

**Clause 4.6 Variation request to
development standard - building
separation**

40-42 Scott Street, Liverpool
Liverpool Civic Place - Phase B & C

Submitted to Liverpool City Council
On behalf of Built Development Group

25 June 2021 | 2200178



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1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Built Development Group. It is submitted to Liverpool City Council (Council) in support of a development application (DA) comprising two buildings forming Phase B and C of the mixed-use precinct known as Liverpool Civic Place at 44 Scott Street, Liverpool (the site). Clause 4.6 of the *Liverpool Local Environmental Plan 2008* (Liverpool LEP 2008) enables a consent authority to grant consent for development even though the development contravenes a development standard. Clauses 4.6(3) and (4)(a)(ii) require that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard. These three matters are detailed below:

- that the applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- 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 in which the development is proposed to be carried out.

The Land and Environment Court has established a set of factors to guide assessment of whether a variation to development standards should be approved. The original approach was set out in the judgment of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89 in relation to variations lodged under *State Environmental Planning Policy 1 – Development Standards* (SEPP 1). This approach was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe).

While these cases referred to the former SEPP 1, the analysis remains relevant to the application of clause 4.6(3)(a). Further guidance on clause 4.6 of the Standard Instrument has been provided by the Land and Environment Court in a number of decisions, including:

- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
- *Moskovich v Waverley Council* [2016] NSWLEC 1015.

In accordance with the above requirements, this clause 4.6 variation request:

- identifies the development standard to be varied (**Section 2.0**);
- identifies the variation sought (**Section 3.0**);
- establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (**Section 4.0**);
- demonstrates there are sufficient environmental planning grounds to justify the contravention (**Section 5.0**);
- demonstrates that the proposed variations are in the public interest (**Section 6.0**); and
- provides an assessment of the matters the secretary is required to consider before providing concurrence (**Section 7.0**).

This clause 4.6 variation request relates to the development standards within clause 7.4 'Building separation in Liverpool City Centre' of the Liverpool LEP 2008, and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated December 2020. This clause 4.6 variation request demonstrates that compliance with the building separation development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify variation to the standard. Therefore, the DA may be approved with the variations proposed in accordance with the flexibility allowed under clause 4.6 of the Liverpool LEP 2008.

1.1 Concept DA Approval (DA-585/2019)

Importantly, it is noted that in approving the Concept Proposal (DA-585/2019) for the site, the Sydney Western City Planning Panel approved variations to the same building separation development standards in the same locations, proposed with this variation request, but of a greater magnitude. On the basis that the consent authority has recently determined that variations greater than those proposed with this request (in the same locations) satisfy the requirement of clause 4.6 of the Liverpool LEP 2008, it is considered that there are sufficient environmental planning grounds to support the proposed variations. **Figure 1** below illustrates the variations approved by the Panel on 31 August 2020. **The variations the subject of this request are of a lesser magnitude given the proposed buildings do not occupy the full extent of the approved building envelopes (our emphasis).**

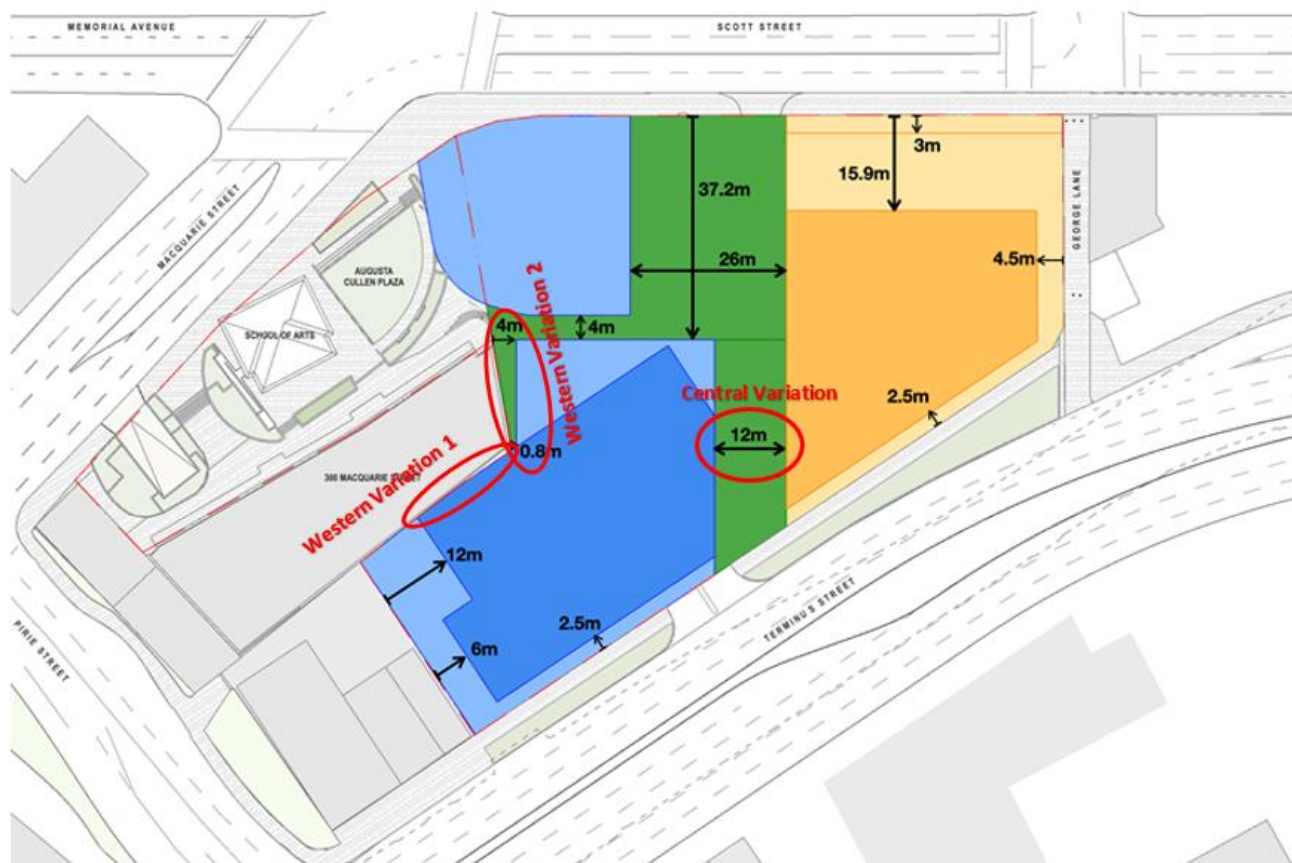


Figure 1 Approved building separation variations under the Concept DA approval (DA-585/2019)¹

Source: FJMT

¹ Of these three variations approved as part of the Concept DA consent, this DA and the accompanying clause only relates to the central variation and the new laneway variation created by breaking the eastern building envelope as part of this development proposal

2.0 Development standard to be varied

This clause 4.6 variation request seeks to justify contravention of the development standards set out in clause 7.4(2)(d) and clause 7.4(2)(e) of the Liverpool LEP 2008. Clause 7.4 states 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.*

(2) *Development consent must not be granted to development for the purposes of a building on land in Liverpool city centre unless the separation distance from neighbouring buildings and between separate towers, or other separate raised parts, of the same building is at least—*

(a) 9 metres for parts of buildings between 12 metres and 25 metres above ground level (finished) on land in Zone R4 High Density Residential, and

(b) 12 metres for parts of buildings between 25 metres and 35 metres above ground level (finished) on land in Zone R4 High Density Residential, and

(c) 18 metres for parts of buildings above 35 metres on land in Zone R4 High Density Residential, and

(d) 12 metres for parts of buildings between 25 metres and 45 metres above ground level (finished) on land in Zone B3 Commercial Core or B4 Mixed Use, and

(e) 28 metres for parts of buildings 45 metres or more above ground level (finished) on land in Zone B3 Commercial Core or B4 Mixed Use.

