

Attachment C

<p>Clause 4.6 Variation Request - Undersized Apartments</p>



Prepared for
School Infrastructure NSW

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architectus™

Clause 4.6 Written Request – Minimum Apartment Size

29-33 Ithaca Road, Elizabeth Bay

Architectus Australia Pty Ltd
ABN 90 131 245 684

Adelaide
Level 1, 15 Leigh Street
57 Wyatt Street
Adelaide SA 5000
T +61 8 8427 7300
adelaide@architectus.com.au

Brisbane
Level 2, 79 Adelaide Street
Brisbane QLD 4000
T +61 7 3221 6077
brisbane@architectus.com.au

Melbourne
Level 25, 385 Bourke Street
Melbourne VIC 3000
T +61 3 9429 5733
melbourne@architectus.com.au

Perth
QV1 Upper Plaza West
250 St Georges Terrace
Perth WA 6000
T +61 8 9412 8355
perth@architectus.com.au

Sydney
Level 18, 25 Martin Place
Sydney NSW 2000
T +61 2 8252 8400
sydney@architectus.com.au

architectus.com.au

Report Contact

Jonathan Archibald
Associate, Planning
jonathan.archibald@architectus.com.au

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Revision history

Issue Reference	Issue Date	Issue Status
A	14 April 2023	Draft
B	19 April 2023	Final

1. Preliminary

1.1 Introduction

This Clause 4.6 variation request has been prepared by Architectus for City of Sydney Council (Council) to support D/2021/1478, which proposes “alterations and additions to the existing part-2 and part-3 storey residential flat building to create a part-3 and part-4 storey residential flat building” at 29-33 Ithaca Road, Elizabeth Bay (the site).

This request is made pursuant to Clause 4.6 of the Sydney Local Environmental Plan 2012 (LEP) to vary the recommended minimum apartment size contained within Clause 30 of State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development (SEPP 65) and Part 4D-1 of the supporting Apartment Design Guide (ADG).

1.2 Response to Council Request for Information

This request has been prepared in response to Council’s Request for Information (RFI), provided by email on 30 March 2023, which provides:

“In accordance with Clause 30(3)(b) of State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development minimum internal area apartment sizes specified in Part 4D of the Apartment Design Guide are development standards, as specified by Clause 30(1)(b).

Council considers Unit 04 and Unit 05 of the proposed development to be 1-bedroom dwellings rather than studio dwellings as identified on plans and therefore do not meet the minimum 50sqm unit size requirement for 1-bed units prescribed by Part 4D of the ADG.

Consequently, a Clause 4.6 variation request seeking to vary the minimum apartment size development standard specified in Part 4D of the Apartment Design Guide is required to be submitted and reviewed by Council prior to determination of the DA.”

Architectus do not accept that recommended minimum apartment sizes contained within the ADG constitute a development standard.

Further, that Clause 4.6 exists within the LEP 2012 and does not carry over to the separate legislative instrument (and higher order) SEPP 65, nor ADG (which is not a legislative instrument).

We are aware that Council have maintained this approach in the past (including, however not limited to D/2017/1672 and D/2018/903), however despite this, such variations are not recorded in Council’s Register of Development Standard Variations.

1.3 Clause 4.6 Exceptions to Development Standards

Clause 4.6(1) of the LEP 2012 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

As such, Clause 4.6(2) of the LEP 2012 enables the consent authority to grant consent for development even though the development contravenes a development standard.

Clauses 4.6(3)&(4) require the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development standard.

Clause 4.6(4)(a) 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 demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;

- That the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- That 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.

Accordingly, this request details the extent of the proposed variation and why compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, including sufficient environmental planning grounds to justify the contravention, having regard for the matters for contained within Clause 4.6(4)(a).

