




## Clause 4.6 Variation Request Height of Buildings (Clause 4.3) – Kogarah *Local Environmental Plan 2012*

80 - 84 Regent St, Kogarah

Submitted to Georges River Council  
On behalf of Regent Street Property

## Report Revision History

| Revision | Date Issued | Prepared by                                      | Reviewed by                                      | Verified by   |
|----------|-------------|--|--|---|
| 01       | 3/09/18     | <b>Tina Christy</b><br><i>Associate Director</i> | <b>Juliet Grant</b><br><i>Executive Director</i> | <b>Juliet Grant</b><br><i>Executive Director</i>                                    |
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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 the Client. 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 prepared in accordance with Clause 4.6 of the Kogarah Local Environmental Plan 2012 to support a development application submitted to Georges River Council for the demolition of existing structures and construction of a residential flat building at 80 - 84 Regent Street, Kogarah ("the site").

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; by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application, compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the standard as the proposed development will be consistent with the objectives of the development standard and zone.

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. (KLEP).

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

The site is a small isolated site, with three (3) street frontages which demands a high-quality public domain response. As a result, opportunity to provide high amenity to the communal open space is limited to the rooftop.

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 Appeal.

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 to be addressed in a written request from the applicant. In Sections 5, 6 and 7 we address 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.

## 2. Extent of variation

The site is located at 80 - 84 Regent Street, Kogarah, and is legally described as Lot 1 DP 1084126, Lot 1 DP 974706 and Lot 139 DP 1388. The site is a regular shaped allotment with a primary frontage to Regent Street to the south, Regent Lane to the east and Stanley Lane to the north. The total site area is 1,358.6sqm. (Refer to Figure 1)

The site is situated in the Kogarah North Precinct, close to public transport by way of trains and buses. The area has been recently rezoned and is going through a transition from low-density dwellings to new multi-storey residential flat buildings. It is located within 75m of the Princes Highway which is a classified road and has a mixture of commercial/retail and residential uses. Properties to the south have a 39m height limit. (Refer to Figure 2).



Figure 1: Site location (outlined in red) (Source: Six Maps)



Figure 2: Height of Buildings Map (Source: Kogarah LEP 2012)

The subject site has a maximum building height standard of 33m. The proposal has a maximum building height, as measured from existing ground level of 37.228m (at RL 53.08 AHD) as confirmed by PBD Architects. Therefore, the proposal breaches the standard by maximum 4.228m. The extent of the height breach is shown below in Figure 3, 4, 5 and 6.



Figure 3:Section showing height breach (Source: PBD Architects)



Figure 4: Revised Height Plane from survey (Source: PBD Architects)

