

Clause 4.6 Exceptions to development standards Written request – Height of Building

Construction of a multi-purpose hall with associated structures and works to the immediate surrounds.



Kingswood High School
Lot 1 Deposited Plan 590302
131 Bringelly Road, Kingswood NSW 2747

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Clause 4.6 Written Request to Vary a Development Standard

Penrith Local Environmental Plan 2010

Applicant's name	NSW Department of Education
Site address	131 Bringelly Road, Kingswood NSW 2747
Proposal	Construction of multi-purpose hall with associated structures and works to the immediate surrounds.
Environmental Planning Instrument	<i>Penrith Local Environmental Plan 2010</i> (PLEP 2010)
Development standard to be varied	<p>Clause 4.3 – Height of Building.</p> <p>The relevant subclause states:</p> <p>(1) The objectives of this clause are as follows:</p> <ul style="list-style-type: none"> (a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality, (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes, (c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance, (d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity. <p>(2) <i>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 (8.5m).</i></p>

Below is the written request relating to the proposed variation to clause 4.3 of the PLEP 2010 in accordance with the provisions of clause 4.6 of the PLEP 2010.

1. Details of development standard sought to be varied

Clause 4.3 of the PLEP 2010 prescribes that the height of a building is not to exceed the maximum height shown on the Height of Buildings Map. The Height of Buildings Map indicates that the maximum permissible height for the subject land is 8.5m. The maximum height of the development is approximately 12.5m as indicated on the architectural plans.

2. Clause 4.6 Exceptions to Development Standards - *Penrith Local Environmental Plan 2010*

Clause 4.6 of the PLEP 2010 is the mechanism by which a consent authority is able to grant consent to a development despite non-compliance with a prescribed development standard. Clause 4.6 is reproduced below:

- (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.*
- (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.*
- (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.*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.
- Note. When this Plan was made it did not include Zones RU3 Forestry or Zone Ru6 Transition.*
- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).
 - (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 6.1, 6.2, 6.6, 6.7, 6.16, 7.7, 7.17, 7.21, 7.24 or Part 9.

3. The statutory obligations of the applicant and Council

The authority established within a recent judgement in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, provides that a 4.6 variation need not establish that a development containing a variation provides a better or even neutral outcome for a development site compared with that which would be provided by a compliant development.

This judgement dictates that it is necessary to distinguish between the obligations of the applicant, and the obligations of Council. The applicant must address the matters required by 4.6(3). Note however that for completeness and to assist Council in its assessment, this variation request has addressed 4.6(3) and 4.6(4).

The consent authority need only be satisfied of the matters required within 4.6(4)(a), namely that the applicant has adequately addressed 4.6(3), and that the development is consistent with the objectives of the standard and the objectives of the zone (i.e. 4.6(4)(b)).

The *Initial Action* judgement states that “the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b)”.

The independent role for the consent authority is therefore to determine whether the proposed development will be consistent with the objectives of the standard and the objectives of the zone. This involves a consideration of the “development” in its entirety, not just the proposed variation. It is clear that the development meets the objectives of the standard and of the zone as discussed throughout this written request.

The responsibilities of the applicant had earlier been clarified within *Four2Five Pty Ltd v Ashfield Council* (2015) NSWCA 248. In addressing clause 4.6(3), the applicant must establish reasons that

the variation should be supported, aside from the consistency of the development with the objectives of the standard and the objectives of the zone.

In *Wehbe V Pittwater Council (2007) NSW LEC 827*, Preston CJ set out the following 5 different ways in which an objection (variation) may be well founded:

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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

It is generally understood that Clause 4.6(3) can be satisfied if it is established that a development satisfies one or more of points 2-5 above. The information contained within this written request provides a range of reasons to support the departure from the standard, including those relating to the second, third and fifth reason within the list above.

Note that although this request is structured to address 4.6(3) and 4.6(4)(a)(ii) individually, the report should be read in its entirety as fulfilling the applicant's obligations under 4.6(3).

4. 4.6(3) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and there are environmental planning grounds to justify the contravention of the standard

Having regard for the authority within *Wehbe*, compliance with the maximum height development standard has been determined to be unreasonable and unnecessary in the circumstances of the case:

- The development seeks to provide a large school hall to a local public high school that is currently provided with only a small indoor assembly area, not capable of holding the entire school population, and not consistent with the Educational Facilities Standards and Guidelines (ESFG). Well-functioning school halls require high internal ceilings in order to facilitate their purpose in enabling indoor ball sports, as well as assemblies and performances.
- The largest part of the proposed development, being the skillion roof feature, is situated within the centre of the building, and is in set from each edge of the structure. The taller element is provided to enable operable louvres to be attached to the roof space. The

louvres provide an important function in enabling natural light into the hall, as well as providing natural cooling during hotter months.

