

CLAUSE 4.6 VARIATION

**9-15 NORTHUMBERLAND
STREET, LIVERPOOL**

13 MAY 2019
P%3426
FINAL
PREPARED FOR ANGLICAN COMMUNITY SERVICES

URBIS

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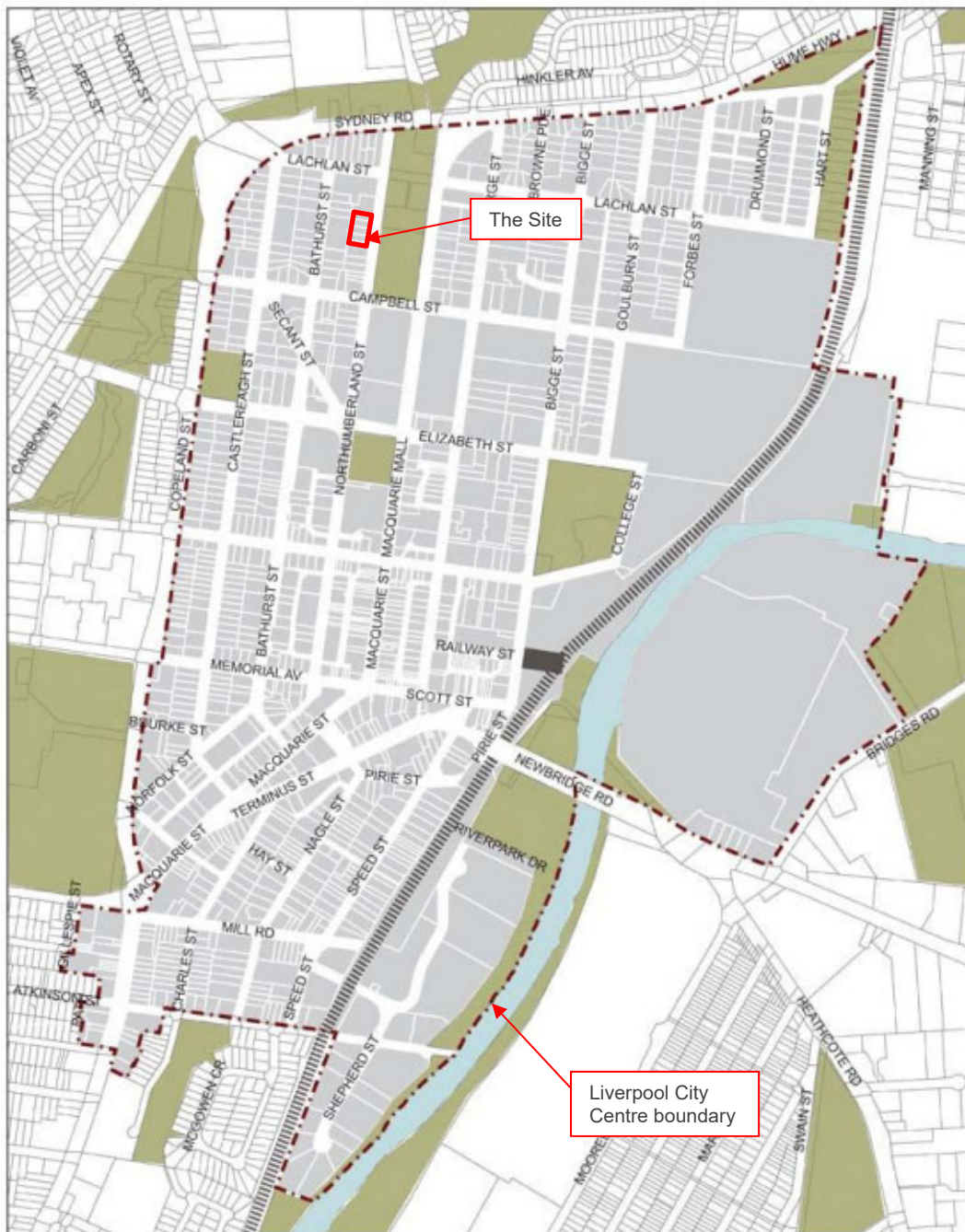
1. INTRODUCTION

This request has been prepared in support of development application 950/2018 (DA950/2018) for a residential flat building comprising strata apartments and social and affordable housing apartments at 9-15 Northumberland Street, Liverpool. DA950/2018 relates to Lots 9, 10 and 11 DP 38602 and Lot A DP 164111.

The site is located in the Liverpool City Centre and as such is subject to Clause 7.4 of *Liverpool Local Environmental Plan 2008* (LLEP 2008) regarding building separation (refer **Figure 1**). This request seeks to vary the building separation development standard prescribed for the subject site under Clause 7.4 of the. The variation request is made pursuant to Clause 4.6 of LLEP 2008.

This request should be read in conjunction with the Statement of Environmental Effects, Architectural Drawings prepared by Group GSA Architects, and other supporting documentation submitted with the DA. A copy of the Architectural Drawings are attached at **Appendix A**.

Figure 1 – Liverpool City Centre Source: *Liverpool Development Control Plan 2008*



2. ASSESSMENT FRAMEWORK

2.1. CLAUSE 4.6 OF LLEP 2008

Clause 4.6 of LLEP 2008 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.*

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

This document forms a Clause 4.6 written request to justify the contravention of the building separation development standard in Clause 7.4 of LLEP 2008. The assessment of the proposed variation has been undertaken in accordance with the requirements of LLEP 2008 Clause 4.6 Exceptions to Development Standards.

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 correct 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. PROPOSED DEVELOPMENT

This Clause 4.6 request accompanies a DA for the development of a residential flat building comprising of strata market residential apartments and social and affordable housing apartments at 9-15 Northumberland Street, Liverpool. **Figure 1** provides perspective image of the proposed development as viewed from Liverpool Pioneers Memorial Park.

The proposed development comprises:

- Erection of an 11-storey residential flat building, including:
 - 137 units, including 28 strata apartments and 109 affordable housing units;
 - Car, motorcycle and bicycle parking associated with the strata residential and social and affordable housing units across two basement levels; and
 - Communal areas, both internal and external, including landscaped open space.
- A respite day care centre at ground level to cater for the care of seniors or people who have a disability. Sleeping Pods will be provided on the ground floor for persons using the respite day care centre.
- A kiosk located at ground level, for use by residents and local walk-by traffic.
- Landscaping works including 1029.5 sqm (37% of site area) and 475 sqm of deep soil zone (17% of site area).
- Associated infrastructure including on-site stormwater detention system and rooftop solar array;
- Public domain upgrade works to footpath adjacent to frontage to Northumberland Street.