(our emphasis bold)

The site is within a B4 Mixed Use zone, as such it is land to which clause 7.4(2)(d) and 7.4(2)(e) applies.

3.0 Nature of the variations sought

For clarity, the building separation development standards prescribed under clause 7.4 only apply to existing buildings or buildings on the same site. In this regard, the two variations specified below are the only variations to which this clause 4.6 request relates. They are herein referred to as the 'central variation' and 'laneway variation'. The central variation is apparent to the west of the proposed commercial office building and relates to its separation from the civic building envelope approved as part of the Stage 1 DA for the Liverpool Civic Place project (DA-585/2019), the detailed design of which is the subject of a separate Stage 2 DA for Phase A of the Liverpool Civic Place project (DA-836/2020). The laneway variation constitutes the separation of the proposed commercial office building from the co-living building the subject of this DA. The variations are illustrated in **Figure 2** below.

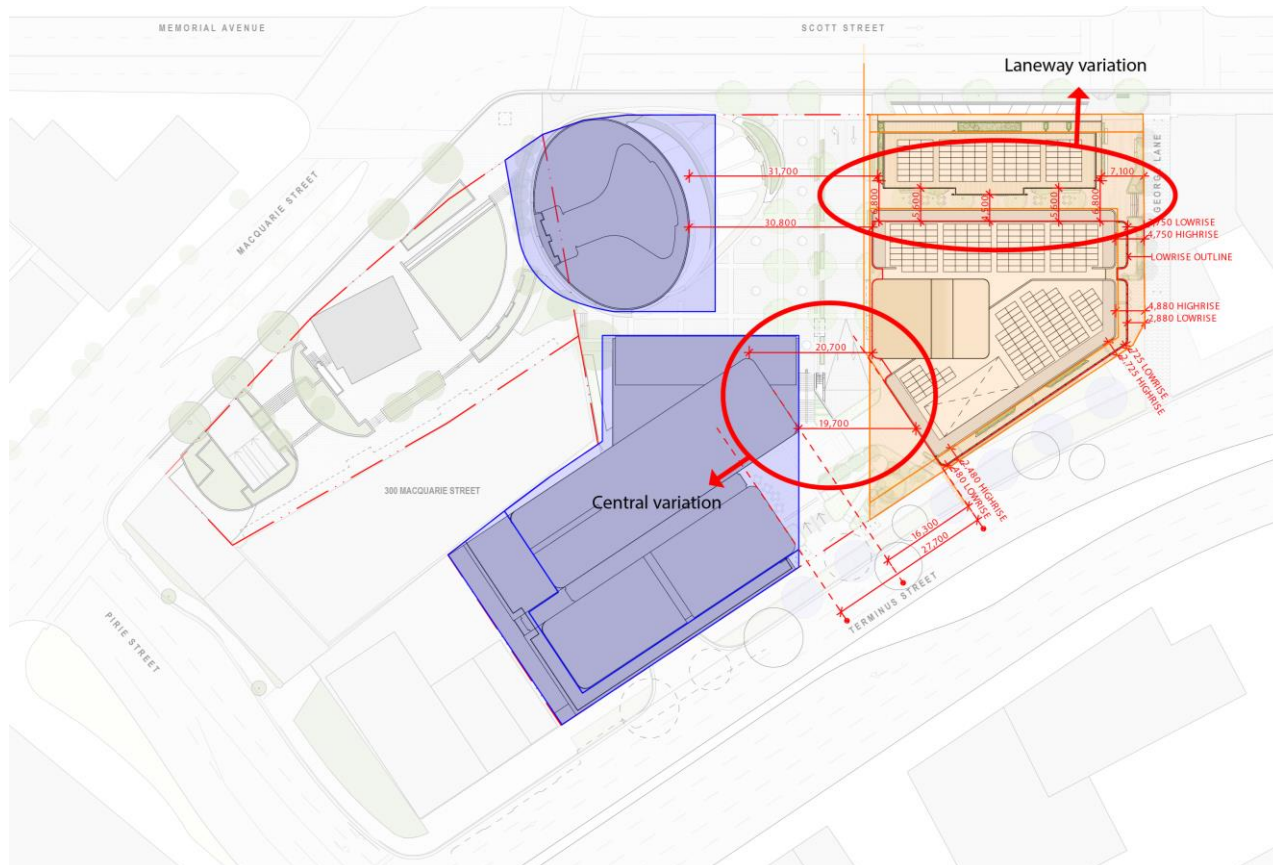


Figure 2 Visual representation of proposed building separation variations

Source: FJMT (with additions)

3.1 Central variation

As illustrated on the Architectural Plans in Appendix A of the SEE and in **Figure 2**, the building separation between the proposed commercial office building and the approved south-western building envelope (DA-585/2019) (the detailed design of which is the subject of a separate DA for Phase A of Liverpool Civic Place [DA-836/2020]) ranges from 19.7 to 27.7m above 45m in height. Clause 7.4(2)(e) requires a minimum separation at this height to be 28m. The proposed variation to this development standard ranges from 0.3m (1.1%) to 8.3m (29.6%). This is a greater separation and an improvement to the separation approved with the Stage 1 DA, where a 12m separation was approved. A visualisation of the extent of this variation is provided in **Figure 3** and **Figure 4**.

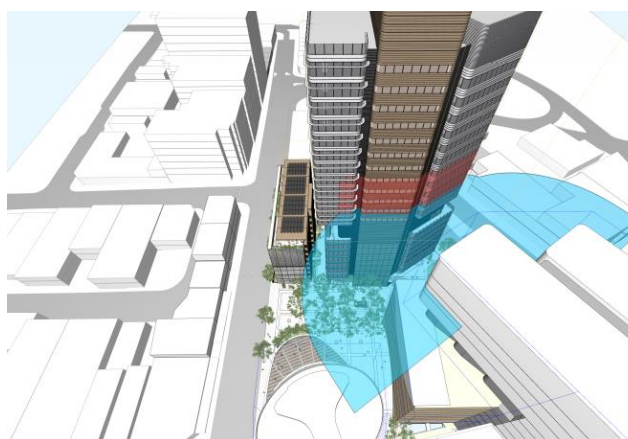


Figure 3 Central variation as viewed from west
Source: FJMT

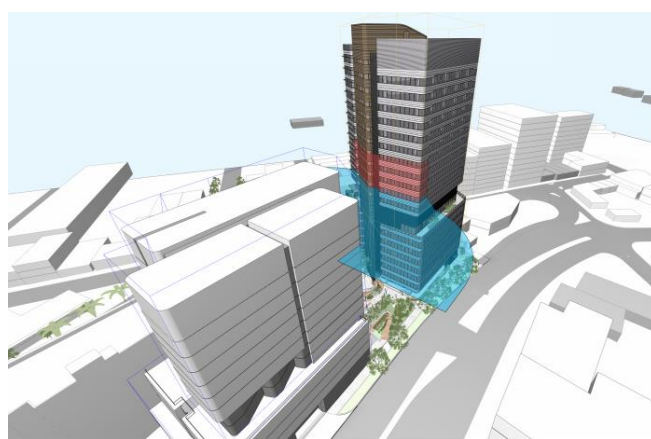


Figure 4 Laneway variation as viewed from east
Source: FJMT

3.2 Laneway variation

As illustrated in **Figure 2** above, the building separation between the proposed commercial office building and co-living building ranges from 4.5m to 6.8m between 25m and 45m in height above ground level. Clause 7.4(2)(d) requires a minimum separation at this height to be 12m. The proposed variation to this development standard ranges from 7.5m (62.5%) to 5.2m (43.3%). Visualisations of the laneway variation are provided at **Figure 5** and **Figure 6**.



