



planning consultants

## Clause 4.6 Variation Request to the Height of Building Development Standard under Clause 4.3 of Warringah LEP 2011

Proposed Construction of a new Science Centre & Extension to an  
Administration Building

German International School

33 Myoora Road, Terrey Hills

Prepared for: German International School  
December 2021

Printed: 8 December 2021  
File Name: 21119B German International School Sydney - Science/Reports/21119B.CI4.6.docx  
Project Manager: Stephen Earp  
Client: German International School  
Project Number: 21119B

**Document Control**

Version	Prepared By	Reviewed By	Issued To	Date
Final	T. West P. Hemphill	S. Earp	Council	8 December 2021

# Contents

---

<b>1</b>	<b>Introduction</b>	<b>1</b>
1.1	Commission	1
1.2	Material Relied Upon	1
<b>2</b>	<b>The Relevant LEP Provisions</b>	<b>2</b>
2.1	Warringah Local Environmental Plan 2011	2
2.1.1	Clauses 2.2-2.3 – Zoning and Permissibility	2
2.1.2	Clause 4.3 – Building Height	2
2.1.3	Clause 4.6 – Exceptions to Development Standards	3
<b>3</b>	<b>The Nature of the Variation</b>	<b>5</b>
<b>4</b>	<b>Case Law</b>	<b>6</b>
4.1	Introduction	6
4.2	Winten Developments Pty Ltd v North Sydney Council [2001]	6
4.3	Wehbe v Pittwater Council [2007]	6
4.4	Four2Five Pty Ltd v Ashfield Council [2015]	7
4.5	Randwick City Council v Micaul Holdings Pty Ltd [2016]	7
4.6	Moskovich v Waverley Council [2016]	7
4.7	Initial Action Pty Ltd v Woollahra Municipal Council [2018]	8
4.8	Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018]	8
4.9	Summary of the Case Law Methodology and Tests	8
<b>5</b>	<b>Assessment of the Variation</b>	<b>10</b>
5.1	Step 1 - Is the planning control a development standard?	10
5.2	Step 2 – Pursuant to cl4.6(4)(a), is the consent authority satisfied that the written request adequately addresses the matters in Clause 4.6(3)?	10
5.2.1	Clause 4.6(3)(a) – compliance is unreasonable or unnecessary in the circumstances of the case	10
5.2.2	Clause 4.6(3)(b) – There are sufficient environmental planning grounds to justify contravening the development standard	10
5.3	Step 3 - Pursuant to cl4.6(4)(b), is the consent authority satisfied that the development will be in the public interest <u>because</u> it is consistent with the objectives of the development standard and the objectives of the zone?	12
5.4	Step 4 - Clause 4.6(4)(b) – The Concurrence of the Secretary has been obtained	13
5.5	Step 5 - Clause 4.6(5) - Concurrence Considerations	13
5.6	Step 6 - Clause 4.6(4) – Statement of Satisfaction	14
<b>6</b>	<b>Conclusion</b>	<b>15</b>

# Contents

---

## Figures

Figure 1	Extract of Height of Building Map (Warringah LEP 2011)	3
Figure 2	Street elevation of proposed science building (Source: Betti&knut architecture)	5
Figure 3	West elevation of proposed science building (Source: Betti&knut architecture)	5
Figure 4	3D height plane (Source: Betti&knut architecture)	12

## Tables

Table 1	Assessment against the objectives of the height of buildings development standard	10
Table 2	Assessment against the objectives of the RU4 Zone	13

# 1 Introduction

---

## 1.1 Commission

DFP has been commissioned by the German International School Sydney (GISS) to prepare a written request ("Variation Request") pursuant to clause 4.6 of *Warringah Local Environmental Plan 2011* (the LEP) for the proposed development of a new science building at GISS.

The proposal is described in detail in **Section 4** of the Statement of Environmental Effects (SEE) and comprises:

- Removal of 17 trees located on site;
- Site excavation;
- Construction of a two (2) storey Science Centre;
- Additions to an existing two (2) storey Administration Building; and
- Associated landscaping.

The proposal exceeds the height of building development standard under cl4.3 of the LEP having a maximum building height of 10.205 metres above the existing ground level at the northern end of the proposed multi-purpose hall. This exceeds the height of building development standard of 8.5 metres by 1.705 metres, which is equivalent to a variation of 20%.

