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Clause 4.6 Variation Request to the Height of Buildings Development Standard under Clause 4.3 of Pittwater LEP 2014

Proposed Alterations and Additions to existing School Building A3
Narrabeen Sports High School

10 Namona Street, North Narrabeen



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1 Introduction

1.1 Commission

DFP has been commissioned by the NSW Department of Education to prepare a written request (“Variation Request”) pursuant to clause 4.6 of *Pittwater Local Environmental Plan 2014* (the LEP) for the proposed alterations and additions to the existing school Building A3 (the Proposal) at Narrabeen Sports High School (NSHS), 10 Namona Street, North Narrabeen (the NSHS site). A separate variation request has been prepared by DFP for the proposed new Building D comprising an administration building, multi-purpose hall, staff hub and covered outdoor learning area (COLA) at Narrabeen North Public School (NNPS), 6 Namona Street, North Narrabeen (the NNPS site).

The proposed alterations and additions to Building A3 at the NSHS site is described in detail in Section 4 of the SEE. The proposed development at NSHS involves a new extension to the west of Building A3 and internal alterations to Building A3 (the proposed development).

The proposed development at NSHS exceeds the height of buildings development standard under clause 4.3 of the LEP having a maximum height of 10.63m at the top of the roof of the new 2 storey extension of Building A3. Therefore, the proposed development exceeds the maximum height of building standard of 8.5m by 2.13m, which is equivalent to a variation of 25%. Additionally, the proposed alterations to existing Building A3 will exceed the 8.5m maximum height of building standard, having a maximum height of 10.69m at the top of the roof level above the skylight windows being a variation of 2.19m or 25.8%.

Notwithstanding the contravention of the 8.5m height of buildings development standard, the proposed development is considered to be consistent with the objectives of the development standard and the objectives of the SP2 zone within which the development is to be carried out and there are sufficient environmental planning grounds to justify the contravention in this instance including the absence of any discernible adverse environmental impacts associated with the variation.

This written request has been prepared to provide a detailed assessment in accordance with the statutory requirements of clause 4.6 of the LEP so that the consent authority can exercise its power to grant development consent, notwithstanding the contravention to the 8.5m maximum height of buildings development standard.

1.2 Material Relied Upon

This Variation Request has been prepared by DFP based on the Architectural Drawings prepared by DesignInc and other supporting drawings and reports which are appended to the Statement of Environmental Effects (SEE) report prepared DFP dated 21 September 2022.

This Variation Request should be read in conjunction with the detailed environmental planning assessment contained in the SEE and the other DA documentation.

2 The Nature of the Variation

Clause 4.3 and the Height of Buildings Map of the LEP designate a maximum building height of 8.5m for the Site (see **Figure 1**).



Figure 1 Extract of Height of Buildings Map (Pittwater Local Environmental Plan 2014)

The LEP defines **building height** as:

building height (or height of building) means—

- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
- (b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The proposed development at NSHS does not comply with the 8.5m height of buildings development standard having a maximum height of 10.63m to the proposed new 2 storey extension of Building A3 and a maximum height of 10.69m to the proposed alterations to the existing Building A3. Therefore, the proposed development exceeds the maximum height of building development standard of 8.5m by 2.13m and 2.19m (respectively) which is equivalent to a variation of 25% and 25.85% (respectively) for the proposed new 2 storey extension and alterations to Building A3 (respectively).

The extent of the non-compliance is shown in the extract of the height plane diagram at **0**.

A copy of the Height of Plane Diagram for NSHS is provided as **Appendix 1** to this variation request.