- The taller element also adds functions as an architectural roof feature, being situated in the centre of the building, and provides visual interest to the design. Larger buildings with architectural features are envisioned by clause 5.6 of the PLEP 2010 (although this proposal does not rely on this clause).
- The design provides for a pitched roof to maximise the ceiling heights, whilst ensuring that taller elements are located within the centre of the building. The side walls of the building comfortably comply with the 8.5m height limit, and the side walls of the building will be the part of the building that is perceived from the site surrounds, with a single storey element provided towards Bringelly Road to assist in minimising the perceived scale of the building from the street.
- To properly serve its purpose, the building must necessarily be wider and longer than the majority of buildings affected by the 8.5m height limit. A compliant building would be either provided with odd proportions or require a flat roof. Neither outcome would result in a sound town planning outcome.
- Having regard to reason (5) listed in *Wehbe* above, it is evident that the 8.5m height development standard is appropriate for the R2 zone, its core function is to limit the height of low density residential land, which are situated on smaller allotments, and closer to site boundaries, than the subject proposal. Whilst it is common for schools to be located within the R2 zone, they are prohibited by this zoning and are prohibited only by a separate instrument, the ESEPP, which does not prescribe any maximum building height. For state significant development (SSD) for the purpose of schools, clause 42 of the ESEPP prescribes that development standards listed within any environmental planning instrument have no application. Although the proposal is not SSD, it is evident that the instrument which permits the development (the ESEPP), does not anticipate that any height limit is relevantly applied to schools.
- It is more appropriate that qualitative design measures, rather than quantitative measures, such as building height, are used to consider the appropriateness of a development proposal within a school. The SEE has demonstrated that the proposal is consistent with the relevant qualitative measures, being the Design Quality Principles contained within Schedule 4 of the ESEPP, and the Educational Facilities Standards & Guidelines developed by the NSW Department of Education.
- Having regard to reason (2) listed in *Wehbe* above, even if the development were permitted by the PLEP 2010, it is evident that the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary; The numerical standards are more appropriately strictly applied within smaller residential lots where the buildings are likely to be situated closer to side boundaries and are more likely to generate impacts on neighbourhood amenity.

- The new school building will create a focal point within the school grounds. It is not unusual for schools to be provided with larger buildings adjacent to the main vehicular and pedestrian entry to the school, with playing fields and wide areas of open space provided behind the main entry. The focal point is typically an entry, school hall, or a place of worship within denominational schools. This layout is currently provided at the subject site; however, the school does not have a focal point at the school. It is favourable for this focal point to be located towards the entry areas, to enable parents and other visitors to easily access the facility.
- Buildings of a similar location and/or scale are not uncommon within nearby local high schools. Examples are provided below:

Cranebrook High School – Hosking Street Cranebrook

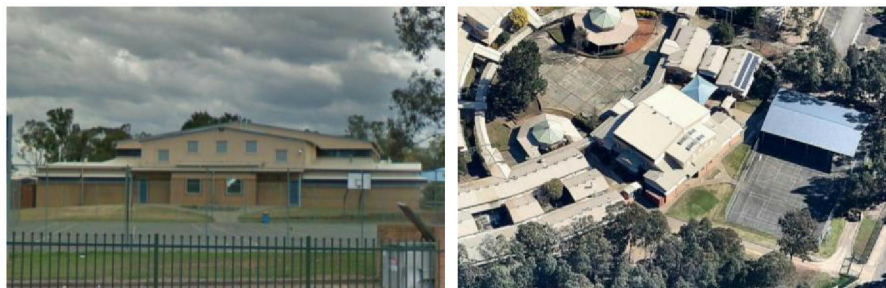


Figure 1: Focal building located at Cranebrook High School, viewed from Hosking Street (left) and aerially from the east (right)

Source: *maps.google.com.au* (left) and *nearmap.com* (right)

