

**CLAUSE 4.6 VARIATION TO CLAUSE 4.3 HEIGHT OF BUILDINGS
OF THE CANTERBURY LOCAL ENVIRONMENTAL PLAN 2012**

1. Introduction

This letter seeks to address the proposed variation to Clause 4.3 of the Canterbury Local Environmental Plan 2012, which relates to the height of buildings development standard.

This submission has been prepared in relation to a development application for proposed alterations and additions, including a first floor addition, to a residential dwelling at 40 Hay Street, Croydon Park.

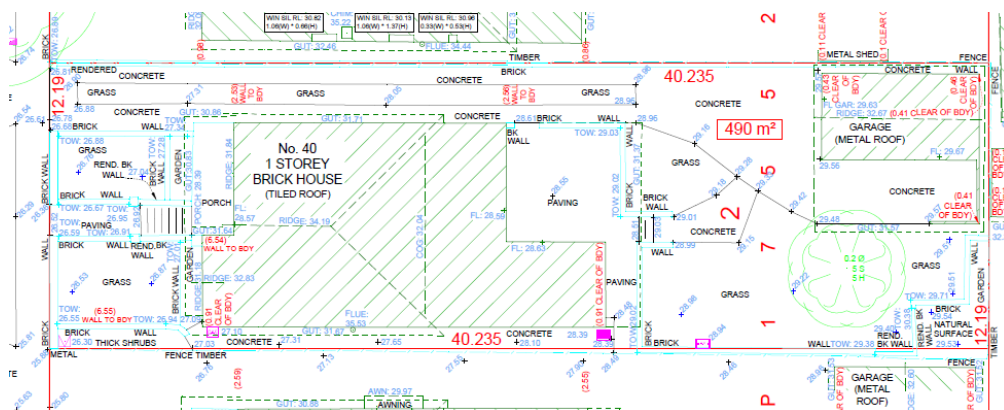
As detailed in this written request for a variation to the height of buildings development standard under the Canterbury LEP 2012, the proposed development meets the requirements prescribed under Clause 4.6 of the Canterbury LEP 2012.

2. Site Background

The subject site is commonly known as 40 Hay Street, Croydon Park, and is legally defined as Lot 2 in Deposited Plan 175523. The site is located on the eastern side of Hay Street.

The site is rectangular in shape with a front and rear boundary measuring 12.19m. The northern and southern side boundary both measure 40.235m. The overall site area is 490m². Refer to Figure 1 – Extract of Survey Plan and Figure 2 – Site Location Map.