2 The Nature of the Variation

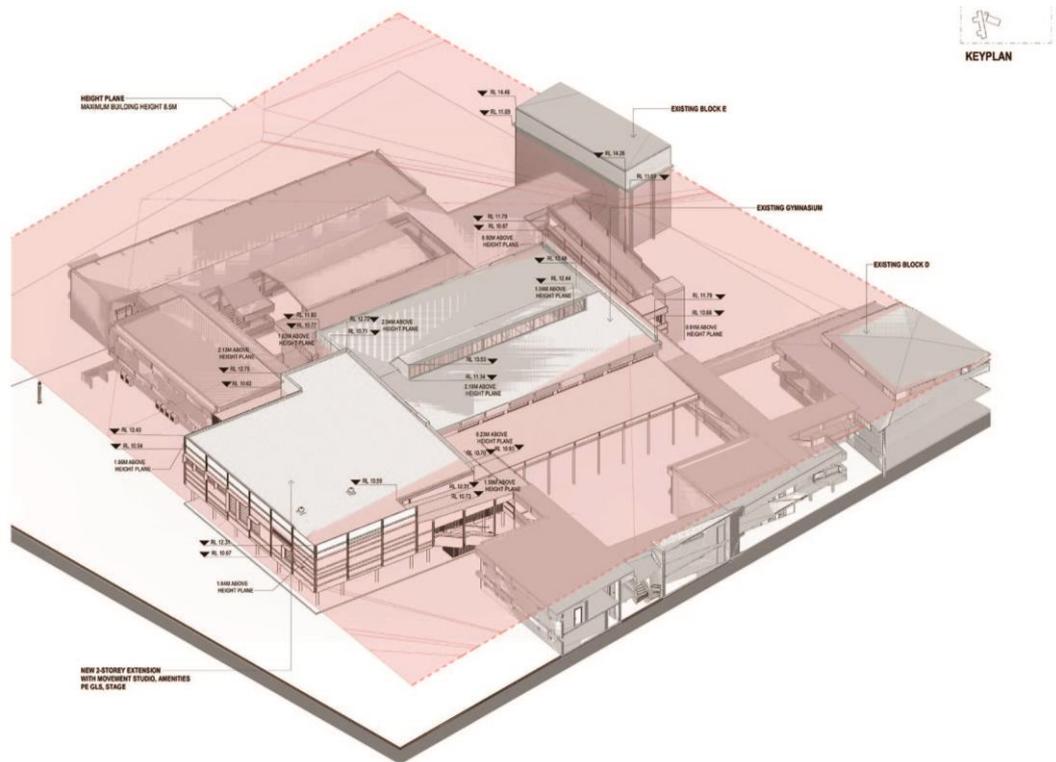


Figure 2 Height plane diagram (DesignInc)

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3.1 Clause 4.6(1) - Objectives

Clause 4.6(1) of the LEP states the objectives of the clause 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.*

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (“Initial Action”), Preston CJ ruled that there is no provision that requires the applicant to demonstrate compliance with these objectives or that the consent authority be satisfied that the development achieves these objectives. Furthermore, neither clause 4.6(3) nor clause 4.6(4) expressly or impliedly requires that development that contravenes a development standard “*achieve better outcomes for and from development*”.

Accordingly, the remaining subclauses of clause 4.6 provide the preconditions which must be satisfied before a consent authority may grant development consent to a development that contravenes a development standard imposed by an environmental planning instrument. These preconditions are discussed hereunder.

3.2 Clause 4.6(2) – Consent May be Granted

Clause 4.6(2) provides that:

- (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.*

The height of building control in clause 4.3 of the LEP is a development standard, defined in Section 1.4 of the 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,*

The height of buildings development standard is not expressly excluded from the operation of clause 4.6 (see **Section 3.7** and **Section 3.9**).

3.3 Clause 4.6(3) – Consent Authority to Consider Written Justification

Clause 4.6(3) relates to the making of a written request to justify an exception to a development standard and states:

- (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.*

This report and information referred to herein, constitute a written request for the purposes of clause 4.6(3) and the following subsections address the justifications required under that subclause.

It will be a matter for the consent authority to consider this written request prior to granting development consent to the DA and as discussed in the Judgment of *AI Maha Pty Ltd v*

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Huajun Investments Pty Ltd [2018] NSWCA 245 ('Al Maha') the consent authority or the Court must, in determining the DA, clearly enunciate that it has satisfied itself of the matters in clause 4.6(4). In the case of a consent authority, this might be by way of a statement in the reasons for approval authored by the consent authority.

