



planning consultants

22 February 2019  
Our Ref: 20050A.3SW\_cl4.6 FSR

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  
FLOOR SPACE RATIO 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 floor space ratio 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 floor space ratio development standard pursuant to clause 4.4 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 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 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.”*

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 4.4 of CLEP 2012 sets out the floor space ratio as follows:

*“The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map”*

The FSR Map identifies the site having a maximum floor space ratio of 0.75:1 for the land zoned R4 High Density and a floor space ratio of 0.5:1 for the land zoned R3 Medium Density Residential. Refer to **Figure 1** below which outlines the zoning for the site, and the FSR applicable.

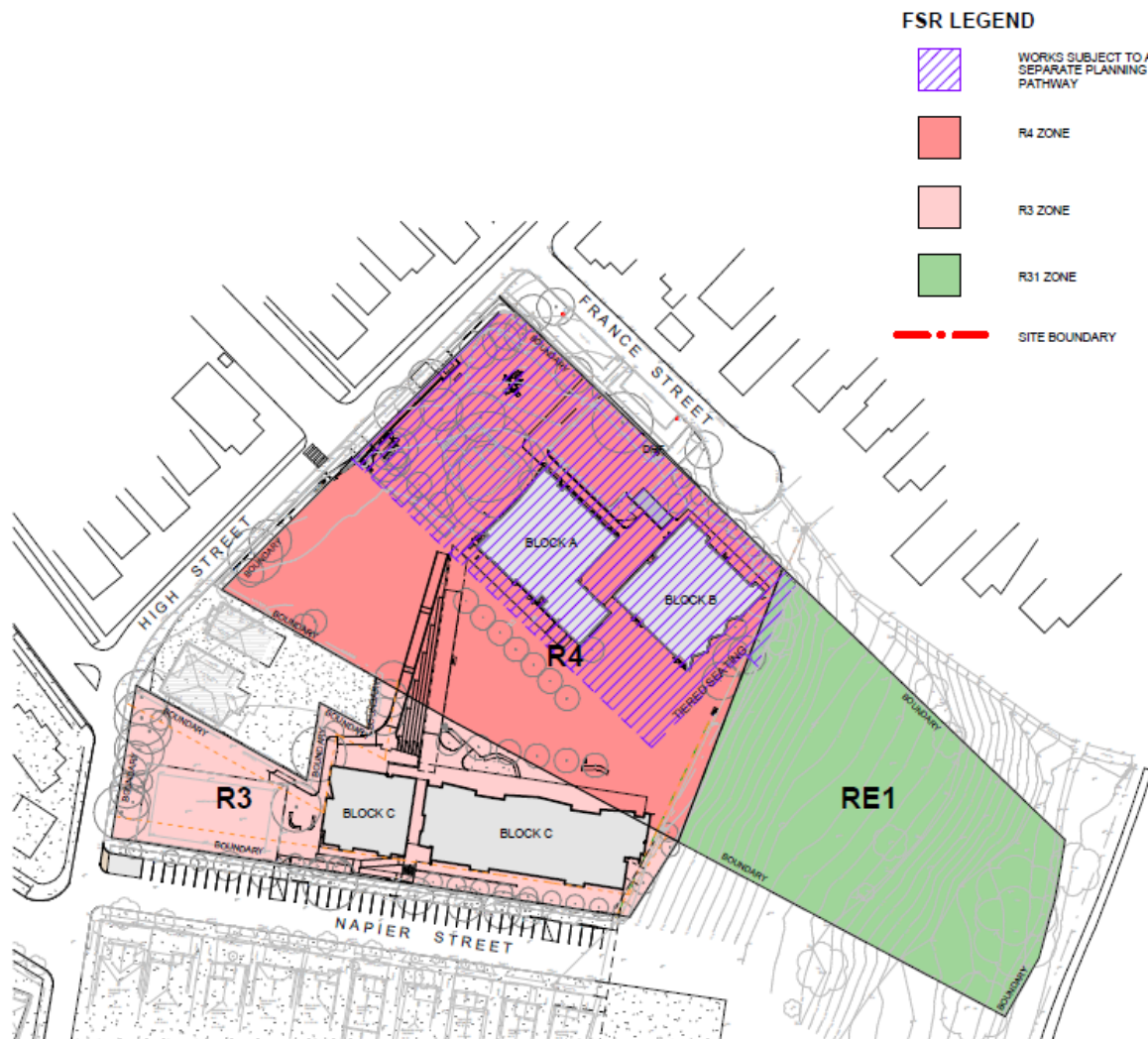


Figure 1: Zoning of the subject site (prepared by NBRs Architecture)

The LEP defines floor space ratio as follows:

*“The floor space ratio of building on a site is the ratio of the gross floor area of all buildings within the site to the site area”*

The development will have an FSR of 0.82:1 on the part of the site which is zoned R3 Medium Density Residential, which permits a FSR of 0.5:1. This is a variation of 0.32:1 or 64%.

