

20 November 2019

The General Manager
Liverpool City Council
Locked Bag 7064
Liverpool BC, NSW 1871

Attention: Emmanuel Torres, Town Planning

Dear Emmanuel,

RE: DA – 257/2019: 127-129 FLOWERDALE ROAD, LIVERPOOL

This variation letter seeks to address the proposed variation to Clause 4.3 of the Liverpool Local Environmental Plan 2008 (LLEP08), which relates to the building development standard.

1. Introduction

This submission seeks a variation to Clause 4.3 of the Liverpool Local Environmental Plan 2008 (LLEP08), which relates to building height.

This submission has been prepared with regards to a development application over Nos. 127 – 129 Flowerdale Road, Liverpool for the demolition of all existing structures and the development of a five (5) storey residential flat building comprising of 11 x 1-bedroom units and 28 x 2-bedroom units to be wholly used for the purposes of affordable rental housing.

This submission follows an email from Council dated 4 November 2019 requesting additional information. Reference should also be made to the cover letter prepared by GAT & Associates and revised architectural drawings prepared by DKO Architects which accompany this package.

As detailed in this written request for a variation to building height being a development standard under LLEP08, the proposed development meets the requirements prescribed under Clause 4.6 of LLEP08.

2. Site Background

The subject site is commonly known as Nos. 127 – 129 Flowerdale Road, Liverpool and is legally defined as Lots 2 and 3 in Deposited Plan 373524. The subject site is located at the south eastern corner of Flowerdale Road and Smith Crescent. Refer to the figure on the following page.

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Figure 1 Site Location Map



Source: Six Maps, 2018

Subject site

The site provides for a primary frontage of 34.825m to Flowerdale Road and a secondary frontage of 70.995m to Smith Crescent. The subject property provides for an overall site area of 1,907m². In terms of its topography, the subject site provides for a gentle fall from Flowerdale Road to the eastern boundary. Levels across the site range from RL 20.86 at the centre of the Flowerdale Road frontage to RL 18.53 at the centre of the eastern boundary, representing a fall of 2.33 metres. Reference should be made to the submitted Survey Plan prepared by Norton Survey Partners.

Located on the subject site at present are detached dwellings with associated outbuildings. All existing structures will be demolished as part of the proposed works.

Immediately adjoining the subject site to the south are recently developed semi-detached dwellings. Development to the east of the site are larger allotments comprising of an older housing stock.

Development in the broader vicinity of the site is typically characterised by low to medium density residential development. In view of the R4 High Density Residential zone afforded to the site, the area will inevitably undergo a transition to higher density building forms with the proposed development representative of this desired future character.

3. Clause 4.6

This submission is made under clause 4.6 of the LLEP08 – Exceptions to development standards. Clause 4.6 states the following:

“4.6 Exceptions to development standards

(1) The objectives of this clause are as follows:

- (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.*

(2) Development consent may, subject to this clause, be granted for a development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard 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.*

(4) Development consent must not be granted for development that contravenes a development standard unless:

- (a) the consent authority is satisfied that:*
 - (i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (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, and*
- (b) the concurrence of the Director-General has been obtained.*

(5) In deciding whether to grant concurrence, the Director-General must 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 Director-General before granting concurrence.*

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note. *When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.*

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4

(ca) clause 6.4, 6.5, 6.6, 7.22, 7.24, 7.25, 7.26, 7.26A, 7.27, 7.28, 7.29 or 7.30."

The use of Clause 4.6 to enable an exception to this development control is appropriate in this instance and the consent authority may be satisfied that all requirements of Clause 4.6 have been satisfied in terms of the merits of the proposed development and the content in this Clause 4.6 variation request report.

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan. Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

"4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

4.6(3)(b) that there is sufficient environmental planning grounds to justify contravening the development standard."

In addition, 4.6(4)(a)(i) and (ii) requires that development consent must not be granted to a development that contravenes a development standard unless the:

"

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(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, and"

This submission has been prepared having regard to the following guideline judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No 1)*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 ('Four2Five No 2)*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 ('Four2Five No 3)*
- *Micaul Holdings Pty v Randwick City Council [2015] NSWLEC 1386;*
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7; and*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118.*

The Environmental Planning Instrument to which these variations relate to is the LLEP 08.

