



Draft Clause 4.6 Variation Request Height of Buildings (Clause 4.3) Kogarah Local Environmental Plan 2012

2-10 Stanley Street, Kogarah

Submitted to Georges River Council on behalf of Carlton Investments no 2 Pty Ltd

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Report Revision History

Revision	Date Issued	Prepared by	Reviewed by	Verified by
01 Draft	10/12/17	Jack Davies	Stephen Kerr	01
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Final	13/10/17	Jack Davies	Stephen Kerr	0101
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This document is preliminary unless approved by a Director of City Plan Strategy & Development

CERTIFICATION

This report has been authorised by City Plan Strategy & Development, with input from a number of other expert consultants, on behalf of Carlton Investments no 2 Pty Ltd. The accuracy of the information contained herein is to the best of our knowledge not false or misleading. The comments have been based upon information and facts that were correct at the time of writing this report.

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1. Introduction

This is a formal written request that has been prepared in accordance with clause 4.6 of the *Kogarah Local Environmental Plan 2012* (KLEP) to support a Development Application (DA) submitted to Georges River Council on behalf of Carlton Investments No 2 Pty Ltd for the construction of a ten (10) storey Residential Flat Building (RFB) at **2-10 Stanley Street**, **Kogarah**.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, compliance with the standard would be unreasonable and unnecessary, and a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

The development standard that this request seeks approval to vary is the Height of Buildings control in Clause 4.3 of the *Kogarah Local Environmental Plan 2012*.

The numeric value of the Height of Buildings development standard is 33m.

The development standard is not specifically excluded from the operation of Clause 4.6 of KLEP.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal¹. It is also important to note that Council resolved to consider variations to the 33m height standard within the Kogarah North Precinct. It is also noted that the Council has also recently exhibited a Draft DCP amendment which is consistent with this policy.

In Sections 3 and 4 of this request, we have explained how flexibility is justified in this case in terms of the matters explicitly required by clause 4.6 to be addressed in a written request from the applicant. In Sections 4, 5, 6 and 7 we address, where relevant and helpful, additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 or the assumed concurrence of the Secretary.

¹ Relevant decisions include: *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46; *Wehbe v Pittwater Council* [2007] NSWLEC 827; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248; and *Moskovich v Waverley Council* [2016] NSWLEC 1015.

2. Extent of variation

The subject site has a maximum building height standard of 33m. The proposal has a maximum building height, as measured from ground level 'existing', of 36m (at RL 50.8AHD) as confirmed by Level 33 Architects. Therefore, the proposal breaches the standard by 3m. Specifically, the portion of the building above the 33m height limit includes parts of the lift overrun and rooftop level.

The extent of the height breach is shown in Figures 1 and 2 below.

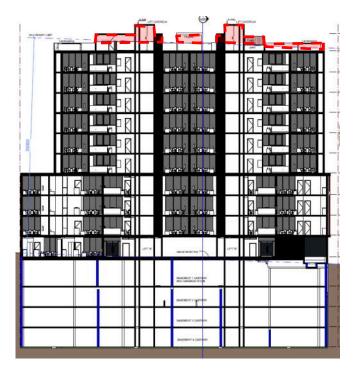


Figure 1: Extract of Section 1 (Source: Level 33 Architects)

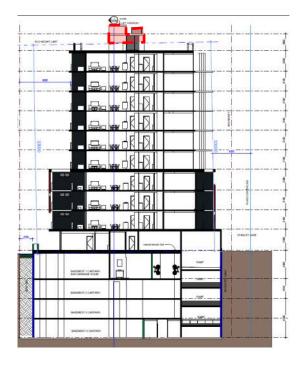


Figure 2: Extract of Section 2 (Source: Level 33 Architects)

It is important to note that the extent of the variation is related to the lift over-run of the building that provides equitable access to the roof-top communal open space on the building.

It is also relevant to observe that the land within the Kogarah North Precinct was recently rezoned to create a high density residential precinct. As part of the Planning Proposal (PP) that created the new development standards (height and floor space ratio), we understand that there was no detailed 'urban design' analysis to determine the likely built form outcomes, particularly as they relate to SEPP 65 and the associated Apartment Design Guide (ADG). Council subsequently commissioned and adopted an urban design study, which found that "many sites will struggle to achieve the permitted 33m height standard and FSR of 4:1" when the relevant design considerations had been taken into account. If these development would "not result in good design outcome and result in a bulky building with little or no articulation". On the 7th of August 2017, Council took the unusual, but necessary, step of adopting criteria by which to consider requests to vary the height standard for buildings in the Kogarah Precinct. The criteria have since been placed in Council's Draft DCP amendment, which has recently been publicly exhinbited, and are addressed later in this request.