2. Development Standard to be Varied

This request seeks a variation to the recommended minimum apartment size contained within Part 4D-1(1) of the ADG (and deemed a development standard by Clause 30(1)(b) of SEPP 65). The objective of Part 4D-1 provides:

“The layout of rooms within an apartment is functional, well organised and provides a high standard of amenity”

This objective is supported by design criteria at Part 4D-1(1) which provides:

“1. Apartments are required to have the following minimum internal areas

<i>Apartment Type</i>	<i>Minimum Internal Area</i>
<i>Studio</i>	<i>35m²</i>
<i>1-Bedroom</i>	<i>50m²</i>
<i>2-Bedroom</i>	<i>70m²</i>
<i>3-Bedroom</i>	<i>90m²</i>

The minimum internal areas include only one bathroom. Additional bathrooms increase the minimum internal area by 5m² each.

A fourth bedroom and further additional bedrooms increase the minimum internal area by 12m² each.”

The above is also supported by design guidance further within this section, which provides that:

“Where minimum areas or room dimensions are not met apartments need to demonstrate that they are well designed and demonstrate the usability and functionality of the space with realistically scaled furniture layouts and circulation areas. These circumstances would be assessed on their merits.”

3. Extent of Variation to the Development Standard

The proposed development seeks alterations and additions to the existing part-2 and part-3 storey residential flat building (RFB) to create a part three (3) and part four (4) storey RFB containing ten (10) dwelling at the site as detailed at **Table 1**.

Table 1. Overview of Proposed Dwelling Sizes

Unit	Type	Internal Area (m ²)	ADG 4D-1 Recommended Minimum (m ²)	ADG 4D-1 Compliant
01	1-Bed+Study (1 bath)	65.72	50	Yes
02	1-Bed (1 bath)	58.73	50	Yes
03	Studio (1 bath)	43.54	35	Yes
04	1-Bed* (1 bath)	43.08	50	No
05	1-Bed* (1 bath)	44.85	50	No
06	1-Bed (1 bath)	50.15	50	Yes
07	Studio (1 bath)	43.88	35	Yes
08	1-Bed+Study (1 bath)	58.18	50	Yes
09	1-Bed+Study (1 bath)	60.04	50	Yes
10	2-Bed (Adaptable, 2 bath)	75.19	75	Yes

*It is noted that whilst Units 04 and 05 were initially proposed as studio apartments, on the basis of the required internal dividing wall (as a result of heritage considerations), Council considers these to constitute 1 bedroom apartments and therefore represent a variation to recommended minimum internal areas contained within the ADG.

This request therefore seeks to address two minor variations as follows:

- Unit 04, which has an internal area of 43.08m² and represents a variation of 6.92m² (13.84%) to recommended minimum internal areas within Part 4D-1 of the ADG (being 50m²).
- Unit 05, which has an internal area of 44.85m² represents a variation of 5.15m² (10.3%) to recommended minimum internal areas within Part 4D-1 of the ADG (being 50m²).

Relevant to this request, it is noted the existing building is not a heritage item, however is identified as a contributory building within the Elizabeth and Rushcutters Bays Heritage Conservation Area (HCA) and this non-compliance is the result of heritage considerations, including the requirement to maintain existing floor layouts, as requested by Council their RFI dated 18 March 2022:

“the front section of the building ... should be retained in its entirety, including side walls, existing floor levels and apartment layouts”.

These heritage considerations have also been acknowledged by Council in their RFI dated 18 March 2022, which provided that:

“Some flexibility may be afforded to the implementation of ADG standards for apartments in an adaptively re-used building if they are dealing with heritage constraints”.

An extract of the floor plans for Unit 04 and Unit 05 are provided below, with an assessment of this request for variation provided at Section 4.

