

**ELECTRONIC REPORT TO THE GEORGES RIVER LOCAL PLANNING PANEL
FOLLOWING DEFERRAL FROM MEETING OF PANEL ON 18 MARCH 2021**

LPP Report No.		Development Application No.	DA2018/0144
Site Address and Ward Locality	192-196 Princes Highway Kogarah Kogarah Bay Ward		
Proposed Development	Demolition, lot consolidation and construction of a residential flat building, landscaping and site works		
Owners	Kogarah Bay Property Pty Ltd		
Applicant	Anthony Charbel		
Planner/Architect	Architect: Bureau SRH, Planner: Planning Ingenuity		
Date of Lodgement	24/04/2020		
Submissions	Nil to original and the amended plans did not require renotification.		
Cost of Works	\$9,543,602		
Local Planning Panel Criteria	Ministerial Direction – Residential Flat Building		
List of all relevant s4.15 matters (formerly s79C(1)(a))	Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000, State Environmental Planning Policy No.65 – Design Quality of Residential Apartment Development, State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017, State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, Greater Metropolitan Regional Environmental Plan No.2 – Georges River Catchment, State Environmental Planning Policy No.55 – Remediation of Land, Draft State Environmental Planning Policy, Draft State Environmental Planning Policy – Remediation of Land, Kogarah Local Environmental Plan 2012, Kogarah Development Control Plan 2013, State Environmental Planning Policy (Infrastructure) 2007, Georges River Interim Policy Development Control Plan 2020		
List all documents submitted with this report for the Panel’s consideration	LPP Report dated 18 March 2021 LPP Minutes dated 18 March 2021 Architectural Plans Clause 4.6 Exception to Development Standard to Clause 4.3 Height of Building		
Report prepared by	Senior Development Assessment Planner		
Recommendation	That the application be refused in accordance with the reasons stated in this report		

Summary of matters for consideration under Section 4.15 Have all recommendations in relation to relevant s4.15 matters been summarised in the Executive Summary of the assessment Report?	Yes
Legislative clauses requiring consent authority satisfaction Have relevant clauses in all applicable environmental planning	Yes

instruments where the consent authority must be satisfied about a particular matter been listed and relevant recommendations summarised, in the Executive Summary of the assessment report?	
Clause 4.6 Exceptions to development standards If a written request for a contravention to a development standard (clause 4.6 of the LEP) has been received, has it been attached to the assessment report?	Yes, 4.3 Height of building
Special Infrastructure Contributions Does the DA require Special Infrastructure Contributions conditions (under s7.24)?	Not applicable
Conditions Have draft conditions been provided to the applicant for comment?	A draft condition set has been prepared if the Panel is of a mind to support the application. <i>(It is noted that the applicant has been made aware of Council's recommendation)</i>

Executive Summary

1. This report has been prepared following the deferral of the subject development application (DA) (DA2020/0144) by the Local Planning Panel on 18 March 2021.
2. The amended proposal the subject of this report seeks consent for demolition of existing structures and construction of a six (6) storey residential flat building with roof top communal open space, landscaping and site works. The proposal comprises of thirty six (36) residential apartments, two (2) levels of basement car parking containing sixty three (63) car spaces and associated landscaping and site works.
3. The subject development application was previously considered by the Georges River Local Planning Panel on 18 March 2021. The Panel resolved to defer consideration of the DA to enable the applicant thirty (30) days in which to submit amended plans to address the matters identified in the assessment report that resulted in the recommendation for refusal. Once the information was provided the application was to be referred back to same Panel for consideration and determination.
4. The applicant, following this deferral, submitted amended plans and supporting documentation in response to the Panel's deferral. In summary, the information submitted by the applicant responded to the deferral reasons, however Council still raises concerns which are unresolved from the original assessment. It was recommended that the application be determined by way of refusal in accordance with the reasons for refusal as recommended and referenced in the report.

