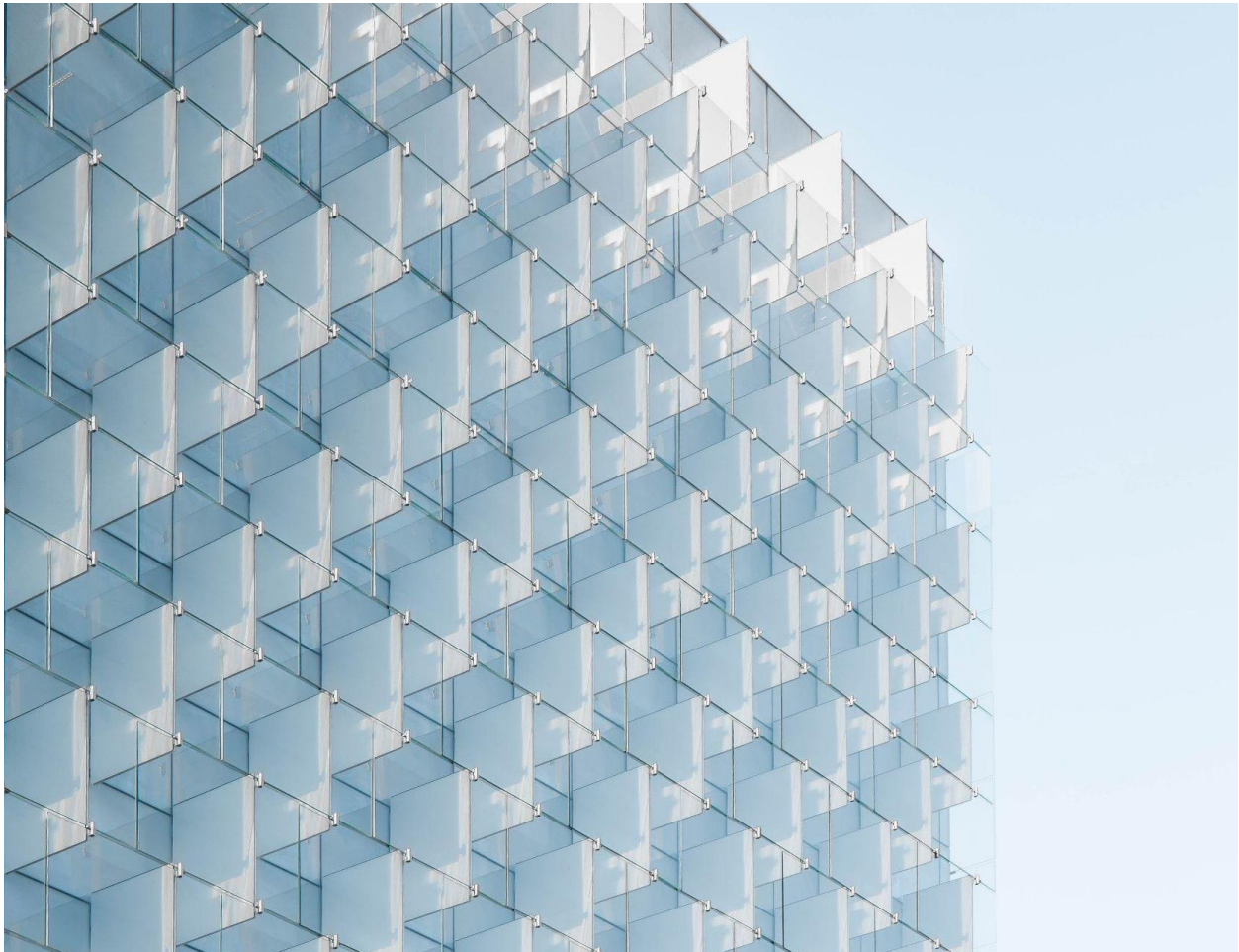


WILLOWTREE PLANNING



9 October 2023

Ref: WTJ22-210
Contact: Sally Prowd



CLAUSE 4.6 VARIATION: HEIGHT OF BUILDING

Proposed development of the Commons Building

423-521 Old Northern Road, Castle Hill
Lot 1370 DP1063007

—
Prepared by Willowtree Planning Pty Ltd
on behalf of Oakhill College C/ Mostyn Copper

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Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



In the spirit of reconciliation and recognition, Willowtree Planning acknowledges the Traditional Owners of this Country throughout Australia and their continuing and ongoing connections to land, waters and community. We show our respect to Elders – past and present. We acknowledge that we stand on this Country which was and always will be recognised as Aboriginal Land. We acknowledge the Traditional Owners of the Lands in this Local Government Area, belonging to the local Aboriginal People, where this proposal is located upon.

