

APPENDIX B

CLAUSE 4.6 REQUEST TO VARY
DEVELOPMENT STANDARD



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PROPOSED DEMOLITION OF EXISTING
STRUCTURES AND CONSTRUCTION OF 8
STOREY RESIDENTIAL FLAT BUILDING

23-25 CHARLES STREET, LIVERPOOL



CLAUSE 4.6 VARIATION REQUEST

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Client and Land Details

Client: Hume Housing
Subject Site: Lot 1 & Lot 2, DP500066, 23-25 Charles Street, Liverpool
Proposal: Proposed Demolition of Existing Structures and Construction of 8 Storey Residential Flat Building



Warwick Stimson RPIA
Director



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TABLE OF CONTENTS

1	INTRODUCTION	1
2	VARIATION CONSIDERATION	2
2.1	NSW Land and Environment Court: Case Law (tests)	2
2.2	The Proposed Development	4
2.3	What is the name of the environmental planning instrument that applies to the land?	4
2.4	What is the zoning of that land?	4
2.5	What are the objectives of the zone?	4
2.6	What is the development standard being varied?	5
2.7	Under what clause is the development standard listed in the environmental planning instrument?	5
2.8	What are the objectives of the development standard?	5
2.9	What is the numeric value of the development standard in the environmental planning instrument?	6
2.10	What is the proposed numeric value of the development standard in your development application?	6
2.11	What is the percentage variation (between your proposal and the environmental planning instrument)?	6
2.12	How is strict compliance with the development standard unreasonable or unnecessary in this particular case?	6
2.13	How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?	6
2.14	Is the development standard a performance-based control?	7
2.15	Would strict compliance with the standard, in your particular case, would be unreasonable or unnecessary?	7
2.16	Are there sufficient environmental planning grounds to justify contravening the development standard?	8
3	SPECIFIC CONSIDERATION OF CL.4.6(4) OF LIVERPOOL LEP 2008	9
4	CONCLUSION	11

1 INTRODUCTION

The NSW planning system provides flexibility in planning controls by providing the ability for a consent authority to vary development standards in certain circumstances.

Stimson Urban & Regional Planning has been engaged by Hume Housing to prepare a request to vary a development standard in respect of its proposed residential flat building on the property known as 23-25 Charles Street, Liverpool. The proposal is to be assessed by Liverpool Council and this request accompanies plans and other documentation, including a Statement of Environmental Effects, submitted to Council. This variation is to be read in conjunction with that material.

The amended plans propose a technical breach in the *height of building* development standard and this submission aims to address that aspect of the application. However, we submit the breach arises largely because of the roof top communal area and associated structures providing amenity to residents. Notwithstanding, we suggest the built form that arises out of this proposal, is similar to other developments within the locality.

The request is considered to be reasonable in the circumstances and argues why compliance with the standard is unnecessary on the grounds that:

- a) there are sufficient environmental planning grounds to justify the contravention of the development standards, namely the orderly and economic development of the land, consistent with the objectives of the *Environmental Planning and Assessment Act 1979*;
- b) the proposed development is in the public interest because it is consistent with the relevant control objectives and development standards, despite the non-compliance;
- c) the contravention achieves better planning outcomes for and from the development without significant environmental impact by providing superior on site amenity, optimum utilisation of well-located land and is consistent with the evolving character of the locality;
- d) the breach is imperceptible when viewed from the public domain and when compared to a fully compliant development; and
- e) this variation request satisfies the tests established by the Land and Environment Court for the justification and assessment of variations to development standards.

It is considered there are sufficient environmental planning grounds to support the variation. These include the proposal complying with the relevant development standards within Council's LEP, satisfying the objectives of the zone and the height of building control. The relatively minor variation in building height will not negatively impact on nearby or adjoining sites, however it maximises the building envelope, representing the most efficient way to deliver housing on the site.

2 VARIATION CONSIDERATION

The NSW Land and Environment Court has resolved a number of matters that have guided the way in which requests to vary development standards are to be considered by the consent authority.

2.1 NSW LAND AND ENVIRONMENT COURT: CASE LAW (TESTS)

The key elements are outlined below.