3.4 Clause 4.6(4)(a) – Consent Authority to be Satisfied

Clause 4.6(4) provides that consent must not be granted for development that contravenes a development standard unless:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Secretary has been obtained.*

The following subsections of this written request address these matters.

3.4.1 Clause 4.6(4)(a)(i) - Written request to adequately address the matters in clause 4.6(3)

Clause 4.6(4)(a)(i) requires the consent authority to be satisfied that this written request adequately address the matters in clause 4.6(3) as follows:

- (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.

Compliance is Unreasonable or Unnecessary

In his Judgment of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* ('Micaul') Preston CJ confirmed that an established means of demonstrating that compliance with a development standard is unreasonable or unnecessary is to establish that a development would not cause environmental harm and is consistent with the objectives of the development standard.

It is considered that the potential adverse impacts of the proposed development can be appropriately mitigated or minimised as described in **Table 1**.

Table 1 Environmental Impact Mitigation and Management	
Issue	Discussion
Streetscape and Visual Impact	Notwithstanding, the exceedance of the 8.5m maximum height of buildings standard for the proposed alterations and additions to Building A3, it will result in minimal change to the existing streetscape of the NSHS site as viewed from Namona Street and Pittwater Road due to the positioning and design of the proposed building at a central position of the school site and well setback from the street frontages. The extension to Building A3 is screened by existing school buildings as well as existing and proposed vegetation at the NSHS site. The proposed Building A3 will be consistent with the built form across the NSHS site. The position and design of the proposed alterations and additions to Building A3 has been carefully considered to retain as many existing trees as possible and to minimise impact on existing school buildings at the NSHS site. Neighbouring low density residential development is located a substantial distance from the proposed alterations and additions to Building A3 along Namona Street, Oak Street and surrounding the residential streets.

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Table 1 Environmental Impact Mitigation and Management

Issue	Discussion
Solar Access and Shadow Diagrams	The shadow diagrams prepared by DesignInc show that the proposed alterations and additions to Building A3 will not cast shadows onto any residential properties which are distant to the site. Good solar access will be provided to all habitable school spaces within the NSHS site in compliance with NCC Guidelines and in consultations with the ESD Consultant.
Flooding	A Flood Risk and Impact Assessment report has been prepared by BMT for the proposed Narrabeen Education Precinct development. The ground floor level of proposed Building A3 does not comply with the Flood Planning Level (FPL) and Finish Floor Level (FFL) requirements of the Council's Pittwater 21 DCP in respect to the ground floor level of proposed Building A3 due to functional requirements to connect to the existing Building A facilities. However, Level 1 of Building A3 is located higher than the Probable Maximum Flood (PMF) level. This will provide a shelter-in-place refuge in the event of a flood.
Heritage	City Plan have prepared a Heritage Impact Statement for the proposed Narrabeen Education Precinct. The proposed alterations and additions to Building A3 at the NSHS site will have no adverse impacts to heritage items within the vicinity of the site including the Binidomes A and B (Item No. 2270341) located on the adjoining NNPS site.

Furthermore, the proposed development is considered to be consistent with the objectives of the height of buildings development standard in Clause 4.6 of the LEP as described in **Table 2**.

Table 2 Assessment against the objectives of the height of buildings development standard

