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## Clause 4.6 Exceptions to development standards written request – Height of Buildings

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Demolition of existing structures and the construction of a new residential flat building containing sixty-three (63) dwellings and basement car parking under the provisions of Division 1 – In-Fill Affordable Housing of State Environmental Planning Policy (Affordable Rental Housing) 2009

1 – 7 Anderson Avenue, Liverpool  
12 El Alamein Avenue, Liverpool  
Lot 57, 58, 59, 60, 61 DP 35980

Prepared for: BCL2 Limited  
Project No: D036  
Date: December 2019

## Document Control

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## Clause 4.6 Written Request to Vary a Development Standard

### Liverpool Local Environmental Plan 2008

<b>Applicant's name</b>	BlueCHP Limited
<b>Site address</b>	1, 3, 5, 7 Anderson Avenue, Liverpool, 12 El Alamein Avenue, Liverpool (Lot 57 DP 35980, Lot 58 DP 35980, Lot 59 DP 35980, Lot 60 DP 35980, and Lot 61 DP 35980)
<b>Proposal</b>	Demolition of existing structures and the construction of a new residential flat building containing sixty-three (63) dwellings and basement car parking pursuant to the provisions of Division 1 – In-Fill Affordable Housing of State Environmental Planning Policy (Affordable Rental Housing) 2009
<b>Environmental Planning Instrument</b>	<i>Liverpool Local Environmental Plan 2008</i> (LLEP 2008at)
<b>Development standard to be varied</b>	<p>Clause 4.3 – Height of buildings</p> <p>(1) The objectives of this clause are as follows:</p> <p>(a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved,</p> <p>(b) to permit building heights that encourage high quality urban form,</p> <p>(c) to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,</p> <p>(d) to nominate heights that will provide an appropriate transition in built form and land use intensity.</p>

This document contains written request relating to the proposed variation to clause 4.3 (height of buildings) of LLEP 2008 in accordance with the provisions of clause 4.6 (Exceptions to development standards) of LLEP 2008. The written request has been prepared in accordance with clause 4.6(3) of the LEP.

### Details of development standard sought to be varied

Pursuant to Clause 4.3(2) of LLEP 2008, the height of a building is not to exceed the maximum height shown on the Height of Buildings Map. The Height of Buildings Map indicates that the maximum permissible height for the subject land is 15 metres.

Measured from existing ground level, particular points of the proposed development would exceed the 15-metre height limit<sup>1</sup>, which include the following:

- Parts of the ceilings, roofs and associated parapets of the top floor of the development, and
- Three (3) lift overruns.

Due to the slope of the site and the stepping of the roof, the maximum proposed height of the ceilings, roofs and parapet vary; the maximum breach of the height standard for these elements is 800mm (i.e. a 5.3% variation to the building height standard), and is located within the eastern section of Unit 59 within the centre of the top level (i.e. Level 4). For reference, the maximum breaches of the height standard at the eastern and western-most points of the building are 740mm and 670mm respectively.

The maximum heights of the Building A, B and C lift overruns would be 16.6 metres, 16.7 metres and 16.6 metres respectively; the tallest point of the building would therefore be the eastern side of the Building B lift overrun, which would form a 1.7 metre (i.e. an 11.3%) variation to the building height standard.

