



Clause 4.6 Variation Building Height

St Aloysius' College Junior Campus

29 Burton Street, Kirribilli

Lot 1 in DP 830667

Prepared by Willowtree Planning Pty Ltd on
behalf of St Aloysius College

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PART A PRELIMINARY

1.1 INTRODUCTION

This Clause 4.6 Variation request has been prepared in support of a State Significant Development for the proposed Concept Master Plan of St Aloysius' College Junior Campus. The Site is known as 29 Burton Street, Kirribilli and legally described as Lot 1 DP 830667. The proposed non-compliance is with the Building Height development standard under Clause 4.3 of the *North Sydney Local Environmental Plan 2013* (NSLEP 2013). This Variation request has therefore been prepared in accordance with the requirements of Clause 4.6 of NSLEP 2013, which includes the following objectives.

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

1.2 PROPOSED NON-COMPLIANCE

Under the provisions of Clause 4.3 in NSLEP 2013, the Site is subject to a maximum building height of 8.5m. The proposal involves a single storey extension above the existing built form. The proposed building height will sit below the existing maximum height across the Junior Campus. Notwithstanding, the proposed building envelope will vary the maximum prescribed building height by 3.3m, measure from natural ground level. As such, the proposed building envelope exceeds the Clause 4.3 Building Height control of 8.5m applicable to the Junior Campus under the NSLEP 2013. A summary of the existing and proposed Building Height calculations for the Site, in accordance with NSLEP 2013, are provided in Table 1 below.

Table 1 / Building Height

	Existing	Proposed	Variation from Prescribed Maximum
Roof	39.85RL	43.10RL (10.1m)	1.6m
		43.80RL (11.8m)	3.3m
		44.50RL (12m)	3.5m
Heritage Roof	45.09RL	-	-

The proposed single storey extension for the Junior Campus will project above the 8.5 metre height limit and are therefore above the prescribed maximum building height. The height limit has been breached for the following reasons:

- The prescribed maximum building height of 8.5m does not reflect the existing building height within the Site, the highest point on the Site is RL 45.09;
- Space within the Site is limited, without compromising the existing use across the Site;
- The proposed development responds to the topography of the Site;
- The proposed building height responds to the existing development height within and immediately surrounding the Site.

Given the existing levels of non-compliance across the Junior Campus, the proposed non-compliance is considered negligible, and therefore it is considered appropriate to consider the proposed variation to development standard as part of a Clause 4.6 variation.

The proposed development results in a maximum variation of 3.5m from the prescribed maximum building height of 8.5m. In relation to the existing height, the proposed development does not exceed the highest point across the Junior Campus. As such, the proposed development is representative of a

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more efficient use of the Site, without increasing the building footprint, when compared to both the existing built form at the Site, and under a scenario whereby a compliant building height were to be constructed.

1.3 STRATEGIC PLANNING JUSTIFICATION

Under both of the alternative building height-compliant scenarios (existing compliant built form and hypothetical compliant built form), the built form potential of the site is/would be under-realised. It is furthermore submitted that a hypothetical building height-compliant building at the site would:

- Construct a building which does not serve the needs of St Aloysius' College;
- Construct a building which is not in conformity with the adjoining medium and high density residential development;
- Result in an outcome which does not necessarily meet the objective of the site's zone to encourage development of infrastructure, in particular educational establishment;
- Result in inefficient built form and the Site not being used to its full development potential.

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 NSLEP 2013. 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 objectives and outcomes of St Aloysius' College.

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PART B THRESHOLD THAT MUST BE MET

2.1 CLAUSE 4.6 OF THE NSLEP 2013

In accordance with Clause 4.6 of NSLEP 2013 the relevant consent authority is required to consider the following:

(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.*

These matters are responded to in **Part D** of this Clause 4.6 Variation.

2.2 CASE LAW

Relevant case law on the application of the standard Local Environmental Plan Clause 4.6 provisions has established the following principles:

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, which emphasised that the proponent must address the following:
 - Compliance with the development standard is unreasonable and unnecessary in the circumstances;
 - There are sufficient environmental planning grounds to justify contravening the development standard;
 - The development is in the public interest;
 - The development is consistent with the objectives of the particular standard; and
 - The development is consistent with the objectives for development within the zone;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, which held that the degree of satisfaction required under Subclause 4.6(4) is a matter of discretion for the consent authority;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827, which emphasised the need to demonstrate that the objectives of the relevant development standard are nevertheless achieved, despite the numerical standard being exceeded. Justification is then to be provided on environmental planning grounds. Wehbe sets out five ways in which numerical compliance with a development standard might be considered unreasonable or unnecessary as follows:
 - The objectives of the standard are achieved notwithstanding the non-compliance with the standard;
 - The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
 - The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
 - 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; or

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- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

These matters are responded to in Part D of this Clause 4.6 Variation.