Notwithstanding the contravention of the development standard, the proposal is considered to be consistent with the objectives of the development standard and the objectives of the 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 minimal extent of the variation and the absence of any discernible environmental impacts associated with the variation.

This written request has been prepared to provide a detailed assessment in accordance with the statutory requirements of cl4.6 so that the consent authority can exercise its power to grant development consent, notwithstanding the contravention to the height of building development standard.

## 1.2 Material Relied Upon

This Variation Request has been prepared by DFP based on the Architectural Drawings prepared by Betti&knut architecture and other supporting drawings and technical reports which accompany the Statement of Environmental Effects (SEE) report prepared DFP.

This Variation Request should be read in conjunction with the detailed environmental planning assessment contained in the SEE and associated supporting documents.

## 2 The Relevant LEP Provisions

---

### 2.1 Warringah Local Environmental Plan 2011

#### 2.1.1 Clauses 2.2-2.3 – Zoning and Permissibility

Clause 2.2 and the Land Zoning Map within the LEP provide that the site is zoned RU4: Primary Production Small Lots (RU4 Zone) and the Land Use Table to Clause 2.3 specifies the objectives of this zone as follows:

- *To enable sustainable primary industry and other compatible land uses.*
- *To encourage and promote diversity and employment opportunities in relation to primary industry enterprises, particularly those that require smaller lots or that are more intensive in nature.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To minimise the impact of development on long distance views of the area and on views to and from adjacent national parks and bushland.*
- *To maintain and enhance the natural landscape including landform and vegetation.*
- *To ensure low intensity of land use other than land uses that are primary industry enterprises.*
- *To maintain the rural and scenic character of the land.*

The proposed development being for the purpose of an educational establishment is a prohibited use in the RU4 zone. However, Pursuant to Clause 33 of the Education SEPP, the RU4 zone is a “prescribed zone”. Under Clause 35, development for the purpose of a school may be carried out by any person with development consent on land in a prescribed zone. The works are therefore permissible with consent under the Education SEPP.

#### 2.1.2 Clause 4.3 – Building Height

Clause 4.3 of the LEP sets out the height of buildings development standard as follows:

- (1) *The objectives of this clause are as follows—*
- (a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
  - (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
  - (c) *to minimise any adverse impact of development on the scenic quality of Warringah’s coastal and bush environments,*
  - (d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

The Height of Buildings Map designates a maximum building height of 8.5 metres for the site. The site is outlined in blue (see **Figure 1**).

## 2 The Relevant LEP Provisions

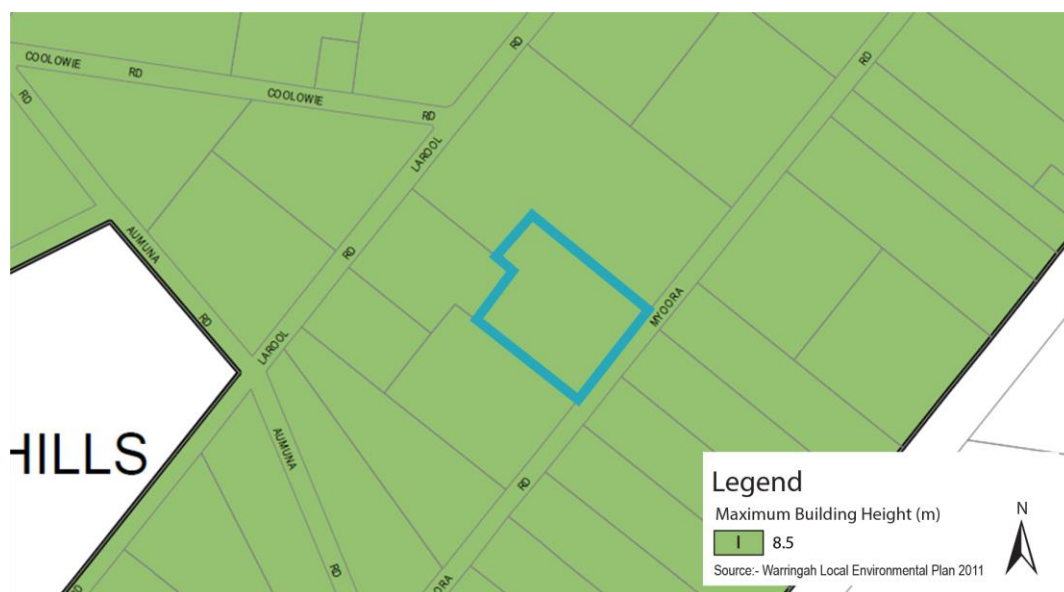


Figure 1 Extract of Height of Building Map (Warringah LEP 2011)

The LEP defines **building height** (or **height of building**) as:

- (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.