It is noted that works proposed (under a separate planning pathway) within the R4 High Density Residential zoned portion of the site will have a FSR of 0.20:1 (maximum allowable is 0.75:1). The overall FSR when taking into account the R3 and R4 zoned land of the school, and the proposed gross floor area over the site, the re-development of the school will have a FSR of 0.40:1, which is well below the 0.5:1 FSR rate stipulated for the R3 zoned land (this figure excludes that part of the site zoned RE1).

#### 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 floor space ratio standard in clause 4.4 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 floor space ratio of 0.5:1 in the R3 zoned land in clause 4.4 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 FSR 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. Block C (which is the building located within the R3 zoned land) has been designed having regard to the character of the area, the 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. This reduces the scale of the building to adjacent residential properties to the west and along Napier street.

Furthermore, strict compliance with the FSR development standard would result in an inefficient use of the land or alternatively, result in an inferior design outcome where additional smaller buildings (located in the R4 zoned land which allows for a greater FSR) would occupy more of the site. This would reduce pervious areas and outdoor play spaces. Strict compliance would prevent the achievement of these design outcomes.

As discussed above, it is noted that works proposed (to be undertaken a separate planning pathway) within the R4 High Density Residential zoned portion of the site will have a FSR of 0.20:1. When taking into account the R3 and R4 zoned land of the school, and the proposed gross floor area across the site, the re-development of the school will have a FSR of 0.40:1, which is well below the 0.50:1 FSR rate stipulated for the R3 zoned land. In calculating the FSR across the site, that part of the site zoned RE1 has been excluded.

Compliance with the floor space ratio development standard is also considered unnecessary in this instance as the 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 Floor Space Ratio Development Standard**

The objectives of the floor space ratio standard in Clause 4.4(1) are:

- (a) to provide effective control over the bulk of future development,*
- (b) to protect the environmental amenity and desired future character of an area,*
- (c) to minimise adverse environmental impacts on adjoining properties and the public domain,*
- (d) to optimise development density within easy walk of the railway stations and commercial centres*

In terms of objective (a), works proposed (under a separate planning approval) within the R4 High Density Residential zoned portion of the site will have a FSR of 0.20:1. The overall FSR when taking into account the R3 and R4 zoned land of the school, and the proposed gross floor area over the site, the re-development of the school will have a FSR of 0.40:1, which is well below the 0.5:1 FSR rate stipulated for the R3 zoned land. It is considered that an overall FSR for the site of 0.40:1 is reasonable and appropriate in this instance.

Building C has been cut into the site on the western side with the ground sloping up to Napier Street. The effectively which reduces apparent the scale of the building in relation 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 rather than a three storey building.

In terms of objective (b), the proposal has been designed having regard to the environmental amenity and the desired future character of an area. 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 designed to provide an efficient built form responding to contemporary teaching techniques without resulting in adverse impacts.

In terms of objective (c), with respect to the bulk and scale of the development, 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. Some shadowing will occur on Napier Street or within the Pat O'Conner Reserve, and some 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. Refer to **Figure 2** below for shadow diagrams.

