

# REQUEST TO VARY A DEVELOPMENT STANDARD - BUILDING HEIGHT AND FLOOR SPACE RATIO

Clause 42 of the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* (Education SEPP), allows development consent to be granted for a development even if the development contravenes a development standard imposed by an environmental planning instrument. The Clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for the development.

Clause 42 states:

*Development consent may be granted for development for the purpose of a school that is State significant development even though the development would contravene a development standard imposed by this or any other environmental planning instrument under which the consent is granted.*

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgements set out the manner in which variations to development standards are required to be approached. These tests and considerations can also be applied to give guidance to the preparation of a variation request under Clause 42 of the SEPP and these have been addressed in the paragraphs below.

The correct approach to preparing and dealing with a request under clause 4.6 is outlined by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118. These principles have been summarised below:

- [13] - The permissive power in cl 4.6(2) to grant development consent is subject to conditions in Clause 4.6(4).
- [14] - the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii).
- [15] - The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.
- [16] - As to the first matter required by cl 4.6(3)(a), the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary has been summarised in *Wehbe v Pittwater Council*.
- [17] - The first and 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.
- [18] - A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.
- [19] - A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

- [20] - A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable.
- [21] - A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary.
- [22] - These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways.
- [23] - As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature.
- [24] - The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter.
- [25] - The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority to form the requisite opinion of satisfaction.
- [26] - The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out.
- [27] - It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.
- [28] - The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)).
- [29] - On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act.

Accordingly, this written variation request addresses the local provisions of Clause 42 of the SEPP with respect to the Building Height and FSR controls, together with the relevant principles established by the Land and Environment Court, as they apply to Santa Sophia Catholic College.

## PLANNING CONTEXT – THE GABLES REZONING

Celestino has initiated a request to The Hills Shire Council to amend *The Hills Local Environmental Plan* (LEP) as it applies to the Box Hill North Town Centre to increase the maximum floor space ratio from 1:1 to a range of 1:1 to 2:1, and increase the maximum height of buildings from 16m (approximately 4-5 storeys) to a range of 16m to 27m (up to 8 storeys).

A Gateway Determination for PP\_2018\_THILL\_012\_00 was issued on 22 January 2019 stating that the planning proposal should proceed subject to conditions. The timeframe for completing the LEP amendment is 9 months from the date of the Gateway Determination. The exhibition period for the planning proposal ended on 23 August 2019.

At the Hills Shire Council meeting on the 10 September 2019 (refer Appendix J) PP\_2019\_THILL\_012\_00 was considered. Council unanimously voted for this to proceed to finalisation, subject to several post-exhibition amendments.

## DEVELOPMENT STANDARD TO BE VARIED

### Height

Clause 4.3 of the *Hills Local Environmental Plan 2012* (HLEP 2012) stipulates the maximum height for a building on any land on the site is not to exceed the maximum height shown for the land on the Height of Buildings Map, which shows a maximum of 16m.