### 2.1.3 Clause 4.6 – Exceptions to Development Standards

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”) (see **Section 4.7**), 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 cl4.6(3) nor cl4.6(4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”.

Accordingly, the remaining subclauses of cl4.6 provide the operable provisions and 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.

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.

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

## 2 The Relevant LEP Provisions

---

*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.*

The proposed development does not comply with the Height of Buildings development standard pursuant to cl4.3 of the LEP however, strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as detailed in **Section 5.2.1**.

In addition, there are considered to be sufficient environmental planning grounds to justify contravening the development standard as detailed in **Section 5.2.2**.

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 Planning Secretary has been obtained.*

**Sections 5.2** and **5.3** of this written request address the matters required under cl4.6(4)(a) of the LEP and **Section 5.4** addresses cl4.6(4)(b).

Clause 4.6(5) provides that:

- (5) 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.*

**Section 5.5** of this written request addresses the matters required under cl4.6(5) of the LEP.

Clause 4.6(6) is not relevant to the proposed development, as subdivision is not proposed as part of the application. Clause 4.6(8) is also not relevant to the proposed development and cl4.6(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 The Nature of the Variation

The proposed development requires a variation to the height of buildings development standard under clause 4.3 of the Warringah LEP 2011. The proposed Science Building has a maximum height of 10.205 metres. The roof exceeds the height limit on the northern end of the Science Building by 1.705 metres, which is the equivalent to a variation of 20%. The non-compliance is the result of the sloping terrain towards the existing concrete footpath to the north of the building.

The extent of the non-compliance is shown in extracts of the elevations at Error! Reference source not found. and **Figure 3**.

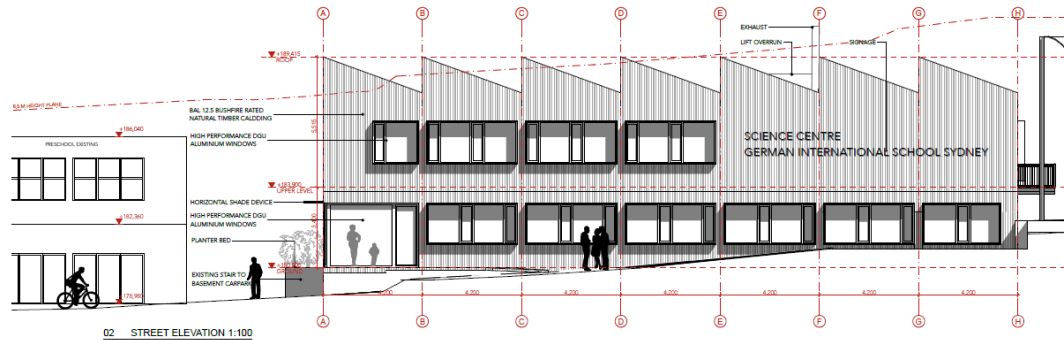


Figure 2 Street elevation of proposed science building (Source: Betti&knut architecture)