Accordingly, outlined below is the justification for the departure to the building height control applicable under the North Sydney LEP 2013. The purpose of this assessment is to demonstrate that strict compliance with the standard is unreasonable or unnecessary in the circumstances of this particular case. It also provides justification for the departure from the control.

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3.1 PROPOSED BUILDING HEIGHT

Table 2 Proposed Building Height Variation

Figure 1 and **Figure 2** below demonstrate the proposed new buildings in the context of the existing Junior Campus.



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PART D PROPOSED VARIATION TO CLAUSE 4.3 BUILDING HEIGHT

4.1 OBJECTIVES OF THE CLAUSE 4.3 BUILDING HEIGHT STANDARD

A key determination of the appropriateness of a Clause 4.6 Variation to a development standard is the proposed development's compliance with the underlying objectives and purpose of that development standard.

Therefore, while the campus is subject to a specified numerical control for Building Height, the objectives and underlying purpose behind the development standard are basic issues for consideration in the development assessment process.

The Site is situated on land where a height limit of 8.5m applies. Clause 4.3 sets out the objectives of the maximum building height development standard. Notwithstanding the proposed variation to the standard, the proposed development is nevertheless consistent with these objectives as set out below.

Table 3 | Building Height Objectives

Clause 4.3 Building Height Objectives	Proposed Development
<i>a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,</i>	Levels vary considerably across the College, and subsequently the existing and proposed built form responds to the change in levels.
<i>b) to promote the retention and, if appropriate, sharing of existing views,</i>	The Site is densely built up and includes a number of buildings already exceed the prescribed maximum and block the potential for views through and / or over the Site. The proposed development will continue to sit within the existing building envelope and will not result in the loss of identified key views.
<i>c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,</i>	The proposed development will result in some additional overshadowing impacts. This is considered unavoidable given the nature and density of surrounding development. However, adequate levels of solar access are maintained to neighbouring properties, achieved through considerate design, and building setbacks.
<i>d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,</i>	It is the overall intention of the College to maintain the privacy of the surrounding residents. Privacy will be achieved through landscaping, setbacks and building articulation.
<i>e) to ensure compatibility between development, particularly at zone boundaries,</i>	The proposed building height is appropriate to the built-up environment in which the Site is located. The Site is situated within an urban environment, surrounding by land zoned R3 Medium Density and R4 High Density. This includes land to the east and west.
<i>f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.</i>	The proposed built form will continue to sit within the existing building envelope with no increase in the existing building height. The proposed development is located within an established urban environment. Kirribilli includes a

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	number of taller building and accommodates several residential flat buildings. The prevailing controls applicable to land surrounding the Site support a more intensive development, being zoned R3 and R4.
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The density of the proposed development would be in keeping with the surrounding built form elements of the existing educational establishment. The intensity of the proposed development would also result in a built form outcome which meets the desired outcome of St Aloysius College as it would allow for improved learning and teaching facilities.

In terms of perceived bulk and scale, reducing the existing elevation would significantly alter the aesthetic and functionality of the Campus, without significantly reducing the perceived 'bulk' of the proposed development.

It is considered that the drafters of the standard Clause 4.3 wording, when crafting the above-mentioned objective of limiting development bulk and scale, did not intend to create built-form outcomes where a site appears partially undeveloped simply for the sake of achieving strict numerical compliance with the relevant Clause 4.3 control.

In terms of bulk and scale, it is also relevant to note the proposed development will not generate additional student and staff numbers.

4.2 OBJECTIVES OF THE ZONE

The Site is currently zoned SP2 – Educational Establishment under NSLEP 2013. The proposed development is for alterations and additions to an existing educational establishment is permissible at the Site with consent. For the purpose of this application, the consent for the proposed building envelopes is sought. Detailed design will be subject to a future development application.

The proposed development is consistent with the following SP2 zone objectives:

- *To provide for infrastructure and related uses;*

The proposed development would facilitate a land use which is compatible with the existing educational establishment, ensuring the Site remains compatible with its surrounding local context and character as part of St Aloysius' College.

- *To prevent development that is not compatible with or that may detract from the provision of infrastructure;*

The proposed development would provide the continued use of the Site as an educational establishment and would ensure compatibility with the existing use of the Site, as well as surrounding development.

