

# **Attachment C**

<p><b>Clause 4.6 Variation Request Height of Buildings</b></p>
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planning consultants

## Clause 4.6 Variation Request to the Height of Buildings Development Standard under Clause 4.3 of Sydney LEP 2012

Proposed Stage 4 Development comprising demolition of existing buildings, construction of a new four (4) storey building containing library, multi-purpose spaces and staff office spaces, refurbishment and conservation works to Administration Building and Wychwood; and new school entry and landscaping.

St Scholastica's College

2 – 4 Avenue Road, Glebe

Prepared for: St Scholastica's College  
July 2023

Printed: 4 July 2023  
File Name: 21078A St Scholastica's College/Reports/21078A.cl4.6v3  
Project Manager: K.Mackay  
Client: St Scholastica's College  
Project Number: 21078A

## Document Control

Version	Prepared By	Reviewed By	Issued To	Date
Rev_1, Draft	A Cropley	S Earp	Client	9 March 2022
Rev_2, Final	A Cropley	S Earp	Council	17 March 2022
Rev_3, Final	A Cropley/K Mackay	K Mackay	Client, Council	28 April 2023
Rev_4, Final	A Cropley/K Mackay	K Mackay	Client, Council	4 July 2023

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# 1 Introduction

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## 1.1 Commission

DFP has been commissioned by St Scholastica's College (the College) to prepare a written request (Variation Request) pursuant to clause 4.6 of *Sydney Local Environmental Plan 2012* (the LEP) for the proposed Stage 4 development (the Proposal) at St Scholastica's College, 2 – 4 Avenue Road, Glebe (the Site).

The Proposal is described in detail in Section 4 of the SEE and includes:

- Demolition of Salem (Building B), Art and Computers (Building D); and parts of the Junior Block (Building E) and Senior Block (Building F);
- Removal of the demountable buildings in the north-east corner of the site on the play fields;
- Removal and transplanting of trees/palms/ferns;
- Construction of a new four (4) storey building (New Building) containing library, multi-purpose spaces and staff office spaces;
- Alterations to existing Building F to tie in with the New Building;
- Refurbishment and conservation works to Administration Building (Building A) and Wychwood (Building C); and
- New school entry from Avenue Road including upgrades to hard and soft landscaping.

The Proposal exceeds the height of buildings development standard of 9m under clause 4.3 of the LEP having a maximum height of 14.61m above the existing ground level measured to the north-eastern corner of the parapet of the New Building although to the south of this, the height is generally in the order of 12.6m and the height of the lift overrun to Building A is 9.35m.

Notwithstanding the contravention of the development standard, the Proposal 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.

This written request has been prepared to provide a detailed assessment in accordance with the statutory requirements of clause 4.6 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 information submitted with the development application in March 2022, supplemented by Amended Plans and supporting information submitted in April 2023.

This Variation Request should be read in conjunction with the detailed environmental planning assessment contained in the SEE and supplementary information.

## 2 The Nature of the Variation

Clause 4.3 and the Height of Buildings Map of the LEP designates a maximum building height of 9m for the site (see **Figure 1**).



**Figure 1** Extract of Maximum Building Height Map (the LEP)

The LEP defines **building height** as:

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

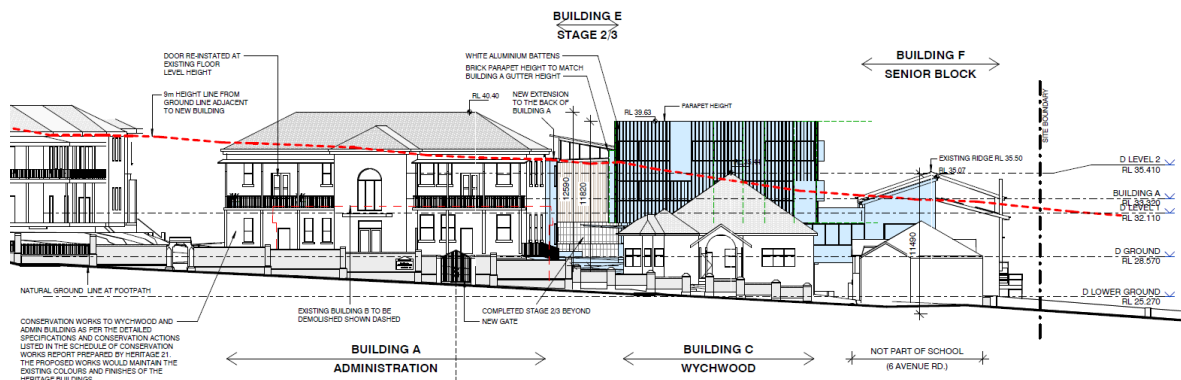
- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
- (b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

*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 9m height of buildings development standard having a maximum height as follows:

- 14.61m above the existing ground level measured to the top of the parapet wall at the north-eastern corner of the parapet of the New Building;
- generally 12.6m or less, south and inboard of the parapet wall, over the majority of the footprint of the New Building;
- 11.47m to the ridge of the roof pop-up addition to Block F; and
- 9.35m to the top of the lift overrun within Building A.