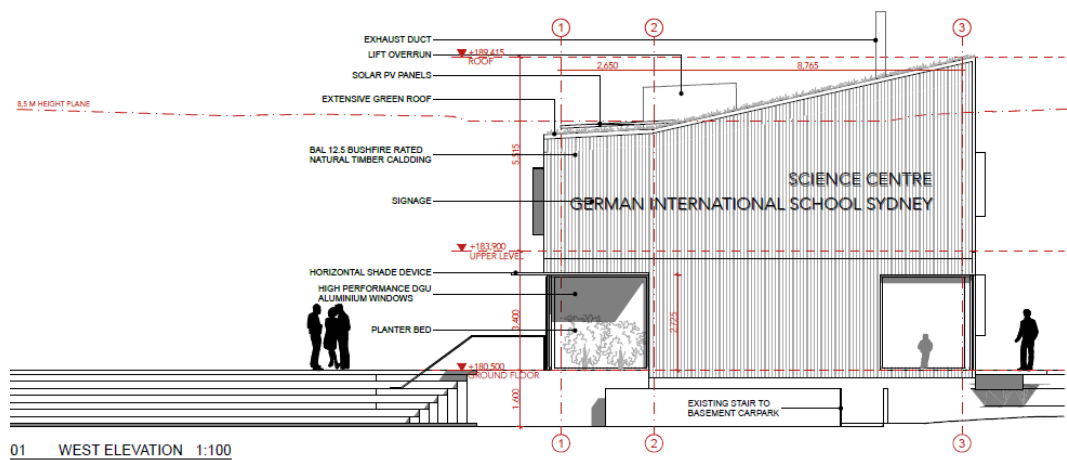


Figure 3 West elevation of proposed science building (Source: Betti&knut architecture)

## 4 Case Law

---

### 4.1 Introduction

The proposed variation to the development standard has been considered in light of the methodology established by the NSW Land & Environment Court (the Court) and the following subsections provide a brief summary of key judgments regarding variations under the former SEPP 1 and cl4.6 of the *Standard Instrument – Principal Local Environmental Plan* (SILEP).

### 4.2 Winten Developments Pty Ltd v North Sydney Council [2001]

Through the Judgment in *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46 (“Winten”) the LEC established a ‘5-part test’ for considering whether strict compliance with a development standard is unreasonable or unnecessary in a particular case. The elements of this test can be summarised as:

- Is the planning control a development standard?
- What is the underlying object or purpose of the standard?
- Is compliance with the standard consistent with the aims of the policy, and in particular, does compliance with the standard tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the *Environmental Planning & Assessment Act 1979*?
- Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?
- Is the objection well founded?

The 1<sup>st</sup> ‘test’ continues to be relevant and is a precondition for the application of cl4.6 – see **Section 5.1**.

The 2<sup>nd</sup> ‘test’ is required to be demonstrated under cl4.6(4)(a)(ii) – see **Section 5.2.1**.

The 3<sup>rd</sup> ‘test’ was specific to cl3 of SEPP 1 and has not been transferred to cl4.6 of the SILEP. Notwithstanding, in Initial Action (see below), Preston CJ indicated that it is reasonable to infer that “environmental planning grounds” as stated in under cl4.6(3)(b), means grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s1.3 of the EP&A Act – see **Section 5.2.2**.

The 4<sup>th</sup> ‘test’ is required to be demonstrated under cl4.6(3)(a) - see **Section 5.2.1**.

The 5<sup>th</sup> ‘test’ is analogous to cl4.6(4)(a) – see **Section 5.3**.

### 4.3 Wehbe v Pittwater Council [2007]

The 5-part test under Winten was later supplemented by the Judgment in *Wehbe v Pittwater Council* [2007] LEC 827 (“Wehbe”) where Chief Justice Preston expressed the view that there are 5 different ways in which an objection to a development standard may be assessed as being well founded and that approval of the objection may be consistent with the aims of SEPP 1. These included:

1. Notwithstanding the non-compliance, is the proposal consistent with the relevant environmental or planning objectives?
2. Is the underlying objective or purpose of the development standard not relevant to the development with the consequence that compliance is unnecessary?
3. Would the underlying objective or purpose of the development standard be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable?
4. Has the development standard been virtually abandoned or destroyed by the consent authority's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable?

## 4 Case Law

---

5. Is the zoning of the particular land unreasonable or inappropriate such that the development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and therefore, compliance with the standard would be unreasonable or unnecessary?

### 4.4 Four2Five Pty Ltd v Ashfield Council [2015]

In the Judgment of *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* (“Four2Five”) Pearson C expanded on the earlier Judgments of Winten and Wehbe, indicating that whilst consistency with zoning and standard objectives of the development standard is addressed specifically in cl4.6(4)(a)(ii), there remains an onus of also demonstrating 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.

The environmental planning grounds that support the proposed variation to the building height development standard in this circumstance are detailed in the SEE, supported by the Architectural Plans and Architectural Design Statement. **Section 5.2.2** of this variation request includes a summary of these environmental planning grounds.

### 4.5 Randwick City Council v Micaul Holdings Pty Ltd [2016]

In his Judgment of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* (‘Micaul’) Preston CJ made it clear that development consent cannot be granted for a development that contravenes a development standard unless the consent authority:

- (a) has considered a written cl4.6 objection seeking to vary the development standard as required by cl4.6(3) of the SILEP;
- (b) is satisfied that the cl4.6 objection adequately addresses the matters required to be demonstrated by cl4.6(3) (as required by cl4.6(4)(a)(i));
- (c) is satisfied that the development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out as required by cl4.6(4)(a)(ii).

