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URBIS

CLAUSE 4.6 VARIATION REQUEST - MIX OF DWELLING SIZES

34 Walker Street Rhodes

URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:

Director	Murray Donaldson
Senior Consultant	Rob Battersby
Project Code	P0037282
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1. INTRODUCTION

This Clause 4.6 variation request (**variation request**) has been prepared by Urbis Pty Ltd (**Urbis**) on behalf of Thirty Four Walker Street Pty (**the applicant**) to accompany an Amending development application (**Amending DA**) lodged to City of Canada Bay Council (**Council**). The Amending DA seeks alterations and additions to DA/2017/0544 (as modified) for mixed use development (**the proposal**) at 34 Walker Street Rhodes (**the site**). The applicant seeks to 'amend' DA/2017/0544 via the provisions of Section 4.17 of the Environmental Planning and Assessment Act 1979 (**EP&A Act**) which enables the retention of an existing consent whilst amending a component of that consent through a separate 'amending' application.

This request seeks a variation to Clause 6.11 of the Canada Bay Local Environmental Plan 2013 (LEP) in relation to the proposed mix of dwelling sizes in residential flat buildings and mixed use development.

Clause 6.11 requires development for mixed use development that results in at least 10 dwellings to provide:

- *at least 20% of the dwellings, to the nearest whole number of dwellings, in the development will be studio or 1 bedroom dwellings, and*
- *at least 20% of the dwellings, to the nearest whole number of dwellings, in the development will have at least 3 bedrooms.*

The proposal provides a total of 273 x residential apartments with the following proposed unit mix:

- 54 x 1-bedroom dwellings (19.8%)
- 105 x 2 bedroom dwellings (38.4%)
- 114 x 3 bedroom dwellings (41.8%)

Accordingly, the proposal exhibits a minor non-compliance (0.2%) with the minimum number of 1-bedroom residential dwellings as a percentage of the total apartments required under Clause 6.11. Notwithstanding this minor non-compliance, the proposal achieves the objectives of Clause 6.11 in that it provides a diverse mix of dwelling types, provides housing choice for different demographics, living needs, and household budgets, and delivers a mixed use development that accommodates a range of household sizes.

Pursuant to Clause 4.6(3) of the LEP, the applicant requests that the development standard be varied.

2. SITE AND CONTEXT

2.1. SITE DESCRIPTION

The site is 34 Walker Street, Rhodes and is legally described as Lot 101 Deposited Plan 624798.

The site is rectangular in shape, has an area of approximately 6,807 sqm and frontages to Walker Street (60.2 metres), Marquet Street (59.8 metres) and Gauthorpe Street (112.8 metres).

The site forms the northern part of the Rhodes Station Precinct and is centrally located within the Rhodes Peninsula (see **Figure 1**). The site is within the City of Canada Bay Local Government Area (**LGA**) and is approximately 14km directly west of the Sydney CBD and 8km east of Parramatta CBD.

Figure 1 Site Location



Source: Urbis

2.2. RHODES PENINSULA

The Rhodes Peninsula is defined by a rail corridor (North Shore, Northern and Western Lines) to the east, Parramatta River to the north, and Homebush Bay to the west. The peninsula is served by Homebush Bay Drive/Concord Road and bridges that connect to adjoining areas, including:

- Ryde Bridge (road, cycle, pedestrian) and John Whitton Bridge (rail, cycle, and pedestrian) across Parramatta River connecting the peninsula to the north and northeast; and
- Bennelong Bridge provides bus, cycle, and pedestrian connection to Wentworth Point to the west.

Due to the site's proximity to transport corridors and services, the site has ease of access to employment, services, and recreational facilities, such as those provided at Sydney Olympic Park.

2.3. SURROUNDING CONTEXT

To the north of the site a high rise and medium density development has recently been constructed. This built form has a minimal setback to Walker Street and Gauthorpe Street, with a height to 23 storeys at the corner of these streets. The forecourt is landscaped and pedestrian connectivity is provided at ground level.

