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Clause 4.6 Variation Statement

RE: Development Application for 14-Storey Mixed Use Development at 10 Dangar Street, Wickham NSW 2293

1 Introduction

The development to which this application relates is the demolition of existing buildings and structures and the construction of a 14-storey mixed use development including ground floor retail, three (3) floors of office space and a residential tower comprising 97 residential apartments located at 10 Dangar Street, Wickham NSW 2293.

The Development Application (DA) seeks approval for:

- Demolition of all existing structures;
- Earthworks;
- Car parking area with 197 car spaces (including two levels of basement car parking), bicycle storage for up to 134 bicycles and 10 motorbike spaces
- Commercial podium containing:
 - Ground floor retail spaces (total 1,098m² GFA) fronting Hannell Street and Dangar Street; and
 - Levels 1 – 3 office space (total 4,386m² GFA);
- Residential tower comprising a total of 97 dwellings ranging from 1 bedroom to 3 bedrooms;
- Vehicle access via Charles Street;
- Associated landscaping, services and necessary site infrastructure.

In summary, the proposal largely complies with the provisions of the Newcastle Local Environmental Plan (LEP) 2012, with the exception of an exceedance in height. An assessment of the variation is provided in the following pages in accordance the requirements of Clause 4.6 of the LEP 2012. This variation has been prepared generally in accordance with the NSW Department of Planning and Infrastructure's publication "*Varying Development Standards: A Guide*" (August 2011), which identifies matters to be addressed in an application to vary a development standard.

2 Exception to development standards

The Department of Planning and Infrastructure's publication "*Varying Development Standards: A Guide*" (August 2011), states that:

The NSW planning system currently has two mechanisms that provide the ability to vary development standards contained within environmental planning instruments:

- *Clause 4.6 of the Standard Instrument Local Environment Plan (SI LEP); and*

- *State Environment Planning Policy No 1 – Development Standards (SEPP1).*

In this instance, SEPP 1 does not apply as the LEP 2012 is a Standard Instrument LEP. It is noted that the Guidelines do not identify any other mechanisms (such as a Planning Proposal) to vary a development standard.

2.1 Clause 4.6

Clause 4.6 of the LEP 2012 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better planning outcomes.

(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.

The proposal seeks to vary the height standard applicable to the site and is not expressly excluded from the operation of this clause.

2.2 Legal Context to Varying Development Standards

This request has been prepared having regard to the latest authority on Clause 4.6, contained in the following guideline judgements:

- *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 No 1)
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 (Four2Five No 2)
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 (Four2Five No 3)

The objection principles identified in the decision of Justice Lloyd in *Winten v North Sydney Council* are outlined below:

(1) Is the planning control in question a development standard;

(2) What is the underlying object or purpose of the standard;

(3) Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act 1979;

(4) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;

(5) Is a development which complies with the development standard unreasonable or unnecessary; and

(6) Is the objection well founded.

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston outlined the rationale for development standards, and the ways by which a standard might be considered unnecessary and/or unreasonable. At paragraph 43 of his decision in that case Preston CJ noted:

"The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development offers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."

Wehbe V Pittwater [2007] NSW LEC 827 also established the 'five part test' to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

- (1) Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives;*
- (2) Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard unnecessary;*
- (3) Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;*
- (4) Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or*
- (5) Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.*

Of particular relevance in this instance is Part 1, that *"the proposal, despite numerical non-compliance, [would] be consistent with the relevant environment or planning objectives"*.

3 Development Standard to be Varied

What is the name of the environmental planning instrument that applies to the land?

Newcastle Local Environmental Plan 2012 (LEP 2012).

What is the zoning of the land?

The land is zoned B3 Core Commercial.

What are the objectives of the zone?

- *To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community.*
- *To encourage appropriate employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To provide for commercial floor space within a mixed-use development.*
- *To strengthen the role of the Newcastle City Centre as the regional business, retail and cultural centre of the Hunter region.*
- *To provide for the retention and creation of view corridors.*

What are the development standards being varied?

The building height development standard contained in Clause 4.3.

Are the standards to be varied a development standard?

Yes, the standard is considered to be a development standard in accordance with the definition contained in Section 1.4 of the Environmental Planning and Assessment Act 1979 and not a prohibition.

What are the objectives of the development standard?

The objectives of Clause 4.3 – Height of Buildings are as follows:

- (a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,*
- (b) to allow reasonable daylight access to all developments and the public domain*

What is the numeric value of the development standard in the environmental planning instrument?

The maximum height under the LEP 2012 is 45 metres.

What is the proposed numeric value of the development standard in your development application?

The building extends to 46.2m at its highest point, with the proposed lift overrun further exceeding the height by 500mm, resulting in an overall height exceedance of 1.7m (as measured from the existing ground level detailed on the survey plan). The proposed 3.7% variation is considered to be minor. The Architectural Plans attached at Appendix A identifies the proposed maximum ridgeline height.

4 Justification for the Contravention

This section addresses Section (3) and (4) of Clause 4.6 and justifies the contravention from development standard 4.3.

(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.*

4.1 Compliance is Unreasonable or Unnecessary

As mentioned above, compliance with a development standard might be shown as unreasonable or unnecessary if the objectives of the standard are achieved notwithstanding noncompliance with the numerical standard.

A variation is sought to the development standards and controls established by the City of Newcastle Local Environmental Plan 2012, being Clause 4.3 Height of Buildings.