In addition, Preston CJ elucidated that the consent authority does not have to be directly satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case – only that it be indirectly satisfied that the applicant’s written request adequately addresses the matters in cl4.6(3) that compliance with the development standard is unreasonable or unnecessary.

Furthermore, 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.

### 4.6 Moskovich v Waverley Council [2016]

Providing further guidance on the interpretation of cl4.6 compared to its predecessor SEPP 1, the Judgment in *Moskovich v Waverley Council [2016] NSWLEC 1015* (‘Moskovich’) outlines that cl4.6(3)(a) is similar to cl 6 of SEPP 1 and the ways of establishing that contravention of a development standard is well founded expressed in Wehbe (e.g. “achieving” the objectives of the development standard) are equally appropriate for the consideration of cl4.6(3)(a).

However, cl4.6(4)(a)(ii) has different wording to SEPP 1 and requires the consent authority to be satisfied that the proposed development is in the public interest because it is “consistent” with objectives of the development standard and objectives for the zone rather than “achieving” the objectives. Consequently, the considerations of cl4.6(3)(a) and cl4.6(4)(a)(ii)

## 4 Case Law

---

are different with the achievement test being more onerous and requiring justification in ‘ways’ such as those expressed in *Wehbe*.

Accordingly, whilst the Judgments in *Winten* and *Wehbe* related to variation requests under SEPP 1, the methodology and reasoning expressed in those Judgments continues to be the accepted basis upon which to assess variation requests pursuant to cl4.6 with minor areas of differing interpretation.

### 4.7 Initial Action Pty Ltd v Woollahra Municipal Council [2018]

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (‘Initial Action’), Preston CJ indicated that cl4.6 does not directly or indirectly establish a test that a non-compliant development should have a neutral or beneficial effect relative to a compliant development. For example, a building that exceeds a development standard that has adverse amenity impacts should not be assessed on the basis of whether a complying development will have no adverse impacts. Rather, the non-compliance should be assessed with regard to whether the impacts are reasonable in the context of achieving consistency with the objectives of the zone and the objectives of the development standard.

In addition, Preston CJ ruled that cl4.6 does not directly or indirectly establish a “test” that a development which contravenes a development standard results in a “*better environmental planning outcome*” relative to a development that complies with the development standard. In fact, there is no provision in SILEP that gives substantive effect to the objectives of cl4.6 stated in cl4.6(1)(a) and (b). That is to say, neither cl4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “*achieve better outcomes for and from development*”.

Furthermore, Preston CJ ruled that it is incorrect to hold that the lack of adverse amenity impacts on adjoining properties is not a sufficient ground justifying the development contravening the development standard, when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts.

### 4.8 Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018]

The Judgment of *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* (‘Al Maha’) makes it clear that a consent authority or the Court must, in determining a development application subject to request under cl4.6, clearly enunciate that it has satisfied itself of the matters in of cl4.6(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 or alternatively, a statement in the Orders or Judgment of the Court.

### 4.9 Summary of the Case Law Methodology and Tests

The collective methodology and tests described above has been applied to the assessment at Section 5 and can be summarised in the following steps:

1. Step 1 - Is the planning control that the applicant seeks to contravene a development standard?
2. Step 2 - Is the consent authority satisfied that the applicant’s written request seeking to justify the contravention of the development standard has adequately addressed the matters required by cl4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard?

## 4 Case Law

---

3. Step 3 - Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out?
4. Step 4 - Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Step 5 - Where the consent authority is the Court, has the Court considered the matters in cl4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.
6. Step 6 – In determining the development application, has the consent authority or the Court clearly enunciated that it is has formed the necessary opinions of satisfaction under cl 4.6(4) of the LEP.

## 5 Assessment of the Variation

### 5.1 Step 1 - Is the planning control a development standard?

This question is the 1<sup>st</sup> ‘test’ in Winten. The height of buildings control in cl4.3 of the Warringah LEP 2011 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:*

(a) *the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*

...

(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 cl4.6 and accordingly, consent may be granted.

### 5.2 Step 2 – Pursuant to cl4.6(4)(a), is the consent authority satisfied that the written request adequately addresses the matters in Clause 4.6(3)?

