



Willoughby Girls High School

Request for 4.6 Variation

Prepared by:

RPS AUSTRALIA EAST PTY LTD

Level 13, 255 Pitt Street,
Sydney, New South Wales 2000

T: 02 9248 9800
E: sydney@rpsgroup.com.au

Prepared by: James Gilchrist
Reviewed: Claire Muir
Approved: Louise Bochner
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Prepared for:

**DEPARTMENT OF EDUCATION C/ CONRAD
GARGETT AMW**

**C/O CONRAD GARGETT ANCHER
MORTLOCK WOOLLEY**

35 Bridge Street
Sydney NSW 2000

T: 02 8218 9100
E: mail@conradgargett.com.au

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1.1 Introduction

This statement applies for a clause 4.6 variation to the proposed building height, and Floor Space Ratio (FSR), pursuant to the provisions of *Willoughby Local Environmental Plan 2012* (WLEP). This statement considers the following LEP provisions which include:

- Clause 4.6 (Exceptions to development standards);
- The objectives of Clause 4.3 (Height of Buildings);
- The objectives of Clause 4.4 (Floor Space Ratio);
- “*Varying Development Standards: A Guide*” published by the Department of Planning and Infrastructure (August, 2011); and
- Relevant case law specifically the considerations for assessing development standards including *Wehbe v. Pittwater Council* [2007] NSWLEC 827, *Four2Five Pty Ltd V Ashfield Council* [2015] NSW LEC and *Moskovich v Waverley Council* [2016].

This request for variation of development standards provides an overview of the development standards and the extent to which the proposed works vary those standards. The variation is assessed in accordance with Clause 4.6 of WLEP and the relevant principles of the court ruling as outlined above.

The variation to the strict application of Clause 4.3 & Clause 4.4 is considered appropriate for the proposed development as:

- The proposal is compliant with the objectives for Height of Buildings and Floor Space Ratio as outlined in WLEP.
- The proposal is compliant with the objectives of the R2 Low Density Residential zone.
- Sufficient environmental planning grounds exist to support the proposed variations.
- The public benefit of maintaining the development standard is not eroded by the proposal.

1.2 Development Standards

Clause 4.3 Height of Building specifies the following;

The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

Height of building map is defined as:

Height of Buildings Map means the Willoughby Local Environmental Plan 2012 Height of Buildings Map.

The relevant Height of Buildings Map shows the site as being zoned:

- (I2): 8.5m

Clause 4.4 Floor Space Ratio specifies the following

The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

Floor Space Ratio map is defined as;

Floor Space Ratio Map means the Willoughby Local Environmental Plan 2012 Floor Space Ratio Map.

The relevant Floor Space Ratio map shows the site as being zoned;

- (B): 0.4:1

1.3 Willoughby Local Environmental Plan 2012

Clause 4.6 provides flexibility to vary the development standards specified within the LEP where it can be demonstrated that the development standard is unreasonable or unnecessary in the circumstances of the case and where there are sufficient environmental grounds to justify the departure. Clause 4.6 states the following:

(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.

(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.

(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

(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.

Accordingly, justification is set out below for departure from the maximum height of buildings and maximum FSR controls applicable under WLEP. The purpose of the information provided is to demonstrate that strict compliance with height of building and FSR standards under WLEP is unreasonable or unnecessary in the circumstances of this proposal.

1.4 Clause 4.6 Assessment

This section assesses the proposed variation to consider whether compliance with the height of building and FSR controls can be considered unreasonable and unnecessary in the circumstances of this particular case, and whether there are sufficient environmental planning grounds to justify contravening the development standard.

The assessment is structured in accordance with the three matters for consideration identified in the Wehbe Land and Environment Court judgment:

- The applicant must satisfy the consent authority that “the objection is well founded,” and compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- The consent authority must be of the opinion that granting consent to the development application would be consistent with the policy’s aim of providing flexibility in the application of planning controls where strict compliance with those controls would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the *Environmental Planning & Assessment Act 1979*; and
- It is also important to consider:
 - Whether non-compliance with the development standard raises any matter of significance for State or regional planning; and
 - The public benefit of maintain the planning controls adopted by the environmental planning instrument.

Consideration has also been given to the findings of the matter of *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LEC, initially heard by Commissioner Pearson and upheld on appeal by Justice Pain. In this ruling it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater* [2007] NSW LEC 827 and demonstrate the following:

- Compliance with the particular requirements of clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
- That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity); and
- That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone which applies to the site.

An assessment of the proposed maximum height of buildings and floor space ratio variation against the provisions of Clause 4.6 and the relevant case law is provided in the following sections.