Cambridge Park High School – Harrow Road, Cambridge Park

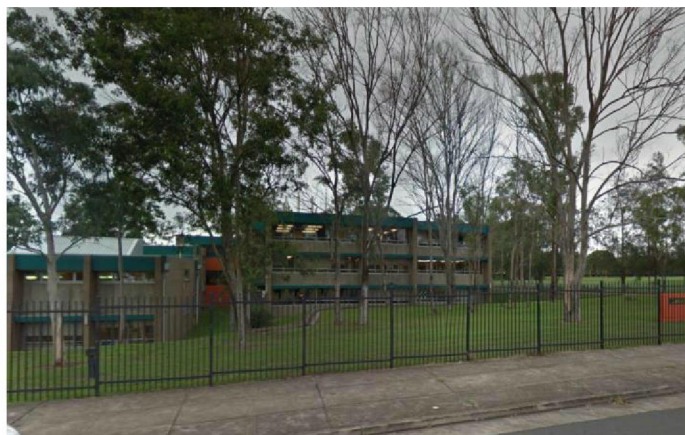


Figure 2: Three storey building located at Cranebrook High School, viewed from Harrow Road

Source: *maps.google.com.au*

St Dominic's College, Copeland Street, Kingswood

Figure 3: Focal building located at Cranebrook High School, viewed from Copeland Street
Source: *maps.google.com.au*

Each of these examples are within the R2 zone and are affected by an 8.5m limit pursuant to the PLEP 2010.

- The building will match the ground levels of the adjoining covered outdoor learning area (COLA), which currently sits lower than the area to the east and south, towards Bringelly Road, as shown within the images below.



Figure 4: Images of existing COLA showing the fall of land towards the COLA. The proposed building is to be located at to the south of the COLA, which is shown respectively in the images as being the space located to the left, and in front of, the COLA.

Source: *maps.google.com.au* (left) and *nearmap.com* (right)

The higher parts of the site are located between the location of the building and Bringelly Road, and this will reduce the apparent height of the building.

- The pitched roof element (i.e. the taller portion) of the proposed building is setback approximately 30 metres from Bringelly Road, with the single storey portion provided forward of this element, being 26 metres from Bringelly Road. The building is setback approximately 13m from the nearest adjoining residential property to the north which has a garage and carport along the southern boundary. In this regard, the relationship of the height of the proposed structure in relation to the scale of existing development within the locality, is not able to be readily perceived from sensitive vantage points. Further, the geometry of the building aligns with the existing COLA, which enables the

height of the proposal to gradually increased from north to south, and the COLA largely screens views of the proposal from the north.

5. Clause 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,

In the recent judgement within *Initial Action*, Preston CJ indicated that a consent authority only needs to be satisfied that an applicant has adequately addressed the matters within clause 4.6(3), and that, pursuant to 4.6(4)(a), the development is consistent with the objectives of the standard and consistent with the objectives of the zone. Although not strictly required, and although the underlying objectives of the standard is of limited relevance to the proposal, this variation request has addressed the reasons that the development satisfies 4.6(4)(a).

The objective of the height of buildings development standard are as follows:

- (a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,

It is evident that the existing locality is largely characterised by low to medium density residential development. The proposed development will not alter the character of the portion of Bringelly Road within the vicinity of the subject site. The streetscape of Bringelly Road between Caddens Road and Derby Street will remain low density residential and with the school building being read as an exception within the streetscape, rather than as precedent for future departures to the height. Kingswood High School currently provides a distinct character to the streetscape and surrounding built form, and will continue to do so.

Although the proposal seeks a height non-compliance, design measures have been employed to respond to the height, bulk and scale of the multi-purpose hall within the visual catchment. For instance, a pitched roof is provided so that the taller ridge element of the building is provided within the central parts of the development, away from distant boundaries. Significant landscaping and tree planting is also proposed within the immediate surrounds of the development. The tree cover proposed is also distinctive within the locality, and assists in minimising any perceived bulk associated with the development in providing a structure that has an improved overall presentation.

- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,

The proposal has provided a sensitive response to views, privacy and solar access, which are each discussed in the following (note that visual impact is discussed throughout this variation request).

Views

No significant or iconic views are available throughout all parts of the locality, and there are therefore no views that would be affected by the proposal.

Privacy

It is not expected that there will be any impacts to visual privacy as a consequence of the proposal. The development is located a sufficient distance from neighbouring boundaries of adjoining properties. In relation to acoustic impacts to nearby residential developments, with acoustic materials to be utilised in construction and noise screening to be provided to the building. Furthermore, the new hall will assist in reducing noise impacts to nearby residential properties, as large assemblies will be able to be contained indoors.