The development standard to which this variation relates to is Clause 4.3 – Height of Buildings, which reads as follows:

"(1) The objectives of this clause are as follows:

- (a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved,*
- (b) to permit building heights that encourage high quality urban form,*
- (c) to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,*
- (d) to nominate heights that will provide an appropriate transition in built form and land use intensity.*

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

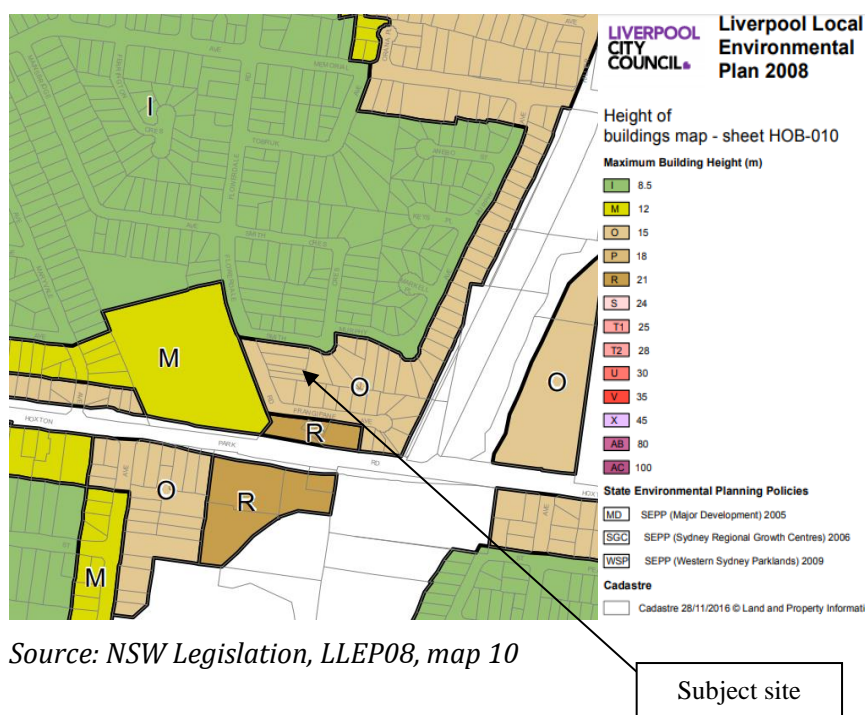
Note. *Clauses 5.6, 7.2 and 7.5 provide for circumstances under which a building in the Liverpool city centre may exceed the maximum height shown for the land on the Height of Buildings Map".*

As demonstrated in Figure 2 on the following page, the subject site is limited to a maximum building height of 15m.

The proposed residential flat building will exceed the standard with a proposed maximum building height of 17.9m as measured from existing ground level to the top of the lift overrun. The greatest variation is therefore equivalent to 2.9m or 19.3%.

A written justification is therefore required for the proposed variation to the maximum building height development standard, in accordance with Clause 4.6 of the LLEP 08.

Figure 2 – Height of Buildings Map



Source: NSW Legislation, LLEP08, map 10

4. Extent of Non-Compliance

As noted above Clause 4.3 of the LLEP 08 states that the maximum building height for the site is 15m.

The current proposal seeks a maximum building height of 17.9m to the lift overrun. The proposal therefore exceeds the standard by 2.9m or 19.3%.

It is noted that in view of level differences across the site, part of proposed Level 5 and the communal open space at roof level will also breach the height standard, however to a lesser extent than the lift overrun.

Where variations are sought at Level 4 and relate to habitable floor area, these areas are focused to the street frontages away from neighbouring developments so as to minimise any impacts to these properties. These variations range from 1.1 – 1.21m along Flowerdale Road and 1.21 – 2.4m along Smith Crescent.

Where variations are sought with regards to the rooftop communal open space this relates to the pergola shading device, being a maximum of 2.4m and parapet/balustrade to the communal open space, being between 0.85 – 1.2m. The pergola element, though sited adjacent to the Smith Crescent frontage is open in its design and as such does not present as visually dominant element to the street despite its height, while the parapet feature has been specifically designed to promote safety at roof level given the majority of the communal open space proposed is sited at this level.

It is our submission that the breach to the building height control, will not impact on the amenity of the development or adjoining properties, nor will the variation compromise the architecture of the building or the bulk and scale of the development.

A degree of flexibility is considered reasonable in this instance.

5. Is Compliance With the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?

The proposed variation from the development standard is assessed against the required tests in Clause 4.6. In addition, in addressing the requirements of Clause 4.6(3), the accepted five possible approaches for determining whether compliances are unnecessary or unreasonable established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council (2007) LEC 827* are considered.

In the matter of Four2Five, the Commissioner stated within the judgement the following, in reference to a variation:

“...the case law developed in relation to the application of SEPP 1 may be of assistance in applying Clause 4.6. While Wehbe concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under Clause 4.6 where Clause 4.6 (3)(a) uses the same language as Clause 6 of SEPP 1.”