1.5 Compliance is unreasonable or unnecessary

In the *Wehbe* judgement, Preston CJ set out five ways in which a variation to a development standard can be supported as follows:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *The development standard has been virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Consideration (1) is relevant in this case. It requires a demonstration that the objectives of the maximum height of buildings and maximum FSR standards can be achieved, notwithstanding non-compliance with the standards. Compliance with the objectives of the maximum height of buildings and maximum FSR standards contained within Clause 4.3 and 4.4 of the LEP are demonstrated below:

Clause 4.3 Height of Buildings

Objectives of Clause 4.3 Height of buildings are as follows:

(1) *The objectives of this clause are as follows:*

- (a) to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape,*
- (b) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
- (c) to ensure a high visual quality of the development when viewed from adjoining properties, the street, waterways, public reserves or foreshores,*
- (d) to minimise disruption to existing views or to achieve reasonable view sharing from adjacent developments or from public open spaces with the height and bulk of the development,*
- (e) to set upper limits for the height of buildings that are consistent with the redevelopment potential of the relevant land given other development restrictions, such as floor space and landscaping,*
- (f) to use maximum height limits to assist in responding to the current and desired future character of the locality,*
- (g) to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood,*
- (h) to achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas.*

The Willoughby Height of Buildings Map shows the site as having the maximum building height zoning of I2, restricting the maximum building height to 8.5m. The proposed development is for a three storey educational building to be constructed at a height of 14m, 6m (64%) higher than the prescribed development standard.

The proposed development will be situated at the south-west corner of the site across from residential apartments and commercial uses. A new five storey apartment building is located south of the site on the opposite side of Mowbray Road. The sites surrounding land uses have the following Building Height controls.

- L: 11m (western side of Penshurst Street and western side of Willoughby Road)
- M: 12m (eastern side of Penshurst Street and eastern side of Willoughby Road)
- P: 18m (southern side of Mowbray Road)

Compliance with the current Height of Building development standard for the site is considered unreasonable as it is inconsistent with surrounding development and the public benefit of the public school buildings. In the context of the site, a three storey building of 14m is in keeping with the current and future character of the area. If full compliance with clause 4.3 was achieved, the site would also be unable to fulfill the objective of achieving a transition in building scale from higher intensity business and retail centres to surrounding residential areas. In addition the proposal is able to efficiently provide for additional school capacity whilst allowing for some open space and sports areas, both important elements to education today.

The site can accommodate the scale of the new building on the corner of Mowbrary Road and Penshurst Street without having significant unreasonable impacts on the amenity of the locality and surrounding properties. This is discussed in Section 6 of the associated SEE.

Clause 4.4 Floor Space Ratio

Objectives of Clause 4.4 Floor space ratio are as follows:

(1) The objectives of this clause are as follows:

- (a) to limit the intensity of development to which the controls apply so that it will be carried out in accordance with the environmental capacity of the land and the zone objectives for the land,*
- (b) to limit traffic generation as a result of that development,*
- (c) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
- (d) to manage the bulk and scale of that development to suit the land use purpose and objectives of the zone,*
- (e) to permit higher density development at transport nodal points,*
- (f) to allow growth for a mix of retail, business and commercial purposes consistent with Chatswood's sub-regional retail and business service, employment, entertainment and cultural roles while conserving the compactness of the city centre of Chatswood,*
- (g) to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood,*
- (h) to provide functional and accessible open spaces with good sunlight access during key usage times and provide for passive and active enjoyment by workers, residents and visitors to the city centre of Chatswood,*
- (i) to achieve transitions in building scale and density from the higher intensity business and retail centres to surrounding residential areas,*
- (j) to encourage the consolidation of certain land for redevelopment,*
- (k) to encourage the provision of community facilities and affordable housing and the conservation of heritage items by permitting additional gross floor area for these land uses.*

The Willoughby FSR map has shown the site as having an FSR control of B: 0.4:1. Surrounding developments across Penshurst Street and Mowbray Road from the site are shown as having FSR controls of S1; 1.5:1.

The extent of non-compliance of the proposal is minimal, with the proposed FSR of 0.41:1 being only marginally higher than the maximum FSR for the site of 0.4:1. The proposed FSR calculations are provided below.

Table 1.1 FSR Calculations provided by CGAMW

Gross Floor Area		
Level	Name	Area
GHS Building Ground Floor	Existing Building	3461m ²
GHS Building Level 1	Existing Building	1742m ²
GHS Main Building Ground Floor	New	763m ²
GHS Main Building Level 1	New	811m ²
GHS Main Building Level 2	New	681m ²
	Subtotal New	2256m ²
	Grand total	77459m ²
	Site Area	18396m ²
	F.S.R	0.41:1 (0.405:1)

The proposal is for a new building within an existing operational school. Space within the school site is extremely limited. To achieve the floor space requirements necessary for the projected population growth and the future school's operations it has been necessary to exceed the development standards. A compliant development would not have delivered the required accommodation which the existing and future student capacity requirements projected by the Applicant.