To the immediate south of the site fronting Marquet Street is a light industrial development and fronting Walker Street, is a residential apartment building which steps up to a height of 8 storeys.

To the west of the site (along Marquet Street), there is a residential development with minimal setback to Marquet Street. This height of buildings for this development range between 6 to 7 storeys.

East of the site is the T1 Northern Line railway corridor, running parallel to Walker Street.

Figure 2 Site Context



Source: SJB Architects

3. PROPOSED DEVELOPMENT

This Clause 4.6 variation request has been prepared to accompany an Amending DA which seeks alterations and additions to an approved development pursuant to the consent to DA/2017/0544 (as modified). Specifically the Amending DA seeks the following alterations and additions:

- Infill slab voids to Basement Levels 03, 05, and 07 to accommodate an additional 218 x parking spaces, comprising 204 x residential spaces (including 41 x accessible spaces) and 14 x visitor spaces);
- Minor changes to Basement Levels 03 – 09 (car parking configuration and vehicle circulation);
- Additional storage cages at Basement Levels 03 – 09 (resulting in a total of 673 storage cages);
- Additional 21 residential levels to Tower D (Levels 20 – 40) providing 178 x residential apartments;
- Additional rooftop level to Tower D (Level 41) comprising a private communal open space and a double height plant zone (to accommodate cooling towers and a lift motor room);
- Additional 11 residential levels to Tower E (Levels 35 – 45) providing 95 x residential apartments;
- Additional 1 x apartment at Level 25 and removal of 2 x apartments at Levels 26 and 27 at Tower E; and
- Additional rooftop level to Tower E (Level 46) comprising a private communal open space and a double height plant zone (to accommodate cooling towers and a lift motor room).

A description of the development is provided in the SEE prepared by Urbis Pty Ltd. The proposal is detailed within the architectural and landscaping drawings and technical documentation that accompany the DA.

4. PROPOSED VARIATION TO DEVELOPMENT STANDARD

Clause 6.11 requires development for mixed use development that results in at least 10 dwellings to provide:

- *at least 20% of the dwellings, to the nearest whole number of dwellings, in the development will be studio or 1 bedroom dwellings, and*
- *at least 20% of the dwellings, to the nearest whole number of dwellings, in the development will have at least 3 bedrooms.*

The proposal provides a total of 273 x residential apartments with the following proposed unit mix:

- 54 x 1-bedroom dwellings (19.8%)
- 105 x 2 bedroom dwellings (38.4%)
- 114 x 3 bedroom dwellings (41.8%)

Accordingly, the proposal exhibits a minor non-compliance (0.2%) with the minimum number of 1-bedroom residential dwellings as a percentage of the total apartments required under Clause 6.11. Notwithstanding this minor non-compliance, the proposal achieves the objectives of Clause 6.11 in that it provides a diverse mix of dwelling types, provides housing choice for different demographics, living needs, and household budgets, and delivers a mixed use development that accommodates a range of household sizes.

5. RELEVANT STATUTORY ASSESSMENT FRAMEWORK

This section outlines the provisions of the environmental planning instrument which applies to the mix of residential sizes development standard and allows for its variation.

5.1. CLAUSE 4.6 OF CANADA BAY LEP 2013

Clause 4.6 of the LEP includes provisions that allow for exceptions to development standards in certain circumstances. The objectives prescribed in Clause 4.6(1) of the LEP are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Clause 4.6(2) provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA 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(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development by demonstrating:

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

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

In accordance with Clause 4.6(3), the applicant seeks to vary the mix of dwelling size development standard.

Clause 4.6(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in Clause 4.6(3). The consent authority should also be satisfied that that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which it is proposed to be carried out.

Clause 4.6(4)(b) requires the concurrence of the Secretary to have 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 Planning Secretary before granting concurrence.

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the DPIE Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under Section 64(1) of the Environmental Planning and Assessment Regulation 2000 and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The concurrence of the Secretary can be assumed for the purpose of this request as the DA is declared regionally significant development and will be determined by the Sydney Eastern City Planning Panel.