Figure 5 Laneway variation as viewed from west
Source: FJMT



Figure 6 Laneway variation as viewed from east
Source: FJMT

4.0 Clause 4.6 (3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five ways in which it could be shown that a variation to a development standard was unreasonable or unnecessary. However, His Honour in that case (and subsequently in *Initial Action*) confirmed that these five ways are not exhaustive; they are merely the most commonly invoked ways. Further, an applicant does not need to establish all of the ways.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis may be of assistance in applying clause 4.6 given that subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]; *Initial Action* at [16]).

The five methods outlined in *Wehbe* were:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
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 (**Fourth Method**).
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

In this instance, the **First Method** is of particular assistance in establishing that compliance with a development standard is unreasonable or unnecessary.

4.1 The objectives of the development standard are achieved notwithstanding the non-compliance (First Method)

The objective of the development standards contained in clause 7.4(2)(d) and clause 7.4(2)(e) of the Liverpool LEP 2008 is:

“to ensure minimum sufficient separation of buildings for reasons of visual appearance, privacy and solar access”

The single objective places an emphasis on visual appearance, privacy and solar access. These components are assessed in relation to the proposed development below. This is also reinforced within **Section 4.0** of the SEE and the Design Report in Appendix C of the SEE.

4.1.1 Visual appearance

The site is in an advantageous central location for site access and activation, site division and the positioning of a gateway tower marker development. The southern end of the Liverpool CBD largely consists of dated low scale buildings and will significantly benefit from urban revitalisation. The massing of the proposed development (including the proposed building separation variations) has been designed to facilitate highly visible and transparent public facilities and an urban marker development in this location. It furthermore seeks to seamlessly integrate the proposal with the heritage significant ‘Hoddle Grid’, as discussed below.

Central variation

A fundamental urban design principle to enhance the site's visual appearance is to recognise the historic Liverpool 'Hoddle grid', with an extension of the George Street service way, as illustrated in **Figure 7**. Unlike George Street, Macquarie Street and Scott Street, the serviceway is not itself heritage listed, however, recognising the alignment of the serviceway through the site is a conscious urban design gesture to enhance the visual appearance of the proposed development. The separation distance between the proposed commercial office building and the south-western building contained within Phase A of Liverpool Civic Place, has been informed by the spatial characteristics of the service grid.

In this regard, **the proposed separation distance ranges from 19.7m to 27.7m, increasing from those approved with the Concept DA at 12m**, as illustrated in **Figure 8**. The proposed increase to the building separation between the commercial office building and the civic building of Phase A allows for the development to seamlessly integrate with the urban fabric in an even stronger and more sympathetic manner, creating a superior visual appearance outcome for the site. Without the proposed variation, this superior visual appearance outcome involving a clean alignment of the buildings with the historic Liverpool 'Hoddle grid' would not be achievable (see **Figure 3** and **Figure 4** above). **(our emphasis)**

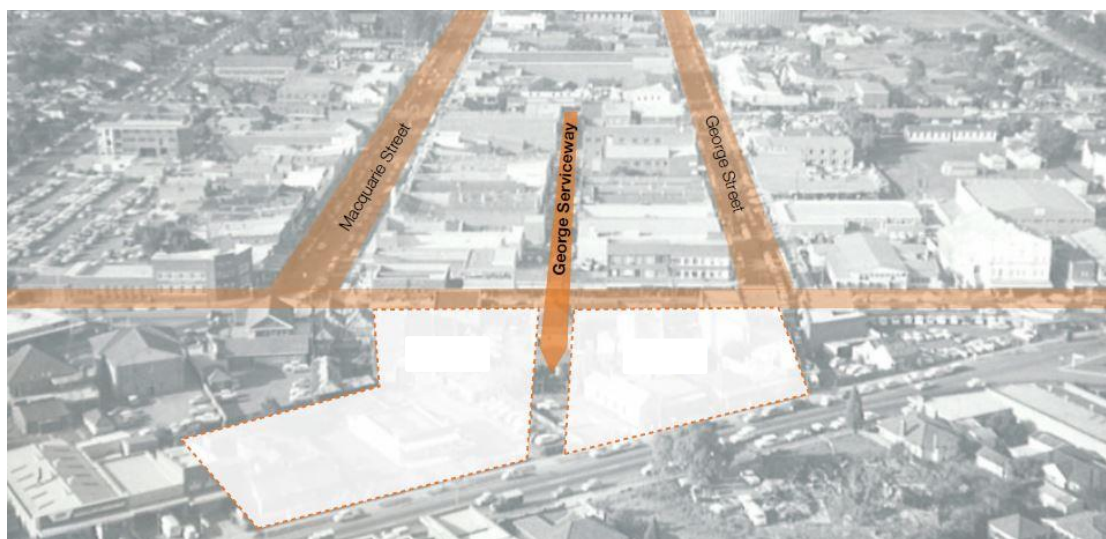


Figure 7 Hoddle grid characteristic

Source: FJMT

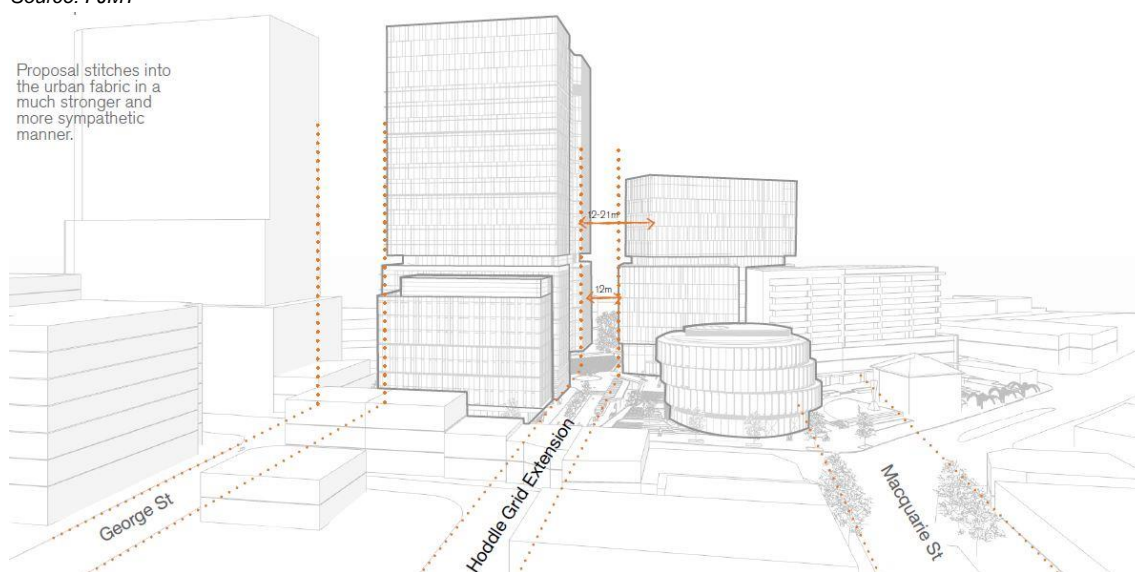


Figure 8 Hoddle grid informed building separation

Source: FJMT

Laneway variation

The proposed separation (including the variation above 25m) between the commercial office building and co-living building is proportionate to their varying scales, whereby the co-living building is significantly shorter than the commercial office building to the rear. When viewed from key vistas, particularly from the west, the separation provided between the two buildings is appropriate and allows for a positive spatial relationship between the two buildings, as illustrated in **Figure 9**.



