

## **Clause 4.6 Variation Request**

### **Clause 4.3 – Height of Buildings Development Standard *Holroyd Local Environmental Plan 2013***

### **Proposed Alterations and Additions to Merrylands Public School 68 Fowler Road, Merrylands**

#### **1.0 Introduction**

This Variation Request relates to the proposed alterations and additions to school facilities at Merrylands Public School, 68 Fowler Road, Merrylands (the Site).

The Variation Request relates to clause 4.3 of *Holroyd Local Environmental Plan 2013 (Holroyd LEP 2013)* which requires that any building must be not more than 9 metres in height.

This Variation Request has been prepared pursuant to clause 4.6 of Holroyd LEP 2013.

#### **2.0 Requirements of Clause 4.6**

Subclause 4.6(1) of the LEP states the objectives of the clause as follows:

- “(a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- “(b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.”*

A response to these provisions is contained within this submission.

Subclause 4.6(2) of the LEP provides that:

- “(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.”*

The Height of Buildings development standard at clause 4.3 of Holroyd LEP 2013 is not expressly excluded from the operation of clause 4.6 and accordingly, consent may be granted to the variation.

Subclause 4.6(3) of the LEP relates to the making of a written request to justify an exception to a development standard and states:

- “(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.”*

As discussed in **Section 3.0** below, the proposed development does not comply with the development standard relating to Height of Buildings pursuant to clause 4.3 of Holroyd LEP 2013.

Strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as the proposal achieves the relevant objectives of the building height development standard as stated in Clause 4.3(1) of Holroyd LEP 2013 which are:

- (a) to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,*
- (b) to ensure development is consistent with the landform,*
- (c) to provide appropriate scales and intensities of development through height controls.*

Strict compliance would result in an increase in the building footprint and consequently reduce the outdoor learning and play space at the site, and opportunities for additional landscaped areas. Therefore, in order to accommodate the additional teaching spaces there would need to be a redistribution of development across the site which would result in an inferior design outcome for the sake of numerical compliance. This is not considered to be a desirable planning outcome.

Furthermore the application is supported by an assessment of impact upon the heritage significance of the existing school buildings, which supports the proposal and concludes that the proposal will not result in unacceptable heritage impacts.

Subclause 4.6(4) of the LEP provides that 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 Secretary has been obtained.”*

The remainder of this written request to vary the development standard addresses the matters required under subclauses 4.6(4) of the LEP.

Subclause 4.6(5) provides that in deciding whether to grant concurrence, the Secretary 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 Secretary before granting concurrence.”*

The proposed non-compliance does not raise any matter of significance for State or regional environmental planning and there would be no significant public benefit in maintaining the development standard in this instance.

It is considered that there are no other matters of relevance that need to be taken into consideration by the Secretary.

### 3.0 The Nature of the Variation

Subclause 4.3(2) of the LEP sets out the Height of Buildings as follows:

*“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 Height of Buildings Map accompanying Holroyd LEP 2013 designates a maximum Height of Buildings for the site of 9 metres.

Holroyd LEP 2013 defines building height (or height of building) as:

*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.*

In the case of the site, the building height development standard is expressed in metres.

The proposed development comprises a built form up to three (3) storeys in height, which results in part of the building exceeding the maximum building height control of 9 metres. The maximum extent of departure is 3.4m to the top of the parapet of the new school building, which represents a variation of approximately 37.8% to the maximum height control.

The extent of the building height variation is shown in yellow at **Figure 1**.



Figure 1 Extract of Section Plan (prepared by JDH Architects)

#### 4.0 Justification for the Variation ('5-Part Test')

The proposed variation to the development standard has been considered in light of the abovementioned objectives, potential environmental impacts and the 5-part test established by the NSW Land & Environment Court and strict compliance is considered to be unreasonable and unnecessary for the reasons expressed hereunder.

The Land and Environment Court of NSW, through the Judgment in *Winten Developments Pty Ltd v North Sydney Council* [2001], has established a '5-part test' for considering whether strict compliance with a development standard is unreasonable or unnecessary in a particular case. This 5-part test was later supplemented by the Judgment in *Wehbe v Pittwater Council* [2007] where Chief Justice Preston expressed the view that there are 5 different ways in which an objection to a development standard may be assessed as being well founded and that approval of the objection may be consistent with the aims of the policy.