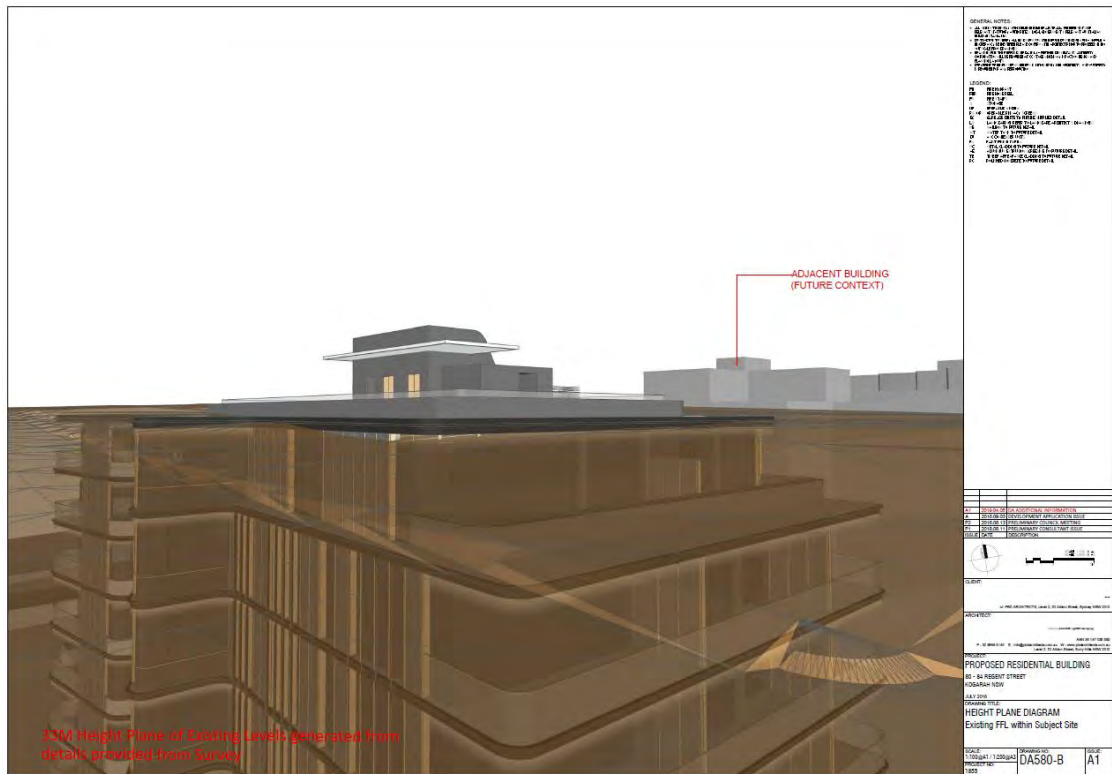


Figure 5: Revised Height Plane viewed from Stanley Lane (Source: PBD Architects)

The extent of the variation is related primarily to the lift over-run of the building, the lightweight structures for the communal open space, stairs to the communal open space and amenities for the communal open space area. These structures provide equitable access to the proposed communal open/covered terrace on the rooftop and are limited primarily to the centre of the building.

In the north-eastern corner of the building the site has an existing "dip" which results in some of the parapet and a very minor section of the windows of the upper level encroaching in this corner. The lowest level in this corner is 260mm from top of parapet. (Refer to Figure 5 above and Figure 6 which shows the roof plan superimposed on the survey below). However, it is predominantly the roof parapet, and above which encroach the height as can be seen from Figures 4 and 5 above.

As is demonstrated in Figure 5, the extent of window encroachment is negligible and hidden below the roof parapet. The proposal will deliver an appropriate built form that is consistent with the desired future character as outlined in the Kogarah Local Environmental Plan and the Apartment Design Guide.