Figure 9 View of the two buildings from the west

Source: FJMT

The separation proposed between the two buildings is important from a visual appearance perspective given the objective to make the space a pedestrian laneway, enhance the permeability throughout the precinct and create better walking connections through the Liverpool CBD. The separation proposed allows for the provision of a laneway between the two buildings and facilitates a permeable and activated ground plane. It is noted that close building proximity and ground floor activation are inherent to a successful laneway. The extent of the proposed separation including the variation provides a sense of enclosure and intimacy which is key to the appreciation of the space as a laneway (see **Figure 10**). In this regard, further separation will diminish the laneway pedestrian experience.

While the non-compliant volume as illustrated in **Figure 5** and **Figure 6** relates to the upper aspect of the co-living facility or commercial building, the removal of any portion of either building at these upper levels to comply with this development standard, would culminate in an incongruous built form relationship between the two buildings. Furthermore, as noted above, the removal of the upper levels of either of these buildings where the non-compliant volume is located would reduce the sense of enclosure, which is paramount to the appreciation of the space as a laneway.

We also refer to the Design Excellence Panel feedback dated 23 March 2021, where it states:

*“The Panel notes that the proposed building separation (i.e. between the co-living building and the commercial tower) is inconsistent with LEP Clause 7.4. In this instance, **the proposed separation distances can be supported** based on the following reasons;*

- *A short length of the proposed laneway;*
- *Varying distances of separation towards the centre and the edges;*
- *It faces a transitional space servicing a small number of co-living spaces and no habitable rooms front on to the laneway;*
- *The design of the privacy screen is being detailed and will be developed further to improve visual amenity/privacy; and*
- *The proposed laneway is not subject to an any adjacent development.*



Figure 10 Proposed laneway space

Source: FJMT

4.1.2 Privacy

Central variation

The central variation is dividing the proposed commercial office building from the Phase A civic building, which will contain public administration, commercial office, and childcare uses. In the absence of any sensitive residential use and by virtue of the proposed uses, the privacy impacts internal to the site are considered negligible.

Laneway variation

The laneway variation divides the proposed co-living building to the north from the proposed commercial office building at the south. In order to address any potential privacy impacts resulting from the proximity of the two buildings, the design of the co-living building incorporates a bronze perforated screen along its southern elevation, which conceals the co-living rooms contained in this building from any overlooking and affords the required level of privacy to this residential use. The screen extends up the full extent of the southern elevation, ensuring the area to which the variation occurs (above 25m) is also screened.

An image of the screening that is proposed at the southern façade of the co-living building is shown in **Figure 11** below. The proposed screening provides an architectural response to the southern edge of the co-living building and ensures that the proposed separation between the two buildings achieves the privacy objectives of the separation control.

Additionally, it is noted that only a small component of the development exceeds the required separation distance set out in clause 7.4, as illustrated in **Figure 12** and **Figure 13**. Notwithstanding this, the privacy treatment incorporated into the southern façade of the co-living building negates any adverse privacy impacts from arising due to the proposed extent of separation between the co-living building and the commercial office building.

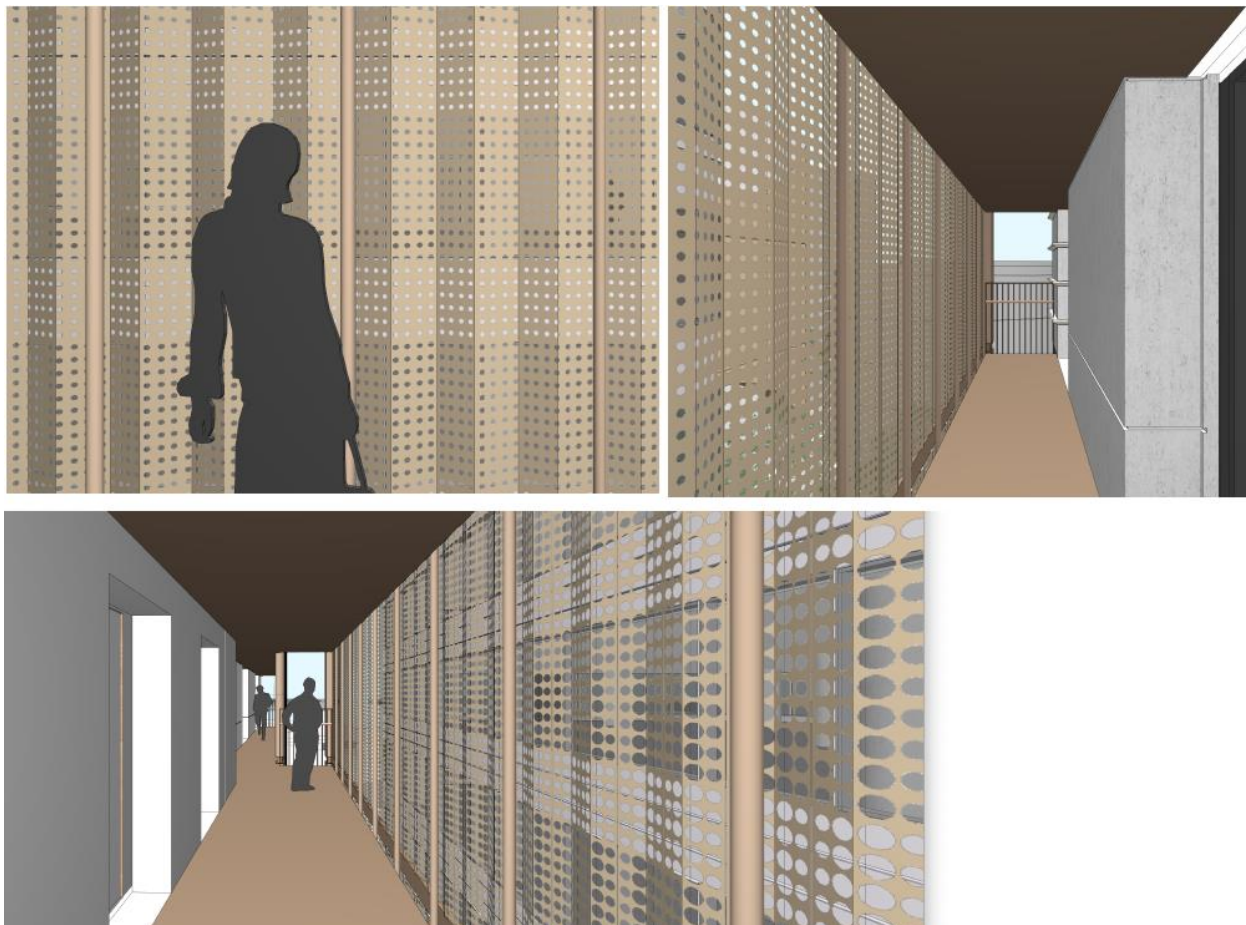


Figure 11 Southern elevation bronze perforated screen to allow for privacy of co-living rooms

Source: FJMT



- Non-compliant volume
- Horizontal plane 25m above ground level (12m separation)