The non-compliance is shown graphically in **Figures 2-5**.



**Figure 2** Extract of east (Avenue Road) elevation (Drawing DA-200 Rev 14 DJRD Architects)



## 2 The Nature of the Variation

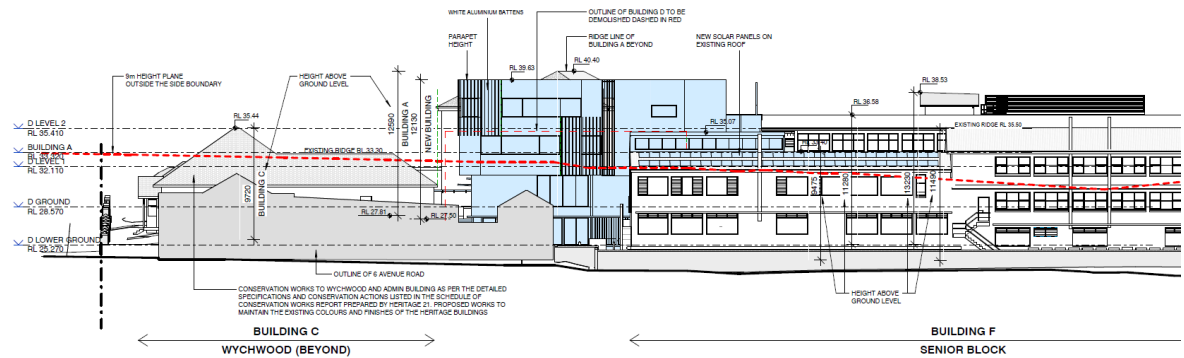


Figure 3 Extract of North elevation (Drawing DA-200 Rev 14 DJRD Architects)

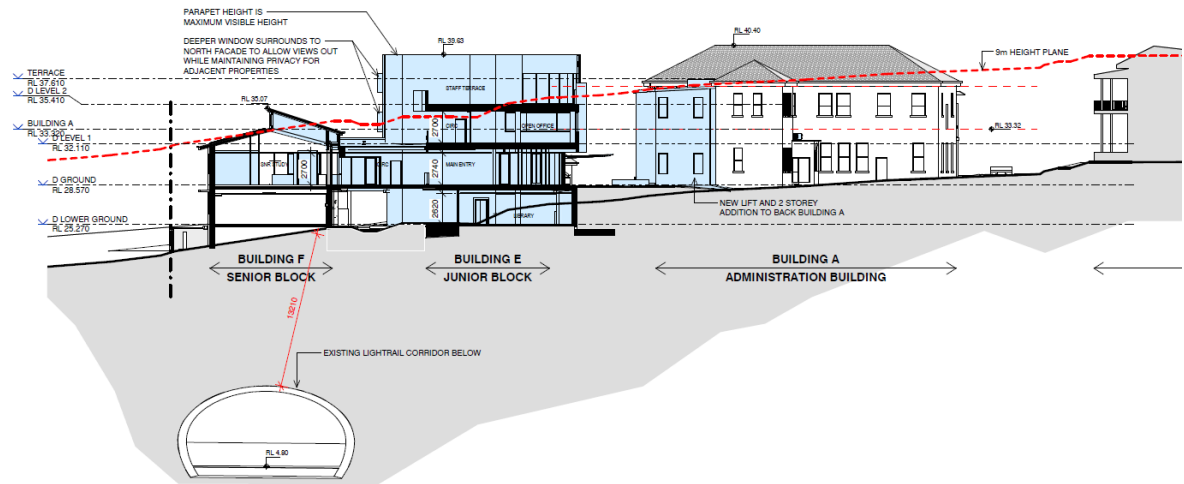


Figure 4 Section A (Drawing DA-250 Rev 13 DJRD Architects)