DOCUMENT CONTROL TABLE			
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Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



TABLE OF CONTENTS

PART A PRELIMINARY	4
1. INTRODUCTION	4
3 INTERPRETING CLAUSE 4.6	10
PART C DEVELOPMENT STANDARD	14
4. CLAUSE 4.3 HEIGHT OF BUILDINGS OF HLEP2013	14
4.1 PROPOSED VARIATION TO STANDARDS	14
PART D PROPOSED VARIATION TO CLAUSE 4.3 HEIGHT OF BUILDINGS	15
5.1 OBJECTIVES OF THE STANDARD	15
5.2 OBJECTIVES OF THE ZONE	16
5.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY	16
5.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD	18
5.5 PUBLIC INTEREST	20
5.6 MATTERS OF STATE AND REGIONAL SIGNIFICANCE	21
5.7 PUBLIC BENEFIT IN MAINTAINING THE STANDARD	21
5.8 SUMMARY	21
PART E CONCLUSION	23



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



PART A PRELIMINARY

1. INTRODUCTION

This Clause 4.6 Variation request has been prepared in support of a Development Application (DA) for the proposed **development of the Commons Building to be used for administration purposes** as part of the existing Oakhill College located at 423-521 Old Northern Road, Castle Hill (the Site). The Site is legally described as Lot 1370 DP 1063007. The proposed non-compliance is related to Clause 4.3 under *Hornsby Local Environmental Plan 2013* (HLEP2013), being the height of buildings. This Variation request has therefore been prepared in accordance with Clause 4.6 of HLEP2013, which includes the following objectives:

- (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.*

Clause 4.6 requires that a consent authority be satisfied of three key matters before granting consent to a development that contravenes a development standard. These three matters are detailed below:

- That the Applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the Applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- That 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.

This Clause 4.6 variation request demonstrates that compliance with the height standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds, as well as being in the public interest, to justify contravention to the standard.

2. SITE LOCATION AND CONTEXT

2.1 SITE LOCATION AND CHARACTERISTICS

The Site located at 423-521 Old Northern Road, Castle Hill and is legally described as Lot 1370 in DP 1063007. The Site comprises approximately 18.2 hectares (ha), with frontage to Old Northern Road. The Site is owned by The Trustees of the De La Salle Brothers.

The Site is located in the suburb of Castle Hill within the Hornsby Local Government Area (LGA). The Site is bounded by Old Northern Road to the west, and low density residential development to all other sides. The Site currently contains a number of existing school buildings servicing Oakhill College, a Catholic Independent Secondary College.



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



On the Site there are several school buildings, playing fields, swimming pool, associated car parking areas and access road, and a cemetery. The Site also contains cleared grazing land along the eastern perimeter which is used for agricultural studies associated with the college. The Site generally slopes downwards towards the east / south-east.

Figure 1 below provides an aerial photograph of the College. **Figure 2** provides a cadastral image of the College.



Figure 1. Aerial of the Site (Source: Nearmap, 2022)



Clause 4.6 Variation - Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



Figure 2. Cadastral Map (Source: Six Maps, 2023)

The existing campus, like many school campus developments, is characterised by a collection of buildings and facilities, which have been developed in isolation, without maximising opportunities for collaboration or connection.

Of significance, the College includes, amongst other buildings and land uses, the following:

- De La Salle Building (including Chapel);
- Walsh Library;
- Innovation Hub;
- Centenary Sports Centre;
- Mackillop Leaning Commons;
- TAS Workshops;
- Science labs;
- Three sports ovals;
- Farm and agriculture zone;
- Swimming Pool; and
- Gym.

Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



A range of built form and building heights exists across the College, which is typical of an Educational Establishment.

2.2 SITE CONTEXT

The Site is surrounded predominantly by low density residential development. The Site is located approximately 2km from the Castle Hill Town Centre and Metro Station to the southwest, and approximately 1km from the boundary of the Castle Hill Station Structure Plan (refer to **Figure 3** below).

The Sydney Central Business District (CBD) is located 30km to the southeast of the Site. Old Northern Road is a major road which the Site fronts to the west and there are also four bus stops located along the road near the Site. Several Anglicare Villages and a community centre are also located immediately to southeast. Castle Hill Heritage Park, the largest dedicated green space in the locality, is located approximately 1km to the northwest.

