

CHRIS YOUNG *Planning*

5 Jamberoo Ave., BAULKHAM HILLS NSW 2153

A.B.N. 25 092 903 654

Phone & Fax (02) 9674 3759

Mobile 0408 474 967

Email chris.cyplan@gmail.com

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Clause 4.6 Objection to clause 4.3 of the Hornsby LEP 2013.

Council has requested by letter dated 9 November a well-founded Clause 4.6 variation. Councils request states:

“The proposal seeks variation of the 8.5m height control contained in Clause 4.3 of the Hornsby Local Environmental Plan 2013. The submitted Clause 4.6 variation statement does not adequately address the provisions of Clause 4.6 within the Hornsby Local Environmental Plan 2013 in the light of the recent judgements by the NSW Land and Environment Court; Four2Five Pty Ltd v Ashfield Council [2015].

Council’s position in the light of the recent decision in Four2Five Pty Ltd v Ashfield Council [2015] is that merely showing that the development achieves the objectives of the development standard and that the development would have negligible environmental impacts is insufficient to justify that a compliance with a development standard is unreasonable or unnecessary. The requirement in Clause 4.6(3)9b0 is to justify that there are “sufficient environmental planning grounds to justify contravening the development standard”. The applicant is required to demonstrate that a better environmental planning outcome would be achieved as a result of the breach. A well-founded Clause 4.6 is required to be prepared and submitted to Council.”

Clause 4.6 is a mechanism which allows Councils to provide a degree of flexibility in varying particular development standards contained in the Standard Instrument including height standards. The subject development seeks to apply for a variation under Clause 4.6 to the maximum 8.5m building height standard under Clause 4.3 of HLEP 2013.

Clause 4.6 states:

“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 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.

(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,”

This Clause 4.6 variation reflects the Court decisions in *Four2Five Pty Ltd v Ashfield Council*. Further to *Four2Five Pty Ltd* are two more recent cases *Moskovich v Waverley Council* and *Randwick City Council v Micaul Holdings Pty Ltd*. These more recent decisions confirm that there is no specific limitation on the consent authority's discretion under clause 4.6(4) and the threshold may vary from case to case, depending on the views of the consent authority.

In *Moskovich* it was submitted that compliance with the FSR standard was unreasonable and unnecessary because the design achieved the objectives of the standard and the R3 zone, in a way that addressed the particular circumstances of the site, and resulted in a better streetscape and internal and external amenity outcome than a complying development. *Moskovich* further submitted that there were “sufficient environmental planning grounds” to justify the contravention because the proposal would replace two aging poorly designed residential flat buildings with a high quality RFB with exceptional internal and external amenity outcomes. Ultimately the decision was made to uphold the Appeal and hence a more merit based clause 4.6 application was now identified in the Court.

A recent decision in the Court in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 confirmed once again that flexibility can be applied to allow variations of numerical development standards and the consent authority (Council in the case of the subject application) has the power and discretion to allow a variation of one or all standards if it so wishes. *Micaul* is a decision of the Chief Judge of the Land and Environment Court in an appeal against a decision of Commissioner Morris to uphold a request under clause 4.6 of the *Randwick LEP 2012 (RLEP 2012)* to vary development standards relating to the height and FSR of a building. Council contended that the Commissioner failed to be satisfied about the requirements in clause 4.6(4), or alternatively failed to give adequate reasons. The Council also claimed that the Commissioner failed to consider a requirement of a Development Control Plan. Council's position was that the bar had been set too low for the clause 4.6 variation request. The Court dismissed the appeal as it held that the Commissioner had set out an appropriate test under clause 4.6. The Commissioner stated that she was satisfied that the proposal satisfied those tests.

What is clear from the decisions is that the degree of satisfaction required under clause 4.6(4) is a matter for the Commissioner (and in this case *Hornsby Shire Council*) and on this basis, it is open to the consent authority to satisfy itself. It is our submission that Council is able to be satisfied that the development is in the public interest because it achieves the zone objectives and height objectives as well as providing a better environmental outcome for the existing and long standing use of the site and established heritage values and standards for the site.

Planning NSW (formerly the Department of Planning & Infrastructure) released a guide for varying development standards pursuant to Clause 4.6 of the new Standard Instrument LEP for Council's and the general public in August 2011. The provisions

contained under Clause 4.6 were implemented as part of the new Standard Instrument LEP to replace the now outdated SEPP 1 provisions to allow flexibility in the application of certain development standards to achieve better development and site outcomes where such standards would otherwise result in unnecessary and unreasonable barriers to suitable development types.

The guide first calls for applicants to justify the need to vary particular development standards by considering the following:

- whether strict compliance with the standard, in the particular case, would be unreasonable or unnecessary and why, and
- demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard.

In this particular instance the height control is unreasonable for the site being a height control established across the local government area for low density residential development of two storey dwellings in the R2 low density residential zone.

Such height is appropriate for such dwelling house development however the site should have been zoned SP2 educational establishments either with or without such height standards reflecting more appropriately the existing and approved building heights of the school and the accepted complying development height of 12m as set down in the State Environmental Planning Policy (Infrastructure). Both the zone and heights were inappropriate at the time of the LEP and the standards are unreasonable and unnecessary.

