



# **87 LOWER FORT STREET, MILLERS POINT**

Clause 4.6 Request

**URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:**

Director	Clare Brown
Associate Director	Alaine Roff
Senior Consultant	Andrew Hobbs
Project Code	SH1364
Report Number	SH1364 V1

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# 1. INTRODUCTION

## 1.1. PRELIMINARY

This variation request has been prepared pursuant to clause 4.6 of *Sydney Local Environmental Plan 2012* (SLEP 2012). Development Application D/2020/182 at 87 Lower Fort Street, Millers Point (the site) seeks consent for demolition of the existing building (known as the former Baby Health Centre), removal of trees, site remediation, Torrens title subdivision of one into two lots and erection of temporary fencing. The works are proposed to remove a redundant building and remediate a contaminated site for future divestment and reinvestment into social housing. As a public authority LAHC is of the view that it is firmly in the public interest to remediate the site before any divestment into private hands.

This clause 4.6 request seeks to vary clause 7.19(a)(ii) of SLEP 2012 relating to demolition and long term adverse visual impact. The site will not be comprehensively redeveloped under D/2020/182 if granted consent.

This variation request is to be read in conjunction with the Statement of Environmental Effects (SEE) and supporting documentation submitted with D/2020/182.

## 1.2. CLAUSE 7.19 OF SLEP 2012

Clause 7.19 of SLEP 2012 states

### ***7.19 Demolition must not result in long term adverse visual impact***

*Development consent must not be granted to development involving the demolition of a building unless the consent authority is satisfied that:*

*(a) any land affected by the demolition:*

*(i) in the case of land to which any provision of Division 5 (Site specific provisions) of Part 6 applies—is subject to a site-specific development control plan, or*

*(ii) in any other case—will be comprehensively redeveloped under the development consent (if granted) or under an existing development consent relating to the site, and*

*(b) adequate measures will be taken to assist in mitigating any adverse visual impacts that may arise as a result of the demolition with regard to the streetscape and any special character area.*

The intent or underlying objective of clause 7.19 is to ensure the quality of the streetscape, special character (if applicable) and urban character of the LGA are protected by minimising the potential adverse visual impacts of undeveloped sites. Specific to this case, the clause is unreasonable and unnecessary as the proposed works will result in the removal of a disused and redundant building while also removing contamination from the site. The clause is not intended to apply to a small 700sqm housing site. Rather, it is intended for larger development sites where vacant land or under-developed land would have long term visual impacts.

This written request seeks to vary clause 7.19(a)(ii) as it is not proposed to comprehensively redevelop the site under this consent (if issued) or any existing consents.

## 1.3. BACKGROUND

A meeting with officers from the City of Sydney Council (CoS) was held on Friday 15 December 2018. Minutes of the meeting were submitted to council to support the SEE. The meeting purpose was to discuss the site and understand requirements for the lodgement of a development application. At this meeting, clause 7.19 of the SLEP 2012 was discussed. Part of the clause states that the consent authority needs to be satisfied that the site will be comprehensively redeveloped under a development consent (if granted) or under an existing development consent relating to the site. This is relevant because the proposal does not seek redevelopment at this stage for the construction of buildings rather the development application proposes demolition, complete site remediation and subdivision to enable future development to be built.

While the SLEP 2012 does not define what constitutes 'comprehensive development', further correspondence from the CoS confirmed subdivision would satisfy this clause, despite the intent of the clause being to avoid vacant/partially demolished or constructed sites impacting on the streetscape for long

periods of time. It was agreed that while the proposal does not include new built form on the site, it is clear the works are required as a first step to ready the site for future construction works.

It was further advised at this meeting that the applicant should seek two section 60 applications to facilitate the demolition works on site and the subdivision of the site.

The Heritage Council of NSW has issued two section 60 approvals:

- S60/2018/11: Approval for demolition of former health clinic building and WC block and site remediation, including excavation, approved 5 March 2018.
- S60/2019/059: Approval for subdivision of the subject site, approved 16 May 2019.

On 3 March 2020, D/2020/182 was lodged with CoS for demolition of the existing building (known as 'the former Baby Health Centre'), removal of trees, site remediation, Torrens title subdivision of one into two lots and erection of temporary fencing.

Council undertook a preliminary assessment of the proposal and provided correspondence on 28 May 2020 advising that the proposal did not constitute comprehensively redevelopment for the purposes of clause 7.19(a)(ii) of SLEP 2012.

Council advised the applicant (Land and Housing Corporation) that a clause 4.6 request should be made to seek a variation to the requirement to comprehensively redevelop the site under D//2020/182.

