

## Clause 4.6 Variation Request

DA 2016/392



### 217 Great Western Highway, Mays Hill

Proposed Cultural Hall

Submitted to:  
Cumberland Council (former Holroyd)



On behalf of:  
The Saiva Manram (TSM)



April 2017



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## 1.0 Introduction

This clause 4.6 variation request has been prepared to support DA 2016/392 at 217 Great Western Highway, Mays Hill in Cumberland Council LGA (former Holroyd) on behalf of TSM.

The proposal is for a new cultural hall (over three levels of basement parking) and associated works including lot amalgamation, demolition of existing site structures and the construction of a new access road.

The DA was made pursuant to the Holroyd Local Environmental Plan 2013 (HLEP 2013).

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The objectives of clause 4.6 of the HLEP 2013 are as follows:

- (1) The objectives of this clause are 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.

The matters which must be addressed and justified by a clause 4.6 variation are:

- (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.**
- (our emphasis)**

- (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 Secretary has been obtained.
- (our emphasis)**

NSW Land and Environment Court judgements guide the approach on varying development standards, key judgements include:

- *Winten v North Sydney Council* [2001] NSWLEC 46
- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009
- *Micaul Holdings Pty Ltd v Randwick City Council* [2015] NSWLEC 1386
- *Maskovich v Waverley Council* [2016] NSWLEC 1015

## 2.0 Relevant Development Standard

The development standard that is sought to be varied is clause 4.3 Height of buildings of the HLEP 2013. The proposed maximum height of the new building is 16.34m, some 1.34m greater than the standard set by the LEP control (15m).

Table 1 – Nature and scale of cl 4.6 variation request

Standard	HLEP 2013 Control	Proposal	% Variation
Height of building	15m	16.34m	8.9%



Figure 1: Holroyd Local Environmental Plan 2013 Height of Buildings Map 'O' – 15 metres

The building height non-compliance is shown volumetrically below. Figure 2 illustrates the minor and inconsequential nature of the height plane breach.



Figure 2: 15m height plane overlay



### 3.0 Grounds of Objection

#### 3.1 HLEP 2013 Clause 4.6 (3) (a)

***compliance with the development standard is unreasonable or unnecessary in the circumstances of the case***

The decision of Justice Preston in *Wehbe v Pittwater [2007] NSW LEC 827* expanded on the findings in *Winten v North Sydney Council* and established the five part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions:

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1. **Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;**
2. Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard unnecessary;
3. Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
4. Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that departs from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
5. Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently compliance with that development standard is unnecessary and unreasonable.

**(our emphasis)**

In justifying the non-compliance the first test is applicable in justifying compliance with the HLEP 2013 height of buildings control is unreasonable or unnecessary. The objectives of the height of building development standard and how it is met by the proposal is outlined below:

Table 2 – Assessment against the HLEP 2013 height of building objectives

Objective	Compliance
(a) to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,	<p>The proposal has deliberately been sited and designed to mitigate against visual impacts to the high density residential area (in current transition and transformation) to the east of the site.</p> <p>The cultural hall is proposed on the low side of the lot, with the height breach only occurring on part of the proposed second storey roof. The roof itself has been designed in keeping with the Dravidian-styled architecture of the building and cultural reference point of the use of the wider TSM site.</p> <p>The building itself sits not only at the lowest part of the site but at the cul-de-sac termination of Belinda Place, beyond which at some height itself atop an embankment is the M4 Motorway. In the context of the termination of the street, the grade change to the M4 and overall impacts it is considered that this breach will result in an inconsequential visual impact to neighbouring properties to the east (noting that no other aspect will be impacted).</p>

	<p>Moreover, solar access testing has shown zero impact upon adjoining properties – see Figure 3.</p> <p>Further, in terms of privacy, the revised proposal has removed the colonnade and entrance from the Belinda Place elevation, and as such any potential privacy or noise intrusion impacts have been mitigated.</p>
(b) to ensure development is consistent with the landform,	<p>The proposed development has taken into account the topography of the site. The architectural design is considered to be site-responsive with the access road proposed on the low side of the building, noting also the dramatic increase in grade at the end of Belinda Place with the placement of an embankment to provide for the M4 Motorway some 5m above Belinda Place.</p>
(c) to provide appropriate scales and intensities of development through height controls.	<p>The proposal is considered to be an appropriate and desirable land use at the transition point between the B6 (Enterprise Corridor) and R4 (High Density Residential) zones noting that the following land uses are also permitted with consent in the B6 zone:</p> <ul style="list-style-type: none"> <li>- bulky goods premises;</li> <li>- food and drink premises;</li> <li>- light industries;</li> <li>- timber yards; and</li> <li>- warehouse or distribution centres.</li> </ul> <p>It is important to note that Community facilities are permissible with consent in both the B6 and R4 zones.</p> <p>The bulk, scale and intensity of the proposed built form is consistent with current/future residential flat buildings completed/proposed in Belinda Place (to the same 15m height limit), and the desired future character of the area which is in significant transformation. The TSM development would not be out of character in its current or future context particularly in its proposed location.</p>

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### 3.2 HLEP 2013 Clause 4.6 (3) (b)

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

There are sufficient environmental planning grounds to support a variation to the height of buildings development standard at the subject site. These are summarised as follows:

#### 1. Appropriate land use, bulk and scale for the transition between B6 and R4 zones

As noted in Table 2 above, the range of land uses permitted in the B6 (Enterprise Corridor) zone includes those which would be much more intrusive upon the amenity of residents in Belinda Place. A cultural hall, which is permitted in both B6 and R4 zones represents a suitable and sympathetic land use at this transition point between the zones.