Figure 1 – Proposed Development



Source: Group GSA

Architectural Plans prepared by Group GSA are included at **Appendix A** and listed at **Table 1**.

Table 1 – Architectural Drawings

Drawing Number	Description	Date
DA0000 Rev. F	DRAWING SCHEDULE / SITE LOCATION PLAN	10/05/2019
DA0004 Rev. A	PERSPECTIVE 4	10/05/2019

Drawing Number	Description	Date
DA0005 Rev. A	PERSPECTIVE 5	10/05/2019
DA1001 Rev. D	EXISTING SITE PLAN	17/12/2018
DA1100 Rev. E	SITE PLAN	10/05/2019
DA1101 Rev. C	SITE ANALYSIS PLAN	05/12/2018
DA2000 Rev. F	BASEMENT 2 GA PLAN	05/12/2018
DA2001 Rev. F	BASEMENT 1 GA PLAN	05/12/2018
DA2002 Rev. H	GROUND FLOOR GA PLAN	10/05/2019
DA2003 Rev. H	LEVEL 1 GA PLAN	10/05/2019
DA2004 Rev. H	LEVEL 2-3 GA PLAN	10/05/2019
DA2005 Rev. F	LEVEL 4 GA PLAN	17/12/2018
DA2006 Rev. F	LEVEL 5 GA PLAN	17/12/2018
DA2007 Rev. F	LEVEL 6-7 GA PLAN	17/12/2018
DA2008 Rev. F	LEVEL 8 GA PLAN	17/12/2018
DA2009 Rev. F	LEVEL 9-11 GA PLAN	17/12/2018
DA2010 Rev. G	ROOF PLAN	28/03/2019
DA2450 Rev. D	ADAPTABLE UNITS	05/12/2018
DA2451 Rev. D	ADAPTABLE UNITS	05/12/2018
DA3000 Rev. G	STREETSCAPE ELEVATION	10/05/2019
DA3001 Rev. H	ELEVATION SHEET 1	28/03/2019
DA3002 Rev. I	ELEVATION SHEET 2	10/05/2019
DA3003 Rev. A	EXTERNAL FINISHES PALETTE	28/03/2019
DA3200 Rev. D	WALL SECTION SHEET 1	28/03/2019
DA4000 Rev. E	SHADOW DIAGRAMS JUNE 21 - 9AM TO 12PM	10/05/2019
DA4001 Rev. D	SHADOW DIAGRAMS JUNE 21 – 1PM - 3PM	05/12/2018
DA4100 Rev. D	GFA LEP	05/12/2018
DA4101 Rev. D	SEPP 65 - BALCONY & COMMON OPEN SPACE	05/12/2018

Drawing Number	Description	Date
DA4102 Rev. D	SUN'S EYE VIEW	05/12/2018
DA4103 Rev. D	SUN'S EYE VIEW - 2	05/12/2018
DA4101 Rev. D	SOLAR ACCESS	05/12/2018
DA4105 Rev. D	CROSS VENTILATION	05/12/2018
DA4106 Rev. B	CALCULATION DIAGRAMS SHEET 1	05/12/2018
DA4107 Rev. B	NOTIFICATION PLAN	05/12/2018
DA4108 Rev. B	SOUTH NEIGHBOUR STUDY – EXISTING BUILDINGS	28/03/2019
DA4109 Rev. B	SOUTH NEIGHBOUR STUDY - APPROVED DA	28/03/2019
DA4110 Rev. B	SOUTH NEIGHBOUR STUDY - PROPOSED DA	28/03/2019
DA4111 Rev. A	SOUTH NEIGHBOUR STUDY- LEP/DCP ENVELOPE	28/03/2019
DA4112 Rev. B	SOUTH NEIGHBOUR STUDY- CALCULATIONS	28/03/2019
DA4113 Rev. A	KIOSK DETAILS	28/03/2019
DA7001 Rev. E	AXO VIEWS	10/05/2019

The key numeric aspects of the proposal are provided in **Table 2** and the various components of the proposed development are described in the following sections.

The proposed building is 11 storey in height and comprises of residential strata apartments, social and affordable housing apartments with Anglicare building management, respite day care and a kiosk on the ground level. The building design compliments the existing high density residential flat buildings that surround the site. The scale and form of the proposed building is minimized through the use of setbacks, horizontal green edges and building articulation. The building provides an active façade through balconies that overlook Liverpool Pioneers Memorial Park. A range of contemporary materials and finishes have been selected.

The front setback is activated through landscaped areas and an inviting communal open space adjacent the kiosk providing a social setting for residents, visitors and walk-by traffic.

Table 2 – Numeric Overview of Proposal

Land Use	<ul style="list-style-type: none"> • Strata residential apartments and 'Boarding House' and 'Infill Affordable' social and affordable rental housing; • Anglicare support services and managers residence; and • Kiosk.
Total GFA	9,725m ²

Proposed FSR	3.5:1
Building Height	51.750 RL
SAH Units	109 units
Residential Strata Units	28 units
Percentage of Site Landscaped	37%
Communal Open Space	1029.5 sqm, 37%
Car Parking	70 car parking spaces
Bicycle Parking	40
Motorcycle Parking	20

3.1. RESIDENTIAL ACCOMMODATION

The residential accommodation proposed consists of boarding house studio units, infill affordable housing units, and strata units as detailed in **Table 3** below.

Table 3 – Residential Accommodation Schedule

Type of Residential Accommodation	Number of Units Proposed
SAH Studio Units N.B. land use definition – ‘boarding house’	78 units
SAH Units N.B land use definition – ‘infill affordable housing’	31 units
Residential Strata Units	28 units
TOTAL:	137

3.2. COMMON AREAS

The proposal will include 1029.5 sqm, 37% of internal and external common areas within the building comprising:

- Ground floor kiosk forecourt, respite garden and child play area;
- Level 1 indoor and outdoor communal area;
- Level 5 indoor and outdoor communal area;
- Level 6-7 indoor communal area;
- Level 8 indoor communal area and outdoor open terrace; and
- Level 9-11 indoor communal area.

