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CLAUSE 4.6  
VARIATION TO HEIGHT OF BUILDING

28 & 30 MCKAY AVENUE  
MOOREBANK

PREPARED FOR  
MCKAY MOOREBANK PTY LTD

PREPARED BY




LIGHTHOUSE PLANNING PTY LTD  
NICHOLAS DOWMAN  
DIRECTOR  
p: +61 403 977 113


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# 1 INTRODUCTION

## 1.1 PURPOSE

This submission has been prepared for McKay Moorebank Pty Ltd to accompany a Development Application (DA) to Liverpool City Council relating to the property known as 28 & 30 McKay Avenue, Moorebank (the Site). It seeks a variation to the building height development standard contained at Clause 4.3 of the Liverpool Local Environmental Plan 2008 (LLEP 2008).

## 1.2 THE PROPOSAL

The application generally proposed the construction of a six-storey residential flat building comprising:

- 28 residential units consisting of:
  - 8 x 1-bedroom units (2 adaptable)
  - 19 x 2-bedroom units (1 adaptable)
  - 1 x 3-bedroom units
- Two (2) x basement levels
- 32 x on-site vehicle parking spaces
- Associated landscaping and communal open space

## 1.3 VARYING A DEVELOPMENT STANDARD

The NSW Department of Planning and Environment's publication "Varying Development Standards: A Guide" (August 2011), states that:

The NSW planning system currently has two mechanisms that provide the ability to vary development standards contained within environmental planning instruments:

- Clause 4.6 of the Standard Instrument Local Environment Plan (SI LEP).
- State Environment Planning Policy No 1 – Development Standards (SEPP1).

SEPP 1 no longer applies and LLEP 2008 is a Standard Instrument LEP.

This proposal seeks to vary the Height of Building development standard applicable to the Site and not introduce new controls across an area. Subclause 4.6 (8) of LLEP 2008 also states specifically when this clause is not to be used. Neither the Site, nor the proposal, satisfy these criteria and therefore, the use of Clause 4.6 to vary the Height of Building is appropriate in this instance.

## 2 NATURE OF THE VARIATION

### 2.1 WHAT IS THE APPLICABLE PLANNING INSTRUMENT AND ZONING?

The LLEP 2008 is the environmental planning instrument that applies to the Site. The Site is zoned R4 High Density Residential under LLEP 2008, in accordance with the Land Zoning Map.

### 2.2 WHAT ARE THE ZONE OBJECTIVES?

The relevant objectives of the R4 High Density Residential Zone are:

- *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.*

### 2.3 WHAT IS THE STANDARD BEING VARIED?

The standard being varied is the Height of Buildings development standard contained in Clause 4.3(2) of LLEP 2008.

### 2.4 IS THE STANDARD TO BE VARIED A DEVELOPMENT STANDARD?

Yes, the Height of Building standard is a development standard in accordance with the definition contained in Section 1.4 of the Environmental Planning and Assessment Act 1979 (as amended) (EP&A Act).

### 2.5 IS THE DEVELOPMENT STANDARD A PERFORMANCE BASED CONTROL?

No, the development standard is a numeric control.

### 2.6 WHAT IS THE UNDERLYING OBJECT OR PURPOSE OF THE STANDARD?

The objectives of Clause 4.3 of LLEP 2008 are as follows:

- *to establish the maximum height limit in which buildings can be designed and floor space can be achieved,*
- *to permit building heights that encourage high quality urban form,*

