

## **Clause 4.6 Exception to Development Standards**

Development standards are a means to achieving an environmental planning objective and can be numerical or performance based. Some developments may achieve planning objectives despite not meeting the required development standards. The planning system provides flexibility to allow these objectives to still be met by varying development standards in exceptional cases.

The proposal seeks to vary a development standard contained within the *Port Stephens Local Environmental Plan 2013*. This application supports the request to vary the standard and, along with the information contained in the Environmental Impact Statement, demonstrates:

- a) Compliance with that development standard is unreasonable or unnecessary in the circumstances of the case.
- b) There are sufficient environmental planning grounds to justify contravening the development standard. This request has been prepared using the Port Stephens Council's Application Form to Vary a Development Standard as a guide to what should be included in the written request.

### **1. Planning Instrument**

The relevant Planning Instrument that applies to the site is *Port Stephens Local Environmental Plan 2013*.

### **2. Clause 4.6 Exception to Development Standards**

Pursuant to Clause 4.3 of *Port Stephens Local Environmental Plan 2013* (LEP 2013) a Building Height (or height of buildings) of 9 metres applies to the site where the development standard requires variation.

The site is zoned **R2 Low Density Residential** pursuant to LEP 2013. The objectives of the **R2 Low Density Residential** zone are as follows:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To protect and enhance the existing residential amenity and character of the area.*
- *To ensure that development is carried out in a way that is compatible with the flood risk of the area.*

The proposed development standard to be varied relates to Height of Buildings (HOB) which is identified in Clause 4.3 of LEP 2013.

(1) *The objectives of this clause are as follows:*

- (a) *to ensure the height of buildings is appropriate for the context and character of the area,*
- (b) *to ensure building heights reflect the hierarchy of centres and land use structure.*

**(2) 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 existing HOB control relating to the site is 9 metres.

The school construction will result in a proposed maximum HOB of 11.50m a variation of 2.50m (approximately 27.77%) from the maximum HOB for a building under LEP 2013. This is the maximum height exceedance of Block I, there are other buildings that also exceed the maximum HOB (to a lesser extent) which are listed below with their corresponding exceedance:

Block A – 2.10m



Block G – 1.70m

Block H – 1.20m

Block J – 1.00m

Clause 4.6 of the LEP 2013 enables Council to consider a variation to development standards including Building Height. The clause provides flexibility in applying certain development standards and aims to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

This correspondence aims to satisfy the requirements of Clause 4.6 to facilitate a variation to the Building Height on the subject site.

### 3. Justification

The proposed variation is made having consideration for each component of Clause 4.6 and in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline *Varying Development Standards: A Guide* and has incorporated relevant principles of *Four2Five Pty Limited v Ashfield Council* [2015] NSWLEC 90 and *Wehbe v Pittwater Council* [2007] NSWLEC 827.

Each component of the Clause is addressed below.

**Table 1: Justification against the requirements of Clause 4.6**

Clause	Response / Justification
<b>Clause 4.6 (1)</b> <i>The objectives of this clause are as follows:</i>	
<i>(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,</i>	The current height limit is 9 metres across the entire site.  Noted. As outlined below, flexibility in the application of the HOB standard is considered reasonable and appropriate in the circumstances of this application.
<i>(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</i>	The proposed built form results in an improved outcome on site from the predominately vacant land which currently exists. The proposed construction achieves building heights required to achieve a design outcome on site that is appropriate for a school as well as meets the needs of the applicant without adversely impacting on the surrounds. The design facilitates appropriate development of the site and involves development of a new school that would allow a higher quality learning opportunities for the surrounding area. In addition, the design is considered to result in an improved outcome to the building layout and provide a positive streetscape. The variation to building height and minor increase from the control will facilitate the proposed development and is considered to be a positive outcome within the context of the R2 Low Density Residential Zone in this location.
<b>Clause 4.6 (2)</b> <i>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.</i>	The development standard is not expressly excluded from the operation of Clause 4.6.
<b>Clause 4.6 (3)</b> <i>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:</i>	This document comprises the written request to vary a development standard.