Objective	Assessment
<i>(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,</i>	The Narrabeen Educational Precinct which comprises the NNPS and the NSHS sites have been an established part of the existing and desired future character of the North Narrabeen locality for many years catering for the education needs of the local community. The proposed alterations and additions to the two storey Building A3 will continue to maintain the existing low-density one (1) and two (2) storey built form across the NSHS site. The proposed alterations and additions to Building A3 will be consistent with the desired character of the North Narrabeen locality including neighbouring low density residential housing and the built form of other adjoining and neighbouring non-residential land uses such as NNPS and the NBISC.
<i>(b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,</i>	The proposed alterations and additions to Building A3 are compatible with the height and scale of the existing school buildings at the NSHS site as well as being compatible with the height and scale of surrounding and nearby developments at the adjoining NNPS site which forms part of the Narrabeen Education Precinct and the height and scale of other existing buildings in the North Narrabeen locality.
<i>(c) to minimise any overshadowing of neighbouring properties,</i>	The proposed alterations and additions to Building A3 will not cast shadows on any neighbouring residential properties, other non-residential properties or the public domain.
<i>(d) to allow for the reasonable sharing of views,</i>	The proposed alterations and additions to Building A3 at the NSHS site will have no adverse view loss impacts on neighbouring properties and accordingly will achieve equitable sharing of views.

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Table 2 Assessment against the objectives of the height of buildings development standard

Objective	Assessment
(e) to encourage buildings that are designed to respond sensitively to the natural topography,	The topography of the NSHS site is low lying and relatively flat which is reflective of the site's geomorphology being connected to Mullet Creek and the Narrabeen Lagoon catchment area. This low topography of the site means that the NSHS is susceptible to flooding. Whilst the ground floor level of proposed Building A3 does not comply with FFL requirement due to functional requirements to connect to the existing parts of Building A facilities, Level 1 is located higher than the PMF level. The proposed NSHS development provides accessible pathways from the main street entrances at Namona Street as well as Pittwater Road which have been carefully located and designed to provide compliant access pathways and ramps and retention of vegetated areas of the site including the coastal wetland.
(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.	The proposed alterations and additions to Building A3 have been designed to minimise the visual impact on the NSHS site including the retention of existing native trees, particularly the coastal wetland vegetation and will be improved by the proposed landscaping treatment of endemic and shade trees within the school site. The proposed Building A3 will not have any impact on the heritage significance of any heritage items of the LEP within the vicinity of the NSHS site including the Binidomes heritage items of the NNPS site.

Sufficient Environmental Planning Grounds

In the Judgment of *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* ("Four2Five") Pearson C indicated there is an onus on the applicant to demonstrate, through the written request, that there are "sufficient environmental planning grounds" such that compliance with the development standard is unreasonable or unnecessary. Furthermore, that the environmental planning grounds must be particular to the circumstances of the proposed development rather than public benefits that could reasonably arise from a similar development on other land.

In Initial Action, Preston CJ indicated that it is reasonable to infer that "environmental planning grounds" as stated in clause 4.6(3)(b), means grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in section 1.3 of the EP&A Act.

The site-specific environmental planning grounds that support the proposed variation to the height of buildings development standard in this circumstance are detailed in the SEE and supported by the DA documentation. In addition, it is noted that the design of Building D is governed by the requirements of the Department of Education's *Educational Facilities Standards and Guidelines* (EFSG). The EFSG establishes detailed design requirements for new buildings including minimum floor to ceiling heights and minimum roof pitches that govern the design of building envelopes. The alterations and additions to Building A3 has been designed to meet the requirements of the EFSG.

Sections of the EFSG guidelines relative to the height of the proposed building are:

- Sufficient space in-between ground floor ceiling and first floor slab to cater for services;
- School design (EFSG) standards associated with room heights for the Movement Studio and Stage have informed the building height. These height requirements are based on the functions of drama and dance, including:
 - Minimum 6m internal height to be clear of any obstructions (floor to ceiling height) for 'Stage' – Ground Floor of Block A3;
 - Clear height of 4m above floor to structures, beams, fans and cable trays for "movement studio" – Level 1 of Block A3.

The height non-compliance largely relates to roof related area. The proposed roof design, including a parapet is considered essential for the overall building design to retain consistency

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with existing built form on the site. The introduction of a differing roof form would detract from the current visual aesthetics of the school.

Although this application is not sought under the Complying Development planning pathway, it should be considered when assessing this Cl4.6 variation that should this or other buildings be sought on the site pursuant to Schedule 6 complying development in Schools – Chapter 3 of TI SEPP, the height limit for new buildings or additions would be 4 storeys or 22m from ground level. The proposed additions while in excess of 8.5m, do not exceed the maximum permissible height on the site under TI SEPP for complying development.