In the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, Preston CJ summarised the five (5) different ways in which an objection under SEPP 1 has been well founded and that approval of the objection may be consistent with the aims of the policy. The five possible ways are as set out below:

| | |
|---------------|---|
| First | <p><i>The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.</i></p> <p><i>The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.</i></p> |
| Second | <i>A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary. (not applicable)</i> |
| Third | <i>A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable. (not applicable)</i> |
| Fourth | <i>A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and</i> |

| | |
|--------------|--|
| | <i>hence compliance with the standard is unnecessary and unreasonable. (not applicable)</i> |
| Fifth | <i>A fifth way is to establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary. (not applicable)</i> |

In respect of the height of buildings standard, the first method is invoked.

The objectives supporting the maximum height of buildings identified in Clause 4.3 are discussed below. Consistency with the objectives and the absence of any environmental impacts, would demonstrate that strict compliance with the standards would be both unreasonable and unnecessary in this instance.

The discussion provided below demonstrates how the proposal is consistent with the objectives of Clause 4.3.

“(1) The objectives of this clause are as follows:

- (a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved,*
- (b) to permit building heights that encourage high quality urban form,*
- (c) to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,*
- (d) to nominate heights that will provide an appropriate transition in built form and land use intensity”.*

With respect to objective (a), the subject site is afforded a maximum building height limit of 15 metres and floor space ratio control of 1.0:1 under LLEP08. As the current proposal is made under State Environmental Planning Policy (Affordable Rental Housing) 2009, a bonus 0.5:1 is afforded, enabling a maximum floor space ratio of 1.5:1 to be achieved on the site.

The proposal is notably compliant with the maximum floor space ratio control, however seeks a variation to the maximum height control as described in this letter.

In a decision of the Land Environment Court, *Abdul-Rahman v Ashfield Council [2015] NSWLEC 1122*, Commissioner O’Neil stated,

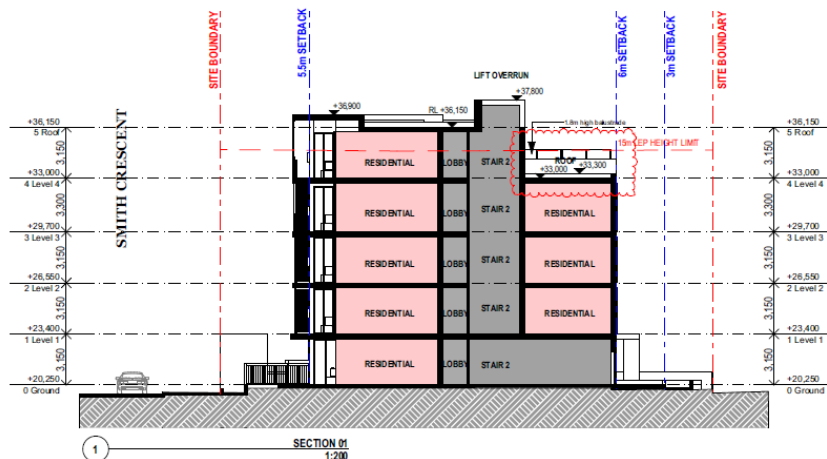
“I accept the argument put by the applicant that the consequence of the SEPP ARH incentives, which seek to facilitate the effective delivery of new affordable rental housing by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards, is to expand the permissible building envelope for a site in some way, although pursuant to cl 16A of SEPP ARH, any increase of the building envelope has to be compatible with the character of the local area. In this matter, the proposal complies with the FSR development standard in LEP 2013 and does not seek the benefit of the FSR incentive of SEPP ARH at cl 13, however the principle of an expanded building envelope in recognition of the contribution of affordable rental housing made by the proposal is still relevant”.

