



## **REQUEST UNDER CLAUSE 4.6 OF LIVERPOOL LEP 2008**

---

**Construction of a 31-Storey Mixed-use  
Development and Associated Site Works  
402 Macquarie Street, Liverpool**

## CONTACT INFORMATION

THE PLANNINGHUB *by Hawes & Swan*  
ABN 27 605 344 045  
Suite 3.09, Level 3,  
100 Collins Street,  
Alexandria New South Wales 2015

[www.theplanninghub.com.au](http://www.theplanninghub.com.au)

Author(s):



Kuzi Jaravani  
Town Planner

Approved by:



Mairead Hawes  
Director

## DOCUMENT INFORMATION

Prepared For:	The Grand Liverpool Pty Ltd
Project Name:	402 Macquarie Street, Liverpool
Job Reference:	24/084
Date Approved:	24 July 2024

## 1.0 The Proposal

This request is written in support of a Stage 2 detailed development application for the Concept Approval **DA-1262/2022** and seeks consent for the construction of a 31-storey mixed-use development comprising hotel or motel accommodation, recreational facility (indoor), residential apartments and associated site works at 402 Macquarie Street, Liverpool.

This Clause 4.6 Request relates to a variation proposed to Council's Building Separation in Liverpool City Centre control as prescribed by Liverpool Local Environmental Plan (LEP) 2008.

### 1.1 Relevant Case Law

Clause 4.6 of within the Liverpool Local Environmental Plan 2008 (LLEP 2008) allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP.

Clause 4.6 (3) of the LEP provides:

- (3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*
- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
  - (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*

The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court (the Court) and the NSW Court of Appeal in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *Randwick City Council V Micaul Holdings Pty Ltd* [2016] NSWLEC 7;
4. *Brigham v Canterbury-Bankstown Council* [2018] NSWLEC 1406;
5. *Initial Action v Woollahra Municipal Council* [2018] NSWLEC 118; and
6. *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511.

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446 [42]-[51] and repeated in *Initial Action* [17]-[21]. Although *Wehbe* concerned a SEPP 1 objection, the common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe* are equally applicable to cl 4.6 (*Initial Action* [16]):

1. *The objectives of the development standard are achieved notwithstanding noncompliance with the standard;*
2. *The underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;*
3. *Underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;*
4. *The development standard has been abandoned by the council; or*
5. *The zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).*

The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* [22]).

The environmental planning grounds relied on in the written request under cl 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* [24]).

## 1.2 Relevant Development Standard

The development standard to which this objection relates is Clause 7.4 Building Separation in Liverpool City Centre. Clause 7.4 of Council's Building Separation control sets out the following:

- (1) *The objective of this clause is to ensure minimum sufficient separation of buildings for reasons of visual appearance, privacy and solar access.*
- (2) *Development consent must not be granted to development for the purposes of a building on land in Liverpool city centre unless the separation distance from neighbouring buildings and between separate towers, or other separate raised parts, of the same building is at least—*
  - (a) *9 metres for parts of buildings between 12 metres and 25 metres above ground level (finished) on land in Zone R4 High Density Residential, and*
  - (b) *12 metres for parts of buildings between 25 metres and 35 metres above ground level (finished) on land in Zone R4 High Density Residential, and*
  - (c) *18 metres for parts of buildings above 35 metres on land in Zone R4 High Density Residential and*

- (d) 12 metres for parts of buildings between 25 metres and 45 metres above ground level (finished) on land in Zone E2 Commercial Centre or MU1 Mixed Use, and
- (e) 28 metres for parts of buildings 45 metres or more above ground level (finished) on land in Zone E2 Commercial Centre or MU1 Mixed Use.

#### Comment

The subject site is zoned MU1 mixed use under the provisions of the LLEP 2008 and this development standard is applicable to the proposed development. The applicable building separation between neighbouring buildings for this development is 12m, for parts of the building between 25m and 45m above ground level (finished), and 28m for parts of buildings 45m or more above ground level (finished).

It is generally applicable that half the building separation distance is provided to allow for future development on adjoining lots to provide the other half of the building separation distance ensuring compliance with Clause 7.4 is achieved. This rationale has been adopted from Council's assessment of **DA48/2015** at 166-176 Terminus Street, Liverpool (the adjoining site to the east).

