



**PROPOSED CONSTRUCTION OF A RESIDENTIAL FLAT BUILDING PURSUANT TO
SEPP (HOUSING) 2021
62-62A COPELAND STREET, LIVERPOOL**

Clause 4.6 - Exceptions to development standards (Height of buildings)

This Clause 4.6 Submission is prepared in support of a Development Application which seeks approval for the demolition of the site's existing structures followed by the construction of a new twelve storey residential flat building consisting of forty-three (43) residential units and two (2) levels of basement car parking upon the subject site.

A variation is sought in respect of compliance with Clause 4.3 - Height of Buildings of the Liverpool LEP 2008.

The subject site is located within Building Height Area "V" and is therefore subject to a maximum building height control of 35m.

The proposal as detailed on the accompanying plans will result in a maximum building height of 37.415m and which exceeds the requirements of this clause.

The proposed non-compliance relates to the proposed lift overrun and a minor portion of the roof top perimeter planter boxes. The extent of non-compliance is considered minor being a maximum of 2.415m or 6.9%.

The following Clause 4.6 variation is provided in support of the proposed height of building non-compliance.

This Clause 4.6 variation has been prepared in accordance with the approach adopted by the Land & Environment Court of NSW in its recent Court decisions.

It is submitted that the variation is well founded and is worthy of the support of the Council.

The following is an assessment of the proposed variation against the requirements of Clause 4.6.

1. What are the objectives of Clause 4.6 and is the proposal consistent with them.

The objectives of Clause 4.6(1) of the LEP are:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

It is my opinion, as is demonstrated by the responses to the questions below, that the proposed variation is consistent with the objectives of this clause.

It is also considered in the circumstances, a flexible approach to the application is warranted.

2. Is the standard to be varied a Development Standard to which Clause 4.6 applies.

A “development standard” is defined in Section 4 of the Environmental Planning & Assessment Act as:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) *the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) *the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) *the cubic content or floor space of a building,*
- (e) *the intensity or density of the use of any land, building or work,*
- (f) *the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) *the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) *the volume, nature and type of traffic generated by the development,*
- (i) *road patterns,*
- (j) *drainage,*
- (k) *the carrying out of earthworks,*
- (l) *the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) *the provision of services, facilities and amenities demanded by development,*
- (n) *the emission of pollution and means for its prevention or control or mitigation, and*
- (o) *such other matters as may be prescribed.*

Clause 4.3 is contained within Part 4 of the Liverpool LEP 2008 and which is titled Principal Development Standards. It is also considered that the wording of the Clause is consistent with previous decisions of the Land & Environment Court of NSW in relation to what matters constitute development standards.

It is also noted that Clause 4.3 does not contain a provision which specifically excludes the application of Clause 4.6 and vice a versa.

On this basis it is considered that Clause 4.3 is a development standard for which Clause 4.6 applies.

3. Is compliance with the development standard unreasonable or unnecessary in the circumstances of this case.

Sub-clause 4.6(3) sets out the matters that must be demonstrated by a written request seeking to justify a contravention of the relevant development standard (that is not expressly excluded from the operation of clause 4.6 under the Liverpool Local Environmental Plan 2008):

- (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.*

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ set out five justifications that may be used to demonstrate that compliance with a development standard is unreasonable or unnecessary:

- The objectives of the development standard are achieved notwithstanding non-compliance with the standard.
- The underlying objective or purpose of the standard is not relevant to the development.
- The underlying objective or purpose would be defeated or thwarted if compliance was required.
- The standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and/or
- The zoning of the land was unreasonable or inappropriate such that the standards for that zoning are also unreasonable or unnecessary.

The first justification is applicable in this instance.

The following assessment of the proposal is provided against the objectives of Clause 4.3 of the Liverpool LEP 2008.

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

The majority of the proposed residential flat building is contained within the maximum 35m building height. The proposed non-compliance relates to the lift overrun and a minor portion of the roof top perimeter planter boxes.

The extent of non-compliance is considered minor being a maximum of 2.415m or 6.9%. Reference is made to the LEP height blanket diagram (Dwg No. DA 7091) which demonstrates the extend of non-compliance.

Furthermore, the proposal complies with the maximum FSR requirements of the SEPP (Housing).

It is also noted that there is no FSR associated with the portion of the building which exceeds the height of building control.

The proposal is therefore considered to be compliant with this objective.

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

The proposal whilst not technically complying with the maximum height of building control in my opinion results in a high quality urban form.

Reference is made to the accompanying Statement of Environmental Effects which provides an assessment of Clause 7.5 of the Liverpool LEP. In this regard it is considered that the proposal as also detailed within the accompanying Apartment Design Guide Assessment Report, exhibits design excellence in satisfaction of the requirements of that Clause.

The proposal is therefore considered to be compliant with this objective.

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

Reference is made to the Shadow Diagrams (Dwg No. DA 6002) contained within the Architectural Plans. The proposal will result in some overshadowing of the adjoining properties to the south and south east. It is considered that the overshadowing is a direct result of the orientation of the site and is largely unavoidable. Notwithstanding, it is considered that the adjoining properties will continue to receive satisfactory exposure to the sky and sunlight. In addition it is my opinion that the extent of height non-compliance will result in a negligible amount of additional overshadowing.