At the time of preparation of the LEP The Department of Planning had a policy, since varied, of not zoning educational establishments, regardless of length of existence of the use on any site, as Special Uses are the previous form of environmental planning instruments had zoned and identified such uses as different form and function to residential areas. The results are that in many cases development standards and zone objectives developed to control residential development are not appropriate to educational establishments and are unreasonable and unnecessary.

Many LEP's now zone educational establishments are SP2 with either no or more appropriate development standards and Clause 4.6 objections are unnecessary.

On this particular site, it is considered unreasonable to restrict a future development form to a strict 12m height limit which would ultimately limit the form to three (3) storeys.

It is considered that there are numerous environmental planning grounds to justify a variation to the height standard in this particular instance. The proposed development represents the orderly economic redevelopment of the site and the inclusion of an acceptable variation which does not exacerbate negative impacts to the streetscape, existing site and approved developments or surrounding properties.

The development of Barker College and building heights have represented consistency in approach based upon the heritage buildings on site and preservation of specified gardens and open space areas.

Compliance with the building height of 8.5m would produce buildings not consistent with existing streetscape and height, of greater footprint and a car park at grade rather than beneath the building as proposed at present. Such compliance would increase site cover, reduce open space and garden areas and adversely impact upon the interaction function between educational spaces within the adjoining buildings. Further the bulk and scale relationships of heritage and later buildings on the site would not be consistent, undermining the consistency of form and height sought throughout the site.

The guide sets out a five-part test to be considered for all applications under Clause 4.6 to be addressed by applicants and considered by Councils. An assessment of the proposed height variation against the five-part test considerations is provided below:

- *the objectives of the standard are achieved notwithstanding the non-compliance with the standard;*

Comment: The objectives of the height standard contained in Clause 4.3 of the HLEP 2013 are as follows:

“4.3 Height of buildings

(1) The objective of this clause is as follows:

(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.”

Notwithstanding the proposed non-compliance presented it is deemed that the overall height and form of the development is consistent with the objectives of the particular standard in that;

- the development responds to the site constraints of slope, heritage building context and continuity of building height across the site and adjoining buildings;
 - the development incorporates an underground car park which if lowered or removed to facilitate the height would require greater excavation, and longer ramping systems, mechanical ventilation or an at grade parking area which increases hard surface area, reduces open space and impacts upon the garden setting of the heritage items adversely.;
 - the proposal is more appropriate to meet the development potential for the site as a continuing educational establishment with a more positive environmental outcome on the infrastructure by provision of the underground car park.
2. *the underlying objectives or purpose of the standard is not relevant to the development and therefore compliance with the standard is unnecessary;*

Comment: The underlying objectives and purpose of the standard are relevant to the proposed development and it is considered that the proposal achieves the intent of the standard. The proposed height does not erode or diminish the intent of the standard,

rather it facilitates a design which is otherwise compliant and provides for a better environmental outcome for reasons expressed above.

3. *the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unnecessary;*

Comment: In requiring compliance with the 8.5m height standard for the roof form, the entire development would need to be reduced in its overall height which would require complete removal and relocation of the top level or excavating the basement car park 3.4m further into the ground or both. Requiring strict compliance with the standard undermines the objectives of the control to provide for a height of buildings that is appropriate for the site constraints as outlined above.

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;*

Comment: The development standard has not been undermined to date by Council's application of minor variations, rather Council's decision to exercise Clause 4.6 to vary the height standard for recent developments across the LGA has allowed flexibility to achieve appropriate development outcomes. This particular application to vary the height standard by up to 3.4m for the purposes of consistency of approved building form and heritage values on site as well as provision of underground car parking and minimisation of site cover is consistent with these recent precedents. It should be noted as stated previously that the application of the standard of 8.5m to the site was inappropriate at the time of imposition as approved buildings including the heritage buildings already exceeded that height. Notwithstanding the previous comment it could be said that the standard had been abandoned prior to imposition and compliance now is unreasonable and unnecessary based upon the Heritage building height basis for development on site.

5. *the compliance with the development standard is unreasonable or inappropriate due to the 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.*

Comment: As setout previously the development standard is unreasonable and the zoning incorrect for the long term use of the site as an educational establishment which predates planning controls in this State. The zoning applied whilst permitting the use is predominantly orientated with controls such as height of building to low density dwelling houses and not special uses such as schools, churches and Indoor Recreation Facilities which are all by building form and function very different to dwelling houses. At the time of implementation of the LEP and the height control the school buildings deemed acceptable to Council and the community by approvals and establishment of heritage controls to preserve the form did not comply with the height of buildings. The control was flawed from the instigation. Present practice is such that this school would be zoned SP2 Educational establishment. It is recognised that this flaw is not one of Council's making but the policy of the Department of Planning at the time of the LEP.

This aspect meets the Wehbe test #1 for unreasonable and unnecessary standard in the circumstances of the case.