BACKGROUND

5. At its meeting on 18 March 2021, the Local Planning Panel (LPP) considered the subject Development Application (DA) and resolved the following:

Deferral

Development Application No. D2020/0144 for the demolitions works and construction of a residential flat building at 192-196 Princes Highway, Kogarah Bay, be deferred and invites the applicant to submit amended plans incorporating the following within 30 days:

- *Submission of an amended Clause 4.6 Variation in relation to the height building control which should include shadow diagrams which depict the impact of the area of the breach as compared to the impact of the development as a whole.*
- *Provide evidence of compliance with the FSR standard by way of a surveyor certificate and associated GFA calculations plans.*
- *All plans to be amended to include full dimensions and setbacks to each boundary.*
- *Amendments to the architectural roof plan to include fixed seating within the communal open space and is to be consistent with the detail as shown on the landscape plan.*
- *Provide details on the architectural plans of the screening treatment to all elevations including which panels are fixed and which are movable.*

Amended plan/information addressing the Panel's concerns, above must be submitted to the Council within 30 days otherwise the application will be determined on the information currently provided. Should there be a disagreement between the applicant and council in respect to FSR calculations the applicant is requested to submit a without prejudice clause 4.6 variation for the FSR. Following receipt of this information, the Panel (as constituted on 18 March 2021) will determine the application electronically, unless the Chair determines that a further public meeting is required.

6. The applicant, following this deferral, submitted amended plans and supporting documentation in response to the Panel's deferral within the permitted thirty (30) days. In summary, although the information submitted by the applicant responded to the deferral reasons, Council raises concerns relating to setbacks and built form as raised within Council's assessment report the subject of the Local Planning Panel's deferral of 18 March 2021.

Deferral Reason 1

7. ***Submission of an amended Clause 4.6 Variation in relation to the height building control which should include shadow diagrams which depict the impact of the area of the breach as compared to the impact of the development as a whole.***
8. Comment: The applicant has submitted a Clause 4.6 Exception to Development Standards - height and accompanying shadow diagrams. An assessment of the submitted Clause 4.6 Exception to Development Standard has been considered below:

Clause 4.6 Exceptions to Development Standards – Height of Building

9. The Kogarah LEP 2012 prescribes a maximum building height of 21m for this site. The proposed development seeks a variation to the development standard relating to Clause 4.3 Height of Building.
10. A variation to the height control can be considered under Clause 4.6 – Exceptions to Development Standards of the KLEP. The non-compliance results in a variation of 1.7m or 8% as the height proposed is 22.7m (lift overrun) and 21.5m being a breach of 0.5m or 2.5% for the rooftop awning.
11. The non-compliance is considered to be acceptable in this case as the impacts are considered negligible and the extent of the variation relates to the lift overruns and communal areas which is not inconsistent with other recent approvals. A detailed discussion regarding justification of the non-compliance in respect to Clause 4.6 is provided in detail below.



Figure 1 – Extract of north and east elevations (Source: Bureau SRH, 2021)