Figure 1: Extract of Survey Plan



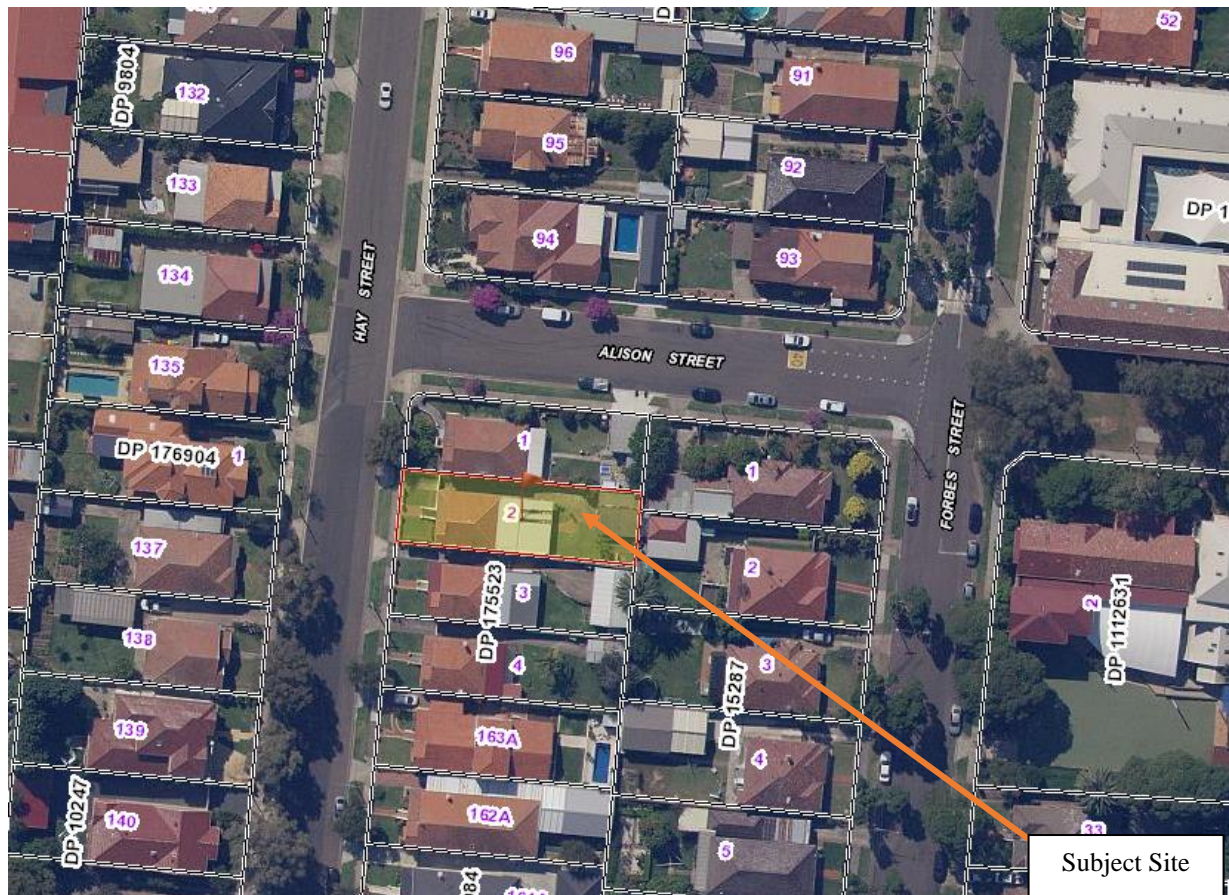
Source: Peak Surveying Services

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Figure 2: Site Location Map



Source: SIX MAPS

Currently located on the site is a single storey residential dwelling with a detached garage. The streetscape presentation of the dwelling is of an older housing stock with a contemporary addition located at the rear of the dwelling.

The site is located within a low density residential area. Properties to the north, south and east of the site consist of residential dwellings that are single storey form. Development in the vicinity of the site is generally of older housing stock with contemporary additions located towards the rear.

While the subject site is not identified as containing a heritage item, the site is identified as being within the Ashbury Heritage Conservation Area.

The subject site is within 550m walking distance from James Folster Reserve and 750m walking distance to Croydon Park which provides opportunities for open-space recreation activities.

The site is well located to shops, services and amenities. The site is within 850m walking distance of local shops along Georges River Road. The site is also within 230m walking distance from bus stops along Roslyn Street which provide services towards the City and Campsie and link to a more expansive public transport network.

In view of the above, it is considered that the subject site is conducive to a development of this nature.

3. Clause 4.6

This submission is made under Clause 4.6 of the Canterbury Local Environmental Plan 2012 – Exceptions to development standards. Clause 4.6 states the following:

“4.6 Exceptions to development standards

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

 - (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.**

- (2) Development consent may, subject to this clause, be granted for a 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.*

- (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:

 - (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.**
- (4) Development consent must not be granted for development that contravenes a development standard unless:

 - (a) the consent authority is satisfied that:

 - (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**
 - (b) the concurrence of the Director-General has been obtained.**

- (5) In deciding whether to grant concurrence, the Director-General must 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 Director-General before granting concurrence.**

- (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note. When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4

(caa) clause 5.5"

The use of Clause 4.6 to enable an exception to this development control is appropriate in this instance and the consent authority may be satisfied that all requirements of Clause 4.6 have been satisfied in terms of the merits of the proposed development and the content in this Clause 4.6 variation request report.

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan. Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

"4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

4.6(3)(b) that there are sufficient environmental planning grounds to justify contravening the development standard."

In addition, 4.6(4)(a)(i) and (ii) requires that development consent must not be granted to a development that contravenes a development standard unless the:

(a) "the consent authority is satisfied that:

(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"

This submission has been prepared having regard to the following guideline judgements:

- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 ('Four2Five No 1')
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 ('Four2Five No 2')
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')
- *Micaul Holdings Pty v Randwick City Council* [2015] NSWLEC 1386;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7; and
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