This variation request demonstrates that compliance with the mix of dwelling size building development standards prescribed for the site in Clause 6.11 of the LEP are unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation, and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standard relating to the mix of dwelling size in accordance with clause 4.6 of the LEP.

Detailed consideration has been given to the following matters within this assessment:

- *Varying development standards: A Guide*, prepared by DPE (dated August 2011); and
- Relevant planning principles and judgements issued by the Land and Environment Court (LEC).

The following sections of the variation request provides detailed responses to the key questions required to be addressed within the above considerations and Clause 4.6 of the LEP.

This variation request has been informed by an assessment of the proposal on:

- Whether compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- Whether there are sufficient environmental planning grounds to justify contravening the development standard; and
- Whether the proposed development is in the public interest.

This assessment concludes that the variation request is well founded and that the particular circumstances of the case warrant flexibility in the application of the mix of dwelling size development standards.

6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED?

The mix of dwelling size development standard prescribed by Clause 6.11 of the LEP is a development standard capable of being varied under Clause 4.6(2). The proposed variation is not excluded from Clause 4.6(2) as it does not comprise any of the matters listed within Clause 4.6(6) or Clause 4.6(8) of the LEP.

6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

Historically, the most common way to establish a development standard was unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This variation request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

This variation request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

This variation request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to the non-existent or inconsequential adverse impacts arising from the proposed non-complying development. This disproportion provides sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

The objectives of the development standard are achieved notwithstanding non-compliance

The objectives of the mix of dwelling size development standard in Clause 6.11 are detailed in Table 1 below. An assessment of the consistency of the proposal with each of the objectives is also provided.

Table 1 Assessment of Consistency with Clause 6.11 Objectives

Clause	Assessment
<ul style="list-style-type: none"> To ensure the provision of a mix of dwelling types in residential flat buildings and provide housing choice for different demographics, living needs and household budgets, To promote development that accommodates a range of household sizes. 	<p>The proposal will achieve a range of residential apartment unit typologies and sizes which will broaden the supply of housing for residents and families in the Canada Bay LGA. The mix of typologies will achieve housing choice and diversity for different demographics, living needs, and household budgets.</p>

This assessment demonstrates that the proposed development is both consistent with (as required by clause 4.6(4)(a)(ii)) and will achieve (as required by clause 4.6(3)(a)) the objectives of the mix of dwelling size development standard, notwithstanding the non-compliance with the development standard.

6.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The Land & Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, assists in considering the sufficient environmental planning grounds. Preston J observed:

“...in order for there to be ‘sufficient’ environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and

...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development”

There is an absence of environmental harm arising from the contravention and sufficient environmental planning grounds to justify contravening the development standard for the following reasons:

- The non-compliance is a numerical technicality in that the number of 1-bedroom residential apartments as a percentage of the total apartments is 20% when rounded up to the nearest whole percentage.
- The minor non-compliance is not perceptible from the public domain and will have no material environmental impact in relation to the natural environment, the built environment, social or economic impacts, or any other amenity considerations (traffic, wind, solar access, BCA compliance, access etc).
- Notwithstanding the non-compliance, the proposal meets the objectives of Clause 6.11 in that it provides a diverse mix of dwelling types, provides housing choice for different demographics, living needs, and household budgets, and delivers a mixed use development with a range of household sizes, as follows:

Unit	Approved as per MOD2021/0135	Amending DA	Total
1 bedroom	39 (9.75%)	54 (19.8%)	93 (13.82%)
2 bedroom	187 (46.75%)	105 (38.46%)	292 (43.39%)
3 bedroom +	174 (43.35%)	114 (41.76%)	288 (42.79%)
Total	400	273	673

Taking into account the particular circumstances of the proposal and the subject land it is neither reasonable nor necessary to require compliance with the mix of dwelling size development standard.