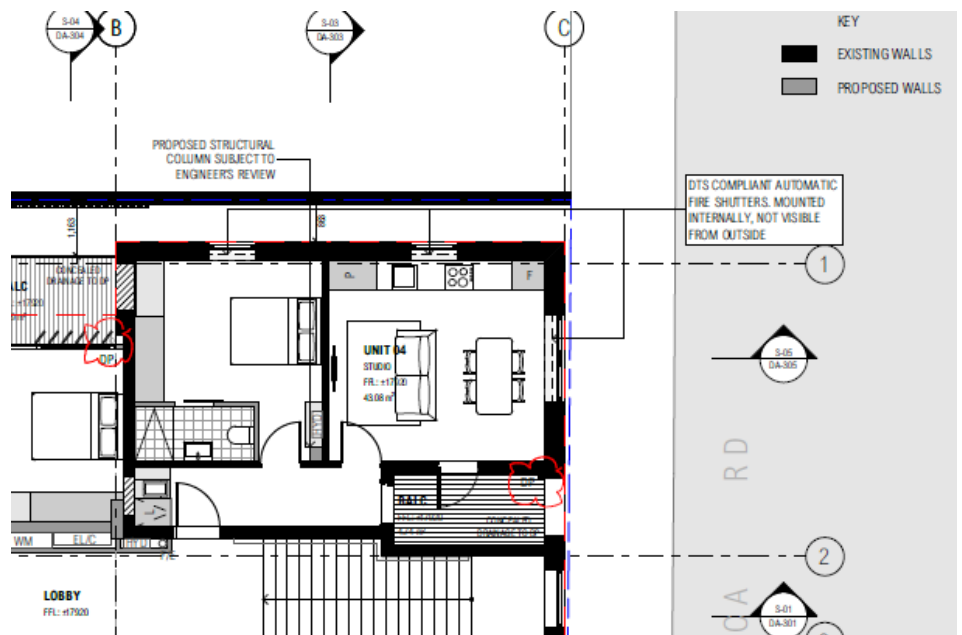


Figure 1 Extract of Unit 04 Layout (Drawing DA-102, Rev. F)
Source: CHROFI

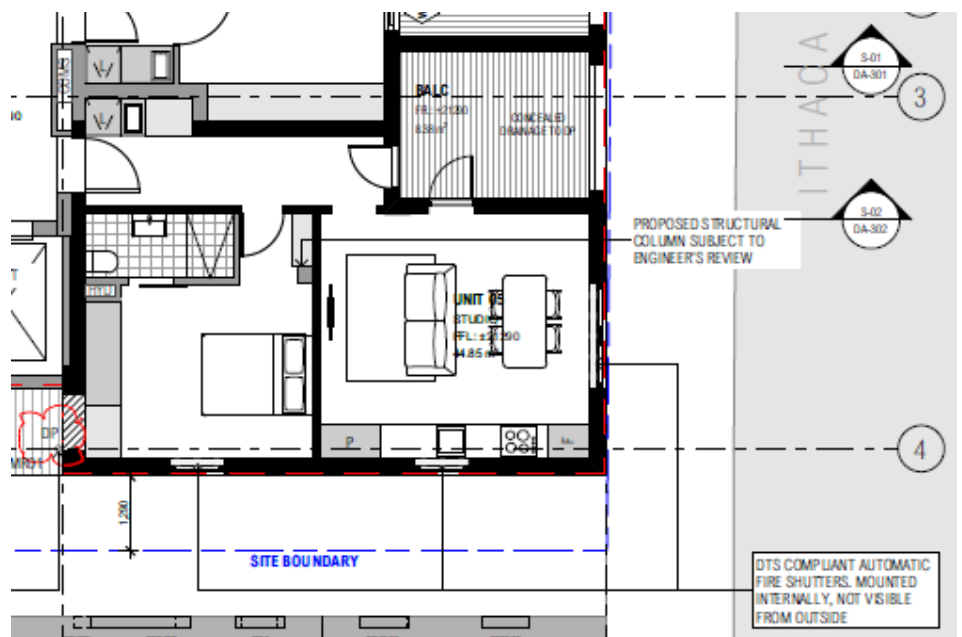


Figure 2 Extract of Unit 05 Layout (Drawing DA-103, Rev. F)
Source: CHROFI

4. Assessment of Variation

4.1 Clause 4.6(3)(a) - Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

Legislative Context

Clause 4.6(3)(a) of the LEP 2012 requires the applicant to provide justification that strict compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

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 (LEC) and the NSW Court of Appeal in:

- *Wehbe v Pittwater Council [2007] NSW LEC 827 (Wehbe);*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (Four2Five); and*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 (Initial Action).*

The relevant matters contained in Clause 4.6 of the LEP 2012, with respect to the development standard and these decisions are each addressed below.

