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URBIS

CLAUSE 4.6 VARIATION REQUEST - BUILDING SEPARATION

34 Walker Street Rhodes

Prepared for
THIRTY FOUR WALKER STREET PTY
6 December 2022

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1. INTRODUCTION

1.1. OVERVIEW

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 the minimum building separation development standard which applies to the site under Clause 7.5 of the Canada Bay Local Environmental Plan 2013 (**LEP**). The Clause provides that development consent must not be granted to development that results in a building in the Rhodes Precinct (within which the site is located) being separated from another building by less than—

(a) for a building higher than 14 storeys but not higher than 20 storeys – 24 metres, or

(b) for a building higher than 20 storeys – 40 metres.

The proposal relates to a building that is higher than 20 storeys. The proposal presents a 37 metre building separation between the two towers at the closest point; this is consistent with the original approved development consent under DA/2017/0544 and subsequent approved modifications. Accordingly, the proposal results in a non-compliance with the minimum building separation development standard by 3 metres. The additional residential levels proposed by the subject amending DA are consistent with the Apartment Design Guide (**ADG**) and the Rhodes West Development Control Plan (**DCP**) in terms of design quality and amenity requirements.

This variation request is made pursuant to Clause 4.6 of the LEP.

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).

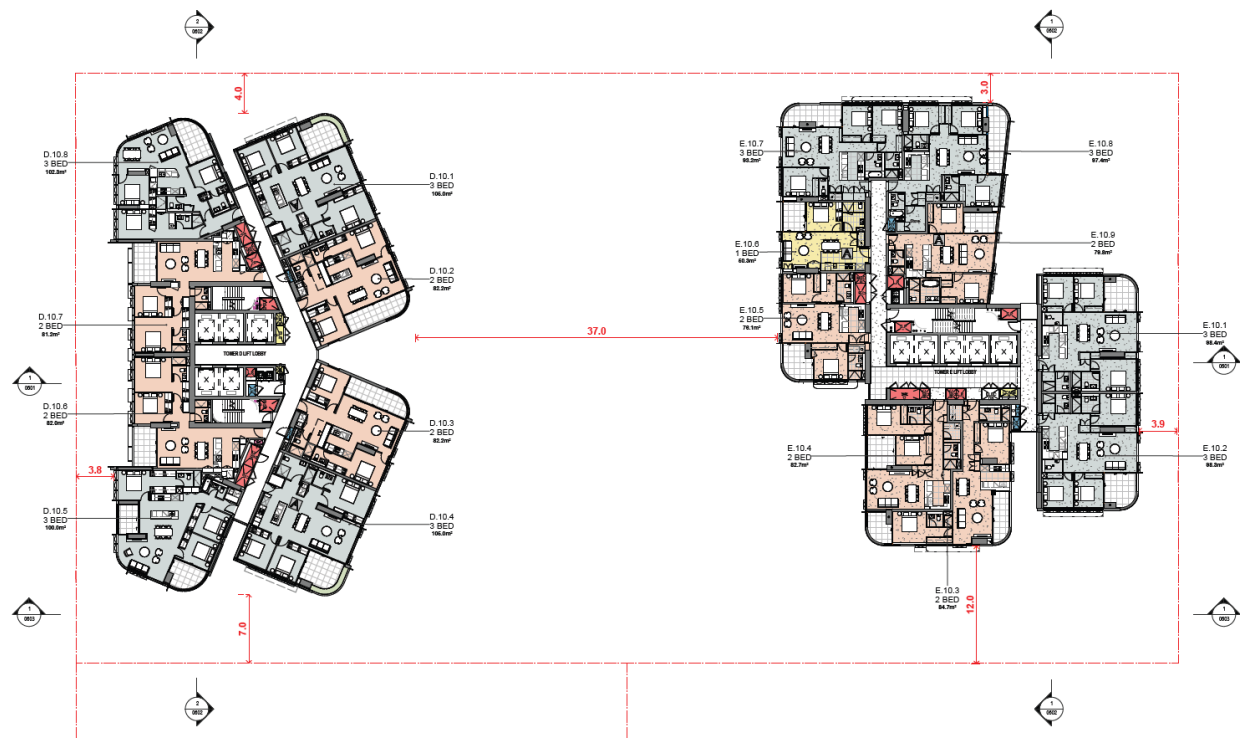
A description of the development is provided in the SEE prepared by Urbis Pty Ltd. The proposal is detailed within the architectural and landscaping drawings and technical documentation that accompany the DA.