Figure 12 Laneway variation as viewed from east

Source: FJMT

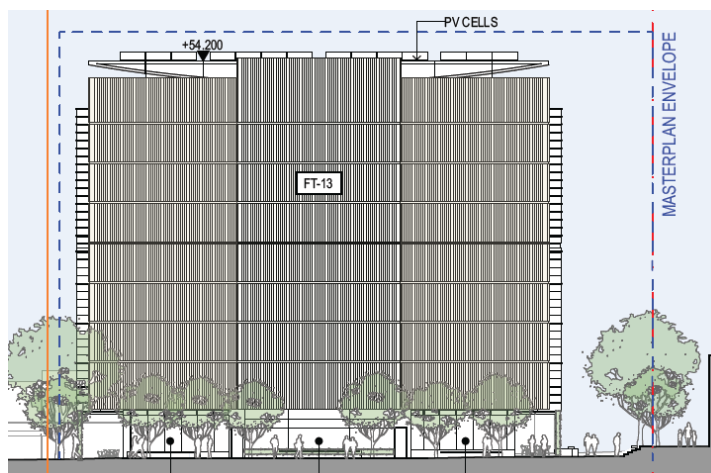


Figure 13 Co-living building southern elevation

Source: FJMT

4.1.3 Solar access

The proposed variations to the building separation development standard will not result in significant adverse impacts on solar access to the site or surrounding sites. In support of this, FJMT has prepared a detailed shadow study (included in the Design Report in Appendix C of the SEE). For absolute clarity, the shadow diagrams are based on the buildings contained within the proposed development during the winter solstice as illustrated at **Figure 14**, and include the buildings the subject of the Phase A DA. As such, this represents the worst case scenario.

Central variation

The central building separation will maintain a high level of solar access to surrounding development and key areas of the public domain and through-site link dividing the site. The shadow cast by the proposed development allows the new public domain area to the west of the Phase B and C buildings to be provided with substantial solar access throughout the day. As can be seen on the shadow diagrams, the shadow cast by the proposed development during the winter solstice will reach south of Pirie Street but pass over residential blocks allowing over 3 hours sunlight between 9am and 3pm. The primary open space on Scott / Macquarie Streets receives over 5 hours of sun, from 11am until the afternoon. The tower is placed at the southern end of the site to reduce overshadowing of public spaces. Shadows are predominantly cast over Terminus Street and the commercial zone to the south. Whilst some overshadowing ensues, this is appropriate within an urbanised and growing metropolitan centre.

Notwithstanding the above, the proposed development will culminate in an improved outcome compared to the approved Concept DA (DA-585/2019), as the proposed Phase B commercial tower is 5.2m shorter than the approved building tower envelope on its south side and does not use part of the envelope that is approved. Moreover, the proposed central variation has been reduced compared to the approved Concept DA, as it provides an additional 7.7m of separation from the proposed Phase A civic building. As such, there is considerably less overshadowing to the surrounding precinct, with the pink shading in the below shadow diagrams representing the reduction in the extent of overshadowing caused by the proposed development (see **Figure 14**).

Laneway variation

The laneway variation does result in any additional shadow impacts on surrounding environment which were assessed and considered acceptable as part of the Concept DA, as evidenced through **Figure 14** below.



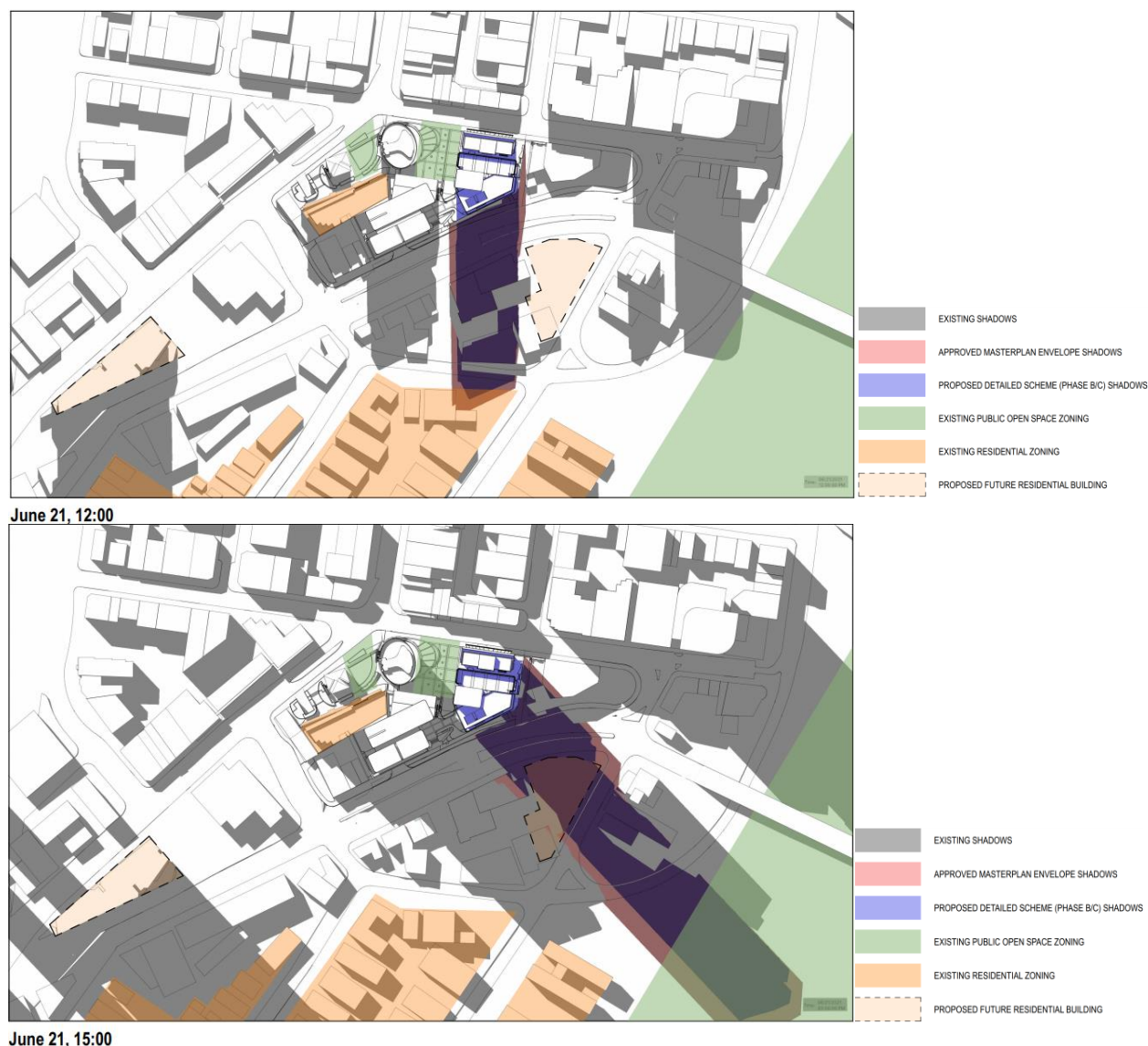


Figure 14 Winter solstice shadow diagrams

Source: FJMT

4.1.4 Wind impact

Whilst wind impacts are not specified within the objective of the building separation development standard, it is a relevant consideration when discussing the proximity of building envelopes and the impact on the surrounding pedestrian environment. In this regard, Windtech has prepared a Wind Impact Statement which is provided in Appendix P of the SEE. In particular, Windtech has examined the likely effect of wind on the various trafficable outdoor areas within and surrounding the site.