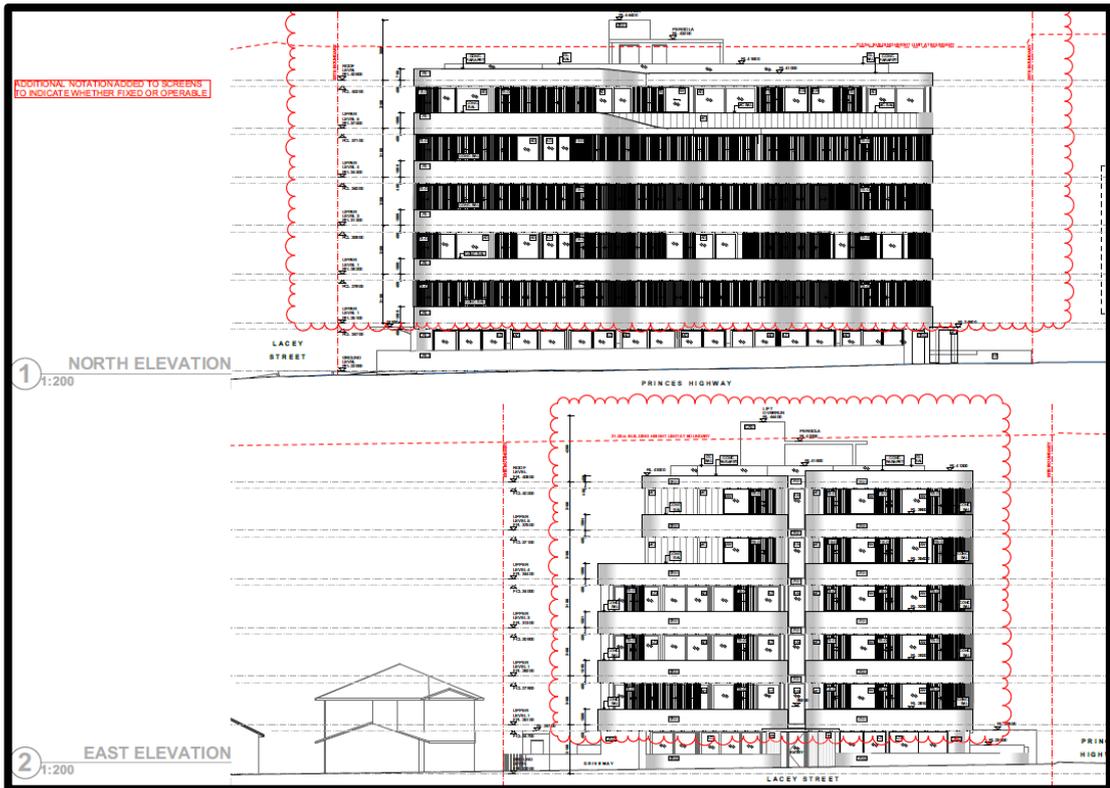


Figure 2 - Extract of Elevations indicative height of building breach (Source: Bureau SRH, 2021).

12. To support the non-compliance, the applicant has provided a request for a variation to Clause 4.3 dated April 2021 in accordance with Clause 4.6 of the Kogarah Local Environmental Plan 2012 (LEP). The relevant criterion has been extracted to justify the reasons to support the variation. This request for a variation is assessed as follows:

Is the planning control in question a development standard?

13. Height of Buildings limitation under Clause 4.3 of the KLEP 2012 is a development standard.

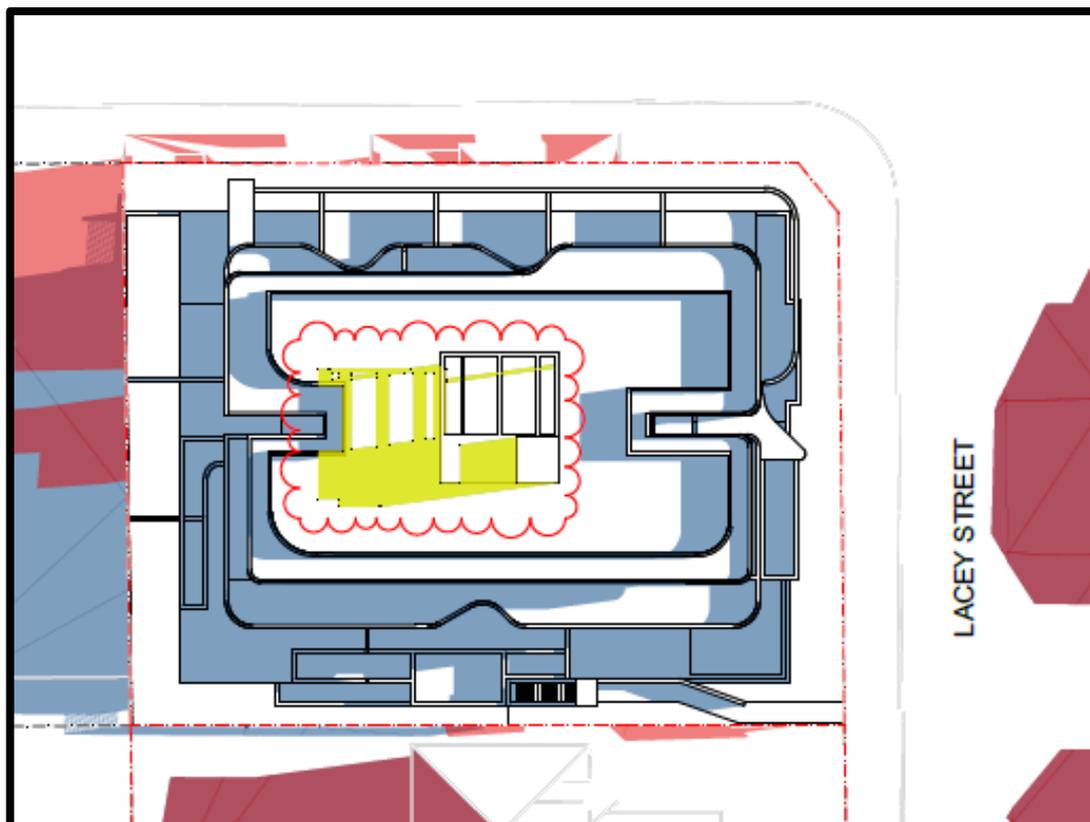
What are the underlying objectives of the development standard?

