

**CLAUSE 4.6 VARIATION  
REQUEST  
LIVERPOOL LEP 2008  
CL. 4.3 BUILDING HEIGHT**

**WESTFIELD LIVERPOOL  
25 GEORGE STREET,  
LIVERPOOL**

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# 1. INTRODUCTION

This clause 4.6 variation request has been prepared by Urbis Pty Ltd (**Urbis**) on behalf of Scentre Group, the applicant for a development application (**DA**) seeking approval for the redevelopment of a portion of Westfield Liverpool Shopping Centre for an entertainment and leisure precinct and construction of an seven storey commercial tower above two levels of proposed retail at 25 George Street, Liverpool (**the site**). This request relates to the commercial tower only.

This request seeks to vary the maximum height of the building development standard prescribed for the site under clause 4.3 of the Liverpool Local Environmental Plan 2008 (LLEP). LLEP prescribes a maximum height of building standard of 35m for the site. The proposed tower has a maximum height of 45 metres exceeding the development standard by 10m (28%).

By way of background, this request has been updated since the original DA lodgement as a result of formal amendments to the DA and changes to the building envelope. This variation request should be read in conjunction with the most recent set of plans dated 26 July 2019.

This variation request is made pursuant to clause 4.6 of the LLEP. For a request to meet the requirements of Clause 4.6(3) of LLEP, it must:

1. *“adequately” demonstrate “that compliance with the height standard is unreasonable or unnecessary in the circumstances” of the project on the site; and*
2. *“adequately” demonstrate “that there are sufficient environmental planning grounds” to justify contravening the height standard.*

This request contains justified reasoning for the proposed variation to the height of building control and demonstrates that:

- The objectives of the development standard will be achieved, notwithstanding that the control will be exceeded, and in doing so, establishes that compliance with the standard is unreasonable or unnecessary (*Initial Action* at [17]) – **Refer to Section 6.3.1 of this Request.**
- Notwithstanding the maximum height of the building development standard will be exceeded, there are sufficient environmental planning grounds to support the proposed development, in that the development complies with the maximum floor space (**FSR**) standard permitted under LLEP 2008 and is consistent with the current and emerging character of Liverpool City Centre – **Refer to Section 6.3.2 of this Request.**

## 2. ASSESSMENT FRAMEWORK

### 2.1. CLAUSE 4.6 OF LIVERPOOL LOCAL ENVIRONMENTAL PLAN 2008

Clause 4.6 of LLEP includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 are:

- *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6 requires that the consent authority consider a written request from the applicant, which demonstrates that:

- a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- b) There are sufficient environmental planning grounds to justify contravening the development standard.*

Furthermore, the consent authority must be satisfied 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, and the concurrence of the Secretary has been obtained.

In deciding whether to grant concurrence, subclause (5) requires that the Secretary 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.*

Concurrence is assumed pursuant to *Planning Circular No. PS 18-003 Variations to Development Standards* dated 21 February 2018].

### 2.2. NSW LAND AND ENVIRONMENT COURT: CASE LAW

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached.

The approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118:

*[13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*

*[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see *Corporation**

of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].

- [15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.
- [16] As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council* at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.
- [17] The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: *Wehbe v Pittwater Council* at [42] and [43].**
- [18] 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: *Wehbe v Pittwater Council* at [45].
- [19] 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: *Wehbe v Pittwater Council* at [46].
- [20] A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: *Wehbe v Pittwater Council* at [47].
- [21] A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: *Wehbe v Pittwater Council* at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.
- [22] These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.
- [23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.
- [24] The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that

contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].

[25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd* at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council* at [38].

[26] The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii).

[27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

[28] The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the *Planning Circular PS 18-003* issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

[29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the *Court Act*. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41].



## 3. SITE AND LOCALITY

### 3.1. SITE ANALYSIS

The site is known as 25 George Street, Liverpool and comprises a total of 33 lots. This variation request relates to the commercial tower located on the following Lot 22 DP 613438, Lot 21 DP 613438 and Lot 433 DP 822256 only. The above lots form part of the broader site. The location of the site is shown at Figure 1, the area of development the subject of this development application is shown in blue and the area of development the subject of this variation request is marked 'X.'