# 2. SITE CONTEXT

## 2.1. THE SITE

The site is known as 87 Lower Fort Street, Millers Point, and is legally described as Lot 26 on DP 1221024 in Deposited Plan 1216874. As shown in Figure 1, the site is located on the western alignment of Lower Fort Street, at the corner of Argyle Place in the suburb of Millers Point NSW. The site has area of 700sqm and is triangular.

The site contains an existing structure being the former Baby Health Centre, a single storey brick build with metal roof. Internally the building consists of two large central rooms (waiting room and consulting room) separated by a folding concertina door, office, storeroom, and bathroom on the south side a kitchenette/ lunchroom on the north side. All ceilings are of a sheet material (fibrous cement) with timer battens. Walls are plastered brickwork, and there has been carpet laid throughout, excluding the bathroom and kitchenette. The building is of a post war civic design in architecture.

The remainder of the site contains landscaping. A fenced inaccessible area in the rear of the yard appears to have been used in the past as a storage area for construction or other waste.

The western boundary of the site abuts a publicly accessible laneway leading from Argyle Street. A portion of this laneway currently sits within boundary of the site. A right of way over this access path currently exists burdening the site.

As shown in Figure 2, two park benches are located within the frontage of the site, along with small trees and a hedge along the western boundary.

Figure 1 – Site Aerial



Source: Urbis

Figure 2 – Site Photos



Picture 1 – Subject site from street frontage

Source: Urbis 2018



Picture 2 – Subject site from street frontage

Source: Urbis 2018

## 2.2. THE SURROUNDS

The site is located in a prominent position within Millers Point within the City of Sydney local government area (LGA). The site is within 1km of Sydney's CBD. The surrounds are characterised as:

- North – Low rise residential and commercial properties including The Hero of Waterloo pub.
- East – Lower Fort Street and a number of residential properties and the Sydney Harbour Bridge.
- South – Lower Fort Street and beyond is the Garrison Church and the Sydney Observatory.
- West – Residential properties and beyond is Barangaroo redevelopment site.