The proposed development seeks a variation to the height standard to ensure that the proposal delivers an appropriate built form that is consistent with the desired future character as outlined in the KNPUDS and controls under the ADG.

3. Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case. [cl. 4.6(3)(a)]

Achieves the objectives of the standard

Compliance with the Height of Buildings development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in Table 1 (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard².

Table 1 - Achievement	of Development Standard	Objectives
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Objective	Discussion
(a) to establish the maximum height for buildings	The proposed height of the proposal is approximately 3m greater than the height standard. As discussed under Section 2 of this Clause 4.6, the height controls established for the Kogarah North Precinct do not work appropriately with the density of development desired by Council of 4:1. The proposed height of the building is a result of delivering a built form that incorporates the desired built form outcomes for the precinct. Whilst the maximum height of the building is 36m, it is noteworthy that the remainder of the building is lower than this, with the built form being consistent with Council's policy for Clause 4.6 variations in the Kogarah North Precinct (up to 20%).
	As detailed later in this variation request, and the SEE, the proposed height is compatible within its context, and will not result in any adverse impacts to surrounding properties. The breach of the standard does not affect consistency with this objective. In fact, the breach of the standard allows for a building that achieves an improved built form providing better amenity and presentation to the street and public domain.
(b) to minimise the impact of overshadowing, visual impact and loss of privacy on adjoining properties and open space areas	Level 33 have prepared detailed shadow diagrams for the proposal, which are provided at Appendix 4 . The shadow diagrams illustrate the additional overshadowing impact caused by the variation of the height standard. Because the greatest breach occurs as a result of the lift overruns, which are located centrally within the building footprint, the additional overshadowing impact is relatively minor and would have no material impact on the existing neighbouring dwellings because they mostly fall in either the front yards or the street in front of those dwellings. The variation of the height standard does not result in any additional overlooking of neighbouring properties and in fact facilitates the achievement of the building separation requirements of the ADG.
(c) to provide appropriate scale and intensity of development	Because of the location of the precinct relative to the Kogarah Rail Station and Kogarah Strategic Centre, Council has deliberately sought to create a high density residential precinct. As noted earlier in this report, Council have acknowledged that achieving the current development standards for height and FSR are difficult to achieve and result in a poor urban built form outcome for the precinct. The breach of the height standard results in a built form outcome for the development that is

² In Wehbe v Pittwater Council [2007] NSWLEC 827 Preston CJ identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established. Although the decision concerned SEPP 1, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii). The 5 ways in Wehbe are: 1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; 2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; 3. The objective would be defeated or thwarted if compliance was required with the consequence that 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 the standard is unreasonable and unnecessary; or 5. The zoning of the land is unreasonable or inappropriate.

through height controls

consistent with the desired building envelope principles as established under the KNPUDS and the ADG. Accordingly, the breach of the standard directly achieves this objective.

The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable

Compliance with the Height of Buildings development standard is also unreasonable or unnecessary in the circumstances of this case because it would thwart the objective (c) of the standard². As noted above, the breach of the standard allows a built form that is consistent with the urban design principles established in the KNPUDS. This includes providing a adequate setbacks to the street, side, and rear boundaries, as well as the provision of rooftop landscaping and communal open space. If the breach did not occur, the built form outcome would be compromised as it would otherwise result in a poorer streetscape presentation of the building as the additional floor space would be located at the lower levels, resulting in significantly less building articulation.

4. There are sufficient environmental planning grounds to justify contravening the standard. [cl. 4.6(3)(b)]

The SEE prepared for this DA provides a holistic environmental planning assessment of the proposed development and concludes that subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the development. There is robust justification throughout the SEE and accompanying documentation to support the overall development and contend that the outcome is appropriate on environmental planning grounds.

In particular, and as demonstrated by the shadow diagrams at Appendix 4, the variation of the height standard results in no environmental harm caused by additional overshadowing.

