





Clause 4.6
Variation Request
Height of Buildings
Clause 4.3 NLEP 2012

Submitted to NSW Department of Planning and Environment
On Behalf of Nihon University Group

26 MARCH 2019

REPORT REVISION HISTORY

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		Prepared by	Verified by
		Lydia Kuczera <i>Project Planner</i>	 Murray Blackburn-Smith <i>Regional Director</i>
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		Prepared by	Verified by
		Lydia Kuczera <i>Project Planner</i>	 Murray Blackburn-Smith <i>Regional Director</i>

Certification

This report has been authorised by City Plan Strategy & Development P/L, with input from a number of other expert consultants. To the best of our knowledge the accuracy of the information contained herein is neither false nor misleading. The comments have been based upon information and facts that were correct at the time of writing.

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1. INTRODUCTION

This is a formal written request prepared in accordance with Clause 4.6 of the *Newcastle Local Environmental Plan 2012* (NLEP 2012) to support a State Significant Development Application (SSDA) submitted to the NSW Department of Planning and Environment (DPE). The SSDA is for the adaptive reuse of the State heritage-listed former Newcastle Courthouse as an educational establishment with associated student accommodation at No. 9 Church Street, Newcastle (the 'subject site'). The development will involve the demolition of the existing non-original buildings which flank the former Courthouse building and the construction of two new part 3, part 4-storey buildings.

Specifically, the request seeks approval to vary the height of buildings development standard in Clause 4.3 of the NLEP 2012. For the avoidance of doubt, the development standard is not specifically excluded from the operation of Clause 4.6 of NLEP 2012.

Clause 4.3 provides a numerical building height limit of 10m over the subject site. The exception to the development standard contained in Clause 4.3 relates to the two new buildings which both reach maximum heights of 16.6m as measured from ground level (existing) to the highest part of the lift overruns, exceeding the prescribed maximum height by 6.6m (66%).

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. As the following request demonstrates, by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application, compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the standard. This request also demonstrates that the proposal will be in the public interest, as the proposed development will be consistent with the objectives of the development standard and the zoning of the site.

This request has been prepared having regard to the NSW Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011) and relevant decisions in the New South Wales Land & Environment Court (L & E Court). Of particular recent relevance are the decisions of Dixon SC in *Brigham v Canterbury – Bankstown Council [2018] NSWLEC 1406* and of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, which both provide a clear outline of the matters required to be demonstrated pursuant to Clause 4.6, including the structure of such requests.

Sections 3 and 4 of this request explain how flexibility is justified in this case in terms of the matters explicitly required to be addressed in a written request on behalf of the applicant. Sections 5, 6 and 7 address additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 or the assumed concurrence of the Secretary.

2. EXTENT OF VARIATION

As shown in Figure 1, the NLEP 2012 prescribes a maximum building height for the subject site of 10m.

