating that the proposed development achieves the objectives of the standard notwithstanding the numerical non-compliance with the Height Limit set out in LEP 2008.

#### **4.1 Meeting the Relevant Objectives of LEP 2008 (Clause 4.6(4)(a))**

The principle set out in *Wehbe v Pittwater Council (2007)* (**Wehbe**) provides an accepted method for justifying that compliance with the development standard is unreasonable or unnecessary. This request relies on method 1 in *Wehbe* which requires an applicant to demonstrate that the objectives of the relevant development standard will be achieved, despite the non-compliance with the numerical standard.

Compliance with the height control is unreasonable and unnecessary in the circumstances of this proposal as the objectives of the development standard (building height) are achieved, notwithstanding the non-compliance with the height control. The Development Application achieves the objectives of the development standard contained at clause 4.3 of the LEP, as outlined below.

The LEP 2008 Clause 4.3 Objectives 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.*

#### **1.1.2 Assessment against the relevant objectives of the Development Standard – Clause 4.3 - Height of Buildings**

- (a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved,***

The proposed height non-compliance is very minor and arise at roof elements to facilitate a usable, high amenity and accessible roof garden for future residents and over a minor portion of the roof parapet at the northern part of Building 2.

The height non-compliance arises in part due to the irregular topography of the site which rises in the centre and near Lucas Avenue and falls away at the north west and south west parts of the site.

The proposed development is for affordable rental housing as defined under the SEPP (Affordable Rental Housing) 2009. As such bonus floor space is permitted as an incentive to achieve the strategic goal of providing affordable housing. The proposed development seeks to take advantage of this bonus. To achieve a good quality built form with suitable ceiling heights, articulation and setbacks and to maximise the amenity of open spaces on the site while accommodating the bonus floor space, the proposed height non-compliance is appropriate in this particular circumstance. A building which complied would be bulkier close to the street level and would have a larger footprint and therefore less landscape area and open space.

The proposed development seeks increased lower level setbacks to the long western setback zone than what is required by Council's DCP and the ADG. This in effect pushes the building higher but allows for more ground level landscape and open space between buildings. This is a better outcome than a building which complied with the standard.

The proposed development maintains a 5-storey scale which is consistent with an 18 m height limit, but utilises the building height to maximise amenity. Other residential flat buildings in the same height zone as the subject site are six storeys which, if these buildings were to strictly comply with key elements of SEPP 65 and the ADG (namely a minimum floor-to-ceiling height of 2.7 m for habitable rooms), then the buildings are likely to also exceed the height limit.

Other recent consents in the area have also exceeded the height limit for a similar purpose.

The site is also somewhat unique in that it has three street frontage which limits the extent of common open space that can be provided behind the front building line at ground level. The proposed roof gardens allow for extended communal open space that achieves a high amenity and is fully accessible.

The proposed development is consistent with the objective.

***(b) to permit building heights that encourage high quality urban form,***

The proposed height non-compliance is directly related to achieving a high-quality built form. The proposed height non-compliance is directly related to achieving a high quality urban form that responds to the particulars of the site as well as the site context. First, the height non-compliance is related to responding to the site's irregular topography. Ground floor level is set to remain similar to the boundary levels of the site at Lucas Avenue near the proposed entry locations. This results in height non-compliances as the site falls away towards the north west and south west. This setting of the ground level contributes to a high-quality entry response where a strong connection between the building entry and the public domain can be achieved without notable level changes, use of stairs, etc.

Secondly, the proposed rooftop elements and the lift overruns are proposed to provide traffical, easily accessible rooftop gardens on a site with limited opportunities for ground level common open space. The constraint on common open space being provided at ground level arises because the site has 3 prominent street frontages and therefore limits areas for common open space behind the front building line. The roof gardens add substantial amenity to the development while responding to the site's important corner position.

Thirdly, the ground level floor to floor height is proposed at 3.6 m. This directly responds to the land use context of the site. The site is in a transitional location direction adjacent to the B2-Local Centre Zone to the south. This zone is permitted a height of 21 m. The subject site is also designated as a Key Site in the LEP whereby the site is identified as suitable for mixed use development such as food and drink premises. These two factors indicate the site is indeed in a mixed-use area. The proposed increased ceiling height at ground level therefore affords for future flexibility of use at ground level and is also consistent with Objective and Criteria 4C-1 of the Apartment Design Guide (ADG). The increased ground floor ceiling height also contributes to the amenity of the lower level units by affording better daylighting and natural ventilation and this contributes to achieving a high quality urban form.