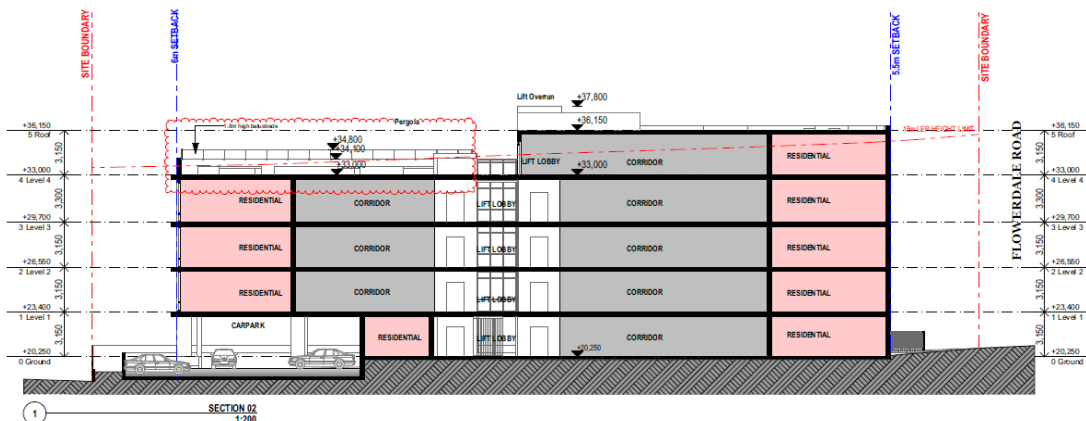
In keeping with the above, we submit that the proposed variation is attributable to the increased density available on the site. In view of the context of the site, it was not considered

feasible to further encroach upon the setbacks of the adjoining developments and consequently the proposed height has exceeded the maximum standard.

We note, that the greatest variation (2.9m) to the height control is achieved only over the lift overrun with lesser variations (between 0.85 – 2.4m) sought in respect to Level 4 and the rooftop communal open space. This is demonstrated in the images below.

Figure 3 – LEP Height Diagrams





Source: DKO Architecture

The tallest component of the building therefore spans a relatively short area of the proposed building, and relates to an element of the design (lift overrun) that has been centred over the site to reduce its visual prominence. Where the greatest variation is sought in relation to habitable floor area at Level 4, we note that these occur along the street frontages allowing for greater separation between the subject site and the adjoining properties.

The proposed development has been carefully designed to project a highly articulated appearance to each of the facades. The width of the units has been limited allowing for breaks in each elevation and steps in the overall design. The use of balconies provides for visual relief from solid external walls and aids to break up the building mass. The proposal therefore satisfies objective (b).

The proposed development has also been designed to maximise solar access with 74% of the proposed units across the entire development achieving a minimum of 2 hours solar access. A total of 62% of units across the development will be naturally cross ventilated in keeping with objective (c).

With respect to solar access achieved by the neighbouring properties, reference is made to Drawing Nos. DA406, 407 and 408. These plans provide for a comparison of the shadows cast by the proposed development which seeks a variation to the building height control versus a development that complies with the maximum building height control, meaning there are no building elements protruding beyond the maximum building height (15m).

As evident in the images at 9am and 10am, a compliant development would not gain any additional solar access to the adjoining southern property compared to the proposed built form. Between 11am – 2pm, the extent of additional solar access achieved to the adjoining southern property is minimal and limited to the roof of the existing building rather than benefitting living areas or private open space. By 3pm, a height compliant development would not improve solar access when compared to the proposed development.

Based on the above, the proposed variation will not adversely impact upon the solar access of adjoining properties.

In terms of objective (d), consideration must be made to the future desired character of the area. The subject site and adjoining land to the east, south and west is zoned R4 High Density Residential. The proposed building has carefully considered the siting of the building on the

land, with the majority of the building bulk located to the north western corner, activating the corner location of the site. This allows for a stepping down in the development with areas of non-trafficable roof and communal open space sited to the east and south of the development where the site adjoins residential properties. From a bulk and scale perspective, there is therefore a transition to the adjoining residential properties both within the current context, given the low scale character of the existing dwellings to the south compared to the current proposal and with regards to future character acknowledging that the proposed building bulk has been sited away from the southern boundary to minimise any impacts over overshadowing.

6. Are there Sufficient Environmental Planning Grounds?

The assessment above demonstrates that the resultant environmental impacts of the proposal will be satisfactory.

The proposal addresses the site constraints, streetscape and relevant objectives of both the standards and the zone. The proposal will not result in any unreasonable amenity or environmental impacts.

We respectfully submit that the proposal will result in a better planning outcome as unlike SEPP (Affordable Rental Housing) 2009, which requires that up to 50% of the dwellings be offered as affordable housing for a period of 10 years, all of the proposed 39 units will be nominated as affordable housing to be managed by our client, St George Community Housing.

The proposal therefore provides a social benefit to the community providing for new, affordable accommodation in an area well serviced by public transport services and local infrastructure.

Regular bus services are available along Flowerdale Road. The site is well located to local amenities and infrastructure with local shopping precincts, parks and schools within walking distance of the subject site.

The development is also notably compliant with the maximum 1.5:1 FSR prescribed by SEPP (Affordable Rental Housing) 2009.

