

**CLAUSE 4.6 OF BANKSTOWN LEP 2015: EXCEPTIONS TO
DEVELOPMENT STANDARDS**

**FOR PROPOSED ALTERATIONS AND ADDITIONS TO AN EXISTING
EDUCATIONAL ESTABLISHMENT (SCHOOL)**

AT 40 HECTOR STREET CHESTER HILL

**CLAUSE 4.3(2) OF *BANKSTOWN LOCAL ENVIRONMENTAL PLAN 2015* –
HEIGHT OF BUILDINGS
(amended 31 May 2016)**

1. Introduction

Development standards contained within environmental planning instruments may be varied via Clause 4.6 of the Standard Instrument Local Environment Plan subject to a written request justifying the variation. This written request justifies the variation of the height of buildings development standard contained in Clause 4.3 of the *Bankstown Local Environmental Plan 2015* (“Bankstown LEP”).

This submission demonstrates that strict compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify varying the development standard. This is outlined below. Accordingly, it is considered that Clause 4.6 exception to the development standard should be upheld.

2. Policy and Guidelines for its Application

Clause 4.6 of the Bankstown LEP aims to provide an appropriate degree of flexibility in applying certain development standards to particular development and to achieve better outcomes for and from development by allowing flexibility in particular circumstances (Cl 4.6(1)).

Development consent may, subject to Clause 4.6(2), be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause. The height of buildings development standard is not expressly excluded and therefore the height development standard, which needs to be varied for the proposal, is capable of being varied under this Clause.

A written request from the applicant that seeks to justify the contravention of the development standard is required before development consent can be granted, demonstrating the following (Cl 4.6((3)):-

- 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.*

These matters are considered in Section 3 of this submission.

Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), the proposed development will be in the public interest (proposal is consistent with the zone and development standard objectives) and the concurrence of the Director-General has been obtained (Cl 4.6(4)).

In deciding whether to grant concurrence, the Director-General must consider (Cl 4.6(5)):

- 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.*

These matters are still considered in Section 3 of this submission.

It is considered that the contravention of the development standard in the current proposal does not raise any matter of significance for State or regional planning and it is considered that there is no public benefit in maintaining the development standard given the proposal is consistent with the objectives of the development standard and the zone (outlined in Section 3).

The Department of Planning and Infrastructure have prepared “*Varying development standards: A Guide*” (“the Guide”) dated August 2011. The Guide provides an application form to vary development standards in Appendix 3 which sets out the following information to be provided:-

Written application providing grounds for variation to development standards:

- *The environmental planning instrument that applies to the land and zoning of the land*
- *The objectives of the zone*
- *The development standard being varied and the relevant clause of the environmental planning instrument (‘EPI’)*
- *The objectives of the development standard*
- *Numeric value of the development standard in the EPI, the proposed numeric value of the development standard and percentage variation*
- *Whether and how strict compliance with the development standard unreasonable or unnecessary in this particular case*
- *Whether and how strict compliance would hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act.*
- *Whether the development standard is a performance based control? Give details.*
- *Whether strict compliance with the standard, in this particular case, would be unreasonable or unnecessary? Why?*
- *Whether there are sufficient environmental planning grounds to justify contravening the development standard? Give details.*

These matters are outlined in Section 3 of this submission.

The ‘five part test’

The Guide states that written applications to vary development standards will not only address the above matters but may also address matters set out in the ‘five part test’ established by the NSW Land and Environment Court. Court cases dealing with applications to vary development standards resulted in the Land and Environment Court setting out a five part test for consent authorities to consider when assessing an application to vary a standard to determine whether the objection to the development standards is well founded:

- 1) *The objectives of the standard are achieved notwithstanding noncompliance with the standard;*
- 2) *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- 3) *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- 4) *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;*
- 5) *The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

The relevant test is the identification of the objective of the particular standard to be varied and whether or not the proposed development is consistent with that underlying object or purpose of that standard and with the broader planning objectives for the locality. This is considered in Section 3 of this submission.

