

**CLAUSE 4.6 VARIATION
CLAUSE 4.3 – HEIGHT OF BUILDINGS**

LIVERPOOL LOCAL ENVIRONMENTAL PLAN 2008

September 2023

1. Introduction

This written request under Clause 4.6 of Liverpool Local Environmental Plan 2008 (LLEP08) is for a variation to Clause 4.3 of the LLEP08, which relates to **height of buildings**.

This written request has been prepared in support of an application for the alterations and additions to an approved residential flat building with basement car parking, landscaping and associated site works at 7 – 9 Castlereagh Street & 6-12 Copeland Street, Liverpool. The proposal also includes a change of use to part of the approved ground floor to create a 90 place child care centre. The site is legally identified as:

- Lot A in DP374032
- Lot B in DP374032
- Lot 2 in DP110597
- Lot B in DP433791
- Lot D in DP374032
- Lot C in DP374032

The development includes:

- 2 x 11-storey residential flat buildings.
- 132 residential units.
- 90 place child care centre
- 186 available car parking spaces

As will be detailed throughout this written request, the proposed development meets the requirements prescribed under Clause 4.6 of the LLEP08 and relevant tests to establish why strict compliance with the standard is unreasonable or unnecessary for the circumstance.

2. Site Context

The subject site is commonly referred to as Nos. 7-9 Castlereagh Street and 6-12 Copeland Street, Liverpool and is legally described as Lot A in Deposited Plan 374032, Lot B in Deposited Plan 374032, Lot 2 in Deposited Plan 110597, Lot B in Deposited Plan 433791, Lot D in Deposited Plan 374032 and Lot C in Deposited Plan 374032.

The site is located within the Liverpool City Centre on the eastern side of Copeland Street and on the western side of Castlereagh Street, Liverpool which in part are parallel to one another. Refer to Figure 1 on the following page.

The development site is an irregular shaped allotment with the sites frontage to Copeland Street measuring 80.098m in its length and the site's frontage to Castlereagh Street equalling 36.937m in its length. To the south, the sites boundary measures 69.165m in its length. The site's northern most boundary equals a length of 30.888m. The eastern side boundary which adjoins No. 3 Castlereagh Street equals 20.118m in length with the eastern boundary adjoining No. 5 Castlereagh Street measuring 20.117m in its length. A splay of 3.658m adjoins part of the

boundary shared with No. 3 Castlereagh Street. The sites northern boundary which adjoins No. 5 Castlereagh Street offers a length of 30.480m. Overall, the site provides for an area of 4,300.42m².



Figure 1: Site Location Map (Mecore Mosaic)

Located across the subject site at present are several detached dwellings with associated outbuildings.

It is important to note that an approval had been issued on 31 July 2017 being DA-631/2015 at the site for demolition of existing buildings, tree removal, and construction of two 9 storey residential flat buildings containing 116 residential apartments over two levels of basement car parking with associated landscaping and ancillary site works. This application did not include No. 6 Copeland Street which now forms part of the current development application before Council.

There is also an existing approval north of the subject site for an eleven (11) - storey mixed use development: Stage No. 1 - 6 premises to be used as neighbourhood shops, 4 levels of basement parking, and 43 residential units. Stage No. 2 - 4 levels of basement parking and 128 residential units at Lot 1 Copeland Street, 1d Castlereagh Street, 1a Castlereagh Street, 1b Castlereagh Street, 1c Castlereagh Street, 3 Castlereagh Street and 5 Castlereagh Street Liverpool. The reference for this approved development application is DA-436/2007.

The development application before Council will have an enhanced development outcome as appose to the existing approvals being DA-436/2007 and DA-631/2015 being developed individually. The benefit of incorporating Lot 6 in this development application is that it will not be isolated.

Development in the vicinity of the subject site is typically of a higher density and is residential in nature. In view of the R4 High Density Residential land zoning afforded to the site and those nearby, the development has conformed with the transition to higher density built forms and is therefore representative of this future desired character.

In proximate locations of the subject site to the east and southeast are several education establishments namely, All Saints Catholic Primary School, Liverpool Boys High School, Liverpool Girls High School and Liverpool TAFE. Sydney South West Private Hospital and Liverpool Hospital are also situated within proximity of the site being to the east and southeast, respectfully.

Several local services and amenities are situated nearby the subject site with Westfield Liverpool Shopping Centre being approximately 500m walking distance of the site to the east. Just south of the Westfield Shopping Centre is the Core of the Liverpool City Centre, further enhancing accessibility to a variety of goods and services for the benefit of future residents.

With several bus stops located along nearby Elizabeth Drive, the site is well serviced by public transport infrastructure which offers connections to a more expansive public transport network and nearby suburbs.