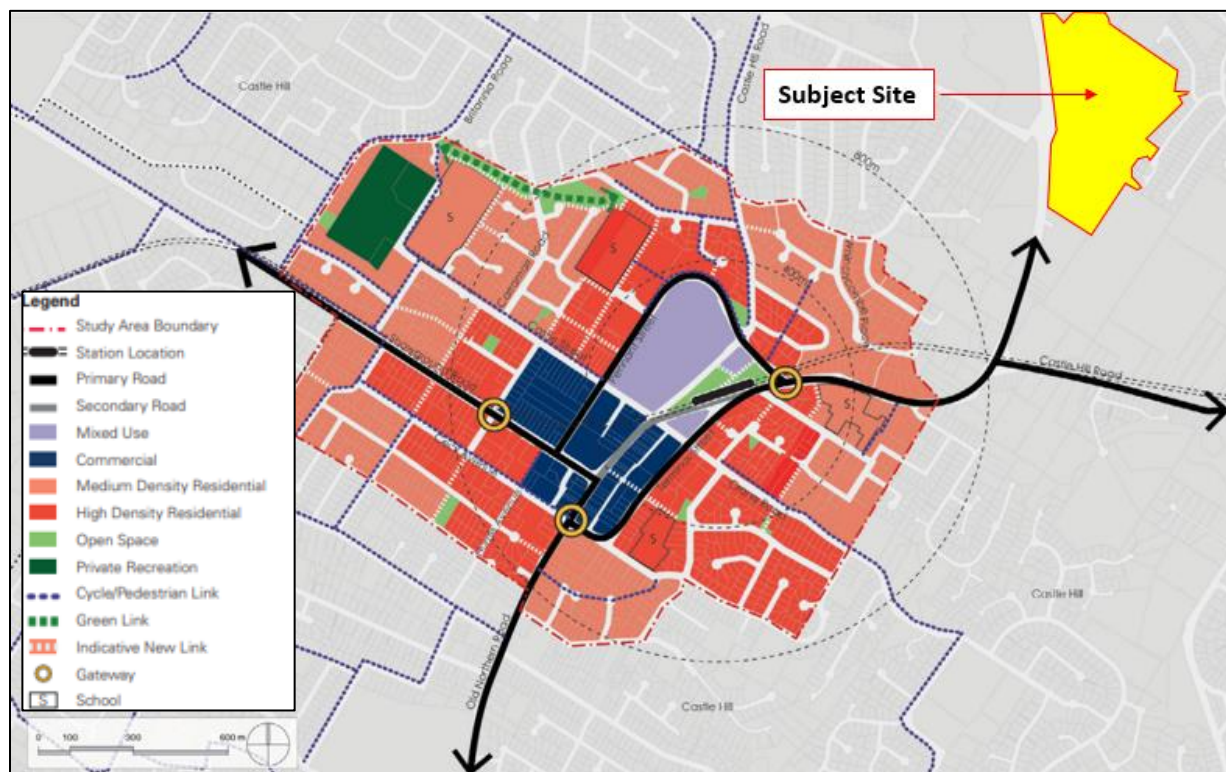


Figure 3. Castle Hill Station Structure Plan (NSW Transport, 2013)

2.3 DEVELOPMENT STANDARD



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Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



Under the provisions of clause 4.3 in HLEP2013, the Site is subject to a maximum building height of 8.5m. Clause 4.3(2) of the HLEP2013 states:

(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.

The Site is mapped as having a building height of 8.5m on the Height of Buildings Map.

‘Development Standards’ are defined under Section 1.4(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) as follows:

“development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,...

It is uncontroversial that the height of buildings control in Clause 4.3 is a development standard. As such, a Clause 4.6 variation request is provided.

2.4 PROPOSED NON-COMPLIANCE

The proposed development would result in a maximum building height of 14.81m to the lift overrun, with the main roof form sitting at a height of 13.6m and the canopy at 14.7m

The proposed development therefore exceeds the Clause 4.3 building height control as follows:

- Maximum exceedance: 6.31m
- Roof height exceedance: 5.1m
- Canopy height exceedance: 6.2m

The Site contains existing buildings ranging in height, in particular the De La Salle Building to the north west (approximately 20m), and the Innovation Hub to the north of 17m. The existing Adrian building which adjoins the proposed development to the south is approximately 13.4m in height, which is slightly below the proposed but exceeds the 8.5m height limit.

The existing buildings which are currently on the Site significantly exceed the height controls and the proposal seeks a similar exceedance.

The height plan below (**Figure 4 and 5**) shows the existing and proposed heights in the context of the maximum height standard.



Clause 4.6 Variation - Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)