This DA proposes a mixed-use building within the Liverpool City Centre that incorporates a maximum building height of 104.9m, therefore this clause is applicable to the top of level 7 and above of the proposed development.

### 1.3 Is the Planning Control in Question a Development Standard?

'Development Standards' are defined under Section 1.4(1) of the EP&A Act as follows:

*"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 character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work..."*

#### Comment:

As defined above, the building separation control under Clause 7.4 of LLEP 2008 is clearly identifiable as a development standard.

### 2.0 The Contravention

The proposal results in the following variation to Council's Building Separation in Liverpool City Centre Control as demonstrated in the table below:

Table 1: Proposed Separation Distances			
Proposed Level	Required Separation Distance	Proposed Separation Distance (Rear Boundary)	Proposed Separation Distance (Eastern Side Boundary)
Levels 7-14	Building to Building 12m	7m to Boundary (levels 7 & 8)	Nil to Boundary (levels 7 & 8 only)
	Building to Boundary 6m	11.46m to Boundary (levels 9-14)	12m to Boundary (levels 9-14)
Level 15 & above	Building to Building 28m	N/A	12m to Boundary
	Building to Boundary 14m	The maximum building height of the site to the rear cannot exceed 45m as per the applicable LEP height control.	12m to Boundary

**Comment:**

The proposed variation was considered acceptable under Concept Approval **DA-1262/2022**. The proposed development retains the approved building envelopes which are non-compliant with the building separation distance along the north-eastern side boundary only. These non-compliances are discussed below:

- Levels Between 25m and 45m**

A small portion of the top of proposed level 7 and level 8 exceeds a height of 25m and is proposed with a nil side setback to the north-eastern boundary. The adjoining tower at 166-176 Terminus Street, Liverpool has been approved with levels 7 and 8 achieving a 6.1m setback to the sites south-western boundary.

Therefore, a minimum setback distance of 5.9m would need to be provided to this side boundary to be compliant. Proposed levels 9-14 provide a minimum setback distance of 12m that is compliant with this control.

- Levels 45m and Above**

Clause 7.4 (e) requires a building separation of 28m for parts of buildings 45m or more above ground level (finished). The existing mixed-use development to the eastern side boundary is eight storeys high

and is unlikely to be redeveloped in the near future, so the proposal would have no impact to this adjoining site, despite the proposed 14.26% (2m) variation to the control.