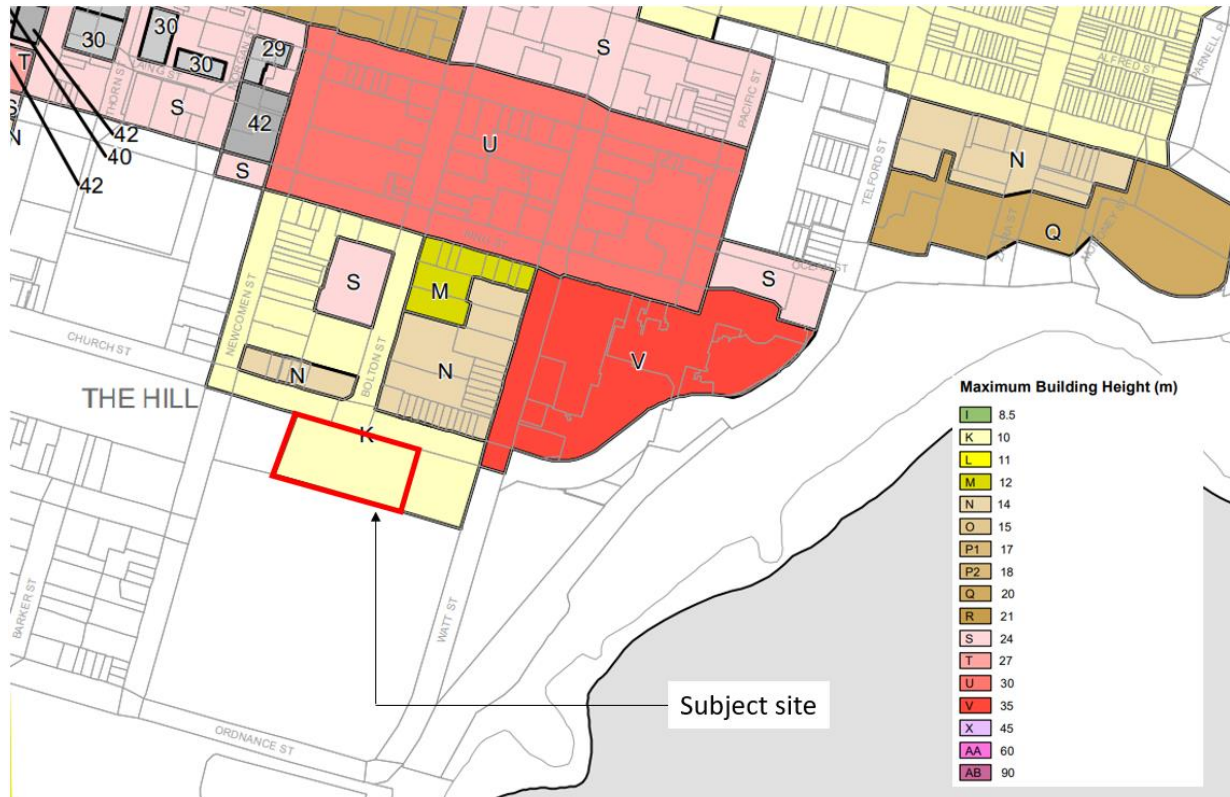


Figure 1: Extract of Height of Building map (source: NLEP 2012)

The proposed development will involve the conservation and adaptive reuse of the part 3 / part 4-storey former Courthouse building, the demolition of the existing 3-storey non-original buildings which flank the former Courthouse building, and the construction of two new part 3 / part 4-storey buildings (referred to herein as the 'eastern building' and the 'western building'). Due to the limited opportunities for communal open space at ground level, communal roof terraces with open air pergolas are proposed above Level 2 of the new buildings to provide additional outdoor recreational space which benefits from views over the area. Access to these rooftop areas will be gained from Level 3 of the new buildings. Level 3 of the eastern building will accommodate additional staff and student accommodation, while the western building will accommodate additional classrooms and a lecture hall at Level 3. Lift(s) and stairways are proposed within the buildings to provide accessibility to all levels, resulting in lift overruns extending above Level 3 of the new buildings. To avoid conflict with the rooftop communal areas, mechanical plant is positioned on the fourth storey rooftops of the new buildings.

All existing buildings within the site exceed the 10m building height standard, with the former Courthouse building reaching a maximum height of 18.9m above existing ground level and the non-original buildings

reaching maximum heights of 12.7m (Higher Courts Western Building) and 13.4m (Administration Building - Eastern Building) (see Figure 2). The new buildings have been configured to adopt a similar form to the existing buildings flanking the former Courthouse building (see Figure 2). The new buildings will maintain a 3-storey frontage to Church Street, with the fourth storey and plant areas contained to the southern/rear part of the site.

The exception to the building height development standard concerns a departure from the standard applicable to the site. Specifically, the new buildings reach the following maximum heights as measured from ground level (existing):

- Eastern Building:
 - 16.6m (RL 38.60m AHD) to the highest part of the lift overrun, exceeding the prescribed maximum height by 6.3m (63%).
 - 11.6m (RL 33.60m AHD) to the highest part of the pergola, exceeding the prescribed maximum height by 1.6m (16%).
- Western Building:
 - 16.6m (RL 38.90m AHD) to the highest part of the lift overrun, exceeding the prescribed maximum height by 6.6m (66%).
 - 11.6m (RL 33.90m AHD) to the highest part of the pergola, exceeding the prescribed maximum height by 1.6m (16%).

The extent of the proposed variation, including the difference of height exceedance between the existing and proposed buildings, is shown in Figures 2 and 3 below. As demonstrated in Figure 2, the non-compliant building elements remain below the height of the former Courthouse building's upper level and parapet, and significantly below the height of the adjoining Newcastle Police Station to the east. The difference of height exceedance between the existing and proposed buildings ranges from 3.2m (eastern building) and 3.9m (western building).