The results of the wind analysis have confirmed that even with the proposed variations, it is not expected that the wind conditions at the site will pose any safety risks to pedestrians in the area, and that wind conditions for the majority of trafficable outdoor locations within and around the development will be suitable for their intended uses. The Wind Impact Assessment recommends for some areas to include mitigation measures to improve conditions, as follows:

- Lower ground floor
 - The inclusion of the proposed landscaping as indicated on the lower ground floor plans, with densely foliating, evergreen species.

- Upper ground floor
 - The inclusion of a 3m wide awning at the north-eastern aspect of the office building. The awning should start approximately midway along the northern aspect and wrap around the corner continuing all the way along George Lane.
 - The inclusion of a 3m high impermeable screen located on the south eastern corner of the office building. The screen should abut the awning along George Lane and wrap around along George Lane.
 - The inclusion of a densely foliating evergreen tree capable of growing 5-8m high and wide, located inside the south eastern wrap-around screen.
- Level 7 terrace – commercial office building
 - The inclusion of the proposed landscaping as indicated on the level 7 terrace plan drawings, with the use of densely foliating, evergreen species.
 - Recommended additional landscaping along the eastern aspect of the level 7 terrace, using densely foliating evergreen species with interlocking canopies.
 - The inclusion of a 3m high impermeable screen along the eastern perimeter of the level 7 terrace. The screen should wrap around the south-east corner and continue along until it reaches the first adjacent landscaping zone.

4.1.5 Summary

The objectives of the development standard are achieved notwithstanding the variations, given the following reasons:

- The separation distance between the commercial office building and the civic building contained in Phase A of Liverpool Civic Place project has been informed by the spatial characteristics of the George Street service grid. This is a visual gesture to the heritage significant 'Hoddle grid'. Moreover, the proposed development involves an increase to the separation approved as part of the Concept DA (DA-585/2019), from 12m to 19.7m (7.7m increase).
- The central separation is dividing non-residential uses. As such, privacy impacts internal to the site are considered negligible.
- The co-living rooms contained within the co-living building will be screened from the commercial office building through the use of a perforated bronze metal screen along the southern elevation, preventing any onlooking into the south of the co-living building and achieving the privacy objectives of the control.
- The proposed laneway variation is important from a visual appearance perspective as it improves the visual relationship of the commercial office and co-living building, while also providing an appropriately sized laneway and a level of separation that creates a sense of enclosure and intimacy which is key to the appreciation and sense of the space as a laneway.
- When viewed from key vistas, particularly from the west, the separation provided between the two buildings is appropriate and allows for a positive spatial relationship between the two buildings.
- The shadow cast by the proposed development during the winter solstice will reach south of Pirie Street but pass over residential blocks allowing over 3 hours sunlight between 9am and 3pm, while also allowing the primary open space on Scott / Macquarie Streets to receive over 5 hours of sun, from 11am until the afternoon. The proposal reduces the bulk and scale of the proposed development by minimising the height of the commercial tower by 5.2m and not using part of the approved envelope, therefore resulting in considerably less overshadowing to the building envelopes approved under the Concept DA (DA-585/2019).
- Windtech concludes that the proposed development (including building variation separations) is capable of accommodating a development that can achieve suitable wind conditions for pedestrians in and around the site.

5.0 Clause 4.6(3)(b) There are sufficient environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the LEP requires the consent authority to be satisfied that the applicant's written request has adequately addressed clause 4.6(3)(b), by demonstrating:

That there are sufficient environmental planning grounds to justify contravening the development standard.

The environmental planning grounds relied on in the written request under clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action v Woollahra Municipal Council* [24] and *Turland v Wingecarribee Shire Council* [42]).

There are sufficient environmental planning grounds to justify a flexible approach to the application of the height control as it applies to the site. In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. The applicable circumstances that relate to the site are discussed below.

5.1 Concept DA Approval (DA-585/2019)

In approving the Concept Proposal (DA-585/2019) for the site, the Sydney Western City Planning Panel approved variations to the same building separation development standards in the same location as the central variation, proposed with this variation request, but of a greater magnitude. The panel in its determination and statement of reasons noted the following in relation to its support for the clause 4.6 Variation request:

Application to vary a development standard

There are two areas of non-compliance with clause 7.4(2)(d) and clause 7.4(2)(e) of the Liverpool LEP 2008 concerning building separation arising from the proposed concept:

- (i) First, a nil separation is provided from the proposed south-western building envelope to the existing mixed-use building at 300 Macquarie Street up to nine storeys high. That non-compliance arises in the context of 300 Macquarie Street presenting a blank rear wall its western boundary, with all apartments and tenancies of that building oriented to the north west. Issues of visual appearance, privacy and solar access which are the objectives of the standards are therefore unlikely to be compromised through that non-compliance.*
- (ii) Second, adjacent to the central thoroughfare between Scott Street and Terminus Street, separation between the proposed south-western tower envelope and the eastern tower envelope is 12m above 45m in height, whereas the minimum separation required at this height by clause 7.4(2)(e) strictly applied is 28m. The proposed variation to this development standard ranges from around 7m (25%) to 16m (57%).*

Again however, the panel is satisfied that the aims of achieving a superior outcome in terms of visual appearance, privacy and solar access can be achieved without strict compliance provided that the final DA design responds to the pinch point between the two built forms with strong articulation and a creative approach to the final facades. That process has been begun with the rotation of the above podium tower on the western side of the thoroughfare. The issue of wind velocity between the two building elements will require further attention at detailed DA stage and potentially will require modelling of the final proposals to ensure a satisfactory result. Shadow modelling has been supplied to demonstrate that adequate compliance can be achieved in future detailed designs.

The Panel was particularly persuaded by the information included with the concept proposal to the effect that the envelopes for which approval is sought have been "deliberately designed as a 'loose fit' with sufficient excess volume to allow for design excellence to be achieved through the detailed building design and articulation". The Panel will look to see that commitment carried through to the final design, and anticipates that it will be a strong theme in future consultation with Council's Design Excellence Advisory Panel.

It is on that basis that following careful consideration of the design against the written request from the applicant, made under cl 4.6 (3) of the Liverpool Local Environmental Plan 2008 (LEP), that the Panel is satisfied that the proposal has demonstrated that:

- a) compliance with clause 7.4(2)(d) and clause 7.4(2)(e) of the Liverpool LEP 2008 is unreasonable or unnecessary in the circumstances; and*
- b) there are sufficient environmental planning grounds to justify contravening the development standards.*

The panel is satisfied that:

- a) the applicant's written request adequately addresses the matters required to be addressed under cl 4.6 (3) of the LEP; and*
- b) the development is in the public interest because it is consistent with the objectives of clause 7.4(2)(d) and clause 7.4(2)(e) of the LEP and the objectives for development in the B4 Mixed Use zone; and*
- c) the concurrence of the Secretary to the variation has been assumed.*

On the basis that the consent authority has recently determined that a variation greater than the central variation proposed with this request (in the same location) satisfies the requirement of clause 4.6 of the Liverpool LEP 2008, it is considered that there are sufficient environmental planning grounds to support the proposed central variation. The central variation the subject of this request is of a lesser magnitude given the proposed buildings do not occupy the full extent of the approved building envelopes.

5.2 Site characteristics

The following subsections outline the site characteristics that present as the environmental planning grounds to justify the proposed building separation variation.

Central variation – land use separation

The proposed variation divides the proposed commercial office building from the civic building to be located in Phase A of the Liverpool Civic Place project, which contains a mixture of public administration, commercial office, and child care uses. Both buildings do not contain any residential uses. As a result, vast building separation is not warranted, which would otherwise be required to maintain high levels of privacy to any private dwellings in the circumstance of these buildings containing residential development. It is widely accepted that these uses can coexist in neighbouring buildings without warranting a significant building separation to maintain privacy. In the absence of any significant sensitivities between this mix of uses and the nature of the proposed uses within the civic building and the proposed commercial office building, the proposed separation distance is considered to be a sufficient environmental planning ground to justify the proposed building separation variation.