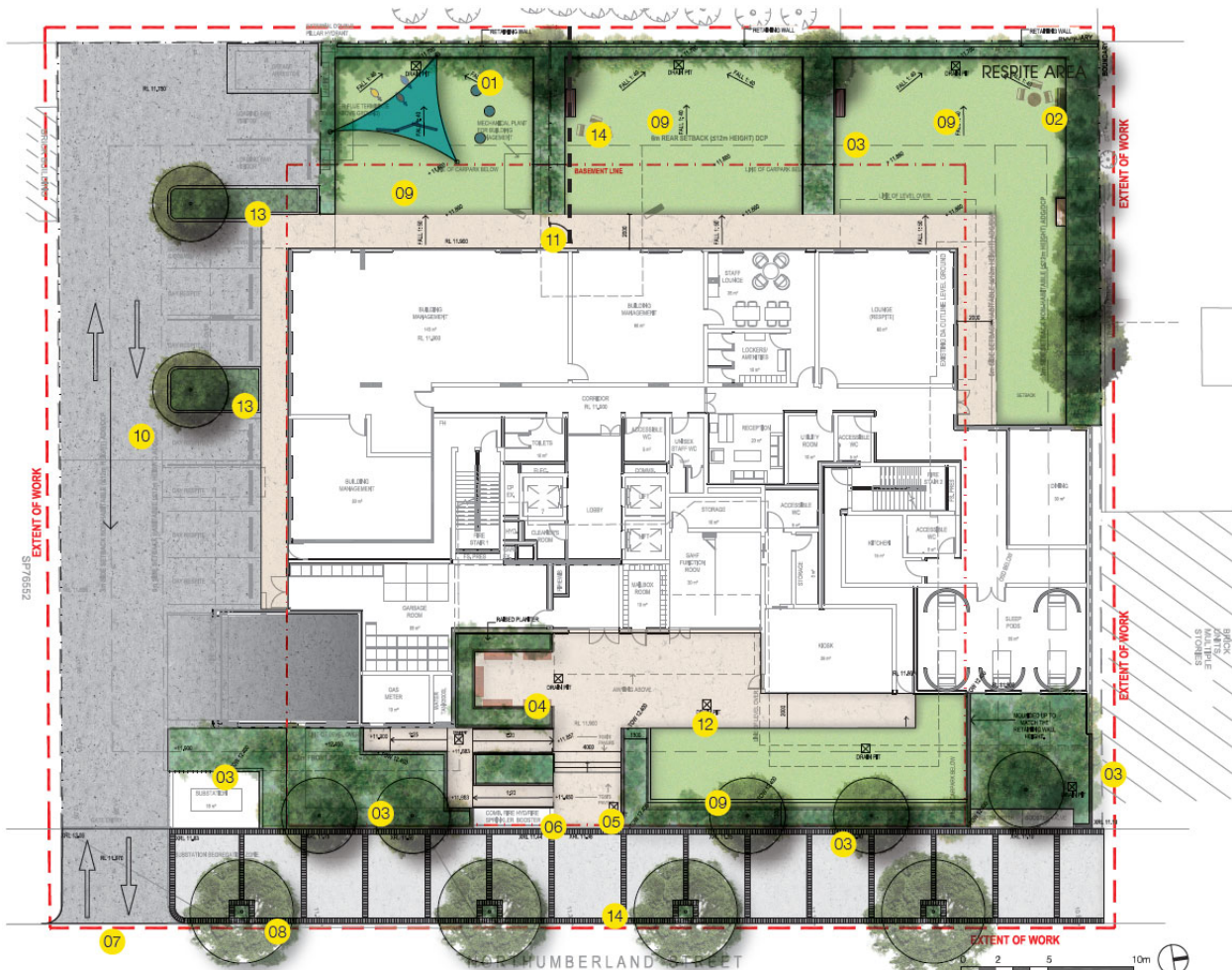
These areas are proposed to provide areas for shared/communal use and activity, including interaction between residents of different tenures. On the ground floor the internal and external communal areas are collocated to enhance the amenity of this space, which will include landscaping and seating.

3.3. LANDSCAPING

The proposal has the following landscaping elements:

- Deep soil planting zones in the front and rear setbacks, including a range of native species. This accounts for 475 sqm of the site area (17%).
- 780 sqm of soft landscaped area
- 249.5 sqm of hard landscaped area
- In total 1029.5 sqm (37%) of the site is landscaped.

Figure 2 – Landscaped Area at Ground Level



Source: Group GSA

3.4. PARKING, VEHICLE ACCESS AND WASTE COLLECTION

The following vehicular access and parking arrangements are proposed for the development.

- Basement car parking over two levels will be provided with access via vehicular access ramp to the south of the site. Entry to this vehicular access arrangement will be provided from Northumberland street.
- The proposal will provide 70 car parking spaces.
- The proposal will provide 40 bicycle spaces.
- The proposal will provide 20 motor bicycle spaces.

- Lift access will be provided from the basement car park to residential dwellings on upper floors.
- Visitor car parking will be provided on grade on the southern side of the development.
- All pedestrian and driveways will be separated.
- A garbage room will be provided on the ground level and will be 65 sqm in size. This will be accessed via the internal vehicular accessway on the southern side of the proposed built form, out of view from Northumberland Street.

4. EXTENT OF CONTRAVENTION

4.1. BACKGROUND

Development Application 962/2016 (DA962/2016) lodged 14 October 2016 sought demolition of existing structures and construction of a 12-storey residential flat building above two levels of basement carpark comprising 106 residential apartments and 126 car spaces. The DA was approved by the Sydney Western City Planning Panel (SWCPP) 16 April 2018.

The residential component of the development comprised a total of 106 units including:

- 40 one bedroom units;
- 55 two bedroom units; and
- 11 three bedroom units.

