

Clause 4.6 Variation Request Height of Buildings

449D Pennant Hills Road, Pennant Hills

Prepared for
Mount St Benedict College
November 2021



1 Introduction

This Clause 4.6 Variation Request has been prepared on behalf of Mount St Benedict College (the applicant) to support a development application (DA) submitted to Hornsby Shire Council for change of use and fit-out of the MSB Centre at 449D Pennant Hills Road, Pennant Hills, for the purposes of a school.

The DA involves internal fit-out works as well as an external staircase for BCA-compliance purposes. This report relates to the proposed external staircase.

This report has been prepared to request a variation to the maximum building height standard under clause 4.3 of Hornsby Local Environmental Plan 2013 (HLEP 2013). The request is being made pursuant to clause 4.6 of HLEP 2013.

2 Clause 4.6 Exceptions to development standards

Clause 4.6 of the LEP enables contravention of the height standard subject to the consent authority considering a written request from the applicant justifying the contravention. The clause reads as follows:

Clause 4.6 Exceptions to development standards

(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 Director-General has been obtained.

(5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.

3 Development standards to be varied

The development standard to be varied is clause 4.3(2) of HLEP 2013, which reads as follows:

4.3 Height of buildings

[...]

(2) 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.

As shown in the Height of Building Map at Figure 1, the site (outlined in red) is subject to a maximum building height of 8.5m.

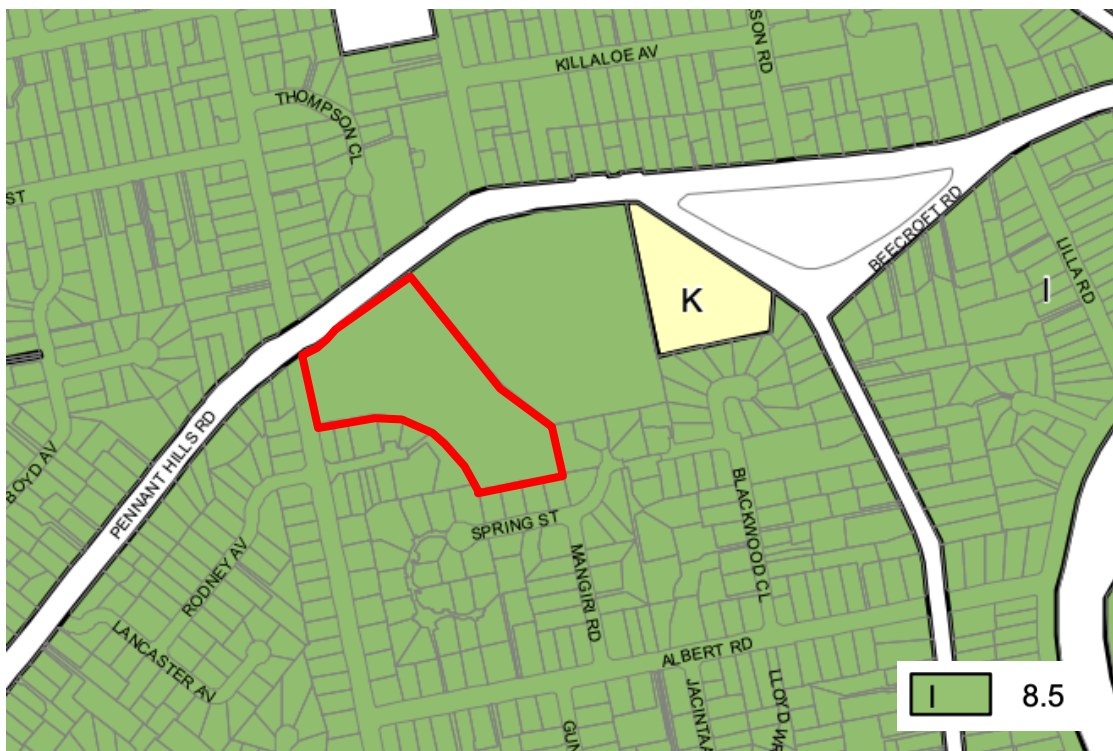


Figure 1 – Height of Building Map (Source: HLEP 2013)

4 Extent of variation to the development standard

The proposed external staircase extends to a maximum of approximately 17.2m above existing ground level, which **exceeds the 8.5m standard by 8.7m or 102%**.

The diagram below illustrates the extent of the exceedance. The external staircase addition is shaded blue, while the extent of the exceedance is marked in red.

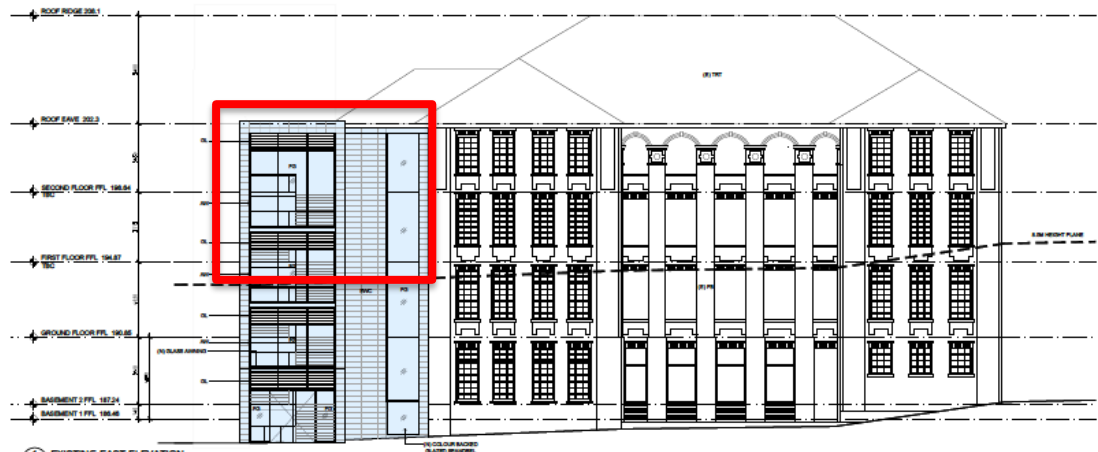


Figure 1: East elevation showing area of exceedance (Source: TKD Architects)



