

Amended Written Request to Vary the height development standard – BBLEP 2013

St Michael's Catholic Primary School, Haigh Avenue, Daceyville

Submitted to
Bayside Council

Prepared on behalf of Sydney Catholic Schools

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1.0 Preliminaries

1.1 Land to which this variation applies and proposed development

This amended written request is provided in support of an amended development application (DA) seeking approval for the following development at St Michael's Catholic Primary School on Haigh Avenue at Daceyville (the **site**):

1. Minor demolition works
2. Construction of a new three storey school building (Block C)
3. Alterations and additions to existing Block A
4. New on site car parking and drop off/pick up facility accommodating 15 car parking spaces plus 11 spaces for drop off/pick up (total of 26 spaces)
5. Removal of trees along the Banks Avenue and Haig Avenue boundaries
6. Increase in the student population comprising a total of 470 students (268 existing + 202 proposed).

This written request has been prepared by Robinson Urban Planning Pty Ltd (**RUP**) and should be read in conjunction with the Amended Statement of Environmental Effects (**SEE**) that accompanies the amended DA.

1.2 Relevant environmental planning instrument

This written request relates to Botany Bay Local Environmental Plan 2013 (**BBLEP 2013**).

1.3 Relevant development standard

This written request relates to the height of buildings standard at cl. 4.3(2) of BBLEP 2013 which states:

4.3 Height of buildings

...

(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.

The height standard for the site is 8.5m, as shown on **Figure 1**.

The height standard is a development standard that is not excluded from the provisions of cl. 4.6.

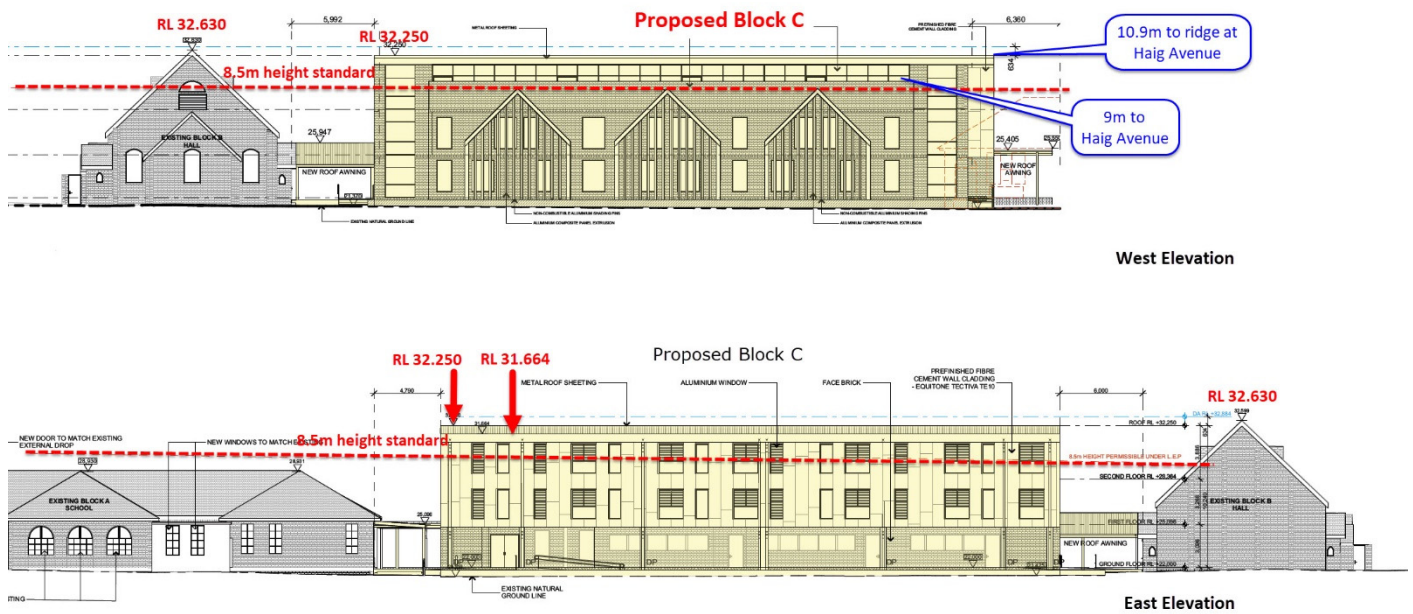
1.4 Proposed variation to the standard

Proposed Block C has a maximum building height of 10.9m (to the ridge) which exceeds the 8.5m height standard by 2.4m or 28%.

Figures 2 to 4 illustrate the extent of non-compliance from the 8.5 height standard. A photomontage of the proposal is provided at **Figure 5**.