In addition to this, it is highlighted that the central variation relates to the secondary façade or short sides of the building envelopes. The primary facades of the western envelope are oriented to the north west and south west and the primary facades of the eastern envelope are oriented to the north and the south.

Central variation – Liverpool CBD 'Hoddle Grid'

The site is located in a local context that is characterised by the heritage significant 'Hoddle grid' network as detailed at **Section 4.1.1**. The proposed building separation variation is a result of creating a building separation between Phase A and Phase B and C and has been informed by the spatial characteristics of George Lane. This is considered a strong urban design move which is unique to the site, and will stitch the proposed development to its local urban context and in conjunction with the separation of uses argument above, is a sufficient environmental planning ground to justify the central variation.

Laneway variation – visual screening

The main issue arising from the laneway variation are potential privacy impacts on the co-living rooms contained in the co-living building. However, these are effectively mitigated through the proposed development's incorporation of a perforated bronze screen along the southern façade of the building. The screen conceals the co-living rooms from direct overlooking from the commercial office building. Moreover, the colour and materiality of the screen harmoniously integrates with the broader Liverpool Civic Place precinct and the proposed development. As such, this adequately addresses privacy impacts and is a sufficient environmental planning ground to justify the laneway variation.

Laneway variation – provision of urban marker commercial building and site activation

The commercial office building has been designed to stand out as an urban marker that helps the precinct to be perceived as the southern gateway to the city. As part of this, the building has adopted a large form which is critical to creating highly functional, adaptable, and flexible floor plates that are attractive to a diversity of commercial tenants. As such, this necessitates the provision of the proposed building separation between the commercial office building and co-living buildings.

Laneway variation – laneway activation and permeability

The two buildings are separated by an open laneway and associated landscaping embellishments which improves the permeability of the precinct. It is noted that close building proximity and ground floor activation are inherent to a successful laneway. The extent of the proposed separation allows for a harmonious built form relationship between the commercial office building and the co-living building, while also allowing for a sense of enclosure and intimacy which is key to the appreciation of the space as a laneway. Furthermore, the ground plane is activated through the inclusion of retail tenancies at the ground plane which are selectively placed so that they front key components of the public domain including the civic plaza, central laneway, and Scott Street pocket park. Hence, the visual screening adopted, the need for an urban marker commercial development and the activation of the ground plane through the provision of a laneway and retail tenancies, are all factors which clearly highlight that there are sufficient environmental planning grounds to justify the laneway variation.

5.3 Consistency with the Objects of the Environmental Planning and Assessment Act 1979

In *Initial Action*, the Court stated that the phrase ‘environmental planning grounds’ is not defined but would refer grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the Act. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, in **Table 1** we consider how the proposed development is consistent with each object, notwithstanding the proposed variation of the building separation development standard.

Table 1: Assessment of proposed development against the Objects of the EP&A Act

Object	Comment
(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources	<p>The proposed building separations will promote the economic and social welfare of the community through the introduction of a tangible improvement in built form in the area that will respond appropriately to the strategic need for new public and employment generating infrastructure in a growing metropolitan centre.</p> <p>Additionally, the proposed development provides for new construction and operational jobs in close proximity to public transport. Further, the attraction of employees and visitors is reasonably expected to provide a higher per capita expenditure and boost to the local economy than the existing use of the site. This will ultimately assist in supporting the on-going prosperity of Liverpool.</p>
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment	<p>The proposed development including the building separations will not preclude the development from achieving ecologically sustainable development by ensuring compliance with the performance standards for the energy efficiency of buildings. Further, the building separation variations are in locations that will have no negative impact on environmental and social considerations and will support the economic health of the City's Metropolitan Centre.</p>
(c) to promote the orderly and economic use and development of land	<p>The site is significantly underutilised and is largely occupied by low scale commercial buildings and car parks in need of urban regeneration. The site is strategically located within the Liverpool CBD and has excellent amenity and access to public transport. The proposed development with varied building separations is considered to be a balanced and orderly design outcome that responds to the unique characteristics of the site and does not represent the over intensification of land.</p>
(d) to promote the delivery and maintenance of affordable housing,	<p>This object is not relevant to this proposed development.</p>
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	<p>The proposed development will have no impact on threatened species or ecological communities.</p>

Object	Comment
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	A fundamental urban design principle to enhance the site's visual appearance is to recognise the heritage significant Liverpool 'Hoddle grid' with an extension of the George Street service way, as illustrated at Figure 7 above. Unlike George Street Macquarie Street and Scott Street, the service way is not itself heritage listed, however this is a conscious urban design gesture to enhance the visual appearance of the proposed development. As such, the proposed building separation variation is a direct response to the site's heritage context and seeks to allow for a clear alignment with the historic Liverpool 'Hoddle Grid'.
(g) to promote good design and amenity of the built environment,	The proposed development has been designed by renowned architects FJMT and will be subject to a review from Council Design Excellence Advisory Panel. The proposed development is consciously good design in this regard. The proposed variation to the building separation development standard will result in urban design outcome commensurate with the site's strategic and locational attributes as a growing CBD is Greater Western Sydney. The proposed development is compatible with the scale of the emerging development in the Liverpool city centre, and it will not result in an additional adverse environmental impact on the surrounding area as detailed at Section 4.1 above.
h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,	The proposed building separations will not preclude the development from complying with all relevant BCA codes and from promoting the health and safety of occupants.
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,	This object is not relevant to this proposed development.
j) to provide increased opportunity for community participation in environmental planning and assessment.	The proposed development will be publicly notified in accordance with Council's requirements.

6.0 **Clause 4.6(4)(A)(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out**

In *Initial Action* it is established that 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. Accordingly, it is demonstrated throughout this clause 4.6 that the proposal is in the public interest as it is entirely consistent with the objectives of the development standard and the objectives of the zone.

6.1 **Consistency with the objectives of the development standard**

The proposed development is consistent with the objectives of the building separation development standard, for the reasons discussed in **Section 4.1** of this report.

6.2 **Consistency with the B4 – Mixed Use Zone**

To provide a mixture of compatible land uses

The proposed development will facilitate a true mixed-use precinct. As outlined in the SEE, this proposed development seeks approval for commercial office, retail and boarding houses uses, along with additional public domain area. Specifically:

- Construction and use of a 22 storey commercial office building, comprising:
 - Lower ground and upper ground retail floor space; and
 - 19 commercial office levels.
- Construction and use of a 9 storey co-living building, comprising:
 - Lower ground level retail floor space; and
 - 8 co-living levels.
- Construction of a 4 level basement, including:
 - 150 parking spaces;
 - Motorcycle, bicycle parking spaces and end of trip facilities; and
 - Loading dock facilities;
- Landscaping and public domain works including:
 - a pocket park fronting Scott Street; and
 - an east west through site link connecting George Lane to the central public plaza.
- Extension and augmentation of services and infrastructure as required.

As such, it is abundantly clear that the proposed development includes a mix of compatible uses and the proposed variation to the building separation development standard does not stifle this.

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 site is located approximately 300m from Liverpool Railway Station and is in the Liverpool CBD which is well serviced by bus public transport. The proposed development will therefore contain a mixture of uses in a location that is close to existing and future transport infrastructure and will allow the integration of suitable uses in an accessible location, encouraging public transit patronage. Bicycle parking and end of trip facilities are also integrated into the development which will help to encourage active transportation, including walking and cycling. The proposed variation to the development standard is therefore consistent with this objective.