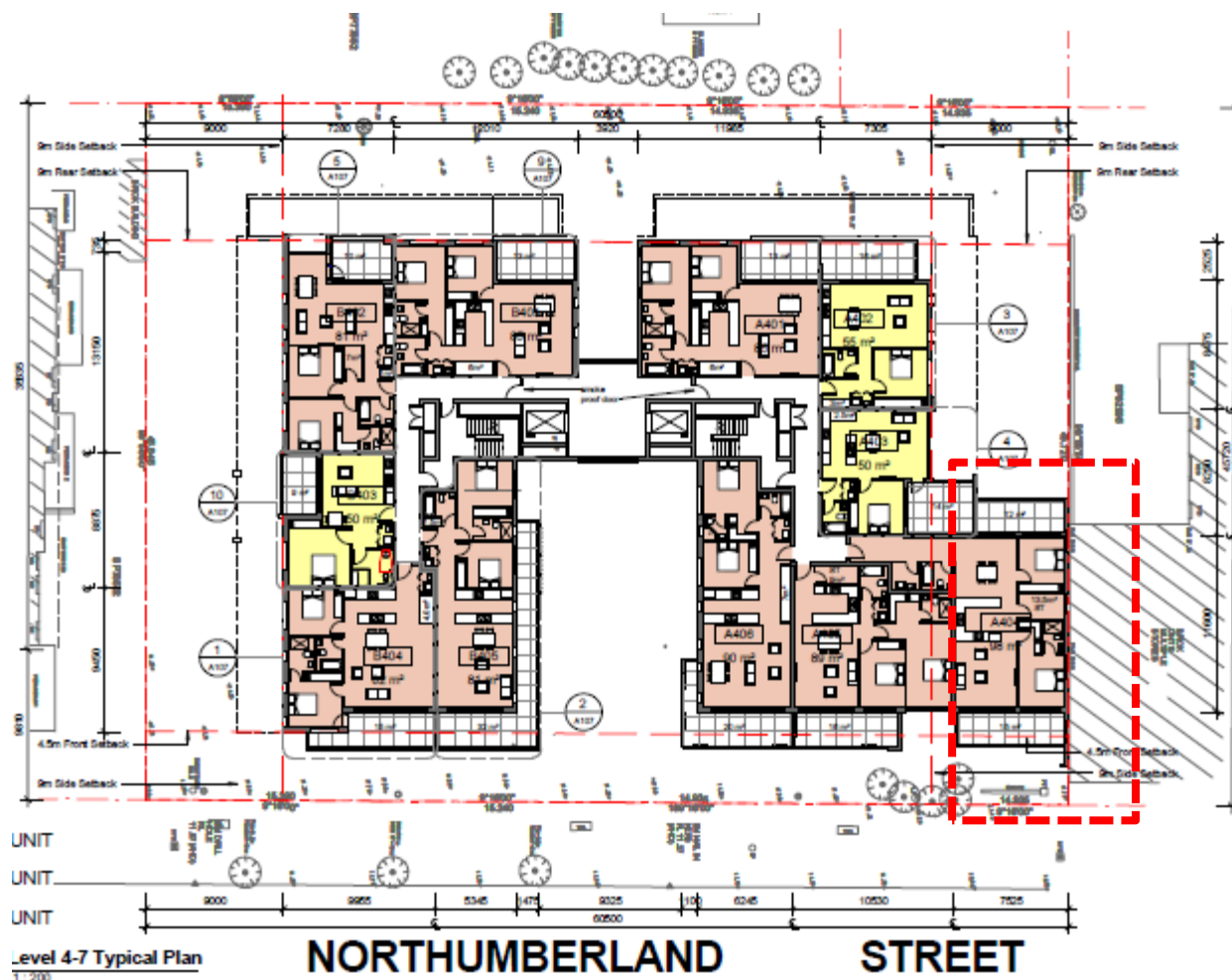
The building presented a U-shaped floor plate with the wings of the building addressing the frontage to Northumberland Street and providing a courtyard space with vantage to Liverpool Pioneers Memorial Park. **Figure 3** provides a perspective of the approved DA962/2016. In requesting this variation, it is important to acknowledge that the approved DA also contravened the building separation development standard at levels 4-7 by having zero setback to the northern boundary shared with 5-7 Northumberland Street as detailed in **Figure 4**. This is the same location proposed to contravene the building separation development standard in this Clause 4.6 variation request.

Figure 3 – Approved DA962/2016 – Perspective



Source: Gus Fares Architects

Figure 4 – Approved DA962/2016 – Levels 4-7 Floor Plan



Source: Gus Fares Architects

4.2. VARIATION TO BUILDING SEPARATION DEVELOPMENT STANDARD

The following is relevant with regard to varying the building separation development standard:

- 9m for parts of buildings between 12m and 25m above ground level (finished) on land in Zone R4 High Density Residential – **relating to Levels 4 to 7 of the proposed development;**
- 12m for parts of buildings between 25m and 35m above ground level (finished) on land in Zone R4 High Density Residential – **relating to Levels 8 to 10 of the proposed development;**
- 18m for parts of buildings above 35m on land in Zone R4 High Density Residential – **relating to Level 11 only of the proposed development.**

Figure 3 provides reference to the above building separation requirements with reference to the locations where the proposed development seeks to contravene this standard. The locations are also summarised as follows:

- North-eastern portion of Level 4-7 (0m setback where 9m is required by Clause 7.4) refer **Figures 4, 5, 6;**
- North-western portion of Level 4-7 (8.251m setback where 9m is required by Clause 7.4) refer **Figures 4, 5, 6;**
- North-eastern portion of Level 8-10 (8m setback where 12m is required by Clause 7.4) refer **Figures 7, 8;**
- External communal space at Level 8 (0m setback where 12m is required by Clause 7.4) refer **Figure 7;**
- North-western portion of Level 11 (12.541m setback where 18m is required by Clause 7.4) refer **Figure 8;**
- Southern extent of building at Level 11 (13.213m setback where 18m is required by Clause 7.4) refer **Figure 8;**
- Western extent of building at Level 11 (12m setback where 18m is required by Clause 7.4) refer **Figure 8.**

Figure 3 – ULEP 2008 Liverpool City Centre Setback Requirements (not to scale)