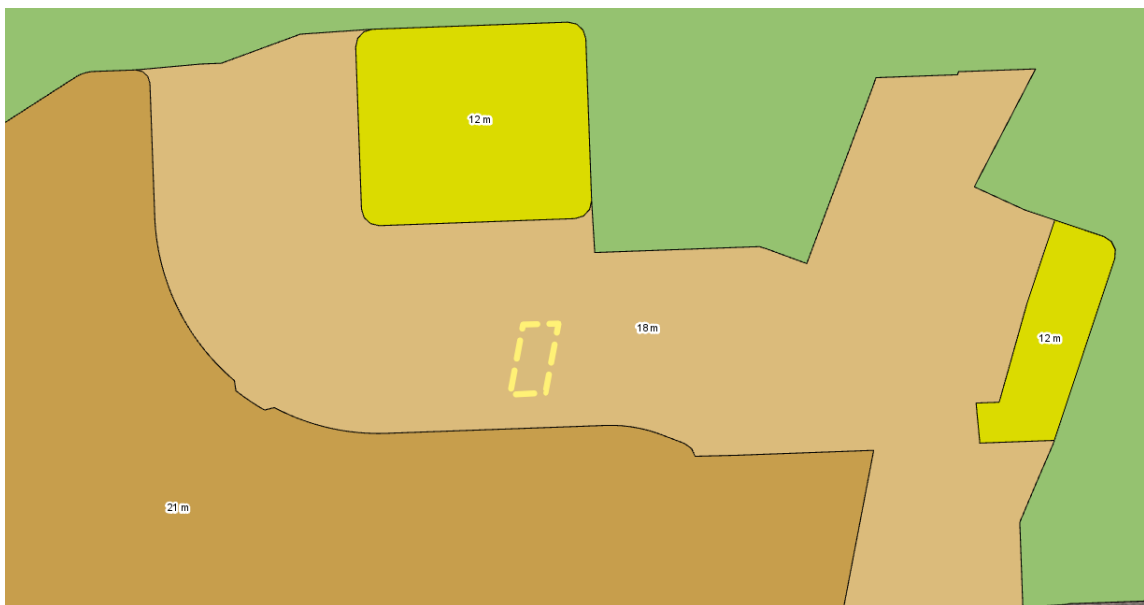
- *to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,*
- *to nominate heights that will provide an appropriate transition in built form and land use intensity.*

In summary, the underlying purpose of the development standard is to manage the height and scale of any future built form, in order to mitigate any adverse impacts and ensure compatibility with the character of the streetscape and amenity of the surrounding area.

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

Subclause 4.3 (2), in association with the Height of Buildings Map of the LLEP 2008, establishes a maximum building height of 18 metres for the Site.

FIGURE 1: EXCERPT FROM THE HEIGHT OF BUILDINGS MAP

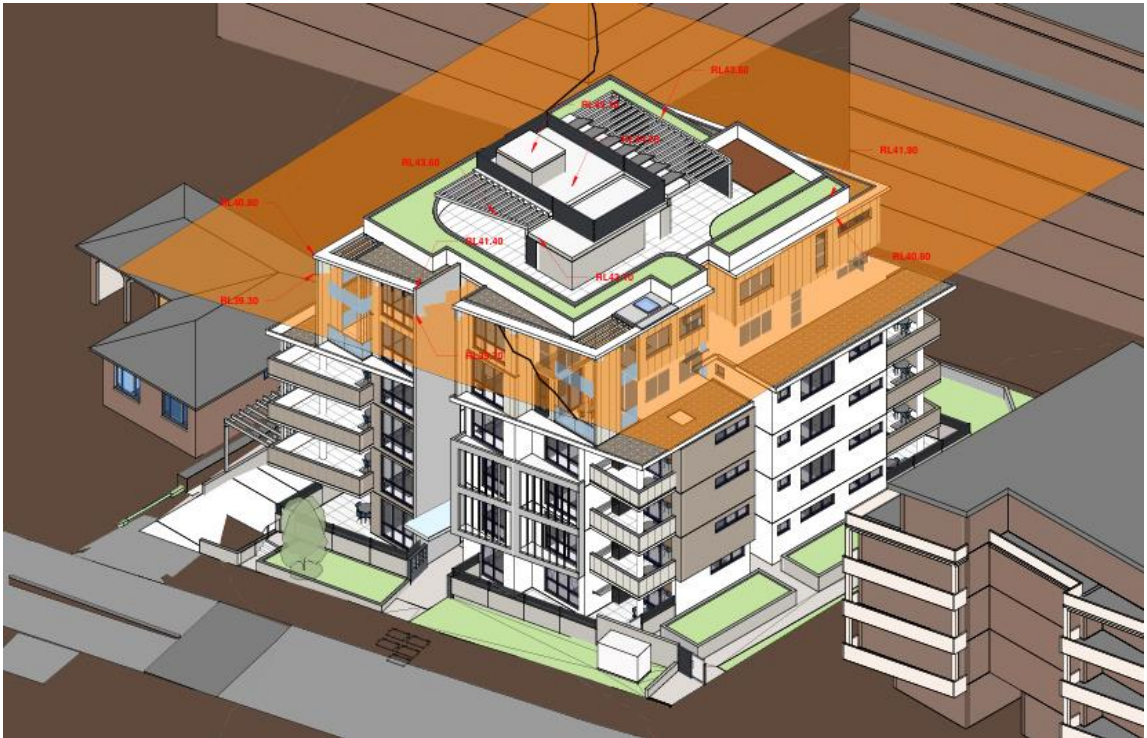


SOURCE: NSW PLANNING PORTAL

## 2.8 WHAT IS THE PROPOSED NUMERIC VALUE OF THE VARIATION IN THE DEVELOPMENT APPLICATION?

The proposed maximum building height is 22.6m metres at the central lift overrun. This equates to a maximum variation of 4.6m (25.6%) from the numeric development standard.