To allow for residential and other accommodation in the Liverpool city centre, while maintaining active retail, business or other non-residential uses at street level

The proposed development includes boarding house uses within the co-living building, however this building contains active retail uses at street level as a means of activating the ground plane and providing active uses to cater to the residents of the proposed co-living accommodation. However, the co-living building does not constitute the part of the development contributing to the proposed building separation variation.

To facilitate a high standard of urban design, convenient urban living and exceptional public amenity

As outlined at **Section 4.1**, the proposed building separations do not result in an adverse urban design impact or result in any significant adverse environmental impact. The central variation is generally consistent with the spatial characteristics of the Liverpool 'Hoddle grid', as such the variation is generated by an urban design gesture to the local historical context.

6.3 Building Separation in a CBD context

The building separation development standards contained under clause 7.4 have been embedded in the Liverpool LEP 2008 for over a decade. In the time since, the strategic vision for Liverpool has evolved which is supported by key strategic plans prepared by the NSW State Government, including the Greater Sydney Region Plan 'A Metropolis of Three Cities' and the Western City District Plan. Specifically, the State Government has identified Liverpool as a Metropolitan Centre within the Western Parkland City, identifying that:

The established centres of Liverpool, Greater Penrith and Campbelltown-Macarthur will be critical locations for commercial and retail businesses and health, education and other services as the city grows.

Given the location of the site within the Liverpool Metropolitan Centre and the strategic objectives for Liverpool as set out in the Greater Sydney Region Plan 'A Metropolis of Three Cities' and the Western City District Plan it is more appropriate to consider the proposed development against the typical characteristics of a site within a growing strategic metropolitan centre. Accordingly, the building separations illustrated in **Figure 1** above, would be consistent with the building separation controls within other Sydney Metropolitan Centres, such as Sydney CBD, Parramatta CBD and North Sydney CBD. Specifically, the following benchmarks have been drawn.

- Sydney DCP 2012 – Section 5 Central Sydney
 - Above a height of 45m, windows or balconies of commercial buildings are to be set back at least 3m from side and rear property boundary. In new commercial buildings, windows at the same level as the principal living room windows or balconies of adjacent residential buildings, or above a height of 45m are to be set back from side and rear boundaries by at least 3m. Walls without windows do not need to be set back.
- Parramatta DCP 2012 – Section 4 Parramatta City Centre
 - Above a height of 54m, the minimum building setbacks from the side property boundaries is 6m. The building separation distances between buildings on the same site are not to be less than those required between buildings on adjoining sites, unless it can be demonstrated that reducing the separation distances provides adequate privacy and solar access to the buildings concerned.
- North Sydney DCP 2012
 - Buildings containing non-residential activities must be set back a minimum of 3m from the property boundary where the adjoining site has balconies or windows to main living areas of dwellings or serviced apartments located at the same level.

Liverpool is the most proximate Metropolitan Centre to the future Western Sydney Airport Aerotropolis at Badgerys Creek. As such, it is abundantly clear that the strategic vision for Liverpool no longer reflects a low urban scale. Accordingly, the legacy building separations development standards, are not conducive to facilitating a growing Metropolitan Centre and this is reflected in by the inconsistency with the abovementioned controls.

7.0 Secretary's Concurrence

Under clause 4.6(5) of the Liverpool LEP 2008, the Secretary's concurrence is required prior to any variation being granted. Under clause 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 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 clause 4.6, subject to the conditions in the table in the notice. We note that none of the conditions in the table apply to the proposed development, therefore the Secretary's concurrence is assumed. Nevertheless, the following section provides a response to those matters set out in clause 4.6(5) of the Liverpool LEP 2008 which must be considered by the Secretary.

7.1 Clause 4.6(5)(a): Whether a contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation does not raise any matters of significance for State or regional environmental planning. The variation to the building separation development standard will not contravene any overarching State or regional objectives or standards or have any effect outside the site's immediate area.

7.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

Maintaining the development standard would not result in any public benefit in this situation. The site is significantly underutilised and is subject to challenging development constraints. Strict numerical compliance would not yield a development that is commensurate with the objectives of the strategically important 'opportunity sites' stipulated under clause 7.5A of the Liverpool LEP 2008. We note, the FSR is well below the 10:1 envisaged for opportunity sites under the Liverpool LEP 2008. In this regard, it is abundantly clear that the proposed variation will not result in the over intensification of the site.

The reduction of the building separation would result in the Applicant exploring an alternate land use to ensure the commercial viability of the site. This would result in a lost opportunity to deliver the Liverpool Civic Place envisaged by Council and the community. Strict numerical compliance in this instance would compromise the integrity of this design response, by requiring that the proponent reconsider the reallocation of building mass on the site, or otherwise risk the viability of the development and encumber the various community and commercial benefits the proposed development will provide.

The proposed variation is in the public interest as it:

- enables additional opportunities to create a vibrant, accessible place for future tenants and the local community;
- will result in a positive urban design relationship with the heritage significant 'Hoddle grid';
- creates additional jobs required to grow a competitive commercial core;
- enhances and responds sensitively to the rich heritage setting, creating spaces that reflect the civic scale and significance of the immediate precinct;
- does not result in any additional adverse environmental impacts; and
- the Architectural Plans in Appendix A of the SEE demonstrate that the proposed buildings will accommodate a development that is significantly below the maximum permissible GFA, as such the extent of the non-compliance does not result in an over intensification of the site.

7.3 Clause 4.6(5)(c): Other matters required to be taken into consideration before granting concurrence

We are not aware of any other matters that the Secretary (or the consent authority, under delegation) is required to consider before granting concurrence.

8.0 Conclusion

This clause 4.6 variation request adequately addresses the matters in clause 4.6(3) by demonstrating that compliance with the building separation development standard contained in clause 7.4 of the Liverpool LEP 2008 is unreasonable and unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify the contravention. It also demonstrates that the proposed development will be in the public interest because it is consistent with the objective of the building separation development standard and the objectives of the B4 Mixed Use zone.

This clause 4.6 variation demonstrates that, notwithstanding the proposed variation to the building separation development standard, the proposed variation is acceptable as:

- in approving the Concept Proposal (DA-585/2019) for the site, the Sydney Western City Planning Panel approved variations to the same building separation development standards in the same location as the proposed central variation but of a greater magnitude. On the basis that the consent authority has recently determined that a variation greater than that proposed with this request (in the same location) satisfies the requirement of clause 4.6 of the Liverpool LEP 2008, it is considered that there are sufficient environmental planning grounds to support this proposed variation;
- it is consistent with the objectives of the zone and the building separation development standard in the Liverpool LEP 2008;
- it is compatible with the building separation/side setback provisions applicable to new development in existing CBD contexts such as Sydney, Parramatta, and North Sydney;
- it will not adversely impact on the amenity of surrounding land uses or development;
- the proposal accommodates a development significantly below the permissible GFA for the site, as such the extent of the variation does not result in an over intensification of the site;
- it will facilitate the orderly and economic redevelopment of an underutilised site in a strategic CBD location to a compatible scale as emerging development in the Liverpool commercial core; and
- it is in the public interest as it remains consistent with the objectives of the applicable land use zone and development standards and will provide additional employment opportunities in close proximity to an area which is well served by existing and emerging public transport and other services and facilities.

For the reasons set out in this variation request the development should be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the Liverpool LEP 2008.