Whebe Method

In *Wehbe* (at 43-48), Preston CJ established five potential ways for determining whether a development standard could be considered to be unreasonable or unnecessary and that approval of the objection may be consistent with the aims of the policy. These include the following methods:

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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.”*

Relevant to the proposed development, the first method is considered to be most appropriate in establishing that compliance with the development standard is unreasonable or unnecessary.

The proposed development seeks alterations and additions to the existing RFB, including retention of the front section of the building in its entirety (including side walls, existing floor levels and apartment layouts) as a result of heritage considerations and at the request of Council. Notwithstanding the minor variation, Units 04 and 05 demonstrate compliance with all other amenity criteria within the ADG. Compliance is considered unreasonable as this would necessitate the demolition of additional fabric and/or compromise overall layouts of the building.

Therefore, methods two through five are not considered applicable under the circumstances.

Part 4 of the ADG (Residential Amenity)

Parts 4A through 4J of the ADG relate to residential amenity and provide guidance to dwelling size, layout and residential amenity considerations (such as solar access, ventilation, circulation and open space). Specifically, Part 4D of the ADG relates to apartment size and layout.

When considering the first method in *Whebe*, the ADG at Part 4D-1 relates to recommended minimum apartment size and contains a single objective, to ensure that:

“The layout of rooms within an apartment is functional, well organised and provides a high standard of amenity.”

Whilst the proposal seeks to vary the recommended minimum apartment size contained within Part 4D-1, it is noted this part is supported by additional design criteria under Part 4D-2 and Part 4D-3 as detailed at **Table 2**.

Table 2. Overview of Part 4D-2 and 4D-3 of the ADG

Part	Objective	Design Criteria
4D-2	Environmental performance of the apartment is maximised	Habitable room depths are limited to a maximum of 2.5 x the ceiling height
		In open plan layouts (where the living, dining and kitchen are combined) the maximum habitable room depth is 8m from a window
4D-3	Apartment layouts are designed to accommodate a variety of household activities and needs	Master bedrooms have a minimum area of 10m ² and other bedrooms 9m ² (excluding wardrobe space)
		Bedrooms have a minimum dimension of 3m (excluding wardrobe space)
		Living rooms or combined living/dining rooms have a minimum width of: <ul style="list-style-type: none">• 3.6m for studio and 1 bedroom apartments• 4m for 2 and 3 bedroom apartments
		The width of cross-over or cross-through apartments are at least 4m internally to avoid deep narrow apartment layouts

All units within the proposed development (including Units 04 and 05) are functional and efficient, meeting all design criteria within Parts 4D-2 and 4D-3 of the ADG, including recommended minimum room dimensions and areas. As detailed within the submitted SEPP 65 statement, all proposed units also comply with (however not limited to):

- All solar and daylight access provisions contained within Part 4A of the ADG;
- Natural and cross ventilation provisions contained within Part 4B-2 and 4B-3 of the ADG;
- Minimum ceiling heights contained within Part 4C of the ADG;
- Minimum room dimensions and areas contained within Parts 4D-2 and 4D-3 of the ADG;
- Minimum open space and balcony provisions contained within Part 4E of the ADG;
- Minimum common circulation and spaces contained within Part 4F of the ADG;
- Minimum storage requirements contained within Part 4G of the ADG;
- Acoustic privacy provisions contained within Part 4H of the ADG;

- Noise mitigation provisions contained within Part 4J of the ADG; and
- All other relevant configuration and performance criteria contained within Parts 4K through 4X of the ADG.