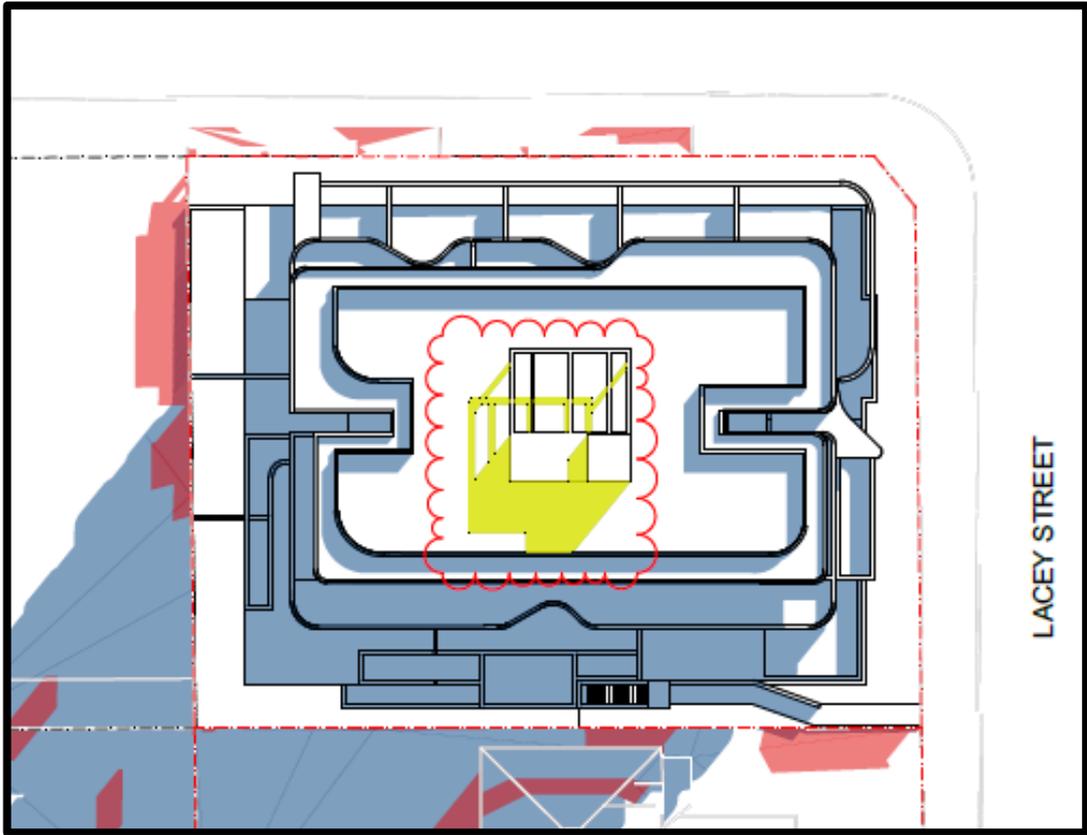
14. The objectives of Height of Buildings standard under Clause 4.3 of KLEP 2012 are:

- (a) *to establish the maximum height for buildings,*
- (b) *to minimise the impact of overshadowing, visual impact and loss of privacy on adjoining properties and open space areas,*
- (c) *to provide appropriate scale and intensity of development through height controls.*

15. The applicant has provided the following justification regarding the development's consistency with the above objectives as detailed within this report.

16. Applicant's Comments: The proposed development achieves the objectives of the standard notwithstanding non-compliance with the height of buildings control because (extracts from the applicant below):
17. *"the height breach creates no significant additional overshadowing to adjoining properties when considering the extent of the overshadowing against the backdrop of the applicable planning controls. That is, the height breach is centrally locate on the site and flanked by built form that complies with the height of buildings development standard,*
18. *The height does not result in any additional privacy impacts given the trafficable portion of the communal rooftop area which is centrally located on site,*
19. *The height breach does not result in any significant additional view loss. The proposed development will not result in any material loss of view or outlook when compared to a building with a compliant height. The extent of the view loss caused by the non-compliant element would be insignificant or nil".*
20. The applicant provided the following shadow diagrams indicating the extent of the impact.