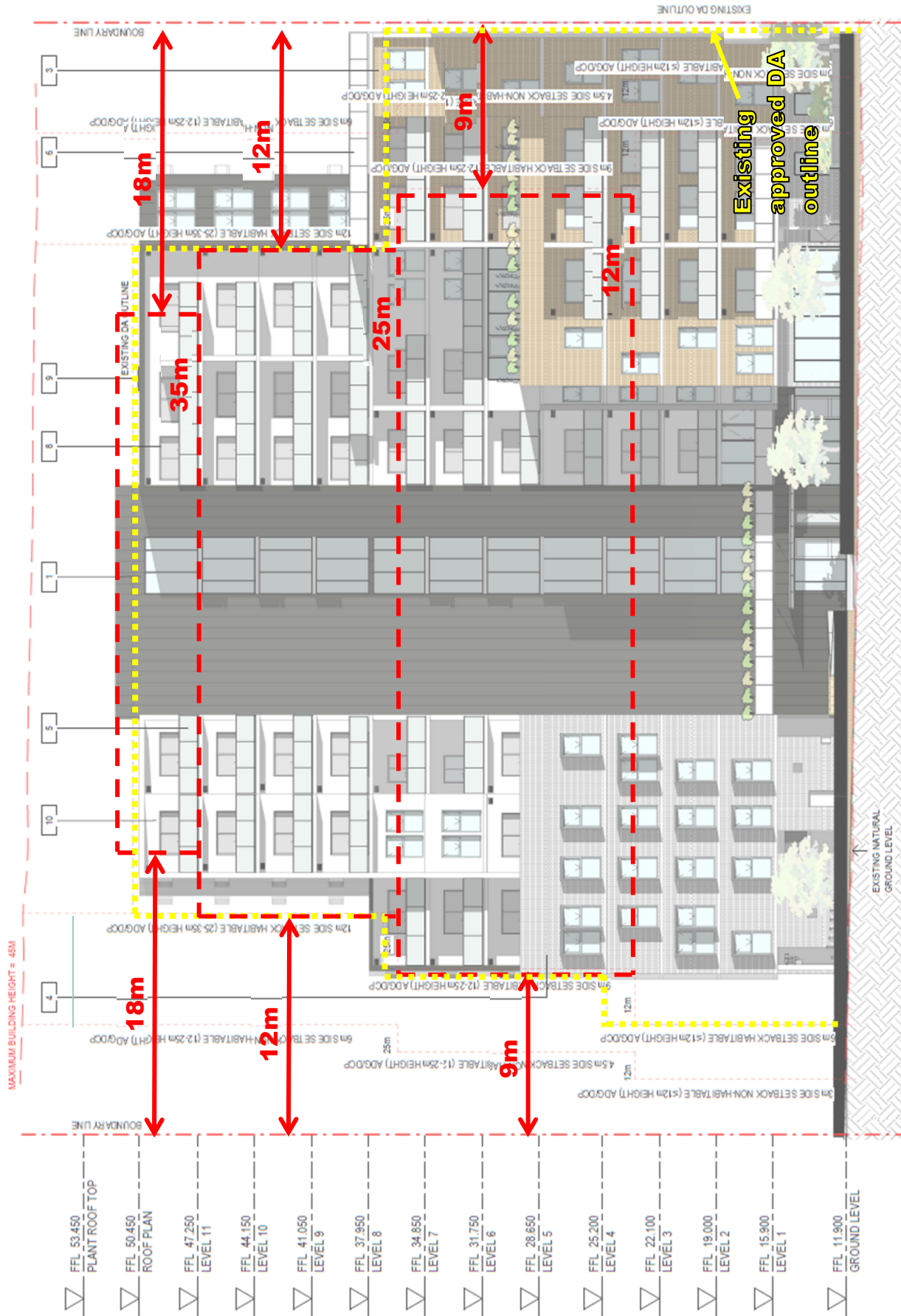
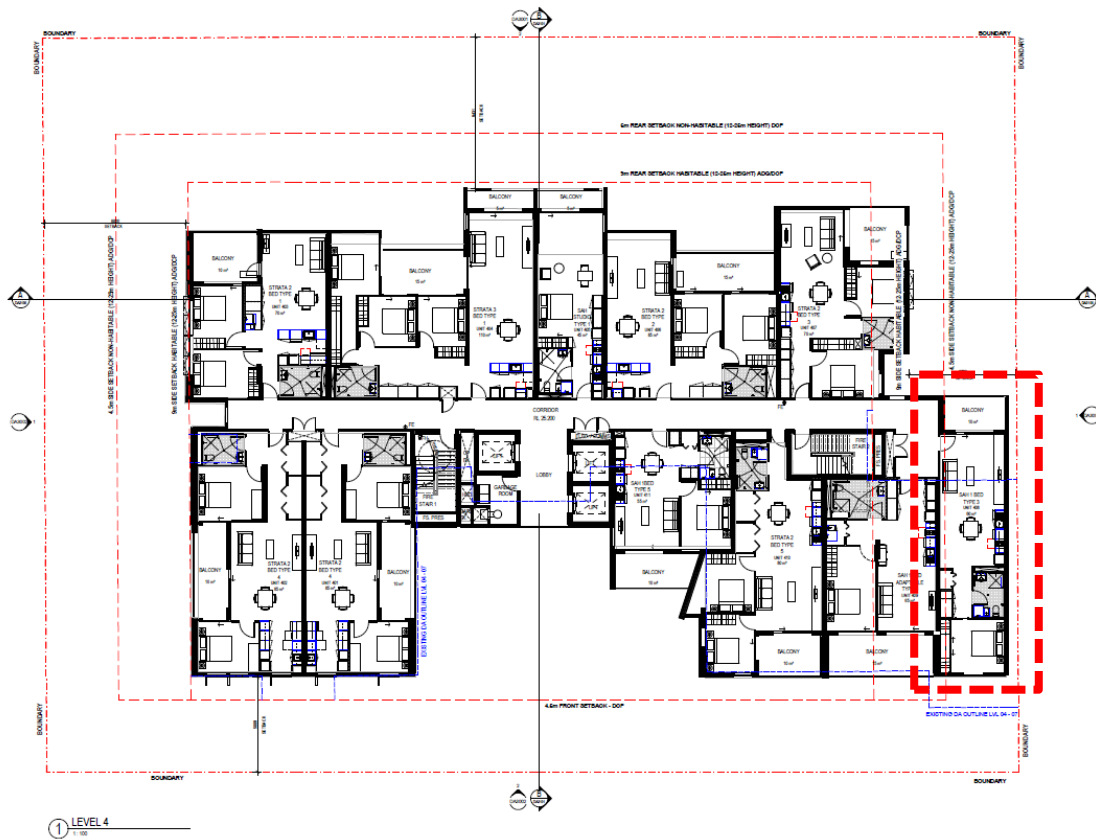
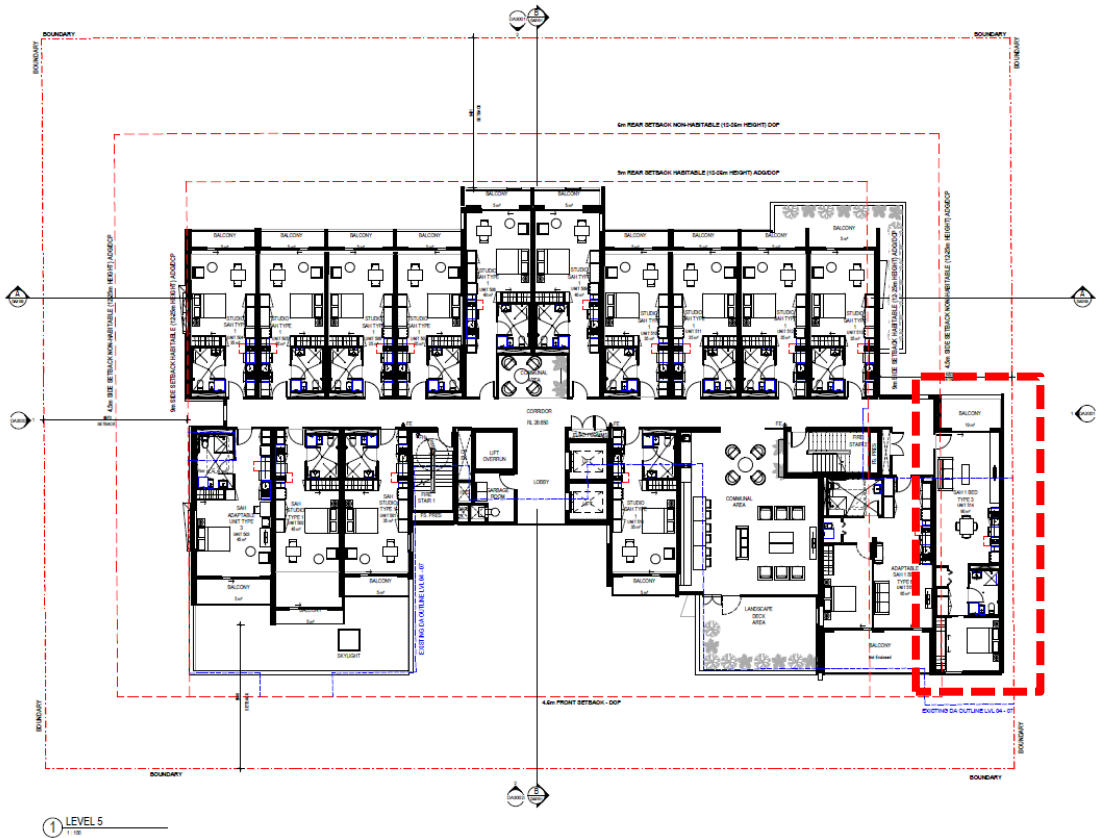