On this basis, notwithstanding the proposed variation to the recommended minimum apartment size, Units 04 and 05 are considered to be functional, well organized and provide a high level of amenity, demonstrating com

The proposed building layout has been derived through close consultation with Council officers, including responding to heritage considerations and Council's request to retain the front section of the building in its entirety, including side walls, existing floor levels and apartment layouts.

The proposal is an appropriate design response for the site, noting the proposal is significantly below the maximum permitted height limit and Floor Space Ratio (FSR) for the site, and the proposed variation (being contained within the existing layout and fabric) does not contribute to building bulk, any overshadowing, loss of visual or acoustic privacy or any loss of residential amenity.

It is considered the proposal meets the objective of Part 4D-1 of the ADG.

4.2 Clause 4.6(3)(b) - Are there sufficient environmental planning grounds to justify contravening the development standard?

There are sufficient environmental planning grounds to justify contravening the development standard because the non-compliance results in no adverse impacts, is a better planning outcome and is consistent with the relevant objective at Part 4D-1 of the ADG and the objectives of the R1 – General Residential zone (refer to **Section 4.3** below).

However, in the case *Four2Five vs Ashfield Council* [2015] NSW LEC 90, Pain J held that a Clause 4.6 must also demonstrate that there are environmental planning grounds to justify contravening the development standard, in addition to meeting the objectives of the standard and zone. In this case, the Court found that the environmental planning grounds advanced by the applicant in a clause 4.6 variation request must be particular to the circumstances of the proposed development on that site.

Moreover, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the Court stated that the phrase 'environmental planning grounds' is not defined but would refer grounds that relate to the subject matter, scope and purpose of the Environmental Planning and Assessment Act 1979 (EP&A Act), including the objects in section 1.3 of the Act.

Noting the achievement of the objective of 4D-1 of the ADG (above) and zone objectives (refer to **Section 4.3** below), it is considered that there are sufficient environmental planning grounds to justify contravening the development standard because the variation to the recommended minimum apartment size results in negligible adverse impacts and results in is a better design, heritage and planning outcome, owing to the sympathetic redevelopment and renewal of the existing contributory building as detailed below:

- The proposal will deliver a high level of amenity to occupants, maintaining compliance with all other residential amenity provisions contained within Part 4D of the ADG including, however not limited to, ceiling heights, room sizes and depths.
- The proposal is of a high quality design and will renew the existing building, which is ageing and in poor condition. The proposal provides a respectful design response to the existing contributory building, with the front section of the building retained in its entirety, including side walls, existing floor levels and apartment layouts, and is considered to positively respond to the streetscape and within the HCA. Adaptation of the existing building also provides for significant sustainability outcomes.

- The proposal is within the permitted maximum building height and FSR under the LEP 2012, with proposed alterations maintaining existing building alignments at the site. The proposed variation is the result of the constrained layout of the existing building (whereby the central internal wall within Units 04 and 05 cannot be removed due to heritage considerations) and does not result in any increased dwelling yield at the site.
- The proposed variation (being contained within the existing layout and fabric) does not contribute to building bulk, any overshadowing, loss of visual or acoustic privacy or any loss of residential amenity.

The proposal will provide for a future development which is responsive to site and context and maintains a high level of amenity within the site and to surrounds. It represents the orderly and economic use of land and good design and amenity of the built environment, as identified by Section 1.3 of the EP&A Act.

4.3 Clause 4.6(4)(a)(ii) - Is the proposal in the public interest because it is consistent with the objectives of the particular standard and the objectives of the development within the zone in which the development is proposed to be carried out?

The proposal is considered to be in the public interest because it is consistent with the objectives of the zone and the objective of the development standard.

An assessment of proposed development against the objective of the development standard is provided at Section 4.1.

An assessment of proposed development against the objectives of R1 – General Residential Zone is provided at **Table 3** below.