#### 5.2.1 Clause 4.6(3)(a) – compliance is unreasonable or unnecessary in the circumstances of the case

To demonstrate that compliance with the Height of Building development standard is unreasonable or unnecessary, this written request relies upon the 2<sup>nd</sup> ‘test’ in Winten and the 1<sup>st</sup> and 2<sup>nd</sup> ‘ways’ in Wehbe – i.e. the underlying objectives or purpose of the standard is satisfied or the objectives are not relevant. These aspects are discussed in the following paragraphs.

#### The underlying objectives or purpose of the standard

Table 1 provides an assessment of the proposed development against the objectives of the height of buildings development standard under cl4.3 of the Warringah LEP 201.

Table 1 Assessment against the objectives of the height of buildings development standard

Objective	Assessment
(a) <i>to ensure that buildings are compatible with the height and scale of surrounding and nearby development,</i>	The extent of the variation the subject of this assessment is limited to a small portion of the peaks of the roof form in the southern corner of the building. The variation results from the architectural design feature of the roof of the building and the fall of land to the southern side of the building.
(b) <i>to minimise visual impact, disruption of views, loss of privacy and loss of solar access,</i>	The building remains of a size and nature that is compatible with adjoining development, is two (2) storeys in height consistent with the established scale and character of the locality, and integrates with the site and landscape setting of the surrounds.
(c) <i>to minimise any adverse impact of development on the scenic quality of Warringah’s coastal and bush environments,</i>	
(d) <i>to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.</i>	The proposed works are located towards the front of the site with a 20 metres setback from the street, screened by vegetation. The proposed building will be screened by existing structures to the east and west, and its roof form would not be visible from the adjoining residence to the west. The requested variation to the maximum building height of the Science Building will have not additional adverse impacts on the bush environment within the vicinity of the site.

#### 5.2.2 Clause 4.6(3)(b) – There are sufficient environmental planning grounds to justify contravening the development standard

As set out in Four2Five, when a development standard is sought to be varied, there is an onus on the Applicant to demonstrate that there are “sufficient environmental planning grounds” such that compliance with the development standard is unreasonable or unnecessary and

## 5 Assessment of the Variation

---

these environmental planning grounds must be particular to the circumstances of the proposed development rather than grounds that could reasonably apply a similar development on any other land.

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, supported by the Architectural Plans and include:

- **Topography:** The topography of the land is sloping and falls from north to south across the proposed science building footprint. To alleviate the need to undertake an extensive amount of cut, the natural topography has been retained where possible, with the exception of some fill that has been proposed beneath the north eastern side of the building.
- **Floor level:** In order to maximise accessibility through and around the proposed building and to provide a flexible learning space, the floor level has been designed to be continuous, without a need for stairs, ramps or lifts.
- **Roof Form and Design:** The roof has been designed to sit harmoniously amongst the existing school landscape and bushland, natural rough sawn timber cladding with a sawtooth green roof is proposed to minimise the visual impact of the building from a distance and respond to its natural setting. Internal light will be captured from the southwest utilising highlight windows on the sawtooth roof design, reducing electrical reliability. In addition to the reduction in artificial lighting, the roof is designed to accommodate a large solar PV array, with surplus power distributed to the remaining campus. The roof design also contributes to local biodiversity through rainwater harvesting to irrigate the landscape, reduce temperatures and assist with stormwater retention.
- **Siting and Impacts on Adjoining Properties:** The proposal is located in the central front portion of the site to establish a connection to the existing school facilities and maximise internal privacy and amenity for students. Due to the orientation and positioning, the proposed science building will not be visible to adjoining properties to the north and west. The building is scaled and located too far from any boundary to cause a loss of privacy, solar access or view loss to any adjoining property or the public domain.

The extent of the roof form which breaches the building height development standard is limited in regard to the portion of the structure that breaches the maximum height and will not be reasonably discernible when viewed from the public domain or from within the site.

**Figure 4** below shows the limited nature of the proposed penetration through the 8.5 metre maximum building height plane, being principally the southern peaks of the triangulated sawtooth roof elements.



