



planning consultants

26 February 2019  
Our Ref: 20051A.2SW\_cl4.6 height

The General Manager  
Burwood Council  
P.O. Box 240  
BURWOOD NSW 1805

Dear Sir

**RE: WRITTEN REQUEST FOR EXCEPTION TO A DEVELOPMENT STANDARD  
BUILDING HEIGHT DEVELOPMENT STANDARD  
PROPOSED ALTERATIONS AND ADDITIONS TO CROYDON PUBLIC SCHOOL  
39-57 YOUNG STREET, CROYDON**

## **1.0 Introduction**

DFP has been commissioned by Schools Infrastructure NSW (SINSW), on behalf of NBRS Architecture to prepare a request pursuant to clause 4.6 of *Burwood Local Environmental Plan 2012* (BLEP 2012) in respect of the proposed alterations and additions to an educational establishment – Croydon Public School, at 39-57 Young Street, Croydon.

This written request relates to a variation to the building height development standard that applies to the site.

## **2.0 Burwood Local Environmental Plan 2012**

### **2.1 Subclause 4.6(1) – Flexibility and Better Outcomes**

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.”*

Our response to these objectives is contained within this submission.

### **2.2 Subclause 4.6(2) – Consent may be granted**

Subclause 4.6(2) provides that:

- (2) 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 is not expressly excluded from the operation of clause 4.6 and accordingly, consent may be granted.

### 2.3 Subclause 4.6(3) – Written Request

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

- “(3) 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.”*

The proposed development does not comply with the 8.5 metre height of buildings development standard pursuant to clause 4.3 of BLEP 2012 however, strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as justified in this written request.

### 2.4 Subclauses 4.6(4) and 4.6(5) – Written Request and Concurrence

Subclause 4.6(4) 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.”*

Furthermore, 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 remainder of this written request for exception to the development standard addresses the matters required under subclauses 4.6(4) and 4.6(5) of the LEP.

### 3.0 The Nature of the Variation

Clause 4.3(2) of BLEP 2012 sets out the building height limit as follows:

*“The height of buildings on any land is not to exceed the maximum height shown for the land on the Height of Buildings Maps”*

The Height of Buildings Map identifies the site as having a maximum building height of 8.5 metres.

The BLEP defines building height (or height of building) as:

- (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.

With respect to Building N, the proposed development comprises a built form of three (3) storeys in height, resulting in a building which exceeds the maximum building height control of 8.5 metres as shown on the height plans prepared by NBR Architecture (**Figure 1**) with the highest point at 13.17m - a maximum variation of 4.67m or 54.9%.