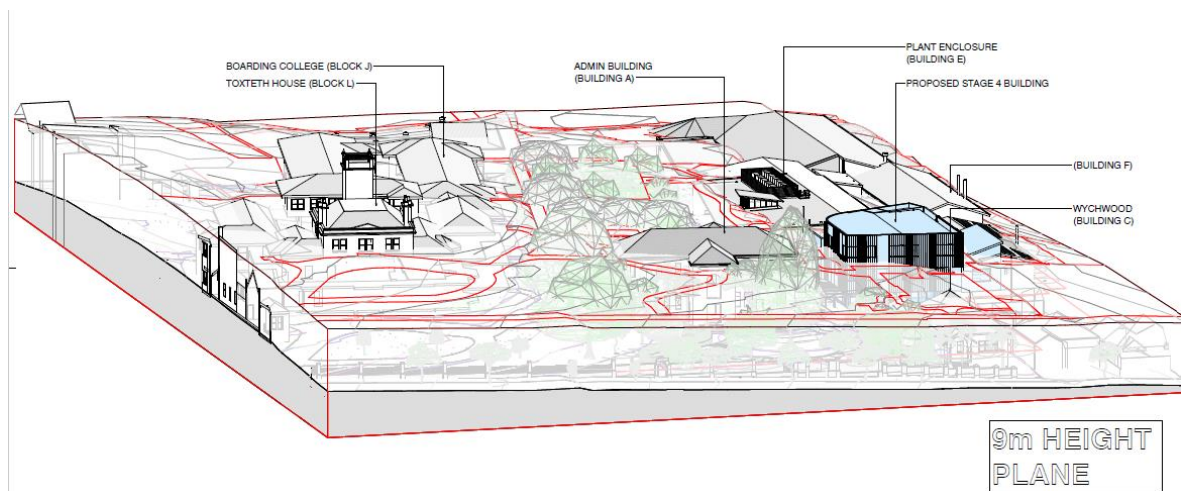


Figure 5 Height Plane Diagram (Drawing DA-923 Rev 2 DJRD Architects)

## 3 Clause 4.6 Assessment

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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 be satisfied that the development achieves these objectives. Furthermore, neither clause 4.6(3) nor clause 4.6(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 may 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 building control in clause 4.3 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 clause 4.6 (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 clause 4.6(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 granting development consent to 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 or the Court



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must, in determining the DA, clearly enunciate that it has satisfied itself of the matters in clause 4.6(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 that consent must not be granted for development that contravenes a development standard unless:

- (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 Planning 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 clause 4.6(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 potential adverse impacts of the proposed development can be appropriately mitigated or minimised as described below.

#### Heritage

The site is identified as containing two (2) local heritage item under the LEP as follows:

- Item I653 'St Scholastica's College including buildings and their interiors, fencing and grounds'; and
- Item I654 'House 'Wych Wood' (4 Avenue Road) including interior.

It is also located in the Toxteth Heritage Conservation Areas (HCA) (Item C34).

In December 2017, a draft Conservation Management Plan (draft CMP) was prepared Design 5 Architects. The draft CMP provides a comprehensive history of the site, description of all existing buildings, an assessment of the heritage significance of the site and conservation policies to guide the future development, care and management of the site. Section 5 of the draft CMP sets out the conservation policies to maintain and protect the heritage significance of the site. Policies 5.2.14 – 5.2.17 of the draft CMP identify potential areas within the site that are available for redevelopment (**Figure 6**).

### 3 Clause 4.6 Assessment



Figure 6 Site plan showing potential redevelopment zone (draft CMP 2017)

Table 1 provides an assessment of the proposal against the policies of the draft CMP.