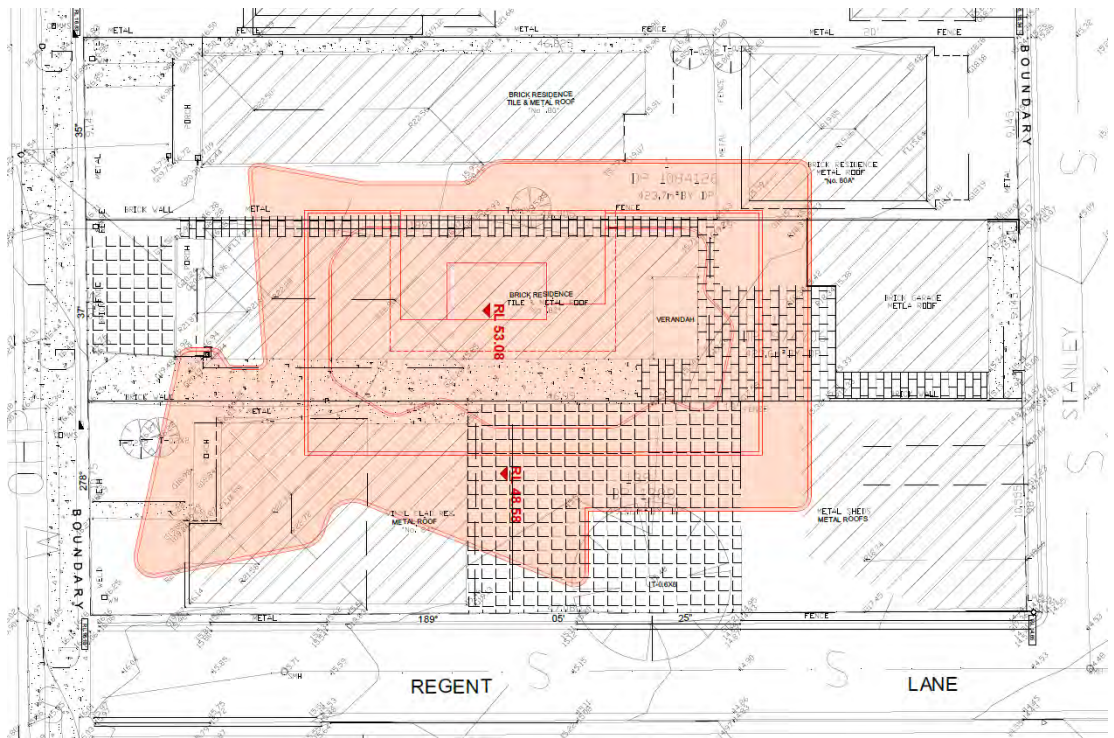


Figure 6: Roof plan superimposed on survey (Source: PBD Architects)

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

The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was



whether the objectives of the standard were still met despite the contravention of that standard.

The following discussion provides a response to the relevant "tests" of the 5-part Wehbe test, remembering only one (1) of the tests has to be achieved, not all five (5).

### 3.1 Achieves the objectives of the standard

Compliance with the 33m maximum height 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 standard.

Table 1: Achievement of Development Standard Objectives

| Objective  | Discussion  |
|--|---|
| <p>Clause 4.3 Height of Buildings</p> <p>1 The objectives of this clause are as follows:</p> <p>(a) to establish the maximum height for buildings.</p> | <p>The subject site is located within R4 High Density Zone and residential flat buildings are permissible within the zone.</p> <p>The maximum breach (4.228m) occurs as a result of the lift overrun and stairs providing access to the communal open space on the roof top, as well as the lightweight structures of that enhance amenity of the communal open space. The habitable portion of the building itself, is within the 33m maximum height, with the exception of a negligible portion of the top of the window to the north-eastern unit due to a small "dip" in the site directly below this point.</p> <p>The proposal has allowed for the lift shaft to have a height of 4.5m at worst case. This is the maximum height of the lift shaft and at construction stage it may be lower.</p> <p>The design complies with this objective of the Height Standard as the habitable portion of the building is within the 33m height limit. Due to the constraints of the site, only the communal open space and structures associated with that space, exceed the height control.</p> |
| <p>(b) to minimise the impact of the overshadowing, visual impact and loss of privacy on adjoining properties and open space areas,</p>                | <p>PBD Architects have prepared detailed shadow diagrams for the proposal which is provided at Appendix 4 of the SEE The overshadowing impact caused by the variation of the height standard is negligible due to the height breach being restricted to the centre of the site. Adjoining premises receive a minimum 2hrs sunlight to their living areas.</p> <p>The area of the building which encroaches the height is primarily restricted to the lift overrun, stairs, and lightweight structures and amenities associated with the communal open space. The areas of non-compliance with the height will not have an adverse</p>   |