Solar access

Shadow diagrams have not been submitted with the proposal given that the development is a considerable distance from surrounding properties, and shadows from the development will predominately be cast on to school driveways and access paths to the east, and the canteen building to the west. It would be expected that solar access to nearby properties would not be affected and that generous solar access would be retained for the open space areas used by students.

- (c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,

The subject site is not identified nor located near a heritage item or conservation area. This site is also not affected by scenic or visual importance. The development is of no adverse impact.

- (d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.

The PLEP 2010 achieves the transition in built form and land use intensity through the provision of varying height limits, and this objective does not strictly apply to sites affected by a singular building height limit. Notwithstanding, the height of the buildings on the site will gradually transition away from residential properties, with the proposed building sitting above the existing COLA. The COLA will largely screen the proposal from neighbouring properties.

As indicated earlier, To properly serve its purpose, the building must necessarily be wider and longer than the majority of buildings affected by the 8.5m height limit. A compliant building would be either provided with odd proportions or require a flat roof. Neither outcome would result in a sound town planning outcome. Having regard to reason (3) listed in *Wehbe* above, compliance would largely inhibit the attainment of this objective.

The objectives of the R2 Low Density Residential Zone are as follows:

- (a) To provide for the housing needs of the community within a low density residential environment.*

This objective is largely irrelevant to the proposal.

- (b) To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposed development will improve the provision of education facilities to meet the needs of those living within the local area. An appropriately located multi-purpose hall will have broadly positive impacts on the day to day needs of residents. The existing school is ideally located amongst a predominately residential area, providing an essential local service that is convenient and easily identifiable within the local area. The proposal will provide a modern and advanced learning space, which is expected to enable the school to become a 'school of choice' for many local parents.

The development will provide further opportunities for a high standard of local public education to the local community, with the facility directly improving the opportunities for children to participate in indoor sports and performance art, and for parents to interact with teachers and other parents.

- (c) To promote the desired future character by ensuring that development reflects features or qualities of traditional detached dwelling houses that are surrounded by private gardens.*

Substantial new landscaping is proposed to be added to the site, which will improve the landscape setting of the building and the landscaped appearance of the public domain. The proposal will otherwise have little impact on the attainment of this objective, as it predominately relates to residential development.

- (d) To enhance the essential character and identity of established residential areas.*

The development is designed with specific regard for the existing context and will enhance the character and identity of the surrounding established residential area.

- (e) To ensure a high level of residential amenity is achieved and maintained.*

Residential amenity considerations have been considered in relation to the discussion to objective (b) of the height standard.

6. Summary

Having regard to the judgement in *Wehbe*, the objectives of the zone, and the objectives of the standard, the reasons for the variation can be summarised as follows:

- The height non-compliance is necessary to ensure that the proposed building fulfils the purpose of providing the building in the first instance;
- The subject development is consistent with both the existing and desired future character of the locality, and there is limited utility in requiring compliance for a school building in this location;
- The numerical standards are more appropriately strictly applied within smaller residential lots where the buildings are likely to be situated closer to side boundaries and are more likely to generate impacts on neighbourhood amenity.
- For this particular development, there are no feasible or suitable design alternatives available that would result in a building which complied with the 8.5m height limit, and a compliant building would not result in a sound town planning outcome;
- The proposal is able to provide generous landscaped areas, and adequate planting, to soften any visual impact associated with the development and to improve the canopy cover within the locality.
- The objectives of the zone and the standard are achieved notwithstanding non-compliance with the standard;
- Other similar buildings are provided to numerous schools throughout the locality;
- The proposal is unlikely to create significant adverse environmental effects on the use or enjoyment of adjoining properties, and is likely to improve the public domain; and,
- The proposal has ensured that good residential amenity is maintained.

The authority within the recent judgement in *Initial Action* has reaffirmed that the role for the consent authority is to determine whether the proposed development will be consistent with the objectives of the standard and the objectives of the zone. This involves a consideration of the “development” in its entirety, not just the proposed variation. It is clear that the development meets the objectives of the standard and of the zone.

This written request has demonstrated that compliance with the standard in this instance would be unnecessary and unreasonable and that there are environmental planning grounds to justify the contravention of the development standard. Given the above, it is considered that the requirements of Clause 4.6 have been satisfied and that the variation to the building height development standard can be approved.