

ANNEXURE B

Clause 4.6 Variation - Building Height



Clause 4.6 variation statement – maximum height (clause 4.3)

Clause 4.3 of CBLEP 2013 relates to the maximum height requirements and refers to the Height of Buildings Map. The relevant map identifies the subject site as having a maximum height of 8.5m. Building height is defined as:

"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."

As indicated in the height blanket diagram included in Figure 16, parts of the proposed new roof, rooftop plant, lift overrun and new parapet to the Tranmere Street façade will exceed the 8.5m height of buildings control. Figure 16 also shows that the existing school hall and the St Marks Church exceed the 8.5m height control.

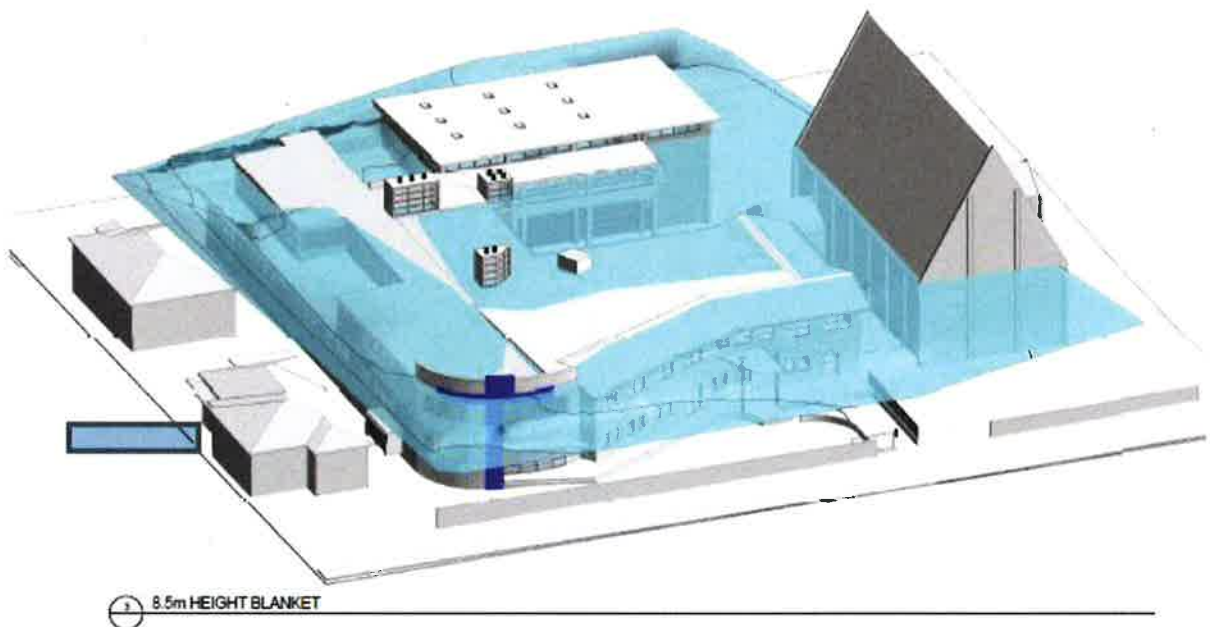


Figure 15: Height blanket diagram showing points of existing and proposed buildings to exceed the 8.5m height of buildings control

The height of buildings control is a "development standard" to which exceptions can be granted pursuant to clause 4.6 of the LEP. The Height of Buildings Map nominates a maximum height of 8.5m for the site. It is hereby requested that an exception to this development standard be granted pursuant to clause 4.6 so as to permit a maximum height of 11.8m for the subject development.

The objectives and provisions of clause 4.6 are as follows:

"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 Secretary has been obtained.
 - (5) 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.
 - (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:
 - (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.
- Note.**
When this Plan was made it did not include all of these zones.
- (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,
 - (ca) clauses 6.4 and 6.5."

The development standards in clause 4.3 are not "expressly excluded" from the operation of clause 4.6.

Objective 1(a) of clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of subclauses 4.6(3) & (4) in order to demonstrate to Council that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective

1(a). In this regard, the extent of the discretion afforded by subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, subclause 4.6(6).

Objective 1(b) of clause 4.6 is addressed later in this request.

The objectives and relevant provisions of clause 4.3 are as follows, inter alia:

"4.3 Height of buildings

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

- (a) to ensure that buildings are compatible with the desired future character in terms of building height and roof forms,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development."*

In order to address the requirements of subclause 4.6(4)(a)(ii), each of the relevant objectives of clause 4.3 are addressed below.