Table 3. Objectives of the R1 – General Residential Zone

Objective	Response
<i>To provide for the housing needs of the community.</i>	The proposal seeks alterations and additions to the existing RFB which is ageing and in poor condition. The proposal will renew the building, respecting its contributory status within the HCA, whilst delivering well designed, modern and high quality dwellings. The proposal provides for a total of ten (10) dwellings, being an additional four (4) dwellings at the site over the existing circumstance and is considered to provide for the housing needs of the community.
<i>To provide for a variety of housing types and densities.</i>	The proposal includes a variety of dwelling types, including studio, 1 and 2 bed apartments and is considered to provide for a variety of housing types and densities.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	This objective is not applicable to the proposed development.
<i>To maintain the existing land use pattern of predominantly residential uses.</i>	The proposal will maintain the existing land use as a RFB.

For the reasons nominated above, the proposal is considered consistent with the objectives of the standard and for development in this zone as required by this subclause.

5. Other Matters for Consideration

Clause 4.6(4)(b) stipulates that consent must not be granted for development that contravenes a development standard unless the concurrence of the Secretary has been obtained.

The matters to be considered by the Secretary in deciding whether to grant concurrence are provided by Clause 4.6(5) and addressed below.

(a) *whether contravention of the development standard raises any matters of significance for State or regional environmental planning, and*

Contravention of the recommended minimum apartment size under Part 4D-1 of the ADG does not raise any matter of significance for State or regional environmental planning.

(b) *the public benefit of maintaining the development standard, and*

For the reasons discussed within this letter, in the circumstances of the proposed development, it is considered there is no public benefit in maintaining the development standard.

If the development standard were to be maintained, this would necessitate the demolition of additional fabric and/or compromise overall layouts of the building, which would be unfavourable on heritage grounds whilst also inhibit feasibility of the development.

The proposal is considered to be an improved outcome for the site over a compliant scenario, retaining the original layout of the contributory building whilst enabling redevelopment of an aging and run down building to deliver new well designed, modern high quality dwellings at the site.

It is therefore concluded that there is no public benefit in maintaining the development standard under the circumstances.

(c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

There are no other matters requiring consideration.

6. Conclusion

This request is made pursuant to Clause 4.6 of the LEP 2012 to vary the recommended minimum apartment size contained within Clause 30 of SEPP 65 and Part 4D-1 of the supporting ADG.

This request seeks to address two minor variations as follows:

- Unit 04, which has an internal area of 43.08m² and represents a variation of 6.92m² (13.84%) to recommended minimum internal areas within Part 4D-1 of the ADG (being 50m²).
- Unit 05, which has an internal area of 44.85m² represents a variation of 5.15m² (10.3%) to recommended minimum internal areas within Part 4D-1 of the ADG (being 50m²).

The proposal will deliver a high level of amenity to occupants, maintaining compliance with all other residential amenity provisions contained within Part 4D of the ADG including, however not limited to, ceiling heights, room sizes and depths.

The proposal is of a high quality design and will renew the existing building, which is ageing and in poor condition. The proposal provides a respectful design response to the existing contributory building, with the front section of the building retained in its entirety, including side walls, existing floor levels and apartment layouts, and is considered to positively respond to the streetscape and within the HCA.

The proposal is within the permitted maximum building height and FSR under the LEP 2012, with proposed alterations maintaining existing building alignments at the site. The proposed variation is the result of the constrained layout of the existing building (whereby the central internal wall within Units 04 and 05 cannot be removed due to heritage considerations) and does not result in any increased dwelling yield at the site.

The proposed variation (being contained within the existing layout and fabric) does not contribute to building bulk, any overshadowing, loss of visual or acoustic privacy or any loss of residential amenity.

Consequently, strict compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances. Based on the above, it is considered that strict compliance with the recommended minimum apartment size is not necessary and that a better outcome is achieved for this development by allowing flexibility in the application.