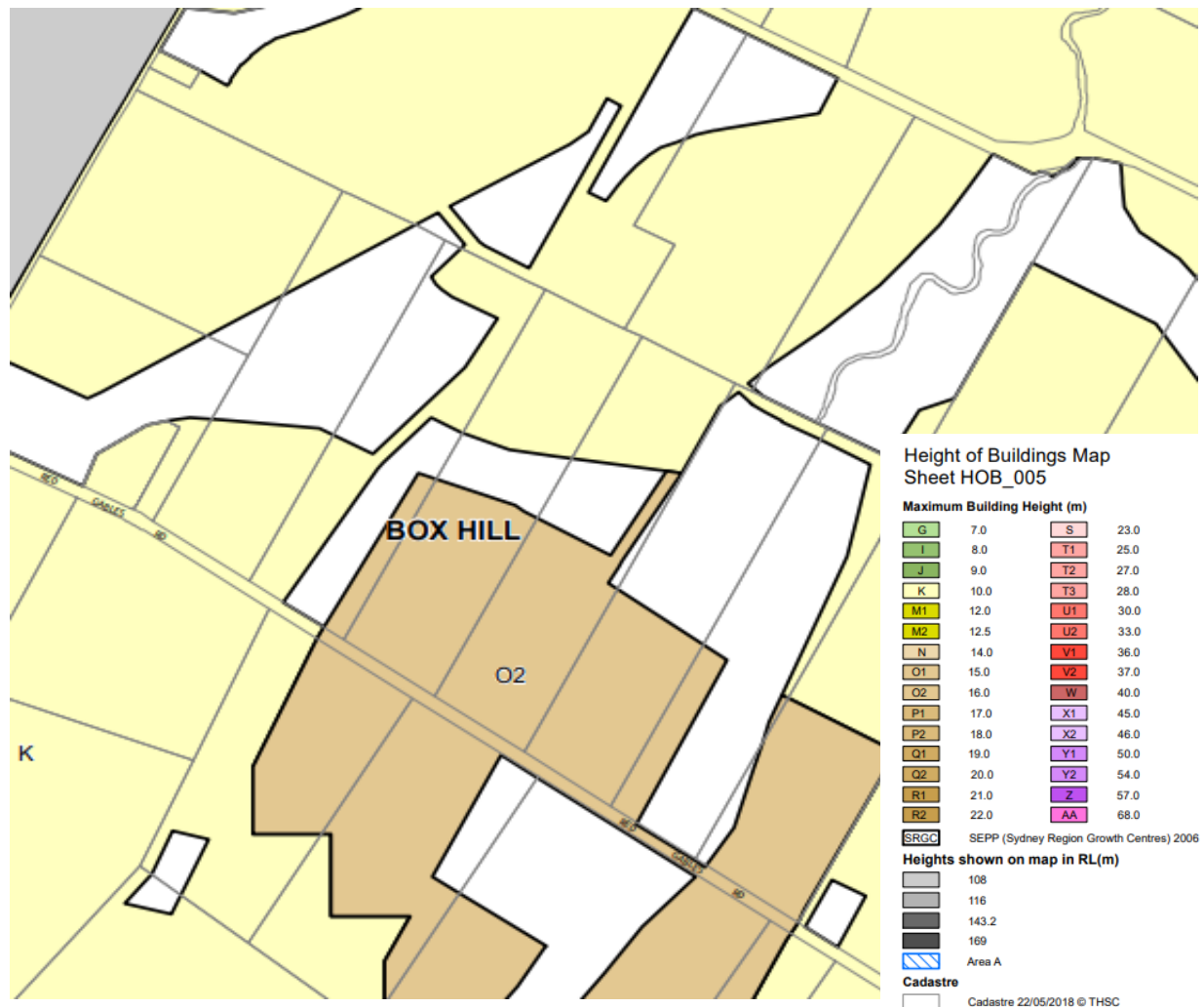
Building Height is defined under the HLEP as:

(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.*

Figure 1 – HOB Map 005



Source: HELP 2012

The school has a proposed total height of 29.9m (including plant) which exceeds the current height control and reflects the density and scale proposed under PP\_2018\_THILL\_012\_00, which has received a Gateway Determination to proceed.

Figure 2 below highlights the areas of the development that exceed the LEP height controls.



## IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD?

### Clause 42 of the Education SEPP

Clause 42 of the Education SEPP states:

*Development consent may be granted for development for the purpose of a school that is State significant development even though the development would contravene a development standard imposed by this or any other environmental planning instrument under which the consent is granted.*

Clause 42 of the Education SEPP negates the need for a cl4.6, and legal advice on other projects has indicated that a cl4.6 is not required for SSD schools. Notwithstanding this, consultation with DPIE has indicated that justification for the height non-compliance is required in a format consistent with a Clause 4.6 variation request.

Section 1.4 of the EP&A Act defines a Development Standard as:

*“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 control is contained within Clause 4.3 HLEP 2012 and is therefore considered a development standard capable of being varied under the provisions of Clause 42 of the SEPP.

## WHAT IS THE UNDERLYING OBJECT OR PURPOSE OF THE STANDARD?

The proposal has considered the objectives of Clauses 4.3 of the HLEP 2012. These are outlined below:

- a) *to ensure the height of buildings is compatible with that of adjoining development and the overall streetscape.*
- b) *to minimise the impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas*

## COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

It is considered that the strict compliance with the height development standard is unreasonable and unnecessary, and this is demonstrated further below.