The environmental planning benefits that are facilitated by the variation of the height standard greatly outweigh the negligible environmental harm. These benefits relate to the achievement of the desired future character of the precinct as established in the urban design principles under the KNPUDS by enabling the provision of a generous street setback and the creation of a distinct four storey podium to create human scale on the street and facilitate boulevard style planting. The variation also facilitates the provision of generous building articulation.

The proposal results in a better environmental planning outcome than if strict compliance of the development standard was observed in favour of the draft DCP controls.

Draft Amendment to Kogarah DCP

Further, it is noted that the draft Amendment to the Kogarah DCP provides criteria to consider requests to vary the height standard. A response to these criteria as follows:

Criteria	Response	
The additional height would result in full compliance with the principles of SEPP 65 and the requirements of the Apartment Design Guide.	It has been demonstrated in the SEE and the Design Verification Statement that the proposal achieves the design quality principals of SEPP 65 and the Design Objectives of the ADG.	
The proposal will not have adverse impacts with respect to:		
(a) The obstacle limitation surface	As noted in the SEE the development is within the 'inner horizontal surfaces' of the OLS map. The proposed development has a maximum R.L of 50.80, and therefore, does not encroach within the OLS.	
(b) The overshadowing of a dwelling, private open space or public open space;	As explained in the SEE, the additional height will not create any additional adverse effects in terms of overshadowing.	
(c) An inappropriate transition in built form and land use intensity; and	The resulting land use intensity is consistent with a high density residential precinct and as explained in the SEE the built form is appropriate in this location and provides articulated building heights that are consistent with the adopted Urban Design Strategy.	
(d) Any adjoining heritage item	There are no nearby heritage items.	

5. The proposal will be in the public interest because it is consistent with the objectives of the standard and the objectives of the zone. [cl. 4.6(4)(a)(ii)]

In section 2 (above), it was demonstrated that the proposal is consistent³ with the objectives of the development standard. The proposal is also consistent with the objectives of the zone as explained in Table 2 (below).

Table 2 - Consistency with Zone Objectives

Objective	Discussion
To provide for the housing needs of the community within a high density residential environment.	The proposal provides additional housing for the local area in the form of a high density residential flat building. The breach of the standard does not result in an inconsistency with this objective. In fact, the breach of the standard more appropriately achieves this objective by providing a high-density development in an appropriate location that will result in an appropriate built form as viewed from the public domain, as well as providing high levels of amenity to the residential units.
To provide a variety of housing types within a high density residential environment.	The proposed development comprises one and two-bedroom units, addressing the local market demand. The breach of the standard does not result in an inconsistency with this objective.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The breach of the standard does not result in an inconsistency with this objective.

As can be seen from Table 2, the proposal is consistent with the objectives of the standard and the objectives of the zone, and is therefore in the public interest.

³ In *Dem Gillespies v Warringah Council* [2002] LGERA 147 and *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC the term 'consistent' was interpreted to mean 'compatible' or 'capable of existing together in harmony'.

6. Contravention of the development standard does not raise any matter of significance for State or regional environmental planning. [cl. 4.6(5)(a)]

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would arise because of varying the development standard as proposed by this application.

7. There is no public benefit of maintaining the standard [cl. 4.6(5)(b)]

As discussed earlier, the proposed breach of the standard facilitates public benefits through a built form outcome that achieves the desired urban design principles established under the KNPUDS. The proposed provides generous setbacks and articulation, resulting in a building that will provide an improved relationship to the public domain.

The breach of the standard is minor and represents a lift over-run, which provides equitable access to rooftop landscaped areas and communal open space. The breach of the standard does not result in any adverse environmental impacts to the public domain or surrounding properties.

Accordingly, there is no public benefit⁴ in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the Height of Buildings standard and hence there are minor public disadvantages.

We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will have an overall public benefit.

⁴ Ex Gratia P/L v Dungog Council (NSWLEC 148) established that the question that needs to be answered to establish whether there is a public benefit is "whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development"

8. Conclusion

This Clause 4.6 variation request demonstrates, as required by Clause 4.6 of the *Kogarah Local Environmental Plan 2012*, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard and is consistent with the objectives of the R4 High Density Residential Zone;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

On this basis, therefore, it is considered appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.