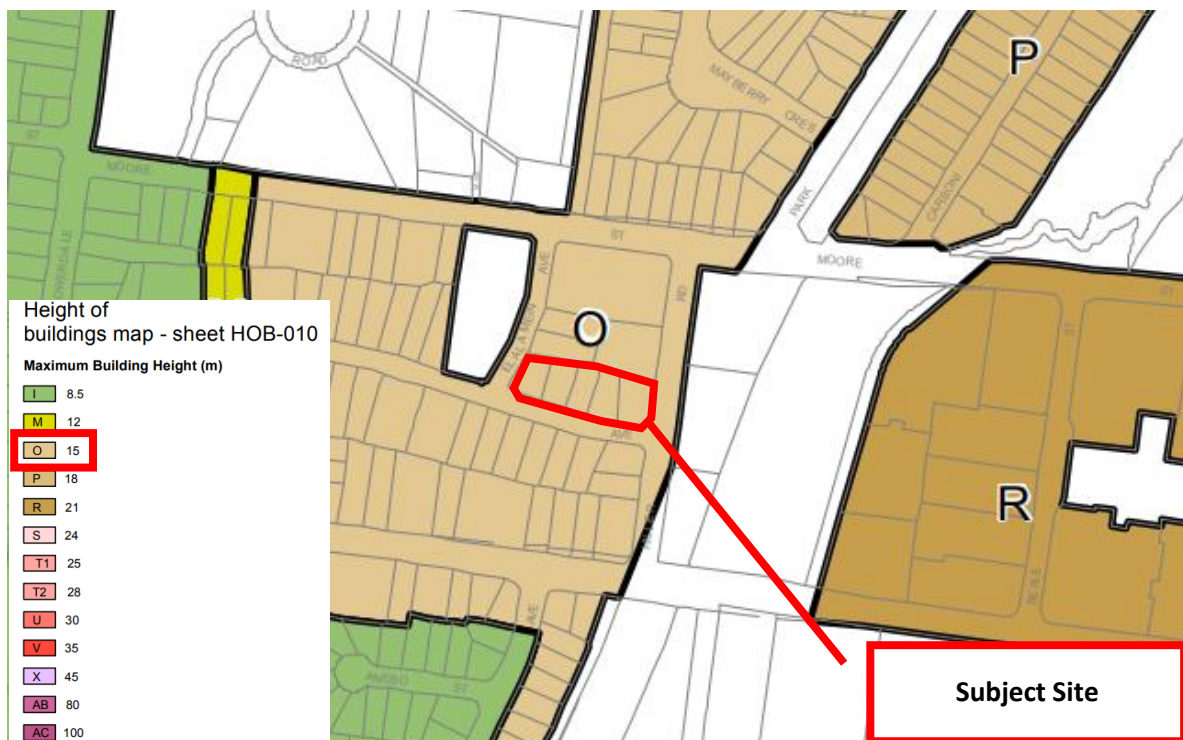


Figure 1: An extract of the height of buildings map, showing the location of the subject site.

Source: [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au)

<sup>1</sup> Prior to the pre-DA meeting, the original project included a greater building height as a result of a higher/more articulated roof. Following design changes recommended by Council's pre-lodgement minutes, articulated elements of the roof were removed; such a change reduced the height of the building with the exception of lift overruns, which the Council minutes indicated were satisfactory.



**Figure 2:** An extract of the long (i.e. east-to-west) section plan of the proposed development; the 15-metre height plane is denoted by the red line. The tallest point of the building that does not include lift overruns is denoted by the red box.

Source: Kennedy Associates Architects, 2019



**Figure 3:** Extract of the cross sections of Buildings A (left) and B (right) within the proposed development. The 15-metre height plane is denoted by the red lines.

Source: Kennedy Associates Architects, 2019

#### Clause 4.6 Exceptions to Development Standards – Liverpool Local Environmental Plan 2008

Clause 4.6 of the CLEP 2010 is the mechanism by which a consent authority is able to grant consent to a development despite a non-compliance(s) with a prescribed development standard. Clause 4.6 is reproduced below:

- (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 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 Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the 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 Secretary 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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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,*
- (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.*

**Note:** The development application does not propose a variation to any of the provisions within clauses 4.6(8)(c) and 4.6(8)(ca).

Clause 4.6(3) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and there are environmental planning grounds to justify the contravention of the standard

The authority established by *Four2Five Pty Ltd v Ashfield Council (2015)*, necessitates that environmental planning grounds for the proposed variation must be established aside from the consistency of the development with the objectives of the standard and the objectives of the zone.

In *Wehbe V Pittwater Council (2007) NSW LEC 827*, Preston CJ set out the following 5 different ways in which an objection (variation) may be well founded:

- 1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- 2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- 3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- 4. 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;*
- 5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

It is generally understood that Clause 4.6(3) (above) can be satisfied if it is established that a development satisfies one or more of points 2-5 above.

Having regard for the authority within *Wehbe*, compliance with the building height development standard has been determined to be unreasonable and unnecessary in the circumstances of this case, as is demonstrated by environmental planning grounds that are outlined below.