Strict application of the height standard to this element of the buildings is considered unreasonable and unnecessary and a variation to the height standard is therefore considered worthy of support.

The proposal specifically addresses Clause 4.6 in the following manner:

(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,

Comment 1(a); Flexibility is sought in regards to the height of the proposal. The height of 8.5m reflects building heights applicable to an R2 low density residential zone and not to educational establishments. The existing buildings on site to which the proposal seeks to harmonise with bulk, scale, height and function exceed the 8.5m limit. Further the provision of underground car parking for the school limits the degree of excavation and height reduction to provide a functional car parking and traffic circulation system without resorting to unnecessary ramping solutions.

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Comment 1(b); the flexibility is required for the proposal to harmonise with existing buildings on site. The building has been excavated to provide for car parking. Further excavation to lower the building will result in unsatisfactory grades to the car park and functionality of teaching spaces. Height restrictions for schools and this school in particular is a result of the zoning of the land as R2 and not SP2 which other councils and the Department of Planning in similar LEP's have placed upon school sites. This site has been a school for some 100 years however the maximum building height does not recognise that use or the heights of existing buildings on the site being in excess of the 8.5m but rather reflects the low-density dwelling house building height. It is clear the zoning and height control are in error on the site. An educational establishment is not a residential building and is unlikely to be of a residential height and scale. A zoning of SP2 does not include a height limit such as sought in this LEP. A far better environmental outcome occurs, as set out above, by the proposal than by strict compliance with the 8.5m standard.

(2) Development consent may, subject to this clause, 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.

Comment 2; the standard sought to be varied is not expressly excluded from the operation of the 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

Comment 3; this statement is to be considered the written request if necessary for variation of the standards under this clause.

Comment 3(a); compliance with the development standard of height is unreasonable and unnecessary in this case because the proposed development standard relates to the height of a residential dwelling building not an educational establishment building as existing and approved by Council on the site and immediate locale as well as the other matters set out above particularly the matter of zoning relevance.

Under the ISEPP complying development provides for a maximum height of 12m. That height is acceptable as complying development for educational establishments under the ISEPP. The proposal could be complying development and the exclusion being only considered due to the listing of the site containing some heritage items. These heritage items exceed the maximum height of buildings in the LEP.

The proposal will not exceed that 12m acceptable educational establishment standard and is a maximum of 11.9m above the existing ground line.

School buildings of this scale and height are common, acceptable and permissible in 21st century schools and the built form of such buildings is by this form and function different to residential development but not considered adverse. Residential development not within the school's ownership and masterplan are not adversely affected by the proposal and variation in height.

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

Comment 3(b); There are sufficient environmental planning grounds to justify the variations. These are set out above and no adverse impact on additional traffic; runoff, solar impacts, tree loss etc arise due to the increase in height and provide a better planning outcome than lower domestic scale buildings occupying a greater footprint of the site.

(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

4; the objectives of the R2 zone are:

Zone R2 Low Density Residential

1 Objectives of zone

- *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 proposal meets the second objective. The first objective cannot be met by educational establishments or non-residential uses and the proposal is not inconsistent with this objective as it is irrelevant to this use. The zone is inappropriate for such uses and educational establishments should be zoned SP2 as in many other LEPs.

The objective of the height standard is as follows:

“4.3 Height of buildings

(1) The objective of this clause is as follows:

(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.”

The proposed variation in height meets this objective. The 8.5m height is less than presently exists in the area, on site and adjoining. The site and lands in the school ownership and campus are not residential in either function or form or are proposed ultimately to be part of the integrated educational establishment of Barker College. School buildings are by form and function different to residential developments and the objectives of the zone and height reflect the inappropriate residential zone on the site.

The site constraints of the site particularly the slope away from the Pacific Highway, the heritage building heights, the heritage gardens and open space, the existing development on site designed to meet the heights of the heritage buildings and be consistent and in harmony with other buildings on site in both form and function all combine to enforce the building of the height as proposed and not the 8.5m of the generic R2 dwelling house height applicable across the Shire for R2 sites. It is considered the proposal is in the public interest rather than strict compliance with the height standard for the better environmental outcomes set out above.

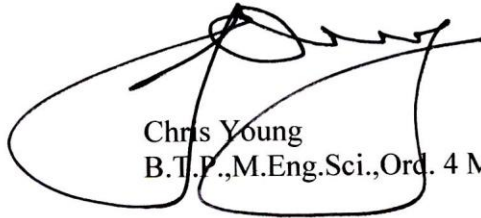
The proposal is considered to meet the objective of the height standard.

In regard to compliance from the Director-General, it is considered that such compliance is not required with Council having the appropriate authority to determine the matter. This aspect has been considered in the LEC cases particularly Moskovich.

In summary, it is considered that based on the information provided in this submission Council can agree to a variation of the height standard in accordance with Clause 4.6 of the HLEP.

Should you require any further assistance on this matter please do not hesitate to contact me on 9674 3759, mobile 0408 474 967 or email chris.cyplan@gmail.com.

Yours sincerely



Chris Young
B.T.P., M.Eng.Sci., Ord. 4 M.P.I.A.