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Clause 4.6 Variation Request to the Height of Buildings Development Standard under Clause 4.3 of Bathurst Regional LEP 2014

Staged Alterations and Additions to St Stanislaus' College
220 Bentinck Street, Bathurst

Prepared for: St Stanislaus' College
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1 Introduction

1.1 Commission

DFP has been commissioned by St Stanislaus' College ("the Applicant") to prepare a written request ("Variation Request") pursuant to cl4.6 of *Bathurst Regional Local Environmental Plan 2014* (the LEP) for the proposed staged alterations and additions to St Stanislaus' College (the Proposal) at 220 Bentinck Street, Bathurst (the Site).

The Proposal is described in detail in Section 4 of the SEE accompanying the development application and includes the construction of improved vertical access to College buildings including lifts and associated balconies.

These new building elements of the Proposal exceed the 9m height of buildings development standard that applies to the Site under cl4.3 of the LEP having a maximum height of 14.7m.

Notwithstanding the contravention of the development standard, the Proposal is to provide improved access to existing buildings, is considered to be consistent with the objectives of the development standard and the objectives of the zone within which the development is to be carried out and there are sufficient environmental planning grounds to justify the contravention in this instance including accessibility, the location of the lifts/balconies on the internal facing elevations of the College and the height of the existing College building.

This written request has been prepared to provide a detailed assessment in accordance with the statutory requirements of cl4.6 so that the consent authority can exercise its power to grant development consent, notwithstanding the contravention to the height of buildings development standard.

1.2 Material Relied Upon

This Variation Request has been prepared by DFP based on the Architectural Drawings prepared by Stanton Dahl and other supporting drawings and reports which are submitted with the development application.

This Variation Request should be read in conjunction with the detailed environmental planning assessment contained in the SEE and other documents submitted with the application.

2 The Nature of the Variation

Clause 4.3 and the Height of Buildings Map of the LEP designates a maximum height of building of 9m for that part of the Site of which the development is proposed (see **Figure 1**).



Figure 1 Extract of Height of Buildings Map (LEP)

The LEP defines **height of building** as:

building height (or **height of building**) means—

- (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 does not comply with the height of building development standard with a maximum height of 14.7m where the LEP prescribes a maximum height of 9m being a variation of 5.7m (63.3%).

The extent of the non-compliance is shown in extracts of the elevations at **Figure 2** to **Figure 5**.



Figure 2 Proposed Internal Courtyard Elevation (Non-Conforming Lift/Balcony Shaded Red)

2 The Nature of the Variation



Figure 3 Proposed Internal Courtyard Elevation (Non Conforming Lift/Balcony Shaded Red)



Figure 4 Proposed Rear Elevation of Block A and Block B (Non-Conforming Lift Shaded Red)



Figure 5 Proposed Rear Elevation of Block F (Non-Conforming Lift Shaded Red)

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3.1 Clause 4.6(1) - Objectives

Clause 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,*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”), Preston CJ ruled that there is no provision that requires the applicant to demonstrate compliance with these objectives or that the consent authority needs to be satisfied that the development achieves these objectives. Furthermore, neither cl4.6(3) nor cl4.6(4) expressly or impliedly requires that development that contravenes a development standard “*achieve better outcomes for and from development*”.

Accordingly, the remaining subclauses of cl4.6 provide the preconditions which must be satisfied before a consent authority can grant development consent to a development that contravenes a development standard imposed by an environmental planning instrument. These preconditions are discussed hereunder.

3.2 Clause 4.6(2) – Consent May be Granted

Clause 4.6(2) provides that:

- (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.*

The height of buildings control in cl4.3 of the LEP is a development standard, 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:

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

The height of buildings development standard is not expressly excluded from the operation of cl4.6 (see **Section 3.7** and **Section 3.9**).

3.3 Clause 4.6(3) – Consent Authority to Consider Written Justification

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

- (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.*

This report and information referred to herein, constitute a written request for the purposes of cl4.6(3) and the following subsections address the justifications required under that subclause.

It will be a matter for the consent authority to consider this written request prior to determining the DA and as discussed in the Judgment of *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (‘Al Maha’) the consent authority must, in determining the DA, clearly

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enunciate that it has satisfied itself of the matters in cl4.6(4). In the case of a consent authority, this might be by way of a statement in the reasons for approval authored by the consent authority.

3.4 Clause 4.6(4)(a) – Consent Authority to be Satisfied

Clause 4.6(4) provides as follows:

- (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.*

The following subsections of this written request address these matters.

3.4.1 Clause 4.6(4)(a)(i) - Written request to adequately address the matters in cl4.6(3)

Clause 4.6(4)(a)(i) requires the consent authority to be satisfied that this written request adequately address the matters in cl4.6(3) as follows:

- (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.