## 5 Assessment of the Variation

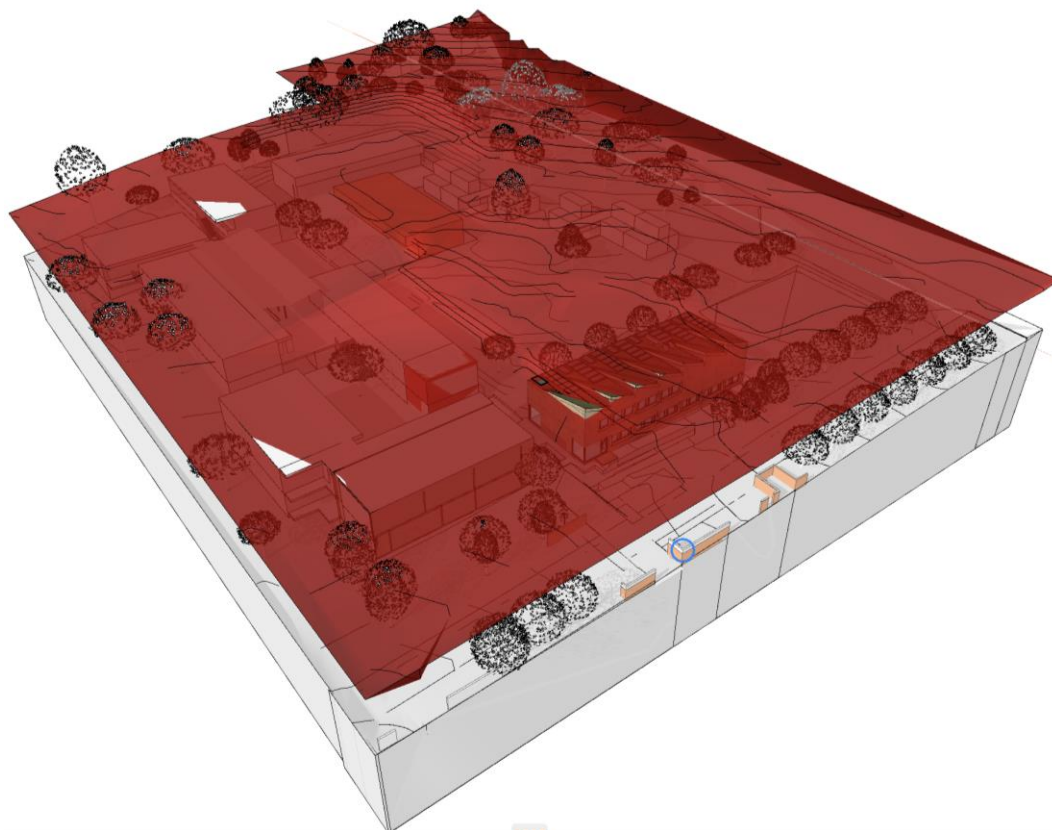


Figure 4 3D height plane (Source: Betti&knut architecture)

In addition to the above grounds, in *Micaul and Initial Action*, Preston CJ clarified that sufficient environmental planning grounds may also include demonstrating a lack of adverse amenity impacts.

As outlined in **Section 5.2.1** of the SEE, there is considered to be no adverse amenity impacts arising from the requested height variation as it will not result in adverse overshadowing, view loss or impact on local character.

In summary, the site conditions and form of development contribute to the contravention of the height of buildings development standard and notwithstanding the contravention, the proposal minimises significant adverse amenity impacts.

### 5.3 **Step 3 - Pursuant to cl4.6(4)(b), is the consent authority satisfied that the development will be in the public interest because it is consistent with the objectives of the development standard and the objectives of the zone?**

As outlined in **Section 5.2.1** of the SEE, the proposal achieves, and is therefore consistent with the relevant objectives of the height of buildings development standard.

However, the consent authority must also be satisfied that the development will be consistent with the objectives of the RU4 Primary Production Small Lots within which the development is to be carried out.

**Table 2** provides an assessment of the proposed development against the objectives of the RU4 Primary Production Small Lots expressed in the Land Use Table to cl2.3 of the Warringah LEP 2011.