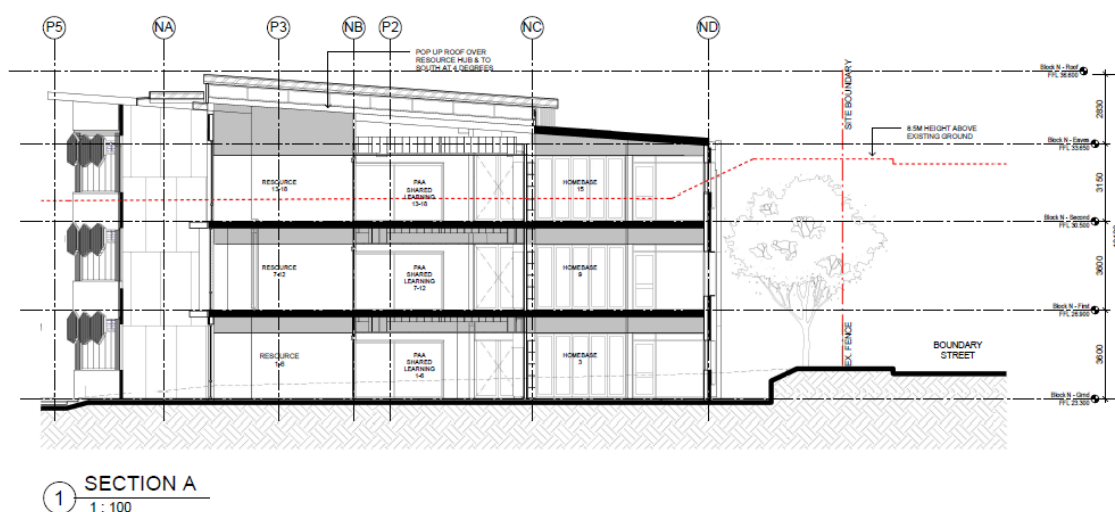


Figure 1 Extract of Cross Section – Building N (prepared by NBR Architecture)

With respect to Building Q, the proposed alterations and additions to the existing building will result in a built form of two storeys in height. The building will exceed the maximum building height control of 8.5 metres as shown on the height plans prepared by NBR Architecture (**Figure 2**), with the highest point at 10m - a maximum variation of 1.5m or 17.6%.

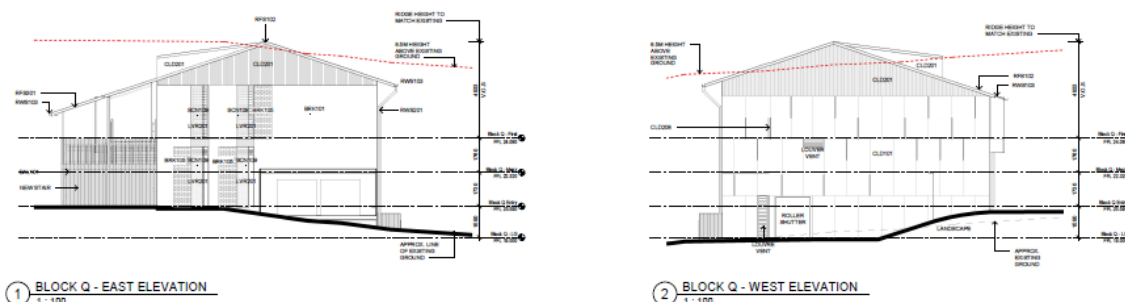


Figure 2 Extract of Cross Section – Building Q (prepared by NBR Architecture)

#### 4.0 Relevant Case Law

The proposed variation to the development standard has been considered in light of the evolving methodology and “tests” established by the NSW Land & Environment Court (the Court) including the following cases:

- Winten Developments Pty Ltd v North Sydney Council [2001]
- Wehbe v Pittwater Council [2007]
- Four2Five Pty Ltd v Ashfield Council [2015]
- Randwick City Council v Micaul Holdings Pty Ltd [2016]
- Moskovich v Waverley Council [2016]
- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118

The Land and Environment Court of NSW, through the Judgment in Winten Developments Pty Ltd v North Sydney Council [2001], 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 is to be consistent with the aims of the policy (being State Environmental Planning Policy No. 1 Development Standards (SEPP1)).

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.

## 5.0 Assessment of the Variation and Grounds of the Objection

The proposed variation to the building height development standard has been considered in light of the above Court cases, the objectives of the development standard and the R2 Low Density Residential zone, and potential environmental impacts.

### 5.1 Step 1 – Is the planning control a development standard?

This question is the 1st 'test' in Winten. The height of building development standard in clause 4.3 of Canterbury LEP 2012 is a development standard as, defined in Section 1.4 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:*

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

The maximum height of buildings control of 8.5 metres in clause 4.3 of Burwood LEP 2012 is a development standard.

### 5.2 Step 2 – Pursuant to clause 4.6(4)(a), is the consent authority satisfied that the written request adequately addresses the matters in Clause 4.6(3)?