3. Matters to be addressed in the Objection

3.1 Relevant Development Standard and Variation Proposed

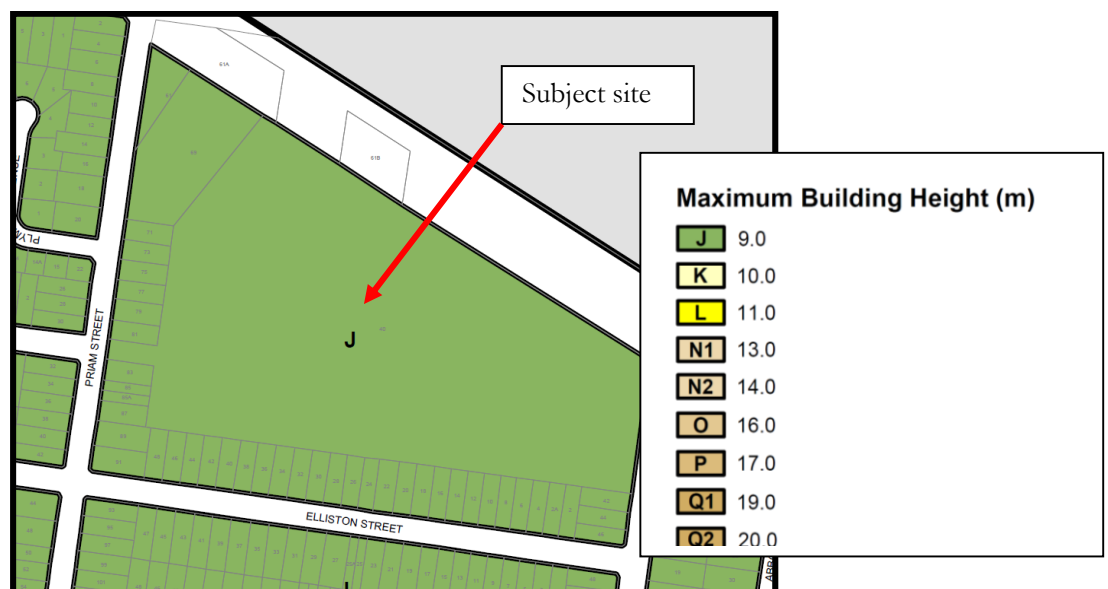
Clause 4.3 of the Bankstown LEP 2015 requires that the height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map. The definition of building height pursuant to the dictionary in the Bankstown LEP 2015 is:-

“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.”

This map sets a maximum height of **9 metres** for the subject site, illustrated in **Figure 1**.

Figure 1: Height of Buildings Map from Bankstown LEP 2015

(Source: Bankstown LEP 2015, www.legislation.nsw.gov.au)



The proposal involves the following building heights (refer **Figure 2**) which exceed this development standard:-

- Lower primary and hall – 12.64 metres (2 storeys);
- Secondary block – 13.747 metres (3 storeys);
- Primary block – 10.816 metres (3 storeys); and
- Sports centre – 10.022 metres (1 and 2 storeys).

Figure 2: Height of the Propsoed Development *(Source: HAMEC Architect, December 2014)*





Secondary block – max height
13.747m (3 storeys)



Sports centre – max height – 10.022m
(1 & 2 storeys)

3.2 Stated/Underlying Objectives of the Development Standard and Broader Planning Objectives

In determining whether a development standard should be set aside to permit the granting of development consent, it must be demonstrated that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case, having regard to the stated and underlying objectives and intent of the standard and the broader planning objectives for the locality.

Objectives/Intent of the Development Standard:

A. Height of Buildings (Clause 4.3 of Bankstown LEP 2015)

The objectives of the height of buildings development standard, as stated under Clause 4.3(1) of the Bankstown LEP 2015, are:-

- (a) to ensure that the height of development is compatible with the character, amenity and landform of the area in which the development will be located,*
- (b) to maintain the prevailing suburban character and amenity by limiting the height of development to a maximum of two storeys in Zone R2 Low Density Residential,*
- (c) to provide appropriate height transitions between development, particularly at zone boundaries,*
- (d) to define focal points by way of nominating greater building heights in certain locations.*

Objectives (a), (c) and (d) are relevant to the proposed development. The proposed development is consistent with the objectives of this development standard for the following reasons:-