In this case, strict compliance with the height of buildings development standard of the LLEP 08 is unnecessary and unreasonable.

7. Is the Variation in the Public Interest?

Clause 4.6 states that development consent must not be granted for development that contravenes a development standard unless 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 to be carried out.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard under Part 4.

The development as proposed will be in the public interest as it is consistent with the objectives of Clause 4.3.

The building contextually has regard to its surrounding properties and provides sufficient open space and landscaping for the amenity of future residents.

Furthermore, it is important to also consider the objectives of the R4 High Density Residential zone in relation to the development, which are as follows:

Zone R4 High Density Residential

Objectives of zone

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide for a high concentration of housing with good access to transport, services and facilities.*
- *To minimise the fragmentation of land that would prevent the achievement of high density residential development.*

In response to the above the following is provided:

The proposed residential flat building will replace the existing two dwellings on the site with 39 proposed units to provide for the housing needs of the community within a high-density environment.

The proposal comprises of a mix of 1 and 2-bedroom units, including adaptable designs ensuring a variety of housing types are available.

No other land uses are proposed.

The site is readily accessible by public transport with proximate bus stops located along Flowerdale Road.

The proposal will not result in the fragmentation of land.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standards, noting the development will be in the public interest.

8. Public Benefit of Maintaining the Standard

It is considered that there is no benefit to the public or the community in maintaining the development standards. The proposed development will allow for the creation of a high quality residential development which as stated above meets the desired objectives of the standard.

Housing affordability in Sydney is becoming increasingly difficult. Our client is a not for profit organisation seeking to address a prevalent issue in Sydney's housing market. Our client is committed to providing a development that is 100% affordable housing far surpassing the

requirements of State legislation. The additional height sought on the site will enable additional units to be provided to the benefit of the local government area. The area can support an increase in density and this is encouraged by Council.

It is not considered that the variation sought raises any matter of significance for State or regional environmental planning.

The departure from the height of buildings control within the LLEP 08 allows for the orderly and economic use of the site in a manner which achieves the outcomes and objectives of the relevant planning controls.

9. Is the Variation Well Founded?

It is considered that this has been adequately addressed in Parts 4 and 5 of this submission. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 of the LLEP 08 in that:

- ❑ Compliance with the development standards would be unreasonable and unnecessary in the circumstances of the development;
- ❑ There are sufficient environmental planning grounds to justify the departure from the standards;
- ❑ The development meets the objectives of the standard to be varied (height of buildings) and objectives of the R4 High Density Residential zoning of the land;
- ❑ The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- ❑ The breach does not raise any matter of State or Regional Significance; and
- ❑ The development submitted aligns with the revitalisation of the formerly low-density precinct.

Based on the above, the variation is considered to be well founded.

10. General

Clause 4.6 also states that:

“(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note. When this plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

- (a) a development standard for complying development,
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
- (c) clause 5.4,
- (ca) clause 6.4, 6.5, 6.6, 7.22, 7.24, 7.25, 7.26, 7.26A, 7.27, 7.28, 7.29 or 7.30."

This variation does not relate to the subdivision of land. The variation sought is thus not contrary to subclause (6).

Should the exception to the development standard sought under this submission be supported by Council, the Council must retain a record of the assessment of this submission.

The development proposed is not complying development.

A BASIX certificate was provided for the development.

Clause 5.4 of the LLEP 08 does not apply to the proposal.

Clauses 6.4, 6.5, 6.6, 7.22, 7.24, 7.25, 7.26, 7.26A, 7.27, 7.28, 7.29 or 7.30 of the LLEP 08 do not apply to the site.

11. Conclusion

The proposal does not strictly comply with the maximum building height control as prescribed by Clause 4.3 of the LLEP 08. Having evaluated the likely affects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of the LLEP 08 are satisfied as the breach to the controls does not create any adverse environmental impacts.

As reiterated throughout this report, the proposal seeks to provide for a development comprising of entirely affordable housing. The development will address a rising social issue in Sydney's housing market whereby rising prices are making affordable accommodation increasingly difficult to come by.

The proposed development will be managed by our client, St George Community Housing with all units used for the purposes of affordable housing for at least a 10 year period.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular instance and that the use of Clause 4.6 of the LLEP 08 to vary this development controls is appropriate in this instance.

Based on the above, it is sensible to conclude that strict compliance with the maximum building height control is not necessary and that a better outcome is achieved for this development by allowing flexibility in the application.

Should you have any questions regarding the proposed development, please do not hesitate to contact me.

Kind regards,

Melissa Rodrigues
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Plan 3416