### 3 Clause 4.6 Assessment

**Table 1 Review against draft CMP policies**

<b>Policy</b>	<b>Comment</b>
<b>5.2.3 Context and Setting</b>	
<p><b>Policy 5.2.8</b> The landscape setting of the place on Avenue and Arcadia Roads must be respected and not obscured. New development should seek to maintain and enhance this landscape setting.</p>	<p>The proposed Stage 4 development will improve the existing landscape setting on Avenue Road by removing the intrusive Salem Building and replacing with a new landscaped entry and courtyard. By consolidating the building footprint, the landscaped area of the site is maximised.</p>
<p><b>Policy 5.2.9</b> New landscaping and development proposals should seek opportunities to enhance the presence and visual prominence of Toxteth House and the Administration building on Avenue Road, though the removal of later structures of lesser significance.</p>	<p>The proposed Stage 4 development will enhance the presence and visual prominence of Toxteth House and the Administration Building through the removal of the Salem Building. The new four (4) storey building and the minor addition to the Senior Block are lower in height than both of these heritage significant buildings and the amended design removes the connecting elements between the Administration Building and the New Building.</p>
<p><b>Policy 5.2.10</b> Opportunities for enhancing the visual presence of Toxteth House on Arcadia Road should be considered in future landscaping proposals in this area.</p>	<p>N/A</p>
<p><b>Policy 5.2.11</b> The exceptional and highly significant views to and from the site (as shown on Figure 3.2) should be maintained. New development should be sited so as to not obstruct these views.</p>	<p>The proposed Stage 4 development has been located outside of the exceptional and highly significant views to and from the site. It will not obstruct these views.</p>
<p><b>Policy 5.2.12</b> Landscaping and site elements as shown on Figure 3.3 should be maintained and conserved in accordance with their significance gradings.</p>	<p>The proposed Stage 4 development will enhance the landscape and site elements including protecting the highly significant Hoop Pine.</p>
<p><b>Policy 5.2.13</b> A full assessment of trees to determine their condition and confirm significance should be undertaken as part of the process for planning for redevelopment at the site.</p>	<p>An Arboricultural Impact Assessment (AIA) of the trees in the vicinity of the proposed development has been undertaken by Civica including an assessment of their condition and landscape significance. The AIA provides generic and specific recommendations to ensure that the trees are appropriately protected during the demolition and construction works.</p>
<b>5.2.4 Potential for redevelopment - site</b>	
<p><b>Policy 5.2.14</b> Future development at the site must take in to consideration the significance of the place, its individual elements and spaces. New development at the site should be preferably sited on areas of lesser significance. Potential development zones at the site are shown on Figure 5.1.</p>	<p>The location of the New Building and the addition to the Senior Block are consistent with the potential development zones shown on Figure 5.1 of the draft CMP.</p> <p>The proposed structures are located on a less significant part of the site and are separated from the Administration Building.</p>
<p><b>Policy 5.2.15</b> Future development proposals at the site should consider opportunities to remove intrusive elements, such as the classroom block known as 'Salem'.</p>	<p>The proposed Stage 4 development includes the removal of Salem and creation of a new landscaped entry and courtyard.</p>
<p><b>Policy 5.2.16</b> New development at the site should be of a height, form and materiality that does not dominate Toxteth House, the Administration building or Wychwood, or detract from their existing character.</p>	<p>The proposed height, form and materiality of the new structures will not dominate Toxteth House, the Administration Building or Wychwood. The maximum RL of the New Building is RL39.63 which is lower than the maximum RL of both the Administration Building (RL40.40) and Toxteth House (RL50.46). A neutral and complementary palette of finishes and materials is proposed to minimise visual impact and ensure that that the heritage items on the site retain their prominence. The New Building is separated from the Administration Building and provided with façade treatments which have a lightweight appearance. The minor addition to the Senior Block is well removed from the heritage buildings.</p>

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Table 1 Review against draft CMP policies

Policy	Comment
<p><b>Policy 5.2.17</b>            A new structure at the rear of the Administration building may be appropriate provided that it is no higher than the existing building, and does not detract from the primary view of the building from Avenue Road.</p>	<p>The amended design has removed the previously proposed linking element between the Administration building and the New Building.</p> <p>The minor rear additions to the Administration Building will replace existing unsympathetic additions with new, discrete additions including a stair and lift for accessibility within the building and these additions will not be highly visible from the primary view of the building from Avenue Road to the retention of existing landscaping and addition of new landscaping.</p>

Therefore, the proposed development is consistent with the relevant conservation policies under Section 5 of the draft CMP.

The Statement of Heritage Impact prepared by Heritage 21 lodged with the DA provides an assessment of the impacts of the proposed development on the heritage significance of the site and heritage conservation area. The SOHI provided the following assessment in relation to the height, bulk and scale of the proposal:

*“... the proposed includes the construction of a new infill building within the subject site. Consideration of the heritage significance of the subject site, the Toxteth HCA, heritage items in the vicinity, and the Avenue Road streetscape has been taken into consideration in the decision to incorporate sympathetic design – the incorporation of horizontal building lines following the heritage listed Administration Building, the breaking up of the facades through articulation, and making use of traditional materials like brick and timber in a contemporary form. We note that the proposal would incorporate appropriate setbacks from all boundaries and would be located behind the Wych Wood and Administration buildings. Further, the provision of landscaping throughout the site would ensure that the new infill building site comfortably and lightly in the existing context without being visually dominant or overly prominent. These measures would ensure that the visual curtilage of heritage items in the vicinity is respected. The combination of the use of modern and flat roof forms would allow the sympathetic introduction of the contemporary development within the existing context. We also note the proposed building would be of the similar height as the Administration Building. Such solutions would help to reduce the perceived bulk of the proposed building, as well as reduce the visual impact of the works.*