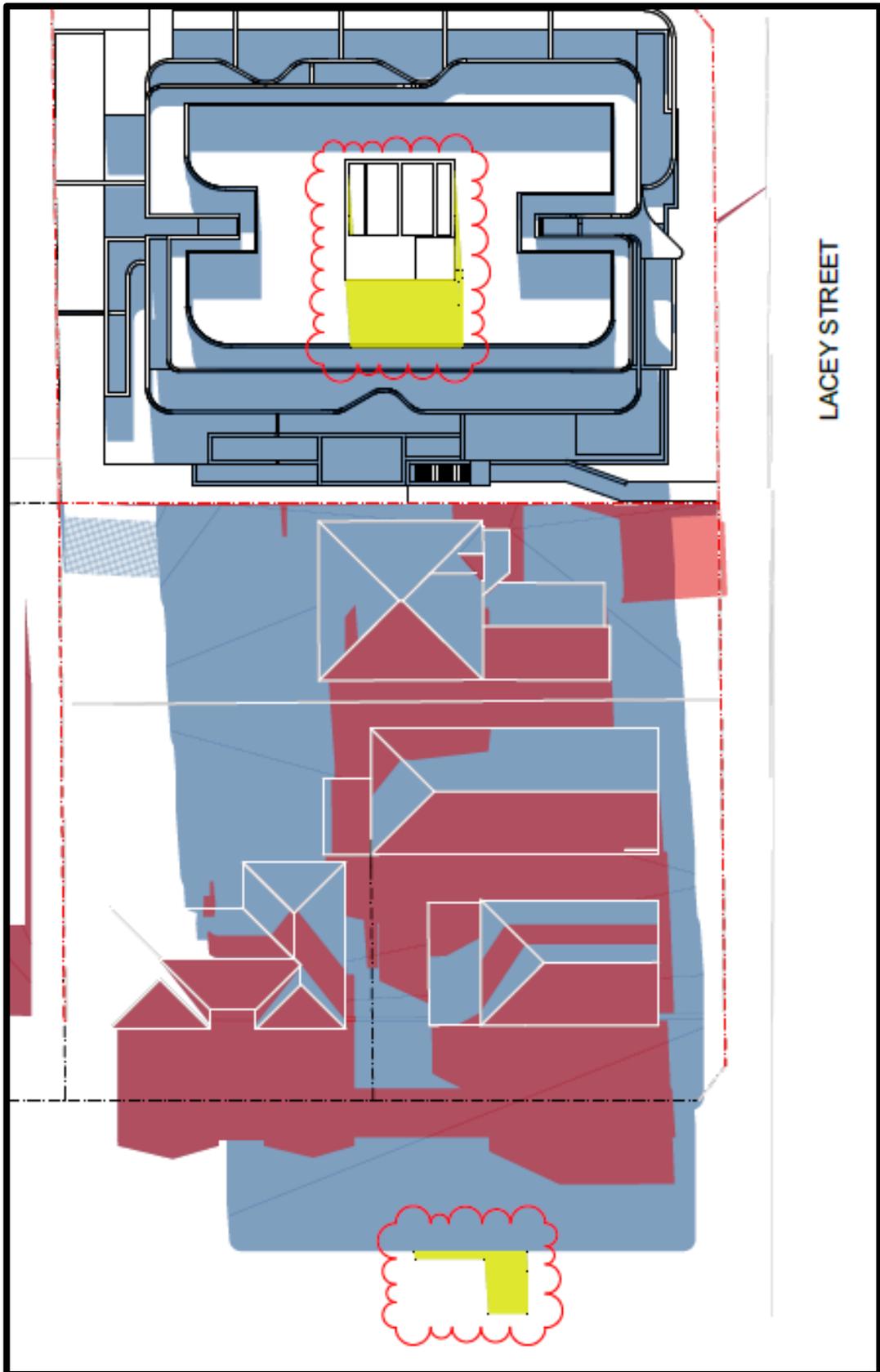


Figure 3 - Extract of applicant's shadow diagrams between 9am, 12pm, and 3pm during Winter Solstice which indicates that overshadowing impacts fall onto the roof of communal open space and roof of the building and onto John Street at 3pm located further to the south (source: Bureau SRH, 2021).