Figure 2: Northern elevation of proposed development showing outline of existing development with orange line and 10m height limit in red dotted line (Source: Azusa Sekkei)

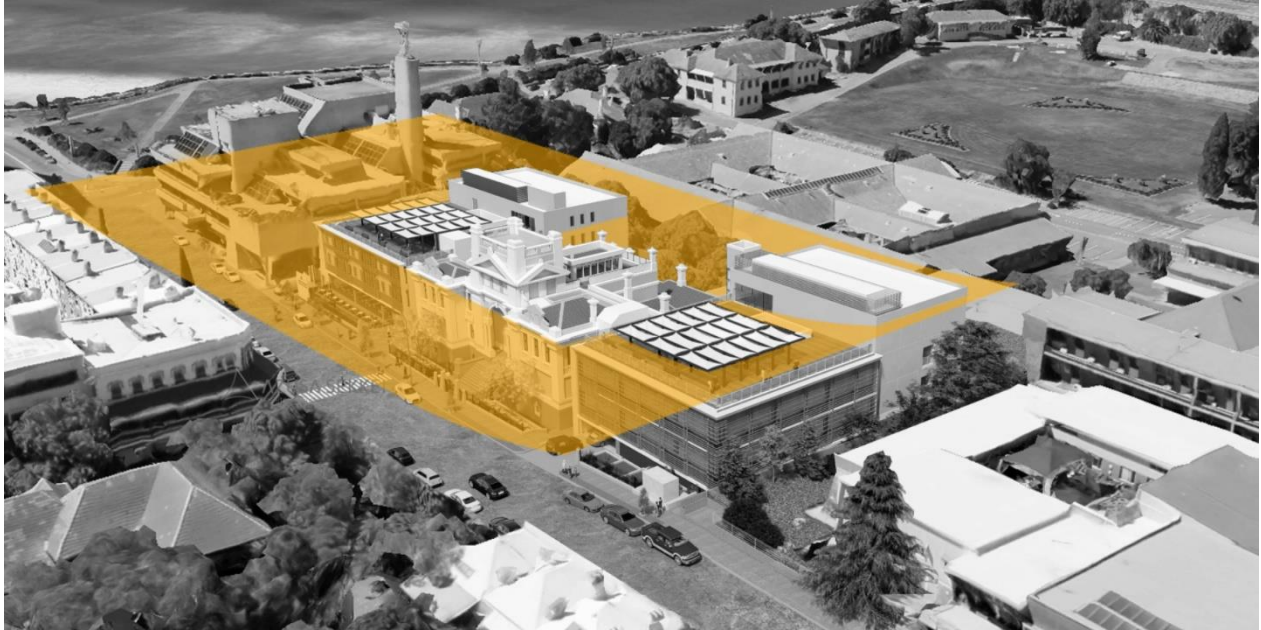


Figure 3: 3D view of proposed development showing 10m height plane in yellow shading (Source: Azusa Sekkei)

3. COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THIS CASE. [cl.4.6 (3)(a)]

The L & E Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal satisfied the objectives of the standard notwithstanding the non-compliance (the first 'test').

The remaining four 'tests' in *Wehbe* are as follows:

1. *The underlying objective or purpose is not relevant, or*
2. *The objective would be defeated if compliance was required resulting in compliance being unreasonable, or*
3. *The development standard has been abandoned, or*
4. *The zoning is unreasonable or inappropriate.*

This request seeks to rely on the first 'test' in *Wehbe*, only, and therefore the remaining four 'tests' are not considered. This approach is consistent with the findings of Dixon SC in *Brigham v Canterbury – Bankstown Council* [2018] NSWLEC 1406 who notes 'you do not need to list all five tests from *Wehbe* if the first test is relied upon and said to be satisfied'.

Pursuant to the first 'test' in *Wehbe*, compliance with the height of buildings development standard is considered to be unreasonable and unnecessary in the circumstances of this case because, as demonstrated below, the objectives of the development standard contained in Clause 4.3 of the NLEP 2012 are satisfied, notwithstanding non-compliance with the standard.

Clause 4.3 Height of buildings objectives

(a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy

The site currently accommodates the former Newcastle Courthouse, a part 3 / part 4-storey building. The former Courthouse building is flanked by 2 non-original 3-storey buildings. As noted in Section 2, all existing buildings within the site exceed the 10m building height standard.