*The proposed materials material palette – the use of brickwork and a muted colour scheme – would be considered sympathetic to the Toxteth HCA and heritage items in the vicinity. It would also be effective in creating a design that would not dominate the existing surrounding built forms. Consequently, it is our assessment that the addition of recessive and clearly identifiable contemporary building that blends into the surrounding streetscape and built forms would minimise the impact of the works, ensure the retention of the heritage significance of heritage items and HCA in the vicinity, and allow them to stand out.*

*... the proposed building would be 4 storeys in height, which would be an increase in height compared to the surrounding built forms within the HCA. We note, however, that there are three storey building in the immediate surrounds and the height of the building would be in line with the Administration building. It is our general assessment that the increase in height of one storey would not detrimentally impact the significance of the HCA, heritage items in the vicinity, or Avenue Road streetscape.*

An addendum to the SOHI has been prepared by Heritage 21 to assess the design amendments since lodgement of the DA with that assessment concluding that the new building would not generate a negative impact on the heritage buildings of the site.

#### Streetscape, Visual Impacts and Views

The proposed New Building and the addition over the existing Senior Block have been carefully sited and designed as a contemporary infill building located within a heritage site and HCA. The new structures are setback from Avenue Road and sited to the rear of Wychwood (**Figure 7**). The New Building replaces an existing building and is located on a part of the site that has been identified as having low heritage significance. Removal of the visually intrusive Salem Building and establishment of a new landscaped entry and courtyard will have a positive impact on the Avenue Road streetscape.



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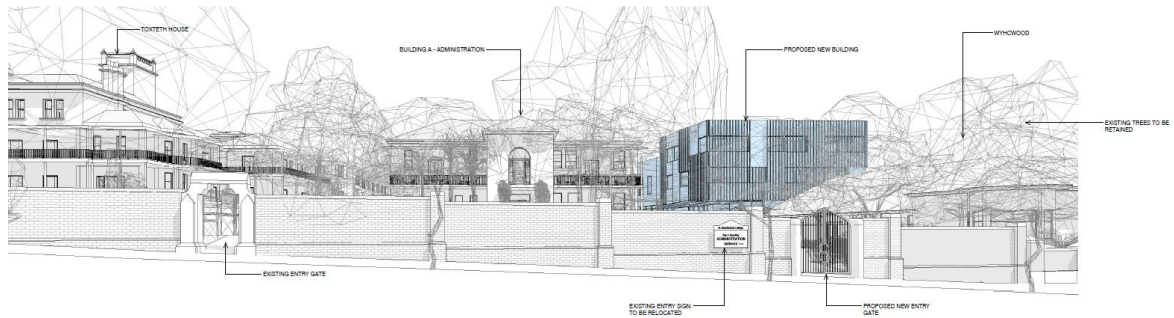


Figure 7 Proposed Avenue Road Streetscape (DJRD Architects)

The overall height and scale of the New Building has been designed to be subservient to the height and scale of the significant heritage buildings on site including Toxteth House and the Administration building. The proposed finishes to the new building are neutral and muted so it does not detract from the character of the heritage buildings and HCA.

There are no key views to, from or over the site from the surrounding public domain towards the tower of Toxteth House that would be impacted by the proposed structures (**Figure 8**).



Figure 8 Existing (top) and Proposed (bottom) view towards St Scholastica's College and Toxteth House from the corner of Avenue Road and Victoria Road (DJRD Architects)

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#### Visual Privacy

The northern and eastern facades of the proposed building have been designed to minimise overlooking from the proposed buildings into the adjoining properties. This has been achieved through the use of deep reveals to the windows.

#### Acoustic Privacy

The proposed development has been assessed in the Acoustic Report by JHA as complying with the relevant acoustic criteria and will not therefore, have an unreasonable impact on neighbours.

#### Solar Access

The proposed structures do not overshadow any adjoining public domain or residential properties. Removal of the Salem Building (Building B) improves access to sunlight for the landscaped forecourt.

Furthermore, 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 ensure the height of development is appropriate to the condition of the site and its context,</i>	<p>There are numerous existing buildings on the site that exceed the height of buildings development standard including Blocks A, E, F, J and L and the height of the proposed new building is consistent with the adjacent Junior Block (Building E) and Senior Block (Building F).</p> <p>The maximum height of the New Building (RL 39.63 AHD) and the lift overrun to Building A (RL 37.52) are less than that of the uppermost roof line of the existing Building A (RL 40.4) as well as the maximum heights of Toxteth House (Block L) (RL 50.46) and Polding Memorial Chapel (RL 45).</p>
(b) <i>to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,</i>	The proposed structures provide an appropriate height transition between Toxteth House, which is the most prominent building located within the site, the lower level buildings within the site to the north and then to surrounding one (1) and two (2) storey low density residential development in the HCA.
(c) <i>to promote the sharing of views,</i>	The proposed structures do not adversely impact on any significant views to, from or across the site.
(d) <i>to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,</i>	N/A
(e) <i>in respect of Green Square—</i> (i) <i>to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</i> (ii) <i>to ensure the built form contributes to the physical definition of the street network and public spaces.</i>	N/A

#### **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, that 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.