Winten v North Sydney Council

The decision in *Winten v North Sydney Council* established the basis on which the former Department of Planning and Infrastructure's Guidelines for varying development standards was formulated.

The questions that needed to be considered included:

- Is the planning control in question a development standard?
- What is the underlying object or purpose of the standard?
- Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act?
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)? and
- Is the objection well founded?

Wehbe v Pittwater [2007] NSW LEC 827

The decision in *Wehbe v Pittwater [2007] NSW LEC 827* expanded on the findings in *Winten v North Sydney Council* and established a five (5) part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions:

- Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;
- Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;

- Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
- Has Council by its own actions, abandoned or destroyed the development standard, by granting consents that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
- Is the “*zoning of particular land*” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.

Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

- Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
- Whether there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
- That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs; and
- All three elements of clause 4.6 have to be met and it is best to have different reasons for each but it is not essential

Moskovich v Waverley Council [2016] NSWLEC 1015

The court further reflected on the recent Four2Five decisions and noted:

- Clause 4.6(3)(a) is similar to clause 6 of SEPP 1 and the *Wehbe* ways of establishing compliance are equally appropriate. One of the most common ways is because the objectives of the development standard are achieved.
- Whereas clause 4.6(4)(a)(ii) is worded differently and is focused on consistency with objectives of a standard. Consequently, a consideration of consistency with the objectives of the standard required under clause 4.6(4)(a)(ii) to determine whether non-compliance with the standard would be in the public interest is different to consideration of achievement of the objectives of the standard under clause 4.6(3).
- The written request should address the considerations in the granting of concurrence under clause 4.6(5).

Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118

This most recent case has been considered in detail in Section 3 of this report.

2.2 THE PROPOSED DEVELOPMENT

The proposed development includes the construction of a residential flat building to be used as affordable housing.

The site is zoned *R4 High Density Residential* under *Liverpool Local Environmental Plan 2008* with the proposal being permissible with consent.

The LEP contains controls relating to the height of a building on site.

For this development, the height of the building exceeds the height limit by an approximate maximum of 2.9m.

2.3 WHAT IS THE NAME OF THE ENVIRONMENTAL PLANNING INSTRUMENT THAT APPLIES TO THE LAND?

Liverpool Local Environmental Plan 2008.

2.4 WHAT IS THE ZONING OF THAT LAND?

The subject site is zoned R4 High Density Residential.

2.5 WHAT ARE THE OBJECTIVES OF THE ZONE?

- (a) to encourage a range of housing, employment, recreation and services to meet the needs of existing and future residents of Liverpool,
- (b) to foster economic, environmental and social well-being so that Liverpool continues to develop as a sustainable and prosperous place to live, work and visit,
- (c) to provide community and recreation facilities, maintain suitable amenity and offer a variety of quality lifestyle opportunities to a diverse population,
- (d) to strengthen the regional position of the Liverpool city centre as the service and employment centre for Sydney's south west region,
- (e) to concentrate intensive land uses and trip-generating activities in locations most accessible to transport and centres,
- (f) to promote the efficient and equitable provision of public services, infrastructure and amenities,
- (g) to conserve, protect and enhance the environmental and cultural heritage of Liverpool,
- (h) to protect and enhance the natural environment in Liverpool, incorporating ecologically sustainable development,
- (i) to minimise risk to the community in areas subject to environmental hazards, particularly flooding and bush fires,

- (j) to promote a high standard of urban design that responds appropriately to the existing or desired future character of areas.

The proposed development is consistent with the objectives of the zone in that:

- The proposal will contribute to the housing needs of the Liverpool community within a high-density residential environment.
- The proposal provides an appropriate unit mix for the development type and expected occupant type.
- The subject site is within close proximity to the Liverpool town centre responding to the day to day needs of the occupants.
- There is significant demand for modern affordable housing in the Liverpool LGA.
- The proposal is consistent with other existing development in the locality, therefore there will be minimal conflict between land uses.

2.6 WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?

Height of Building.

2.7 UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

Clause 4.3 Height of Building.

2.8 WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

The following are the objectives of the height of buildings development standard:

- (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.