4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ set out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation:

1. *Establish that compliance with the development standard is unreasonable or unnecessary because **the objectives of the development standard are achieved notwithstanding non-compliance** with the standard.*
2. *Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*

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3. *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
4. *Establish that 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. *Establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".*

In applying the tests of *Wehbe v Pittwater Council [2007] NSWLEC 827*, only one of the above rationales is required to be established. Notwithstanding the proposed variation, the development is consistent with the underlying objectives of the standard for Height of Buildings and the relevant Zoning prescribed under NSLEP 2013.

In view of the particular circumstances of this case, strict compliance with Clause 4.3 of NSLEP 2013 is considered to be both unnecessary and unreasonable. The proposed development does not conflict with the intent of Clause 4.3 as demonstrated above. The proposed development achieves the objectives, notwithstanding the proposed numeric variation.

The proposed development is justified on the following environmental planning grounds:

- It represents a logical and co-ordinated development of the Site for College use;
- It will result in improvements to the physical appearance of the Site through a carefully designed series of buildings and structures that is responsive to the Site context and its intended function;
- The architectural design of the proposal provides a good quality-built form outcome for the Site;
- New development will aim to minimise undue impacts in terms of overlooking, overshadowing or privacy issues;
- Development will be consistent in height with existing buildings; and
- Compliance could be achieved by reducing the scale of the development, but this would undermine the visual quality of the design and the School's accommodation requirements would not be achieved.

4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

The variation to the development standard for Height of Buildings is considered well founded because, notwithstanding the proposed non-compliance with the standard:

- The proposed development is entirely consistent with the underlying objective or purpose of the standard as demonstrated;
- The scale of the proposal is considered to be appropriate for the Site and the surrounding area and meets the needs of the College and the educational needs of wider Sydney Metropolitan area;
- The bulk and scale of the proposal is limited and is consistent with the style and scale of other buildings on the Site;
- The proposed development will not significantly impact on the amenity of adjoining residents;
- Strict compliance with the height limit would unreasonably restrict the potential to develop the facilities required by the College on a single Site;
- The applicable height controls do not reflect existing development within the Site, with a number of existing buildings already exceeding the 8.5m height control which applies; and

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- The proposed development will not result in any unreasonable privacy intrusion or loss of daylight access to adjacent properties.

4.5 PUBLIC INTEREST

As outlined in **Section 2.2**, *Four2Five Pty Ltd v Ashfield Council* 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 particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

Sections Error! Reference source not found. and Error! Reference source not found. have already demonstrated how the proposed development is consistent with the objectives of both Clause 4.3 and the SP2 zone under the NSLEP 2013.

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:

- Create a world class secondary education precinct with modern teaching and learning facilities;
- Rationalise existing teaching functions across the three (3) Sydney campuses focusing on specialised activities within each campus;
- Establish additional floor space to increase availability and efficiency of teaching functions for St Aloysius College;
- Upgrade the public domain to create visually interesting transitions through the campus, and promote the heritage elements of the campus; and
- Strengthen pedestrian linkages through the campus.

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.

4.6 SUMMARY

For the reasons outlined above, it is considered that the objection to Clause 4.3 of NSLEP 2013 is well-founded in this instance and the granting of a Clause 4.6 Variation to the development standard is appropriate in the circumstances. Furthermore, the objection is considered to be well founded for the following reasons as outlined in Clause 4.6 of the NSLEP 2013, *Four2Five Pty Ltd v Ashfield Council* and *Wehbe v Pittwater Council*:

- Compliance with the development standard is unreasonable and unnecessary in the circumstances;
- There are sufficient environmental planning grounds to justify contravening the development standard;
- The development is in the public interest;
- The development is consistent with the objectives of the particular standard;
- The development is consistent with the objectives for development within the zone;
- The objectives of the standard are achieved notwithstanding the non-compliance with the standard;

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- The development does not negatively impact on any matters of State or regional significance; and
- The public benefit in maintaining strict compliance with the development standard would be negligible.

It is furthermore submitted that:

- Strict compliance with the standards would hinder the achievement of the objects of the EP&A Act;
- The proposed development is consistent with the surrounding educational establishment, the development standards of NSLEP 2013 and the controls in the NSDCP 2013; and
- No unreasonable impacts are associated with the proposed development.

Overall, it is considered that the proposed Clause 4.6 Variation to the existing and maximum building height control is entirely appropriate and can be clearly justified having regard to the matters listed within NSLEP 2013 Clause 4.6.

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PART E CONCLUSION

It is requested that the Department of Planning and Environment 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 the NSLEP 2013.

This is particularly the case given the relatively minor nature of the proposed exceedance as well as the proposed development's otherwise compliance with the NSLEP 2013 and NSDCP 2013, and the Campus's strategic suitability for the proposed development at both a local and State government level.