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In Initial Action, Preston CJ indicated that it is reasonable to infer that “*environmental planning grounds*” as stated in under clause 4.6(3)(b), means grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the EP&A Act.

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.

The site-specific environmental planning grounds that support the proposed variation to the height of buildings development standard in this circumstance are detailed in the SEE, supported by the architectural plans prepared by DJRD Architects, Architectural Design Statement prepared by DJRD Architects and are summarised hereunder.

#### Site Opportunities and Constraints

In 2016, DJRD Architects development a master plan for the overall school site. The masterplan identified four (4) stages:

- Stage 1: Internal refurbishment works. As part of this stage, the teaching staff and library were relocated to demountable buildings located on the sports fields;
- Stages 2 and 3: These works where the subject of Development Application D/2018/14 (as modified) which approved alterations and additions to the Junior Block, Senior Block, Benedict Centre and Trixie Forest buildings including works that exceeded the 9m height limit;
- Stage 4: These are the final stage of works on the site and the subject of this DA.

As noted in the Architectural Design Statement prepared by DJRD Architects:

*A number of different potential development sites across the campus were investigated as part of the master planning, specifically those identified in the Conservation Management Plan (CMP) prepare by Design 5 Architects.*

*The proposed development site was selected for a number of reasons:*

- *Close proximity to the Administration building (Building A) This building currently accommodates both executive and administrative staff, but as part of the proposed Stage 4 development it will service executive staff and work areas for teaching staff.*
- *Close proximity to Wychwood (Building C) which is currently used for teaching spaces, but as part of the proposed Stage 4 it is to accommodate the administrative staff.*
- *Close proximity to the front of the school and proximity to the teaching spaces in Building E and Building F.*
- *The proposed location does not interfere with high value heritage sight-lines across the campus – identified in the CMP.*
- *The proposed new building location reduces the built footprint to respect impact on the heritage buildings and the landscape. It will have minimal impact on open spaces, gardens, outdoor teaching areas and existing trees.*
- *The proposed new building site is the current location of the existing Building D (Arts and Computers building) which was identified early in Master plan stage as inhibiting access through the campus. The existing building also has neutral to little heritage value, and the existing floor levels are at odds with the adjacent buildings which makes circulation between buildings problematic.*

*It is worth noting that the footprint for this proposed design has undergone many reviews over this time to address the impacts on heritage, existing trees and open space and the general amenity of the school. The original masterplan showed this new building wrapping around the Administration Building. However we believe its revised location is a more sensitive approach, addressing heritage concerns, open space requirements for the school and minimising the removal of existing trees.*

The proposed location of the new structures has been carefully considered with regard to the site’s opportunities and constraints, as illustrated in the following diagrams prepared by DJRD Architects.



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- Polding Memorial Chapel = 14.42m (+5.42m);
- Administration Building (Building A) = 12.59m (+3.59m);
- Wychwood (Building C) = 9.72m (+0.72m);
- Junior Block (Building E) = 13.23m (+4.23m); and
- Senior Block (Building F) = 11.49m (+2.49m).

This is clearly demonstrated by the Height Plane Diagram prepared by DJRD Architects (**Figure 5**). The proposed New Building is consistent with these buildings as it has a maximum height of 14.61m but typically 12.6m and the pop-up addition over Building F has a height of 11.47m, less than the existing Building F ridgeline to the west. In addition, the new lift overrun to Building A is only 35cm greater than the height limit and lower than the ridgeline of this existing building and will not be visible from the street. This shows that the proposal is not unreasonable or uncharacteristic within its visual setting, reflects the scale and typology of educational facilities constructed over a long history, and is therefore consistent with established and future expectations for the site.

#### Response to Topography / Existing Levels

The topography of the site slopes down towards the north. The New Building is a linking element between the courtyard adjacent to the Administration building and the Junior Block (Building E) and Senior Block (Building F) to the north and west. Finished floor levels for New Building have been established with regard to the floor levels of the existing buildings to provide efficient transitions between buildings and minimise the need for stairs and ramps.

