



Clause 4.6 Variation Request

Clause 4.3 – Height of Buildings Development Standard Appendix 1 – Oran Park and Turner Road Precinct Plan State Environmental Planning Policy (Sydney Region Growth Centres) 2006

Proposed New Gledswood Hills Public School Development Lot 3 DP 1227491, C The Hermitage Way, Gledswood Hills

1.0 Introduction

This Variation Request relates to the proposed new Gledswood Hills Public School development at Lot 3 DP 1227491, C The Hermitage Way, Gledswood Hills (the Site).

More specifically, the Variation Request relates to clause 4.3 of *Appendix 1 – Oran Park and Turner Road Precinct Plan* (the Precinct Plan) of *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* (the Growth Centres SEPP) which requires that any building that is not a residential flat building must be not more than 9.5 metres in height.

The Variation Request has been prepared pursuant to clause 4.6 of the Precinct Plan as clause 1.9(2) of the Precinct Plan provides that *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1) does not apply to land to which the Precinct Plan applies (which includes the Site).

2.0 Requirements of Clause 4.6

Subclause 4.6(1) of the Precinct Plan 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.”

A response to these provisions is contained within this submission.

Subclause 4.6(2) of the Precinct Plan 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 development standard at clause 4.3 of the Precinct Plan is not expressly excluded from the operation of clause 4.6 and accordingly, consent may be granted to the variation.

Subclause 4.6(3) of the Precinct Plan 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.”*

As discussed in **Section 3.0** below, the proposed development does not comply with the development standard relating to Height of Buildings pursuant to clause 4.3 of the Precinct Plan.

Strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as the proposal achieves the relevant objectives of the development standard which are to limit solar access impacts on surrounding dwellings and their private open spaces, limit bulk and scale and ensure high quality urban forms and to facilitate higher density neighbourhoods whilst minimising residential amenity impacts.

Furthermore, strict compliance would limit the student capacity of the proposed public school facilities such that they would not be able to cater for future demands and therefore result in an inefficient use of the land or alternatively, result in an inferior design outcome where additional smaller buildings would occupy more of the Site, limiting pervious areas and reducing outdoor play spaces.

Subclause 4.6(4) of the LEP 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 Director-General [Secretary] has been obtained.”*

The remainder of this written request to vary the development standard addresses the matters required under subclauses 4.6(4) of the LEP.

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 Director-General [Secretary] before granting concurrence.”*

Notwithstanding that the proposed development is of State significance as it will provide educational facilities to meet the demands of the new residential population in and around Gledswood Hills, 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.

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

3.0 The Nature of the Variation

Subclause 4.3(2) of LEP 2009 sets out the Height of Buildings as follows:

“Except as provided by this clause, the height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.”

The Height of Buildings Map (see **Figure 1**) designates in part a maximum Height of Buildings for the Site of 16 metres for residential flat buildings or 9.5 metres for “All other developments”. The proposed buildings form part of an *educational establishment* and accordingly, the proposal is subject to a maximum building height of 9.5 metres under this control. In addition, the Height of Buildings Map also designates the western edge of the site a maximum Height of Buildings of 17 metres.



Figure 1 Height of Buildings Map – Sydney Growth Centres SEPP Appendix 1

The Precinct Plan defines building height (or height of building) as:

“... the vertical distance between ground level (existing) at any point 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 number of buildings which exceed the maximum building height control of 9.5 metres as

shown on the height plans prepared by Perumal Pedavoli Architects (**Figure 2** and **Figure 3**) with the highest building at 14.4 metres - a maximum variation of 4.9 metres (51.6%).

