Clause 4.6 Variation Request - Height

Kingsgrove North Highschool

Submitted to Canterbury Bankstown Council on behalf of Kingsgrove North High School

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Document status

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1. Introduction

This Clause 4.6 variation request has been prepared by Paro Consulting on behalf of Urban Den and accompanies a Development Application (DA) submitted to Canterbury Bankstown Council located at Kingsgrove North High School located at 2 St Albans Road, Kingsgrove (the site). The DA seeks approval for four (4) flood lights located to the sports oval at Kingsgrove North High School.

This request seeks to vary the maximum height of building development standard prescribed for the site under clause 4.3 of the Canterbury Local Environmental Plan 2012 (Canterbury LEP 2012). The Canterbury LEP 2012 prescribes a maximum height of building standard of 8.5m for the site.

The proposed four (4) flood lights achieve a height of 18.9m, which translates to a 10.4m height variation.

This variation request is made pursuant to Clause 4.6 of Canterbury LEP 2012. For a request to meet the requirements of Clause 4.6(3) Canterbury LEP 2012, it must:

- *"adequately" demonstrate "that compliance with the height standard is unreasonable or unnecessary in the circumstances" of the project on the site; and*
- *"adequately" demonstrate "that there are sufficient environmental planning grounds" to justify contravening the height standard.*

This request contains justified reasoning for the proposed variation to the height of building development standard and demonstrates that:

- The objectives of the development standard will be achieved, notwithstanding that the control will be exceeded, and in doing so, establishes that compliance with the standard is unreasonable or unnecessary (Initial Action at [17]) – Refer to Section 6.2.1 of this Request; and
- Whilst the height of building development standard will be exceeded, there are sufficient environmental planning grounds to support the proposed development – Refer to Section 6.2.2 of this Request.

2. Assessment Framework

2.1 Clause 4.6 of the Canterbury LEP 2012

Clause 4.6 of Canterbury LEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. 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".

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6 requires that the consent authority consider a written request from the applicant, which demonstrates that:

"(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".

Furthermore, the consent authority must be satisfied that 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, and the concurrence of the Secretary has been obtained.

In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

> *"(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
>
> *(b) the public benefit of maintaining the development standard, and*
>
> *(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence".*

Concurrence is assumed pursuant to Planning Circular No. PS 18-003 Variations to Development Standards dated 21 February 2018].

2.2 NSW LEC: CASE LAW

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached.

The approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118:

[13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.

[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61 NSWLR 707;

[2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79;

[2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].

[15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.

[16] As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.

[17] 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].

[18] 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].

[19] 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].

[20] 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].

[21] 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.

[22] 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.

[23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

[24] The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

[25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in Randwick City Council v Micaul Holdings Pty Ltd at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to

form the requisite opinion of satisfaction: see Wehbe v Pittwater Council at [38].

[26] The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii).

[27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

[28] The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

[29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act.

Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: Fast Buck$ v Byron Shire Council (1999) 103 LGERA 94 at 100; Wehbe v Pittwater Council at [41].

3. Extent of Contravention

3.1 Definition of building height

The standard instrument includes the following definition of building height:

> ***"building height** (or **height of building**) means—*
>
> *(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
>
> *(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to 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".*

…

*"**building** has the same meaning as in the Act.*

Note—The term is defined to include part of a building and any structure or part of a structure, but not including a manufactured home, a moveable dwelling or associated structure (or part of a manufactured home, moveable dwelling or associated structure)".

The proposed flood lights are not expressly excluded from the definition of building height and whilst the lights are not considered a building they are defined as a structure and therefore the height standard is applicable.

3.2 Variation to height of building standard

The subject site is subject to a maximum building standard of 8.5m, as shown in the Canterbury LEP 2012 Building Height Map. The proposed four (4) flood lights achieve a height of 18.9m, which translates to a 10.4m height variation. Figure 1. below provides an elevation of the building and clearly identifies the extent of the variation to the height standard.