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

The proposed development is considered to result in a development which is compatible with the height of buildings located within the Liverpool City Centre.

On this basis it is my opinion that strict compliance with the standard is unreasonable and unnecessary in the circumstances of this case.

4. Are there sufficient environmental planning grounds to justify contravening the development standard.

Consistent with the findings of the Court in *Initial Action P/L v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC* an applicant is required to demonstrate in writing that there are sufficient environmental planning grounds to justify the variation.

In *Initial Action* at [24], Preston CJ stated, that 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”.

Further he stated,

“... the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl. 4.6(4)(i) that the written request has adequately addressed this matter”.

In order to determine environmental planning grounds relevant to the non-compliance it is often accepted to relate the departure to the objects of the Act as set out at Section 1.3 - Objects of the Act.

Relevant to the proposal the following submission is provided in relation to the question as to whether there are sufficient environmental planning grounds to justify the non-compliance.

What is the aspect or element of the development that contravenes the development standard

The proposal as detailed on the accompanying plans will result in a maximum building height of 37.415m and which exceeds the requirements of this clause.

It is my opinion that the additional building height associated with the proposal and which equates to 2.415m or 6.9% is attributable to the proposed lift and stair access to the roof terrace level and is required in order to achieve access to the roof top communal open space.

What are the environmental grounds associated with the departure

It is my opinion the environmental planning grounds associated with the proposed departure primarily relate to the provision of access to the roof top communal open space. It is my opinion that there is a clear benefit associated with the non-compliance in that it will provide significant amenity benefits for the residents of the development by ensuring that they are provided with access to the rooftop and which contains the proposed communal open space. The communal open space will provide residents with a functional space which will be provided with high levels of solar access and excellent views and outlook.

In support of this element of the proposal, reference is made to the provisions of the Apartment Design Guide and in particular Objective 3D which provides the requirements for Communal and public open space. In this regard design guidance states that where communal open space cannot be provided at ground level it should be provided on a landscaped roof top terrace.

It is also noted that the provision of the roof top lift and stair access is considered to be a typical feature of a building of this type.

The non-compliant portion of the building has a small footprint and is set in from the perimeter of the building. It will therefore not present as a visually dominant element of the proposed building.

It is not considered that there will be any unreasonable impacts associated with the portion of non-compliant building.

In addition it is submitted that the proposal exhibits design excellence and satisfies the requirements of Clause 7.5 of the Liverpool LEP. Reference is made to the accompanying Statement of Environmental Effects which provides an assessment of Clause 7.5 of the Liverpool LEP.

Are the environmental planning grounds sufficient to justify contravening the development standard

It is my opinion that given the non-compliance is primarily associated with the provision of access to rooftop communal open space and which will provide significant amenity benefits to residents of the development. On the basis that the proposal exhibits design excellence in accordance with Clause 7.5 of the LEP and Objective 1.3(g) of the Act, that there are

sufficient environmental planning grounds to justify contravening the development standard.

It is also my opinion that the proposal is consistent with Objective 1.3(d) of the Act in that it seeks to promote the delivery and maintenance of affordable housing.

It is therefore my opinion based upon the above that this submission has demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by Clause 4.6(3)(b) of the LEP.

5. Is the proposed development 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 proposed development pursuant to Clause 4.6(4)(a)(ii) of the LEP is in my opinion in the public interest because it is compliant with both the zone objectives and the objectives of the particular standard.

The objectives for development within the R4 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.*

The proposal seeks to provide for a new residential flat building upon the subject site and which is otherwise compliant with the statutory requirements of the Council.

The proposal provides for a high quality architecturally designed residential flat building which has been designed so as to address both street frontages.

It is considered that the proposal will make a positive contribution to the character of the locality, particularly when viewed from the public domain.

The proposed development is in my opinion compatible with the scale and character of the existing and desired future character of the Liverpool City Centre.

It is not considered that the proposal will result in any unreasonable amenity impacts upon adjoining properties.

The proposal is therefore considered to be consistent with the above objectives.

As detailed in response to Question 3 of this variation, the proposal is also considered to be consistent with the objectives of Clause 4.3 of the Liverpool LEP.

In the absence of any unreasonable impact and given the proposals compliance with the applicable objectives, the proposal is considered to be in the public interest.

6. Whether contravention of the development standard raises any matter of significance for state or regional environmental planning.

It is my opinion that contravention of the standard does not raise any matters of significance for State or Regional environmental planning.

7. What is the public benefit of maintaining the development standard.

It is my opinion that there is no public benefit in maintaining the development standard in this instance given that the proposal will result in a built form having a bulk and scale with spatial separation from adjoining properties consistent with that envisaged by the Council controls.

It is therefore my opinion that in the absence of any detrimental impact that the proposal is in the public benefit.

Conclusion

It is therefore my opinion based upon the content of this submission that a variation of the maximum height of building control as required by Clause 4.3 of the Liverpool LEP 2008 is appropriate in this instance.



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