



Clause 4.6 – Exceptions to Development Standards

CLAUSE OBJECTIONS AND EXCLUSIONS

Clause 4.6(1) – Clause Objectives

Clause 4.6 provides a mechanism to vary development standards prescribed within Port Stephens Local Environmental Plan (PSLEP) 2013.

The objectives of the clause are as follows:

- a) *To provide an appropriate degree of flexibility applying certain development standards to particular development.*
- b) *To achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6(2) – Exclusions to the operation of Clause 4.6

Development consent may be granted even though the development would contravene a development standard imposed by the PSLEP, unless the development standard is expressly excluded under Clause 4.6 (8). Clause 4.3 of the PSLEP is not excluded from the operation of Clause 4.6, and therefore the proposed variation has been considered below.

PROPOSED REQUEST

Clause 4.6(3) – Request to vary development standards

The development application includes a written request to vary development standard(s) in the PSLEP 2013.

The relevant development standard(s) and the extent of the proposed variation(s) is:

Development Standard	Proposed Variation	Extent of Variation (%)
Clause 4.3 – Height of Buildings of the PSLEP	2.4m	26.7%

As the proposed variation is greater than 10%, in accordance with Planning Circular PS 20-002, the concurrence of the Secretary cannot be assumed by a delegate of Council. The Hunter and Central Coast Regional Planning Panel (HCCRPP) is the consent authority for the application and is not a delegate of Council, therefore this restriction does not apply.

Clause 4.6(3)(a) – Compliance is unreasonable or unnecessary



Clause 4.6(3)(a) requires the applicant to justify the contravention of the development standard(s) by demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

In *Wehbe v Pittwater Council* (2007) LEC 827 (*Wehbe*), Chief Justice Preston identified five ways in which a request to vary a development standard may be determined to be well founded. These reasons include:

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

The Clause 4.6 request makes reference to the first reason identified in *Wehbe v Pittwater Council*. The key reasons provided by the applicant have been summarised below:

- The height exceedance is primarily associated with the sites topography and the requirement to establish a level foundation for equitable access.
- A stepped building foundation in response with the topography will restrict access to some users.
- The percentage of the roof area that exceeds the height limit is restricted to a relatively small part of the total roof area.
- The height exceedance is restricted to the central section of the architectural roof feature and decreases in height exceedance with the pitch of the roof structure.
- The building location is significantly setback from the road and surrounding properties, thereby avoiding amenity impacts such as overshadowing or excessive bulk and scale.
- Whilst the scale of the building is taller than the existing buildings located on the school site, the style and format of the building is considered to compliment the educational use of the site.



- The LEP building height of 9m is presumed to be based on the maximum typical building height of a two-storey residential dwelling. It is noted that school buildings are more akin to commercial buildings in their construction, requiring a greater floor to ceiling height.
- Schedule 6 of the Transport and Infrastructure (T&I) SEPP 2021 allows complying development for the purpose of schools to be built to a height of four storeys and a maximum of 22 metres.
- Educational premises are permissible within the R2 Low Density Residential Zone by virtue of the T&I SEPP. Therefore, school buildings which are typically taller than residential buildings can be expected in this zone and are reflective of the land use structure and hierarchy.

Clause 4.6(3)(b) – Sufficient environmental planning grounds

Clause 4.6(3)(b) requires an applicant to justify the contravention of the development standard(s) by demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard.

The provided Clause 4.6 request notes that there is sufficient environmental planning grounds to contravene the development standard as:

- The building location is significantly setback from the road and surrounding properties, thereby avoiding amenity impacts such as overshadowing or excessive bulk and scale.
- The height exceedance is primarily associated with the sites topography and establishing a level foundation for equitable access. A stepped building foundation in response with the topography would restrict access to some users.
- The proposal is consistent with the aims of the PSLEP.

The applicant submits that the potential environmental planning benefits justify the contravention of the development standard.