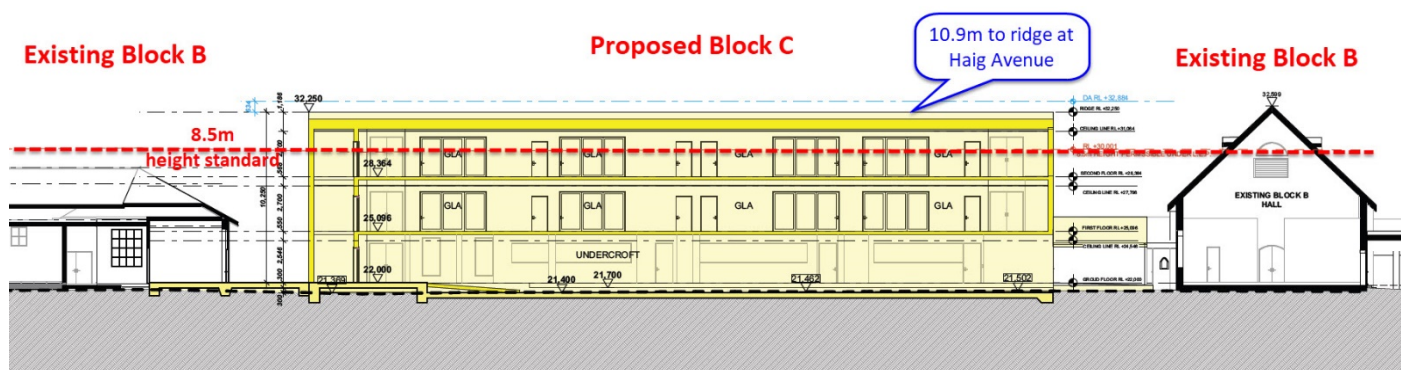


Figure 1 – BBLEP 2013 Height of Buildings Map (Sheet HOB_004)



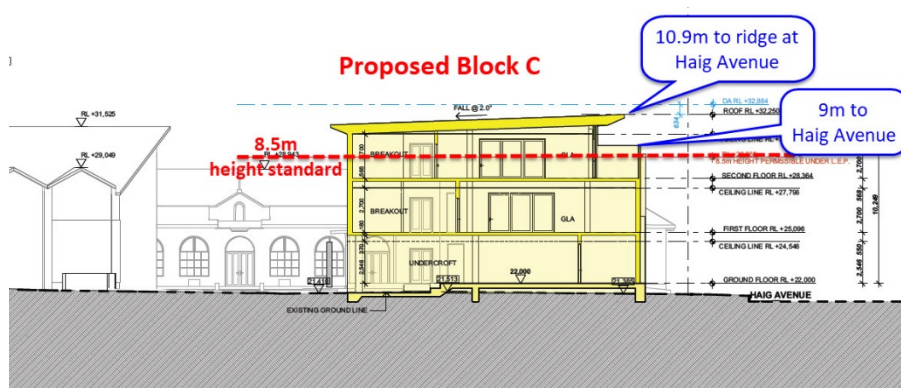
NTS

Figure 2 – Proposed departure from the 8.5m height standard: West and East Elevations (Source: JDH, DA-07_C)



NTS

Figure 3 – Proposed departure from the 8.5 height standard: Section (Source: JDH, DA-09_C)



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Figure 4 – Proposed departure from the 8.5m height standard: Section (Source: JDH, DA-09_C)



Figure 5 – Photomontage (Source: JDH, DA-12_C)

2.0 Justification for the exception and matters for consideration

2.1 Clause 4.6

Clause 4.6 of BBLEP 2013 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.*
- (6) *...*
- (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.*

2.2 Land and Environment Court tests

This section of the amended written request assesses the proposed variation from the height standard against the cl. 4.6 considerations using the accepted tests for the assessment of development standard variations established by the NSW Land and Environment Court in:

- *Initial Action v Woollahra Municipal Council* [2018] NSWLEC 118
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')
- *Wehbe v Pittwater Council* [2007] NSW LEC 82
- *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46).

2.3 Clause 4.6(3)

The applicant bears the onus to demonstrate that the matters in cl. 4.6(3) have been adequately addressed by the written request in order to enable the consent authority to form the requisite opinion of satisfaction. The applicant's written request seeking to justify the contravention of the development standard must adequately address both:

- That compliance with the development standard is **unreasonable or unnecessary** in the circumstances of the case (cl 4.6(3)(a)); and
- That there are **sufficient environmental planning grounds** to justify contravening the development standard (cl 4.6(3)(b)).

The following sections justify contravention of the height development standard using these tests.

2.3.1 Clause 4.6(3)(a) (Whether compliance with the development standard is unreasonable or unnecessary)

The common ways in which an applicant might demonstrate that compliance with a development standard is **unreasonable or unnecessary** are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446. Although *Wehbe* concerned a SEPP 1 objection, the common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe* are equally applicable to cl 4.6. The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way.