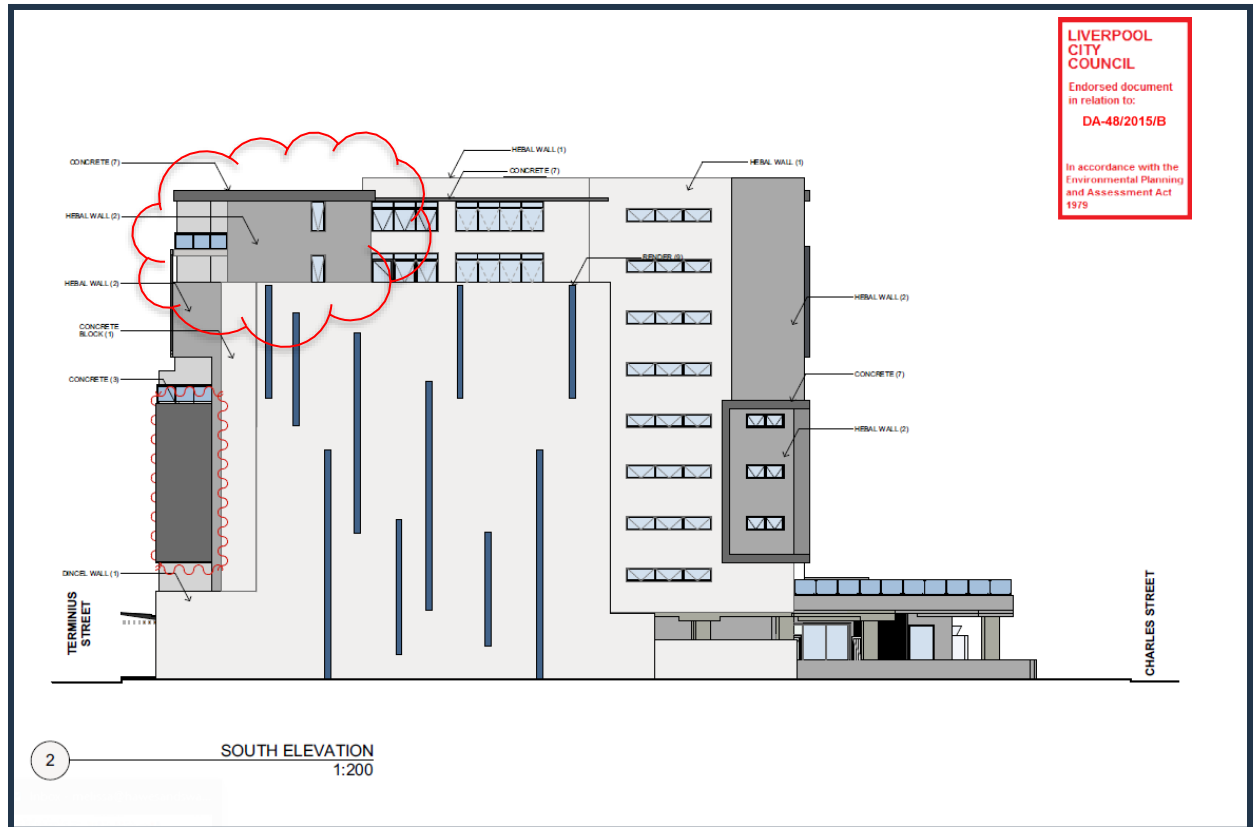
Therefore, the subject site is irregular in shape containing a splayed frontage and tapering lot width at the rear. The development has been designed to respond to the site's constraints, provide an active street frontage and tie into the development on the adjoining site at 180-188 Macquarie Street, Liverpool. Full compliance would render a third of the site undevelopable resulting in an undesirable built form on site and achieve a floor plate inappropriate for development.

In addition, the contravention only applies the portion of the adjoining building at 166-176 Terminus Street, Liverpool on levels 7 and 8 only, at a depth of 12m which was considered acceptable under **DA-1262/2022**.

As illustrated in **Figures 1 and 2** below, **DA48/2015/B** approved a 9-storey mixed use building with levels 7 and 8 stepped with a side setback of 6.1m to the site's south-western boundary, this boundary adjoins the proposed development.



**Figure 1:** Western elevation of adjoining mixed-use building at 166-176 Terminus Street, Liverpool approved under DA48/2015. Level 7 & 8 achieve a 6.1m setback to sites south-western boundary.



**Figure 2:** South Elevation of adjoining mixed-use building at 166-176 Terminus Street, Liverpool approved under DA48/2015. The area within red cloud denotes the building depth of Level 7 & 8 and does not extend the length of the site.

### 3.0 Justification of the Contravention

#### 3.1 The Site Context

Site context is a key consideration when determining the appropriateness and necessity of a development standard. The site and its surrounds as existing are a mix of residential and commercial uses. The site is identified as being located in the Liverpool City Centre, which is currently undergoing redevelopment.

Furthermore, the Liverpool LEP 2008 (Amendment No. 52) identifies the site as a 'key-site' within the mid-rise precinct of Liverpool City Centre that encourages better built form outcomes by relating the floor space ratio to building typology and public domain outcomes.

Of note, the adjoining property at 166-176 Terminus Street, Liverpool is currently undergoing redevelopment with other larger residential towers currently underway within in the Liverpool CBD. There are a number of draft masterplan concept proposals in place such as Georges River and the Liverpool City Centre Precincts that illustrates the strong urban growth ahead. The recently completed developments such as the Skyhaus and Paper Mill Developments that have now set new benchmarks in development envelopes and urban regeneration of Liverpool.



#### 4.0 Is Compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case (Clause 4.6(3)(a))?

Clause 4.6(3)(a) of the Liverpool LEP 2008 requires the departure from the development standard to be justified by demonstrating:

- ***Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case***

##### Comment

As detailed in the section above, the proposal maintains the future higher density-built form that is at a scale comparative to the site's location within the Liverpool City Centre. The numeric non-compliance to building separation for the proposed development is approximately 5.9m to adjoining levels 7 and 8 and 2m from levels 15 and above.