The site is bounded by four street frontages being Campbell Street to the north, George Street to the east, Elizabeth Drive to the south and Bathurst Street to the west.

The principal features of the site include:

- A total area of approximately 72,370m<sup>2</sup>;
- Primary street frontage to Elizabeth Drive, opposite Macquarie Street Mall;
- Vehicle access is currently available at various locations along Campbell Street, Bathurst Street and George Street;
- Limited vegetation on site with street trees planted along the perimeter of the site;
- Located directly opposite the site is St Luke's Church and Grounds which is recognised in LLEP as a state listed heritage item.

Figure 1 – Aerial Location Plan



Source: Urbis



### 3.1.1. Existing Development

The site accommodates Westfield Liverpool which is a three-storey shopping centre with basement level and associated car parking. Westfield Liverpool is a significant retail centre with retail facilities provided over three levels. There are 3,498 basement, under-cover and open-air car parking spaces.

The area to which the DA and this clause 4.6 variation request relates is generally located on the central and eastern thirds of the shopping centre and is occupied by the following land uses (see Figure 2):

- Cinemas;
- Retail; and
- Food and drink premises.

Figure 2 – Subject Site



Picture 1 – Westfield Liverpool as viewed from Elizabeth Drive.



Picture 2 – Southern entrance to shopping centre.

Source: Urbis

## 3.2. SURROUNDING LAND USE

### North

To the north is Liverpool Memorial Pioneers Park, a State significant heritage item (refer to Figure 1)

### East

To the east on the opposite side of Macquarie Street Mall is the Western Sydney University (WSU) Liverpool campus. The site comprises a nine-storey educational establishment with ground floor café (see Picture 3).

### South

To the south on the opposite side of Elizabeth Drive is St Luke's Anglican Church, which is listed as a State Heritage Item under LLEP (Item 84). The Church is set back from Elizabeth Drive behind landscaping and a fence (see Picture 4). Also to the south is Macquarie Street Mall which forms part of a pedestrianised section of Macquarie Street and accommodates street furniture, landscaping and outdoor dining (see Pictures 5 and 6).

### West

Westfield Liverpool extends along Elizabeth Drive to Bathurst Street. Bathurst Street is characterised by a mix of older residential development and some recent residential flat buildings.

Figure 3 – Site and Surrounds



Picture 3 – University of Western Sydney Liverpool Campus looking north-east as viewed from Elizabeth Drive.

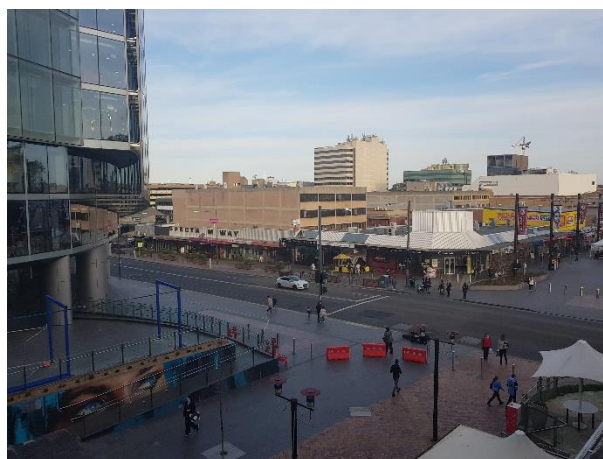


Picture 4 – St Luke's Church Grounds looking south, as viewed from the subject site.



Picture 5 – Macquarie Street Mall looking south across Elizabeth Drive, as viewed from the subject site.

Source: Urbis



Picture 6 – Macquarie Street Mall, Liverpool CBD and WSU Building looking south-east across Elizabeth Drive, as viewed from the subject site.

### 3.3. PLANNING CONTEXT

The proposal is for a commercial tower and Entertainment and Leisure Precinct comprising a mix of office, retail, food and beverage and indoor recreation facilities. The site is zoned B3 Commercial Core. Commercial premises are permissible with consent in the B3 zone.

The maximum permissible FSR for the site under LLEP is 5:1. The proposed FSR of the development is 2.76:1 (incl 75% above ground parking as per cl. 7.3 of LLEP). The development complies with the floor space ratio standard applicable to the site.