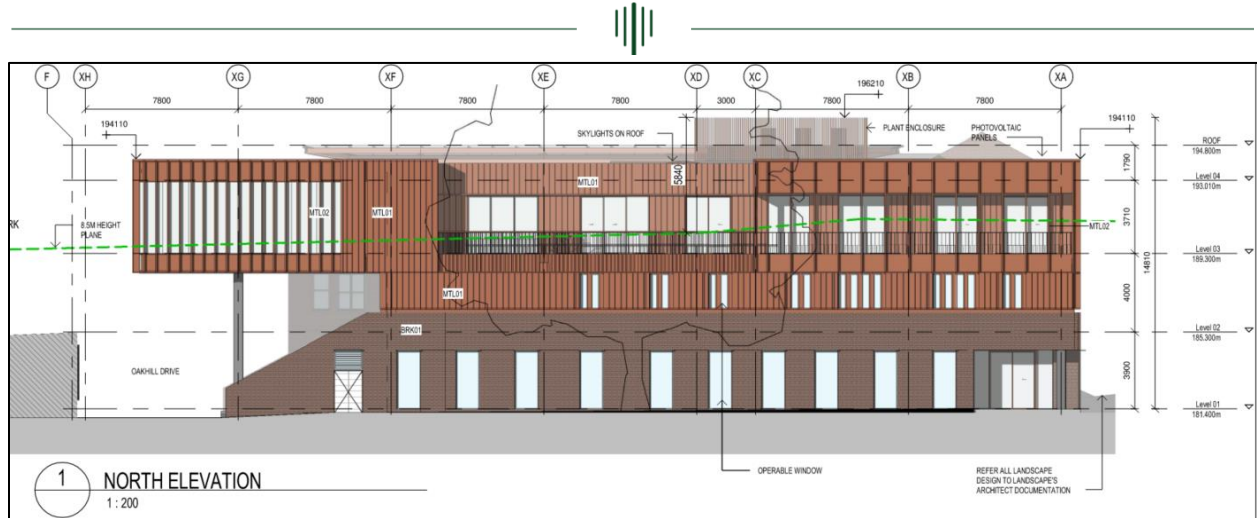


Figure 4. Height exceedance north elevation (Source: BVN 2023)

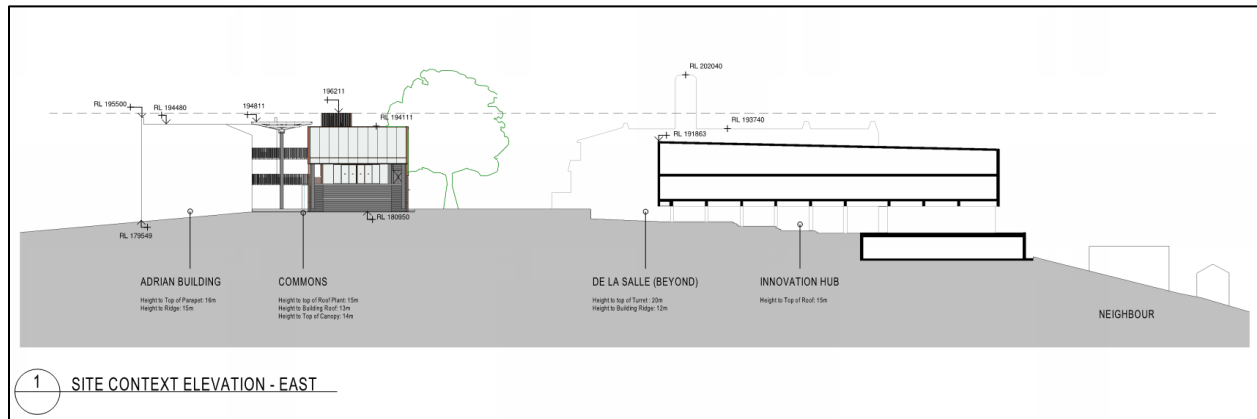


Figure 5. Site Context of Heights (Source: BVN, 2023)

This Clause 4.6 Variation request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards under HLEP2013. It considers various planning controls, strategic planning objectives and existing characteristics of the Site, and concludes that the proposed building height non-compliance is the best means of achieving the objective of encouraging orderly and economic use and development of land under Section 5 of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



PART B THRESHOLDS THAT MUST BE MET

3 INTERPRETING CLAUSE 4.6

Clause 4.6 of HLEP2013 facilitates exceptions to strict compliance with development standards in certain circumstances. Clause 4.6(3) states (our emphasis added):

*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.*

In addition, clause 4.6(4) states that (our emphasis added):

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.*

Further to the above, clause 4.6(5) states the following (our emphasis added):

In deciding whether to grant concurrence, the Planning 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 Planning Secretary before granting concurrence.***

Accordingly, a successful clause 4.6 variation must satisfy three limbs explained in detail below.

First Limb – cl 4.6(4)(a)(i)

Clause 4.6(4)(a)(i) provides that the consent authority must be satisfied that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3).

These matters are twofold:



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



- that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)); and
- that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). To this end the environmental planning grounds advanced in the written request must justify the contravention, not simply promote the benefits of carrying out the development as a whole: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15].

In the decision of *Rebel MH v North Sydney Council* [2019] NSWCA 130 Payne JA held (our emphasis added):

*“Although it was unnecessary finally to decide the correct construction of cl 4.6(4) in Al Maha, I agree with the construction advanced in that case by Basten JA, with whom Leeming JA agreed, at [21]-[24]. **Properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).** Clause 4.6(3) requires the consent authority to have “considered” the written request and identifies the necessary evaluative elements to be satisfied. To comply with subcl (3), the request must demonstrate that compliance with the development standard is “unreasonable or unnecessary” and that “there are sufficient environmental planning grounds to justify” the contravention. It would give no work to subcl 4.6(4) simply to require the consent authority to be satisfied that an argument addressing the matters required to be addressed under subcl (3) has been advanced.”*

Accordingly, a consent authority must be satisfied:

- (a) that the Clause 4.6 variation application addresses the matters in Clause 4.6(3); and
- (b) of those matters itself which means that there is greater scope for a consent authority to refuse a Clause 4.6 variation.

