



Consideration of Land and Environment Court Principles

Variation to Height of Buildings and Floor Space Ratio Development Standards

1.0 INTRODUCTION

This submission has been prepared by JBA to support a variation to the height of buildings and floor space ratio (FSR) development standards under *Burwood Local Environmental Plan 2012* (LEP 2012) to facilitate the proposed modifications to the approved development at MLC Burwood under SSD 6484.

Whilst section 96 applications which contravene a development standard do not trigger the need to be accompanied by a clause 4.6 variation, the relevant principles established by the NSW Land and Environment Court have been considered to assist the Department with their merit assessment of the proposed modification.

This submission should be read in conjunction with the original Environmental Impact Statement (EIS) and clause 4.6 variations prepared by JBA dated September 2014, and the section 96 application dated October 2016.

The proposed modifications seek to increase the approved GFA across the campus by 862m², and the approved height by 3.9 metres. On this basis, the proposed modifications result in an FSR of 0.94:1 and a maximum building height for the Teaching and Learning Building of 19.16 metres (RL 43.3). The development, as proposed to be modified, exceeds the maximum FSR standard of 0.55:1 and the maximum height standard of 8.2 metres which apply to the site under LEP 2012. We note that the approval under SSD 6468 granted consent to variations to these controls, with an approved FSR of 0.87:1 and an approved maximum height of 15.26 metres (RL 39.4).

The proposed amendments to the approved development, and subsequent exceedances of the FSR and heights of buildings development standards, result from a holistic review of the approved design. In reviewing the design, the school has identified a number of design improvements and efficiencies that will enhance the daily operations of the school, better respond to the school's teaching needs, and improve the functionality of the approved building.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- that the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- 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.

The consent authority's satisfaction as to those matters is to be informed by the objective of providing flexibility in the application of the relevant control.

The Land and Environment Court has established questions to be addressed in variations to development standards lodged under *State Environmental Planning Policy 1 – Development Standards* (SEPP 1) through the judgment of Justice Lloyd, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89. The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 (Webbe). An additional principle was established in the recent decision by Commissioner

Pearson in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (Four2Five) which was upheld by Pain J on appeal.

2.0 JUSTIFICATION FOR CONTRAVENTION OF DEVELOPMENT STANDARDS

2.1 Compliance with the development standard is unnecessary and unreasonable

Clause 4.6(3)(a) of the LEP requires the departure from the development standard to be justified by demonstrating:

that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

In the decision of *Wehbe*, the Chief Justice expressed the view that there are five different ways in which an objection to a development standard might be shown as unreasonable or unnecessary and is therefore well founded. Of particular relevance in this instance is the first and fifth ways, as follows:

1. *The objectives of the standard are achieved notwithstanding noncompliance with the standard.*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

The objectives of the standard are otherwise achieved

The objectives of the FSR and maximum height of buildings standards predominantly set out to ensure the proposed development's bulk and scale is compatible with the surrounding built form, and to ensure the development does not cause unreasonable amenity impacts. As outlined below, the objectives are satisfied by the proposal despite the numerical non-compliance with FSR and height standards.

The proposed development, including the additional GFA, will continue to achieve the objectives of the FSR standard for the following reasons:

- The additional FSR will achieve a development with a bulk and scale that is appropriate for the site's use as an educational facility.
- The additional FSR is not proposed for the purpose of intensifying the development or accommodating a greater number of students at the school.
- The increased scale of the Teaching and Learning Building will be counterbalanced by the reduction to the Middle School Building.
- The bulk and scale of the modified Teaching and Learning Building will continue to appear as an appropriate urban form within the context of the existing school campus and the surrounding precinct.
- The setbacks of the additional storey are consistent with the approved building, and will therefore maintain an appropriate urban form relative to the surrounding medium density and low density residential development.
- As stated previously, the additional FSR relates to the inclusion of a fourth storey to the Teaching and Learning Building. The additional storey will present as a continuation of the approved built form and maintains the same building separation distances to adjoining uses. Accordingly, the increased FSR maintains a built form that is appropriate in scale when viewed from Park Road.