Whilst these Judgments related to variation requests under SEPP 1, the methodology and reasoning expressed in those Judgments continues to be the accepted basis upon which to assess variation requests pursuant to clause 4.6 and accordingly, we have applied this methodology to the assessment below.

##### 1. Is the planning control a development standard?

Yes, the control requiring a maximum height of buildings of 9 metres in clause 4.3 of Holroyd LEP 2013 is a development standard, defined in section 4 of the EP&A Act as follows:

*"development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that*

*development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:*

...

- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work”.*

## **2. What is the underlying object or purpose of the standard?**

The stated objectives of clause 4.3(1) of Holroyd LEP 2013 are as follows:

- (a) *to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,*
- (b) *to ensure development is consistent with the landform,*
- (c) *to provide appropriate scales and intensities of development through height controls.*

The proposal is consistent with the relevant objectives of the development standard under clause 4.3 for the following reasons.

With regard to **objective (a)**, the building has been deliberately sited and designed to support the educational needs of the school by linking currently separated play areas, whilst minimising the environmental impacts of the proposal on adjoining properties and existing buildings at the site. The building is located in the central area of the site with the nearest residential properties located on the opposite side of Fowler Road approximately 30m to the west of the proposed building. This separation, in combination with existing landscaping works at the site will mitigate any potential impacts relating to privacy. Shadow diagrams have been prepared as part of Architectural Plans showing that the proposed development will have no impact on the solar access of adjoining properties.

In terms of visual impacts, the proposed building is of a scale that is largely comparable to the height of existing buildings, when considering topography and roof-form. Significant trees to the north, south and west of the proposed building have been retained and will assist in screening the building and providing a human scale to the development. The proposed materials and building finishes have been designed with regard to the prevailing heritage characteristics in the southern portion of the site, with more open and contemporary materials towards the playing field in the north. The design incorporates a ground level undercroft which provides an accessibility and visual link between the existing hard-stand play areas and the sports field, improving the view-corridors throughout the site. Therefore the proposal will not result in any unacceptable visual impacts to adjoining properties or in terms of heritage impacts within the site itself.

In respect to **objective (b)**, the roof line of the proposed building provides a stepped form to accommodate the topography of the site. The building has been designed and located to minimise the need for cut and fill, and responds to the location of significant existing trees to the north and south.

The maximum height of one existing building (Block A) exceeds the 9m height control applying to the site. Block A is located in the southern portion of the site and has a maximum building height of 11.2 metres. The bulk and scale of the proposed new classroom building is comparable with the existing maximum building height at the site, taking into consideration the topography of the site and separation between the two. Existing and proposed landscaping will provide appropriate screening to the development and will reduce any visual impacts relating to additional bulk and scale.

The proposal will provide additional classrooms capable of accommodating an additional 138 students. The proposal seeks to remove existing demountable buildings to facilitate the works.



Consolidation of teaching spaces in a permanent building will minimise the footprint of buildings at the site whilst maximising outdoor play and learning spaces. In this regard and in response to **objective (c)**, the proposal will not cause an inappropriate scale and intensity of development as a result of the proposed building height.

If the development were to be re-designed to be consistent with the height control, this would necessitate construction of some 522m<sup>2</sup> of GFA to another area of the site, thereby increasing the site coverage and intensity of the use of the site, and reducing the extent of play areas, outdoor learning areas and landscaping.

The proposal is consistent with the relevant objectives of the building height development standard and it has been shown that there are sufficient environmental planning grounds to justify a contravention of the development standard in this instance.

It is also relevant to consider the objectives of the R2 Low Density Residential Zone (within which the site is located). The objectives of the R2 zone are expressed in the Land Use Table to Part 2 of Holroyd LEP 2013. The objectives of the R2 zone are:

- *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.*
- *To allow residents to carry out a range of activities from their homes while maintaining neighbourhood amenity.*

The proposal is consistent with the relevant zone objectives for the following reasons:

- The proposed development will provide additional permanent teaching/learning spaces without resulting in any unacceptable impacts and which are compatible with the characteristics of the low density residential environment within which it is located;
- The development will provide permanent, high quality educational facilities to accommodate the growing demand for educational services in the area;
- The site is located in a predominantly residential area. As has been discussed previously, the location and design of the proposed classroom building responds to the opportunities and constraints of the site and will not result in any unacceptable impacts to the residential amenity of the neighbourhood;
- In regard to potential heritage impacts, Heritage 21 has undertaken an assessment of the proposal and concludes *“that the proposed development complies with pertinent heritage controls and would have supportable impact on the heritage significance of the subject site”*.