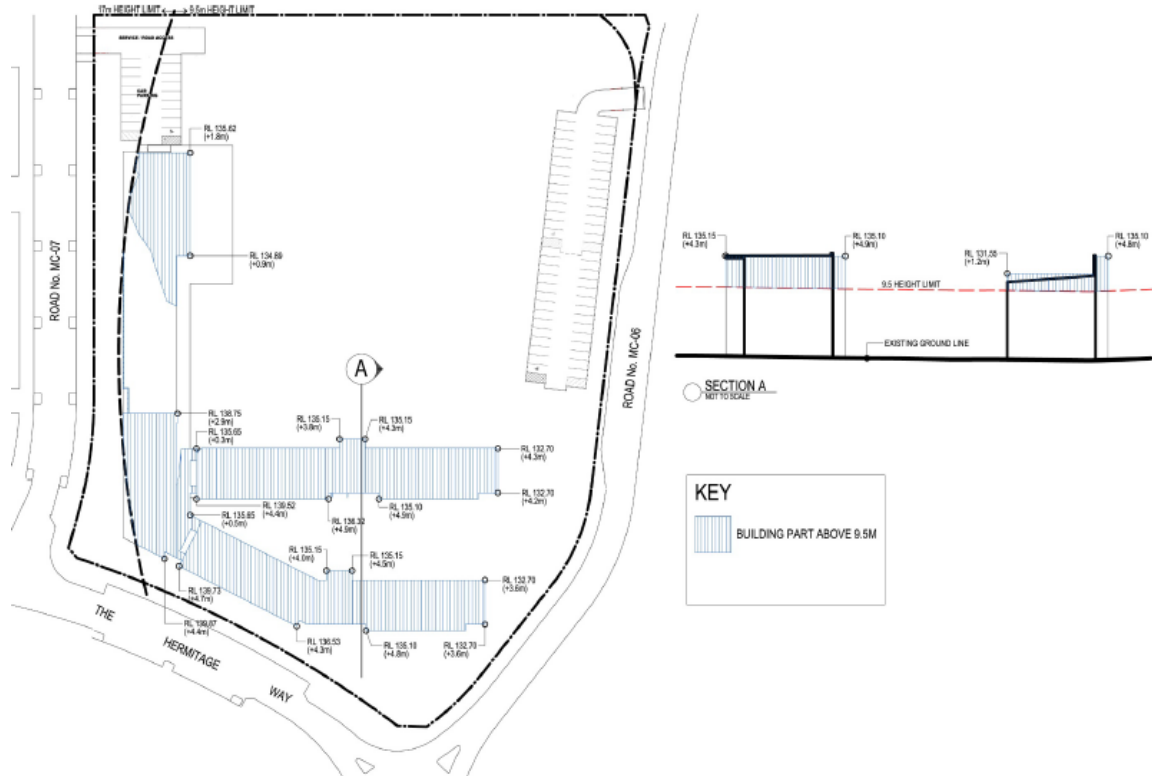


Figure 2 Extract of Building Height Plan (prepared by Perumal Pedavoli Architects)

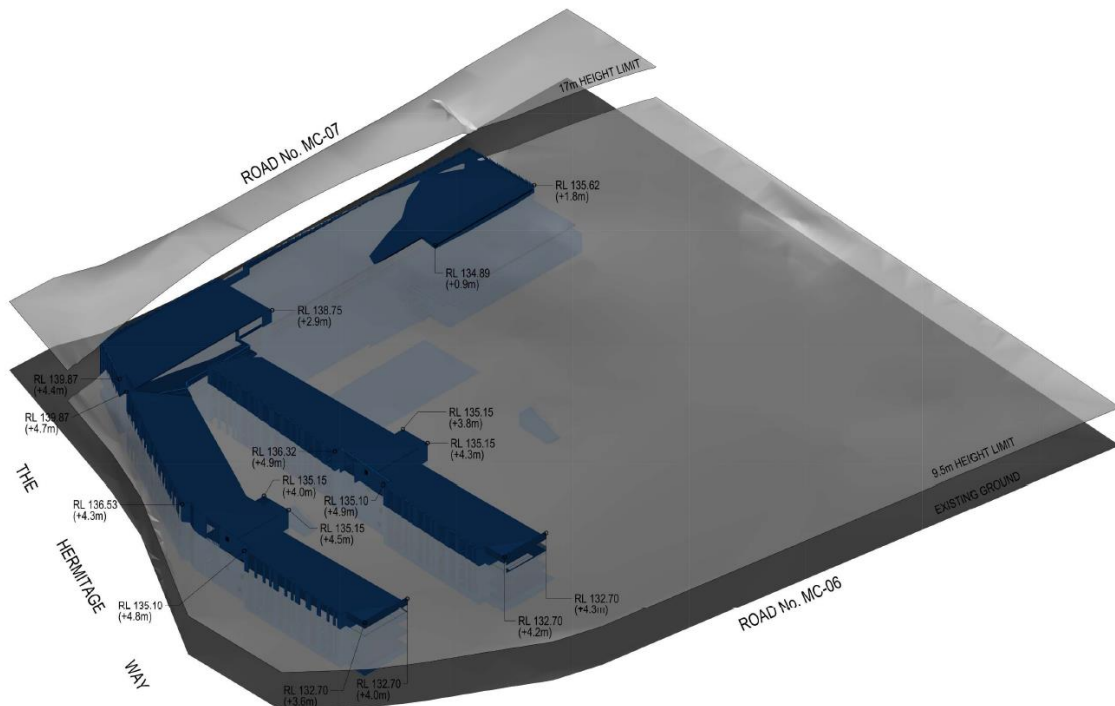


Figure 3 Extract of Building Height Plan (prepared by Perumal Pedavoli Architects)

4.0 Justification for the Variation ('5-Part Test')

The proposed variation to the development standard has been considered in light of the abovementioned objectives, potential environmental impacts and the 5-part test established by the NSW Land & Environment Court and strict compliance is considered to be unreasonable and unnecessary for the reasons expressed hereunder.