Floor to ceiling heights have been reduced to 2.7m where possible to reduce the overall height of the proposed building.

#### Site Coverage / Open Space

The proposed development comprises the removal of existing demountable buildings and consolidation of these facilities into a building within an efficient building footprint. A two (2) storey building would require a much larger footprint and reduce the quantity and quality of the landscape open space provided on the site. The proposed design is considered to achieve an efficient use of the site and protect the landscape character of the site.

#### Streetscape, Visual Impacts and Views

As discussed herein, the proposed New Building, the addition over the existing Senior Block and the new lift overrun to Building A are all set back from Avenue Road, sited to the rear of Wychwood or Building A and, notwithstanding the height above the development standard, will be subservient to the height and scale of the significant heritage buildings on site, many of which vastly exceed the height of buildings development standard.

Furthermore, there are no key views to, from or over the site from the surrounding public domain towards the tower of Toxteth House that would be impacted by the proposed structures above the height limit.

#### Visual Privacy

As stated above, the New Building has been designed to minimise overlooking from the into the adjoining properties.

#### Acoustic Privacy

The proposed development has been assessed in the Acoustic Report by JHA as complying with the relevant acoustic criteria and the areas of height exceedance will not therefore, have an unreasonable impact on neighbours.

### 3 Clause 4.6 Assessment

#### Solar Access

The areas of non-compliance with the height development standard do not result in overshadowing of any adjoining public domain or residential properties.

#### Summary

Accordingly, as discussed above, the context of the site, including existing tall buildings and topography, and the satisfactory management and mitigation of adverse amenity impacts are considered to be 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 clause 4.6(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 R1 General Residential Zone expressed in the Land Use Table to clause 2.3 of the LEP is provided in **Table 3**.

Table 3 Assessment against the objectives of the R1 General Residential Zone	
Objective	Assessment
<ul style="list-style-type: none"><li>To provide for the housing needs of the community.</li></ul>	N/A
<ul style="list-style-type: none"><li>To provide for a variety of housing types and densities.</li></ul>	N/A
<ul style="list-style-type: none"><li>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</li></ul>	St Scholastica's College is an educational establishment that has for over 100 years provides educational facilities to meet the day to day needs of residents and the proposal will enable this to continue.
<ul style="list-style-type: none"><li>To maintain the existing land use pattern of predominantly residential uses.</li></ul>	St Scholastica's College is an existing educational establishment, that has been located on the site since 1901. The proposed Stage 4 development will not impact upon the existing land use pattern of the surrounding residential precinct.

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 former clause 64 of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) (now section 55 of the *Environmental Planning and Assessment Regulation 2021*) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under clause 4.6 of the *Standard Instrument – Principal Local Environmental Plan* (the SILEP) or SEPP 1 subject to certain conditions.

The LEP adopts clause 4.6 of the SILEP and therefore, that prerequisite of the Notice is met.

Condition 1 of the Notice is not relevant in this instance as the request does not seek to vary a development standard relating to minimum lot size or in one of the zones specified by the notice.



## 3 Clause 4.6 Assessment

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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 variation exceeds 10% and accordingly, referral to the Sydney LPP is required.

### 3.6 Clause 4.6(5) - Concurrence Considerations

In the event that concurrence cannot be assumed pursuant to the Notice, clause 4.6(5) of the LEP 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 Secretary before granting concurrence.*

Furthermore, in Initial Action, Preston CJ clarified that, notwithstanding the Court's powers under section 39(6) of the Court Act, the Court should still consider the matters in clause 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

Accordingly, the proposed contravention of the height of buildings development standard has been considered in light of clause 4.6(5) as follows:

- The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed development for this particular Site and this design is not directly transferrable to any other site in the immediate locality, wider region or the State and the scale of the proposed development does not trigger any requirement for a higher level of assessment;
- As indicated in **Section 3.4.2**, the proposed contravention of the height of buildings development standard is considered to be in the public interest because it is consistent with the objectives of the zone and the objectives of the development standard. Accordingly, there would be no significant public benefit in maintaining the development standard in this instance; and
- It is considered that there are no other matters of relevance that need to be taken into consideration by the consent authority.

This is a matter for the Secretary or the Court to address in its written reasons for determining the subject development application.