- The proposal involves a variety of building heights which are generally compatible with the character, amenity and landform of the area in which the development will be located given the surrounding residential development is largely 1 and 2 storey development. The majority of the buildings are located towards the central portion of the site and away from adjoining properties.
- The proposal involves building heights which allow a transition to lower height buildings characterised by the adjoining residential development. The proposal generally comprises two storey development, with some three storey elements in limited locations throughout the site.
- The subject site and proposed height of buildings provides a defined focal point by providing greater building heights on a large site zoned for infrastructure adjoining the water pipeline to the north. Given the site's size and isolated nature to the north and east and parts of the western boundary, ensure the site is capable of sustainable greater building heights with minimal impacts to adjoining development.

B. Objectives for Land in the SP2 zone (Clause 2.3 of the Bankstown LEP 2015)

The objectives of SP2 Zone - include:

- *To provide for infrastructure and related uses.*
- *To prevent development that is not compatible with or that may detract from the provision of infrastructure.*

As outlined in Section 4.1. (Table 2) of the Statement, the proposed development is considered to be consistent with the objectives of the zone for the following reasons:-

- The proposal is consistent with the zone objectives given the proposal provides for infrastructure by providing additional educational needs and opportunities in the area for the community.
- The proposed alterations and additions to the existing school are permissible in the zone as the purpose of the zone is for an educational establishment. The proposed sports centre is ordinarily ancillary to the use of the site for an educational establishment (school) and is therefore also permissible.

It is therefore considered that the proposal is consistent with the objectives of the development standard and the broader planning objectives of the locality demonstrated through its consistency with both the zone and development standard objectives.

3.3 Aims of the Policy and Objects of the Act

The relevant object of the Act as specified in Section 5 is:

- (a) *to encourage:*
 - (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
 - (ii) *the promotion and co-ordination of the orderly and economic use and development of land.*

If Council insisted on strict compliance with the height of buildings development standard contained in Clause 4.3 of the Bankstown LEP 2015, such a decision would tend to hinder the attainment of the above objects of the Act in that:

- the proper development of man-made resources that are compatible with the character of existing and potential development in the surrounding locality would be discouraged as the proposal will result in a significant improvement in the educational opportunities and choice in the area.
- the social and economic welfare of the community would not be promoted as it would prevent the provision of additional educational services in the area in a location close to residential and public transport; and
- the co-ordination of the orderly and economic use and development of the land would be discouraged as it would prevent the construction of appropriately designed alterations and additions to an existing school development in an established infrastructure zone with good access to existing facilities, services and other community infrastructure.

It is therefore considered that compliance with the height of buildings development standard would be inconsistent with the aims of the Policy, in that requiring compliance with this development standard would hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act as outlined above.

3.4 The Public Interest

The proposal, notwithstanding the non-compliance with the height of buildings development standard, achieves the objectives of the development standards and the zone. Furthermore, the proposal provides additional educational opportunities and supply in an area that is well serviced. This infrastructure development has a high level of amenity and makes efficient use of the site

area. The appropriate bulk and height along all elevations and lack of amenity impacts further demonstrates that the proposal and its associated height are in the public interest.

3.5 Better Planning Outcome

The proposed variation to the building height development standard allows for a better planning outcome as it will allow a proposal to provide additional educational opportunities on a site which is already used for the purposes of a school on an appropriately zoned site. This will ensure a more efficient use of the subject site. The proposal will achieve a high standard of education accommodation given it accords with minimum area requirements, achieves sufficient ventilation and solar access and provides specialised and standard classrooms to allow for improved educational opportunities for current and future students.

The proposal seeks to increase the height of the built form which is located in a convenient location close to various uses and bus services which is a preferred planning outcome. The subject site is unusually large and permits excellent separation from the nearest residential development. Overall the variation with the height control allows for a better planning outcome while it minimises the impacts to the surrounding properties and ensure for an appropriate height transition along Hector Street and at residential boundaries.

3.6 Compliance with the Development Standard is Unreasonable/ Unnecessary

In this instance, compliance with the height of buildings development standard at Clause 4.3 of the Bankstown LEP 2015 is unnecessary and unreasonable for the following reasons:

a) Amenity Impacts and the Streetscape

The non-complying element of the height of the proposed building does not result in any significant unreasonable impacts on the amenity of nearby properties in terms of overshadowing, privacy, loss of views and has minimal impact on the streetscape.