Moreover, the height control (15m) is consistent with the desired future character of Belinda Place and the Mays Hill area generally which is undergoing transformation from a low density residential area predominately occupied by detached dwellings to a high density

residential area, with many residential flat buildings already built or under construction. The bulk and scale of all developments in the area are alike, with the hall unlikely to be an outlier in this regard, particularly in its termination to the cul-de-sac context.

## 2. Public interest, community need and reduction in burden upon Council infrastructure

The development is in the public interest in that its objectives are to continue to foster the social, cultural and community welfare activities of the Temple's Saiva and Hindu communities and cater for its recent substantial growth.

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The Temple will continue to service the spiritual needs of a large number of the Saiva and Hindu communities. The congregation is currently subjected to a number of disadvantages due to lack of facilities within the TSM precinct and the locality generally. The proposed facilities will help alleviate the inconveniences experienced by the Saiva and Hindu communities without impacting significantly on the surrounding neighbourhood. The development will also resolve existing parking issues at the site with a further 197 parking spaces (bringing to a total of 304 spaces site-wide). The hall will enable visitors to undertake spiritual and festive activities in one location rather than travel or commute between venues during particular events. This would assist in reducing traffic volumes at other times.

The TSM proposal provides for a use and built form likely to better relate to the Belinda Place context than that of other permitted land uses noting that in being permitted in either zone it could be viewed as providing a form of buffer at this zone transition point.

The commissioning of the proposed facility will only be a minor intensification of the existing activities, as at present temporary structures and marquees are used for events of a size greater than the existing hall's capacity. The Hall will not operate on a commercial basis or like an entertainment centre for the general public's use.

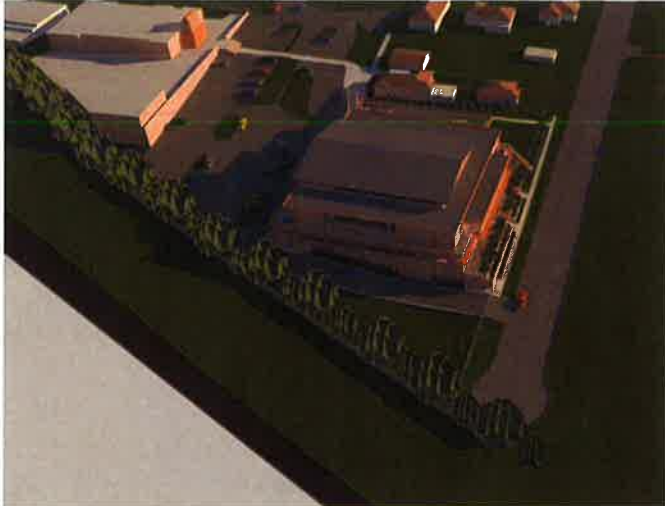
Unlike residential or commercial development, the Temple does not create a new population reliant upon Council's services or infrastructure. The Temple (and the new Hall) is in itself social infrastructure and enhances Cumberland Council's array of community halls. Whilst it will only serve TSM's community, it will free up other facilities operated by Council (or other groups) and reduce any significant burden upon competition for those spaces/facilities at peak periods.

## 3. Variation does not result in any additional overshadowing, noise or privacy impacts

As discussed above, height of building breach is minor and results in zero to inconsequential impacts upon the amenity of neighbouring landholdings.

As shown in Figure 3, the proposed cultural hall will not overshadow adjoining residential properties on Belinda Place. Indeed in mid-winter, the shadows fall onto the TSM at-grade car park in the morning, or onto the termination of Belinda place itself or up the M4 embankment in the afternoon.

The project team have redesigned the hall to minimise the colonnade and entrance to Belinda Place, reducing the (possible) minimal noise and privacy impacts to neighbouring residences. Overall, the variation will not result in any additional amenity impacts.



9am 21 June



12 noon 21 June



3pm 21 June

Figure 3: Sunlight access testing



### 3.3 HLEP 2013 Clause 4.6 (4) (a) (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***

#### *Consistency with objectives of the development standard*

The proposal is consistent with the HLEP 2013 height of buildings standard as discussed above.