OBJECTIVE (A): TO ENSURE THAT BUILDINGS ARE COMPATIBLE WITH THE DESIRED FUTURE CHARACTER IN TERMS OF BUILDING HEIGHT AND ROOF FORMS

It is noted that objective (a) refers to being "compatible" with adjoining development. It is considered that "compatible" does not promote "sameness" in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191:

"22 There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve."

The proposal includes the retention of the existing school hall adjacent to South Street and the original two storey school buildings fronting Tranmere Street. These existing buildings dominate the visual appearance of the school as viewed from both streets and both buildings slightly exceed the height of buildings control. In conjunction with the existing church (which significantly exceeds the height of buildings control), the existing development on the site has a height and roof form which are non-compliant with the height of buildings control.

The proposed additions and alterations have been designed to be well integrated with the finished floor levels, ceiling heights and roof levels of those buildings to be retained. Therefore it is reasonable to anticipate that the new building works are of a similar scale and height to the existing non-compliant buildings. Despite the need to be integrated with the existing buildings, the new works have been designed with low-pitched metal roofing and the majority of the new building works are below the 8.5m height control.

Furthermore the first floor level of the new buildings has been set back significantly from the south eastern side boundary. This increased setback greatly reduces the visual impact of bulk and scale in comparison to the existing buildings as viewed from the adjoining residential properties to the south east.

The lift overrun exceeds the building height control but is located in the centre of the site and will not be visible from adjoining public spaces or from neighbouring residential properties.

For these reasons the proposal is consistent with objective (a) in being of a height which is well integrated with the character, height and roof form of existing buildings within the site that are to be retained.

OBJECTIVE (B): TO MINIMISE VISUAL IMPACT, DISRUPTION OF VIEWS, LOSS OF PRIVACY AND LOSS OF SOLAR ACCESS TO EXISTING DEVELOPMENT



As stated above, the majority of the new works will not be readily visible from the adjoining streets as the existing school hall and the original two storey school buildings are to be retained and these buildings dominate both street presentations. The first floor level of the new buildings has been set back significantly from the south eastern side boundary. This increased setback greatly reduces the visual impact of bulk and scale in comparison to the existing buildings as viewed from the adjoining residential properties to the south east. For these reasons the proposed height breaches will have minimal visual impact.

The works will not obstruct any existing views across the site from neighbouring properties.

Overlooking towards neighbouring residential properties to the south east will be notably reduced in comparison to the existing built form due to:

- An increase in the setback to the south eastern side boundary;
- Installation of privacy screens to the upper storey windows oriented to the south east;
- Installation of acoustically treated openings in the south east façade as recommended by the Environmental Noise Assessment submitted with the development application; and
- Installation of landscaping and retention of existing trees within the setback to the south eastern side boundary.

Solar access to the neighbouring properties to the south east will be improved in comparison to the existing school buildings with the increased setbacks of the new works. This is clearly demonstrated by the shadow diagrams submitted with the development application.

All of the abovementioned reasons demonstrate that the proposed building height will still achieve compliance with Objective (b) despite the numeric non-compliance.

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, as discussed above it is considered that there is an absence of significant impacts of the proposed non-compliance on the amenity of future building occupants, on area character and on neighbouring properties.

On "planning grounds" and in order to satisfy that the proposal meets objective 1(b) of clause 4.6 in that allowing flexibility in the particular circumstances of this development will achieve "a better outcome for and from development", it is considered that the proposal provides for a more effective and appropriate building form to replace the poorly connected demountable buildings and improve the efficient and accessible layout of the school building whilst also achieving improved solar access and visual and acoustic privacy for the neighbouring residential properties.

The new building works have been designed in consultation with Heritage Consultants John Oultram Heritage and Design to ensure that the works are compatible with the heritage character and curtilage of St Marks Church and with the Bourketown Heritage Conservation Area. The proposal retains the majority of the built form visible from both street frontages and the new works are mostly concealed from view from both streets.

The proposal provides for a floor space ratio which complies with the maximum permitted and accordingly, the height breach is not associated with additional density beyond what is expected by the controls.

It is considered to be a significantly better planning outcome to replace the demountable buildings with new works that optimise the efficient use of space, create a transition between indoor and outdoor spaces and allow accessible paths of travel throughout the school building. Therefore, on balance, the proposal is considered to achieve a planning purpose of enhancing the amenity of the school and of adjoining properties in the absence of any additional adverse impacts.

Returning to Clause 4.6(3)(a), in *Wehbe v Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

"An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."

The judgement goes on to state that:

"The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."

Preston CJ in the judgement then expressed the view that there are 5 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, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- *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;*
- *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard is unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of clause 4.6(3) are satisfied.