The subject site is located adjacent to the Newcastle City Centre, within *The Hill Heritage Conservation Area*, and is identified as a heritage item of state significance, known as the 'Courthouse'. Surrounding built form ranges in bulk and scale, from the predominately 2-storey James Fletcher Hospital building to the immediate west to the 4-5 storey brutalist-style Newcastle Police Station to the immediate east.

Although zoned B4 Mixed Use, the desired future character and built form of the immediate area is essentially to maintain or complement the existing character and built form. This is achieved by retaining original built features that contribute to the existing character and through new buildings that complement and protect the heritage significance and character of surrounding heritage values.

The proposed development responds to this desired character and form through the retention of the former Courthouse building and the introduction of new buildings on either side that are recessive and simplistic in design. The new buildings are clearly defined elements between the old and new and have been configured to adopt a similar form to the existing buildings flanking the former Courthouse building. The new buildings

will maintain a 3-storey frontage to Church Street. The fourth storey components of each building will be significantly setback such that they are not noticeably visible from the streetscape and do not alter the bulk or scale of the development. Although set further forward, the roof terrace pergolas are lightweight structures and will be articulated to blend within the building form.

It is considered that, overall, the proposal will deliver an appropriate built form that generally resembles the existing site development and remains compatible with the scale of nearby developments. Importantly, the highest parts of the new buildings remain below the uppermost level of the former Courthouse building and significantly below the height of the adjoining Police Station to the east.

(b) to allow reasonable daylight access to all developments and the public domain.

Shadow diagrams and 3D models have been prepared for the proposal by Azusa Sekkei and are included in the Architectural Plans submitted with this SSDA. Figures 4-11, below, have been extracted from the Architectural Plans. These extracted figures demonstrate that, due to existing ground level changes between the site and adjoining land, shadows cast by the proposed buildings, including the non-compliant components, are generally confined within the site's boundaries during the winter solstice.

External shadow impacts from the non-compliant components of the development during the winter solstice, between 9:00am and 3:00pm, are summarised as follows:

- Some overshadowing to the garden area of the adjoining Hospital Campus site to the west will occur during the morning period, however this will be limited to less than 1 hour.
- Overshadowing of the Hospital site to the south is exceedingly minor in the context of this large site and will not affect any areas of usable open space.
- No overshadowing of nearby residential development or the public domain will occur.

In light of the above, it is submitted that reasonable daylight access to neighbouring developments and the public domain is maintained as a result of the height non-compliances.