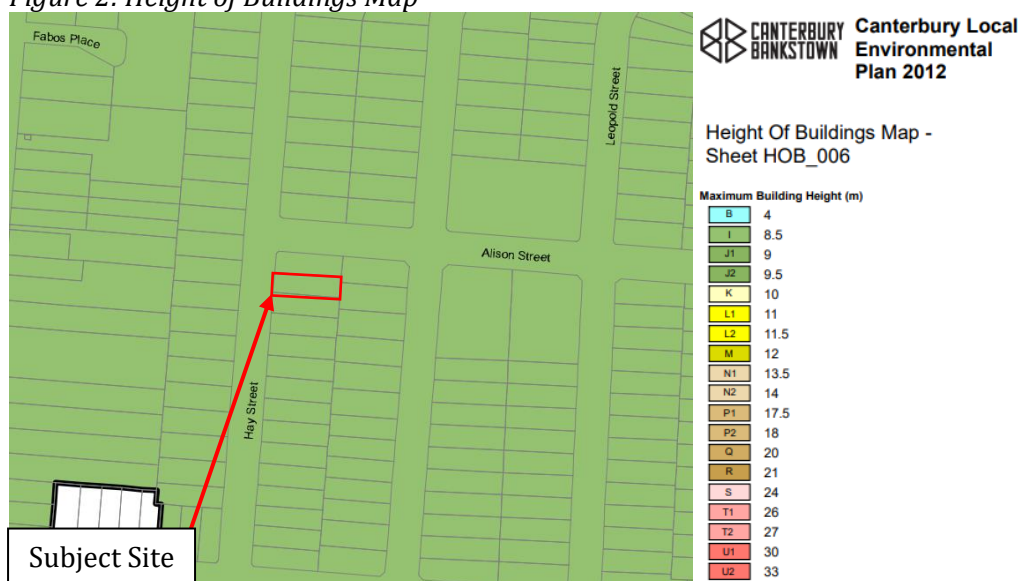
The Environmental Planning Instrument to which these variations relate to is the Canterbury Local Environmental Plan 2012.

The development standard to which this variation relates to is Clause 4.3 – Height of Buildings, which reads as follows:

- (1) *The objectives of this clause are as follows:*
 - (a) *to establish and maintain the desirable attributes and character of an area,*
 - (b) *to minimise overshadowing and ensure there is a desired level of solar access and public open space,*
 - (c) *to support building design that contributes positively to the streetscape and visual amenity of an area,*
 - (d) *to reinforce important road frontages in specific localities*
- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*
- (2A) *Despite subclause (2), the height of a dwelling house or dual occupancy must not exceed 8.5 metres if the dwelling house or dual occupancy is to be located on land in Zone R4 High Density Residential.*

Council's maps identify a maximum building height on the site of 8.5 metres. Refer to Figure 2 below.

Figure 2: Height of Buildings Map



Source: NSW Legislation, CLEP 2012

The maximum height proposed is 9.04 metres.

A written justification is therefore required for the proposed variation to the height of buildings development standard, in accordance with Clause 4.6 of the Canterbury Local Environmental Plan 2012.

4. Extent of Non-Compliance

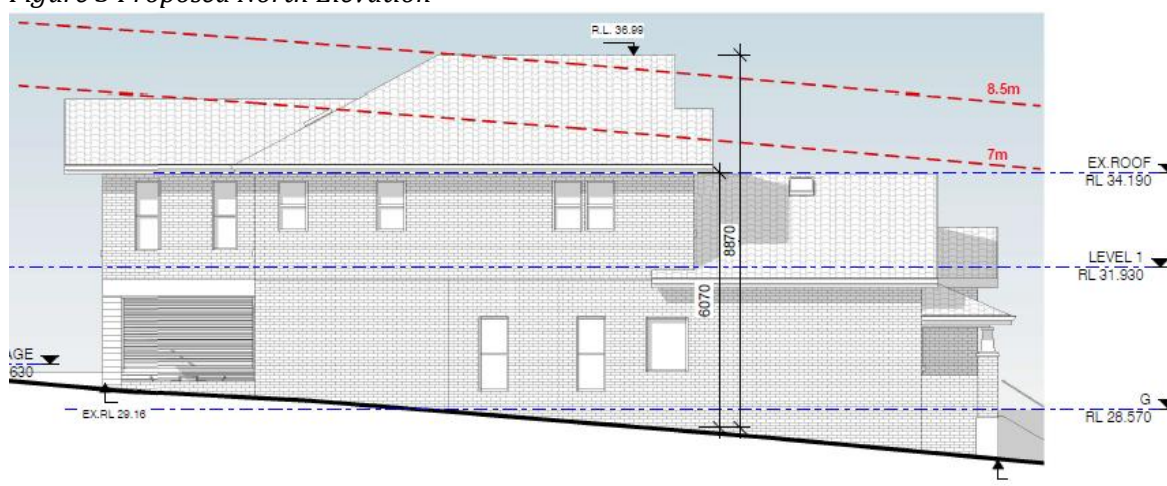
Clause 4.3 of the Canterbury Local Environmental Plan 2012 states that the subject site has a maximum building height of 8.5 metres.