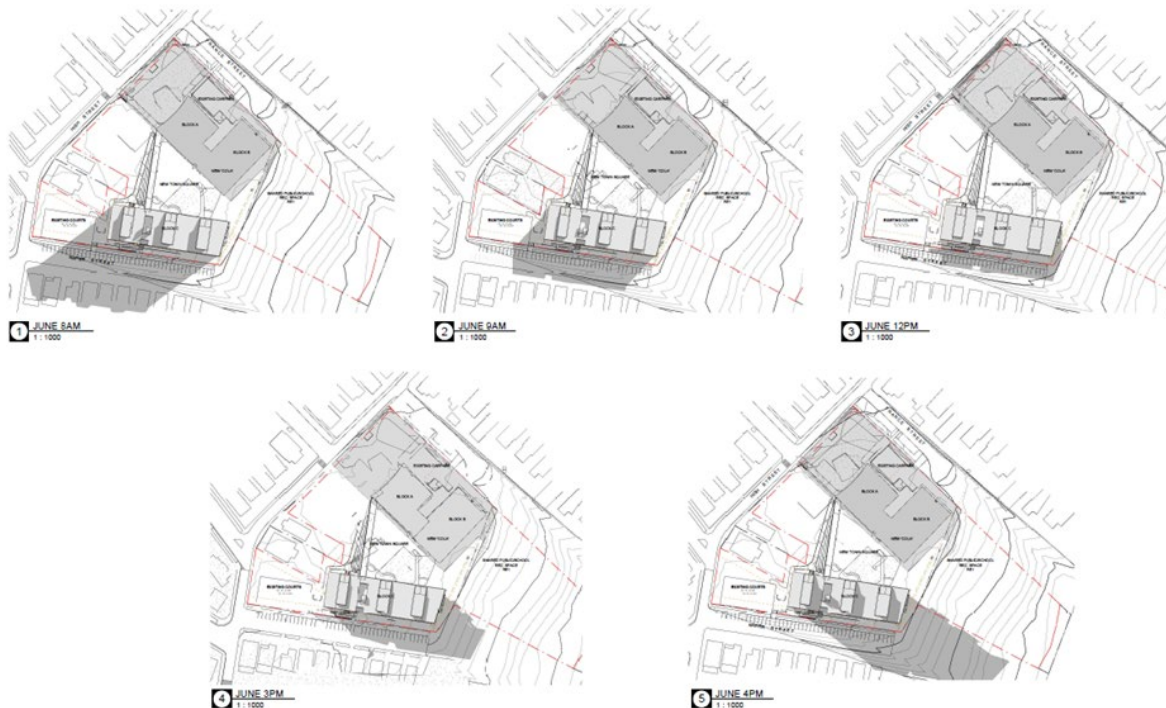


Figure 2: Overshadowing diagrams for Winter Solstice between 8am and 4pm

Specifically, the residential properties to the south, across Napier Street are not adversely affected in terms of overshadowing impacts. Privacy/overlooking impacts have been mitigated through design features, sill heights and screen landscaping. In terms of the bulk and scale of the development, Block C has been designed having regard to the character of the area, the 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. This reduces the scale of the building to adjacent residential properties to the west and along Napier street, with an aim to be more in keeping with the scale of nearby development.

In terms of objective (d), the school is located within 950m or a 10 minute walk to Canterbury train station. The proposed overall density is considered suitable for the site and will meet the future needs of the primary school for the local residents of Canterbury.

### **Objectives of the Zones**

The Land Use Table of Canterbury LEP 2013 states the zones 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 specifically address density in relation to the housing needs and types with respect to the residential environment. The objectives also 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 floor space ratio proposed with the R3 zoned portion of the site.

### **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 is not inconsistent with the character of the area and will not impact on amenity. The school re-development provides for a high quality learning environment that enhance 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 FSR variation does not hinder the protection of the natural environment or hinder the implementation of ecological sustainability within the site through the development process.
- (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 within the R3 Medium Density zoned portion of the site results in an FSR of 0.82:1, resulting in a development that exceeds the maximum FSR control of 0.5:1. The proposed FSR is 0.82:1, a maximum variation of 0.32:1 or 64%.

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 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 as the building which results in variation to the FSR control is specific to the education use of the site to meet the needs to 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 floor space ratio 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 0.5:1 maximum floor space ratio development standard as it applies to that part of the site zone R3 is unreasonable and unnecessary in the circumstances of the case.

Strict compliance 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 additional built form on that part of the site zone R4. This would be an inferior design and operational outcome. In consideration of the overall re-development of the site, and the overall site area of the school (being the R3 and R4 zoned land), the school will have a FSR of 0.40:1 which is well below the 0.50:1 which applies to the R3 zoned land.

The non-compliance with the maximum FSR does not generate any adverse overshadowing impacts or loss of solar access to adjoining properties. The bulk and scale of the development is considered appropriate in this instance, the building has been designed to provide an efficient built form responding to contemporary teaching techniques without resulting in adverse impacts.

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: \_\_\_\_\_