The maximum building height permissible on the site is 35m. The proposed commercial tower has a maximum building height of 45 metres, resulting in a non-compliance of 10 metres. The majority of the commercial tower complies with the 35m height control, with the exception of the top two levels and roof plant located in the southern portion of the site. Development on the remaining areas of the site will comply with the height of buildings standard.



## 4. THE PROPOSED DEVELOPMENT

### 4.1. PROPOSED COMMERCIAL TOWER

It is proposed to construct a seven-storey commercial tower above ground floor retail on the western side of Macquarie Street mall. The proposed architecture is bold, contemporary and seeks to act as the gateway to Westfield Shopping Centre and the proposed entertainment and leisure precinct.

The design of the proposed tower seeks to complement, although not 'mimic', the existing Western Sydney University Tower located on the eastern side of Macquarie Street Mall and together act as landmarks, contributing to the transformation of the area into a vibrant central business district in Sydney's growing South West.

The proposed commercial tower will also activate the northern part of Macquarie Street Mall with ground floor retail uses that extend out to the new pedestrian boulevard, improving both visual permeability and physical connectivity to Macquarie Street Mall.

Figure 4 – Photomontage – Proposed development from Elizabeth Drive and Macquarie Mall



Source: Scentre Group

### 4.2. URBAN DESIGN, MASSING AND BUILT FORM

The site is subject to a maximum height control of 35m. The proposed development has a maximum height of 45m. In accordance with clause 7.2 of LLEP, the tower has been set back over 9m from the 'public right of way' above a height of 20m to minimise excessive overshadowing to St Luke's Church Grounds and surrounding public open space. The public right of way constitutes the entire road reserve of Elizabeth Drive.

The tower comprises vertical glazed elements that integrate the proposed building with the existing built form. The horizontal connectivity to the proposed mall at ground level seeks to create a 'fluid' and 'welcoming' space to the commercial tower, rooftop car park and shopping centre. A curved cantilevered structure with soft green

overhang also extends across the double height ground floor lobby, softening the built form when viewed from Elizabeth Drive (see **Figure 4**).

The ground level retail spaces within the tower are orientated towards Elizabeth Drive and Macquarie Street Mall. Rooftop terraces for the commercial tenants are proposed on levels 5 and 10 orientated towards Macquarie Street Mall.

An extract from the Design Report prepared by Fitzpatrick & Partners in collaboration with Scentre Group is provided below:

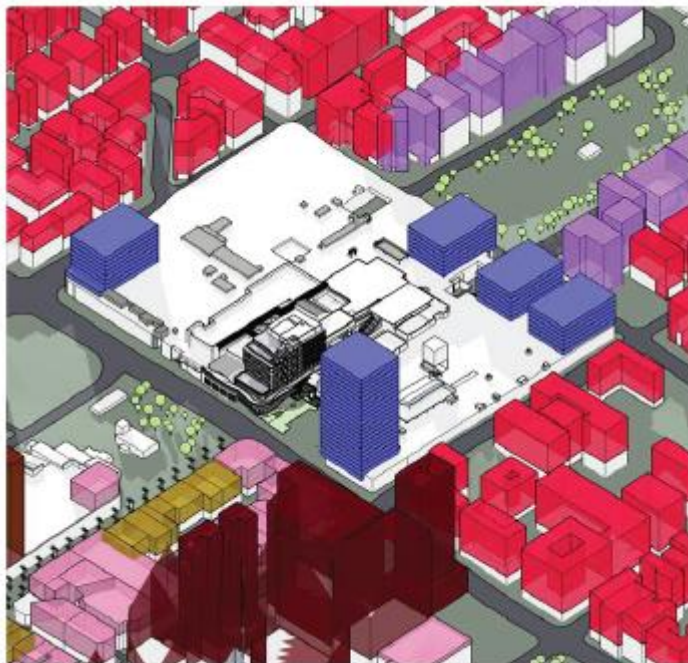
*Responding to the urban context of St Luke's Church to the south of the building, the tower design proposition is defined as a simple series of horizontal volumes in a stepping relationship with the street which sees the ground plane retail base and first office level address the street wall to a height of less than the allowed 20m, then the main office form is setback more than 9m to minimise solar shading to the church grounds opposite, then the top level setbacks for the same purpose providing a second terrace facing down Macquarie Street.*