Clause	Response / Justification
<p>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.</p>	<p>Strict compliance with the development standard in this instance is considered to be unreasonable and unnecessary as the proposed development will result in a variation from the existing HOB and existing HOB controls which provide improved design outcomes and future learning for students, the development utilises the existing landscape and provides appropriate land use in the zone.</p> <p>The outcomes will not adversely impact on the characteristics of the site or surrounding area that would warrant such a limitation when having regard to the existing and proposed built form, visual impacts, views to and from the site and positive social impacts, and therefore the standard is unreasonable and unnecessary, as discussed in further detail in this table.</p> <p><b>Zoning Objectives</b></p> <p>The R2 zone seeks to enable other land uses that provide facilities or services to meet the day to day needs of residents. Increased development opportunities at the site allow for access to public transport, employment and enhance other services and facilities in the area and as such provide a better outcome than strict compliance with the standard.</p> <p><b>Visual impacts</b></p> <p>The proposed school development is in keeping with the site and surrounds. A 7 storey building is located east of the site with a 1 storey building to the west. Proposed alterations and additions to the building provide an appropriately scaled development. Furthermore, the building will be significantly enhanced through modern architecture that will result in improved streetscape and overall visual impact.</p> <p><b>Views</b></p> <p>The site is visible from Medowie Road. Views to the building will be significantly improved by the proposed architecturally designed purpose built development. The site and surrounds have been considered through the design to provide positive views to the building when viewed from various vantage points.</p> <p>Landscaping has been planned to improve the visual impact from the road while also providing futures students the benefit of solar access, ventilation and views across the broader area.</p> <p>Proposed variation to the height of building standard will create positive visual impact to and from the site.</p> <p><b>Departure from the standard</b></p> <p>In establishing that compliance with a development standard is unreasonable or unnecessary, the following principles have been addressed:</p> <ul style="list-style-type: none"> <li>• the underlying objective or purpose of the standard is not adversely impacted on as a result of the proposed variation. The proposal still results in a development of appropriate density and consistent with the objectives of the zone and surrounding buildings</li> <li>• the proposal will create a positive visual impact with a high quality architecturally designed building</li> <li>• Views to and from the site will enhance the location, improve living arrangements and allow street activation.</li> </ul> <p><b>Summary</b></p> <p>The proposal demonstrates that the variation from the HOB standard is positive when considering the objectives of the zone and objectives of the HOB standard.</p>
<p>(b) that there are sufficient environmental planning grounds to</p>	<p>The proposed HOB does not affect the ability to comply with all other relevant development standards and controls. As a result, the proposal retains the amenity of the site and surrounding development.</p>

Clause	Response / Justification
<p><i>justify contravening the development standard.</i></p>	
<p><b>Clause 4.6 (4)</b> <i>Development consent must not be granted for development that contravenes a development standard unless:</i></p>	
<p><i>(a) the consent authority is satisfied that:</i></p> <p><i>(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</i></p> <p><i>(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</i></p>	<p>This correspondence aims to adequately address the matters required to be addressed in sub clause (3).</p> <p>Clause 4.6(4)(a)(ii) requires consideration of the objectives of the development standard and the zone objectives. Pursuant to Clause 4.6(4)(a)(ii) Council may be satisfied that 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.</p> <p>The objectives of the HOB standard are:</p> <ul style="list-style-type: none"> <li>(a) to ensure the height of buildings is appropriate for the context and character of the area,,</li> <li>(b) to ensure building heights reflect the hierarchy of centres and land use structure.</li> </ul> <p>(2) 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.</p> <p>The information in this document demonstrates that the proposed HOB is a result of the development of a new school and is appropriate to the location having regard to the surrounding area that is of a similar scale, response to the scenic qualities of the site, compliance with development controls and protection of amenity whilst respecting the transport opportunities and other uses of the surrounding area.</p>
<p><i>(b) the concurrence of the Secretary has been obtained.</i></p>	<p>Noted. Council is responsible for obtaining consent of the secretary.</p>
<p><b>Clause 4.6 (5)</b> <i>In deciding whether to grant concurrence, the Secretary must consider:</i></p>	
<p><i>(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and</i></p>	<p>It is considered that contravention of the development standard does not raise any matter of significance for State or regional environmental planning.</p>
<p><i>(b) the public benefit of maintaining the development standard, and</i></p>	<p>As demonstrated throughout this correspondence, the contravention of the development standard will result in minimal environmental and social impacts. The public benefit of maintaining the standard is largely irrelevant as the proposed building is in keeping with the zone objectives, will result in a better outcome for the area and the streetscape and will provide improved schooling options in an area serviced by public transport that close to recreation and commercial activities.</p>
<p><i>(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.</i></p>	<p>Noted.</p>

Clause	Response / Justification
<p><b>Clause 4.6 (6)</b> <i>Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living ...</i></p>	<p>N/A. The proposal is not for the subdivision of land.</p>
<p><b>Clause 4.6 (7)</b> <i>After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).</i></p>	<p>Noted.</p>
<p><b>Clause 4.6 (8)</b> <i>This clause does not allow development consent to be granted for development that would contravene any of the following:</i></p> <p>(a) <i>a development standard for complying development,</i></p> <p>(b) <i>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 <a href="#">State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004</a> applies or for the land on which such a building is situated,</i></p> <p>(c) <i>clause 5.4,</i></p> <p>(ca) <i>clause 2.8, 6.1 or 6.2.</i></p>	<p>Noted.</p>

#### 4. Objects of the EP&A Act

Objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act) are provided in Section 5 of the Act. Two objects relevant to the Clause 4.6 variation are 5(a)(i) and (ii) and are discussed below.

Section 5(a)(i) aims to encourage *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.*

The proposed development will improve educational opportunities in an existing residential environment. Improved educational options in an area that has access to transport, employment and recreation opportunities will promote social and economic welfare of the residents of the area and assist local businesses.

Section 5(a)(ii) aims to encourage *promotion and co-ordination of the orderly and economic use and development of land.*

Development of a new school in a residential use zone will promote orderly and economic use of the land. The site has access to services and infrastructure and is appropriately placed to allow improved educational options in an existing urban environment.

#### 5. Conclusion

Whilst the proposed development results in a variation to HOB controls, the proposed exception to a development standard will result in a better planning outcome than not allowing the exception. The proposed new development result in a minor non-compliance. Furthermore, the proposed changes do not adversely impact on the development being consistent with zone objectives, HOB objectives or streetscape.

Yours Faithfully



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