### 1. The General Objectives of the Standard are Met

The proposal responds to the objectives outlined above as:

- The site is currently a paddock with no streetscape. This site context is changing with Celestino's town centre development.
- The proposal is compatible with the scale of future apartment and retail development in the Town Centre.
- The proposed development is consistent with objectives of Clause 4.3 of the HLEP, these being:

- The multi storey school design is compatible with the future built form of the Gables Town Centre. The adjacency of the proposal to the future town centre building means that the building will be an appropriate and suitable scale in its immediate context.
- BVN has undertaken master planning co-ordination with the neighbouring development to the south. The future land use of the building to the south is not yet confirmed. However, BVN and Celestino has tested the design as though it will be residential. The master planning has confirmed that a potential building will achieve compliance with SEPP 65 and the Apartment Design Guide in terms of building separation, solar access, cross ventilation and open space.
- There are no views across the site that will be impacted by the proposal.
- The proposal is consistent with the objectives of the B2 Local Centre Zone as it will provide social infrastructure to serve the needs of the future Box Hill North residents as well as the broader community. It will provide construction, operation and maintenance jobs serviced by future public transport connections.

## **2. Height Exceedance Stemming from Site Characteristics and Education Requirements**

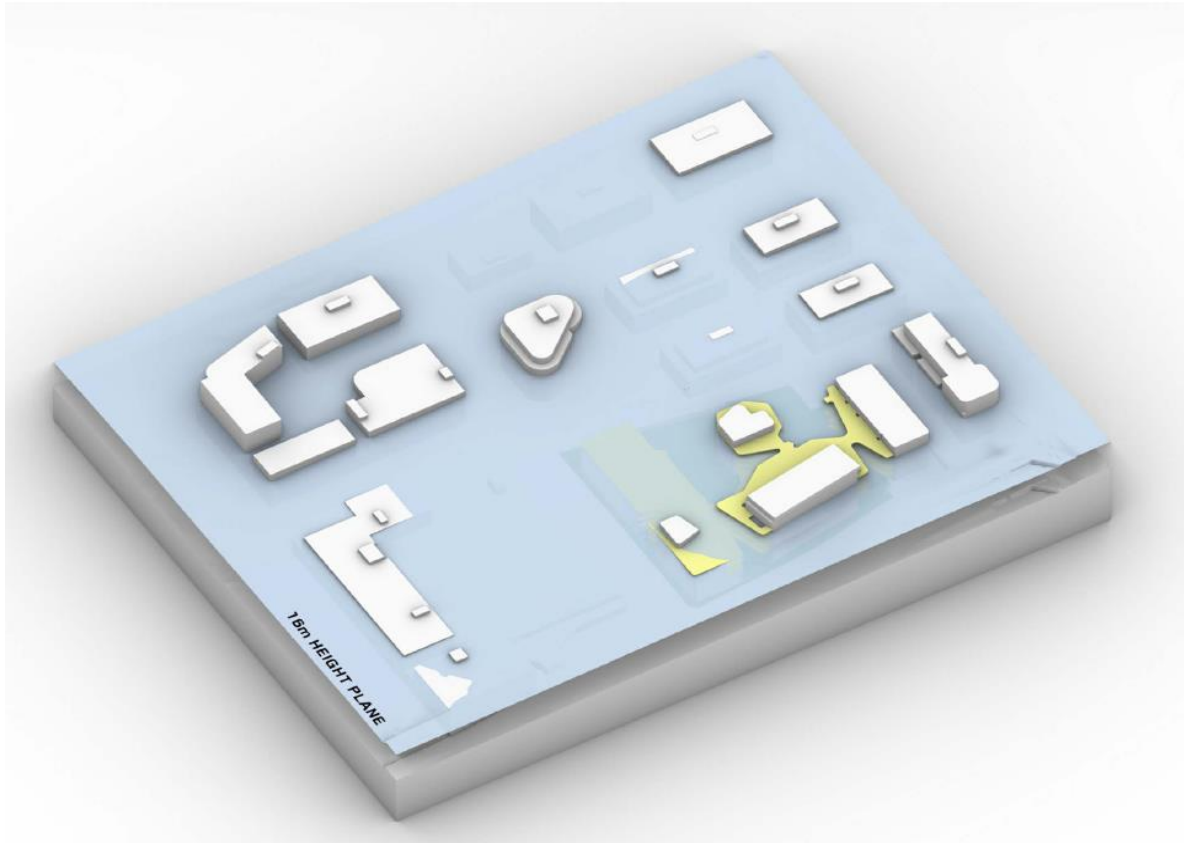
### **Future Surrounding Development:**

The vertical design of the college responds to the proposed building heights and typologies proposed across the town centre under the Celestino Planning Proposal. These building heights will facilitate smaller floor plates allowing for improved amenity and public domain outcomes in the town centre.

