



planning consultants

22 February 2019
Our Ref: 20050A.2SW_cl4.6 height

The General Manager
City of Canterbury Bankstown Council
PO Box 8
Bankstown NSW 1885

Dear Sir

**RE: WRITTEN REQUEST FOR EXCEPTION TO A DEVELOPMENT STANDARD
BUILDING HEIGHT DEVELOPMENT STANDARD
PROPOSED ALTERATIONS AND ADDITIONS TO CANTERBURY SOUTH PUBLIC
SCHOOL
20 HIGH STREET, CANTERBURY**

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 *Canterbury Local Environmental Plan 2012* (CLEP 2012) in respect of the proposed alteration and additions to an educational establishment – Canterbury South Public School, at 20 High Street, Canterbury.

2.0 Canterbury 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 CLEP 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 Subclause 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 CLEP 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 height of 8.5 metres.

The CLEP 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.

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 as shown on the height plans prepared by NBR Architecture (**Figure 1**) with the highest point at 13.586m - a maximum variation of 5.086m or 59.8%.



Figure 1 Extract of Cross Section (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 development standard has been considered in light of the above Court cases, the objectives of the development standard and the R3 Medium Density Residential and R4 High Density Residential zones 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 control requiring a maximum height of buildings of 8.5 metres in clause 4.3 of Canterbury 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 element of the school building that exceeds the building height development standard are located such that it will not cause adverse impacts on the built environment or the amenity of nearby properties. Specifically, the residential properties to the south, across Napier Street are not adversely affected in terms of overshadowing impacts, and privacy/overlooking impacts have been mitigated through design features including sill heights 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, earthworks are proposed to reduce building height and the apparent bulk of the structure when viewed from Napier Street. Overall, the proposed educational facility building has been designed to respond to the constraints of the site, including the requirement for gradient levels for access requirements, requirements to meet lower and upper floor levels, as well as to provide suitable floor-to-ceiling heights within the school. This is considered to be a good planning outcome.

Furthermore, the provisions of the State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (Education SEPP), Schedule 2 Schools – complying development permits new buildings, or alterations and additions to existing buildings up to a height of 22 metres (4 storeys). While this proposal is seeking development consent for the built form and an increase in student numbers, and the height control for complying development in the Education SEPP would not strictly be a consideration, it does provide an indication of the acceptable built form for educational establishments, notwithstanding other constraints of the site. Under the complying development planning pathway, in relation to height, the proposed development would be compliant.

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 building maintains the desirable attributes and character of an area;
- The building heights do not result in any overshadowing of nearby residential properties;

- The building design contributes 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 fall of the site at the eastern end of the site, and the need to provide suitable learning spaces in a built form which responds appropriately to contemporary teaching techniques. Strict compliance 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 and maintain the desirable attributes and character of an area,*
- (b) *to minimise overshadowing and ensure there is a desired level of solar access and public open space,*
- (c) *to support building design that contributes positively to the streetscape and visual amenity of an area,*
- (d) *to reinforce important road frontages in specific localities.*

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 single dwellings being single or two storeys, and the proposal seeks approval for a 3 storey structure, however, the proposal has been design 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, shadows resulting from the proposed development will generally be contained within the bounds of the site, on Napier Street or within the Pat O'Conner Reserve with the exception of minor overshadowing on the front yard of Nos. 15 and 17 Napier Street in the morning during the Winter Solstice (between 8am and approximately 8:30am), and a small corner of the rear yard of 24 High Street in the morning during the Summer Solstice.

The level of overshadowing impact resulting from the proposal has been identified as confined to brief sections of the day, generally outside of the relevant assessment benchmark commonly used – that being the hours of 9am through to 3pm at the winter solstice. Refer to **Figure 2** below for shadow diagrams.