The matters identified in the First Limb are addressed in **Sections 5.3** and **5.4** of this Variation Request.

Second Limb – clause 4.6(4)(a)(ii)

Clause 4.6(4)(a)(ii) provides that the consent authority must be satisfied that the proposed development will be in the public interest because it is consistent with:

- (a) the objectives of the particular development standard; and
- (b) the objectives for development within the zone in which the development is proposed to be carried out.

The opinion of satisfaction under clause 4.6(4)(a)(ii) differs from the opinion of satisfaction under clause 4.6(4)(a)(i) (ie the first limb) in that the consent authority must be directly satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the zone, not indirectly satisfied that the applicant’s written request has adequately addressed those matters.

The matters identified in the Second Limb addressed in **Sections 5.1, 5.2** and **5.5** of this Variation Request.

Third Limb – clause 4.6(4)(b)



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



Clause 4.6(4)(b) requires that concurrence of the Secretary of the NSW Department of Planning and Environment (DPE) has been obtained.

Clause 4.6(5) outlines the matters to be considered by the Planning Secretary in deciding whether to grant concurrence.

The matters identified in the Third Limb are addressed in **Sections 5.6** and **5.7** of this Variation Request.

Other relevant legal matters

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191;
4. *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130;
5. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action);
6. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552 (Baron Corporation);
7. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (Al Maha);
8. *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511;
9. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386;
10. *Moskovich v Waverley Council* [2016] NSWLEC 1015; and
11. *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [Clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [Clause 4.6(3)(b)]; and
3. That 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 [Clause 4.6(4)].

In *Initial Action* Chief Justice Preston considered the proper interpretation of Clause 4.6 and found that:

- **Clause 4.6 does not require a proponent to show that the non-compliant development would have a neutral or beneficial test relative to a compliant development (at [87]);**



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



- **There is no requirement for a clause 4.6 request to show that the proposed development would have a 'better environmental planning outcome for the site' relative to a development that complies with the standard (at [88]); and**
- **One way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts** (at [95(c)]). That is, the absence of environmental harm is sufficient to show that compliance with the development standard is unreasonable or unnecessary

More recently, the Land and Environment Court emphasized that Clause 4.6 is not subordinate to development standards such as height or FSR, and that the ability to vary a development standard is equally as valid as the development standards themselves. In that regard, Acting Commissioner Clay held in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (later upheld on appeal by Chief Justice Preston) that:

"It should be noted cl 4.6 of WLEP is as much a part of WLEP as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome"

Nevertheless, the language used in a Clause 4.6 variation application is of paramount importance. In the decision of *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191 the court held that the applicant had inferred an entitlement to floor space and had asserted, expressly or by necessary inference, that floor space that would be forgone as a result of a variation not being permitted, would be required to be relocated elsewhere in a revised development. The court did not look favourably on this assertion and refused the variation to the development standard. Accordingly, the building envelope set by the development standards should be viewed as a maximum area and not an entitlement and language that infers an entitlement has the potential to jeopardise the success of the application.

The case law also outlines that it is important to focus on whether the exceedance that arises as a result of the variation to the development standard (in this case the exceedance of the maximum height of buildings standard) is consistent with the objectives rather than the totality of the whole development.

This written request has been prepared under Clause 4.6 to request a variation to the "Height of Buildings" (HOB) development standard at Clause 4.3 of HLEP2013.





PART C DEVELOPMENT STANDARD

4. CLAUSE 4.3 HEIGHT OF BUILDINGS OF HLEP2013

The development standard being requested to be varied is Clause 4.3 Height of Buildings of HLEP2013, which provides the following:

4.3 Height of buildings

- (1) The objectives of this clause are as follows—*
- (a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*
- (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.*

The HLEP2013 map referred to in Clause 4.3 identifies the Site as being subject to a maximum built height of 8.5m. Pursuant to Clause 4.6 the proposed development seeks exception to the 8.5m building height standard prescribed by Clause 4.3.

4.1 PROPOSED VARIATION TO STANDARDS

The proposed development seeks approval for the proposed Commons building, which will function for administration and associated purposes as part of the existing Oakhill College. The proposed development would result in a proposed maximum building height of 14.81m (RL 196.21) under Clause 4.3 of HLEP2013.

Table 1 outlines the proposed Variation to Clause 4.3 of HLEP2013.

TABLE 1. PROPOSED BUILDING HEIGHT VARIATION – HLEP2013			
HLEP2013 Clause	Development Standard	Proposed Development Non-Compliance	Percentage of Variation
Clause 4.3 Height of Buildings	Maximum building height of 8.5m for the Site.	Maximum non compliance – RL 196.210	6.31m or 74.23%

The Site is zoned R2 Low Density Residential under the provisions of HLEP2013, whereby educational establishments are permissible with consent. Notwithstanding, the proposal development is part of an existing operational school being Oakhill College.