#### Objectives of the standard and zone:

Where they are applicable, the proposal would satisfy the objectives of both the building height standard and the R4 High Density Residential zone within LLEP 2008 (refer to the assessment of clause 4.6(4) below).

#### No impact on the surrounding area

As demonstrated by the SEE to which this variation request is attached, the proposed variations would have no adverse or unreasonable impacts on the amenity of the surrounding sites and the public domain in terms of privacy impacts, reduced solar access, view loss and adverse streetscape impact.

### Character of the built form

With regard to the significant size of the subject site (3,347m<sup>2</sup>) and the R4 High Density Residential zoning, the proposed building height is considered to be appropriate both for the site and the locality more broadly. Development within the surrounding area consists predominantly of low-density residential structures, however Council's LEP<sup>2</sup> anticipates that the surrounding locality will be progressively redeveloped and transition from a low to predominantly high-density residential area. While the proposed development would be inconsistent with the current form and context of the surrounding area, given the development standards and controls which apply to the area, future development on surrounding sites is likely to be of a similar (if not larger) scale to that being proposed in terms of building height and/or FSR.

In terms of height, bulk and scale, examples of similar such approvals under current planning provisions within the surrounding area include the following:

- 21-23 Anderson Avenue (approximately 95 metres west of the subject site), which was approved by Development Consent No. DA-1109/2016. This development included a five-storey, twenty-eight (28) apartment (including fourteen affordable dwellings) residential flat building, with a maximum building height of 17.18 metres (i.e. a 2.18 metre/14.5% variation to the building height standard) and a 1.5:1 Floor Space Ratio (FSR).
- 188-190 Moore Street (approximately 85 metres northwest of the subject site), which was approved by Development Consent No. DA-970/2015. This development included a four-storey residential flat building, containing twenty-three (23) affordable housing apartments, with a maximum building height of 14.15 metres and a 1.5:1 FSR.
- 88-92 Elizabeth Drive (approximately 395 metres north of the subject site), which was approved by Development Consent No. DA-108/2018. This development included a five-storey residential flat building containing forty-nine (49) affordable housing dwellings, with a maximum height of 17.417 metres (i.e. a 2.417 metre/16.1% variation to the building height standard)<sup>3</sup> and a 1.49:1 FSR.
- 4 Mayberry Crescent (approximately 295 metres northeast of the subject site), which was approved by Development Consent No. DA-4/2014 (later modified). This development included a five-storey residential flat building containing nine units, with a maximum building height of 16.14 metres (i.e. a 1.14 metre/7.6% variation to the building height standard) and an FSR of approximately 1:1.

Aside from being consistent with the future character of the locality, approval of the development would be consistent with other similar approvals within the surrounding area as outlined by the above dot points and would therefore not set an undesirable development precedent.

### Transition of height

The subject site is located well within both the R4 zone and an area where a 15-metre height limit applies (noting that R4 zoned areas east of Brickmakers Creek have a height limit of 21 metres). As the site is located at least 130 metres from areas with a lower height limit, the height of the building

<sup>2</sup> LLEP 2008 established R4 zoning both on the site and within the surrounding area when it was gazetted in 2008.

<sup>3</sup> Development Consent No. DA-826/2015 also approved an earlier development on this site with a maximum building height of 19.34 metres.