Figure 2: East elevation detail (Source: TKD Architects)

5 Assessment

Clause 4.6(3)(a) – Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ set out five justifications to demonstrate that compliance with a development standard is unreasonable or unnecessary. These include:

- *the objectives of the development standard are achieved notwithstanding non-compliance with the standard*
- *the underlying objective or purpose of the standard is not relevant to the development*
- *the underlying objective or purpose would be defeated or thwarted if compliance was required*
- *the standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and/or*
- *the zoning of land was unreasonable or inappropriate, such that the standards for that zoning are also unreasonable or unnecessary.*

As per Wehbe justification no. 1, compliance with the with standard is unreasonable and unnecessary as the proposal is consistent with the objectives of the zone notwithstanding non-compliance with the standard. The objectives of the height standard under clause 4.3 of HLEP 2013 are addressed in Table 1.

Table1. Consistency with objectives of standard

Objective	Consistency
(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.	The height of the proposed staircase responds directly to existing site conditions/constraints. The staircase is required to provide BCA-compliant egress from all levels of the existing building. Given the existing building exceeds the height limit, the staircase will also necessarily exceed the height limit. The staircase raises no issues regarding development potential or infrastructure capacity.

As per Webhe justification no. 4, the standard has been virtually abandoned/destroyed at the site as evidenced by the height of the existing MSB Centre, which is approximately 22m above existing ground level or 13.5m above the height limit. The proposed external stairs must serve all levels of the existing building and therefore must exceed the height limit.

If strict compliance with the height standard were required, emergency egress could not be provided for all levels of the building, and the health and safety of the building occupants could not be protected.

Clause 4.6(3)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

As noted in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 by Preston CJ at [23], “The adjectival phrase ‘environmental planning’ is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.”

In accordance with the object at section 1.3(h) of the EPA Act, the proposed contravention promotes the “proper construction of buildings, including the protection of the health and safety of their occupants”. It does this by providing egress stairs that are required for BCA-compliance purposes. There is no height-compliant alternative that would have acceptable heritage impacts.

The existing internal stairs cannot be utilised for egress purposes because they do not meet BCA requirements in the following respects:

- They do not achieve BCA requirements for level of construction or fire resistance.
- They do not achieve an egress width of 2m, which is required given that each level of the building will accommodate up to 200 staff and students.
- The existing balustrades do not meet the BCA minimum height requirement of a 1000mm.

Theoretically, BCA-compliant egress stairs could be constructed within the existing building, which would avoid any contravention of the height standard. This approach, however, would require the demolition of significant portions of the internal building fabric and is therefore unacceptable from a heritage impact perspective.

Additionally, in accordance with the object at section 1.3(g), the proposed contravention promotes “the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)”. It does this providing BCA-compliant egress stairs that are designed and positioned to minimise impacts on the existing heritage building. As noted above, BCA-compliant egress stairs could be provided within the existing building, but this would require substantial demolition of heritage fabric. The proposed external stairs avoid this impact. The proposed stairs leave the existing original heritage fabric largely intact and can be interpreted as a clearly new addition. The project heritage consultant, Heritage 21, has confirmed that the proposed stairs will have a “neutral” impact on the heritage significance of the building. From a heritage-management perspective, it is clear that the proposed external stairs provide a superior outcome compared to height-compliant internal stairs.

Further environmental planning grounds include:

- The additional height, being located well below the ridgeline of the existing building, will result in no significant overshadowing impacts.
- The additional height allows for no overlooking to neighbouring sensitive uses. The nearest residential land is approximately 70m to the southwest of the MSB Centre and buffered by vegetation.

Clause 4.6(4)(a)(ii) - Is the proposed development 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 development standard objectives

The particular development standard is clause 4.3 of HLEP 2013. The relevant objectives are addressed at Table 1 above.

Consistency with R2 Low Density Residential zone objectives

The proposed development's consistency with the R2 Low Density Residential zone objectives is outlined in Table 2.

Table 2. Consistency with objectives of the zone

Objective	Consistency
To provide for the housing needs of the community within a low density residential environment.	The proposal does not prevent provision of housing in a low density environment. The proposal provides for upgrades to an existing building for a purpose (school) that is compatible with the surrounding low density environment.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The proposal does not prevent provision of facilities or services to meet the day to day needs of residents. The proposal provides for upgrades to an existing building for a purpose (school) that is compatible with the surrounding low density environment.

6 Matters of significance for State or regional environmental planning

The proposed variation to the height of buildings standard does not raise any matter of State or regional planning significance.

7 Conclusion

This written request justifies the proposed height variation in the terms required under clause 4.6 of HLEP 2013. In summary, the proposed variation is justified for the following reasons:

- Compliance with the height standard is unreasonable and unnecessary in the circumstances because the proposed development achieves the objectives of the height standard notwithstanding the non-compliance.
- There are sufficient environmental planning grounds which justify the height exceedance.
- The additional height allows for a better planning outcome than a compliant scheme, enabling emergency egress for all levels of the existing building.
- Despite the variation, the proposal is consistent with the R2 Low Density Residential zone objectives.

- There are no matters of State or regional planning significance and no notable public benefits in maintaining the height standard in this case.