The five ways to demonstrate that compliance with is unreasonable or unnecessary and the relevance to this written request are noted below:

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

The objectives of the height standard (BBLEP 2013 cl. 4.3(1)) are satisfied as noted below:

(a) to ensure that the built form of Botany Bay develops in a coordinated and cohesive manner,

The proposal has minimal and acceptable environmental impacts (see Amended SEE, Section 4.0).

(b) to ensure that taller buildings are appropriately located,

Proposed Block C is appropriately located given the heritage, flooding, tree retention and school planning constraints.

(c) to ensure that building height is consistent with the desired future character of an area,

The character of the area is unlikely to change in the future and is expected to remain as education, ecclesiastical and recreation uses on the eastern side of Haig Avenue with

residential uses to the west. The proposal retains this arrangement and provides a new high quality infill building.

(d) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,

The proposal would have minimal and acceptable impacts in terms of overshadowing, privacy, noise and views (see Amended SEE, Section 4.0).

(e) to ensure that buildings do not adversely affect the streetscape, skyline or landscape when viewed from adjoining roads and other public places such as parks, and community facilities.

Proposed Block C will have a neutral impact on the Haig Avenue streetscape, as detailed in the SoHI (see Amended SEE, Appendix D).

Given the above, it is unreasonable and unnecessary in this circumstance to comply with the height development standard.

2. The underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;

N/A

The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in (i) above.

3. Underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable

N/A

The underlying object or purpose of the standard would not be defeated or thwarted if compliance was required.

Flood protection, play space and the educational functionality of the St Michael's Catholic Primary School, however, would be diminished if compliance was mandated as it would necessitate infilling of the undercroft, increase site coverage or deletion of the second floor.

4. The development standard has been abandoned by the council

N/A

5. The zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).

This consideration has some relevance in this instance for the following reasons:

- (a) The site, which is in Zone R2 – Low Density Residential, is not occupied for residential purposes and instead forms part of an educational and ecclesiastical precinct
- (b) The former Botany Bay City Council recognised that Zone R2 may not be suitable for school sites when it prepared a planning proposal to amend the provisions of BBLEP 2013 that apply to school sites, to:
 - (i) Amend the zoning from Zone R2 – Low Density Residential to Zone SP2 – Education Establishments
 - (ii) Remove the FSR standard
 - (iii) Remove the height of buildings standard.

- (c) The planning proposal was refused by the Greater Sydney Commission (the Minister's delegate) on 26 May 2016 on the grounds "that there is insufficient justification to support the zoning of educational establishments SP2 Infrastructure".
- (d) Our research indicates that the Department of Education and Communities objected to the planning proposal and requested that current residential zonings for school sites be retained to be consistent with the Department of Planning and Environment's Practice Note (PN10-001) – Zoning for Infrastructure in LEPs and the aim of providing for school infrastructure under State Environmental Planning Policy (Infrastructure) 2007.

Given the above, the zoning of the site is unreasonable or inappropriate so that an 8.5m height of buildings development standard appropriate for Zone R2 is also unreasonable and unnecessary as it applies to the site and compliance with the standard would be unreasonable or unnecessary.

2.3.2 Clause 4.6(3)(b) (Whether there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b))

"Sufficient environmental planning grounds" is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 [26]):

Subclause (3)(b) requires a written report to demonstrate that sufficient environmental planning grounds support the contravention of a development standard. The EPA Act or the LEP do not define "sufficient" or "environmental planning grounds". As the Appellant submitted these phrases are of wide generality enabling a variety of circumstances or grounds to justify contravention of the particular development standard. The "sufficient ... grounds" must be "environmental planning grounds" by their nature. The word "environment" is defined in the EPA Act to mean "includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings".

The environmental planning grounds relied on in the written request under cl 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole [24].

Four2Five [31]:

Further support for the Commissioner's approach is derived from the use of the word "sufficient". Contrary to the Appellant's submission that this suggests a low bar, I draw the opposite inference, namely that the written report must address sufficient environmental planning grounds to inform the consent authorities finding of satisfaction in cl 4.6(4)(a)(i).

Using these test, there are **sufficient environmental planning grounds** to vary the height development standard in this instance given that:

- **Flooding:** Flood levels provided by Council (see Flood Advice, **Appendix H**) preclude the provision of habitable rooms at the ground floor and inhibit. The proposed undercroft addresses flooding, but increases building height
- **Function:** The functional requirements of the proposal necessitate a two storey form to accommodate the school's educational requirements (eight new classrooms).
- **Play space:** An increase in height reduces site coverage and increases the available play space increasing student amenity and activity.
- **Density:** The proposal is below the FSR standard (0.5:1 permitted and 0.34:1 is proposed) therefore the height non-compliance does not increase the planned density on the site.

