



## **Revised Clause 4.6 submission requesting variation of Development Standard.**

### **Clause 4.3 – Maximum Height of Buildings Kogarah Local Environmental Plan 2012**

Demolition of the existing building and construction of a twelve (12) storey + rooftop mixed use development consisting of twenty-three (23) residential apartments, ground floor commercial/retail floor area and basement carparking.

1 Butler Road, Hurstville  
Project No: 6/2017  
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## Introduction

Clause 4.6 of Kogarah Local Environmental Plan 2012 (KLEP 2012) allows the consent authority to grant consent to a development even though the development contravenes a development standard imposed by the LEP.

The objectives of clause 4.6 are:

- 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.*

This submission is seeking a variation of the maximum height of building standard as specified in clause 4.3 of KLEP 2012 and associated “maximum height of buildings” maps and has been prepared having regard to the decision by Chief Justice Preston in *Wehbe v Pittwater Council (2007) NSW LEC 827* and the principles outlined in the latest authorities on Clause 4.6, contained in the following judgements:

- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 (‘Four2Five No 3’)*
- *Moskovitch v Waverley Council [2016] NSWLEC 1015*
- *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 118*

In summary, the principles arising from the above matters are:

- a) That the relevant objectives are those stated in the controls not unidentified underlying objectives;
- b) The environmental planning grounds relied upon need not necessarily be particular to the circumstances of the proposed development and/or the site; the relevant question is whether the decision maker is reasonably satisfied with the grounds on appropriate grounds; and
- c) Five methods of establishing that compliance is unreasonable or unnecessary are identified by Preston J in *Wehbe* and these remain relevant as they were recently reaffirmed in *Initial Action Pty Ltd v Woollahra Council*. Even though cl4.6(a)(ii) already encompasses a requirement that the development be consistent with the objectives of the standard and for development in the zone, that matter remains relevant (but not exclusively so) as grounds that may satisfy the test in cl4.6(4)(a)(i) in relation to matters referred to in cl4.6(3)(a).

In *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 7* Biscoe J noted that the consent authority’s obligation is to be satisfied that the applicant’s clause 4.6 submission has adequately addressed that 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. He held that:

*“the Commissioner **did not have to be satisfied directly** that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, **but only indirectly by being satisfied** that the applicant’s written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary.”*

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

Kogarah Local Environmental Plan 2012 (KLEP 2012)



### **What is the development standard being varied?**

The proposed development seeks to vary the maximum height of buildings standard as specified in clause 4.3 of KLEP 2012 and the associated “maximum height of buildings” maps which indicate that the maximum height of a building for the site is 39m.

**building height (or height of building)** means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like. landscaped area

The height of the building to the parapet along the Ormonde Street frontage is 39.39m (RL 110.30 AHD) which represents a minor variation of the 39m height standard.

However, the lift overrun, fire stairs and architectural roof element which relate to the rooftop communal open space area exceed the maximum height standard more significantly to 42.87m (RL 113.85) to the top of the lift overrun and 42.42m (RL 113.40 AHD) to the architectural roof feature.

### **What is the zoning of the land?**

The site is zoned B4 – Mixed Use

### **Justification for Contravention of Development Standard.**

Clause 4.6(3) of KLEP 2012 states that:

*“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”*

Clause 4.6(4)(a) of KLEP 2012 states that the consent authority must not grant consent to a development which contravenes a development standard unless it is satisfied:

*(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*

These matters are address below.

### **That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

In *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston identified five examples of situations in which compliance with a development standard might be shown as unreasonable or unnecessary.



While *Wehbe* relates to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis remains of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009, *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248; *Moskovitch v Waverley Council* [2016] NSWLEC 1015).

The five methods of establishing that compliance is unreasonable or unnecessary are identified by Preston J in *Wehbe* remain relevant as they were recently reaffirmed by Justice Preston in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118.

The five methods identified in *Initial Action* include:

13. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
14. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
15. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
16. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
17. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

Justice Preston also noted that:

*These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*



### What are the objectives of the zone?

The objectives of the zone are to:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
- *To encourage development that contributes to economic growth and employment opportunities.*
- *To encourage development that contributes to an active, vibrant and sustainable town centre.*
- *To provide opportunities for residential development, where appropriate.*

It is considered that the proposed development is of a form and scale that is consistent with and satisfies the objectives of the zone as:

- The proposal provides a mixture of compatible land uses and is located within the Hurstville Town Centre immediately opposite Hurstville Railway Station, bus interchange and Hurstville Central Shopping Centre. It is in close proximity to employment opportunities and services which will encourage the use public transport, walking and cycling.
- The proposal is consistent with Hurstville's status as a *Strategic Centre* and it reflects Hurstville's importance to the Sydney Region as a retail and commercial centre. The proposal does not conflict with the *South District Plan* which identifies Hurstville as a Strategic Centre:

*"Hurstville is an important retail destination for the South District with its high street, Westfield and Central shopping centres. The centre also serves as a commercial precinct for the local population and benefits from a rail station and several bus routes. It has an opportunity to leverage its cultural diversity to grow tourism."*

- The development provides retail/commercial floor area that will be suitable for a range of uses that will provide the opportunity increased economic growth and employment within the Hurstville Town Centre.
- The provision of a residential development immediately adjacent to public transport, shops and services is both appropriate and sustainable. The nature of the proposal and the diversity of apartments types within the development will contribute to an active, vibrant and sustainable town centre.
- Properties surrounding the site and within in the Town Centre are zoned B4 – Mixed Use under KLEP 2012 and are subject to a height to 39m and FSR to 4.5:1 so substantial redevelopment of the locality in a similar form to that currently proposed is anticipated for the future.

### What are the objectives of the development standard?

The objectives of the height of buildings standard contained within the proposed clause 4.3 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 scales and intensities of development through height controls.*

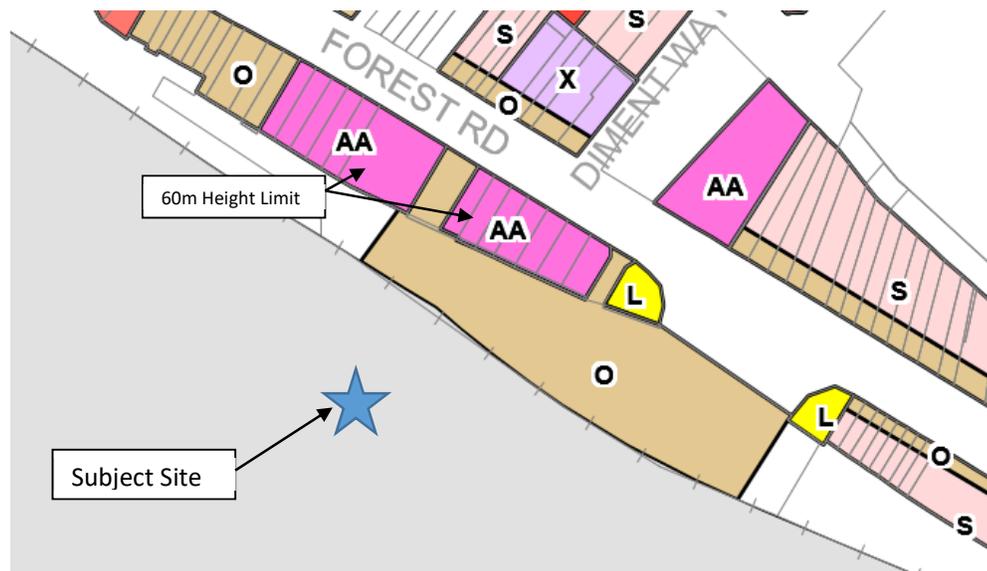
Having regard to the first method in Initial Action, it is considered that the proposed development despite not complying with the maximum height standard satisfies the objectives of the standard for the following reasons:



- a) The proposed variation to the height standard is considered minor and does not relate to the entire building only parts of the building that are generally associated with the rooftop communal open space area. The non-compliance resulting from the provision of the lift overrun and fire stairs to the rooftop communal open space allows equitable access to this space that enhances the amenity for residents and visitors within the development without impacting on the amenity of surrounding properties
- b) The proposed development is a high quality mixed development building that is well articulated using architectural elements, varied setbacks and materials to ensure that the development contributes positively to the streetscape and when viewed from surrounding lands and the public domain.
- c) It is considered that given the nature of surrounding land uses the areas of non-compliance with height do not result in any significant increase in adverse amenity impacts on these properties in terms of privacy, overshadowing, view loss or visual intrusion.
- d) Properties within the Hurstville Town Centre on the southern side of railway line are all zoned B4 – Mixed Use with a maximum height to 39m and it is anticipated that substantial redevelopment of the locality in a similar form to that currently proposed is likely to occur in the future.

However, within 200m of the site there are a number of developments that exceed the 39m height limit, including, a substantial sixteen (16) storey mixed use development under construction on the old ATO site to the west of the site and the “Empress Towers” to the south-east which is also sixteen (16) storeys. In addition, properties immediately on the northern side of the railway line on Forest Road have a maximum height limit of up to 60m.

It is considered that there is no homogenous character in the locality whereby a variation of the height control to the minor extent proposed would not prevent the achievement of objective (c) as the height of the proposed development is compatible and appropriate given the context of the site.