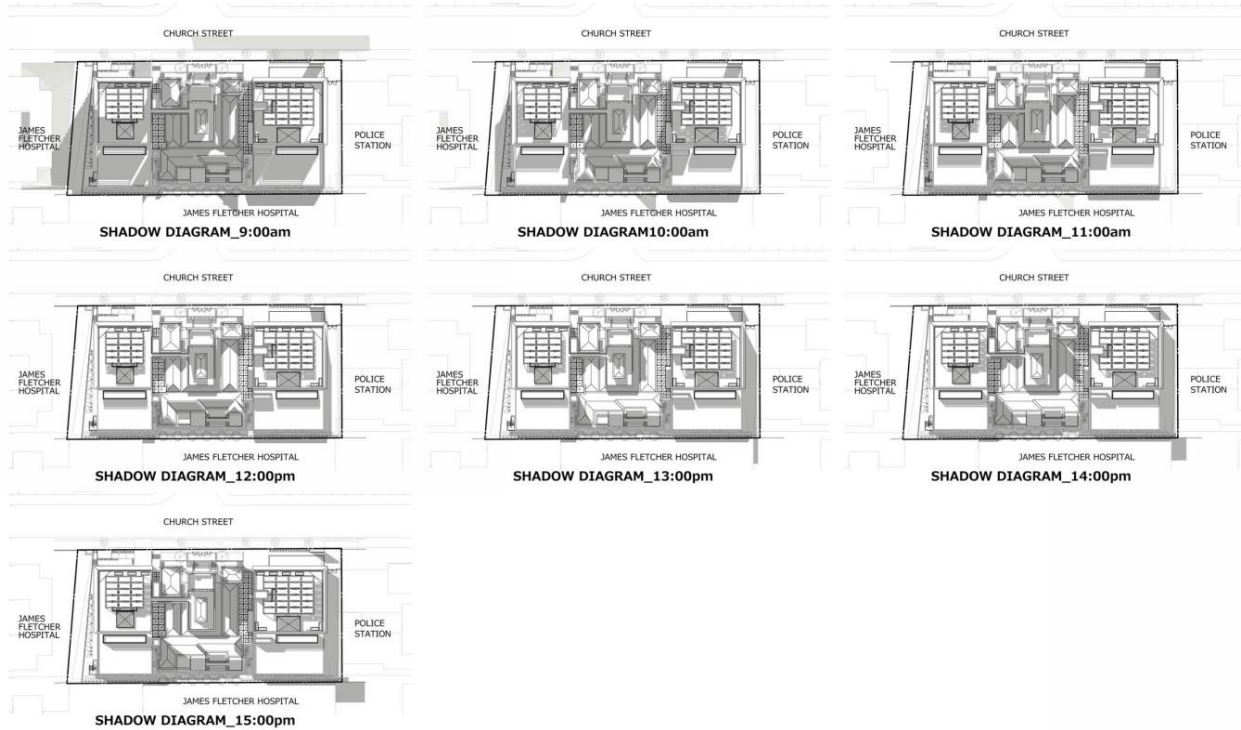


Figure 4: Shadow impact of proposed development during winter solstice (Source: Azusa Sekkei)

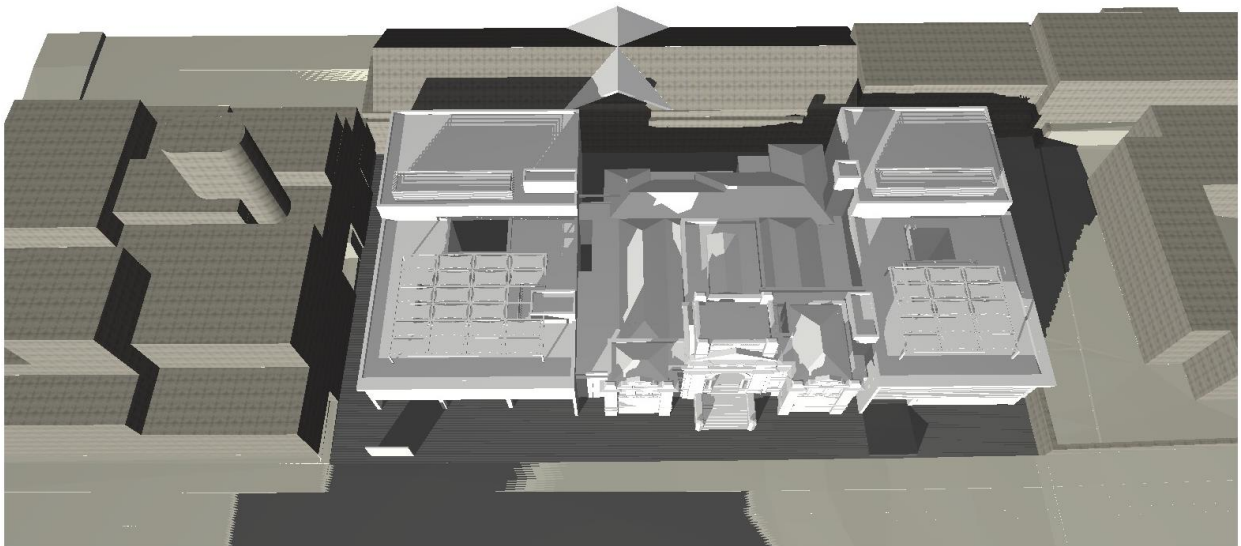


Figure 5: 3D Model showing shadow impact of proposed development at 9:00am, winter solstice (Source: Azusa Sekkei)