FIGURE 2 | BUILDING HEIGHT PLANE



SOURCE: MORFOSIS

## 2.9 WHAT IS THE CONTEXT OF THE VARIATION?

The variation to the prescribed maximum height of building occurs primarily to the lift overrun, located centrally within the building floorplate at roof level. This lift core provides required and beneficial access to the generous and well-designed communal open space area at the roof level. Its location on the building and site mean they will not be materially perceived from the public domain at street level. Landscaping is envisaged as part of the communal open space, which will serve to soften and 'green' the visual impact of the upper most portion of the building. The location of the lift core on the building also results in negligible overshadowing impacts as shadows largely fall on the subject building and McKay Avenue to the south.

Minor elements of the street-facing elevation also result in a variation to the prescribed maximum building height. This occurs in line with a gradual fall in topography towards the southern street frontage, resulting in a maximum variation to the height limit of approximately 1.7m (9.4%) at the uppermost level (see Figure 2). The street facing elevations are a lesser variation to the height standard than the central lift overrun and do not result in unreasonable adverse impacts in terms of overshadowing or view loss.

Equally, the minor nature of the variation is not easily discernible from the public domain in terms of visual impact and the areas of variation incorporate considerable



articulation and areas setback from the site boundaries. They are compatible with the surrounding locality and envisioned future character of the streetscape.

FIGURE 3 | PERSPECTIVE FROM MCKAY AVENUE



SOURCE: MORFOSIS



## 3 ASSESSMENT OF VARIATION

### 3.1 OVERVIEW

Clause 4.6 of LLEP 2008 establishes the framework for varying development standards applying under the instrument. Council 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:

*'4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.*

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

Subclause 4.6(4)(a) mandates that development consent must not be granted for a development that contravenes a development standard unless Council is satisfied:

(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....'*

#### Relevant case law to Clause 4.6 Variation Requests

This request has been prepared having regard to the principles established by the Court when considering the assessment of Clause 4.6 requests (including applicable principles adopted from consideration of SEPP 1 requests), contained in the following guideline judgments:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118
- *RebelMH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130

In summary, the principles adopted and applied in this clause 4.6 request include:

- In *Wehbe V Pittwater Council* (2007) NSWLEC 827 Preston CJ held that, it can be demonstrated that the objectives of the development standard are achieved notwithstanding non-compliance with the standard, as below (emphasis added):

- “43 The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).” *Wehbe V Pittwater Council* (2007) NSWLEC 827 Preston CJ
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 held (at paragraph 15) that for there to be power to grant development consent for a development that contravenes a development standard, cl 4.6(4)(a) requires that the Court, in exercising the functions of the consent authority, be satisfied that the written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) and adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(ii)). The Court must also be satisfied that the proposed development will be consistent with the objectives of the zone and with the objectives of the standard in question, which is the measure by which the development is said to be in the public interest (cl 4.6(4)(a)(ii)).
- At paragraphs 23 and 24 in *Initial Action*, Preston CJ held that with respect to “environmental planning” grounds, although not defined, the grounds should relate to the subject matter, scope and purpose of the EP&A Act, including the objects in s. 1.3 of the Act. Further, in order that the environmental planning grounds proffered in the written request are “sufficient”, firstly the focus should be on the aspect or element of the development that contravenes the development standard, rather than the development as a whole and why the contravention is justified and secondly, the environmental planning grounds must justify the contravention of the development standard, not just promote the benefits of carrying out the development as a whole.
- *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 the Court, in exercising the functions of the consent authority, must “in fact” be satisfied of the above matters. The state of satisfaction that compliance is “unreasonable or unnecessary” and that there are “sufficient environmental planning grounds” to justify the contravention must be reached only by reference to the cl 4.6 request. The evidence in the proceedings cannot supplement what is in the request, although the evidence may assist in understanding the request and

in considering its adequacy. On the other hand, the state of satisfaction that the proposed development is consistent with the relevant objectives, and therefore in the public interest, can be reached by considering the evidence before the Court and is not limited to what is contained in the cl 4.6 request.