Extract from Height of Buildings Map HLEP 2012. ([www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au))

In view of the above, the requirement to strictly adhere to the numerical development standard for building height is considered to be unreasonable and unnecessary in this instance as the proposed development achieves and is consistent with the objectives of the standard.



**That there are sufficient environmental planning grounds to justify contravening the development standard**

Having regard to the discussion above, it is considered that there are also sufficient environmental planning grounds to justify contravening the development standard for building height for the proposed development as:

- a) The proposed height variation for the lift overrun, fire stairs and architectural roof element is as a direct result of providing communal open space on the rooftop. This high quality communal open space area will represent a green oasis and focal point for the development that will promote social interaction amongst residents & visitors. The space is easily accessible and its size allows for the provision of a BBQ area, seating and landscaping that enables all residents the opportunity to enjoy the space without detracting from the amenity of the apartments

The Apartment Design Guide (ADG) recommends the provision of communal open space that has a minimum area equivalent to 25% of the site area but it also acknowledges that there are circumstances where developments may not ordinarily be able to achieve this.

*“Where developments are unable to achieve the design criteria, such as on small lots, sites within business zones, or in a dense urban area, they should:*

- *provide communal spaces elsewhere such as a landscaped roof top terrace or a common room*
- *provide larger balconies or increased private open space for apartments*
- *demonstrate good proximity to public open space and facilities and/or provide contributions to public open space”*

This variation relates, in part, to the provision of access to communal open space which is over and above the circumstances that would have been required under the ADG as this development application relates to a small isolated site within a mixed-use zone and a dense urban environment it has provided communal open space on the rooftop, larger balconies and is within reasonable proximity public open space and facilities.

In these circumstances, there would be reasonable grounds not to provide any communal open space within the development. However, the proposal seeks to enhance the amenity of the development by providing equitable access to the communal rooftop open space for all residents and visitors of the development which makes it a better development and represents a good planning outcome.

- b) Part 4N of the ADG states:

*The roof is an important element in the overall composition and design of a building. Quality roof design provides a positive addition to the character of an area and can form an important part of the skyline. Roofs also provide opportunities for open space where appropriate and can add to the sustainability performance of a building.*

To facilitate the provision of interesting roofscapes clause 5.6 of KLEP 2012 allows architectural roof features to be provided that can exceed the maximum building height. However, as the proposed architectural roof feature over the communal open space area does not fully integrate with the lift overrun and fire stairs it is considered that this clause does not apply. However, the objectives of clause 5.6 are still considered relevant:

- “(a) to create variety in the Kogarah skyline and urban environment,*
- (b) to encourage quality roof designs that contribute to the aesthetic and environmental design and performance of the building,*
- (c) to encourage integration of the design of the roof into the overall facade, building composition and desired contextual response,*



*(d) to promote architectural design excellence.”*



Photomontage of proposed development as viewed from Ormonde Street showing the architectural roof feature.

It is considered that the roof feature over the communal open space area provides a sculptural element consistent with the architectural form of the building that creates variety to the Hurstville Town Centre skyline and urban environment. The roof feature is appropriately integrated into the overall building façade, reinforces the corner of the urban block and provides the building with a base, middle and top which contributes the aesthetic of the development.

In addition, the roof feature also increases the functionality and usability of the communal open space by providing a level of weather protection to the space.

It is considered that the provision of the architectural roof feature represents a good planning outcome as it provides a positive addition to the character of an area and forms an important part of the skyline.

- c) It is considered that given the nature of surrounding land uses the areas of non-compliance with height do not result in any significant increase in adverse amenity impacts on these properties in terms of privacy, overshadowing, view loss or visual intrusion.

Strict compliance with the development standard would not improve the building's relationship to its surroundings. The proposed design solution is considered to represent the best possible development outcome for the site, whilst ensuring the amenity of both existing development and future residents is preserved.

### **Conclusion**

Having regard to the discussion above, it is considered that compliance with the maximum height standard as specified in clause 4.3 KLEP 2012 is both unreasonable and unnecessary in this particular case and it has been demonstrated that there are sufficient environmental grounds to justify contravening the standard.



In addition, it is considered that the proposed development will not be contrary to the public interest (cl 4.6(a)(ii)) as it is consistent with the objectives of the standard and the objectives of the zone in which the development will be carried out.

This written request demonstrates that despite its non-compliance with the height standard the proposed development will deliver a better outcome for the community and the future residents of the development. It will result in a high-quality development that will positively contribute to the area.

A handwritten signature in black ink, consisting of a large, stylized initial 'M' followed by a horizontal line extending to the right.

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