3. Clause 4.6

This submission is made under clause 4.6 of the Liverpool LEP 2008 – 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 Planning Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the Planning Secretary 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 C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 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 all of these zones.*

(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,*
- (caa) clause 5.5,*
- (ca) clause 6.4, 6.5, 6.6, 7.5A, 7.22, 7.23, 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 written request for a variation to the building height standard.

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

Contravened Development Standard

The Environmental Planning Instrument to which the variation relates to is the Liverpool Local Environmental Plan 2008. The contravened development standard is Clause 4.3 Height of Buildings, which reads as follows:

4.3 Height of buildings

(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.

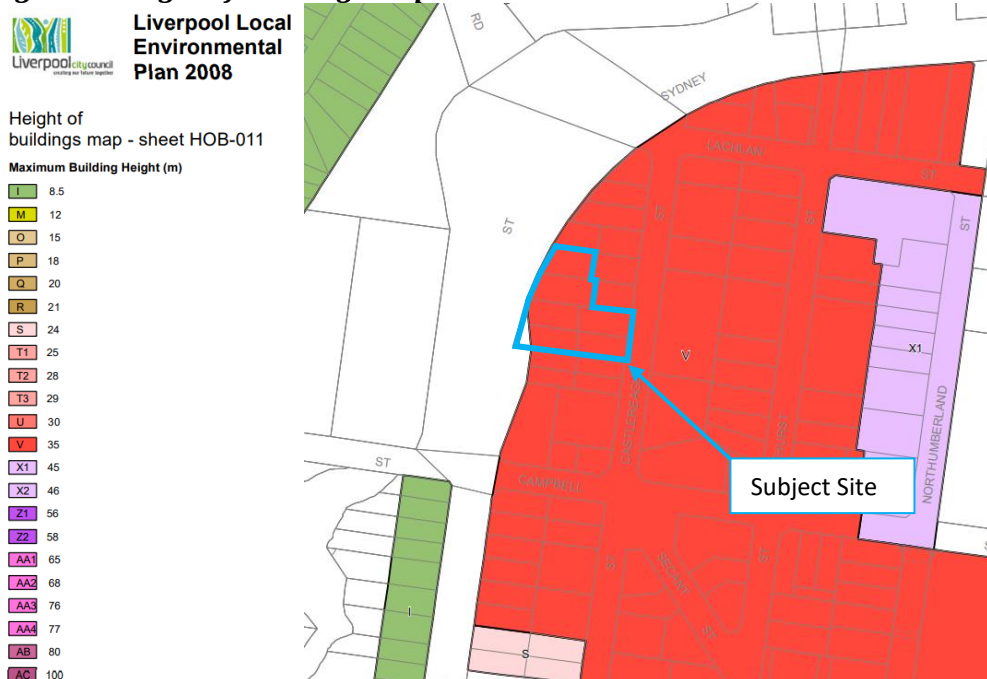
(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

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.

Council's Height of Buildings Map identify the maximum height of buildings for the site to be 35m ("V"). Refer to **Figure 2** below. While the site is located within the Liverpool City Centre, no additional clause that alters the mapped building height applies as the site is not identified as being within "Area 8", "Area 9" or Area 10" on the Liverpool LEP Floor Space Ratio Map.