Compliance is Unreasonable or Unnecessary

In his Judgment of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* ('Micaul'), Preston CJ confirmed that an established means of demonstrating that compliance with a development standard is unreasonable or unnecessary is to establish that a development would not cause environmental harm and is consistent with the objectives of the development standard.

It is considered that the components of the proposed development that contravene the height of buildings development standard will not cause environmental harm as described in Error! Reference source not found..

Table 1 Analysis of Environmental Harm

Issue	Discussion
Heritage	<p>The HIS accompanying the DA provides the following comments on the lift/balconies and clearly demonstrates no adverse heritage impact:</p> <ul style="list-style-type: none">• Block A: A new lift would be built on the rear outside of the building. This would bring these rooms into current use with no adverse heritage impact.• Block C: A steel-framed accessways with stairs and a lift would be built on the south-western side of the McAuliffe / O'Reilly wing... This work is essential for this large three storey building with timber-framed floors to be deemed to comply with the NCC for egress. This walkway and vertical links have been designed with care for the minimum heritage impact in achieving requirements.• Block E and Block F are acceptable due to the later period of construction of the buildings with no adverse heritage impact identified. <p>The proposed variation will not cause environmental harm in relation to heritage.</p>

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Table 1 Analysis of Environmental Harm

Issue	Discussion
Solar	The proposed lifts and balconies sit beneath the height of the existing buildings and will not result in any additional overshadowing of the internal courtyard area. Further, it is noted the proposed balconies would provide beneficial shading from the western sun. The proposed variation will not cause environmental harm in relation to solar access.

The proposed development is considered to be consistent with the objectives of the height of buildings development standard as described in **Table 2**.

Table 2 Assessment against the objectives of the height of buildings development standard

Objective	Assessment
(a) <i>to establish the maximum height limit to which buildings may be erected in certain locations.</i>	The proposed non-conforming elements are proposed to provide access to an existing building. That is, the proposed development does not increase the overall or perceived height of St Stanislaus' College. In this regard, the proposed development does not offend the objective of the LEP.

Sufficient Environmental Planning Grounds

In the Judgment of *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* ("Four2Five") Pearson C indicated there is an onus on the applicant to demonstrate, through the written request, that there are "*sufficient environmental planning grounds*" such that compliance with the development standard is unreasonable or unnecessary. Furthermore, the environmental planning grounds must be particular to the circumstances of the proposed development rather than public benefits that could reasonably arise from a similar development on other land.

In Initial Action, Preston CJ indicated that it is reasonable to infer that "*environmental planning grounds*" as stated in under cl4.6(3)(b), means grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s1.3 of the EP&A Act.

The site-specific environmental planning grounds that support the proposed variation to the height of buildings development standard in this circumstance are summarised in **Table 3**.

Table 3 Environmental planning grounds supporting the proposed variation

Environmental Planning Ground	Discussion
Visual Impact	The proposed location of the height variation is either to the rear façade (Block A and Block F) or facing an internal courtyard (Block C and Block E). There is no height variation which would be visible from Bentinck or Brilliant Street which is the principal façade and landmark elevation of the College buildings.
Heritage	The proposed external lifts, balcony and stair additions minimise the intrusions into the existing heritage item. The provision of lift shafts etc. within the existing building would have resulted in the removal of significant additional heritage/building fabric. In addition, the HIS concludes that the proposed external lifts will have no adverse heritage impact.
Accessibility	The proposed non-conforming elements will provide for improved accessibility to all floors of the existing building. Compliance could be achieved by removing lift access to the upper most level however this would not be equitable.
Fire Safety	The proposed non-conforming elements will provide for improved fire egress from all levels of Building C. It is preferable to provide the most straightforward path of travel in the event of a fire and splitting the path of travel (by internalising fire stairs

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Table 3 Environmental planning grounds supporting the proposed variation

Environmental Planning Ground	Discussion
	for a portion (for example)) would not be preferable (noting the above heritage implications of additional internal 'shafts').
Existing Height	The proposed location of the height variation is beneath either the eave or ridgeline of the existing school buildings and will not be disproportionate or out of character with the existing building.
Materiality	The proposed materiality of the non-conforming elements is lightweight steel and glazing to ensure the heritage item behind remains prominent and to reduce the visual appearance of the additions. This in effect, works to reduce the impacts of the new additions.

In addition, in Micaul and Initial Action, Preston CJ clarified that sufficient environmental planning grounds may also include demonstrating a lack of adverse amenity impacts. As summarised in Error! Reference source not found., the proposal satisfactorily manages and mitigates adverse amenity impacts.