For the sites immediately to the south and to the east of the college site, the proposed maximum building height is 27m. The proposed height of the college will be consistent with the modulation of building heights sought across the town centre (Refer Figure 3 below). The adjacency of the proposal to the future town centre also means that the building will appear of an appropriate and suitable scale in its immediate context.



Figure 3 – Surrounding Height Analysis



Source: BVN Architects

The current proposal is for a for approximately 15,000m<sup>2</sup> of floor space across a part five and part six storey building. The building will present as three main hubs connected by terraced courtyards and garden spaces. The maximum height of the school will be 29.9m above ground level.

#### **Multi-storey Design Approach**

Locally, high-rise schools are a relatively new concept, however Section 8.12 of the Architectural Design Report prepared by BVN outlines several precedents of high-rise schools as exemplars of the design concept. These include the following:

- South Melbourne Primary
- Adelaide Botanical High School, Adelaide
- Haileybury City Campus, Melbourne
- Arthur Phillip, Parramatta

The above examples consist of campus's over five storeys high, with school populations ranging between 500 – 3000 students. These existing schools employ several strategies to provide suitable amenity for students and staff including the provision of roof terraces, large atrium spaces which are day-lit, designated sports areas, and adjacent terraces to classrooms with high visibility.

These strategies are reflected within the projects design principles, which emphasise the utilisation of topography to create the following:



### **Defined Spaces**

The design utilises a change in level to create the necessary delineations between public and private school areas and in turn the various age groups. The tiered topography also allows functions to be stacked below the roof outdoor space.

### **Clear and Intuitive Movement**

Walkways and vertical transport will be legible with wayfinding informed by the architecture. The vertical circulation at Santa Sophia is supported by 3 key circulation stairs, 2 additional escape stairs and 3 lifts. These have been equally disbursed between the South, Central and North building to ease congestion. Stairs 1, 3 and 6 are designed as the central access stairs for the 3 buildings. Stairs 4, 5 and 7 are utilised for escape but will be utilised as secondary vertical circulation.

### **Variety in Outdoor Areas**

The design maximises opportunities for outdoor learning and play spaces by creating various courtyard and terrace spaces on and between the built form. Outdoor spaces are intended to be sheltered but to also have access to daylight.

The current massing is considered a superior education and urban design outcome; conceived through a series of iterative workshops the design team, the client and The Gables developer (Celestino) who worked through several proposals to arrive at the current form. The school is built across five storeys to maximise opportunities for outdoor learning and play space in courtyards, and on terrace spaces on and in between buildings. The design and adjacency of classrooms to outdoor spaces is consistent with and supported by CEDP research on effective learning environments (refer section 3.1.2 of the RTS document; *Towards Effective Learning Environments in Catholic Schools (TELE): An Evidence-based Approach project*).

The multi-storey design of the school means that students will have the opportunity for increased incidental movement and exercise, as they will be required to walk up and down stairs to reach different areas of the school. An added benefit of this design is that the negotiation of stairs, slides and climbing frames aides in the development of gross motor skills, particularly for younger students.

The built form will also facilitate the CEDP's open space design approach, which aims to provide optimal play environments which balance space, visual supervision, potential social interaction and in early years, play equipment (refer section 3.1 of the RTS report for further details). The school provides all the required open space for its students within the school boundary. The amount of open space provided equates to approximately 7m<sup>2</sup> per student. Further, the development achieves a total provision of deep soil of 823.97m<sup>2</sup> or 7.2% of the total site area.

The design principles that have been applied to the concept have generated a building that will positively impact on its immediate proposed neighbourhood. The mass and scale of the proposed building is in keeping with the height and scale of the proposed multi-unit residential blocks in the immediate vicinity of the school.

## **3. Design Excellence is Achieved:**

As noted above, the scheme was subject to the State Design Review Process (SDRP), administered by Government Architect NSW.

The proposal will respond to the Design Quality Principles outlined in Schedule 4 of the Education SEPP, as follows:

- Principle 1 –context, built form and landscape: The proposal includes new built form and landscaping elements. The new built form will consider the relationship between proposed buildings and other developments planned for the town centre.

