



# City of Canterbury

*City of Cultural Diversity*

*Our Reference:*  
150/308D PT 7

Enquiries: Rita Nakhle  
Direct Phone: 9789 9449  
Direct Fax: 9789 1542



Mr Peter Jackson  
Pikes & Verekers Lawyers  
DX 521  
SYDNEY

PIKES & VEREKERS  
LAWYERS

19 MAY 2015

Dear Mr Jackson,

## Request for Legal Advice - Extent of Variation Using Clause 4.6

### Background

On 19 February 2014, the Joint Regional Planning Panel ('JRPP') approved Development Application DA-405/2013 for the 'construction of a mixed use development comprising ground floor commercial units, 126 residential units, eight (8) multi dwelling housing units and associated basement car parking' at 308-310 & 312-320 Canterbury Road, and 6-8 Canton Street Canterbury. A copy of the JRPP Assessment Report, JRPP Minutes and Notice of Determination are enclosed for your information.

The development, as approved, involved slight variations to the maximum applicable height controls under Canterbury Local Environmental Plan 2012 ('CLEP 2012'), where there was a maximum building height of 8.7 metres where the maximum standard is 8.5 metres in the R4 zoned part of the site, and a maximum building height of 19.5 metres where the maximum standard is 18 metres in the B5 zoned part of the site. A Clause 4.6 variation was considered and supported in the assessment and determination of the subject development.

### Current Applications

On 19 December 2014, Council received the following two applications relating to the approved development at the subject site :

- **DA-604/2014:** Construction of additional three (3) to four (4) storey levels on an approved mixed use development resulting in a total of 220 residential apartments (Estimated Cost of Development at \$15,068,255.00); and
- **DA-405/2013:** Section 96(1A) modification to amend the layout and design of basement level car parking area and internal reconfiguration of basement and waste management facilities of an approved mixed use development.

Canterbury City Council, Administration Centre 137 Beamish Street • PO Box 77 Campsie NSW 2194  
When writing to Council please address your letter to the GENERAL MANAGER, MR JIM MONTAGUE  
Phone: (02) 9789 9300 Fax: (02) 9789 1542 TTY: (02) 9789 9617 DX 3813 Campsie  
email:council@canterbury.nsw.gov.au website:www.canterbury.nsw.gov.au

The two applications submitted essentially seek to increase the density of the subject development from 134 to 220 residential dwellings, enlarge the basement car parking area and an overall proposed increase in the overall building height to 29 – 30 metres.

The applicant has submitted a 'Clause 4.6 Exception to the Height Development Standards' prepared by LJB Urban Planning Pty Limited in support of the variation proposed, and also submitted is Legal Opinion by Scott Nash of Martin Place Chambers in regard to the use of Clause 4.6 in the case of the subject development. Both documents are enclosed for your information.

**Request for Legal Advice**

We enclose in this package a copy of both applications currently before Council and we are seeking your review of the proposals involved and more specifically seeking your advice on whether the use of Clause 4.6 for the variation proposed to the building height standard is reasonable in the case of the subject development, given the significant extent of the variation.

We respectfully request your advice to be provided to us by 29 May 2015 so that we are able to determine the way forward with the applications.

If you have any queries in regard to the above, please do not hesitate to contact me on 9789 9449.

Yours sincerely,



Rita Nakhle  
**SENIOR PLANNER**

18 May 2015

**Roslyn McCulloch**

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**From:** Roslyn McCulloch  
**Sent:** Tuesday, 26 May 2015 7:28 PM  
**To:** 'Rita Nakhle'  
**Cc:** Peter Jackson  
**Subject:** RE: Advice: 308-320 Canterbury Rd and 6-8 Canton Street Canterbury

**Saved:** 0

Dear Rita,

The question of whether a clause 4.6 variation should be supported is not a legal question but one that should be decided having regard to the constraints in clause 4.6 (referred to in our advice) and considerations under s.79C EP&A Act.

The degree of variation from the standard is a relevant consideration but there is no bright line to decide when a variation is too great. Equally, just because a request for a variation is made does not imply that it ought to be granted. It will depend on the context of the proposed development. It is also relevant to have regard to the fact that the zoning instrument is relatively new (2012) so the standards it contains might be expected to reflect the desired future scale of development in that zone.