*The tower forms are described as a series of slipped rectangular forms with soft curved corners defined by a strong horizontal line that allows the slip to occur. They reflect a sophisticated glass façade interspersed with vertical spandrels where needed on the east and west facades to improve energy performance. The north façade is further enhanced with a series of horizontal sunshades at ceiling height that block high angle northern sun.*

### 4.3. FUTURE VISION

A Vision Document for the Westfield Liverpool site has been prepared which seeks to identify the future aspirations that Scentre Group and their Joint Venture partner have for this site. This includes further redevelopment proposals that may be undertaken in the future. The image in Figure 5 identifies areas within the Westfield site in which future development potential exists based on existing planning controls as well as identified site constraints. This massing diagram seeks to demonstrate the proposal in the context of possible future redevelopment opportunities both within the site and surrounding it.

Figure 5 – Future Context



Source: Urbis and Scentre Group

## 5. EXTENT OF CONTRAVENTION

### 5.1. THE HEIGHT STANDARD

Clause 4.3 (2) of LLEP states:

*(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 Height of Building Map sets a height standard of 35m for the site. The 35m building height standard has been measured in accordance with the LLEP definition:

*building height (or height of building) means:*

*(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*

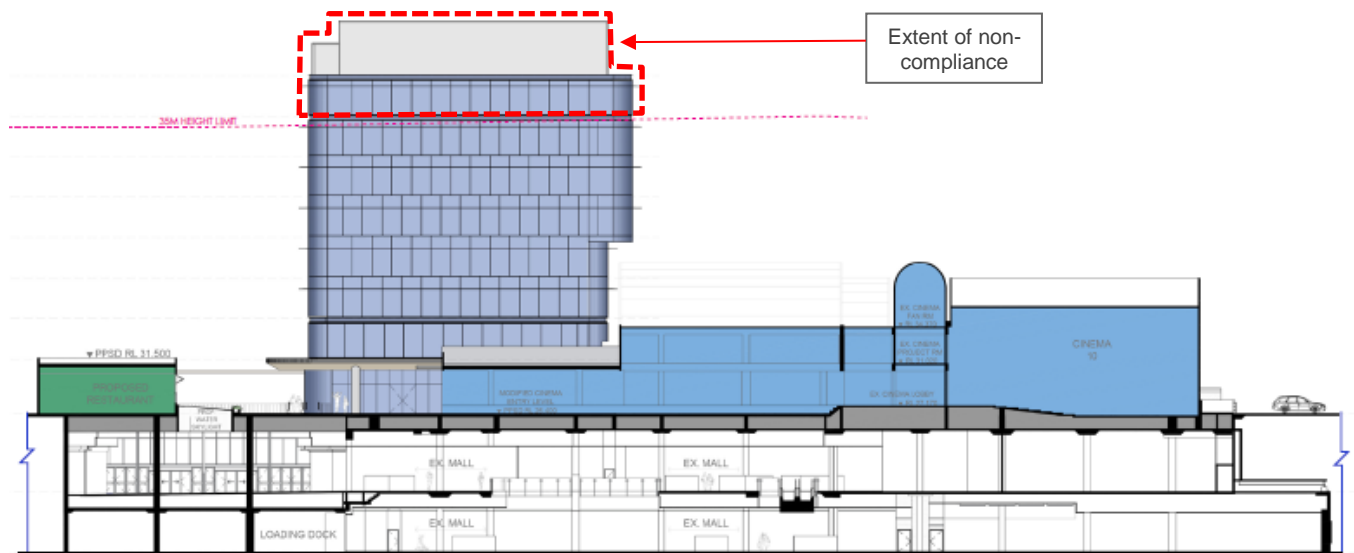
*(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

*including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

### 5.2. VARIATION TO BUILDING HEIGHT

The proposed tower has a maximum height of 45m. The extent of non-compliance is 10m (28%) above the 35m height standard and relates to the top two levels of the commercial tower and roof plant. Figure 6 and the drawings submitted at **Appendix A** detail the areas of non-compliance with the maximum 35m height of buildings development standard. As evident below, the areas of non-compliance are set back 30m from the front boundary and partially relate to non-habitable areas (i.e. the rooftop plant room).

Figure 6 – Section – Western View



## 6. CLAUSE 4.6 VARIATION REQUEST: BUILDING HEIGHT

The following sections are the written request to vary the development standard relating to the height of buildings standard under with clause 4.6 of LLEP.