21. Officer Comment: The applicant's justification is supported. As shown in the figures above the extent of the height variation relates to the lift overrun and pergola above the communal open space which is centrally sited within the building footprint of the upper level. The proposed variation does not comprise floor space or an area which could be readily converted to floor space.
22. The height of the building results in minimal additional impacts on overshadowing and visual bulk, when compared to that of a numerically compliant building. The additional shadowing will fall onto the communal roof top open space and will not impact other developments given the topography of the land and solar orientation of the site.
23. Given the above, the proposed variation is considered to be consistent with the objectives of Clause 4.3 and is acceptable despite the numerical non-compliance.

What are the underlying objectives of the zone?

24. The objectives of the R3 Medium Density Residential zone are as follows:

To provide for the housing needs of the community within a medium density residential environment.

To provide a variety of housing types within a medium density residential environment.

To enable other land uses that provide facilities or services to meet the day to day needs of residents.

25. Officer Comment: The applicant's justification is considered to be reasonable and sound given the underlying zone objectives and height objectives of the Development Standard in relation to the extent of the variation. The modification is considered to positively contribute to the broadening of the variety of housing types within the Medium Density Residential zone.

26. The objectives for Clause 4.3 Height of Buildings development standard state the following:

“(1) The objectives of this clause are as follows:

- (a) to establish the maximum height for buildings,*
- (b) to minimise the impact of overshadowing, visual impact and loss of privacy on adjoining properties and open space areas,*
- (c) to provide appropriate scale and intensity of development through height controls.*

27. The applicant has provided the following justification as per the submitted Clause 4.6 Exception to Development Standard whereby:

“it is considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of

surrounding properties, the amenity of future building occupants and on the character of the locality”.

28. Officer Comment: The variation in height at its highest point is 1.7m above the permitted height result in an 8% breach of the height control. The applicant’s justification is considered to be reasonable. The extent of the variation from an amenity perspective is minor, inconsequential and of minimal impact. Further consideration has been applied to the variation having regard to the principles established under the ‘Five Part Test’ established by the NSW Land and Environment Court. Councils may choose to not only use the principles of Clause 4.6 and SEPP1 but also this five part test.
29. The objectives of the standard are achieved notwithstanding non-compliance with the standard.
30. Officer comment: The applicant’s justification is considered to be sound given that the underlying objectives have been satisfied which has been supported by shadow diagrams indicating the extent of impacts regarding solar access.
31. The underlying objective or purpose of the standard is not undermined by the development and therefore compliance is unnecessary.
32. Applicant’s comment: *“the development is consistent with the standard and zone objective, even with the variation, there are no additional significant adverse impacts arising from the proposed non-compliance, and important planning goals are achieved by the approval of the variation”.*
33. Officer comment: Given the above, the proposed extent of the variation is considered satisfactory as this results in a built form which is generally consistent with the maximum height within the zone and results in a reasonable outcome for the site and the precinct.
34. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
35. Applicant’s comment: *“the insistence of compliance with the height of building will require the deletion of the lift overrun and awning to be obscured from the public domain, will be visually recessive and not jarring to the casual observer“.*
36. 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.
37. Officer comment: Council has not abandoned or destroyed its controls by the granting of consent to variations to the height control relating to elements that support roof top communal open space. The extent of the minor variation is considered similar to that of other approved residential flat buildings with the precinct. The height breach related to the upper element of the lift overrun, access stair and pergola will not be readily discernible from the public domain

and is not considered to undermine the control even though numeric compliance is not achieved.

Is the variation to the development standard consistent with Clause 4.6 of the Kogarah LEP 2012?

38. Clause 4.6(1):
The objectives of this clause are as follows:

to provide an appropriate degree of flexibility in applying certain development standards to particular development,

to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

39. Comment: Flexibility in applying the standard is appropriate and requisite levels of satisfaction permitted by the controls have been achieved in this case. The variation is to provide access and amenity for the communal rooftop only.