Figure 2: Height of Buildings Map



Source: NSW Legislation, LLEP08 Map_011

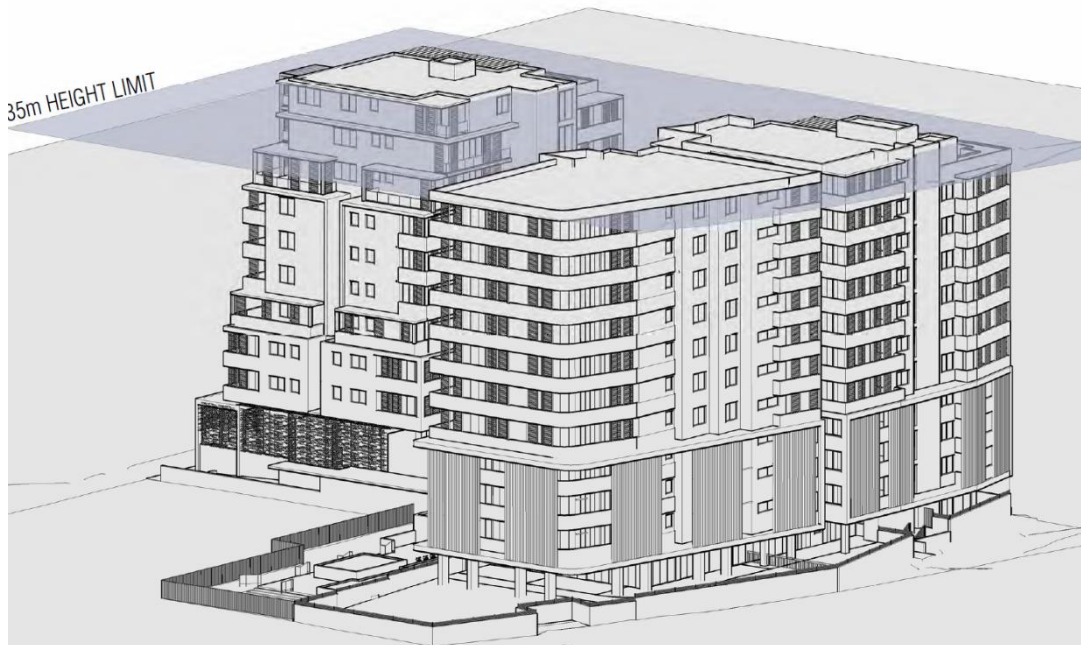
4. Extent of Non-Compliance

As noted above, Clause 4.3 of the LLEP08 states that the subject land has been prescribed to have a maximum height of buildings of 35m.

- Maximum Height of Building: 35m
- Proposed Height of Building:
 - Block A: 36.62 (Maximum) See Section Plan (DA-203).
 - Block B: 36.8 (Maximum) See Section Plan (DA-203).
- Variation:
 - Block A: 1.62m (4.6% variation)
 - Block B: 1.8m (5.1% variation)

The extent of the maximum building height variation is illustrated in an excerpt extracted from the architectural plans prepared by Zhinar Architects (Figure 3).

Figure 3: Excerpt of Height Study



Source: Zhinar Architects

The proposed variation is primarily a result of the provision of, and access to, the roof level for communal open space and include the lift, lift overrun and pergolas. Lesser variations relate to the roof over the Level 10 units and the plant located at roof level.

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	<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> <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. (applicable)</i>
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 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 height of buildings control 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.

4.3 Height of buildings

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,

While the proposed development also seeks a slight variation to the FSR standard, it is important to note that all habitable floor area is located below the 35m building height control. Therefore, the proposed variation to FSR has no bearing on the proposed variation to building height.

The majority of the proposed development is compliant with the maximum building height control of 35m, with the only exception being the lift access to the proposed communal open space, plant equipment and the roof over the Level 10 units. The proposed variation to building height will allow for the provision of a roof-top communal open space area that will be able to achieve year-round solar access even after the adjoining northern property is redeveloped to its maximum potential.

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

High quality urban form is achieved within the design of the building. The building and landscaping fronting Copeland Street and Castlereagh Street will promote a high architectural standard that contributes positively to the streetscape and immediate neighbourhood. In addition, the street façades and the side elevations have been treated with a range of architectural features that ensure a high quality built form (illustrated in Figures 4 and 5). These features include:

- Articulated block colours (light and dark greys proposed on Level 4 and above, and dark greys and caramel proposed at Level 3 and below).
- Variety of materials, cladding and screening types – Face brick, glass, applied textured paint finish and vertical and horizontal timber screens.
- Open balconies located at the corner of the buildings to add to the visual articulation of the built form.



Figure 4: Extract of perspective view from Copeland Street and schedule of finishes (Source: Zhinar Architects)



Figure 5: Extract of perspective view from Castlereagh Street and schedule of finishes (Source: Zhinar Architects)

It can therefore be demonstrated that the building height proposed is conducive to a residential development that achieves a high quality built form regardless of its building height, that is also fit-for-purpose and contributory to the ongoing emergence of contemporary building forms, and therefore achieves objective (b).

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

The proposed development has also been designed to maximise solar access with 71.21% of the proposed units across the entire development achieving a minimum of 2 hours solar access.

To further ensure a high level of amenity is provided to all residents, rooftop communal open space is proposed that ensures all future residents are afforded with a quality area of outdoor recreation which achieves good solar access.

In terms of adjoining properties, reference should be made to the shadow diagrams prepared by Zhinar Architects submitted under separate cover. It is important to acknowledge that given the orientation of the site and its location to other high-density developments, a degree of overshadowing is inevitable. The proposed elements of the built form that breach the maximum permissible building height are generally located centrally within the site and have a limited effect on the overshadowing cast to adjoining properties.

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

The subject site is zoned and bounded by properties that are zoned R4 High Density Residential and mapped on the height of buildings map with the same maximum height standard (35m). Therefore, the proposed building form and scale has been designed to reflect the emerging high density residential character of the area. The site is otherwise under-utilised and will benefit from the redevelopment in a form that is suitable for the intensity of use.

Consequently, it is demonstrated that the proposed dwelling meets the objectives of Clause 4.3 of the Liverpool Local Environmental Plan 2008. The proposal provides for the orderly and economic development of the site, given the site's orientation, location and context it is considered that the site is well suited to accommodate the extent of development and variation to the standard sought.