- Principle 2 –sustainable, efficient and durable: The proposal will adopt a range of ESD initiatives, and an ESD Report will accompany the EIS. The proposal will also provide positive social and economic benefits for the local community by ensuring that teaching facilities are meeting contemporary educational needs, and new residential communities are adequately serviced by infrastructure. The proposal will be developed with consideration for the Government Architect of New South Wales (GANSW) Environmental Design in Schools.
- Principle 3 –accessible and inclusive: The proposal is capable of complying with relevant provisions for accessibility.
- Principle 4 –health and safety: Crime Prevention Through Environmental Design (CPTED) measures will be incorporated into the design, operation and management of the site to ensure a high level of safety and security for students and staff.
- Principle 5 –amenity: The proposal will contain high quality facilities, spaces and equipment for use by students and staff. These will provide students with an enhanced learning environment.
- Principle 6 –whole of life, flexible and adaptive: The proposal involves construction of new classrooms and associated facilities, which will be designed to ensure flexibility and longevity.
- Principle 7 –aesthetics: The proposal will have high quality external finishes. The material selection and scale of the proposal are suitable within the setting of The Gables Town Centre.

#### **Flexibility:**

Finally, the proposed building provides facilities to meet the school's immediate and future needs in addition to identifying facilities that could be shared with the wider community when the school is not in operation.

The structural grid utilised in the design of the general learning spaces as well as the specialist learning spaces is flexible to allow for future changes in use over time. The learning spaces have been specifically designed to accommodate a range of learning settings, environments and group sizes and the overall scheme provides a variety of teaching spaces. The mechanical strategy has been designed to adapt to potential changes over the lifecycle of the building.

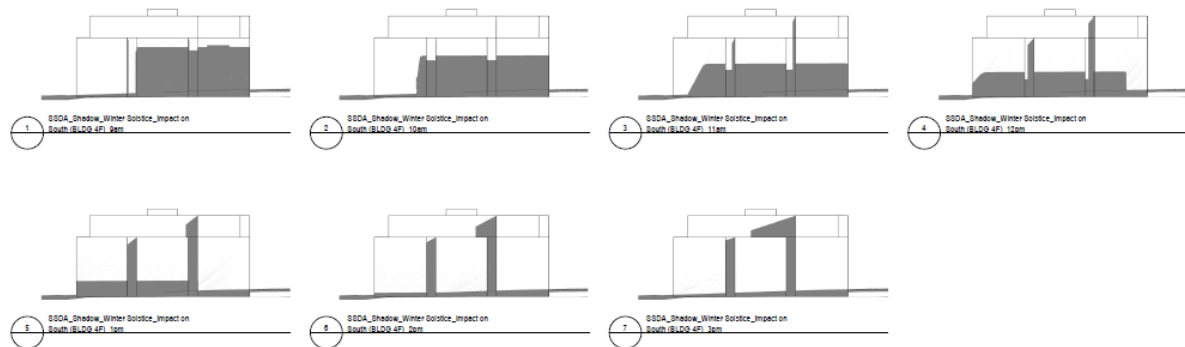
## **THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD**

There are environmental planning grounds to justify contravention of the height of building and floor space ratio development standards in this instance.

#### **Overshadowing**

Shadow diagrams have been prepared by BVN Architects as part of the updated Architectural Package at Appendix C.1. The shadow analysis demonstrates that between 9am and 3pm at Mid-Winter the southern school building will have some shadow impacts on future building to the south (Building 4F).

Figure 2 – Elevation Study – Future Building 4F – Mid Winter



Source: BVN Architects

The shadow analysis testing in the design report (Appendix C) has found that:

- From 9am to 10am there will be some impact to the second and third blocks of the future building. The majority of the first block will receive direct sunlight.
- At 11am, the shadow moves across the building onto the mid-lower sections of the building.
- From 12pm to 1pm the shadow starts to move across and away from Building 4F and across the school's entry way to Red Gables Road. By 1pm, the majority of the impact will be to the lower sections of the three blocks. The shadow will also reach to the top of the parapet as a result of the articulated building form.
- From 2pm to 3pm the shadow moves past the lower building line of Building 4F and over the public domain. Shadows remain on the mid-sections of the building due to the articulation.
- From 9am to 3pm a portion of the southern facing apartments of Building 4F will be in shadow by virtue of their orientation.

The impacts are considered justifiable as the massing of the southern school building has been organised such that the southern-most edge of the adjacent building will receive solar access throughout the day. BVN has also undertaken master planning co-ordination with the neighbouring development to the south to understand their future design intent. As the design of the neighbouring building to the south is yet to be finalised, there is an opportunity for the future design to respond to these conditions, for example by locating the living areas of this building away from the southern façade

Given the above, the proposal is considered to achieve an acceptable outcome in terms of overshadowing.