In the context of the area along Mowbray Road and Penshurst Street, full compliance with the development standard is considered unreasonable as the departure is minor and allows for a quality development which provides the high school new facilities which will add to the continued education of girls in a historical setting, which is a significant public benefit of the additional school buildings being provided.

The site can accommodate the scale of the new building on the corner of Mowbray Road and Penshurst Street without having significant unreasonable impacts on the amenity of the locality and surrounding properties. This is discussed in Section 6 of the associated SEE.

1.6 Adequate grounds for contravening the development standard

Clause 4.6 requires the Applicant to demonstrate that there are sufficient environmental planning grounds to contravene the development standard. In this instance, there are strong planning grounds in support of the maximum height of buildings and FSR variations.

- The site will fully comply with the objectives of the site's R2 Low Density Residential zone which are:

1 Objectives of zone

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provides facilities or services to meet the day to day needs of residents.
- To accommodate development that is compatible with the scale and character of the surrounding residential development.
- To retain and enhance residential amenity, including views, solar access, aural and visual privacy, and landscape quality.
- To retain the heritage values of particular localities and places. To encourage self sufficiency with respect to energy and food supply.

- The proposed development provides facilities to meet the day to day educational needs of residents.
- Existing residential amenity will be retained for residential properties nearby.
- Provides social infrastructure that reflects the existing and future capacity of the transport network and facilitates walking, cycling and the use of public transport.
- Enhance the education experience for students and staff and provides facilities to improve the quality of life of the local community.
- Achieve a high quality urban form, design excellence and reflects the character of the area.
- Conserve the environmental heritage of the Willoughby City Council, by retaining the existing heritage listed buildings.
- The proposed development complies with the objectives of clause 4.3. In particular, the proposed development will be in keeping with the bulk and scale of the surrounding buildings and streetscape; will not adversely impact on adjoining or nearby properties; will be of a high visual quality as a result of a high standard of design; existing views will not be greatly compromised; and will provide a transition in building scale from higher intensity business and retail uses to surrounding residential areas.
- It is noted the opposing developments along Penshurst Street and Mowbray Road have maximum height restriction of 11m, 12m and 18m respectively. This is significantly higher than the existing high restrictions of the site of 8.5m. The proposed departure from 8.5 to 14m will deliver development consistent with the existing and future character. The proposal will also provide transition in bulk and scale from residential apartments and commercial buildings to low density residential to the north and east of the subject site.
- The proposed development is in full compliance with the objectives of clause 4.4. In particular, it is considered that the intensity of development will be in accordance with the environmental capacity of the land; the impacts of the development on adjoining or nearby properties will be unaffected in terms of loss of views, privacy, overshadowing or visual intrusion; the bulk and scale of the proposed development suits the educational land use; and the development will assist in achieving a transition in building scale and density from the higher intensity business and retail centres nearby to the surrounding residential areas.
- It is noted that surrounding development along Penshurst Street and Mowbray Road has an FSR of S1: 1.5:1, significantly greater than the maximum FSR for the subject site of 0.4:1. The proposed minor departure of the FSR for the site to 0.41:1 will result in a development form that is consistent with the existing built form of the surrounding area.

1.7 Significance for State or regional planning

The non-compliances will not raise any matter of State or regional Significance.

1.8 The public interest

Clause 4.6 requires that the consent authority consider the public benefit in determining whether to support the variation.

It is considered that the proposed development is in the public interest because, as discussed above, it is consistent with the objectives of the height of buildings and FSR controls.

The proposal utilises existing land resources in a site with significant spatial and heritage constraints. The proposal consolidates the building footprint and thereby maximising the open space for students of Willoughby Girls High School.

The proposed works relate to an existing school and will result in a significant public benefit as it will provide the educational facilities to meet the needs of an increasing number of school children residing in the local area by providing permanent facilities replacing the need for a number of demountable buildings and catering for a moderate number of additional students.

1.9 Conclusion

In view of the development context, strict compliance with Clauses 4.3 and 4.4 of WLEP is considered to be unreasonable and unnecessary in this case. The proposal is justified on the following environmental planning grounds.

- The proposed variation will not negatively impact on the streetscape or neighbourhood character of Willoughby.
- The proposal will fulfil the desired zoning of R2 as outlined above.
- The proposed non-compliance will have no detrimental effects upon public benefit and legitimacy of the development standard. No matters of State or regional planning will be affected by the proposed variation.