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



PART D PROPOSED VARIATION TO CLAUSE 4.3 HEIGHT OF BUILDINGS

Pursuant to Clause 4.6 of HLEP2013, exception is sought from the 8.5m height of buildings standard applicable to the Site pursuant to clause 4.3 of HLEP2013. Clause 4.6(4)(a)(ii) requires the consent authority to be satisfied that 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.

5.1 OBJECTIVES OF THE STANDARD

The objectives of Clause 4.3 under HLEP2013 are as follows:

(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

The proposed development is considered an appropriate response to the site constraints, including maintaining open space for school users, minimal impact to the nearby heritage item and ensuring no impact to biodiversity values.

The proposed development is for an additional building which is required to allow for the continued operation of the Oakhill College and its staff and students. The proposed development would not impact on infrastructure as there is no proposed increase to student or staff numbers.

The proposed development is located in the centre of the campus and as such would have minimal impacts to any surrounding residential neighbours. The proposed development would not impact on views, privacy or cause overshadowing to the surrounding residential development.

Specifically, the proposed development meets the objectives of the Clause as it responds to the site constraints, the development potential and the infrastructure capacity as outlined below:

Site constraints:

- The height of the building is appropriate for the surrounding context of which there are already a number of tall buildings, which form the immediate context for the proposal;
- The proposed development is sited as to avoid excessive tree removal;
- The proposal has avoided areas of mature native trees, significant slopes and the existing outdoor recreation space utilised by the College;
- The height is appropriate as it does not result in impacts to privacy, overshadowing, amenity or noise for any surrounding residents or uses; and
- The height is located within the middle of the site and largely not visible from any public areas and does not impact on significant view corridors or views of heritage items.

Development potential:

- The College requires ample and modern facilities to maintain safe and high quality learning environments;
- The College is an important community/ social asset to the area to which many local students attend and as such it is always intended that new facilities would be required to maintain the use in this location;



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



- The proposed development does not limit the future development potential of the site or surrounding area; and
- The College has adequate space to accommodate the development which would not increase the capacity of students or staff on the site.

Infrastructure capacity:

- The existing infrastructure including services and roads have capacity to accommodate the proposed development including the additional height;
- The proposed development and increased height, does not increase any pressure on the road network or on other Council infrastructure including water and sewer; and
- The proposal is a much needed replacement building which will be highly efficient in design and operation.

5.2 OBJECTIVES OF THE ZONE

The Site is currently zoned R2 Low Density Residential under HLEP2013. Consistency with the R2 Low Density Residential zone is addressed in **Table 2** below.

TABLE 2. CONSISTENCY WITH THE R3 MEDIUM DENSITY RESIDENTIAL ZONE OBJECTIVES	
Zone Objectives	Comments
R2 Low Density Residential zone	
<i>To provide for the housing needs of the community within a low density residential environment.</i>	The proposed development continues to allow for provision of low density residential development in the surrounding area.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	The proposed development would support the ongoing operation of Oakhill College, which assist in providing facilities and services to meet the needs of the local residents.

5.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

Subclause 4.6(3)(a) and the judgement in *Four2Five Pty Ltd v Ashfield Council* (refer to **Section 2.1**) emphasises the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances.

In *Wehbe v. Pittwater Council* [2007] NSWLEC 827 (**'Wehbe'**), Chief Justice Preston of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that those types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis is of assistance to variations made under clause 4.6.

The five methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
- 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 (**Fourth Method**).
- 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 (**Fifth Method**).

Whilst the Court has held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (*Wehbe*), it is important to note that:

- The requirement is to demonstrate that compliance is unreasonable **or** unnecessary. It does not need to be shown that compliance is both unreasonable and unnecessary;
- *Wehbe* identifies five ways of demonstrating that compliance is unreasonable or unnecessary, but the Courts have held that this list is not exhaustive (*Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [22])
- Equally, it is not necessary to identify more than one of the five *Wehbe* tests. “An applicant does not need to establish all of the ways. It may be sufficient to establish only one way” (*Initial Action* at [22]).

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary, is the First Method. That is, the objectives of the standard are achieved, despite the non-compliance.

The following justification is provided as why the standard is unreasonable and unnecessary in this instance:

- (a) The proposal represents logical and co-ordinated development of the Site for a continued use as an educational establishment (School), and continues to meet the aims of the R2 Low Density Residential zone.
- (b) The proposal will result in improvements to the functionality and operations of the Site through allowing upgraded and purpose built facilities to support the ongoing use by Oakhill College.
- (c) The design response and built form is responsive to the Site constraints, largely keeping to the already established area of development on the College grounds, is suitable to the context and heritage setting and existing character of the College and surrounding residential area.
- (d) The architectural design provides a high quality built form outcome for the Site and is functional for the proposed outcomes;
- (e) Development will be compatible with the desired and future character of the immediate locality;
- (f) The proposed building height is acceptable in terms of heritage impacts, and is of a similar height of various existing college buildings, and will sit below the



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



heritage De La Salle building height, resulting in an sympathetic heritage outcome;

- (g) The proposed variation to the building height will not give rise to any unacceptable environmental or amenity impacts to surrounding development in relation to views, overshadowing, solar access, noise and visual privacy;
- (h) Compliance may be achieved by reducing the scale of the development, but this would undermine both the functionality of the design and operations of the College;
- (i) Reducing the building height to achieve a compliant building height would not deliver any measurable environmental or amenity benefits.

