





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

12-24 Stanley Street, Kogarah

Submitted to Georges River Council on behalf of Poly Australia

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This document is preliminary unless approved by a Director of City Plan Strategy & Development

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CERTIFICATION

This report has been authorised by City Plan Strategy & Development, with input from a number of other expert consultants, on behalf of Poly Australia. 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 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 Poly Australia for the construction of an eleven (11) storey Residential Flat Building (RFB) at **12-24 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.

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 33 metres, which is proposed to be varied by a maximum of 2.707 metres.

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 Appeal⁷.

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.

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.

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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; Moskovich v Waverley Council [2016] NSWLEC 1015; and Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118.

2. Extent of variation

The site is subject to a maximum building height standard of 33m. The proposal has a maximum building height, as measured from ground level 'existing', of 35.707m (at RL 51.95 AHD) as confirmed by Scott Carver Architects. This is a breach of the standard by 2.707m (i.e. 0.6%).

The plans demonstrate that the bulk of the built form and that all habitable floorspace is below the maximum building height limit. The portion of the building above the 33m height standard includes parts of the lift overrun and rooftop level relating to the provision of high quality accessible communal open space (CoS).

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



Figure 1: 3D Height Plane as seen from Stanley Street (Source: Scott Carver)



Figure 2: 3D Height Plane as seen from Stanley Lane (Source: Scott Carver)

The proposed variation is derived, in part, from the following site constraints:

- The site slopes down approximately 3m from West to East; and
- The site is required to dedicate a 1200mm strip of land to Council at the rear boundary.

The proposed building has been designed to respond to these constraints where possible, whilst minimising potentially adverse impacts on surrounding sites.

As noted, the site falls approximately 3m from west to east. The highest point at which the proposal breaches the maximum height control occurs on the lift overrun located on the portion of the site mostly affected by the sloping topography within the eastern core.

Despite this, the proposed design has attempted to minimise the variation by stepping the building. The lift on this portion of the development provides equitable access to the rooftop CoS. It is important to note that the rooftop is the most logical location and best design outcome for a CoS given that the site has a reduced floorplate due to land dedication to Council. The rooftop allows residents to enjoy CoS with natural sunlight, excellent views, privacy and visual amenity. Should the CoS be located elsewhere, these benefits will be compromised. Whilst improved compliance might be achieved by relocating the CoS elsewhere (i.e. ground floor), this is not a desirable outcome.

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 residential development is approximately 2.707m greater than the height standard. As discussed within 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 improved planning outcomes 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	Scott Carver has 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 overrun, which is located centrally within the building footprint, the additional overshadowing impact is relatively minor, as can be seen in Figure 3 below.			
areas	Point IDam Itam			
	12pm ppn cpm spm			
	Figure 3: Shadow Diagrams (Source: Scott Carver)			

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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 noncompliance 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.

Further, as no habitable rooms are located within the height breach, there is no potential impact of overlooking to occur due to non-compliance. The plantings located within the rooftop CoS provide a visually pleasing and aesthetic improvement whilst minimising direct views to adjacent properties.

(c) to provide appropriate scale and intensity of development through height controls 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. The breach of the height standard results in a built form outcome for the development that is consistent with the desired building envelope principles as established under the Kogarah North Precinct Urban Design Strategy (KNPUDS), the subsequent DCP amendments and the ADG. Accordingly, the breach of the standard directly achieves this objective. Further, we note the proposal is consistent with the scale and intensity of development recently approved at the adjoining site at 2-10 Stanley Street.

Compliance with the Height of Buildings would lead to an inferior outcome in relation to this objective. As noted, the breach of the standard allows a built form that is consistent with the urban design principles established in the KNPUDS, and the subsequent amendments to the Kogarah DCP (specifically part E4 'Kogarah North Precinct'). This includes providing 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

"Abandonment" of standard

Whilst we do not go so far as to say that Council has "abandoned or destroyed" the standard by its actions, we do note however, Council's advice that it generally accepts variations to the building height standard resulting from minor roof and roof top features (plant, overruns etc). As such, we believe that it would be unreasonable and unnecessary for this proposal, where the variation relates only to those same features, to strictly comply with the standard.

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 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 adverse impacts caused by additional overshadowing.

The breach of the height limit also does not cause any loss of privacy for neighbouring properties.

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 a rooftop CoS area that has equitable access and is of high amenity. Should the CoS be located elsewhere (i.e. the ground level), the tangible benefits associated would be thwarted, and residents would be consequently provided with a CoS of lower amenity, that will likely be affected by privacy issues and reduced sunlight access.

Further to this, the provision of CoS on the rooftop is a direct response to the reduced floor plate caused by the 1200mm laneway dedication. The design of the development aims to contribute to the consistent street wall frontage on Stanley Street and to also address the Stanley Lane frontage as suggested in the vision for the KNPUDS. Accordingly, if the CoS were to be located on the ground floor, these design elements would be compromised.

The breach is also directly related to the sloping nature of the land, which slopes west to east. The building has responded to this environmental constraint by stepping of the built form from 11 storeys down to 10 storeys.

If it was not for the sloping topography, the dedication of land, or the planning benefit to locate the CoS on the roof for improved amenity (compared to ground level) the proposal would otherwise likely comply with the standard.

For the above reasons it is therefore considered that proposal results in a better environmental planning outcome and that strict compliance of the development standard would be unreasonable and unnecessary.

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 is 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, two and three-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.

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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 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 acceptable 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 the western roof, a lift over-run and a rooftop communal open space, which provides residents with a high amenity space to conduct various recreational activities, where if it were to be located elsewhere, amenity would be compromised. 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.

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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 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.