40. Clause 4.6(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.”

41. Comment: Clause 4.3 Height of Buildings is not excluded from the operation of Clause 4.6.

42. Clause 4.6(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:

That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

43. Comment: The applicant has provided a written variation request prepared by Planning Ingenuity.

44. Clause 4.6(4):

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), and

45. Comment: The written request adequately addresses the matters in subclause (3). Strict compliance with the standard is unreasonable and unnecessary because the development remains consistent with the objectives of the R3 zone and height of building standard as described above. It is considered that sufficient environmental planning grounds to justify contravening the standard given that the non-compliance provides for an improved amenity outcome while resulting in no adverse environmental impacts. 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.
46. Comment: For the reasons detailed above, the development is considered to be consistent with the objectives of Clause 4.3 Height of Buildings and the R3 Medium Density Residential zone and similar to that of variations to lift overruns for residential flat buildings approved within the locality.
47. The concurrence of the Director-General has been obtained.

Conclusion – Assessment of Clause 4.6 Request for Variation

48. The variation is considered minor in extent for a maximum of 22.7m being 1.7m above the maximum 21m height of building development standard.
49. In a recent Court decision *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ further clarified the correct approach in the consideration of clause 4.6 requests. This advice further confirms that clause 4.6 does not require that a development that contravenes a development standard must have a neutral or better environmental planning outcome than one that does not. This is considered to be the case in this instance given the additional height sought and minimal impact generated.
50. As held in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [39], Preston CJ confirmed (at[25]) that the test in 4.6 (4)(a)(i) does not require the consent authority to directly form the opinion of satisfaction regarding the matters specified. Rather, it needs to do so only indirectly in forming its opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated.
 - The majority of the building (including all habitable residential levels) are below the maximum building height of 21m.
 - The proposed area of communal open space, the stairs and lift that provides access to this area could be removed and the building will then be a fully compliant with the height control. However, the provision of a communal roof top area is a common facility on most contemporary RFB's and encouraged by the ADG as it utilises this area and makes it a

physically functional space especially if it is well designed. Its inclusion in the overall design of the proposal is considered beneficial for providing amenity for occupants of the site.

- The areas of non-compliance pertain to a small section of the lift overrun and the uppermost section of the pergola being 1,700mm (maximum) and 500mm respectively.
- The proposed areas of non-compliance satisfy the objectives of the development standard (Height Control) in particular, “to minimise the impact of overshadowing, visual impact and loss of privacy on adjoining properties and open space areas”. The structures will not be overbearingly visible from the public domain and will not adversely affect any areas of public open space. In relation to overlooking, the separation distance from the structures exceeds the minimum requirements by the ADG and as these structures are non-habitable they will not be intensively utilised as they are only for access and circulation.
- In terms of overshadowing the additional height will cast a small shadow that would be contained within the building footprint so it would not affect any immediately adjoining properties. The overshadowing created by the development complies with the minimum requirements stipulated by the Kogarah Development Control Plan and the Apartment Design Guide which is considered to be reasonable.
- The provision of the roof top terrace and associated structures will not establish an undesirable precedent and its use and functionality is more beneficial in achieving high quality design, amenity and planning outcomes and will not adversely affect the amenity of the immediately adjoining properties and the general locality which is similar to that of recent residential flat buildings within the locality.

51. For the reasons above, the Clause 4.6 Variation is supported, and the non-compliance is not considered to be unreasonable or unnecessary in this case. Given the above, this reason for deferral has been adequately satisfied.

Deferral Reason 2:

Provide evidence of compliance with the FSR standard by way of a surveyor certificate and associated GFA calculations plans.

52. Comment: The applicant provided an amended surveyor certificate and GFA calculation plans. Council has accepted that based on this information that the proposal complies in relation the applicable FSR of 2:1 within Clause 4.4 of the KLEP 2012. Given the above, this reason for deferral has been adequately satisfied.

Deferral Reason 3:

All plans to be amended to include full dimensions and setbacks to each boundary.

53. Comment: The plans have been amended to include full dimensions and setbacks to each boundary which provides sufficient detail. Given the above, this reason for deferral has been adequately satisfied.

Deferral Reason 4:

Amendments to the architectural roof plan to include fixed seating within the communal open space and is to be consistent with the detail as shown on the landscape plan.

54. Comment: The revised architectural roof plans includes fixed seating within the communal rooftop open space and is consistent with the landscape plan. This reason for deferral has been adequately satisfied.

Deferral Reason 5:

Provide details on the architectural plans of the screening treatment to all elevations including which panels are fixed and which are movable.