The matters in clause 4.6(3) are:

- (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.”*

The elements of the school buildings that exceed the building height development standard are located such that they will not cause adverse impacts on the built environment or the amenity of nearby properties. Specifically, the residential properties to the south, across Boundary Street, are not adversely affected in terms of overshadowing impacts and privacy/overlooking impacts have been mitigated through design features and screen landscaping.

The non-compliance with the height of buildings development standard allows for the orderly use of the land, which has the capacity to accommodate a high-quality educational facility. Furthermore, Building N is set lower than the existing level of Boundary Street, thereby reducing the apparent height of the structure when viewed from Boundary Street. Overall, this building has been designed to respond to the constraints of the site, including the requirement for gradient levels for access requirements, as well as to provide appropriate floor-to-ceiling heights within the school. This is considered to be a good planning outcome.

The alterations and additions to Building Q have been designed to maintain the existing ridge level of the building. Reducing the height of this building to comply with the development standard would be unreasonable and would not provide a symmetrical development or be of good design.

Strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as the proposal achieves and/or is not inconsistent with the relevant objectives of the development standard in that:

- The height of the proposed buildings maintains the desirable attributes and is not out of character with the desired future of the area;
- The building heights do not result in any significant overshadowing of nearby residential properties;
- The building designs contribute positively to the streetscape and visual amenity of the area.

Furthermore, strict compliance would limit the ability to provide high quality cohesive learning spaces and would result in an inefficient use of the land and reduce at grade playground space. Compliance with the building height development standard would result in an inferior design outcome where additional buildings with a larger footprint which would occupy more of the site, thus reducing pervious areas and outdoor play spaces. As discussed below, the maximum variation is due to the need to provide suitable learning spaces in a built form which responds appropriately to contemporary teaching techniques. Strict compliance with the development standard would prevent the achievement of these design outcomes.

Compliance with the 8.5m building height development standard is also considered unnecessary in this instance as the height variation does not give rise to adverse impacts to the built environment or surrounding properties and therefore there are sufficient environmental planning grounds to justify the variation.

### **5.3 Step 3 - Pursuant to cl4.6(4)(b), is the consent authority satisfied that the development will be in the public interest because it is consistent with the objectives of the development standard and the objectives of the zone?**

#### **The Objectives of Building Height Development Standard**

The objectives of the maximum height of buildings standard in Clause 4.3(1) are:

- (a) *to establish the maximum height of buildings to encourage medium density development in specified areas and maintain Burwood's low density character in other areas,*

(b) to control the potentially adverse impacts of building height on adjoining areas.

In terms of objective (a), the proposal has endeavoured to maintain the desirable attributes and character of the area by providing a high quality development that meets the educational needs of the local residents and community as a whole. It is noted that the local character of the area is generally detached dwellings of single or two storeys, however a residential flat building currently under construction to the south-west of the site, across Boundary Street, is 8 storeys in height. The land to the south of the site, across Boundary Street is zoned R1 General Residential, and has a maximum height of 26 metres. Having regard to the building height controls with the area, it is considered that the proposed buildings will not be out of character with the desired future character of the area.

Overall, the proposal has been designed to provide an efficient built form which responds appropriately to contemporary teaching techniques without resulting in significant adverse impacts.

In terms of objective (b), as demonstrated in the shadow diagrams submitted with the development application, given the orientation of the site and the location of the proposed building, the most prominent overshadowing comes from Building N in the morning of the winter solstice to the south of the site, and some minor overshadowing to the private space to the west. However, from midday until 3pm, shadows resulting from the proposed development will generally be contained within the bounds of the site and on Boundary Street. Therefore, the proposal is not considered to result in an unacceptable impact upon solar access, as the proposal will not reduce solar access for any property to less than 3 hours during the day.



Figure 2: Overshadowing diagrams for Winter Solstice between 9am and 3pm

With respect to visual privacy, Building N has been designed to be orientated to the north, towards the existing playing fields. Given the orientation of the site, location and design of the buildings and the proposed vegetation along the southern boundary of the site, privacy for neighbouring properties has been maintained. The building has been setback 5 metres from the southern boundary. This provides the opportunity for screen planting, which will have a mature height of 20 metres.