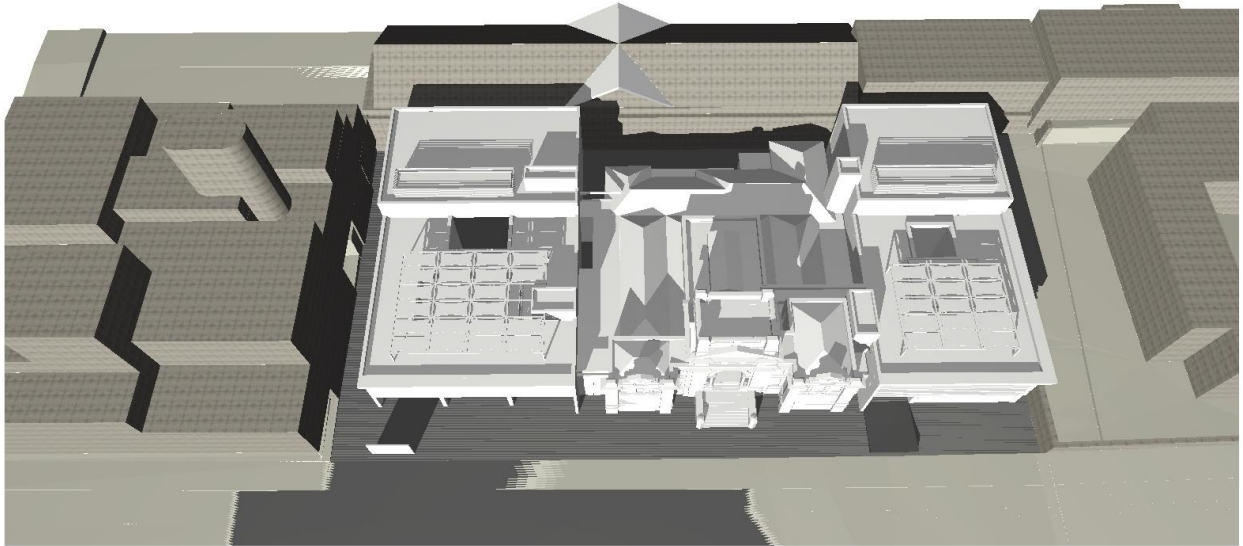


Figure 6: 3D Model showing shadow impact of proposed development at 10:00am, winter solstice (Source: Azusa Sekkei)



Figure 7: 3D Model showing shadow impact of proposed development at 11:00am, winter solstice (Source: Azusa Sekkei)



Figure 8: 3D Model showing shadow impact of proposed development at 12:00pm, winter solstice (Source: Azusa Sekkei)

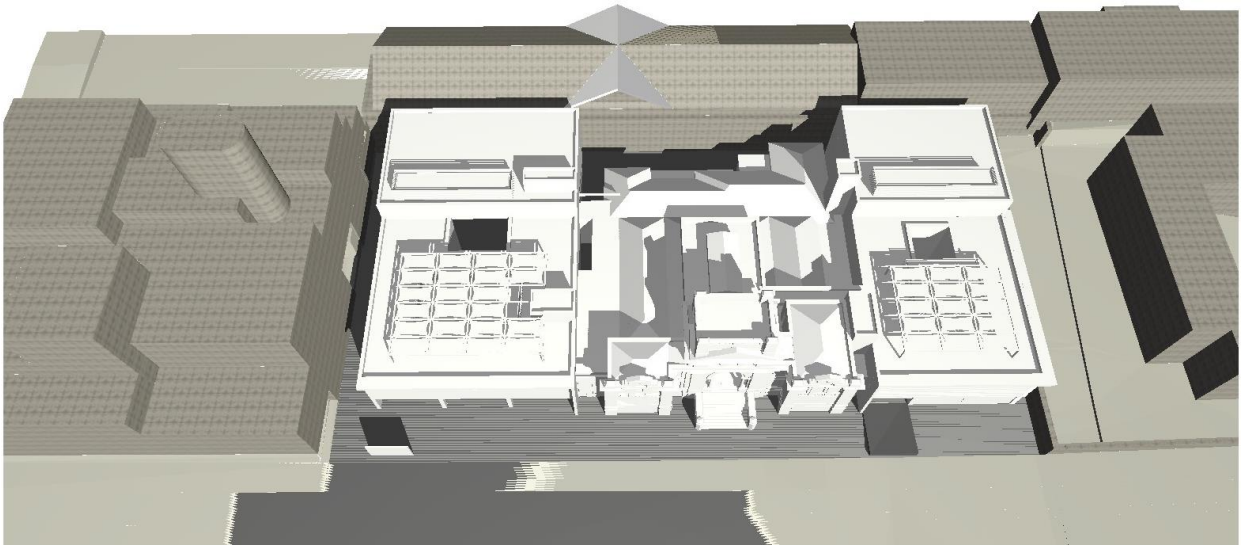


Figure 9: 3D Model showing shadow impact of proposed development at 1:00pm, winter solstice (Source: Azusa Sekkei)