Accordingly, notwithstanding the non-compliance with the 9 metre building height limit, the proposal is consistent with the objectives of the development standard and the relevant objectives of the land use zone within which the site is located.

**3. *Is compliance with the standard consistent with the aims of the policy, and in particular, does compliance with the standard tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the Environmental Planning & Assessment Act 1979?***

Clause 1.2 of Holroyd LEP 2013 sets out the following aims:

- (a) *to provide a clear framework for sustainable land use and development in Holroyd,*
- (b) *to provide for a range of land uses and development in appropriate locations to meet community needs, including housing, education, employment, recreation, infrastructure and services,*

- (c) to promote ecologically sustainable development by facilitating economic prosperity, fostering social well-being and ensuring the conservation of the natural environment,*
- (d) to concentrate intensive land uses, increased housing density and trip-generating activities in close proximity to centres and major public transport nodes in order to retain the low-density character of other areas,*
- (e) to promote the efficient and equitable provision of public services, infrastructure and amenities,*
- (f) to protect the environmental and cultural heritage of Holroyd including:*
  - (i) identifying, conserving and promoting cultural heritage as a significant feature of Holroyd's landscape and built form as a key element of its identity, and*
  - (ii) effectively managing the natural environment (including remnant bushland and natural watercourses) to ensure its long-term conservation.*

The non-compliance with the height of buildings development standard allows for an orderly use of the land, that provides for a well-designed school classroom building, within the environmental capacity of the site. The development will not give rise to adverse streetscape impacts.

The school currently utilises a number of demountable classroom buildings to accommodate the current student population. Removing demountable classrooms and consolidating teaching spaces at the site in permanent classroom buildings will enhance operational outcomes for the school by minimising site coverage, and maximising outdoor play spaces and opportunities for additional landscaping. The siting and design of the proposed building has ensured that the proposed development will not result in any adverse impacts on the residential amenity of adjoining properties. It is therefore considered that the provision of a three-storey classroom will result in a better planning outcome than a design that provides strict compliance with the 9 metre control.

The preceding assessment, including the assessment contained in the Statement of Environmental Effects, demonstrates that the resultant environmental impacts of the proposal will be acceptable and not unreasonable. The variation is considered to be appropriate given that it is limited to the central portion of the site and will not result in any adverse environmental impacts in terms of residential amenity, and thus is consistent with the aims of the Holroyd LEP 2013.

This assessment has demonstrated that the site has the environmental capacity to accommodate the additional student population without adverse impacts and the proposed development is consistent with the objectives of Clause 4.3 of Holroyd LEP 2013 and the R2 zone. Requiring strict compliance with the development standard would be inconsistent with the objectives of clause 4.6 which are to provide flexibility in the application of the standard and to achieve better outcomes for and from development through such flexibility.

Furthermore, it is considered that the relevant Objects of the Act are satisfied as the proposed non-compliance with the development standard:

- will have no negative consequences in terms of 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; and
- will promote the orderly and economic use and development of the site in a manner which achieves the objectives of the relevant planning controls.

Accordingly, strict compliance with the development standard is considered to hinder the promotion and co-ordination of the orderly and economic use and development of land comprising the site.

**4. *Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?***

For the reasons expressed in this clause 4.6 variation request, strict compliance with the development standard is considered to be unnecessary and unreasonable in the circumstances of this particular case.

**5. *Is the objection well founded?***

This variation request relies upon the first ‘way’ expressed by Chief Justice Preston in *Wehbe v Pittwater Council [2007]* as follows:

“1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard.*”

As discussed above, notwithstanding the non-compliance the proposed development achieves the objectives or “purpose” of the development standard under clause 4.3 and will not adversely impact on the natural or built environment. This assessment has demonstrated that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of the proposal;
- There are sufficient environmental planning grounds to justify the departure from the standard;
- The proposed development is not contrary to the public interest and there is no public benefit in maintaining the standard; and
- The breach does not raise any matter of State or Regional Significance.

Therefore, the objection is considered to be well founded.