## 5 Assessment of the Variation

**Table 2 Assessment against the objectives of the RU4 Zone**

Objective	Assessment
<i>To enable sustainable primary industry and other compatible land uses.</i>	The proposed development of additional learning spaces (science) is a related use to the operation of the site for an existing educational establishment and is compatible with surrounding land uses.
<i>To encourage and promote diversity and employment opportunities in relation to primary industry enterprises, particularly those that require smaller lots or that are more intensive in nature.</i>	The proposed science building is located away from site boundaries and does not detract from the ability of surrounding sites to operate primary industries.  The proposed development will benefit the school and local community by assisting the long term sustainability of the school.
<i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i>	The proposed science building is located away from site boundaries and does not detract from the ability of surrounding sites to operate primary industries.  The proposal does not seek to increase the number of staff or students attending the school so does not increase the intensity of the use of the site.
<i>To minimise the impact of development on long distance views of the area and on views to and from adjacent national parks and bushland.</i>	The building remains of a size and nature that is compatible with adjoining development, is two (2) storeys in height consistent with the established scale and character of the locality, and integrates with the site and landscape setting of the surrounds.  The proposed building will be screened by existing structures to the north, east and west. The proposed will not reduce long distance views of the area to bushland or to Garigal or Ku-Ring-Gai National Parks.
<i>To maintain and enhance the natural landscape including landform and vegetation.</i>	The building has been designed to sit harmoniously amongst the existing school landscape and bushland. The natural rough sawn timber cladding with a sawtooth green roof is proposed to minimise the visual impact of the building from a distance and respond to its natural setting.  Proposed landscaping on site will soften the existing and proposed built form on the site when viewed from the street frontage.
<i>To ensure low intensity of land use other than land uses that are primary industry enterprises.</i>	The proposal does not seek to increase the number of staff or students attending the school so does not increase the intensity of the use of the site.
<i>To maintain the rural and scenic character of the land.</i>	The proposed science building sits harmoniously within the established scale and character of the locality, and integrates with the site and landscape setting of the surrounds.

Accordingly, it follows that the proposed development is in the public interest because it is consistent with the objectives of the height of buildings development standard and the objectives of the RU4 Primary Production Small Lot zone under the Warringah LEP 2011.

### 5.4 Step 4 - Clause 4.6(4)(b) – The Concurrence of the Secretary has been obtained

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 cl4.6 of the SILEP or SEPP 1 subject to certain conditions.

The conditions of the Notice identify that for "development that contravenes a numerical development standard by more than 10%", concurrence may not be assumed by a delegate of the consent authority. As the extent of the variation to the building height development standard is greater than 10%, Council may not assume the concurrence of the Department.

### 5.5 Step 5 - Clause 4.6(5) - Concurrence Considerations

In the event that concurrence cannot be assumed pursuant to the Notice, cl4.6(5) of the LEP provides that in deciding whether to grant concurrence, the Secretary must consider:

## 5 Assessment of the Variation

---

- (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.*

Accordingly, the proposed contravention of the building height development standard has been considered in light of cl4.6(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 for this particular 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 5.3** of the SEE, the proposed contravention of the building height 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.

### 5.6 Step 6 - Clause 4.6(4) – Statement of Satisfaction

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

## 6 Conclusion

---

The proposed development contravenes the height of buildings development standard under cl4.3 of the Warringah LEP 2011.

The height of buildings control under cl 4.3 of the Warringah LEP 2011 is a development standard and is not excluded from the application of cl4.6.

This written request to vary the development standard has been prepared in accordance with cl4.6(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 height of buildings development standard, the proposed development is consistent with the relevant objectives of the development standard pursuant to cl4.3 of the Warringah LEP 2011 and is consistent with the relevant objectives of the RU4 Primary Production Small Lot zone and therefore, the proposed development is in the public interest; and
- Notwithstanding the contravention of the height of buildings development standard, the proposed building height will not result in significant adverse environmental harm in that the environmental amenity of neighbouring properties will be preserved and adverse impacts on the amenity (such as overshadowing, bulk and scale) of the locality are not anticipated.

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

- The extent of the variation is minor and attributed to a small section of the top-most parts of the roof;
- The variation arises due to the characteristics of the site (including topography and floor levels) and the design to accommodate natural lighting, passive airflow, a green roof with rainwater harvesting; solar power generation and a modulated sawtooth design to reduce building massing and site appropriately within its landscape;
- The environmental amenity impacts of the proposal are minor to unobservable and will not impact surrounding private or public land; and
- The characteristics and design requirements cannot be modified any further to reduce the building height, without compromising the sustainable initiatives and superior aesthetic design of the roof structure.

Accordingly, this written request can be relied upon by the consent authority when documenting that it has formed the necessary opinions of satisfaction under cl4.6(4) of the LEP.

The consent authority can be satisfied that contravention of the development standard does 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 cl4.6(2) to grant development consent to the proposed development notwithstanding the contravention of the development standard.