Given the high level of compliance with other key design guidelines and high quality design of the overall proposal, the variation to the development standard is supportable from environmental planning grounds.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the minor non-compliance with the mix of dwelling size development standard in this instance.

6.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)?

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

Each of the sub-clause (3) matters are addressed in this variation request, including detailed consideration of whether compliance with the development standards is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposed development, to justify the variation to the development standard.

6.5. IS THE DEVELOPMENT IN THE PUBLIC INTEREST?

Clause 4.6(4)(a)(ii) states development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The consistency of the development with the objectives of the mix of dwelling size development standard is demonstrated in **Table 1** above. The proposal is also consistent with the land use objectives that apply to the site under the LEP. The subject land is zoned B4 Mixed Use. The proposed alterations and additions are consistent with the relevant land use zone objectives as outlined in **Table 2** below.

Table 2 Assessment of compliance with Land Use Objectives

Zone B4 Mixed Use	Assessment
<ul style="list-style-type: none">To provide a mixture of compatible land uses.To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.	The proposal is consistent with the objectives of the B4 Zone in that they will deliver additional residential accommodation and complement the approved mix of compatible land uses. The site is a highly accessible location which maximises public transport patronage and encourages walking and cycling.

Overall it is considered that the strict maintenance of the mix of dwelling size development standard in this instance is not in the public interest as:

The proposal achieves and is consistent with the objectives of the development standard as provided in Clause 6.11 and of the LEP, as outlined in **Table 1** of this variation request.

The proposal is consistent with the objectives of the B4 Zone as outlined above.

6.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED?

The concurrence of the Secretary can be assumed to have been granted in accordance with the DPE Circular PS 18–003 'Variations to development standards', dated 21 February 2018. The DA is declared regionally significant development and will be determined by the Sydney Eastern City Planning Panel.

Clause 4.6(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?

The minor 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 developments.

Clause 4.6(5)(b) – is there a public benefit of maintaining the planning control standard?

The proposal achieve and satisfy the objectives of the mix of dwelling size development standards and the land use zone objectives notwithstanding the technical minor non-compliance (representing a 0.2% exceedance). Overall it is considered that strict maintenance of the development standards in this instance is not in the public interest. There is no material impact or benefit associated with strict adherence to the development standard and no compelling reason or public benefit derived from maintenance of the standard.

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, however, there are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

7. CONCLUSION

For the reasons set out in this written request, strict compliance with the mix of dwelling size development standard contained within Clause 6.11 of the LEP is unreasonable and unnecessary in the circumstances of the case. In addition, there are sufficient environmental planning grounds to justify the proposed variation.

In this regard, it is reasonable and appropriate to vary the mix of dwelling size development standard to the extent proposed. For the reasons set out in this variation request, strict compliance with the numerical standard in this circumstances is both unreasonable and unnecessary, there are sufficient environmental planning grounds to justify the contravention, and it is in the public interest to do so. In summary:

- The proposal satisfies the objectives of the mix of dwelling size development standard notwithstanding the minor non-compliances such that to require strict compliance would be unnecessary. The minor non-compliance is a numerical technicality in that the number of 1-bedroom residential apartments as a percentage of the total apartments is 20% when rounded up to the nearest whole percentage.
- Notwithstanding the non-compliance, the proposal meets the objectives of Clause 6.11 in that it provides a diverse mix of dwelling types, provides housing choice for different demographics, living needs, and household budgets, and delivers a mixed use development with a range of household sizes.
- The proposal is consistent with the objectives of the B4 Zone in that it provides additional residential accommodation to complement the approved mixture of compatible land uses. The site is a highly accessible location which maximises public transport patronage and encourages walking and cycling
- The minor non-compliance is not perceptible from the public domain and will have no material environmental impact in relation to the natural environment, the built environment, social or economic impacts, or any other amenity considerations (traffic, wind, solar access, BCA compliance, access etc).

For the reasons outlined above, the Clause 4.6 request is well-founded. Compliance with the mix of dwelling size development standards is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the mix of dwelling size development standard should be applied.

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