### 6.1. CLAUSE 4.3 HEIGHT OF BUILDINGS

The height of buildings development standard under LLEP is 35m.

The objectives of the development standard under clause 4.3(1) of LLEP 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.*

### 6.2. KEY QUESTIONS

#### Is the Planning Control a Development Standard?

The height of buildings control under clause 4.3 of LLEP is a development standard capable of being varied under clause 4.6 of LLEP.

#### Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of clause 4.6 as it is not listed within clause 4.6(6) or clause 4.6(8) of LLEP.

#### What is the Underlying Object or Purpose of the Standard?

The underlying objective of the height of buildings standard is to minimise the adverse environmental impacts associated with new development on existing buildings and public areas specifically in regard to overshadowing, solar access and visual built form.

### 6.3. CONSIDERATIONS

#### 6.3.1. Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the ‘five-part test’ outlined in *Wehbe v Pittwater [2007] NSWLEC 827*. These tests are outlined in Section 2.2 (paragraphs [17]-[21]).

An applicant does not need to establish all of the tests or ‘ways’. **It may be sufficient to establish only one way**, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way

The development is justified against **three** of the Wehbe tests as set out below.



**Test 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard**

The proposed development achieves the objectives of the development standard as outlined within **Table 1**.

Table 1 – Assessment of Achievement of Objectives of Development Standard

Development Standard Objective	Achievement of Objective
a) <i>to establish the maximum height limit in which buildings can be designed and floor space can be achieved,</i>	<p>The site as a whole has an FSR of 2.76:1 and a permissible FSR of 5.1. The part of the proposed tower that exceeds the height control represents 0.008:1 FSR which is 0.89% of the entire gross floor area that exceeds the 35m height of buildings control.</p> <p>The proposal does not seek to gain FSR across the entire site but to locate it in an area that minimises impacts to adjoining development and establishes a good design outcome for future development in the Liverpool CBD. The location of the proposed tower has been carefully selected following a detailed contextual analysis of the site and wider city centre.</p> <p>The recent revitalisation of Macquarie Street Mall presents a significant opportunity to build on its recent success by extending the city spine and anchoring the precinct with a new commercial tower that acts as both a visual reference and way-finding device on the corner of two of the city's key axis.</p> <p>The tower has been designed to ensure it is not excessive yet still provides a prominent street address on a key corner site. Proposing the tower in this location allows for the extension of Macquarie Street Mall whilst offering a commercial focus that complements the Mall rather than compete.</p>
b) <i>to permit building heights that encourage high quality urban form,</i>	<p>The new tower anchors the CBD precinct with a landmark building and acts as a gateway to the Westfield Shopping Centre and the proposed entertainment and leisure precinct. The tower has been subject to various design refinements including the stepping back of the upper levels to reduce the scale of the built form. The elements that breach the height standard are located behind the podium and stepped back from Elizabeth Drive. The street wall height (17.3m) within 9m of the public right of way is also well below the maximum 20m control.</p> <p>The proposed height does not detract from the quality of the built form but rather enhances the streetscape with a contemporary, architecturally designed commercial building. The building design promotes a high-quality urban form through appropriate articulation and building materials, establishing a positive precedent for the Liverpool City centre.</p> <p>The design incorporates horizontal and vertical massing elements with complementary materials, colours, and setbacks to differentiate the podium from the upper levels. The tower design also utilises modulation in the façade with outdoor terraces, varied setbacks, glazing and greenery to reduce the bulk of the tower's envelope, whilst also providing a visually appealing external façade treatment that demonstrates design excellence.</p>
c) <i>to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,</i>	<p>The area of non-compliance at the top of the commercial tower does not inhibit the ability to maintain adequate solar</p>