In addition, the proposed development will continue to achieve the objectives of the height of buildings development standard for the following reasons:

- The existing school already exceeds the LEP's maximum height limit of 8.2 metres, with the ILC Building having a height of RL 43.3. The proposed height of the Teaching and Learning Building is consistent with the height of the ILC Building at RL 43.3 (19.16 metres) and so will continue to be compatible with the scale of existing development on the school campus.

- The design and siting of the additional storey gives due consideration to adjoining developments. In particular, the modified development will not result in any overshadowing of private property. Similarly, the proposed setbacks, which range from 6 - 7.7 metres are considerably greater than the setbacks associated with small lot residential development to which the height control relates. The setback will continue to be provided along the northern boundary in order to protect the amenity of the neighbouring dwelling on Park Road.
- The Learning and Teaching Building will face onto the school's land, being the sports fields and Junior School on the eastern side of Park Road. The building will have no adverse impact on the streetscape of Park Road as the roadway is essentially a defacto school road that is predominantly used by school related pedestrian and vehicular traffic.
- The uppermost storey continues to incorporate privacy screening to minimise potential overlooking from the outdoor learning terraces to the adjoining residential properties.

The zoning is inappropriate

The fifth way relates to the zoning being unreasonable or inappropriate, so that the development standard associated with that zoning is also unreasonable and unnecessary. The height and FSR standards applying to the site are reflective of the site's R2 Low Density Residential zoning with a domestic scale subdivision pattern, which is clearly inappropriate for the ongoing use of the site as a school. MLC School was founded on the site in 1886, and the site would be more appropriately zoned SP2 Infrastructure to reflect the historical use of the site and its size which is not reflective of a suburban residential subdivision. In recognition of the unique requirements and public benefits offered by educational establishments, SP2 Infrastructure zonings are often free of prescriptive height and FSR standards. Further, the existing and approved development on the site already exceeds the height and FSR standards established by LEP 2012, further indicating that the zoning (and associated standards) are inappropriate for the use of the site.

The modifications to the approved expansion and upgrade of the existing school are required to provide a high quality teaching environment that supports collaborative learning spaces and modern teaching facilities. Strict adherence to the height and FSR development standards would prevent these positive educational outcomes from being achieved.

Having regard to the above, in our view it would be unreasonable and unnecessary for the consent authority to seek compliance with the FSR and building height controls contained within clauses 4.3 and 4.4 of LEP 2012.

2.2 There are sufficient environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the LEP requires the departure from the development standard to be justified by demonstrating:

that there are sufficient environmental planning grounds to justify contravening the development standard.

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a clause 4.6 variation request must be particular to the circumstances of the proposed development on that site.

There are two key factors which have influenced the proposed design, and inhibit the development's ability to achieve strict adherence with the FSR and height of buildings development standards.

Educational design requirements

The variations to the FSR and height of buildings standards result from consolidating the learning facilities of the science and language schools into one single building to provide efficiency and flexible education space. The additional storey will ensure the internal configuration is appropriately sized to accommodate educational facilities that align with modern learning and teaching requirements and foster collaborative learning. A scheme compliant with the maximum FSR and height standards would not provide for these educational outcomes.

Further, it is noted that the additions approved to the Middle School Building under SSD 6484 are proposed to be deleted. Accordingly, the reduced scale of this component will counterbalance the increased scale of the

Learning and Teaching Building, meaning the distribution of additional bulk and scale across the entirety of the development will not substantially increase. Consequently, the development as a whole will not appear overly obtrusive when viewed from the surrounding public domain.

Need to retain open space

A key driver for the school's redevelopment has been to provide new, high quality open spaces, with the approved development delivering over 1,200m² of additional open space.

Whilst the school could reduce the height of the proposed building and look to develop on this open space, this would thwart this objective and would reduce the amenity of the campus for students and staff. It is considered that the proposed building, which will have minimal amenity or public domain impacts on surrounding land, represents a superior outcome for the site.

2.3 Public Interest

Clause 4.6(4)(a)(ii) of the LEP requires that development consent must not be granted for development that contravenes a development standard unless the consent authority is 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.

The proposal, as modified, is assessed against the objectives for the R2 Low Density zone, as well as the FSR and height of buildings development standards, in **Table 1**.

The proposal is considered to be in the public interest as it nevertheless satisfies the objectives of the zone and the objectives of the development standard.