55. Comment: The information provided has adequately resolved the reasons for deferral by the Local Planning Panel however, it is the assessing officer's opinion that the application is to be refused based on the original reasons for refusal as contained within the original assessment report within the original assessment report primarily relating to; built form, setbacks, spatial separation, communal open space on ground level and landscaping.

CONCLUSION

56. The application has been assessed having regard to the Matters for Consideration under Section 4.15 of the Environmental Planning and Assessment Act 1979, the provisions of the relevant State Environmental Planning Policies, Local Environmental Plans and Development Control Plans having due regard to the proposal and the concerns outlined within the original assessment report in relation to the built form.

DETERMINATION AND STATEMENT OF REASONS

57. Statement of Reasons

- The proposed development results detract from the amenity on site and adjoining properties and results in an undesirable precedent in relation to the desired future character of the area in relation to the C2 Medium Density Housing of the Kogarah Development Control Plan 2013.
- The proposed development will have unacceptable adverse impacts to the natural and built environment the scale of the development proposed.
- In consideration of the aforementioned reasons, the proposed development is not a suitable and planned use of the site and its approval is not in the public interest.

Determination

58. THAT pursuant to Section 4.16 (1)(b) of the Environmental Planning and Assessment Act 1979, as amended, the Georges River Local Planning Panel refuse development consent to Development Application DA2020/0144 for demolition works and construction of a residential flat building including landscaping and site works associated with Lot 1 DP 655948, Lot 2 DP 658231 and Part 3 Section 17 DP 1963 and known as 192-196 Princes Highway, Kogarah for the following reasons:

1. **Environmental Planning Instrument** - Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development does not satisfy the following Object of the Act:
 - (a) *To promote good design and amenity of the built environment.*

2. **Environmental Planning Instrument** - Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development does not comply with the State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development in terms of the following:
 - (a) 3F Visual privacy and separation - whereby the proposal has not provided sufficient spatial separation of levels 4-6 along the western side boundary.
 - (b) 3E Deep Soil whereby – no adequate deep soil planting with appropriate dimensions have been provided.

3. **Environmental Planning Instrument** - Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development does not satisfy the following objectives of the R3 Medium Density Residential Zone of the Kogarah Local Environmental Plan 2012.
 - *To provide for the housing needs of the community within a medium density residential environment.*
 - *To provide a variety of housing types within a medium density residential environment.*
 - *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

4. **Development Control Plan** - Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979, the proposed development does not comply with the following sections of Chapter C2 Medium Density Housing of the Kogarah Development Control Plan 2012;
 - (a) Clause 3. Building Setbacks and Street Interface Clause (iii) above four storey setbacks.
 - (b) Clause 3. Building Setbacks and Street Interface Clause (iv) above four storey setbacks on corners.
 - (c) Clause 4. Basement setbacks (1) minimum basement setback to site boundaries.
 - (d) Clause 6. Landscape Treatment and Private Open Space (1) deep soil dimensions.
 - (e) Clause 7. Common open space (4) minimum common open space to be located on ground level.
 - (f) Clause 11. Dwelling mix (1) minimum number of studios and 1 bedroom apartments.

5. **Impacts on the Environment** - Pursuant to Section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979, the proposed development is likely to have an adverse impact on the following aspects of the natural environment:
 - (a) The proposal due its design and building footprint has resulted in reduced opportunities to provide for meaningful deep soil planting.

6. **Impacts on the Environment** - Pursuant to Section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979, the proposed development is likely to have an adverse impact on the following aspects of the built environment:
 - (a) The proposal results in adverse visual bulk and scale impacts.
 - (b) The proposal results in reduced amenity for future occupants on site.

7. **Suitability of Site** - Pursuant to Section 4.15(1)(c) of the Environmental Planning and Assessment Act 1979, the site is not considered suitable for the proposed development as:
 - (a) The proposal results in an adverse bulk and scale which is not proportionate with the subject site.

8. **Public interest** - Pursuant to Section 4.15(1)(e) of the Environmental Planning and Assessment Act 1979, the proposed development in its current form is not considered to be in the public interest and is likely to set an undesirable precedent within the locality.

Appeal Rights - Part 8 (Reviews and appeals) of the Environmental Planning and Assessment Act 1979 confers on an applicant who is dissatisfied with the determination of the application a right of appeal to the Land and Environment Court of New South Wales.