| Objective   | Discussion   |
|---|--|
|   | <p>impact on solar access or overshadowing due to their location towards the centre of the site. (Refer to Appendix 4 of the SEE).</p> <p>For the same reason, the structures that breach the height do not adversely impact on the visual quality of the building. They are centrally located so as to reduce any visibility from the street.</p> <p>The variation of the height standard does not result in any additional overlooking of neighbouring properties. The communal area itself is setback a minimum 8.68m to the western common boundary, 12.91m - 13.13m to the northern rear lane boundary, 7.87m to the east lane boundary and 10.98m to the front Regent St boundary. The communal open space is generally set in 2.5m - 2.8m from the roof edge. The only exception being to the west for a length of 8.4m where it varies from 1.4m to 1.8m setback from the roof edge. This section provides a solid wall enclosing the stairs so has no visual/acoustic impact on neighbours.</p> <p>All doors are oriented "inwards" to the rooftop, with a solid wall facing towards the west to preserve visual and acoustic privacy.</p> <p>The design complies with this objective of the Height Standard.</p> |
| (c ) to provide appropriate scale and intensity of the development through height controls.                                   | <p>The portion of the building that exceeds the height does not alter the scale or intensity of the development. It is similar in size and height to what has recently been approved adjoining to the west.</p> <p>The design is considered to be consistent with this objective and in accordance with the higher density residential precinct expected in this area due to the location relative to the Kogarah Rail Station and Kogarah Strategic Centre and as endorsed by the Kogarah North Precinct Urban Design Strategy.</p> <p>The portion of the building that exceeds the height does not add to the bulk and scale of the development and is concentrated to the centre of the building.</p>   |
| (2) The height of building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map. | <p>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.</p> <p>The breach of the standard allows for a building that achieves an improved built form providing better amenity to the residents of the development and the adjoining neighbours. The provision of communal open space on the roof, (with a variety of useable spaces);</p>  |

| Objective | Discussion   |
|-----------|--|
|           | which achieves abundant solar access, is consistent with this objective and objective 3D-1 relating to Communal Open Space within the SEPP 65 provisions. It also results in less impact on adjoining residents by maintaining the communal area to the centre of the site and not near an adjoining boundary. |

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

Compliance with Clause 4.3 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 standard (Test 3 under Wehbe).

The breach of the standard allows a built form that is consistent with the urban design principles established in the Kogarah North Precinct Urban Design Study. This includes providing an adequate setback 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, (given that there are three (3) street frontages), and poor amenity for the residents because the communal open space would need to be located on the ground floor (or a lower) level, with limited solar access and resulting in significantly less building articulation. This would detrimentally affect the scale and intensity of the development. The positive interface with the public domain would be reduced as the communal open space was made private.

### 3.3 Development standard has been virtually abandoned or destroyed by the granting of consents departing from the standard in similar cases to this

Compliance with the Clause 4.3 Height of Buildings development standard is also unreasonable or unnecessary in the circumstances of this case because the development standard has been abandoned for similar reasons in the immediate area and Local Government Area (Test 4 under Wehbe).

The proposed building immediately to the west, No. 70 - 78 Regent Street, has been approved with a breach above the maximum 33m height standard for the communal rooftop and associated structures relating to that rooftop, being lift overrun, stairs, amenities and lightweight shade structures. Additional examples where this variation to the height standard and development consent has been granted is provided below in Table 2:

Table 2: Examples of variation to height standard in Georges River Council

| Address                   | DA Number and Description  | Height Control | Approved                                   | Uplift | Area of non-compliance  |
|---------------------------|--|----------------|--|--------|---|
| 70-78 Regent St, Kogarah, | DA111/2017<br>[2018] NSWLEC 1370<br>Demolition of existing buildings, amalgamation | 33m            | 37.9m to top of lift overrun<br>(RL 54.65) | 14.8%  | Rooftop communal open space and lift overrun to service this space. |

|                               |   |     |              |        |   |
|-------------------------------|---|-----|--------------|--------|---|
| Next door to subject site     | of lots and construction of a residential flat building consisting of eleven levels.<br><br>Regent Land Pty Ltd ATF Regent Land Unity Trust v Georges River Council, decision date 24 July 2018 |     |              |        | Extract from the Court appeal: "The Council supports the height breaches required in order to provide additional quality rooftop communal open space and reasonable access to it." [p143] |
| 365 - 377 Rocky Point Rd,     | DA227/2015<br><br>Alterations and additions to an approved mixed-use development.<br><br>Primus DMS Pty Ltd v Georges River Council decision date 11 August 2017.                               | 15m | Approx 18.7m | 24.67% | Rooftop communal open space and lift overrun to service this space.   |
| 27-29 Andover Street, Carlton | DA2017/119<br><br>Residential Flat Building   | 15m | 16.7m        | 7.5%   | Lift overrun  |

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

The SEE prepared for to support this DA provides an holistic environmental planning assessment of the proposed development and concludes that there are sufficient environmental planning grounds to support the development.