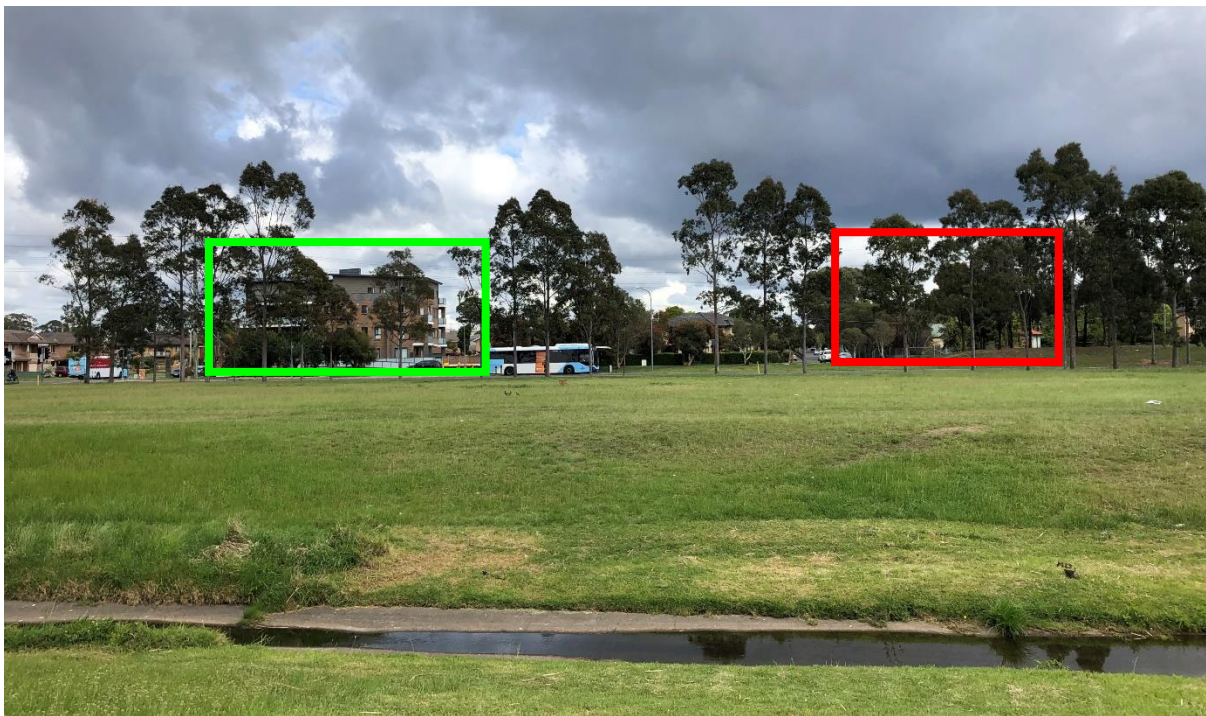
would not result in an undesirable height transition between development on the site and lower density zones to the north, west and south of the site.

#### Visual impact of the variation

Only relatively small sections of the roof breach the height standard; further, given that:

- The highly articulated design of the building,
- The landscape design of the site (which includes deep soil areas that are well in excess of minimum requirements, and which accommodate large trees that would progressively filter and screen the development as they mature), and
- The 15 metre height limit of both the site and surrounding areas,

it is unlikely that the 700-800mm breaches created by the roof would be discernible from areas immediately surrounding the site. Any visual impact associated with the development's height is also unlikely to be discernible from public and residential areas to the east, northeast and southeast due to well-established lines of mature trees which follow the alignment of the bus transitway immediately to the east of the site (refer to **figure 4**).



**Figure 4:** A photo taken from the eastern side of Brickmakers Creek, approximately 145 metres west of the subject site (the approximate location of which is indicated by the red border). Note that the trees along the bus transitway to the east of the subject heavily obscure development to the west of this point, including the residential flat building at 125 Memorial Avenue (indicated by the green border).

Source: CPS, October 2019

The largest breaches of the standard would be created by the lift overruns; aside from being integrated into the overall design of the building, these relatively small (i.e. 2.95m x 5.8m) features would be recessed within the building (i.e. they would not be located at the peripheries of the building, thereby forming dominant features when viewed from the public domain). As such, elements which breach the height standard would have very minimal (if any) visual impact.

### Excavation limitations

Given that the site is relatively level, it is not possible to excavate further into the site in order to attain compliance with the height standard. The proposed ground floor levels are unable to be lowered further as a result of overland flow paths and the storage levels of the proposed Onsite Detention System (OSD). Irrespective of drainage issues, further lowering of the ground floor levels would create design issues relating to streetscape presentation and both the amenity and functionality of ground floor apartments.

### Amenity, social benefits and dwelling yield

As the proposed development is to be occupied by social and affordable housing, dwelling yield is critical to maximising the social benefit that is to be gained by such a project. Rather than just designing a structure that satisfies minimum design standards however, the applicant has sought to construct housing that would also provide superior amenity (in terms of solar access and natural ventilation) to as many units as possible.