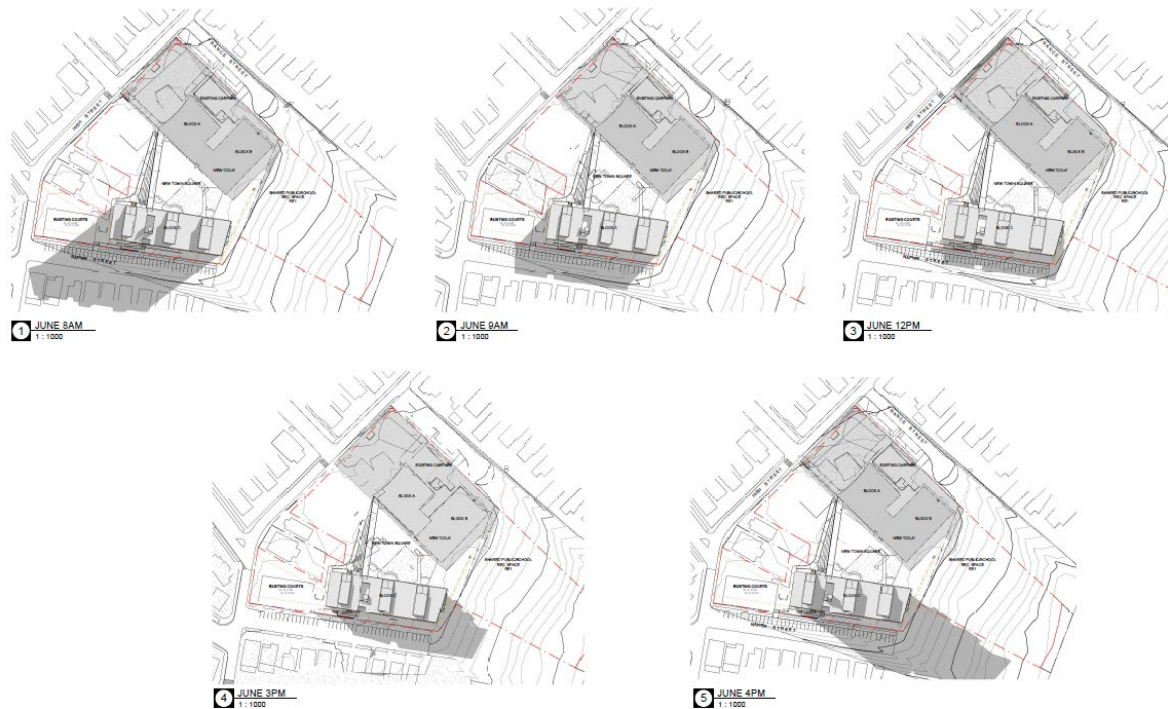


Figure 2: Overshadowing diagrams for Winter Solstice between 8am and 4pm

In terms of objective (c), Block C has been designed taking into consideration streetscape and the overall visual amenity of the locality. The building has been cut into the site on the western side with the ground sloping up to Napier street, which reduces the scale of the building to adjacent residential properties to the west and along Napier Street. From the street the main bulk of the building to the main roof eaves line reads as a two / two and half storey building than a three storey building (refer **Figure 3**). Roof elements including clearstory windows provide further solar access, but also aim to reduce the scale of the building as viewed from the south. The Napier Street pedestrian entry point forms a natural break in the southern façade splitting the building mass into two connected forms. The green and blue façade treatments along the southern elevation assist in breaking up the length of the building, while enforcing the educational nature of the site.



Figure 3: Photomontage of building C as viewed from the northern end of Napier Street.

Objective (d) is not applicable.

Objectives of the Zones

The Land Use Table of Canterbury LEP 2013 states the objectives of the R3 Medium Density Residential zone and R4 High Density Residential zone as follows:

Objectives of the R3 Medium Density Residential Zone:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Objectives of the R4 High Density Residential Zone:

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high 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 zones 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 at the existing educational establishment to achieve these zone objectives is not affected by the proposed building height variation. Furthermore, it is considered that the maximum 8.5 metre building height is at odds with the zone objectives and is more akin to low density residential zones.

Objectives of Canterbury LEP 2013

Clause 1.2(2) of the Canterbury LEP 2013 sets out the following aims:

- (a) *to provide for a range of development that promotes housing, employment and recreation opportunities for the existing and future residents of Canterbury,*
- (b) *to promote a variety of housing types to meet population demand,*
- (c) *to ensure that development is of a design and type that supports the amenity and character of an area and enhances the quality of life of the community,*
- (d) *to create vibrant town centres by focusing employment and residential uses around existing centres and public transport nodes,*
- (e) *to revitalise Canterbury Road by encouraging a mix of land uses that does not detract from the economic viability of existing town centres,*
- (f) *to retain industrial areas and promote a range of employment opportunities and services,*
- (g) *to promote healthy lifestyles by providing open space that supports a variety of leisure and recreational facilities and encouraging an increased use of public transport, walking and cycling,*
- (h) *to protect the natural environment for future generations and implement ecological sustainability in the planning and development process,*
- (i) *to protect and promote the environmental and cultural heritage values of Canterbury.*

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

- (a) – The proposal has the opportunity to provide for future employment opportunities for existing and future residents.

- (b) – Not applicable
- (c) – The proposal is of a design and type that supports the amenity and character of the area. The school re-development provides for a high quality learning environment that enhances the quality of life for residents, in particular school children in the locality attending their local public school.
- (d) – Not applicable
- (e) – Not Applicable
- (f) – Not Applicable
- (g) – Not Applicable
- (h) – The proposed building height variation does not hinder the protection of the natural environment or hinder the implementation of ecological sustainability within the site through the development process. By reducing the building footprint of the building, more impervious land can be provided.
- (i) – The proposal where possible, will aim to protect the environmental and cultural values of Canterbury.

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. The building has a maximum height of 13.586m, which equates to a maximum variation of 5.086m or 59.8%.

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

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 associated with 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 Canterbury LEP 2013 and prepared this written request which provides justification that compliance with the 8.5 metre building height development standard is unreasonable or 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 adverse overshadowing impacts or loss of solar access to 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

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Reviewed: _____