There is robust justification through the SEE and accompanying documentation to support the overall development and contend that the outcome is appropriate on environmental planning grounds.

Additional specific environmental grounds to justify the breach of the standard are summarised as follows:

- The breach of the standard allows for a development that is consistent with the desired future character of the area which is going through a transition from low density to high density. It is consistent in the transition of perceived heights for this area, as the permissible heights step from 39m to the south, to the 33m for the site and to the north,
- The proposal complies with the maximum permissible floor space ratio for the site. The additional height is not to achieve additional floor space, but rather to provide a better designed building which results in improved amenity for the residents of the development and those adjoining. It is a better allocation of floorspace across the building envelope, to avoid a short/squat built-form. It allows for the provision of the four (4) storey podium, thus maintaining the human scale at the street,

- Compliance with the standard would be unreasonable or unnecessary, due to the existing controls being virtually abandoned or destroyed from previous consents being granted. The property to the west has been recently approved for a development similar in height and with lift overrun and communal open space exceeding the height control,
- The subject allotment is unique in configuration as it has three (3) street frontages and is a narrower isolated site. This design allows for a visually interesting building on a constrained site, that achieves high quality communal area for the occupants of the development and little impact on adjoining residents,
- The proposed height is compatible with the existing development in the immediate context of the site and with the emerging pattern of development in the locality. Where possible, the areas that exceed the development standard have been located in the centre of the building to reduce their visual appearance when viewed from the intervening public domain
- There will be no loss to any 'significant' views as a result of the breach of the standard,
- The shadow diagrams that form part of this Development Application indicate that the area of non-compliance with the height will not have an adverse impact on solar access or overshadowing,
- It is considered that the proposed non-compliances with the maximum height limit for the site do not result in any unreasonable impact and is appropriate for the orderly and economic use of the land, and
- The proposed development results in an improved urban design outcome and enhanced Apartment Design Guide compliance.

The environmental planning benefits that are facilitated by the variation of the height standard relate to the achievement of the desired future character of the precinct as established in the Kogarah North Precinct Urban Design Study. It enables the provision of a generous street setback and the creation of a distinct four-storey podium to create human scale on the street. The variation also facilitates the provision of generous building articulation, by having the majority of the communal open space on the roof.

## 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 3 of this request, it was demonstrated that the proposal is consistent with the objectives of the development standard. The proposal is also consistent with the objectives of the zone as explained in Table 3 below:

Table 3: Consistency with Zone Objectives

| Objective                       | Discussion   |
|---------------------------------|--|
| Zone R4 High Density Objectives | The breach of the standard does not result in an inconsistency with this objective. The proposal as a whole provides for a variety of unit sizes and layouts to meet the demand of |

| Objective   | Discussion  |
|---|---|
| To provide for the housing needs of the community within a high-density residential environment         | the local market within close proximity to the Kogarah Town Centre and Railway station.   |
| To provide a variety of housing types within a high-density residential environment                     | The proposed development comprises one, two and three-bedroom units, with differing layouts 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. The residential units are located within close proximity to the Kogarah Town Centre, Kogarah Railway Station and bus services.  |

As can be seen from Tables 1 and 3, the proposal is consistent with the objectives of the standard and the objectives of the zone; and is therefore considered to be in the public interest.

## 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 result as a consequence 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 Kogarah North Precinct Urban Design Strategy. The proposal provides generous setbacks and articulation, resulting in a building that will provide an improved relationship to the public domain. It is also consistent with the objectives of rooftop communal open space to increase solar access to that space and to limit privacy and acoustic impacts if it were to be located at a lower level.

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, due to the central design of that area.

Accordingly, there is no public benefit<sup>1</sup> 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 very minor disadvantages.

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

## 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 Zone;
- Compliance with the standard would thwart the objectives of the standard and would be incongruous with the existing and desired character of the area;
- The development standard has been virtually abandoned or destroyed by the granting of consents departing from the standard in similar cases to this,
- 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.