Given the unique circumstances of the subject site (in terms of orientation, width and depth), the height of the proposed development correlates directly to maximising dwelling yield and the amenity of those proposed apartments. To permit a small breach of the building height standard would enable both the addition of a fifth storey and a reduction of the building's depth; this would substantially increase the number of dwellings and maximise both north-facing and cross-through (i.e. multi-aspect) apartments, thereby maximising both dwelling yield and internal amenity. A lower and wider building would likely be too wide to contain cross-through apartments with depths capable of satisfying Apartment Design Guide ('ADG') requirements.

As it is not possible to further lower the height of the development as proposed, strict enforcement of the height standard would require removing the entire upper floor of the building; as a development containing a significant proportion of affordable housing, a substantial reduction in dwelling yield would therefore have adverse social consequences.

It is therefore submitted that a building with minor breaches of the height standard would result in a better planning outcome, in that the dwelling yield is maximised (thereby providing better social outcomes through the provision of more affordable housing) while also providing high levels of amenity to the majority of apartments. Given the critical need for affordable housing within the Liverpool LGA, it is submitted that compliance with the development standard in this instance would be unreasonable and unnecessary. Given that the relatively minor breaches would not adversely affect the surrounding area, for the consent authority to deny a small breach of the building height standard would:

- Significantly reduce the amount of housing available for vulnerable members of the community, and/or
- Likely reduce the amenity that could otherwise be afforded to the proposed apartments.

In summary, there are substantive environmental planning grounds which demonstrate why strict application of the development standard in this instance would be both unnecessary and unreasonable. Noting the importance of maximising the number of affordable dwellings on the site,

permitting minor breaches of the height standard would enable the maximum dwelling yield to be realised while also providing optimal amenity to the vast majority of proposed dwellings. Further, the proposed variation to the building height standard will not adversely affect surrounding sites and the locality more broadly, and would not present to surrounding areas in a manner that would be inconsistent with the future character of the area.

**Clause 4.6(4)(a)(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,**

The consent authority can be satisfied that the proposed development is in the public interest, as both the objectives of the building height development standard and the zone would be satisfied.

The objectives of the building height development standard, and a planning response to each demonstrating that such objectives would be satisfied are as follows:

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

**Comment:**

Proposed breaches of the height standard are limited to very minor encroachments by the roof, parts of the ceilings, roofs and associated parapets and lift overruns. As discussed within the assessment of clause 4.6(3) above, the zoning and associated development standards and controls of the area anticipate future redevelopment of the locality with bulk and scale that is consistent with that being proposed; this is reflected by approvals for similar development within the surrounding area. Further, the height variations would not be discernible from surrounding sites and the public domain, nor would they result in any impacts that would adversely affect the surrounding area. A number of developments with similar (if not greater) heights have also been approved within the surrounding area; approval of the development would therefore not result in an undesirable development precedent, nor would it establish new height limits that could be reflected by similar future development within the surrounding area.

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

**Comment:**

As indicated within the planning assessment to which this variation request is attached, dwellings within the proposed development would obtain very high levels of amenity, due to the design enabling direct solar access and cross-ventilation to the vast majority of apartments. As discussed within the assessment of clause 4.6(3) above, if the development were designed to comply with the height standard, it is likely that the development would either take on a substantially different form and layout that would not provide as many affordable dwellings or would not afford those dwellings with the same level of amenity that the current design permits. The exterior design of the building would have a high-quality appearance, with the articulated building facades lessening any visual impacts associated with the noncompliant height. Given that the proposed height of the development would improve residential amenity without adversely affecting surrounding areas, the consent authority can be satisfied that the proposed height of the building encourages high-quality urban design.

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

**Comment:**

As demonstrated by the submitted plans and the planning assessment to which this variation request is attached, the orientation and design of the proposed development would afford ample solar access to both dwellings and communal areas within the site. Further, the proposal would not excessively nor unreasonably overshadow surrounding residential sites and would not excessively overshadow the public domain, noting that the development would have no impact on the public park within El Alamein Avenue. The highly articulated façades and variable setbacks would also not reduce the public domain's exposure to the sky.