4. PROPOSED VARIATION TO DEVELOPMENT STANDARD

Pursuant to Clause 7.5, development consent must not be granted to development that results in a building higher than 20 storeys in the Rhodes Precinct being separated from another building by less than 40 metres.

The proposal relates to a building that is higher than 20 storeys and presents a 37 metre building separation between the two towers at the closest point (refer **Figure 3** below). This is consistent with the original approved development consent under DA/2017/0544 and subsequent approved modifications. Accordingly, the proposal results in a non-compliance with the minimum building separation development standard by 3 metres.

Figure 3 Building Separation



Source: SJB Architects

5. RELEVANT STATUTORY ASSESSMENT FRAMEWORK

This section outlines the provisions of the environmental planning instrument which applies to the minimum building separation 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 requests that the minimum building separation development standards that applies to the site be varied.

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 minimum building separation development standard prescribed for the site under Clause 7.5 of the LEP is 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 minimum building separation 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 minimum building separation development standard.

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

The minimum building separation development standards prescribed by Clause 7.5 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

Clause 7.5 does not state any development standard objective. Notwithstanding, the proposed development is consistent with general environmental principles and objectives of a planning control that relates to building separation. This is summarised below.

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 proposal protects the amenity of residential apartments, neighbouring properties, and public spaces.
- The 37 metre building separation between the two towers as per the approved consent (as modified).
- The proposal retains visual and acoustic privacy, solar access, and view sharing. The two towers are designed to face away from each other. Tower D splits in two, angling its inner walls away from Tower E, thus lessening the impact of the minor non-compliance.
- The proposal does not create any net increase in overshadowing to surrounding public places (including Union Square) during prescribed times.
- The additional residential levels to Tower D and Tower E are consistent with ADG and DCP design quality and amenity criteria.
- Approximately 72.7 % of apartments receive 2 hours direct sunlight in mid-winter. The design optimises the number of apartments receiving sunlight to habitable rooms, primary windows, and open spaces.
- Approximately 69% of apartments achieve natural cross ventilation.
- Visual privacy allows residents within surrounding buildings to use their private spaces without being overlooked. The proposal balances the need for views and outlook with the need for privacy. The building elements respect the required setbacks and separation distances and ensure adequate privacy and daylighting are achieved.
- Acoustic amenity has been provided through the use of appropriately rated glazing suites to provide acoustic amenity for residents.

Taking into account the above and the particular circumstances of the proposal and the site, it is neither reasonable nor necessary to require strict compliance with the LEP building separation control.

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 evident that there are sufficient environmental planning grounds to justify the minor non-compliance with the minimum building separation 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 alterations and additions, 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 proposal is 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 1** below.

Table 1 Assessment of Compliance with Land Use Zone Objectives

Zone B4 Mixed Use	Assessment
<p><i>To provide a mixture of compatible land uses.</i></p> <p><i>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.</i></p>	<p>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.</p>

Overall it is considered that the strict maintenance of the minimum building separation development standard in this instance is not in the public interest as:

- The proposal achieves and is consistent with general environmental principles of achieving adequate building separation as outlined above.
- The proposal is consistent with the objectives of the B4 Zone as outlined above.
- The proposal achieves a superior planning outcome compared to a 'compliant' scheme.
- Strict compliance with the development standard cannot be achieved for the reason that the original development consent approved the 37 metre building separation and is under construction.

Accordingly, it is considered that, notwithstanding the proposed variation to the minimum building separation development standards, the proposed alterations and additions are in the public interest.

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 minimum building separation development standard that applies to the site will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variations are 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 achieves and satisfies the intent of building separation, notwithstanding the minor non-compliance. Overall it is considered that strict maintenance of the development standard in this instance is

not in the public interest. There is no material impact or benefit associated with strict adherence to the development standard, which would require the proposed floor levels to be setback 3 metres, and there are no compelling reasons 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 minimum building separation development standard contained within Clause 7.5 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 minimum building separation development standard to the extent proposed. For the reasons set out in this variation request, strict compliance with the numerical development 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.

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