Development Standard Objective	Achievement of Objective
	<p>access and sunlight to surrounding buildings and public areas, specifically St Luke's Church and grounds.</p> <p>The height breach is confined to the ceiling of level nine, level ten and roof plant, both of which are significantly set back from the lower level podium (30m from the front boundary). A shadow analysis comparing the proposed building envelope with a fully compliant envelope is submitted at <b>Appendix A</b> and demonstrates the proposed built form will not excessively overshadow public areas such as St Luke's Church Grounds and Macquarie Street Mall. There is no overshadowing to Bigge park, Liverpool Pioneer's Memorial Park or Apex Park.</p> <p>The footprint of the overshadowing has been minimised by creating a slimmer building profile and providing a greater setback from Elizabeth Drive. The proposed building reduces the amount of shadow cast over St Luke's Church Grounds (refer to Shadow Study Summary Table) than a compliant envelope, resulting in a better outcome for and from the development.</p> <p>Importantly, the proposed development complies with the sun access controls prescribed in Clause 7.2 of LLEP which seeks to protect specified public open space from excessive overshadowing. Whilst St Luke's Church grounds will be subject to overshadowing on the 21 June, the degree of overshadowing is less than a compliant envelope, is not considered excessive and for the majority of the year the proposed tower will not overshadow the church or grounds.</p>
<p>d) <i>to nominate heights that will provide an appropriate transition in built form and land use intensity.</i></p>	<p>Elizabeth Drive forms one of the five gateways into the city centre. Accordingly, locating the proposed tower in this location provides an appropriate transition in built form and land use intensity to surrounding built form.</p> <p>The tower presents a compliant three storey podium to Elizabeth Drive with a suitably scaled six storey component behind. At the ground floor level, the tower will complement the fine grain form of the wider centre and integrate with the active retail uses along Elizabeth Drive. Above the podium, the building height and setbacks will play a transitional role that mitigates overshadowing of sensitive interfaces particularly St Luke's Church grounds. The areas of the building above the 35m height limit are set back from the podium to allow for an appropriate transition in built form.</p> <p>Further, the proposed building height presents an appropriate transition to the adjoining Western Sydney University building and creates a focal point at the intersection of Westfield Liverpool and Macquarie Street Mall. The adjacent WSU building breaches the 35m height limit with an approved height of 43.4m (DA-377/2015). It is considered the proposed building height provides an appropriate transition to Macquarie Street Mall, before stepping up to the taller massing of the adjoining WSU building.</p> <p>The Heritage Impact Statement prepared by Graham Brooks and Associates finds that the height of the new building will not create visual dominance or detract from the heritage listed St Luke's Anglican Church, as the church is not located immediately adjacent to the site but a comfortable distance away - across the roadway, behind a large landscaped area.</p>

Development Standard Objective	Achievement of Objective
	The generous curtilage around the church allows for an appropriate transition between the commercial tower and church grounds.

In summary, the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

***Test 3: The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable***

Strict compliance with the height development standard would defeat or thwart the achievement of underlying objectives of the standard for the reasons outlined below:

- The proposed development reduces the amount of shadow cast to St Luke's Church Grounds compared to a compliant scheme, resulting in a better outcome for and from the development. A detailed shadow analysis has been undertaken to determine the degree of overshadowing to St Luke's Anglican Church, Church hall and surrounding yard. As evident in the shadow diagrams submitted at **Appendix A**, the proposed building envelope improves sunlight to St Luke's Church Grounds by 19.2% when compared to a compliant building envelope.
- A fully compliant building height would therefore defeat Objective (c) of the height of building standard which seeks to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight.

***Test 4: 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***

Whilst we do not believe the development standard has been abandoned by Council in granting consents departing from the standard, Liverpool City Council has previously supported clause 4.6 variations, and before that, SEPP 1 objections, where non-compliance with the height of building standard is proposed. The adjacent WSU building is a recent and contextually sound example of this.

On 22 July 2015, Liverpool Council approved a clause 4.6 variation request which sought approval for a 38m commercial office building (3m above the height of buildings standard). Several subsequent modifications have since been lodged, resulting in an overall height increase from 38m to 43.3m (DA-377-2015-C). An extract from the assessment report endorsing the most recent variation is provided below:

- *The increase in height of 1.7m from the latest modified approval is considered negligible in this instance and does not generate a detrimental impact in terms of overshadowing on adjoining properties.*
- *The proposed building height still promotes a high-quality urban form.*
- *The modified building height still receives adequate solar accesses.*
- *The proposed additional height is to cater for amenities and requirements of Western Sydney University. The provision of a suitably designed tertiary educational establishment will provide for the social and intellectual betterment of the Liverpool LGA.*
- *The proposed building has demonstrated consistency with the objective of the B3 zone.*
- *The proposed educational establishment will also allow for the economic benefit of the surrounding commercial uses.*

*Having regard to the above it is considered the increased height is worthy of support in this instance.*

Whilst the above approval does not demonstrate virtual abandonment of the development standard, evidently Council have previously supported variations of a similar nature to that proposed under this request. Although the application was approved in 2017, it remains entirely relevant to the satisfaction of Test 4, because the height development standards applying to the site have not changed since this time and the approved development has been constructed.