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

**Comment:**

The subject site is located well within both an R4 High Density Residential zone and an area that permits development up to 15 metres high (noting that R4 zoned areas to the east permit even greater building heights and floor space ratios). As such, the development would not result in an undesirable transition between areas of differing development densities and building heights. Further, as the proposed height variations are minor, the development would not represent a further height transition when compared to future development on surrounding sites (i.e. it is unlikely to appear taller than future development on surrounding sites).

The objectives of the R4 High Density Residential zone, and a planning response to each demonstrating that such objectives would be satisfied are as follows:

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

**Comment:**

As indicated within the planning assessment to which this variation request is attached, the Liverpool LGA is an area that is subject to significant housing stress and where there is significant and growing need for housing catering specifically for people on low incomes and/or with a disability. The proposed development would provide apartments of varying sizes that are to be dedicated as affordable housing. As demonstrated within the SEE to which this variation request is attached, there is a demonstrated need for affordable housing within the Liverpool LGA. The proposal would therefore satisfy the housing needs of this sector of the community; as a residential flat building, the development would also be consistent with that found within a high-density residential environment. As such, the objective would be satisfied.

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

**Comment:**

The proposed development would provide a mix of one, two- and three-bedroom apartments, which are a form and variety of residential accommodation that is consistent within the context of a high-density residential environment.

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

**Comment:**

The development would not affect the ability of surrounding sites to provide development containing facilities and/or services that would meet the regular needs of local residents.

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

**Comment:**

The proposed development would provide for a high concentration of dwellings on a site that has excellent access to local transport facilities. The site is within 200 metres walk of numerous bus stops that service high-frequency routes that provide fast and direct access to facilities and services within Liverpool, Parramatta and other local centres within the Western Sydney district.

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

**Comment:**

The proposed development would not result in the fragmentation of surrounding sites. Three of the subject site's four boundaries adjoin public road reserves, therefore development to the east, west and south of the site would not be fragmented; two residential allotments adjoin the northern boundary, and are briefly discussed as follows:

- 6-8 Hillier Road has an area of approximately 1,556m<sup>2</sup> and a frontage of approximately 38 metres. The site currently contains a modern multi-dwelling housing development, and is unlikely to be redeveloped in the foreseeable future. Based on Council's area and frontage requirements however, the proposed development would not prevent future high-density residential development (i.e. a residential flat building) on the site.
- 10 El Alamein Avenue has an area of approximately 767m<sup>2</sup> and a frontage of approximately 19 metres. On its own, this site would have insufficient area and frontage to accommodate future high-density residential development. If consolidated with 8 El Alamein Avenue<sup>4</sup> however, the combined area and frontage of

<sup>4</sup> The site further north at 176-188 Moore Street already contains a large multi-dwelling/residential flat-type development that was constructed around 2009; it is therefore unlikely that this site would be redeveloped in the foreseeable future, therefore it should be assumed that 8 and 10 El Alamein Avenue are the only two remaining allotments on that block that are capable of being subdivided for a future high-density residential development.

those two allotments would be approximately 1,470m<sup>2</sup> and 35 metres respectively. The combined area of the two allotments would therefore be capable of accommodating high-density residential development.

With regard to the above, the proposed development would not result in fragmentation that would preclude high-density residential development from being established on surrounding sites.

In summary, irrespective of the height variation, the consent authority can be satisfied that the proposed development will satisfy all objectives of both the building height standard and R4 High Density Residential zone. The proposed development would therefore be in the public interest.

#### Conclusion

It is acknowledged that the proposed development does not comply with the building height standard imposed by clause 4.3(2) of LLEP 2008.

As demonstrated above however, the breach of the standard is not significant and would not adversely affect surrounding sites and public domain. The scale of the proposed development is also envisioned by the zoning and associated development controls which apply to the site; this is reflected by approvals for similar such development within the surrounding area. The development is therefore consistent with the desired future character of the area and would not set an undesirable development precedent.

Aside from being consistent with the objectives of the zone and building height standard and subsequently being in the public interest, this written request has demonstrated that compliance with the standard in this instance would be unnecessary and unreasonable; there are also sound environmental planning grounds to justify the contravention of the development standard.

As such, it is submitted that the requirements of Clause 4.6 have been satisfied and that the proposed variation to the building height development standard can be supported.