The Land and Environment Court of NSW, through the Judgment in *Winten Developments Pty Ltd v North Sydney Council [2001]*, has 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 may be consistent with the aims of the policy.

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.

1. *Is the planning control a development standard?*

Yes, the control requiring a maximum height of buildings of 9.5 metres for development other than residential flat buildings in clause 4.3 of the Precinct Plan is a development standard, defined in section 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".*

2. *What is the underlying object or purpose of the standard?*

The stated objectives of clause 4.3 of the Precinct Plan are as follows:

- "(a) to preserve the amenity of adjoining development in terms of solar access to dwellings, private open space and bulk and scale,*
- (b) to provide for a range of residential building heights in appropriate locations that provide a high quality urban form,*
- (c) to facilitate higher density neighbourhood and town centres while minimising impacts on adjacent residential areas,*
- (d) to provide appropriate height controls for commercial and industrial development."*

The proposal is consistent with the relevant objectives of the development standard under clause 4.3 for the following reasons:

- **Objective (a)** - The proposed school buildings will not result in any adverse overshadowing of surrounding dwellings, residential land or private open spaces of residential dwellings as any shadows external to the Site will fall within the road corridor of The Hermitage Way (to the south) and in part the road corridor of MC-06 as demonstrated by the shadow diagrams prepared by Perumal Pedavoli Architects (see **Appendix 10 to the EIS**).

With regard to bulk and scale, the zoning and height controls for the Site permit residential flat buildings to be constructed up to 16 metres in height. This demonstrates that buildings up to that height are considered appropriate on this Site and surrounding land, subject to their architectural design and the density of development provided across that site. It is considered that the lower height limit of 9.5 metres relates to traditional forms of single dwelling houses and attached dwellings (1 and 2 storeys in height), rather than educational establishments. Therefore the 9.5m building height control is not considered an appropriate development standard against which an educational establishment should be assessed alone.

The school is located opposite the Gledswood Hills Entertainment Precinct, which is zoned B4 Mixed Use and has building heights permitted up to 17 metres. Therefore, in terms of bulk and scale the school buildings will be significantly lower than those located on the opposite side of the Western Side Street. In particular, the corner of The Hermitage Way and MC-07 has been designed as both a corner-highlight and a transition between the built form of the Entertainment Precinct and future development to the north, south and east.

The school buildings transition from 2-3 storeys at the corner of The Hermitage Way and MC-07 in line with the natural land fall to be 3 storeys at the eastern end of the site. However, the 3 storey section of the building is set back a minimum of 16 metres from The Hermitage Way boundary and 9 metres from the Eastern side street boundary. This provides adequate depth to the public domain, given the landscaping proposed along all street frontage.

Accordingly, the proposed new buildings will not detract from the amenity of adjoining development in terms of bulk and scale and are not inconsistent with the overall height limit envisaged for the locality of 16 metres.

Furthermore, the design achieves the requirements of the Educational Facilities Standards and Guidelines (EFSG) resulting in a development which provides:

- Student and Staffing Accommodation of 6,533.02²; and
- Landscaping and play areas of 16,618.12m² (approximately 16m² per student).

Through the concept design analysis process for the project, it was resolved that a partial 3 storey built form was desirable to optimise the balance between internal accommodation spaces and outdoor play areas.

Limiting the new school buildings to 2 storeys would not result in a better planning outcome as approximately 2,411.12m² of floor space within the upper levels of the proposed buildings would need to be relocated to within the proposed outdoor play spaces. This would require the construction of one (1) additional two-storey building thereby;

- Reducing the amount of play space available to students, a reducing the consistency of the proposal with the objectives of the EFSG;
- Increasing site coverage and therefore decreasing soft landscaping and opportunities for WSUD;
- Increasing the cost of the development – i.e. a less efficient use of public money; and
- Reducing the accessibility of the site for mobility impaired students and staff by spreading out classrooms further and increasing travel times and pathways.