Also contributing to the height non-compliance are the increased lower level setbacks proposed which allow for more substantial open spaces and landscaped areas at ground level. A landscaped buffer of approximately 7-8 m is proposed at the western setback area where the DCP only requires a 3 m setback and the ADG only seeks a 6 m setback. This allows for more space between buildings, more opportunities for landscaping and more daylighting to dwellings on the subject site and adjoining sites. It also provides additional separation to afford more privacy for future residents and neighbours. In other words, building volume has been transferred to upper levels to allow for a smaller footprint away from the site boundary. This provides a better balance between built form and open space and directly contributes to a high quality urban form. The proposed development also achieves a high level of façade articulation which contributes to the quality of built form.

The height non-compliance is also related to the provision of high amenity rooftop gardens. These spaces provide significant increased amenity for future residents. It also provides opportunities for green roof elements, reducing radiant surfaces and providing a more sustainable outcome for the high density residential topology. This directly contributes to achieving a high quality urban form.



The proposed development is consistent with this objective and the height non-compliance proposed actually contributes to achieving a better urban form outcome than a built form which complied with the standard in this case.

***(c) to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,***

The proposed height non-compliances occur at areas of the building which are setback from the roof edge and do not give rise to sky exposure and solar access impacts. The proposed development is 5 storeys which is fully consistent with the 18 m height limit. The greatest height non-compliance occurs at the northern part of the site so that any potential increased overshadowing is minimised.

The proposed development does not unreasonably overshadow adjoining areas and the public domain.

The objective is satisfied.

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

The proposed development is for Affordable Housing as defined under the SEPP (Affordable Rental Housing) 2009 which provides a floor space bonus to facilitate the provision of affordable housing. The proposed development seeks a portion of the applicable bonus which can go up to 0.5:1. The site is within an R4-High Density Residential zone. It is directly adjacent to the B2-Local Centre zone where heights of 21 m and FSRs of 1.7:1 are permitted. The site is therefore in a transitional setting. It is also noted that the other two residential flat buildings within a block of the subject site are six storeys in height. These are 80-82 Lucas Avenue and 96-98 Nuwarra Road. These precedents together with the recently consented developments at McKay and Harvey Avenue indicate a future character that is high density and 5-6 storeys. The permissible height of buildings within the adjacent sites to the south also indicate that the proposed development with its very minor height non-compliance is compatible with the anticipated built form and intensity of development in the area.

It is also noted that the proposed height non-compliance only comprises minor incursions of elements associated with the roof parapet, balustrade and more substantially the lift overrun which is positioned well away from the building edge and screened by the proposed architectural roof feature. These elements are ancillary to the development below and do not increase the intensity of development, nor do they have an adverse visual impact.

The objective is satisfied.

### **1.1.3 Meeting the Objectives of the Zone – R4 High Density Residential**

The second consideration under clause 4.6(4)(a)(ii) is to ensure the development is consistent with the objectives for development within the zone.

The objectives of the R4 zone are:

- *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.*

The proposal is consistent with the objectives for development within the zone for the following reasons:

- *To provide for the housing needs of the community within a high density residential environment.*

The proposed development is a high density residential development. The objective is satisfied.

- *To provide for the housing needs of the community within a high density residential environment.*

The proposed development provides infill affordable rental housing integrated with market housing. A mix of units is proposed in both the affordable and standard units and the proposal provides a variety of unit configurations and characters. The height non-compliance is directly related to ensuring the affordable housing development is provided with a high level of amenity and in particular in order to provide quality rooftop common open spaces. The objective is satisfied.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposed development locates housing on a site that is adjacent to an existing local centre and within easy walking distance of frequent bus service. While the proposal does not provide land uses other than residential the design of the ground floor, particularly the ceiling height would afford for future change of use to food and drink premises which is a contemplated use on the site given that it is designated as a Key Site in the area. The objective is satisfied.

- *To provide for a high concentration of housing with good access to transport, services and facilities.*

The subject site is suitable for a concentration of housing due to its good access to public transport and its adjacency to the B2-local centre zone and Moorebank shopping centre. The site is a gateway to the R4 neighbourhood which adjoins the B2 zone and is therefore a site particularly suited for the proposed development. The objective is satisfied.