In view of the circumstances of the subject proposal, strict compliance with Clause 4.3 of HLEP2013 is considered to be both unnecessary and unreasonable. The proposal does not conflict with the intent of Clause 4.3 of HLEP2013 as demonstrated above and satisfies its objectives, notwithstanding the proposed numerical departure.

The proposed building height variation will retain compatibility with surrounding development and continue to support the ongoing operations of the College as well as the continued surrounding residential uses in the locality, consistent with the objectives of the R2 Low Density Residential zone.

The abovementioned justifications are considered valid, and in this instance the proposed Clause 4.6 Variation is considered to be acceptable. The proposed development represents an efficient and continued use of the Site. The objectives of the relevant clause and R2 Low Density Residential zone would be upheld as a result of the proposed development. In light of the above, the application of the height of building development standard is therefore unreasonable and unnecessary in response to the proposed development.

5.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

Clause 4.6(3)(b) of the HLEP2013 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that Site at [60].

Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 found that it is not necessary to demonstrate that a development will result in a “better environmental planning outcome for the site” relative to a development that complies with the height development standard. However, in relation to this objective the consent authority must be satisfied there is a ‘preservation’ of amenity. In this case, the environmental amenity of both the surrounding College buildings and neighbouring properties is preserved as the proposal does not result in any additional amenity impacts.

The variation to the development standard for height of buildings is considered well founded on the basis that:



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



- The increased height will allow for improved accessibility and connectivity with the nearby Adrian Building, which currently does not cater to disabled access. To ensure connectivity that is appropriate and weather proofed, the additional height is required to align with the existing floor levels of the Adrian building and provide a covered canopy between the buildings.
- The increased height of the building can also be attributed to the greater floor to floor requirements for the proposed use, to also ensure ample natural daylight into the rooms and foster a positive learning environment.
- The sloped topography of the site also contributes to the variation in the building height exceedance across the proposed development, with a lesser variation at the point where the natural ground is higher.
- The additional height also contributes to a high quality and cohesive built form environment, which is in keeping with the established internal character of the School buildings in particular relating to the existing predominant built form that surrounds the proposal.
- The additional height of the building in part also is attributed to the lift overrun which is an essential component to ensure access to all levels for all users.
- The additional height at the eastern end of the proposed building also provides for improved outdoor space for the students, allowing a weatherproof amphitheatre.
- Of particular note, the additional height of the building would have no impacts in terms of amenity, privacy, outlook or overshadowing to the internal College buildings and the adjoining residential development.

Furthermore, the proposed development as a whole including the additional building height has substantial environmental planning grounds including the following:

- (a) The proposed building height variation is consistent with the underlying objective or purpose of the standard as demonstrated in **Section 5.1**;
- (b) The proposed building height variation is consistent with the objectives of the R2 Low Density Residential zone as described in **Section 5.2**;
- (c) Compliance with the standard would be unreasonable and unnecessary for the reasons outlined in **Section 5.3**;
- (d) The proposed height variation has been designed to be sympathetic and respectful to the nearby heritage building and surrounding existing buildings.
- (e) The proposed height variation would have no amenity impacts on the nearby residential properties, particularly with regard to visual bulk, privacy, overshadowing and sunlight access. As demonstrated in the Shadows Diagrams submitted for the subject DA, the neighbouring residential properties would continue to receive adequate solar access.
- (f) The proposal is seen to be in keeping with the existing buildings located on the College campus.
- (g) The proposal does not result in any undue environmental or amenity impacts to the surrounding or adjoining properties. In this respect, the proposal, including the building height encroachment, is commensurate to the context of the Site and the available outlook from surrounding sites to the development and does not provide opportunity for any unreasonable or unwarranted visual impacts.
- (h) The proposed increase in height would not create any adverse visual or acoustic amenity impacts for the surrounding sensitive land users. Limiting the building height to a strict 8.5m would not deliver any measurable environmental or amenity benefits.



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



- (i) The visual impacts when viewed from adjoining properties and the public domain result in impacts considered to be in the low to negligible ranges and consistent with the existing character of the College campus;
- (j) The proposal accommodates improved accessibility for all to the adjoining existing building;
- (k) Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any meaningful benefits to the continued operation of Oakhill College or the general public in the particular circumstance of this site. Instead strict compliance would constrain the achievement of sensible planning for the existing College and lead to a development that does not impact on amenity nor impact on the significance of the heritage item.
- (l) Compliance with the remaining development standards applicable to the Site is achieved.