Figure 4 – Level 4 Plan (not to scale)



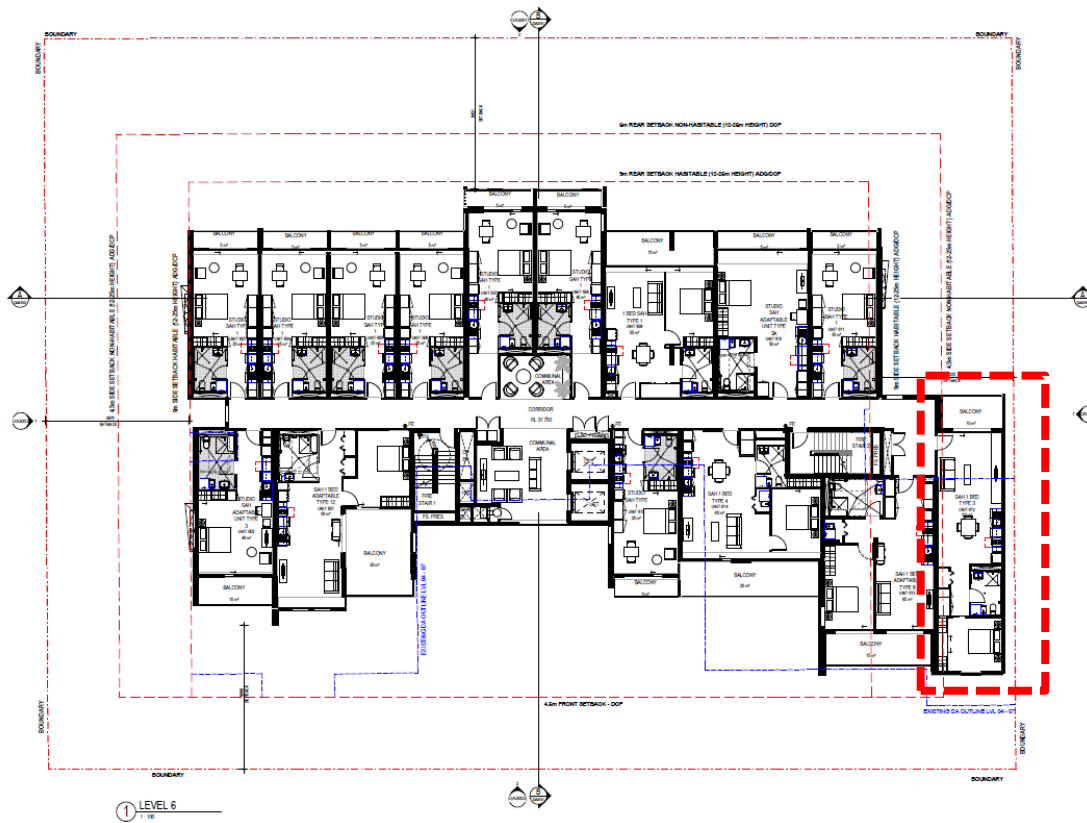
Source: Group GSA

Figure 5 – Level 5 Plan (not to scale)