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#### *Consistency with objectives of the zone*

We note that the land use sits as somewhat of an anomaly relative to the B6 (Enterprise Corridor) zoning, due to the objectives largely speaking to business, economics and employment, see below:

#### **Zone B6 Enterprise Corridor**

##### **1 Objectives of zone**

- To promote businesses along main roads and to encourage a mix of compatible uses.
- To provide a range of employment uses (including business, office, retail and light industrial uses).
- To maintain the economic strength of centres by limiting retailing activity.
- To provide for residential uses, but only as part of a mixed use development.

It is noted that the whole of TSM's site/landholdings in this part of the site were rezoned B6 under LEP 2013, indicating a level of Council acceptance or appreciation that a consolidation of TSM activities would be planned for at some point into the future. Accommodation for TSM community purposes would have been understood to form part of this consolidation at the site. As described above, the hall is permissible in both the B6 and adjacent R4 zones, and serves as a reasonable transition development in the overall context of its location and siting. While not directly relevant, none of the B6 zone objectives will be thwarted by the proposal. A better assessment can be made against the aims of the HLEP 2013 as summarised in Table 3 below:

Table 3 – Assessment against the aims of HLEP 2013

Aim of Holroyd LEP 2013	Compliance
(a) to provide a clear framework for sustainable land use and development in Holroyd,	Complies – land use is permissible and appropriate for the transition between B6 and R4 zones, as outlined above.
(b) to provide for a range of land uses and development in appropriate locations to meet community needs, including housing, education, employment, recreation, infrastructure and services,	As above. The land use is also appropriate as it is directly servicing a known community need, and potentially also freeing-up other community spaces through the provision of this development.
(c) to promote ecologically sustainable development by facilitating economic prosperity, fostering social well-being and ensuring the conservation of the natural environment,	As above. The development is considered to be socially responsible and will not have any negative impacts upon the natural environment.
(d) to concentrate intensive land uses, increased housing density and trip-generating activities in close proximity to centres and	N/A, noting however that a development that consolidates activities into a single location will inherently be able to reduce trip generation in the locality. As noted in the supplementary traffic and parking report, the site's traffic

major public transport nodes in order to retain the low-density character of other areas,	generation is also in keeping with the RMS traffic generation rates and corresponding road capacities of both the Great Western Highway and Belinda Place.
(e) to promote the efficient and equitable provision of public services, infrastructure and amenities,	As noted above, the proposal reduces the burden upon Council's and other groups social infrastructure, since members of the TSM will be able to celebrate functions at the proposed cultural hall rather than at Council owned facilities and providing wider equitable use of those facilities.
(f) to protect the environmental and cultural heritage of Holroyd including: (i) identifying, conserving and promoting cultural heritage as a significant feature of Holroyd's landscape and built form as a key element of its identity, and	N/A – the proposal will not impact upon any items of environmental heritage or landscape.
(ii) effectively managing the natural environment (including remnant bushland and natural watercourses) to ensure its long-term conservation.	As above.

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We have also carried out a review against HLEP's R4 zone objectives as this is the adjacent zone over Belinda Place, which has also been perceived as being a 'residential' street only despite the adjacent zones.

Table 4 – Assessment against the HLEP 2013 R4 zone objectives

Aim of Holroyd LEP 2013	Compliance
<ul style="list-style-type: none"> <li>To provide for the housing needs of the community within a high density residential environment.</li> </ul>	<p>N/A – does not provide housing, but does enable a successful high density environment, to be developed and provided for acknowledging that conversely, a community hall would be permitted in B6 and R4 in either context.</p> <p>Note: site does not sit in a residential zone and the dwellings lost to the development have a low occupancy rate and are used by TSM. Other nearby higher density residential developments will more than adequately compensate for any accommodation lost.</p>
<ul style="list-style-type: none"> <li>To provide a variety of housing types within a high density residential environment.</li> </ul>	<p>N/A – as above.</p> <p>Note: site does not sit in a residential zone</p>
<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>	<p>The proposal will directly service for the day to day needs of the Mays Hill (and broader Cumberland LGA) residents of the Saiva and Hindu communities. As discussed, the TSM population in the area has rapidly increased over the past few years and is outgrowing the existing facilities on site and locality. In this regard, the proposal will also alleviate the burden upon existing Council social infrastructure.</p>

### 3.4 HLEP 2013 Clause 4.6(5)

Under clause 4.6(5), the Secretary must consider the following matters:

Table 5 – Assessment against the SLEP 2012 Clause 4.6 (5) provisions

Clause 4.6 (5)	Compliance
(5) 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	The contravention of the height of building development standard does not raise any matter of significance for state and regional environmental planning.
(b) the public benefit of maintaining the development standard, and	Complies. Refer earlier comments above.
(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.	N/A

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## 4.0 Conclusion

In summary, compliance with the height of buildings standard in the HLEP 2013 is unreasonable and unnecessary in the unique circumstances of the case. The proposal facilitates a better outcome from an architectural, environmental and public benefit perspective as described above.