As demonstrated on the submitted architectural plans, the proposed building height at the greatest extent is 9.04m. This represents a variation of 540mm or 6.3%.

The variation sought is limited to the roof ridge at the front of the site.

The maximum building height noted above has been measured to the highest point of the building. Refer to Figure 3 below.

Figure 3 Proposed North Elevation



Source: House to Home Finishes

While a variation is sought, it is considered that the built form proposed is suitable within the context of the site. While a reduced roof pitch or a hipped roof form would comply with the CLEP2012 building height control, it is considered that a modified roof form will detract from the existing design of the dwelling and the character of the Ashbury Heritage Conservation Area. The proposed roof form draws upon the style and pitch of the existing roof form to create a cohesive design that will positively contribute to the streetscape and visual amenity of the area by maintaining the desirable attributes and character of the dwelling and greater conservation area.

The breach in height being sought is not significant in its nature and will not be read within the context of the overall development. A degree of flexibility is considered reasonable in this instance.

5. Is Compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?

The proposed variation from the development standard is assessed against the required tests in Clause 4.6. In addition, in addressing the requirements of Clause 4.6(3), the accepted five possible approaches for determining whether compliances are unnecessary or unreasonable established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council (2007) LEC 827* are considered.

In the matter of Four2Five, the Commissioner stated within the judgement the following, in reference to a variation:

“...the case law developed in relation to the application of SEPP 1 may be of assistance in applying Clause 4.6. While Wehbe concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under Clause 4.6 where Clause 4.6 (3)(a) uses the same language as Clause 6 of SEPP 1.”

In the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, Preston CJ summarised the five (5) different ways in which an objection under SEPP 1 has been well founded and that approval of the objection may be consistent with the aims of the policy. The five possible ways are as set out below:

First	<p><i>The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.</i></p> <p><i>The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable. (applicable)</i></p>
Second	<i>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. (not applicable)</i>
Third	<i>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. (not applicable)</i>
Fourth	<i>A fourth way is to establish that 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. (not applicable)</i>
Fifth	<i>A fifth way is to establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary. (not applicable)</i>

In respect of the height of buildings standard, the first method is invoked.

The objectives supporting the maximum height of buildings identified in Clause 4.3 are discussed below. Consistency with the objectives and the absence of any environmental impacts, would demonstrate that strict compliance with the standards would be both unreasonable and unnecessary in this instance.

The discussion provided below demonstrates how the proposal is consistent with the objectives of Clause 4.3.

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

- (a) to establish and maintain the desirable attributes and character of an area,*
- (b) to minimise overshadowing and ensure there is a desired level of solar access and public open space,*
- (c) to support building design that contributes positively to the streetscape and visual amenity of an area,*
- (d) to reinforce important road frontages in specific localities*

First Method

While a variation is sought, it is considered that the proposed built form maintains the desirable attributes and character of the local area.

As previously stated, the site is located within the Ashbury Heritage Conservation Area. A Statement of Heritage Impact has been prepared by Archnex Designs and is submitted under a separate cover. The Statement of Heritage Impact states that there will be no adverse effects created by the proposal on the character of the Ashbury Heritage Conservation Area.

The proposed variation to building height sought is limited to the portion of the roof ridge at the centre of the dwelling. While the roof pitch could be lowered to achieve compliance with the maximum building height, it is considered that the proposed roof form is more conducive to positively contribute to the character of dwellings within the Ashbury Heritage Conservation Area.

The proposal satisfies objective (a).

In terms of solar access within the proposed development, reference is made to the submitted shadow diagrams prepared by House to Home Finishes. The shadow diagrams prepared demonstrate that although additional overshadowing will occur, the living areas and private open space of adjoining properties, specifically No.42 Hay Street, will continue to receive direct solar access throughout the winter solstice.

There are no solar hot water or photovoltaic systems on adjoining properties that will be impacted by the overshadowing sought.

Therefore, the proposed development complies with the solar access controls outlined in C1 of the Canterbury DCP. The proposal satisfies objective (b).

Careful consideration has been given to the articulation of the development to ensure the proposed development has no significant amenity impacts, in terms of overshadowing, view loss or privacy onto neighbouring properties. The proposed breach in height is limited to the roof ridge at the centre of the dwelling with the majority of the dwelling compliant with the

maximum 8.5m building height control. The variation sought to the CLEP12 maximum building height will not impact the amenity of adjoining developments.

The proposed alterations and additions will continue to positively contribute to the streetscape noting the proposed first floor addition has been designed to match the design and roof pitch of the existing dwelling. Although a variation is sought, the proposed roof design will ensure that the residential dwelling continues to reflect the desired streetscape character of the Ashbury Heritage Conservation Area.