- *To provide for a high concentration of housing with good access to transport, services and facilities.*

The proposed development is a result of a substantial land amalgamation including the late acquisition of 31 Harvey Avenue on Council's advice to ensure site isolation does not occur. The objective is satisfied.

## **4.2 Sufficient Planning Grounds for Justifying the Non-Compliance (Clause 4.6(3)(b))**

There are sufficient environmental planning grounds to justify contravening the development standard due to the following:

- The breach of the height control promotes the orderly and economic development of the land (object (c) of the *Environmental Planning and Assessment Act 1979*). The non-compliance with the height control allows the realisation of the permissible FSR within a building envelope that complements and fits with the planned and desired streetscape.
- The communal open space area provided exceeds the minimum requirements in the ADG and provides a high quality facility for future residents. In *MGT 6 Pty Ltd v The Council of the City of Sydney* [2017] NSWLEC 1211, Martin SC and Dixon C considered a similar request to vary the building height

standard that arose from the extension of the lift to the roof in order to provide accessible access. Dixon C found at [50]

*“Without the lift overrun and the breach of the standard the communal open space would need to be accessed by a chair lift (and stair) which is less equitable access to the area. Maintaining the standard would result in a sub-optimal outcome for all residents, with a reduction in the amount and type of communal open space provided in the development”*

Similarly, the proposed development would result in a sub-optimal outcome for all residents if strict compliance with the standard was required.

- The proposed development meets the objectives of Clause 4.3 and the objectives of the R4-High Density Residential Zone.
- The strategic location of the site in terms of sustainable transport and its connections to the Local Centre mean that the site is highly suited affordable rental housing with a high level of amenity.
- The subject site seeks redevelopment in a strategically important zone next to a local centre and is the result of a significant amalgamation of 5 separate allotments.
- The proposed development maintains a transition in bulk and scale from the B2 zone.
- The height non-compliance allows for high amenity roof gardens to be provided on the site adding to the amenity of future residents.
- The height non-compliance allows for green roof elements which contribute to the sustainability of built form while also contributing to the aesthetic quality of the development.
- The height non-compliance arises out of the particulars of the site including site topography and three out of four boundaries being street (front) boundaries (limiting opportunities for ground level communal open space).
- The height non-compliance arises out of the particular of the site context where the site is adjacent to the B2 zone, is a designated key site and is suitable for increase floor-to-ceiling heights to allow for future flexibility of use.
- The height non-compliance is directly related to achieving amenity. A development which complied with the standard would have less amenity.
- The number of storeys proposed is actually less than other notable residential flat buildings in the same zone which are six storeys.
- The height non-compliance does not give rise to adverse environmental or amenity impacts on neighboring sites.
- The height non-compliance allows for larger setbacks at lower levels to the west to afford more open space and landscaped area than what is required by both the DCP and AD.
- The height non-compliance allows for additional dwellings to be achieved having regard to the applicable FSR bonus permitted under the SEPP (Affordable Rental Housing).

## **5 Clause 4.6(4)(b) and (5) Concurrence of the Secretary**

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It is assumed that the concurrence of the Secretary is delegated to the relevant consent authority, in this instance the Planning Panel.

## **6 The Public Interest**

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The proposal is within the public interest since it is consistent with the objectives of Clause 4.3 and the objectives of the R4 zone.

## **7 Conclusion**

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The proposed variation from Clause 4.3 of LEP 2008 is fully justified as the proposed development meets the objectives and requirements of Clause 4.6. The proposed development meets the objectives of the zone and the objectives of the HOB standard notwithstanding the non-compliance. Furthermore, the additional height sought is directly related to achieving building amenity and allowing appropriate setbacks, built form and high amenity roof gardens with equitable access for all. The height is also related to the particulars of the subject site, namely topography, three street frontages and the site context including the character of the area. The non-compliance is thus justified in the circumstances of the case.

The height proposed achieves a transition between the height permitted north of the site and that permitted south of the site. The proposed development does not give rise to unreasonable visual, privacy or shadow impacts on adjoining sites, particularly the sites directly to the south and west. In this regard, the variation does not result in an unacceptable level of environmental impact; rather the variation is preferable to a development which was to fully comply.

The consent authority should be satisfied that the request is justified.