It is not useful to compare the proposed development with other applications in which a substantial variation to a development standard has been permitted because each application will have different circumstances which need to be considered. For example there are LEC cases where an FSR of double that permitted in the zone has been allowed and other cases where a very small variation to the FSR has been refused.

We note that the extent of the variation to the height control being sought is in the order of a 66% exceedance of the control. That is a very significant departure from the standard so there would need to be a strong justification for it. Whether the variation is justified is a question for Council's planning staff and, ultimately, Council.

Kind regards,

**Roslyn McCulloch** | Special Counsel

**Pikes & Verekers Lawyers**

t 9262 6188 | direct 8098 6221 | f 9262 6175 | e [rmcculloch@pvlaw.com.au](mailto:rmcculloch@pvlaw.com.au)

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**From:** Rita Nakhle [<mailto:Ritan@canterbury.nsw.gov.au>]  
**Sent:** Tuesday, 26 May 2015 5:00 PM

**Roslyn McCulloch**

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**Sent:** Tuesday, 26 May 2015 5:00 PM  
**To:** Roslyn McCulloch  
**Subject:** Re: Advice: 308-320 Canterbury Rd and 6-8 Canton Street Canterbury

Dear Roslyn,

Thank you for your email below and attached advice.

I have discussed the advice with the Director of City Planning, Mr Spiro Stavis, and we seek your further assistance of whether in your opinion / experience with similar matters, Council should support the proposed significant variation under Clause 4.6 in this instance, and if so, are there any examples where such significant Clause 4.6 variations have been favourably considered.

Thank you in advance.

Please contact me on the number below if you wish to discuss.

Regards,

**Rita Nakhle | Senior Planner**  
City of Canterbury 137 Beamish St Campsie NSW 2194  
T: 9789 9449 | F: 9789 1542  
[ritan@canterbury.nsw.gov.au](mailto:ritan@canterbury.nsw.gov.au) | [www.canterbury.nsw.gov.au](http://www.canterbury.nsw.gov.au)



>>> Roslyn McCulloch <[RMcCulloch@pvlaw.com.au](mailto:RMcCulloch@pvlaw.com.au)> 26/05/2015 12:02 PM >>>

Dear Rita,

Please see attached letter of advice. A hard copy will follow by DX.

Please do not hesitate to call me if you have any queries.

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FILE

150433

**Kate Garnock**

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**From:** Peter Jackson  
**Sent:** Wednesday, 27 May 2015 9:46 AM  
**To:** Kate Garnock  
**Subject:** FW: RE: Advice: 308-320 Canterbury Rd and 6-8 Canton Street Canterbury  
**Attachments:** Spiro Stavis.vcf

**Saved:** 0

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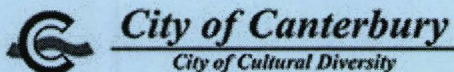
**From:** Spiro Stavis [mailto:Spiros@canterbury.nsw.gov.au]  
**Sent:** Wednesday, 27 May 2015 9:04 AM  
**To:** Peter Jackson  
**Cc:** Evar@canterbury.nsw.gov.au; Georgeg@canterbury.nsw.gov.au; Ritan@canterbury.nsw.gov.au; Stephenp@canterbury.nsw.gov.au  
**Subject:** Fwd: RE: Advice: 308-320 Canterbury Rd and 6-8 Canton Street Canterbury

Hi Peter,

Please see below.

Gary Green has provided such opinions for me in the past. We need something similar. Can you please call me when you can.

**Spiro Stavis | Director City Planning**  
 City of Canterbury 137 Beamish St Campsie NSW 2194  
 T: 9789 9487 | F: 9789 1542 | [spiros@canterbury.nsw.gov.au](mailto:spiros@canterbury.nsw.gov.au) | [www.canterbury.nsw.gov.au](http://www.canterbury.nsw.gov.au)



>>> Rita Nakhle 27/05/2015 8:58 AM >>>  
 FYI - will need to know which way I need to proceed with this.

>>> Roslyn McCulloch <[RMcCulloch@pvlaw.com.au](mailto:RMcCulloch@pvlaw.com.au)> 26/05/2015 7:28 PM >>>



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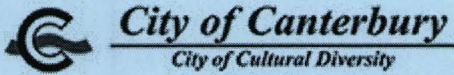
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