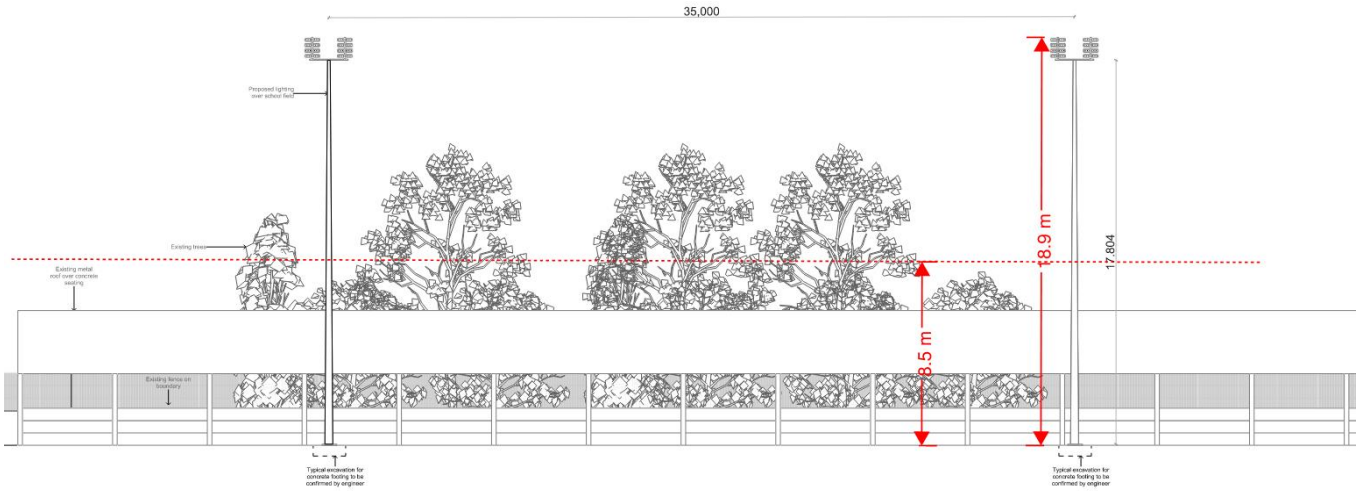

Figure 1. Elevation including area of variation
Source: Urban Den

4. Clause 4.6 Assessment

The following sections of the report provide an assessment of the request to vary the height of building development standard in accordance with clause 4.6 of Canterbury LEP 2012.

4.1 Key questions

Is the Planning Control a Development Standard?

The height of building control prescribed under clause 4.3 of the Canterbury LEP 2012 is a numeric development standard capable of being varied under clause 4.6 of Canterbury LEP 2012.

Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of clause 4.6 as it is not listed within clause 4.6(6) or clause 4.6(8) of Canterbury LEP 2012.

What is the Underlying Object or Purpose of the Standard?

The objectives of clause 4.3 as set out in clause 4.3(1) of the Canterbury LEP 2012.

4.2 Considerations

4.2.1 Clause 4.6(3)(a)(i) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

It is not considered necessary for an application to need to establish all of the tests or 'ways' a development standard is unreasonable or unnecessary. 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. This development is justified against the one of the Wehbe tests as set out below.

Compliance with the development standard is considered unreasonable and unnecessary in the circumstance of the application based on the following:

Test 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The proposed development achieves the objective of the height of building development standard (clause 4.3) as described in Table 1 notwithstanding the non-compliance with the height of building standard.

Table 1. Assessment of consistency with the objectives of the building height standard

Details	Assessment
(a) to establish and maintain the desirable attributes and character of an area,	The proposed lighting is not considered to establish an undesirable attribute and is typical of a large recreational use oval.
(b) to minimise overshadowing and ensure there is a desired level of solar access and public open space,	The proposed slender flood lights will not result in any significant overshadowing to the sports oval grounds.
(c) to support building design that contributes positively to the streetscape and visual amenity of an area,	The proposed lighting structures are not considered to contribute negatively to the streetscape or visual amenity of the area. The proposal lights are not considered to result in any significantly adverse visual impact as a result of the structure or illumination.
(d) to reinforce important road frontages in specific localities.	The existing oval sits approximately 3m below street level, the streetscape include dense vegetation and flood lights are located to a central part of the oval and 15m from the northern boundary which will ensure the proposed flood lights will not be highly visible from the frontage.