In addition, the alternative would be to construct a new building, which would result in loss of active and passive open space areas currently available and may result in loss of existing vegetation within the school. This is not considered to be a suitable option for the school as the students would lose operational open space and play area.

In addition, in Micaul and Initial Action, Preston CJ clarified that sufficient environmental planning grounds may also include demonstrating a lack of adverse amenity impacts on neighbouring properties. As summarised in **Table 1**, the proposal satisfactorily manages and mitigates any potential adverse amenity impacts on neighbouring properties.

Accordingly, it is considered that there are sufficient environmental planning grounds to justify the contravention of the height of buildings development standard in this instance.

3.4.2 Clause 4.6(4)(a)(ii) – Public Interest

Pursuant to clause 4.6(4)(b) and as discussed by Preston CJ in Initial Action, if the development is consistent with the objectives of the development standard and the objectives of the zone, the consent authority can be satisfied that the development will be in the public interest.

An assessment of the proposal against the objectives of the height of buildings development standard is provided at **Table 2** and an assessment of the proposed development against the objectives of the SP2 Infrastructure (Educational Establishment) zone (the SP2 zone) expressed in the Land Use Table to clause 2.3 of the LEP is provided in **Table 3**.

Table 3 Assessment against the objectives of the SP2 zone	
Objective	Assessment
<ul style="list-style-type: none">To provide for infrastructure and related uses.	The proposed alterations and additions to Building A3 at the NSHS site is a part of the Narrabeen Education Precinct project of School Infrastructure NSW which will upgrade and redevelop the NNPS and NSHS on their existing sites to significantly improve education outcomes and support the delivery of modern pedagogical learning for students of the local community.
<ul style="list-style-type: none">To prevent development that is not compatible with or that may detract from the provision of infrastructure.	The proposed development is consistent with the existing school use of the NSHS site and it will provide a wide range of benefits to educational facilities for the local community.

These assessments demonstrate that the proposed development is consistent with the relevant objectives of the development standard to be varied and the relevant objectives of the SP2 zone within which the development is to be carried out. Accordingly, it follows that the proposed development is in the public interest.

3.5 Clause 4.6(4)(b) – Concurrence of the Secretary

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under cl64 of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under clause 4.6

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of the *Standard Instrument – Principal Local Environmental Plan* (the SILEP) or SEPP 1 subject to certain conditions.

The LEP adopts clause 4.6 of the SILEP and therefore, that prerequisite of the Notice is met.

Condition 1 of the Notice is not relevant in this instance as the request does not seek to vary a development standard relating to minimum lot size or in one of the zones specified by the notice.

Condition 2 of the Notice provides that concurrence may not be assumed by a delegate of the consent authority (i.e. a Council Officer) if the development will contravene a development standard by more than 10%. In that instance, the application must be determined by the relevant Local Planning Panel (LPP) unless:

- the proposed development is regionally significant development, in which case the relevant regional or Sydney district planning panel will be the consent authority and may assume concurrence (this also applies to State Significant Development which has been delegated to a regional or Sydney district planning panel); or
- a Minister is the consent authority.

The proposed development is regionally significant development and will be determined by the Sydney North Planning Panel (SNPP)

3.6 Clause 4.6(5) - Concurrence Considerations

In the event that concurrence cannot be assumed pursuant to the Notice, clause 4.6(5) of the LEP provides that in deciding whether to grant concurrence, the Secretary must consider:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Furthermore, in Initial Action, Preston CJ clarified that, notwithstanding the Court's powers under Section 39(6) of the Court Act, the Court should still consider the matters in clause 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

Accordingly, the proposed contravention of the 8.5m maximum height of buildings development standard has been considered in light of clause 4.6(5) as follows:

- The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed alterations and additions to Building A3 at the NSHS site and this design is not directly transferrable to any other site in the immediate locality, wider region or the State and the scale of the proposed development does not trigger any requirement for a higher level of assessment;
- As indicated in **Section 3.4.2**, the proposed contravention of the height of buildings development standard is considered to be in the public interest because it is consistent with the objectives of the zone and the objectives of the development standard. Accordingly, there would be no significant public benefit in maintaining the development standard in this instance; and
- It is considered that there are no other matters of relevance that need to be taken into consideration by the consent authority.