This variation adopts Method 1 in Wehbe which requires an applicant to demonstrate that the objectives of the relevant development standard will be achieved, despite the non-compliance with the numerical standard.

### 3.2 IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

Yes - in this instance, strict numerical compliance with the development standard for Height of Buildings is unreasonable and unnecessary for the following reasons that are specific to this site and proposal:

- The reasons and context discussed in the section above, including the accommodation of additional gross floor area for affordable housing and the absence of associated impacts.
- Despite numerical non-compliance, the proposal remains consistent with the relevant environmental and planning objectives of the R4 Zone and Height of Building development standard. This is explored further in Section 3.4 of this report.
- The variation results in a scale and character that remains compatible with the surrounding locality and envisioned future character of the area. A development compliant with the building height development standard contained in the LLEP 2008 would not achieve a perceivably different or better planning outcome.
- Strict compliance with the development standard would likely require the loss of several units, currently proposed as affordable development in an appropriate and accessible location. This outcome would result in no discernible benefit to the site or surrounding locality.
- It is unreasonable to require removal of significant portions of the development, that is within the permissible FSR, when the variations do not result in material adverse impact or discernible visual difference to the surrounding and emerging character.

### 3.3 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS?

Yes. In the circumstances of the case, there are sufficient environmental planning grounds to justify the variation to the development standard, namely:

- The reasons and context discussed in the section above, including the accommodation of additional gross floor area that is provided as an incentive for the inclusion of affordable housing, and the absence of associated impacts.
- A variation to the prescribed maximum building height occurs to the lift overrun and rooftop communal open space, located centrally within the building floorplate. The location and scale of height variation mean that there are negligible adverse impacts in terms of overshadowing, view loss or visual impact while allowing the development to accommodate significant affordable housing in an accessible area and appropriately utilise the rooftop for the benefit of future occupants.
- Some elements of the street-facing elevation are marginally above the prescribed building height. This is in part due to a variation in the topography across the site, sloping down towards McKay Avenue to the south. The need to provide a consistent level across the site for the ground floor results in a partial variation to the height limit at the uppermost level. Accordingly, the extent of variation reflects the natural fall relative to the consistent ground level (which will not be perceived following completion). The street facing elevations are a lesser variation to the height standard than the central lift overrun and do not result in unreasonable adverse impacts.
- The public interest is better served by supporting the variation as it provides additional affordable housing stock that is designed to achieve SEPP 65 requirements, in an accessible location.
- The proposal satisfies the objectives of the R4 High Density Residential zone and the objectives of the Height of Buildings development standard, having regard to the particular nature of the development and the particular circumstances of the Site.
- The non-compliance with the standard will nevertheless result in a scale of development that is compatible with both the existing and future character of the locality.
- The variation to the building height standard will not have unreasonable visual impact from the public domain. The extent of variation is greatest at the lift

overrun, which does not present to the street and are considerably setback from side boundaries.

### 3.4 PUBLIC INTEREST

The public involvement in the planning process shapes and endorses the objectives that underpin the relevant development standard. The standards are derived as a means of achieving the public interest in delivering development that meets the objectives. Compliance with the Development Standard is accepted as being one method by which the objectives are met. Equally, the public interest can be served if the objectives are met, notwithstanding a variation to the development standard.

Approval of the proposed variation to the building height is in the wider public interest as the underlying objectives are met by virtue of the variation. This is detailed in the below section.

THE PROPOSAL REMAINS CONSISTENT WITH THE OBJECTIVES OF THE HEIGHT OF BUILDINGS DEVELOPMENT STANDARD:

The proposal remains consistent with the relevant objectives of the Height of Buildings development standard outlined in subclause 4.3 (1) of the LLEP 2008, despite the numerical non-compliance with subclause 4.3 (2), as demonstrated below:

*(a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved*

As this objective notes, the prescribed maximum heights have been established with consideration of the associated FSR prescribed for each site. In this instance, additional gross floor area is permitted for the development under SEPP (Housing) 2021, due to the desired provision of affordable housing within an accessible area. Accordingly, this additional FSR needs to be accommodated within the built form and the approach taken has respected the setbacks and general envelope stipulated by the controls, which results in the marginal variation to the height. This objective is met as the height proposed reflects the floor space that can be achieved in this instance.