The objectives of the development standard are met in that:

- The maximum floor space is achieved as a result of this proposal.
- The height breach allows for a superior outdoor communal open space element to be delivered for residents of the development.
- Exposure to sky and sunlight is not compromised as a result of the proposal.
- The proposed building is of a scale that is consistent with other local development.

2.9 WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

The maximum height of building control on the site is 24m.

2.10 WHAT IS THE PROPOSED NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN YOUR DEVELOPMENT APPLICATION?

A maximum height of 26.9m is proposed, although this applies to a small area of the breach – a lift overrun, accessible toilet and fire stair. Otherwise, the breach is very minor and only arises because of the height of the required balustrading.

2.11 WHAT IS THE PERCENTAGE VARIATION (BETWEEN YOUR PROPOSAL AND THE ENVIRONMENTAL PLANNING INSTRUMENT)?

The maximum variation sought is 12% when described as a percentage.

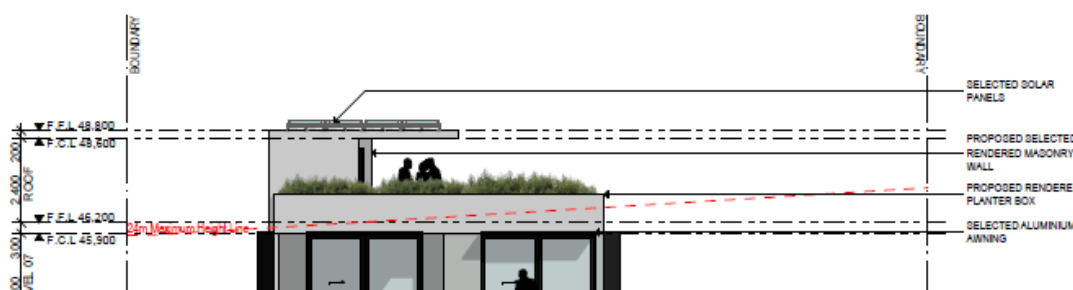


Figure 1 Proposed height breach

2.12 HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?

The variation is minor in the context of the development proposed. The breach arises because of the necessary structures to allow for the use and activation of the roof top as a communal open space for residents. It is unreasonable in the circumstances because the breach facilitates a superior amenity outcome for residents. Compliance is unnecessary since no negative impacts arise as a result of the breach.

2.13 HOW WOULD STRICT COMPLIANCE HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN SECTION 5(A)(I) AND (II) OF THE ACT?

Section 1.3 of the *Environmental Planning and Assessment Act 1979* details its objectives:

The objects of this Act are as follows:

- (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,
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
- (c) to promote the orderly and economic use and development of land,
- (d) to promote the delivery and maintenance of affordable housing,
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
- (g) to promote good design and amenity of the built environment,
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,
- (j) to provide increased opportunity for community participation in environmental planning and assessment.

It is submitted that the building height encroachment still maintains an appropriate bulk and scale, and also maintains the objectives of the clauses within the LEP that relate to the zone and building height. The objects of the Act are not hindered through the proposed variation being supported.

Complying with the height limit will not materially alter the outcome in relation to visual bulk, scale, amenity and solar access and it is considered the proposal provides a good planning outcome.

2.14 IS THE DEVELOPMENT STANDARD A PERFORMANCE-BASED CONTROL?

No, it is prescriptive.

2.15 WOULD STRICT COMPLIANCE WITH THE STANDARD, IN YOUR PARTICULAR CASE, WOULD BE UNREASONABLE OR UNNECESSARY?

It is unreasonable in the circumstances because the breach facilitates a superior amenity outcome for residents. Compliance is unnecessary since no negative impacts arise as a result of the breach.