Table 1 – Modified development's assessment against zone objectives and objectives of the development standard

Objective	Proposal
Clause 2.3 – Zone Objectives: R2 Low Density Development	
To provide for the housing needs of the community within a low density residential environment.	<p>The proposed modifications are for the purposes of amending the approved (SSD 6484) educational establishment, and as such, the underlying purpose for this objective is not relevant to the development and therefore compliance is unnecessary.</p> <p>Despite this, the increased scale of the development does not threaten the low density residential environment of the zone due to the existing scale of development on the site, and due to the development being located in a mixed-use neighbourhood within an established school campus. Directly opposite the site to the west on Grantham Street, the land is used for the purpose of a hospital and aged care facility. To the east, opposite the site on Park Road, is the MLC Junior School campus.</p> <p>As shown at Attachment A, the additional height results in minimal overshadowing that will have no impact on the amenity of adjoining residential dwellings. Further, generous setbacks to the boundaries continue to be provided, therefore preventing the additional bulk from having any adverse amenity impacts to surrounding developments.</p>
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	<p>The site is used for the purpose of an educational establishment, which provides a day-to-day service for residents. The modifications proposed as part of this application rationalise the internal layouts of the buildings and deliver an increased number of learning spaces. Accordingly, the proposal will further enhance the public benefits delivered by the educational facility.</p>
Clause 4.3 – Height of Buildings	
(a) to establish the maximum height of buildings to encourage medium density development in specified areas and maintain Burwood's low density character in other areas,	<p>At present the site does not contribute towards the low or medium density character of the neighbourhood as the site already exceeds the height controls. The development, as modified, will align with the existing tallest building on the site, being the ILC Building at RL 43.3. The deletion of the additions to the Middle School Building will also reduce the scale of the development when viewed from Grantham Street.</p> <p>In light of the above and notwithstanding the non-compliance with the</p>

Objective	Proposal
	development standard of the LEP, the proposed development will not undermine the intentions of the LEP height controls.
(b) To control the potentially adverse impacts of building height on adjoining areas.	The proposed third storey to the Teaching and Learning Building will not give rise to adverse impacts on adjoining properties. The extra height is moderated by the significantly increased setback (than would be the case with a two storey dwelling) and the opportunity to landscape this setback.
Clause 4.4 – Floor Space Ratio	
(a) To enable development density and intensity of land use to achieve an appropriate urban form,	The proposed FSR is commensurate with an educational facility that seeks to deliver modern teaching facilities that provide a high standard of learning and amenity. With the deletion of the additions to the Middle School, the proposal exceeds the approved FSR by only 7.5%. The proposed additional storey appears as a continuation of the approved building and is therefore is an appropriate urban form in respect of the facilities already approved for the site.
(b) To focus higher development density and intensity of land use in the inner part of the Burwood Town Centre and to provide a transition in development density and intensity of land use towards the edge of the Burwood Town Centre.	The proposed modifications achieve an appropriate scale and density within the site that is consistent with the site's educational use. The modifications provide for a reduction in the built form of the Middle School, therefore improving the development's relationship to the built form along Grantham Street.

3.0 SECRETARY'S CONCURRENCE

The following section provides a response to those matters set out in clause 4.6(5) of the LEP which must be considered by the Secretary.

Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variations to the FSR and height of buildings development standards of LEP 2012 will not raise any matter of State or regional significance. The proposed variation will not have any amenity impacts outside of the immediate site area. The proposed variations will support a development that is deemed to be of State significance, and will enable this State significant development to achieve the optimum outcome for the school community without adversely impacting adjoining land uses.

The public benefit of maintaining the development standard

Maintaining the development standard would not result in any public benefit in this instance. Maintaining the existing built form would separate educational facilities rather than consolidate them into one building and therefore hinder the efficient daily operations of the school.

The development as a whole will deliver a number of public benefits to the area, including:

- a modern educational facility that does not exceed the height of buildings currently contained within the site, and is in keeping with the established built form on the site;
- providing adaptable and collaborative educational facilities that achieve modern educational standards; and
- improving the overall amenity provided by the school, whilst not adversely impacting neighbouring uses.

Any other matters required to be taken into consideration by the Secretary before granting concurrence

There are no other matters required to be taken into consideration in this instance.