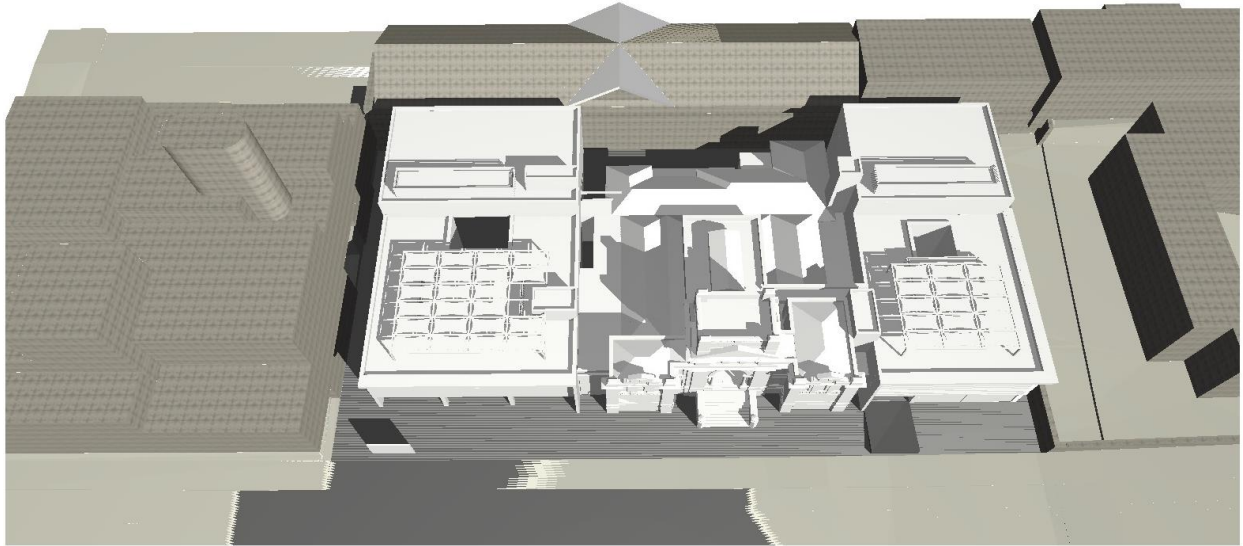


Figure 10: 3D Model showing shadow impact of proposed development at 2:00pm, winter solstice (Source: Azusa Sekkei)



Figure 11: 3D Model showing shadow impact of proposed development at 3:00pm, winter solstice (Source: Azusa Sekkei)

4. THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE STANDARD. [cl. 4.6(3)(b)]

The Environmental Impact Statement (EIS) prepared to support this SSDA provides a holistic environmental planning assessment of the proposed development and concludes that there are sufficient environmental planning grounds to support the development.

Specific environmental planning grounds to justify the breach of the standard are summarised as follows:

- The proposal responds to and enhances the existing heritage character of the State-listed Courthouse through its adaptive reuse, while providing appropriate facilities for University staff, students and the general public. In this respect, the proposed exceedances facilitate high-quality outdoor communal space, educational facilities and student/teacher accommodation, as well as accessible access to these spaces. The additional educational space and student/staff accommodation would ensure Nihon's operational requirements are met, whilst ensuring conservation of the former Courthouse building. Lift(s) and stairways are proposed within the buildings to provide accessibility to all levels, resulting in lift overruns extending above Level 3 of the new buildings. To avoid conflict with the rooftop communal areas, mechanical plant is positioned on the fourth storey rooftops of the new buildings, resulting in additional height in the rear third of the site.
- Due to the site's geographical constraints, opportunities for accessible open space are limited. As a result, the majority of the development's communal open space has been elevated to the Level 3 rooftop of the new buildings. The roof terraces offer magnificent views to the city and generous areas for outdoor relaxation. The non-compliant pergola structures are proposed to provide amenity and weather protection to students.
- The new buildings have been configured to adopt a similar form to the existing buildings flanking the former Courthouse building. No significant increase in height exceedance is proposed compared to existing building heights within the site. Importantly, the non-compliant building elements remain below the height of the former Courthouse building's upper level and parapet, and significantly below the height of the adjoining Police Station to the east.
- The exceedances will not result in any unreasonable amenity, overshadowing or streetscape impacts. The new buildings will maintain 3-storey frontages to Church Street, generally below the maximum building height limit. The fourth storey components of each building will be significantly setback such that they are not noticeably visible from the streetscape and do not alter the bulk or scale of the development, with the exception of the roof terrace pergolas which will be articulated to blend within the building form.
- The NLEP 2012 does not prescribe an FSR over the subject site, and therefore does not seek to quantitatively control building bulk and scale. It is noted that the land immediately adjoining the site to the north is subject to a prescribed FSR of 1.5:1. The proposed development has an overall FSR of 1.3:1. On environmental planning grounds such a density of development in a mixed use zone adjoining the City Centre is considered appropriate and could not be regarded as representing excessive development of the site. To enable this density in a built form setting respectful of the locality's heritage character, a stepped built form away from the street is favoured on environmental planning grounds.