ASSESSMENT

Clause 4.6(4) – Assessment of request to vary development standards

Clause 4.6(4)(a)(i) - Adequacy of the applicant's request

Clause 4.6(4)(a)(i) requires the consent authority to be satisfied the Clause 4.6 request has adequately addressed the matters set out in Clause 4.6(3) of the PSLEP 2013 listed above.



As stated in the preceding section, in *Wehbe* the Land and Environment Court identified five ways in which a request to vary a development standard may be determined to be well founded.

The applicant's Clause 4.6 Variation request asserts that compliance with Clause 4.3 height of buildings is unreasonable or unnecessary having regard to the *first* test set down in *Wehbe*, being that the objectives of the standard are achieved notwithstanding non-compliance with the standard.

The objectives of Clause 4.3 are to ensure that the height of buildings is appropriate for the context and character of the area and ensure that building heights reflect the hierarchy of centres and land use structure.

The site contains an existing educational premises known as Irrawang High School. The immediate context and character of the area is defined by the schools existing buildings which comprise a mix of 1 and 2 storey buildings with large floor plates. The broader locality is characterised by low density housing, ranging between 1 and 2 storeys in height. The application adequately demonstrates that the proposed building is compatible with the context and character of the area despite the variation, as it remains 2 storeys in height, with larger floor to ceiling heights to accommodate its use as a school building. The height exceedance is restricted to the central section of the architectural roof feature and decreases in height exceedance with the pitch of the roof structure. The area of the height exceedance is modest in relation to the scale of the building. The height exceedance is further subdued by the substantial setback of the building from the road where screening is offered by the retention of existing vegetation.

Regarding the clause objective relating to the hierarchy of centres and land use structure, the application adequately demonstrates that the proposal is consistent with and reflective of the land use structure and hierarchy in that educational premises are permissible within the R2 Low Density Residential Zone by virtue of the T&I SEPP. Therefore, school buildings which are typically taller than residential buildings can be expected in this zone, including school buildings up to 4 storeys in height which can be carried out as complying development under the T&I SEPP.

On this basis, the objectives of Clause 4.3 are achieved, despite the numerical non-compliance. Subsequently, compliance with the standard is considered unnecessary in this instance.

Sufficient environmental planning grounds are noted to have been achieved on the basis that the proposal is consistent with the character of the area and that the additional height will not result in any unacceptable privacy, overshadowing, or view loss impacts on surrounding properties. In addition, the height exceedance is primarily associated with the sites topography and the requirement to establish a level foundation for equitable access. Alternate stepped building designs in response



to the topography would not result in equitable access and result in an inferior planning outcome.

Clause 4.6(4)(a)(ii) - Public interest – consistency with objectives of the standard and objectives of the zone

Clause 4.6(4)(a)(ii) requires the consent authority to be satisfied 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.

As outlined above, notwithstanding the non-compliance with the standard, the objectives of Clause 4.3 are achieved noting that the proposal is in keeping with the context and character of the area and is reflective of the hierarchy of centres.

Furthermore, the proposal, despite the variation is compatible with the zone objectives as follows:

- The school represents an important facility to meet the day to day needs of local residents.
- The proposed building is sited appropriately to avoid overshadowing, visual, privacy and acoustic impacts to surrounding residential areas.
- The proposed building design and landscaping are of a high quality that contributes to the character of the area.

On this basis, the proposal is considered to be in the public interest, despite the variation.

Clause 4.6(4)(b) - Concurrence of the Secretary

As the proposed variation is greater than 10%, in accordance with Planning Circular PS 20-002, the concurrence of the Secretary cannot be assumed by a delegate of Council. The Hunter and Central Coast Regional Planning Panel (HCCRPP) is the consent authority for the application and is not a delegate of Council, therefore this restriction does not apply.

CONCLUSION

The proposed development is considered to be consistent with the objectives of Clause 4.6 given it will achieve a better outcomes in these particular circumstances as the objectives of the development standard are achieved notwithstanding non-compliance.