The proposal satisfies objective (c).

With respect to objective (d), the development has been designed to address Hay Street. The proposed façade and form of the first floor addition will continue to reinforce the character of the Ashbury Heritage Conservation Area.

The proposed breach in height is limited to a portion of the roof ridge at the centre of the dwelling. The proposed breach in height is significantly setback from Hay Street and will not detract from the streetscape presentation of the building.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard.

6. Are there Sufficient Environmental Planning Grounds?

The assessment above and shown throughout the supporting documentation demonstrates that the resultant environmental impacts of the proposal will be satisfactory.

As demonstrated on the submitted architectural plans, the maximum proposed height as measured in metres, is 9.04m with the proposed variation of 540mm.

The extent of variation sought is limited to a portion of the roof ridge at the centre of the dwelling. While compliance could be achieved with a lower roof pitch, it is considered that the minor departure from the CLEP12 building height standard will allow for a development which positively contributes to the character of the Ashbury Heritage Conservation Area. The proposed roof pitch sought is consistent with the existing dwelling and sympathetic to other dwellings with the Ashbury Heritage Conservation Area.

The proposed variation to building height sought does not result in any negative impacts to the amenity of adjoining properties.

In this case, strict compliance with the development standard for height of buildings in the Canterbury Local Environmental Plan 2012 is unnecessary and unreasonable.

7. Is the Variation in the Public Interest?

Clause 4.6 states that the development consent must not be granted for development that contravenes a development standard unless 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 to be carried out.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard under Part 4.

The development as proposed will be in the public interest as it is consistent with the objectives of Clause 4.3.

Furthermore, it is important to also consider the objectives of the R2 Low Density Residential zone in relation to the development, which are as follows:

Zone R2 Low Density Residential

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The following comments are made in relation to the zone objectives:

- The proposal will retain the existing residential use of the site and will provide for an orderly use of the land whilst maximising its development potential. The proposed development will continue to respond to the low density residential zoning noting the proposal is a maximum of two (2) storeys in height.
- The proposal does not entail any other land uses.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standards, noting the development will be in the public interest.

8. Public Benefit of Maintaining the Standard

It is considered that the public benefit will not be undermined by varying the standard. The proposal provides for the orderly and economic development of the site. Given the site's orientation, location and context it is considered that the site is well suited for the development and designed to meet the desired future character of the area.

The built form, bulk and scale is considered suitable within the context of the site and its surrounds.

The development is generally consistent with the current planning controls applicable to the site and proposed development.

It is not considered that the variation sought raises any matter of significance for State or Regional environmental planning.

The departure from the height of buildings control within the Canterbury Local Environmental Plan 2012 allows for the orderly and economic development of the site in a manner which achieves the outcomes and objectives of the relevant planning controls.

9. Is the Variation Well Founded?

It is considered that this has been adequately addressed in Parts 4 and 5 of this submission. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 of the Canterbury Local Environmental Plan 2012 in that:

- Compliance with the development standards would be unreasonable and unnecessary in the circumstances of the development;
- There are sufficient environmental planning grounds to justify the departure from the standards;
- The development meets the objectives of the standard to be varied (height of buildings) and objectives of the R2 Low Density Residential zoning of the land;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- The breach does not raise any matter of State of Regional Significance; and
- The development submitted aligns with the predominantly low density residential nature of the neighbourhood.

Based on the above, the variation is considered to be well founded.

10. General

Clause 4.6 also states that:

“(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note. *When this plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.*

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant’s written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4

(caa) clause 5.5”

This variation does not relate to the subdivision of land in the stated land use zones. The variation sought is not contrary to subclause (6).

Should the exception to the development standard sought under this submission be supported by Council, the Council must retain a record of the assessment of this submission.

The development proposed is not complying development.

A BASIX Certificate has been provided for the development.

The development is not affected by clause 5.4 or clause 5.5.

11. Conclusion

The proposal does not strictly comply with the height of buildings control as prescribed by Clause 4.3 of the Canterbury Local Environmental Plan 2012. Having evaluated the likely affects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of the Canterbury Local Environmental Plan 2012 are satisfied as the breach to the controls does not create any adverse environmental impacts.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular instance and that the use of Clause 4.6 of the Canterbury Local Environmental Plan 2012 to vary this development controls is appropriate in this instance.

Based on the above, it is sensible to conclude that strict compliance with the height of buildings control is not necessary and that a better outcome is achieved for this development by allowing flexibility in the application.

Should you have any questions, please do not hesitate to contact me.

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