The above points are environmental planning grounds that warrant the departure from the development standard and are not "generic" but rather specific to the site and the circumstances of the case.

5. THE PROPOSAL WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE STANDARD AND THE OBJECTIVES OF THE ZONE. [CL.4.6(4)(A)(II)]

Clause 4.6(4)(a)(ii) provides that development consent must not be granted for development that contravenes a development standard unless 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.

In Section 3 of this request, it was demonstrated that the proposal is consistent with the objectives of the development standard. The proposal is also consistent with the objectives of the B4 zone as explained in Table 1 below:

Table 1: Consistency with B4 zone objectives from NLEP 2012

Objective	Discussion
To provide a mixture of compatible land uses.	The proposal provides an educational establishment with associated student accommodation and a cafeteria that will serve the needs of international students and staff. Some components of the new campus will also be open to the local community.
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.	<p>The site is located in close proximity to various public transport nodes and a wide range of services, recreational opportunities and other community facilities to maximise opportunities for public transport patronage and to encourage walking and cycling.</p> <p>The proposal provides an educational establishment with ancillary student accommodation and food and drink premises. The proposal will therefore be mainly self-contained, providing for the living, social and educational needs of international students. It is anticipated that the range of nearby services and facilities (accessible by walking or public transport) will cater to the additional needs of staff and students.</p> <p>A Green Travel Plan for the site will be developed and available for implementation at the commencement of site operations.</p>
To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.	<p>The proposal provides educational and ancillary accommodation land uses, which are major supporting uses to surrounding commercial centres.</p> <p>The proposal will transform the site to a vibrant educational and social hub within Newcastle East, producing direct and indirect economic benefits to the</p>

	surrounding commercial centre. The ongoing rotation of international students, who will require facilities, services and goods within the proximity to the site, will enhance the ongoing viability of the nearby centre.
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The objectives of the zone, as demonstrated above, as well as the objectives for the standard, have been adequately satisfied. Therefore, the proposed variation to the development standard is considered to be in the public interest.

6. CONTRAVENTION OF THE DEVELOPMENT STANDARD DOES NOT RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING. [cl. 4.6(5)(a)]

There is no identified outcome which would be prejudicial to planning matters of State or Regional significance that would result as a consequence of varying the development standard as proposed by this application.

7. THERE IS NO PUBLIC BENEFIT OF MAINTAINING THE STANDARD. [cl. 4.6(5)(b)]

Pursuant to case law in *Ex Gratia P/L v Dungog Council (NSWLEC 148)*, the question that needs to be answered is '*whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development*'.

There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that would result from the variation to the maximum height of buildings standard. Rather, the redevelopment of the site will facilitate the conservation and adaptive reuse of a currently unused State-listed heritage building, while providing a new education hub with associated student accommodation to support the viability of the adjoining Newcastle City Centre. Importantly, the additional building height would not present any unreasonable impacts upon adjoining development, heritage values or the streetscape.

Overall, the proposal will result in a number of positive social and economic impacts and is a direct positive contribution towards the realisation of the NSW Government's commitment to establish Nihon University at the site

Accordingly, there is no public benefit in maintaining strict compliance with the height of buildings development standard given that there are no unreasonable impacts that would result from the variation to the standard.

8. CONCLUSION

This Clause 4.6 variation request demonstrates, as required by Clause 4.6 of the NLEP 2012, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard and is consistent with the objectives of the B4 Mixed Use zone, notwithstanding the variation;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard in this instance; and
- The variation does not raise any matter of State or Regional Significance.

Accordingly, it is considered appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.