This is a matter for the Secretary or the Court to address in its written reasons for determining the subject development application.

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3.7 Clause 4.6(6) – Subdivision on Certain Land

Clause 4.6(6) is not relevant to the proposed development as it does not relate to subdivision of land.

3.8 Clause 4.6(7) – Keeping of Records

Clause 4.6(7) is an administrative clause requiring the consent authority to keep a record of its assessment under this clause after determining a development application.

3.9 Clause 4.6(8) – Restrictions on use of clause 4.6

Clause 4.6(8) of LEP states as follows:

- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
 - (a) *a development standard for complying development,*
 - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) *clause 5.4,*
 - (caa) *clause 5.5.*

Clause 4.6(8) is not relevant to the proposed development as it is subject to a DA and does not constitute Complying Development, does not seek to vary any requirements of SEPP BASIX and does not relate to a standard under clause 5.4 or clause 5.5 of the LEP.

4 Conclusion

The proposed development contravenes the 8.5m height of buildings development standard under Clause 4.3 of the LEP.

The height of buildings control under Clause 4.3 of the LEP is a development standard and is not excluded from the application of Clause 4.6.

This written request to vary the development standard has been prepared in accordance with Clause 4.6(3) of the LEP and demonstrates that strict compliance with the development standard is unreasonable and unnecessary for the following reasons:

- Notwithstanding the contravention of the 8.5m height of buildings development standard, the proposed alterations and additions to Building A3 at the NSHS site is consistent with the relevant objectives of the development standard under Clause 4.3 of the LEP and is consistent with the relevant objectives of the SP2 Infrastructure zone and therefore, the proposed development is in the public interest; and
- Notwithstanding the contravention of the 8.5m maximum height of buildings development standard for the proposed alterations and additions to Building A3 at the NSHS site, it will not result in any significant adverse environmental harm in that the environmental amenity of neighbouring residential and non-residential properties will be preserved and potential adverse impacts on the amenity (such as overshadowing, bulk and scale, view loss) of the locality will be minimised to a reasonable level.

In addition, this written request outlines sufficient environmental planning grounds to justify the contravention of the height of buildings development standard including:

- The variation in the 8.5m maximum height of building standard arises due to the characteristics of the site and the constraints of existing school buildings and accessible pathways, as well as the design requirements of the built form necessitated by the intended school purposes of the proposed Building A3 at the NSHS site;
- The proposed alterations and additions to Building A3 at the NSHS site have been carefully positioned and designed to have minimal environmental impact on existing vegetation including the Coast Wetlands area and includes additional planting of native and shade trees;
- The environmental amenity impacts of the proposal are minimal (if any) or otherwise capable of being mitigated such that the proposal will not impact surrounding private or public land; and
- The positioning, characteristics and design requirements for the proposal at the NSHS site cannot be modified any further to reduce the building height having regard to the dimensions required for fit-for-purpose educational facilities and to marry proposed Building A3 in with existing school buildings and accessible pathways as required under the NSW Department of Education's Educational Facilities Standards and Guidelines (EFSG).

Accordingly, this written request can be relied upon by the consent authority when documenting that it has formed the necessary opinions of satisfaction under clause 4.6(4) of the LEP.

The consent authority can be satisfied that contravention of the development standard does not raise any matter of significance for state or regional environmental planning, there is no public benefit of maintaining the development standard and there are no other relevant matters required to be taken into consideration.

Accordingly, the consent authority can exercise its power pursuant to clause 4.6(2) to grant development consent to the proposed development notwithstanding the contravention of the development standard and assume the concurrence of the Secretary pursuant to the Notice issued on 21 February 2018.