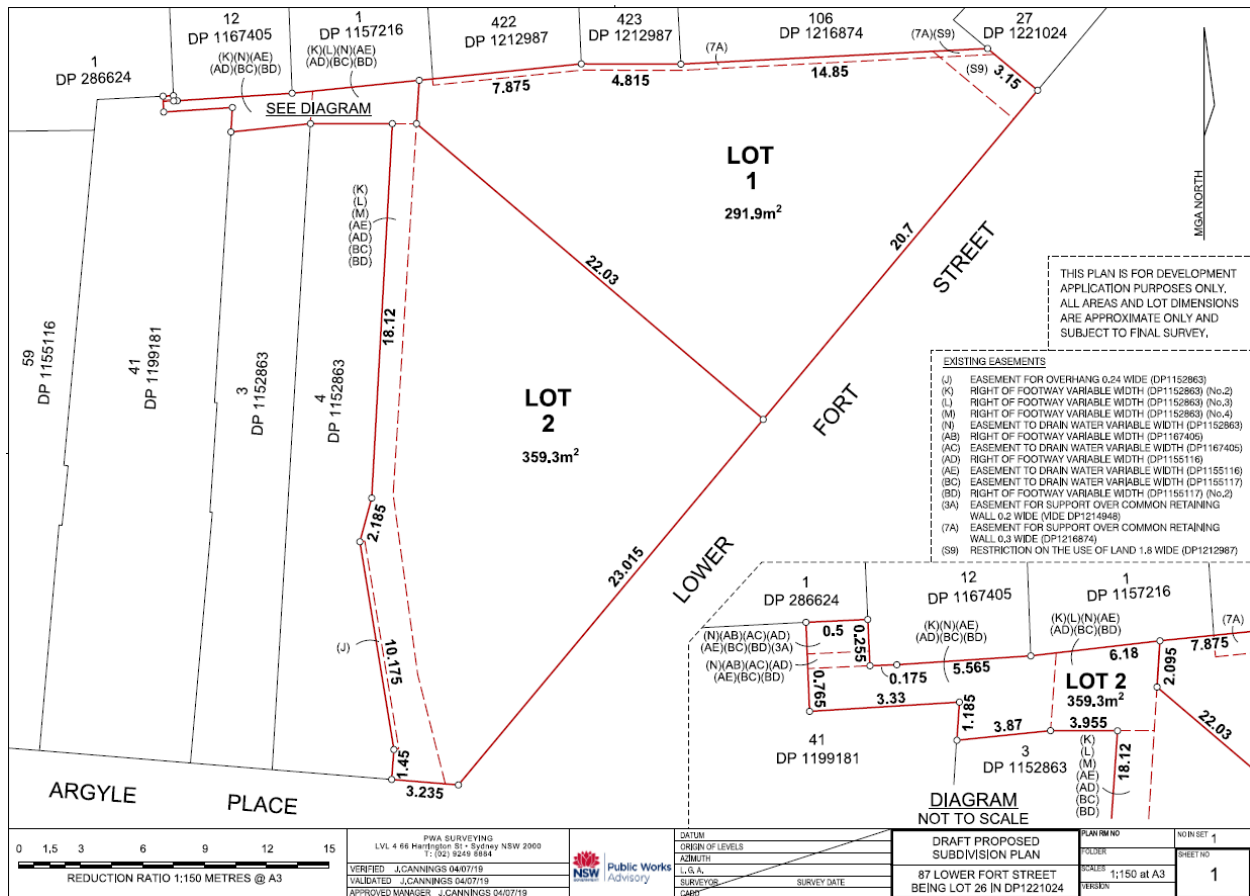


# 3. PROPOSED DEVELOPMENT

The development application D/2020/182 seeks approval for works which will remediate and ready the site for future development. The proposed works include the following:

- Demolition of the existing structure on site.
- Subdivision of the site into two lots, with proposed lot 2 to include a public pedestrian laneway (Refer to Figure 3).
- Remediation of the site including removal of all building materials and contaminated fill.
- Removal of all trees on site with the exclusion of trees 6 and 9 (inclusive of the hedge along the rear of the site).
- Minor works on retaining wall running along western boundary of site to ensure structural integrity.
- The site will remain fenced off (with the works fencing) after the works are completed, with the excavated ground graded and stabilised and turfed to limit erosion).

Figure 3 – Proposed Subdivision Plan



Source: PWA Surveying

## **4. PROPOSED VARIATION TO DEVELOPMENT STANDARD**

This written request seeks to vary clause 7.19(a)(ii) as it is not proposed to comprehensively redevelop the site under this consent (if issued) or any existing consents.

## 5. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a detailed assessment of the request to vary the development standard in accordance with clause 4.6 of the SLEP 2012. Detailed consideration has been given to the following matters within this assessment:

- *Varying development standards: A Guide*, prepared by DPIE (dated August 2011).
- Relevant planning principles and judgements issued by the Land and Environment Court (LEC).

The following sections of the variation request provides detailed responses to the key questions required to be addressed within the above considerations and clause 4.6 of the SLEP 2012.

This variation request has been informed by an assessment of the proposal on:

- Whether compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
- Whether there are sufficient environmental planning grounds to justify contravening the development standard.
- Whether the proposed development is in the public interest.

This assessment concludes that the variation request is well founded and that the particular circumstances of the case warrant flexibility in the application of the development standard.

### 5.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED?

Clause 7.19(a)(ii) is a development standard capable of being varied under clause 4.6(2). The proposed variation is not excluded from clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of the LEP.

### 5.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

Historically, the most common way to establish a development standard was unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34], the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to the non-existent or inconsequential adverse impacts arising from the proposed non-complying development. This disproportion provides sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

### **The objectives of the development standard are achieved notwithstanding non-compliance**

There is no stated objective for clause 7.19. The intent or underlying objective of clause 7.19 is to ensure the quality of the streetscape, special character (if applicable) and urban character of the LGA are protected by minimising the potential adverse visual impacts of undeveloped sites. This has been achieved by Council by effectively prohibiting demolition unless there is an approval for comprehensive redevelopment of the site. The clause, however, is intended for larger development sites in Sydney CBD rather than small housing lots. Larger vacant or under-developed sites have the potential for long term visual impact, whereas smaller housing lots are unlikely to pose any long term visual impact. It should therefore be applied flexibly where visual impact is minimised.

The Heritage Impact Statement that accompanied D/20202/182 concludes that the existing building to be demolished is a mid-twentieth century structure and, although it has been identified to have some degree of social significance, it does not positively contribute to the broader historic landscape and character of the locality. The building is not required to be retained on heritage grounds.

The proposed subdivision has been designed with regard for the historic subdivision pattern of the site and surrounding area, and with consideration for the most appropriate future uses. The subdivision will facilitate replacement of the existing vacant and redundant community building with residential development and continued access of an existing and historic public laneway behind Argyle Place. Additionally, consent was granted by the Heritage Council for the proposal inclusive of the subdivision layout.