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

There are a number of positive environmental planning grounds that arise as a result of this development, and specifically the breach in the height limit, including:

- The proposed variation of the height limit allows for a superior open space result for residents of this development.
- The height variation allows for optimisation of the site's development potential as a transport-accessible site and provision of much needed affordable residential accommodation in the Liverpool Local Government Area which in turn would assist in Council achieving the goals of its housing strategy and the NSW Government's strategic plans.
- The proposal represents the orderly and economic development of the land, and provides for affordable housing, both two objectives of the *Environmental Planning and Assessment Act 1979*.
- The proposed building height variation makes for efficient, economic and optimal use of the subject site, taking advantage of the local topography, and surrounding context, increasing the provision of housing with minimal environmental impact. The proposed development has been designed giving regard to the natural contours of the site, to reduce its visual impact.
- The non-compliant height will not give rise to any material streetscape or amenity impacts compared to a compliant development, by virtue of the proposed siting, massing, setbacks, design of the building, and site characteristics. The proposed development reflects a built form that is consistent with the controls and development that has been already constructed in the locality.
- The proposed development satisfies the objectives of the building height control and zone objectives, despite the non-compliance.
- Compliance is achieved with all other development standards that apply to the development.

The environmental planning grounds cited above are considered to be sufficient for the variation to be supported.

3 SPECIFIC CONSIDERATION OF CL.4.6(4) OF LIVERPOOL LEP 2008

A recent decision of the NSW Land and Environment Court (*Initial Action Pty Ltd v Woollahra Municipal Council*) further clarified the correct approach to the consideration of Clause 4.6 requests. This included clarifying that the Clause does not require that a development that contravenes a development standard must have a neutral or better environmental planning outcome than one that does not.

Clause 4.6 of a standard instrument LEP permits a consent authority to grant development consent for development that would contravene a development standard where the consent authority is satisfied that:

- cl4.6(4)(a)(i): a written request from the applicant adequately demonstrates that compliance with the development standard is unreasonable or unnecessary (cl4.6(3)(a)), and that there are sufficient environmental planning grounds to justify the contravention (cl4.6(3)(b)), and
- cl4.6(4)(a)(ii): the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development within the relevant zone.

To clearly consider this case and its applicability to the proposed development, the clauses have been tabulated below, and considered against the above Court case, the proposal, and this very submission.

Liverpool LEP 2008	23-25 Charles St, Liverpool
(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	<p>Subclause (3) requires the following to be demonstrated for the purposes of this consideration:</p> <p>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</p> <p>(b) that there are sufficient environmental planning grounds to justify contravening the development standard.</p> <p>In respect of the building height variation, the reasons why compliance is unreasonable or unnecessary are provided in Section 2.</p> <p>We also note that the objectives of the standards have been achieved notwithstanding the non-compliance with those standards (<i>Wehbe v Pittwater Council</i>).</p>

	<p>It follows that this aspect of Clause 4.6 has been satisfied.</p> <p>As to there being 'sufficient environmental planning' grounds to justify the variation, the focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. In this context this submission has considered the building height standard accordingly.</p>
<p><i>(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</i></p>	<p>The proposed development is consistent with both the development standards that are proposed to be varied, as well as the objectives of development in the zone. The development is therefore in the public interest (see para 27 of the judgement).</p>

Given the assessment above, it is considered the Clause 4.6 is well founded and can be supported in the context of this most recent court case.

4 CONCLUSION

Compliance with the building height development standard is considered to be unreasonable and unnecessary in the circumstances of the case, and it is considered that there are sufficient environmental planning grounds to vary the standards in this case.

The request to vary the development standards is considered to be well-founded on the grounds that the non-compliance with the building height standard, *inter alia*:

- enables provision for additional housing stock in a transport-accessible location;
- assists in the provision of housing in the Liverpool Local Government Area consistent with State government policy;
- allows for the efficient and economic development of a site that is capable of accommodating, and suitable for, the additional building height proposed;
- enables a development that reflects the changing character of the locality without significant impact on the use and enjoyment of adjoining land;
- does not fetter consistency of the development with the objectives of the building height development standards, or the objectives of the zone;
- achieves relevant objects of the Environmental Planning & Assessment Act 1979, in particular, the provision of affordable housing, in the public interest; and
- does not raise any issues of State or regional planning significance.

This variation request addresses the matters required to be considered in Clause 4.6 of Liverpool LEP 2008. Council is requested to exercise its discretion to vary the development standards by granting consent to the proposed development despite its non-compliance with the building height standard.