The proposed development achieves the objectives of Clause 4.3 as detailed below:

(a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,

The proposed built form will reflect the emerging contemporary character of the locality and positively upgrade the existing streetscape. It is noted that Wickham is undergoing rapid development with building density increasing as new developments proceed. There is a high demand for apartment type living in the area which stems from the prime location that is attractive to potential residents at different stages in life.

The proposed height enables the efficient and effective use of the site and the proposal has achieved high quality design and amenity. The proposed height exceedance is contained to the rooftop and lift overrun and is unlikely to result in any detrimental impact to the streetscape and adjoining land uses.

The proposal achieves compliance with all applicable planning provisions and policies. In particular, the design accords with the design principles of SEPP 65 and achieves all of the specified design objectives within the SEPP 65 Apartment Design Guide.

The bulk and scale of the development has been softened with the use of varying materials, stepped facades and varying rooflines to create interest. Landscaping is also proposed to complement the development and soften the bulk of the building. Details of the façade and articulation are provided in the Architectural Plans submitted with the DA.

Given the high-quality design outcome proposed and the lack of any unreasonable impacts as a result of the variation sought; the variation is considered to be well justified in this instance.

(b) to allow reasonable daylight access to all developments and the public domain.

As demonstrated by the shadow diagrams at Appendix A, solar access to surrounding development and the public domain is not unreasonably impacted by the proposed development. The shadow diagrams demonstrate that the adjoining properties will still achieve, or be capable of achieving adequate sunlight.

Overall, it is submitted that the development is considered reasonable on the basis that:

- The proposed built form will reflect the emerging contemporary character of the locality and positively upgrade the existing streetscape;
- The proposed development meets the underlying intent of the controls and is a compatible form of development that does not result in unreasonable environmental amenity impacts;
- The greatest extent of the height exceedance is the lift overrun however given the setback it is not expected to be visible from the public domain, therefore will not contribute to 'bulky development' or an unacceptable building scale;
- The excess height resulting from non-compliance will not result in any undue impacts on adjoining properties particularly with respect to overshadowing, loss of privacy and loss of views;
- The application satisfies other numerical standards of the LEP 2012, SEPP 65 Design Quality of Residential Apartment Development and Council's DCP ensuring a high-quality development;

- Strict compliance with the exact standards would not achieve a greater planning or urban design outcome on the basis that the proposed development achieves the applicable FSR and is generally within the building envelope provisions;
- The proposed development satisfies the objectives of the B3 Commercial Core zone and the objectives of Clause 4.3 Height of Buildings;
- Height exceedance is partially attributed to necessary occupiable floor levels in flood areas, requiring the ground floor levels to be raised to 2.68m AHD for safety reasons;
- The proposed development has been architecturally designed with the use of varying materials, stepped facades and varying rooflines to create interest in the façade; and
- The proposal represents an efficient use of land within the site.

Taking into account the above, the strict application of the development standard for maximum height is unreasonable and unnecessary as it would not achieve a greater planning or urban design outcome. The proposed height will facilitate a quality residential development with a high level of amenity without allowing additional density or FSR or resulting in additional environmental impacts. The overall development presents a highly functional, contemporary building which offers design excellence and contributing land uses to the locality.

Therefore, the proposed development within this context demonstrates the numerical height non-compliance is acceptable.

4.2 Sufficient Environmental Planning Grounds to Justify Contravention

The proposal is consistent with the objectives of the B3 Commercial Core zone, notably that it is facilitating a range of permissible uses, including commercial floor space in an accessible location close to public transport options. The proposal will strengthen the role of the Newcastle City Centre as the regional business, retail and cultural centre of the Hunter region and has not unreasonable impacts on identified view corridors.

This assessment demonstrates that the resultant environmental impacts of the proposal are considered to be satisfactory. If made to strictly comply with Clause 4.3, there would be no additional benefit to the streetscape, neighbouring properties and the local area. The variation will enable a high quality, architecturally designed development in the Wickham area. The proposal seeks to provide new mixed-use development in an existing urban area and will maximise reliance on existing infrastructure in a location that is in proximity to a range of employment, recreation, education and transport services. The objectives of Clause 4.3 have been met within the proposed development. In light of this, there is sufficient environmental planning grounds to justify contravening the development standard.

4.3 Public Interest

The development is in the public interest as it is consistent with the objectives of Clause 4.3 of NLEP 2012 (height of buildings) and is consistent with the B3 zone objectives. The development is considered to be a land use that is compatible and consistent with the surrounding area in this central location.

The proposed development results in a better planning outcome for the site, and in the circumstances of this case, the proposal respects the amenity of the area and the quality of the environment, in accordance with the relevant zone objectives.

It is considered that the applicant has demonstrated that the standard is unreasonable and unnecessary in this instance and that the proposed scale of development is in character with the surrounding area.

It is recommended that the variation to the development standard be supported.

4.4 Secretary's' Concurrence

It is understood that the Secretary's concurrence under clause 4.6(4)(b) of LEP 2012 has been delegated to Council.

5 Conclusion

This Clause 4.6 Variation to Development Standard has been prepared in response to the numerical non-compliance against the standards of Clause 4.3 – Height of Buildings of the NLEP 2012.

The proposed development meets the underlying intent of the control and is a compatible form of development for the area. The minor excess in height resulting from the partial non-compliance will not result in any undue impacts on adjoining properties particularly with respect to overshadowing, loss of privacy and loss of views.

It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allowing for a better outcome in terms of planning merits. Further, the proposal will not result in any unreasonable amenity or environmental impacts.

Council can be satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development and that there are sufficient environmental planning grounds to justify contravening the development standard, as detailed within this Statement.

Yours sincerely,



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Town Planner
KDC Pty Ltd