***Test 5: The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary***

Not relied upon.

### **6.3.2. Clause 4.6(3)(b) - Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?**

There are sufficient environmental planning grounds to justify the proposed variations to the development standard, including the following:

- The proposed height variation relates to a site within an existing, highly urbanised and town centre. The development has been purposely designed to provide a positive environmental benefit. Rather than distributing the floor space across the site (which would require demolition of significant portions of the existing shopping centre and a greater building footprint) the majority of the height non-compliance is consolidated in the seven-storey commercial tower at the south-east corner of the site.
- Between the hours of 9am and 3pm on 21 June, the proposed development casts 19.2% less shadow than a compliant development (2.8% less shadow per hour) which is considered a better outcome than a development with a fully compliant building height. Furthermore, the church hall in the north-west portion of the church grounds receives full sunlight from 9.29am onwards.
- The overall site development is well below the maximum FSR permitted on the site (Permitted: 5:1, Proposed: 2.76:1). The height non-compliance is not driven by excess bulk or over-development.
- The proposed development is consistent in scale and form with the approved WSU building located on the opposite side of Macquarie Street Mall. The proposal exceeds the height standard by a similar proportion to the exceedance of the adjoining building. As such, strict compliance with the development standard would result in a building 8m below the adjoining building and present an incongruous transition of building heights.
- Strict compliance with the 35m height control would result in the loss of approximately 3,257sqm of highly sought A-Grade commercial floor space in the Liverpool CBD. The proposed commercial tower seeks to act as a catalyst for change across the broader City Centre by providing A-Grade office space within a highly accessible and prominent location. This will contribute towards fulfilling the vision for Liverpool as Sydney's 'third CBD.'
- The areas of non-compliance are set back from the street boundary and podium and therefore are not readily discernible from a pedestrian viewpoint at ground level.
- The development is consistent with previous Council approvals to exceed building height in the immediate vicinity.
- The development achieves the objectives of the development standard as outlined in Section 6.3.1 and is also consistent with those objectives as outlined in Section 6.3.3.
- The proposed commercial building is consistent with the desired future character of Liverpool CBD which envisions buildings up to a height of 80m. Whilst the proposal does not rely on this clause, it should be noted that the site is located in 'Area 10' as identified on LLEP's height of buildings map. In accordance with clause 7.5A of LLEP, developments that dedicate at least 20% of the total GFA to: *business premises, centre-based child care facilities, community facilities, educational establishments, entertainment facilities, food and drink premises, functions centres, information and education facilities, medical centres, public administration buildings or retail premises*, **and** are able to meet the criteria listed below, are able to exceed the maximum height of buildings standard:
  - Lot size exceeding 1500m<sup>2</sup>; and,
  - 2 or more street frontages.

In order to be eligible for the bonus height, a development control plan must be prepared and the site on which the building is located also includes recreation areas, recreation facilities (indoor), community facilities, information and education facilities, through site links or public car parks.

The commercial building is located on Lot 22 DP613438, has a lot size of approximately 7,687sqm, dual frontage to Elizabeth Drive and Macquarie Street Mall and dedicates more than 20% of the GFA to business premises. Whilst the proposal does not rely on this clause, it demonstrates that the proposed development has been designed to account for the desired future character and intended built form for the site.

In conclusion, there are sufficient environmental planning grounds to justify convening the development.

### **6.3.3. Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?**

The proposal is in the public interest as the development is consistent with the objectives of the development standard as outlined in Section 6.3.1 of this request. The proposal is also consistent with the land use objectives that apply to the site under LLEP as demonstrated within Table 4 below.