*(b) to permit building heights that encourage high quality urban form*

The proposal is a high-quality, well considered and articulated design that is largely compliant with SEPP 65, SEPP Housing 2021 and LLEP 2008, despite resulting in minor variation to the height. The proposal reflects the outcomes of a meeting with Liverpool's design excellence panel.

*(c) to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight*

The areas of height variation do not result in material additional overshadowing as it falls to McKay Avenue to the south of the proposed development or falls on to the roof of the subject building.

*(d) to nominate heights that will provide an appropriate transition in built form and land use intensity*

As demonstrated in Figure 1 of this Report, the proposal is located adjoining an area with a higher maximum permissible building height (21m). This means that the proposed variation will not be incompatible with buildings in close proximity to the site. The majority of the building does not perceivably vary the standard, as it is to a limited portion of the elevation and the centrally located plant room. Accordingly, the proposal does provide an appropriate transition from the adjoining higher development standard while retaining a compatible scale and bulk for the R4 Zone.

THE PROPOSAL REMAINS CONSISTENT WITH THE OBJECTIVES OF THE R4 HIGH DENSITY RESIDENTIAL ZONE:

The proposal remains consistent with the relevant zone objectives outlined in Clause 2.3 and the Land Use Table of the LLEP 2008, despite the height variation, as demonstrated below.

- *To provide for the housing needs of the community within a high density residential environment.*

The proposal results in a residential flat building that directly responds to the housing needs of the community and addresses the state-wide need for greater affordable housing within accessible areas.

- *To provide a variety of housing types within a high density residential environment.*

The site is located in an accessible area and integrates an appropriate high-density mix of dwellings in close proximity to a wide range of services and facilities, including numerous public transport options.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

N/A – the proposal solely provides residential uses.

- *To provide for a high concentration of housing with good access to transport, services and facilities.*

The proposal optimises use of the site by providing a concentration of housing, including affordable housing, close to services, facilities and public transport options.

- *To minimise the fragmentation of land that would prevent the achievement of high density residential development.*

The site amalgamates two current lots to provide the residential development.

### 3.1 WOULD STRICT COMPLIANCE HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN SECTION 1.3 OF THE ACT?

Relevant objects in Section 1.3 of the Act include the following:

- *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,*
- *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- *to promote the orderly and economic use and development of land,*
- *to promote the delivery and maintenance of affordable housing,*
- *to promote good design and amenity of the built environment,*
- *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*

In this instance, strict compliance would unnecessarily limit the opportunity to readily provide additional housing stock and affordable housing with great amenity, with no discernible reduction in environmental impacts.

The proposed non-compliance with the development standard would support, rather than hinder the attainment of the objects of Section 1.3 of the EP&A Act. These objectives are to encourage social and economic welfare of the community, the proper management of built and natural resources, good design and to promote and coordinate orderly and economic use and development of land. The proposal remains consistent with the design criteria of the ADG and is consistent with the objectives of both the land use zone and the development standard.

In this instance, strict compliance with the development standard would not result in any discernible benefits to the amenity of adjoining sites or the public while compromising housing and amenity outcomes. It therefore stands that the environmental planning grounds and outcomes that are particular to this development



and this Site are such, that a departure from the development standard in that context would promote the proper and orderly development of land as envisioned by State policy.

## 4 CONCLUSION

This report accompanies a Development Application for a residential flat building at 28 & 30 McKay Avenue, Moorebank. An exception is sought, pursuant to Clause 4.6 of the Liverpool Local Environmental Plan 2008 to the maximum permissible building height prescribed by subclause 4.3(2) of the LLEP 2008.

The variation is primarily a consequence of accommodating the incentive additional gross floor area, provided for the considerable quantum of affordable housing incorporated within the project. In retaining appropriate setbacks and residential amenity, the height of the building is marginally varied to accommodate the additional GFA without unreasonable impact.

The variation enables a well-considered development, with an affordable housing component, that addresses the streetscape and relevant objectives of both the standards and the zone. It also accommodates a well-designed communal open space at roof level, which is greater use of the site in providing amenity and recreation space for occupants. The report finds that the variation will not result in unreasonable environmental impacts. Accordingly, a variation of the development standard is justified.