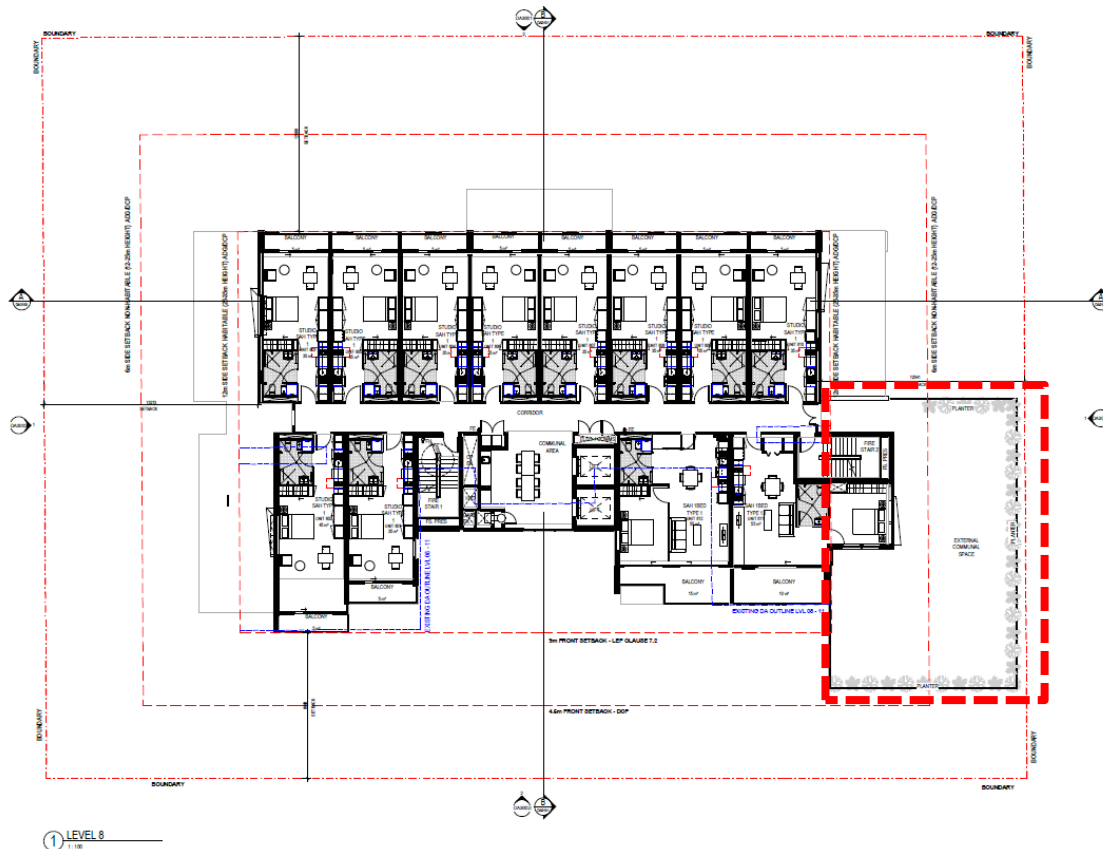
Source: Group GSA

Figure 6 – Level 6-7 Plan (not to scale)



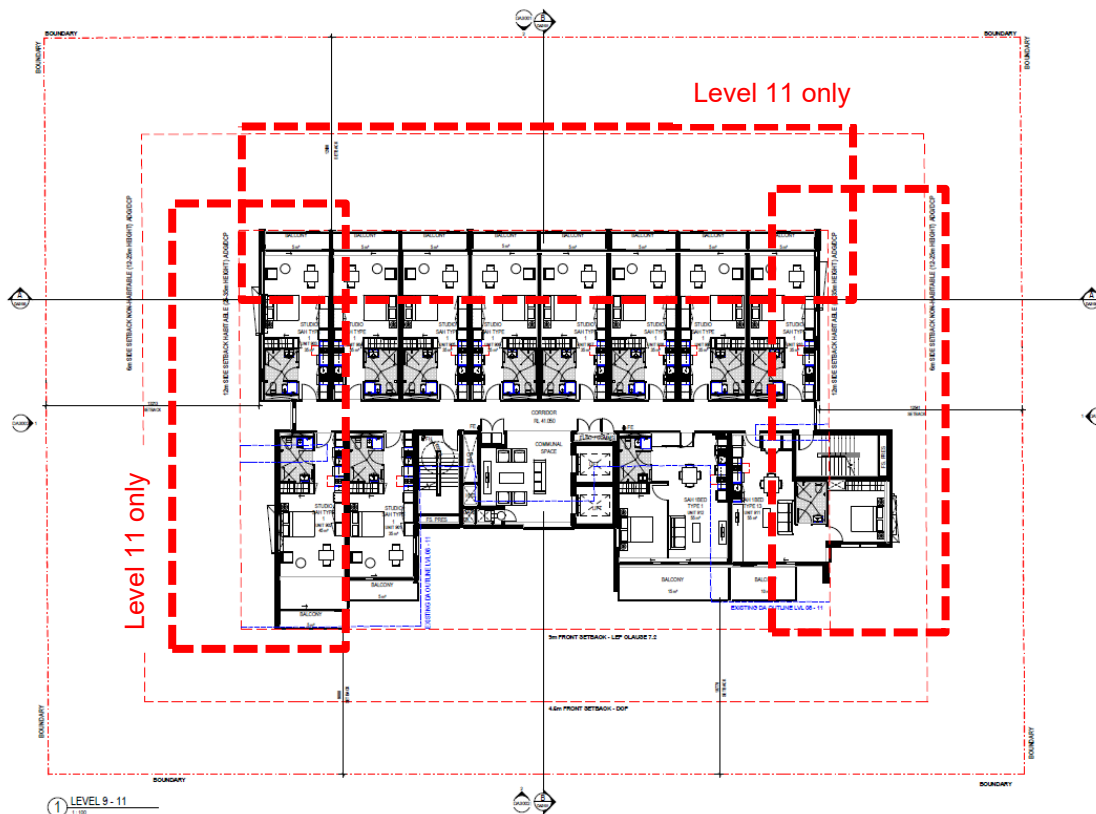
Source: Group GSA

Figure 7 – Level 8 (not to scale)



Source: Group GSA

Figure 8 – Level 9-11 (not to scale)



Source: Group GSA

The building separation breaches are a response to:

- The existing solid boundary wall on the adjacent site at 5-7 Northumberland Street, Liverpool.
- The existing approved building envelope and reduced setbacks approved under the active approval on this site for a residential flat building (DA-962-2016) approved by Liverpool Council 16 April 2018.
- The sites constraints in terms of existing built form context.
- Achievement of the objectives of the Apartment Design Guide (ADG) with regard to building separation under the building separation control 2F, solar and daylight access control 4A.
- Achievement of the objectives of the Apartment Design Guide (ADG) with regard to visual privacy under the visual privacy control 3F.

5. CLAUSE 4.6 VARIATION REQUEST

5.1. KEY QUESTIONS

5.1.1. Is the Planning Control a Development Standard?

The building separation prescribed under Clause 7.4 of the LLEP 2008 is a development standard capable of being varied under Clause 4.6 of LLEP 2008.

5.1.2. 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.

5.1.3. What is the Underlying Object or Purpose of the Standard?

The objective of the building separation development standard is as follows:

7.4 Building separation in Liverpool city centre

(1) The objective of this Clause is to ensure minimum sufficient separation of buildings for reasons of visual appearance, privacy and solar access.

5.2. CONSIDERATION

5.2.1. 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 of this report (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 the first 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 building separation standard as outlined in Clause 7.4(1) of LLEP 2008. The objective of Clause 7.4 LLEP 2008 is ‘to ensure minimum sufficient separation of buildings for reasons of visual appearance, privacy and solar access’. Having regard to this objective the following is noted:

Visual appearance: The proposed development provides zero setback along a portion of its northern boundary shared with the adjacent property at 5-7 Northumberland Street. No. 5-7 Northumberland Street is built to its southern boundary to eight stories in height. The proposal includes matching this zero-setback for a portion of this shared boundary from Ground Level to eight stories in height. Matching this setback at the north-eastern portion of the site assists in mitigating the existing adverse visual impact of the blank wall of 5-7 Northumberland Street and presents as a more cohesive scale of built form. The inclusion of a brick portal frame entryway to match the brick portal frame entry of 5-7 Northumberland Street also assists in creating cohesive visual appearance and bulk from street-level. Strict compliance to the setback standard through increased separation would expose the blank wall of the adjoining development which would present poorly to the street.