## Privacy

The proposal has been appropriately designed to prevent adverse privacy impacts on surrounding future residents and future students and staff as:

- The school will continue to generally operate during standard school hours, when most residents are at work. This will ensure privacy is maintained during the early morning, evenings and at night;
- The southern school building will be located adjacent to the most sensitive future land-uses (residential), and these will be adequately separated to meet the ADG guidelines for privacy. The buildings will also be separated by play space and landscaping.

## General Amenity

The design achieves a high level of general amenity as outlined below;

- **Sustainable Development:** The building has been designed to achieve the equivalent of 4 Star Green Star Rating. Further, the materials used in the proposed new building have been specified for their aesthetic, efficiency, low maintenance qualities and durability. Corrugated powder-coated metal sheeting has been used consistently across the facades.

A Green Travel Plan has also been developed for the site, which aims to promote walking and cycling to the school. To prioritise pedestrian traffic and encourage walking and cycling no parking is provided on site.

- **Deep Soil:** The total provision of deep soil for the development is 823.97m<sup>2</sup> or 7.2% of the total site area. These areas are provided across levels 00 and 01 of the development.
- **Accessibility:** The proposal has been assessed against the Deemed-to-Satisfy provisions of the Building Code of Australia 2019 (BCA2019) and is considered to comply with this code.
- **Health and Safety:** The principles of CPTED has been considered in the overall design:
  - Toilets have been grouped and designed as capsule toilets to deter bullying and allow for passive surveillance.
  - An external lighting will be designed for surveillance and visibility outside school hours in line with operation report.
  - The outdoor spaces have been shaped to allow for passive surveillance by staff.
  - The school is proposed as being secure and open in line with its operational plan.
  - External lighting will be used to illuminate external spaces.
  - The school will install security cameras and alarms in line with its operational plan.
- **Natural Light:** The daylight amenity provided to the outdoor spaces of Santa Sofia is good and will provide a comfortable well-lit environment for play, movements, intermittent study and similar tasks. As outlined in the Daylight Study prepared by Steensen Varming at Appendix C, 63% of the outdoor areas achieve 400lux illuminance for at least 50% of school hours throughout the school term. More exposed floors on the upper level of the building achieved higher luminance levels of ~80-90%. Less than 10% of the total outdoor area receives less than 400lux at all times. These levels are in excess of the best practice standard, which would be to achieve 400lux across 40-60% of the total areas for at least 50% of school hours throughout the school term.

## THE PROPOSED DEVELOPMENT WILL BE IN THE PUBLIC INTEREST

- The proposal provides many and varied public benefits to the future students and residents of the Box Hill North Precinct, including:
  - The proposal will result in a high-quality educational environment for students and staff and enables an excellent academic programme;
  - Supports a fulfilling and diverse extra-curricular experience;
  - Provides an inclusive, supportive and secure pastoral environment for both primary and secondary school students; and
  - Provides efficient and environmentally sustainable facilities.
- Subject to the various mitigation measures recommended by the specialist consultants, the proposal does not have any unreasonable impacts on future adjoining development or the public domain in terms of traffic, social and environmental impacts.

- The proposal will make a positive contribution to the built form and to the community within Box Hill North, The Gables and the surrounding area.

For the reasons outlined above, strict compliance with the maximum height of building control is considered unreasonable and unnecessary. And therefore, the request to seek a variation is well-founded and justifiable.

## **CONCLUSION**

The applicant recommends that compliance with the development standard is not required for this development for the following reasons:

- The variation of the development standard will not raise any matter of significance for State or Regional environment planning as it would be unlikely to set a precedent given the specific requirements of educational facilities.
- The proposal is considered appropriate for the site and will result in a high-quality educational environment for staff and students.
- The proposal will be in context with the scale of development envisaged in the Town Centre. Future development will have heights of 27m. If the proposal is made to comply with the current 16m height limit it will be out of context resulting in a poor urban design and built form outcome.
- There are sufficient environmental planning grounds to justify contravening the development standards.
- The proposed heights will not result in detrimental amenity impacts such as overshadowing or privacy, on any future surrounding development.
- The proposal is consistent with the relevant local development parameters as well as strategic planning policies for the site, particularly the NSW State Priorities, The Greater Sydney Regional Plan, A Metropolis of three cities and the Central City District Plan.