For the reasons outlined above, it is considered that the proposed variation to the building height control under Clause 4.3 is appropriate and can be clearly justified having regard to the matters listed within clause 4.6(3)(b) under HLEP2013.

5.5 PUBLIC INTEREST

As outlined in **Section 2.1**, *Four2Five Pty Ltd* emphasised that it is for the proponent to demonstrate that the proposed non-compliance with the development standard is in the public interest. Subclause 4.6(4)(a)(ii) requires the proposed development be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

Sections 5.1 and **5.2** have already demonstrated how the proposed development is consistent with the objectives of both Clause 4.3 and the R2 Low Density Residential zone under HLEP2013.

In *Lane Cove Council v Orca Partners Management Pty Ltd (No 2)* [2015] NSWLEC 52, Sheahan J referred to the question of public interest with respect to planning matters as a consideration of whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development.

The public advantages of the proposed development are as follows:

- (a) Modern facilities for the existing College, that would continue to serve the staff, students and visitors;
- (b) Preserve and enhance the existing heritage item being the De La Salle building;
- (c) Attracting a greater number and diversity of residential uses into the locality;
- (d) Contributing positively to the residential character of the R2 Low Density Residential zone;
- (e) Enabling an opportunity for increased housing;
- (f) Stimulating a development outcome that is compatible with the existing and emerging residential area; and
- (g) Facilitating development that is a permissible land use and consistent with the R2 zone objectives.



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



There are no significant public disadvantages which would result from the proposed development. The proposed development is therefore considered to be justified on public interest grounds and there is no material public benefit in maintaining the standard.

5.6 MATTERS OF STATE AND REGIONAL SIGNIFICANCE

The proposed non-compliances with Clause 4.3 of HLEP2013 will not give rise to any matters of significance for State or regional environmental planning. They will also not conflict with any State Environmental Planning Policy or Ministerial Directives under section 9.1 of the EP&A Act.

5.7 PUBLIC BENEFIT IN MAINTAINING THE STANDARD

Strict compliance with the Clause 4.3 building height development standard would result in:

- (a) Impacts to the functional operation of the existing College;
- (b) Increased overall area which would be required to accommodate an updated facility, and implications this may have on siting;
- (c) Development of buildings which are not in keeping with the existing character of the College; and
- (d) Not result in any measurable environmental or amenity benefits to surrounding properties or the public domain.

Further to the above, in the event the development standard was maintained, the resulting benefits to the adjoining properties and wider public would be nominal and would not warrant strict compliance at the expense of the matters identified above.

Accordingly, there is no genuine or identifiable public benefit in maintaining this strict building height control in the context of the proposed development.

5.8 SUMMARY

For the reasons outlined above, it is considered that the variation to Clause 4.3 of HLEP2013 is well-founded in this instance and is appropriate in the circumstances. Furthermore, the Variation Request is considered to be well-founded for the following reasons as outlined in Clause 4.6 of HLEP2013, *Four2Five Pty Ltd v Ashfield Council* and *Wehbe v Pittwater Council*:

- (a) Compliance with the development standard is unreasonable and unnecessary in the circumstances (refer to **Section 5.3** as part of the First Limb satisfied);
- (b) There are sufficient environmental planning grounds to justify contravening the development standard (refer to **Section 5.4** as part of the First Limb satisfied);
- (c) The development is in the public interest (refer to **Section 5.5** as part of the Second Limb satisfied);
- (d) The development is consistent with the objectives of the particular standard (refer to **Section 5.1** as part of the Second Limb satisfied);
- (e) The development is consistent with the objectives for development within the zone (refer to **Section 5.2** as part of the Second Limb satisfied);
- (f) The development does not give rise to any matter of significance for the State or regional environmental planning and is consistent with the visions and objectives of the relevant strategic plans (refer to **Section 5.6** as part of the Third Limb satisfied);



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



- (g) The public benefit in maintaining strict compliance with the development standard would be negligible (refer to **Section 5.7** as part of the Third Limb satisfied); and
- (h) The objectives of the standard are achieved notwithstanding the non-compliance with the standard.

Overall, it is considered that the proposed variation to the maximum building height control is entirely appropriate and can be clearly justified having regard to the matters listed within Clause 4.6 of HLEP2013.



Clause 4.6 Variation – Height of Buildings

Proposed Commons Building

423-521 Old Northern Road, Castle Hill (Lot 1370 DP 1063007)



PART E CONCLUSION

It is requested that Hornsby Shire Council exercise its discretion and find that this Clause 4.6 Variation adequately addresses the matters required to be demonstrated by subclause 4.6(3) of HLEP2013. This is particularly the case given the proposed development's otherwise compliance with HLEP2013, and the Site's suitability for the proposed development at a local government level.

The proposal represents a suitable form of development that does not cause conflict with the adjoining properties or undermine their daily function.