In particular, the various building height exceedances are considered reasonable in terms of a lack of amenity impacts on adjoining land due to:-

- The height limit exceedance of the proposed secondary block is located along the northern side boundary which adjoins the water pipeline land. Therefore, there will be no adverse impacts on the amenity of the adjoining land in this instance;
- The lower primary block and hall building is located centrally within the site and therefore the height exceedance of this building will not result in any adverse impacts to adjoining land;
- The sports centre is located at a significant distance from side boundaries and is separated from adjoining land by car parking and landscaping. Therefore, it is considered the height exceedance of this building will not cause any amenity impacts to adjoining land; and
- While the primary block is located in closest proximity to the adjoining residential land to the south of the site, this building already consists of up to three (3) storeys with the proposed addition being located on the northern side of this building, which is located facing into the existing school ground and away from adjoining land.
- The proposal for the Primary Block has been amended in response to Council advice. Part of the proposed Primary Block additions remains 3 storeys, however this is set back a distance from the boundary greater than the building height. The two storey component (eave height 6.099m) is set back 8.985m. The minimum setback of the third storey where it exceeds 9m is 16.065m setback. The maximum ridge height of new work in the Primary block is 12.59m at the far northern end of the Primary Block.

- The amended shadow diagrams illustrate that while there will be some minor additional overshadowing caused by this proposal adjoining land during mid-winter. However no habitable rooms are affected at all and well over 50% of private open space receives over 4 hours sunlight at midwinter, comfortably well in excess of the control.

Accordingly, the proposal, with the additional height, is considered to be consistent with the surrounding development. Requiring compliance with this development standard would therefore prevent orderly and economic of buildings that do not adversely affect the amenity of the existing adjoining residential development from being achieved on the subject site.

b) Visual Impact

The visual impact of the proposal is minimised by the generous landscaped setting and, among other things, the proposed additional building articulation and architectural detailing proposed for the built form on the site. The additional height of the built form allows it to be broken up and large areas of the proposed buildings (and causes of additional height in some instances) are the extensive undercroft areas which allow for covered outdoor areas for students.

This design in its spacious landscaped setting mitigates the perceived bulk and scale despite exceedance of the height limit. This assists in reducing the potential visual impact of the proposal when viewed from adjoining properties and the street. Requiring compliance with this development standard would therefore prevent this improvement in visual impact from being achieved on the subject site.

c) Nature of the Use

The subject site is currently used for a school and the proposal intends to significantly increase the size of the school on a site which has significant infrastructure in place to increase student numbers. The extension of the school at the subject site has obvious locational advantages in that there are already significant assets and resources already at the site in terms of libraries, staff and administration facilities and the Mosque. Such use of the premises warrants special consideration in terms of the height limit given the additional resources needed to house the extra student enrolments at the site contributes to the lack of compliance with the height of buildings development standard on the site. Requiring compliance with this development standard would therefore prevent more efficient use of existing site capability and improvement in educational uses proposed from being achieved on the subject site.

d) Consistent with Objectives

The proposed development is consistent with the objectives of the height of buildings development standard as well as the zone objectives as outlined in in Section 3.2 of this objection. In fact, the proposal provides a more acceptable built form solution on the site, given the setting, the provision of additional building articulation, the proposed breaking up of the development across numerous buildings and the added visual benefits of the architectural detailing of the proposed built form. Requiring compliance with this development standard would therefore prevent this improvement from being achieved on the subject site.

e) Consistent with Development Controls

The proposal involves significant alterations and additions to the existing school on the site and generally complies with the majority of the planning controls, with the exception of building length and some side setbacks. The majority of the buildings which exceed the maximum building height development standard are generally located a significant distances to side

boundaries, with the exception of the primary block. As outlined earlier, the additions to this block are generally located away from adjoining properties, with a small section facing the southern side boundary. While this proposed addition will result in some overshadowing of the adjoining residential properties to the south, such properties will still receive adequate solar access given the overshadowing is minimal in the afternoon.

f) Landscaping and Urban Design

By allowing the building height development standard to be varied for the lower primary, primary, secondary and sports centre buildings, additional opportunities are provided for outdoor play areas and for landscaping throughout the site as outlined on the accompanying landscape plan. This additional open space area also allows for landscaping to be provided that is in scale with the proposed height of the buildings, allowing for a greater transitional effect to the lower density residential to the south and further contributing to the high quality of the urban built form on the subject site.