In summary, achieving compliance with the standard is unreasonable and unnecessary (clause 4.6(3)(a)) as notwithstanding the non-compliance, the development is consistent with the objectives of the standard (clause 4.6(4)(a)(ii)).

Test 2: The underlying objectives or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.

Not relied upon.

Test 3: The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable

Not relied upon.

Test 4: The development standard has been virtually abandoned or destroyed by council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable

While the standard has not been virtually abandoned or destroyed, it is important to note that Council have consented to proposals in the locality with a building height that exceeds the development standard, as evidenced in the Register of Exceptions to Development Standards published on Council's website. There are numerous examples of developments in the Canterbury Bankstown LGA and which have been approved despite non-compliances with the maximum building height development standard. Whilst each DA is assessed on its own merits and each site has different characteristics, Council has accepted variations to the maximum building height standard in the past.

Test 5: 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 is in circumstances of the case would also be unrealistic or unnecessary

Not relied upon.

4.2.2 Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?

There are sufficient environmental planning grounds to justify the proposed variation to the development standard for the following reasons:

- The flood lights have been proposed to ensure the sports ovals can be used between 5pm to 8pm on weekdays between April to August. The hours of the proposed flood lights will not restrict the sleep of any nearby residents given the lights will turn off at 8pm ensuring the lights will not have any adverse impacts.
- The school is located to the east of the site and light industrial building to the south and west of the site. There will not be any residents located to the industrial properties and there will likely not be any impact to these properties.
- There are substantial trees located to the northern boundary of the site, the land falls 3m from the street and flood lights are setback 15m from the northern boundary of the site. The location of the site, existing vegetation and level will minimise the visual impact of the lights upon the streetscape or nearby properties.
- Communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like are excluded from the height standard. The proposed flood lights height non-compliance relates to a metal pole and lights which includes a similar visual impact to any of the above-mentioned structures that are excluded from the height standard.

4.2.3 Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in which The Development is Proposed to be Carried Out?

The proposed development is consistent with the objectives of the building height standard, as shown in Section 6.2.1. The proposal is also consistent with the land use objectives that apply to the site under Canterbury LEP 2012 as demonstrated in Table 2 below. The site is located in the R3 Medium Density Residential Land use zone.

Table 2. Assessment of Compliance with Land Use Zone Objectives

Details	Assessment
• To provide for the housing needs of the community within a medium density residential environment.	Not Applicable.
• To provide a variety of housing types within a medium density residential environment.	Not Applicable.
• To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The land zoning is a prescribed zone for the purposes of the Transport and Infrastructure SEPP and permits the development of a school with consent. The proposed use of the lighting to the oval support the recreational needs of the school and nearby residents in the R3 Medium Density Residential land use zone.

4.2.4 Clause 4.6(5)(a) – Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?

The proposed non-compliance with the development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

4.2.5 Clause 4.6(5)(b) – Is There a Public Benefit of Maintaining the Planning Control Standard?

The proposed development achieves the objectives of the building height development standard and the land use zoning objectives. The public benefit of maintaining the development standard is not considered significant given that the building presents a compliant building height to the street. The building height variation does not result in any view loss, loss of privacy, adversely impact the streetscape character and results in an acceptable amount of additional overshadowing,

4.2.6 Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

Concurrence can be assumed. Nevertheless, there are no known additional matters that need to be considered within the assessment of the Clause 4.6 request and prior to granting concurrence, should it be required.

5. Conclusion

The proposal to exercise the flexibility afforded by Clause 4.6 of the Canterbury LEP 2012 results in a better outcome, being an appropriate built form massing for the site. This variation request demonstrates, as required by Clause 4.6 of the Canterbury LEP 2012, that:

- Compliance with the development standard is unreasonable and unnecessary, as the development will continue to achieve the objectives of the standard, despite the non-compliance;
- That there are sufficient environmental planning grounds to justify a contravention to the development standard;
- The development achieves the objectives of the development standard and is consistent with the objectives of the R3 Medium Density Residential land use zone;

- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard in this instance; 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.