Table 2 – Assessment of Compliance with B3 Commercial Core Land Use Zone Objectives

<b>Objective</b>	<b>Consistency with Objective</b>
<i>To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community</i>	The proposed commercial tower will act as the landmark to the shopping centre and entertainment and leisure precinct which will provide a range of retail, entertainment and other suitable land uses that serve the needs of the local and wider community. The proposed tower also provides a mix of retail and commercial land uses at ground level that will provide choice and convenience to consumers in the area and provide an improved shopping experience.
<i>To encourage appropriate employment opportunities in accessible locations.</i>	<p>Liverpool CBD is a major focus for public transport in the region. Liverpool Station is located approximately 600 metres from Westfield shopping centre and services the South, Bankstown and Cumberland Lines. A bus interchange is located immediately adjacent to the station. It serves as a terminus for all bus routes serving the CBD and the Liverpool to Parramatta Transitway.</p> <p>In addition, the CBD is serviced by a total of 30 bus routes. Over 80% of these routes pass directly adjacent to the commercial tower either on Elizabeth Drive or George Street. Accordingly, the proposed commercial tower provides employment opportunities in a highly accessible location. The additional commercial floorspace is expected to provide employment for around 900 jobs.</p>
<i>To maximise public transport patronage and encourage walking and cycling</i>	As discussed above, the site is highly accessible by public transport. It is anticipated that visitors and employees will utilise the existing bus and rail services available. The proposed tower provides 56 bicycle spaces in addition to end-of-trip facilities which is intended to encourage walking and cycling.
<i>To strengthen the role of Liverpool city centre as the regional business, retail and cultural centre of south western Sydney.</i>	The Greater Sydney Region Plan identifies Liverpool CBD as a Strategic Centre, responsible for delivering higher order jobs and a wide range of goods and services. The proposed development will strengthen the business role of the centre by providing premium A-grade office space in the heart of Liverpool CBD, strengthening the regional business centre role of south-west Sydney.
<i>To ensure that, for key land in the Liverpool city centre, opportunities for</i>	The proposal provides a high-quality commercial development on a key site in the Liverpool CBD that will promote employment opportunities in the long term. It is intended that



<i>retail, business and office uses exist in the longer term.</i>	the provision of high-quality A-grade commercial office space in the city centre will attract further investment, business and jobs in the Liverpool CBD.
<i>To facilitate a high standard of urban design and exceptional public amenity.</i>	The proposal has provided a design that promotes pedestrian activity at street level whilst providing high quality A-grade office space above. The proposed design has been through an extensive design review process and provides a building design that exhibits design excellence.

The proposal is considered to be in the public interest as the development is consistent with the objectives of the development standard, and the land use objectives of the zone.

#### **6.3.4. Clause 4.6(5)(a) - Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?**

The proposed non-compliance with the development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

#### **6.3.5. Clause 4.6(5)(b) - Is There a Public Benefit of Maintaining the Planning Control Standard?**

The proposed development achieves the objectives of the height of building development standard and the land use zoning objectives despite the non-compliance. The contravention has been demonstrated to be appropriate and supportable in the circumstances of the case. There would be no public benefit in maintaining the development standard in this case as:

- The overall site development with the proposal achieves an FSR well below the maximum permitted under Clause 4.4 of LLEP (Permitted: 5:1, Proposed: 2.76:1).
- In accordance with Clause 7.2 of LLEP, the proposed commercial tower will not excessively overshadow St Luke's Church and Church grounds. On the 21 June, the proposed development casts 19.2% less shadow than a compliant envelope (2.8% less shadow per hour) and is not deemed to be 'excessive.' Importantly, for the majority of the year the Church and grounds will not be overshadowed by the proposed tower.
- Maintaining the development standard would result in the loss of 3,257sqm of commercial GFA in circumstances where there is no adverse impact resulting from the additional building height.
- An alternate scheme to achieve the same quantum of commercial GFA would require a more horizontal and bulky development and require additional demolition of the existing shopping centre;
- The proposed variation will enable the delivery of premium-grade office space, directly responding to the demand for commercial floor space in the Liverpool CBD; and
- When compared to a compliant building height, the proposal improves solar access to St Luke's Church Grounds, Church hall and yard. Accordingly, there is no public benefit in maintaining the height of buildings development standard.

#### **6.3.6. Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed. Nevertheless, there are no known additional matters that need to be considered within the assessment of the Clause 4.6 request and prior to granting concurrence, should it be required.





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