Accordingly, it is considered that there are sufficient environmental planning grounds to justify the contravention of the height of buildings development standard in this instance.

3.4.2 Clause 4.6(4)(a)(ii) – Public Interest

Pursuant to cl4.6(4)(b) and as discussed by Preston CJ in Initial Action, if the development is consistent with the objectives of the development standard and the objectives of the zone, the consent authority can be satisfied that the development will be in the public interest.

An assessment of the proposal against the objectives of the height of buildings development standard is provided at **Table 2** and an assessment of the proposed development against the objectives of the SP2 Zone that applies to the Site, as expressed in the Land Use Table to cl2.3 of the LEP is provided in **Table 4**.

Table 4 Assessment against the objectives of the SP2 Zone

Objective	Assessment
(a) <i>To provide for infrastructure and related uses.</i>	The proposed height variation would enable the upgrading of an existing educational establishment which is a form of community infrastructure being consistent with this objective of the zone.
(b) <i>To prevent development that is not compatible with or that may detract from the provision of infrastructure.</i>	The height non-conformance would not detract from the ability of the subject site or adjoining sites to provide for infrastructure. The proposed development is directly related to, and for the purpose of promoting and advancing, existing infrastructure (educational establishment), consistent with this object of the zone.

These assessments demonstrate that the proposed development is consistent with the relevant objectives of the development standard to be varied and the relevant objectives of the zone within which the development is to be carried out. Accordingly, it follows that the proposed development is in the public interest.

3.5 Clause 4.6(4)(b) –Concurrence of the Secretary

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under cl64 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 cl4.6 of the

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Standard Instrument – Principal Local Environmental Plan (the SILEP) or SEPP 1 subject to certain conditions.

The LEP adopts cl4.6 of the SILEP and therefore that prerequisite of the Notice is met.

Condition 2 of the Notice provides that concurrence may not be assumed by a delegate of the consent authority (i.e. - a Council Officer) if the development will contravene a development standard by more than 10%. In that instance, the application must be determined by the relevant Local Planning Panel (LPP) unless:

- the proposed development is regionally significant development, in which case the relevant regional or Sydney district planning panel will be the consent authority and may assume concurrence (this also applies to State Significant Development which has been delegated to a regional or Sydney district planning panel); or
- a Minister is the consent authority.

The proposed development is regionally significant development and will be determined by the Western Regional Planning Panel.

3.6 Clause 4.6(5) - Concurrence Considerations

Clause 4.6(5) is not relevant in this instance as concurrence can be assumed pursuant to the Notice.

3.7 Clause 4.6(6) – Subdivision on Certain Land

Clause 4.6(6) is not relevant to the proposed development as it does not relate to subdivision of land.

3.8 Clause 4.6(7) – Keeping of Records

Clause 4.6(7) is an administrative clause requiring the consent authority to keep a record of its assessment under this clause after determining a development application.

3.9 Clause 4.6(8) – Restrictions on use of cl4.6

Clause 4.6(8) of LEP states as follows:

- (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.*
 - (caa) *clause 5.5,*
 - (ca) *clause 6.1, 6.2, 6.3, 7.7, 7.8 or 7.11.*

Clause 4.6(8) is not relevant to the proposed development as it is subject to a DA and does not constitute Complying Development, does not seek to vary any requirements of SEPP BASIX and does not relate to a standard under cl5.4, 5.5, 6.1, 6.2, 6.3, 7.7, 7.8 or 7.11.

4 Conclusion

The proposed development contravenes the height of buildings development standard that applies to the Site under cl4.3 of the LEP.

This written request to vary the development standard has been prepared in accordance with cl4.6(3) of the LEP and demonstrates that strict compliance with the development standard is unreasonable and unnecessary because, notwithstanding the contravention of the height of buildings development standard, the proposed development is consistent with:

- the objectives of the development standard pursuant to cl4.3 of the LEP as the additions will provide improved access/egress to an existing building; and
- the relevant objectives of the SP2 Zone as it relates to, and promotes the advancement of, existing social/community infrastructure.

Therefore, the proposed development is in the public interest.

In addition, this written request outlines that there are sufficient environmental planning grounds to justify the contravention of the height of buildings development standard including:

- Retaining heritage fabric;
- The location of the breaches minimises visual impact and are suitable for its context;
- Improving accessibility and fire egress; and
- The use of suitable materials to minimise bulk and scale.

Accordingly, this written request can be relied upon by the consent authority when documenting that it has formed the necessary opinions of satisfaction under cl4.6(4) of the LEP.

The consent authority can assume the concurrence of the Secretary pursuant to the Notice issued on 21 February 2018 and can exercise its power pursuant to cl4.6(2) to grant development consent to the proposed development notwithstanding the contravention of the development standard.