The proposed variation was considered acceptable under Concept Approval **DA-1262/2022**. The proposed development retains the approved building envelopes which are non-compliant with the building separation distance along the north-eastern side boundary only. Strict compliance with the control continues to be unreasonable and unnecessary in the site circumstances for the following reasons:

- The proposal will continue to achieve the objectives of the building separation in Liverpool City Centre development standard of LEP 2008.
- The non-compliance results from the irregular shape of the site to provide a desirable built form on site and achieve a floor plate appropriate for development.
- The adjoining tower at 166-176 Terminus Street, Liverpool proposes construction to up to levels 7 and 8. The development proposes a blank wall within this interface that is a design method commonly adopted in city centre areas in accordance with the provisions of Section 2F Building Separation of the ADG to maintain privacy to adjoining properties on main streets.
- The communal open space area located on the podium level (level 8) is a non-habitable space that does not directly interface the adjoining building that has approval for a maximum height of 8 storeys.
- The minor non-compliance will not impact the solar amenity of the adjoining property.
- The proposal does not adversely impact upon the visual appearance of the building or privacy and solar access of adjoining properties.
- The adjoining property has recently been development and is unlikely to undergo redevelopment in the near future.

Therefore, it is considered that the objectives of the development standard are met notwithstanding the breach of Council's building separation in Liverpool City Centre control, so strict compliance with the control is unreasonable and unnecessary in the site circumstances and site context.

## 5.0 Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard (Clause 4.6(3)(b))?

Clause 4.6(3)(b) of Liverpool LEP 2008 requires the departure from the development standard to be justified by demonstrating:

- ***There are sufficient environmental planning grounds to justify contravening the development standard***

### Comment

It is our opinion that there are sufficient environmental planning grounds to justify contravening the building separation in Liverpool City Centre development standard in this instance. These are as follows:

- The proposed variation was considered acceptable under Concept Approval **DA-1262/2022** and the proposed development retains the approved building envelopes.
- The minor variation only applies between towers to adjoining levels 7 and 8 at a depth of 12m and the proposed development proposes a blank wall to this section ensuring privacy to the adjoining site is retained. This is a design method commonly adopted in city centre areas in accordance with the provisions of Section 2F Building Separation of the ADG to maintain privacy to adjoining properties on main streets.
- The variation largely results from the irregular shape of the site to provide a desirable built form on site and achieve a floor plate appropriate for development.
- The proposal does not result in any adverse impact from adjoining properties.

It is considered the proposed development continue to offer a high-quality development that offers appropriate residential amenity and a high-quality built form. In addition, the provision of a blank wall to the section of building that is directly opposite the balcony of the adjoining tower ensures privacy to the adjoining site is retained.

Strict compliance with the building height development standard would require a setback of essentially a third of the site area to remain clear of development from 25m - 45m above the ground floor (finished) and would significantly reduce the site's ability to provide a floor plate appropriate for development therefore reducing the sites potential to facilitate higher density residential development.

With regard to the above, it is considered that there are sufficient environmental grounds to justify in varying the building separation control.

## 6.0 Conclusion

The proposed contravention of the building separation in Liverpool City Centre control of Clause 7.4 is based on the reasons outlined in this request.

It is considered that this proposal represents an individual circumstance in which Clause 4.6 was intended and to be available to set aside compliance with unreasonable or unnecessary development standards. The proposal will not result in the setting of an undesirable development precedent.

As demonstrated throughout this statement, it is evident that:

- The applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- The applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and

In view of all of the above, it is considered that this written request has adequately addressed the matters required by Clause 4.6(3) of LLEP 2008 and Council's support to contravene the building separation in Liverpool City Centre of Clause 7.4 is therefore sought.

## CONTACT US

---

Level 57, 25 Martin Place,  
Sydney New South Wales 2000

---

---

Email [INFO@THEPLANNINGHUB.COM.AU](mailto:info@theplanninghub.com.au)

---

Phone 02 9220 1786

---

Website [THEPLANNINGHUB.COM.AU](http://THEPLANNINGHUB.COM.AU)

---