### 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 Clause 4.6 Assessment

### 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,*
  - (ca) *clause 4.3 (Height of buildings), but only in relation to land shown as being in Area 1 or Area 2 on the Height of Buildings Map,*
  - (cab) *clause 4.5A (Balconies on certain residential flat buildings),*
  - (cb) *clause 5.3A (Development below ground level in Zone RE1),*
  - (cc) *clause 6.10 (Heritage floor space),*
  - (cd) *clause 6.11 (Utilisation of certain additional floor space requires allocation of heritage floor space),*
  - (cda) *clause 6.11A (Temporary alternative heritage arrangements in relation to allocation of heritage floor space),*
  - (ce) *clause 6.17 (Sun access planes),*
  - (cf) *clause 6.18 (Exceptions to sun access planes),*
  - (cg) *clause 6.19(1)(d)–(h) and (j), unless the additional overshadowing is caused by playground equipment, a shade structure, an awning, a sculpture or artwork, or a community notice or public information sign,*
  - (cga) *clause 6.26 (AMP Circular Quay precinct),*
  - (cgb) *clause 6.29 (58–60 Martin Place, Sydney),*
  - (cgc) *clause 6.33 (230–238 Sussex Street, Sydney),*
  - (cgd) *clause 6.35 (45 Murray Street, Pyrmont), but only if the development is an alteration or addition to an existing building,*
  - (cge) *clause 6.36 (12–20 Rosebery Avenue, 22–40 Rosebery Avenue and 108 Dalmeny Avenue, Rosebery),*
  - (cgf) *clause 6.37 (296–298 Botany Road and 284 Wyndham Street, Alexandria),*
  - (cgg) *clause 6.41 (7–15 Randle Street, Surry Hills),*
  - (cgh) *clause 6.42 (102–106 Dunning Avenue, Rosebery),*
  - (cgi) *clause 6.40 (2–32 Junction Street, Forest Lodge),*
  - (cgj) *clause 6.43 (Danks Street South Precinct),*
  - (cgk) *clause 6.52 (1–11 Oxford Street, Paddington),*
  - (cgl) *clause 6.55—4–22 Wentworth Avenue, Surry Hills,*
  - (cgm) *clause 6.56—24–40 Wentworth Avenue, Surry Hills,*
  - (cgn) *clause 6.58—187–189 Thomas Street, Haymarket,*
  - (ch) *Division 1 of Part 7 (Car parking ancillary to other development).*

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, does not relate to a standard under clause 5.4 and the other subclauses do not apply to the Site.



## 4 Conclusion

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The proposed development contravenes the height of buildings development standard under clause 4.3 of *Sydney Local Environmental Plan 2012* (the LEP).

The height of buildings control under clause 4.3 of the LEP is a development standard and is not excluded from the application of clause 4.6.

This written request to vary the development standard has been prepared in accordance with clause 4.6(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 clause 4.3 of the LEP as the height of the new structures is consistent with other buildings on the site and provides an appropriate height transition between the Toxteth House and the surrounding one (1) and two (2) storey residential buildings; and
- the relevant objectives of the R1 Zone as it is an existing educational establishment that has been located on the site since 1901 and the proposed Stage 4 development will maintain the existing land use pattern of the precinct.

Therefore, the proposed development is in the public interest.

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

- the proposed structures are consistent with the conservation policies under the draft Conservation Management Plan prepared by Design 5 Architects (dated December 2017). The new structures are lower in height than the significant buildings located on the site including Toxteth House and the Administration Building;
- the proposed height of the new structures will have a neutral impact on the heritage significance of the site, the Toxteth Heritage Conservation Area (HCA) or any heritage items located within the vicinity of the development;
- the proposed structures will not have an adverse impact on the Avenue Road streetscape with the proposed building set behind the existing heritage buildings. The contemporary infill building adopts a muted and neutral palette of materials and finishes that doesn't detract from the character of the heritage buildings and HCA;
- a lack of significant adverse environmental amenity impacts including no overshadowing or overlooking of adjoining residential properties and no adverse acoustic impacts;
- the siting of the proposed structures has been carefully considered with regard to the site's opportunities and constraints including heritage significance and landscape character. The new building is located on a part of the site with less heritage significance and the footprint of the proposed building has been minimised to maximise landscape and open space on the site. A two (2) storey building that complies with the 9m height of buildings development standard would require a much larger footprint and reduce the quantity of landscape open space provided on the site and likely have detrimental heritage impacts;
- A compliant proposal would require buildings to be located elsewhere on the site and such an outcome would not achieve the balanced response to heritage and landscape considerations; and
- The proposed structures are consistent with the height of other buildings on site, which currently exceed the 9m height of buildings development standard.

## 4 Conclusion

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Accordingly, this written request can be relied upon by the consent authority when documenting that it has formed the necessary opinions of satisfaction under clause 4.6(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 clause 4.6(2) to grant development consent to the proposed development notwithstanding the contravention of the development standard.