The design of the development across numerous, separate building forms, allows the school to be divided into age-appropriate areas for enhanced learning opportunities for current and future students. The exceedance of the height limit allows for such a separation to occur.

The high quality of the built form, particularly with respect to articulation, building materials and colours and significant fenestration, allows the bulk and scale of the buildings to be reduced and allows the buildings to integrate into the landscape setting of the site. The significant detailing to these buildings reduces their overall impact and allows the height exceedances to be visually reduced.

g) Environmental Impact

There is no adverse environmental impact resulting from the height variation.

3.7 Environmental Planning Grounds

Whether there are sufficient environmental planning grounds to justify contravening the development standard is a consideration required under Clause 4.6. In this instance, it is considered there are sufficient environmental planning grounds to justify contravening the development standard as outlined below:-

- The proposed bulk and scale in the context of the generous landscaped setting will be compatible with surrounding development and will allow for an appropriate height transition along the streetscape.
- The departure from the maximum building height will not result in any significant adverse amenity impacts such as overshadowing, privacy impacts or any significant view loss to the surrounding neighbours above that which is otherwise permissible under the existing controls. A consideration of amenity impacts is considered in Section 4 of this Statement.
- The height standards have not been abandoned but have been flexibly applied as anticipated by the provisions of Clause 4.6.
- The reasons outlined in Section 3.6 of this variation request.

3.8 Matters of State or Regional Planning Significance and Public benefit

It is also important to consider whether non-compliance with the development standard raises any matter of significance for State or regional planning and the public benefit of maintaining the

planning controls adopted by the environmental planning instrument. These are the matters that the Director-General would need to consider in deciding whether the grant concurrence.

It is considered that the additional height of the proposed building on the subject site does not raise any matters of state or regional planning significance. It is considered that the public benefit of maintaining planning controls is not adversely affected by this non-compliance with building height given the size of the site. The proposal achieves the objectives of the development standard and the zone, provides additional educational opportunities in the area and provides a more orderly and economic use of land already used for a school.

The proposed height variation ensures the orderly and economic use of land as envisaged by the *Environmental Planning and Assessment Act, 1979*. The proposed height allows for achievement of an increased student density to a site that is accessible to various uses and bus services. The proposed height is therefore consistent with the Metropolitan Strategy.

3.9 Is the objection well founded?

It is considered that this objection is well founded in that the aims of the Policy are better served by allowing the development standard to be varied given the resulting development achieves the objects of the Act. Furthermore, the proposal, notwithstanding its non-compliance with the height of buildings development standard, is consistent with the development standard objectives as well as the zone objectives. As outlined above, it is considered that the height of buildings development standard is unreasonable and unnecessary in the circumstances of this case.

In *Webbe*, Preston J expressed the view that there were five different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. In the current instance, it is considered that the first way described by Preston J is the most relevant, which is that the objectives of the standard are achieved notwithstanding non-compliance with the standard as outlined above.

4. Conclusion

While the proposed development does not comply with the height of buildings development standard contained in Clause 4.3(2) of the Bankstown LEP 2015, it nevertheless satisfies the stated/underlying objectives of the development standard and the broader planning and zoning objectives for the locality.

The design and siting of the proposal minimises adverse impacts that may arise from the proposed additional height of the buildings.

The non-compliance in building height does not result in any significant or unreasonable amenity impacts to the neighbouring properties or any significant adverse impact in relation to visual amenity. The proposal provides for an appropriate form of development, and will make a positive contribution to the visual amenity and character of the surrounding locality. The proposal will also provide additional educational opportunities on an appropriately zoned and located site of an existing school.

Compliance with the development standard is therefore unnecessary and unreasonable in the circumstances of the case, and refusal of the development application as a result of the proposed non-compliance with the height of buildings development standard is not warranted.

Steven Layman, November 2015.