Temporary hoarding is proposed around the site to limit visual impact of the works and to ensure the site is secure during demolition. The hoarding will comply with Council's requirements and any conditions of consent and will be keeping with the scale of the surrounding locality. The hoarding will remain around the site until it is purchased and redeveloped. The two pieces of street furniture located along the front boundary of the site will continue to be accessible during and after the proposed works on the site.

The hoarding will be Type A hoarding. This is not a permanent fixture or built structure and is completely reversible. The proposed temporary hoarding fence will not impact any significant heritage fabric. It is intended that the temporary hoarding fence will contain historic images of the immediate area to provide aesthetic interest and heritage interpretation for the duration of its installation.

Immediately following the completion of demolition and remediation works on site, LAHC propose to install and instate turfing on the site to limit any visual amenity impact caused by a vacant site.

Approval has already been granted by the Heritage Council of NSW for the proposed works under Section 60 and Section 65A of the Heritage Act 1977.

Future redevelopment will be subject to additional development applications which will assess the design and built form of new buildings, including their visual and amenity impact. Future development applications will need to demonstrate that the design and built form are sympathetic to the significance of the area.

LAHC understand that the demolition, remediation and turfing of the site could occur within six months. Due to the unique location of the site, LAHC do not anticipate the site would not remain on the market long.

The proposal is acceptable from a visual and heritage perspective as it will not result in any long-term adverse impacts to the streetscape and surrounding heritage items or the conservation areas. The site will be comprehensively redeveloped with a design that minimises long term visual impact.

The temporary hoarding will remain until the site is redeveloped to minimise the short-term visual impact of the demolition and vacant site, with turfing to immediately follow to ensure no lasting visual impact.

### **The objectives of the development standard would be thwarted by a compliant development**

There is no stated objective for clause 7.19. The intent or underlying objective is to ensure the quality of the streetscape, special character (if applicable) and urban character of the LGA are protected by minimising the potential adverse visual impacts of undeveloped sites. The clause is not intended to apply to a small 700sqm housing site. Rather, it is intended for larger development sites where vacant land or under-developed land would have long term visual impacts.

The intent of the clause would not be thwarted by a compliant development because the proposal is short term: an interim development scenario until the site is remediated and redeveloped. In the interim, extensive works will be undertaken to demolish structures and remediate and fence the land. The land will be transformed and improved from its contaminated and poorly presented state.

L&HC's objective would be thwarted if strict compliance is required. L&HC's objectives are to remediate the land to make it suitable and safe and to sell the land for future redevelopment. Proceeds from the sale of Government owned properties in Millers Point (and Dawes Point and The Rocks) have returned hundreds of millions of dollars back into the social housing system. Sale proceeds are financing the construction of new fit-for-purpose social housing across the Sydney metropolitan area and regional NSW. L&HC have no intention to redevelop the land themselves. Redevelopment under clause 7.19 for D/2020/182 is contrary to L&HC's objective and will impact their ability to finance other social housing projects.

### **5.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?**

The Land & Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, assists in considering the sufficient environmental planning grounds. Preston J observed:

*"...in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and*

*...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development"*

Contravening the development standard does not result in any adverse environmental impacts. There are sufficient environmental planning grounds to justify contravening the development standard:

- It is in the public interest for LAHC to remove the redundant structure and remove all contamination from the site prior to divestment to fund new social housing.
- The measures proposed as part of the Remediation Action Plan ensure contamination known to be present on site will be managed appropriately to ensure current and future safety to persons using the site.
- The proposal does not negatively impact on the locality statement for Millers Point. The site is not a heritage listed building item. This proposal will not impact on the significance of the Millers Point Locality long term, and consent for the works has already been considered appropriate and approved by the Heritage Council.
- Suitable hoarding is to be installed during works on site to ensure appropriate public safety is implemented.
- The hoarding will contain historic images to provide aesthetic interest and heritage interpretation for the duration of its installation.
- Site wide turfing will be installed and instated, along with suitable landscaped areas to be provided to minimise visual impact following site remediation and demolition.
- No medium to long-term acoustic or dust impacts will occur as the site will be levelled and landscape after demolition and remediation.

There are sufficient environmental planning grounds to justify the proposed non-compliance with the development standard in this instance.

### **5.4. HAS THE WRITTEN REQUEST ADEQUATELY ADRESSED THE MATTERS IN SUB-CLAUSE (3)?**

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

Each of the sub-clause (3) matters are addressed in this variation request, including detailed consideration of whether compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the subject lot, to justify the proposed variation to the development standard.