- **Heritage:** The proposed additional height increases the curtilage provided around heritage items on the site and the heritage impacts of proposed Block C are satisfactory (see SoHI, **Appendix D**). The design of proposed Block C has been amended to address concerns raised by Council's Heritage Advisor who has given in principle support to the amended proposal.
- **Trees:** An increase in height minimises site coverage and tree removal.
- **Amenity:** The additional height does not give rise to any adverse amenity impacts (shadows, views, privacy etc).
- **Streetscape:** The street frontage height of proposed Block C is 9m, with the maximum height of 10.9m achieved at the ridge only (see **Figures 2 to 5**).
- **Design Review Panel:** The Design Review Panel considered that the *"design is generally of a high quality and appropriate to its context"* subject to a 200mm reduction in height (and several other matters that have been addressed). As amended, the height of proposed Block C is 934mm lower than the original scheme presented to the Design Review Panel (from RL 33.184 in the pre-DA to RL 32.250 in the amended plans).
- **Relevance of the zoning and height standard:** The zoning of the site (Zone R2) is unreasonable/inappropriate so that an 8.5m height of buildings development standard is also unreasonable/unnecessary as it applies to the site and compliance with the standard would be unreasonable or unnecessary.
- **Compliance options:** Compliance with the standard (whilst retaining the required number of new classrooms) would necessitate the provision of habitable rooms at the ground level, breaching the required flood levels and reducing the available play space. An alternative compliance strategy would be to reduce the building height by one storey and increase the footprint. This would also reduce the available play space, reduce the curtilage around heritage items on the site, and increase tree loss.
- The non-compliance with the development standard allows for an orderly use of the land and the proposal has been designed with consideration to the desired future character of the area.
- Additionally, the Objects of the Act are satisfied as:
 - The departure from the height 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
 - The departure from the height standard allows for the orderly and economic use of the site in a manner which otherwise achieves the outcomes and objectives of the relevant planning controls.

2.4 Clause 4.6(4)(a)

Clause 4.6(4)(a) establishes preconditions that must be satisfied before a consent authority (or the court exercising the functions of a consent authority) can exercise the power to grant development consent.

The first opinion of satisfaction in cl 4.6(4)(a)(i) is that the written request has addressed subclause (3). As demonstrated above at Section 2.3, the written request has addressed both parts of cl. 4.6(3). Demonstrating:

- That compliance with the height standard is unreasonable and unnecessary; and

- That there are sufficient environmental planning grounds to justify contravening the development standard.

The second opinion of satisfaction in cl 4.6(4)(a)(ii) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard that is contravened and the zone objectives. The consent authority must be satisfied that the development is in the public interest because it is consistent with these objectives, not simply that the development is in the public interest.

The consistency of the development with the objectives of the development standard is addressed above at Section 2.3.1.

The consistency of the development with the objectives of Zone R2 is noted below, demonstrating that the development is in the public interest

(a) To provide for the housing needs of the community within a low density residential environment.

N/A

The site is not used for residential purposes.

(b) To enable other land uses that provide facilities or services to meet the day to day needs of residents.

The proposal improves an existing school that provides a facility to meet the day to day needs of residents. It also provides additional primary school places in an area where demand is high

The proposed number of classrooms will service this demand for additional primary school places. Compliance with the height standard (whilst retaining the required number of new classrooms) would necessitate:

- The provision of habitable rooms at the ground level, breaching the required flood levels and reducing the available play space; or
- A reduction in building height by one storey and an increase in building footprint. This would also reduce the available play space, reduce the curtilage around heritage items on the site, and increase tree loss.

A reduction in classrooms/school places or the alternative design options described above that would achieve compliance would be contrary to Zone Objective (b) as the complying development would not meet the educational day to day needs of children residents in the area in particular:

- There would be insufficient classrooms/school places to meet the high demand for primary school places; or
- The quality of the school environment would be diminished in terms of play space, trees, heritage and flood protection.

(c) To encourage development that promotes walking and cycling.

Travel to the site by walking or cycling is to be encouraged.

2.5 Clause 4.6(4)(b) (Concurrence of the Secretary of the Department of Planning and Environment)

The Secretary of the Department of Planning and Environment has granted concurrence to Bayside Council.

3.0 Conclusion

The proposal has a maximum building height of 10.9m which exceeds the BBLP 2013 height standard of 8.5m by up to 2.4m (28%).

Consistent with the tests established by the Land and Environment Court, this written request to vary the height standard demonstrates that:

- Compliance with the development standard is unreasonable and unnecessary;
- There are sufficient environmental planning grounds to justify contravening the development standard; and
- The proposed development will be in public interest because it is consistent with the objectives of the development standard that is contravened and the zone objectives.