- **Objective (b)** – the proposal is not a residential building form, the height of which (as a residential flat building) could extend up to 16 metres. Notwithstanding, for the reasons stated above, the proposal is considered to be of high quality urban form that will be sympathetic to existing and future surrounding residential buildings, as it will have a maximum building height of 14.4 metres.
- **Objective (c)** – the proposal is not for a residential land use but seeks to service surrounding low, medium and high density residential development with a high quality educational establishment in close proximity to the town centre.
- **Objective (d)** – the proposal is not a commercial or industrial land use and this objective is not relevant in this instance.

It is also relevant to consider the objectives of the R1 General Residential Zone and B4 Mixed Use Zone (within which the Site is located) expressed in the Land Use Table to Clause 2.3 of the Precinct Plan as follows:

“Zone R1 General Residential

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To support the well being of the community, including educational, recreational, community, religious and other activities and, where appropriate, neighbourhood shops if there will be no adverse effect on the amenity of proposed or existing nearby residential development.*
- *To allow for small scale kiosks, function centres, restaurants and markets that support the primary function and use of recreation areas, public open space and recreation facilities located within residential areas.*
- *To allow for small scale intensity tourist and visitor accommodation that does not interfere with residential amenity.*
- *To provide for a variety of recreational uses within open space areas.*

Zone B4 Mixed Use

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
- *To encourage development that supports or complements the primary office and retail functions of the Neighbourhood Centre Zone and the Local Centre Zone.*
- *To encourage development providing services to the surrounding community.*
- *To permit development that adds to the vitality and diversity of commercial and retail centres while not prejudicing their principal function.”*

The proposal is consistent with the relevant zone objectives for the following reasons:

- The proposed development will provide public education facilities which will meet the day to day needs of residents and support the well-being of the community and as shown through the community consultation, is a highly sought after facility within the Gledswood Hills community;
- The proposed use of the site as an educational establishment is compatible with the adjoining Entertainment Precinct, having being identified as such within the Masterplan for the Village Centre;
- The proposal will not result in any adverse overshadowing, loss of views or bulk and scale amenity impacts as discussed above; and
- The proposal makes appropriate use of a well located site proximate to residential development, The Gledswood Hills Entertainment Precinct, open public space, cycle and pedestrian pathway networks and public transport services.

Accordingly, notwithstanding the non-compliance with the 9.5 metre building height limit for “Other development” (i.e. not residential flat buildings), the proposal is consistent with the objectives of the development standard and the relevant objectives of the land use zones within which the Site is located.

3. *Is compliance with the standard consistent with the aims of the policy, and in particular, does compliance with the standard tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the Environmental Planning & Assessment Act 1979?*

The non-compliance with the height of buildings development standard allows for an orderly use of the land, which has the capacity to accommodate an educational facility in the form proposed. The construction and use of the educational facility buildings will not give rise to adverse streetscape impacts and will be a better planning outcome for the Site than providing increased impervious areas and reducing outdoor play spaces by constructing additional smaller buildings throughout the rest of the Site.

Under the provisions of State Environmental Planning Policy (Infrastructure) 2007 (Infrastructure SEPP), new educational establishment structures up to a height of 12 metres are permitted as Complying Development. The provisions of the draft *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* (draft Education SEPP) provide a more appropriate context for the expected built form of an educational establishment.

The draft Education SEPP proposes to permit new educational establishment structures up to a height of 22 metres (4 storeys). Thus, the built form proposed in the current proposal is consistent to that which is permissible as complying development under the proposed controls of the draft Education SEPP.

Accordingly, requiring strict compliance with the development standard would be inconsistent with the objectives of clause 4.6 which are to provide flexibility in the application of the standard and to achieve better outcomes for and from development through such flexibility.

Furthermore, it is considered that the relevant Objects of the Act are satisfied as the proposed non-compliance with the development standard:

- will have no negative consequences in terms of the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment; and



- will promote the orderly and economic use and development of the Site in a manner which achieves the objectives of the relevant planning controls.

Accordingly, strict compliance with the development standard is considered to hinder the promotion and co-ordination of the orderly and economic use and development of land comprising the Site.

4. *Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?*

For the reasons expressed in this clause 4.6 variation request, strict compliance with the development standard is considered to be unnecessary and unreasonable in the circumstances of this particular case.

5. *Is the objection well founded?*

This variation request relies upon the first 'way' expressed by Chief Justice Preston in *Wehbe v Pittwater Council [2007]* as follows:

- "1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard.*"

As discussed above, notwithstanding the non-compliance the proposed development achieves the objectives or "purpose" of the development standard under clause 4.3 and will not adversely impact on the natural or built environment and therefore, the objection is considered to be well founded.