### Objectives of the Zones

The Land Use Table of Burwood LEP 2012 states the zone objectives of the R2 Low Density Residential zone as follows:

- *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 objectives of the zone do not specifically address building height but relate to encouraging other forms of land uses to service or meet the day to day needs of residents. The ability of the proposed works to achieve these zone objectives is not affected by the proposed building height variation.

### Objectives of Burwood LEP 2012

Clause 1.2(2) of the Burwood LEP 2012 sets out the following aims:

- (a) *to create a land use framework that allows detailed provisions to be made,*
- (b) *to encourage or restrict development of land according to its suitability for various purposes,*
- (c) *to encourage provision of a range of housing types,*
- (d) *to encourage growth in business and employment development.*

It is considered that the proposal will uphold the aims of the LEP for the following reasons:

- (a) – Not applicable.
- (b) – The proposal is a permissible form of development in the R2 zone and is of a design and type that is not inconsistent with the existing and desired future character of the area. The school re-development provides for a high quality learning environment that will enhance the quality of life for residents, in particular school children in the locality attending their local public school.
- (c) – Not applicable.
- (d) – The proposal has the opportunity to provide for future employment opportunities for existing and future residents.

### 5.4 Step 4 – Clause 4.6(4)(b) – The Concurrence of the Secretary has been obtained

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under clause 64 of the Environmental Planning and Assessment Regulation 2000 (the EP&A Regulation) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under clause 4.6 of the Standard Instrument LEP or SEPP 1 subject to certain conditions.

The Secretary's concurrence may not be assumed by a delegate of council if:

- the development contravenes a numerical standard by greater than 10%; or
- the variation is to a non-numerical standard.

The proposed development comprises a built form up to three (3) storeys in height, resulting in a building which exceeds the maximum building height control of 8.5 metres. Building N has a maximum height of 13.17m - a maximum variation of 4.67m or 54.9%.

Notwithstanding, the DA will need to be determined by the Sydney Eastern City Planning Panel due to the type (Crown development) and cost (greater than 5 million dollars) of the proposed development. The above restrictions do not apply to decisions made by the Planning Panel.

### **5.5 Step 5 – Clause 4.6(5) – Concurrence Considerations**

In the event that concurrence cannot be assumed pursuant to the Notice clause 4.6(5) of the LEP also requires the Secretary, in deciding whether to grant concurrence, to consider the following:

*“(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning,”*

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

*“(b) the public benefit of maintaining the development standard,”*

The proposed variation does not set a precedent given the educational use of the site, and the specific land use requirements of the school. In this instance there is not considered to be a public benefit in maintaining the development standard.

*“(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.”*

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

### **6.0 Conclusion and Recommendations**

We have assessed the proposed building height variation against the relevant statutory provisions of clause 4.6 of Burwood LEP 2012 and prepared this written request which provides justification that compliance with the 8.5 metre building height development standard is unreasonable and unnecessary in the circumstances of the case.

Strict compliance with the height control would limit the ability to provide high quality learning spaces and result in an inefficient use of the land. A compliant development would result in an inferior design outcome where additional smaller buildings would occupy more of the site, limiting pervious areas and reducing outdoor play spaces. The non-compliance with the building height limit does not generate any significant adverse solar access or overshadowing impacts adjoining residential properties. Overall, it is considered that the proposal contributes positively to the streetscape and visual amenity of the area, whilst also providing a high quality educational establishment.

Accordingly, the justification within this written request is considered to be well founded.



Should you have any queries please do not hesitate to contact the undersigned.

Yours faithfully

**DFP PLANNING PTY LTD**

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Reviewed: A handwritten signature in black ink, appearing to read 'E. R. H. T.', written in a cursive style, positioned above a horizontal line.