## 5.5. IS THE DEVELOPMENT IN THE PUBLIC INTEREST?

Clause 4.6(4)(a)(ii) states development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The consistency of the proposal with the underlying objective of clause 7.19 is demonstrated in Section 6.2 above. The proposal is also consistent with the land use objectives of the R1 General Residential zone under the SLEP 2012 as outlined in below.

Table 1 R1 General Residential Objectives

<b>R1 Objective</b>	<b>Assessment of Proposal</b>
<i>To provide for the housing needs of the community.</i>	The proposal seeks to ready the site for future redevelopment, most likely housing, which will increase housing supply in the area. The site is currently underutilised. The proposal is the first step in enabling the site to be used for residential purposes.
<i>To provide for a variety of housing types and densities.</i>	As above. The proposal is likely to facilitate two dwellings in the future, which is appropriate for the size of the site and subdivision.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	The proposal demolishes disused community buildings. These buildings are no longer needed. Residential is permitted in the zone and the most appropriate future land use.
<i>To maintain the existing land use pattern of predominantly residential uses.</i>	The proposal will subdivide the site and provide opportunities for a continued residential land use pattern. The subdivided sites will be of a size capable of accommodating residential dwellings.

Strict imposition of clause 7.19 development standard in this instance is not in the public interest as:

- The proposal is consistent with the underlying objective of the development standard, as outlined in Section 5.2 of this variation request.
- The proposal is consistent with the objectives of the R1 General Residential Zone, as outlined above.
- The proposal removes non-contributing buildings and structures and will not have an adverse heritage impact.
- The proposal is to remediate the site to make it safe and suitable for future use.
- Compliance would not achieve L&HC's objective to remediate the site for future redevelopment. Comprehensive redevelopment will be undertaken in the future by others.
- Compliance would not achieve L&HC's objective to sell redundant land to finance new social housing across NSW.
- Compliance is an unnecessary hindrance to the proposal delivering a clean, subdivided site to a purchaser for the construction of future residential development.

Notwithstanding the proposed variation to the development standard, the proposal is in the public interest.

## **5.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED?**

The Planning Circular PS 18-003, issued on 21 February 2018 (Planning Circular), outlines that all consent authorities may assume the Secretary's concurrence under clause 4.6 of the *Standard Instrument (Local Environmental Plans) Order 2006* (with some exceptions). SLEP 2012 is a standard instrument LEP and so the relevant consent authority may assume the Secretary's concurrence in relation to clause 4.6(5). The matters the Planning Secretary must consider are assessed below.

### **Clause 4.6(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?**

The proposed contravention will not raise any matter of significance for State or regional environmental planning. The proposed contravention is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

### **Clause 4.6(5)(b) – is there a public benefit of maintaining the planning control standard?**

There is no public benefit in maintaining the standard. The site will remain unused and unsafe in terms of contamination unless the proposal is approved as lodged. There is a public benefit in approving the proposal, as outlined in Section 6.5 of this request report.

### **Clause 4.6(5)(c) – are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed, however, there are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

## 6. CONCLUSION

For the reasons set out in this written request, strict compliance with the development standard contained in clause 7.19(a)(ii) of the LEP is unreasonable and unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds to justify the proposed variation.

In summary:

- The proposal satisfies the underlying objective of the development standard to minimise long term visual impact from demolition without redevelopment. Type A hoarding with historical imagery will ensure the site is safe and visually interesting until during demolition and remediation works, with site wide turfing to be installed and instated on the site until it is comprehensively redeveloped.
- The proposal is consistent with the underlying objective of the development standard and the objectives of the R1 General Residential Zone.
- The proposal removes non-contributing buildings and structures and will not have an adverse heritage impact.
- The proposal is to remediate the site to make it safe and suitable for future use. Compliance would not achieve L&HC's objective to remediate the site for future redevelopment. Comprehensive redevelopment will be undertaken in the future by others.
- The proposal will achieve L&HC's objective to sell an uncontaminated site to finance new social housing across NSW.
- There is no public benefit in maintaining the standard. The site will remain unused and unsafe in terms of contamination unless the proposal is approved as lodged.
- No provision of clause 4.6(8) restricts the variation sought in this application. The consent authority can therefore be satisfied that this variation request can be lawfully approved pursuant to clause 4.6 of HLEP 2013.

For the reasons outlined above, this clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In this regard, flexibility in the application of clause 7.19(a)(ii) should be applied.