6. Are there Sufficient Environmental Planning Grounds?

The assessment in **Section 5** of this written request demonstrates that the resultant environmental impacts of the proposal will be satisfactory against the objectives of the zone.

The proposed variation is for a maximum of 1.8m, or a 5.1% exceedance to Council's control.

The proposed variation is primarily a result of the provision of, and access to, the roof level for communal open space and include the lift, lift overrun and pergolas. Given the orientation of the lot, any communal open space provided at ground level will be overshadowed once the adjoining northern site is redeveloped to the maximum potential envisaged under the LLEP08. Therefore, the provision of roof-top communal open space and subsequent variation to building height, will ensure that a communal open space that is capable of achieving year-round solar access is provided within this site. Thus, the proposed variation will result in an improved residential amenity outcome.

The assessment below demonstrates that there are sufficient environmental planning grounds to justify contravening the building height development standard as follows:

- The majority of the proposed development is compliant with the maximum building height control of 35m, with the only exception being the lift access to the proposed communal open space, plant equipment and the roof over the Level 10 units. The new elements are centralised over the roof form and have limited visibility from the streetscape.
- All habitable floor area is located below the 35m building height control.
- The variation to height sought will allow for the provision of roof-top communal open space that will be able to achieve year-round solar access.
- The proposed development has been carefully articulated to ensure adjoining developments and the public domain will be able to receive an adequate exposure to the sky and sunlight. The minor height breach sought is unlikely to cause significant overshadowing onto the streetscape or adjoining properties.
- The proposed development is located within an established high density residential area characterised by 9-11 storey residential flat buildings. The proposed development will reflect the scale and built form character of the area despite the minor variation to height sought.

It is therefore demonstrated that the building height sought allows for the efficient and economic use of the land within the environmental opportunities and constraints for the context of the site.

In this case, strict compliance with the development standard for height of buildings in the LLEP08 is unnecessary and unreasonable.

7. Is the Variation in the Public Interest?

Clause 4.6 states that the 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 written variation provides sufficient environmental planning grounds to justify contravening the development standard.

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 for a well-articulated built form and heightened amenity for future occupants and visitors.

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:

The objectives of the zone are as follows:

- *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 following comments are made with respect to the objectives, demonstrating that the development is consistent with the above-mentioned objectives of the zone.

- The proposed development provides a positive response to the evolving high density character of the locality which will contribute to the housing stock with the local government areas and specifically within the Liverpool City Centre.
- The proposal offers an appropriate mix of 1, 2 and 3-bedroom apartments to cater for the diverse housing needs of the community.
- The proposal includes a child care centre to part of the ground floor of Block B. The centre will provide for a service to meet the day to day needs of residents.
- With the subject site located within the Liverpool City Centre, the site benefits from its proximate location to an array of local businesses, shops, amenities and infrastructure which are located throughout the Liverpool City Centre. Several bus stops are located within a proximate location to the site, offering alternative transport modes for the benefit of future residents.
- There is no fragmentation of land that would result from the proposed development. It should be noted that the proposal encompasses No. 6 Copeland Street which the previous approval at the site did not, therefore avoiding any isolation of sites.

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 the public benefit will not be undermined by varying the standard:

- ❑ The proposal provides for a high quality residential building that is in keeping with the high density residential zoning and desired future character of the land.
- ❑ Given the site's orientation, location and context, it is considered that the site is well suited for the development.
- ❑ The development is generally consistent with relevant planning controls.
- ❑ 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 Liverpool LEP 2008 allows for the orderly and economic development 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 throughout this written request for a variation. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 of the Liverpool LEP 2008 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 residential nature of the neighbourhood.

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 C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 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 all of these zones.

(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,

(caa) clause 5.5,

(ca) clause 6.4, 6.5, 6.6, 7.5A, 7.22, 7.23, 7.24, 7.25, 7.26, 7.26A, 7.27, 7.28, 7.29 or 7.30."

The following notes to the above are:

- The variation sought is not contrary to subclause (6) and the proposed variation does not relate to the subdivision of land in the stated land use zones.
- 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 has been prepared and submitted under separate cover.
- Clauses 5.4, 5.5, 6.4 and 6.6, 7.5A, 7.22, 7.23, 7.24, 7.25, 7.26, 7.26A, 7.27, 7.28, 7.29 or 7.30 are not applicable in this instance.

11. Conclusion

The proposal does not strictly comply with the height of buildings control as prescribed by Clause 4.3 of the Liverpool LEP 2008. Having evaluated the likely affects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of the LLEP08 are satisfied as the breach to the controls does not create any adverse environmental impacts, and is a result of environmental constraints and opportunities.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular instance.

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