The proposed setback at the north-western portion of Level 3-7 (8.251m setback where 9m is required by Clause 7.4) is minor and does not result in any adverse impacts to the visual appearance of the building form as viewed from vantage points.

The remaining non-compliant setbacks relate to:

- the north-eastern portion of Level 8-10 (8m setback where 12m is required by Clause 7.4),
- the external communal space at Level 8 (0m setback where 12m is required by Clause 7.4); and
- north-western portion of Level 11 setback (12.57m where 18m is required by Clause 7.4).

These setbacks result in a 'vertical stepping' of the building form as viewed from Northumberland Street and Liverpool Pioneers Memorial Park. This visually 'breaks-up' the mass of the building and creates a building form which is more consistent with the established and emerging streetscape. Strict compliance to the setback standard through increased separation would decrease the viability of the proposal and create a building mass that is inconsistent with the adjacent and emerging building form in the area of the Liverpool City Centre.

Privacy: The proposal provides appropriate window shading, screening and use of high-level windows to the northern elevation to maintain visual privacy both within the site and with regard to adjacent sites. For a portion of the northern setback, the proposal mirrors the blank boundary wall of the adjacent building form at 5-7 Northumberland Street. To maintain visual privacy, no windows are provided at this façade.

All remaining windows on the northern elevation to habitable rooms are high level windows to maintain privacy for occupants and adjacent neighbours.

The setback is considered appropriate in the context of the site, given that the proposed built form matches the boundary wall height to Level 8 and above this height the setback is increased to 8m with no windows or balconies to this portion of the façade. The remainder of the northern setback is consistent with ADG control 3F.

Solar access: as demonstrated in the Architectural Drawing set (**Appendix A**), the proposal provides sufficient solar access in accordance with State Environmental Planning Policy Affordable Rental Housing 2009 (SEPP ARH 2009) and in accordance with the ADG.

Accordingly, these unique circumstances warrant support of the departure from the building separation control.

Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary

Not relied upon.

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

Not relied upon.

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

Not relied upon.

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.

Therefore, the underlying objectives of the separation controls are reasonably satisfied as the proposal is responding to context on the adjoining site and there are no privacy or visual appearance issues that are generated by this urban design response. In addition, given they relate to the north eastern corner of the site, there are no additional impacts in terms of solar access or overshadowing.

The unique circumstances of the case that warrant support of the departure are that the variation enables the development to:

- Adopt an appropriate urban form and provide quality open space both for private and public use. The proposal provides for a suitable zero metre setback along a portion of the northern boundary shared with

5-7 Northumberland Street that mitigates the adverse visual impact of the existing blank wall of the adjoining development to create a more cohesive streetscape appearance. This also facilitates the creation of a high-amenity common open space within the front forecourt of the building by creating a sense of enclosure.

- Strict compliance to the building separation standard through increased separation would expose the blank wall of the adjoining development, presenting poorly to the street.
- The ADG permits zero metre separation between blank walls. The ADG should take precedence over the LLEP 2008 in this instance, particularly in circumstances where an improved Urban Design outcome is achieved.
- The departure does not discernibly increase overshadowing from the additional height, given the building is well below the maximum building height this reduces the anticipated overshadowing from the DCP/LEP controls to Liverpool Pioneers Memorial Park. Requiring strict compliance would necessitate an additional level and would increase overshadowing.

Therefore, the proposal is a better outcome than a compliant building separation to these portions of the building.

5.2.2. 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 Statement of Environmental Effects submitted with the DA demonstrates that any impacts associated with the proposed development are acceptable, particularly because there are no significant solar access impacts on neighbouring properties or the public domain resulting from contravention of the building separation development standard (compared to the approved DA on the site).
- The variation does not result in unreasonable adverse amenity impacts on adjacent land.
- The variation does not diminish the development potential of adjacent land.
- The development is compliant with the floor space ratio development standards.
- The scale of development is appropriate given the scale of the site and its context within Liverpool City Centre.

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

5.2.3. 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 consistent with the objectives of the R4 High Density Residential Zone as per LLEP 2008. These objectives are addressed in the Statement of Environmental Effects which accompanies the Development Application.

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

The proposed non-compliance with the building separation 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.

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

A design concept to achieve compliance with the building separation standard would result in a

mediocre development outcome for the proposed development, as strict compliance with the building separation standard would:

- Result in commercial viability issues and potentially resulting in Anglicare seeking other development sites thus eroding the diversity of the residential housing offering in Liverpool.
- Not respond appropriately to the site's context strategically in terms of the provision of housing in close proximity to high frequency transport as referenced to the Western City District Plan.
- Not respond to the existing site context with regard to:
 - No. 5-7 Northumberland Street which restricts development of this portion of the site due to the adjacent solid boundary wall; and
 - The scale of adjacent residential development of comparable height and character to its north, west and south.

Accordingly, the proposal promotes the economic use and development of the land consistent with its zone and purpose and it is not contrary to the public interest and accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

5.2.6. 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 prior to granting concurrence, should it be required.

6. SUMMARY

In summary, the proposal is considered appropriate and consistent with the objectives and intent of Clause 7.4 of LLEP 2008. Having regard for the context of the site and the approved DA, strict compliance with the numerical standard in this instance is both unreasonable and unnecessary for the following reasons:

- As demonstrated in the proposal, the built form has been developed in response to site constraints, surrounding context and the design development for the built form and massing across the site.
- The reduced boundary setbacks will not result in any detrimental amenity impacts to surrounding development when compared to the design approved in DA-962-2016. Nor will the extent of the non-compliance result in any adverse amenity or privacy impact on the adjacent sites given that the objectives of the ADG with regard to 2F building separation are achieved through window shading, configuration of non-habitable and habitable rooms and placement of solid boundary walls in response to the adjacent 5-7 Northumberland Street.
- The proposal represents a superior design outcome, compared to the approved design and provides a significant long-term social contribution through the provision of affordable rental housing.
- The non-compliance will not hinder the development's ability to satisfy the objectives of the R4 High Density Residential zone.
- The non-compliance will not hinder the development's ability to satisfy the vision for the Liverpool City Centre or the Western City District Plan.
- The proposal is highly consistent with the Greater Sydney Region Plan a Metropolis of Three Cities which acknowledges the need to provide housing in close proximity to high frequency transport services.

Based on the reasons outlined, it is concluded the request is well founded and the particular circumstances of the case warrant flexibility in the application of the building separation development standard.

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APPENDIX A ARCHITECTURAL DRAWINGS

