

# Development Application – Alterations and Additions to Jerrabomberra High School

Clause 4.6 Written Request – Building  
Height

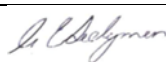

101 Environa Drive, Jerrabomberra

# Project Director

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A – Draft	July 2023	For Review	Georgia Sedgmen	
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\* This document is for discussion purposes only unless signed and dated by the persons identified.  
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# 1 Introduction

This Clause 4.6 Written Request has been prepared on the behalf of NSW Department of Education to support a request for variation to a development standard under cl. 4.6 of the *Queanbeyan-Palerang Regional Local Environmental Plan 2022* (QPLEP 2022) to accompany a development application (*the Application*) for alterations and additions to the approved Jerrabomberra High School at 101 Environa Drive, Jerrabomberra (*the subject site*).

The request has been prepared in accordance with the requirements of cl. 4.6 of the LEP to vary the height of buildings development standard.

The subject site is legally described as Lot 2 DP1277158 and is known as 101 Environa Drive, Jerrabomberra.



**FIGURE 1: THE SUBJECT SITE**

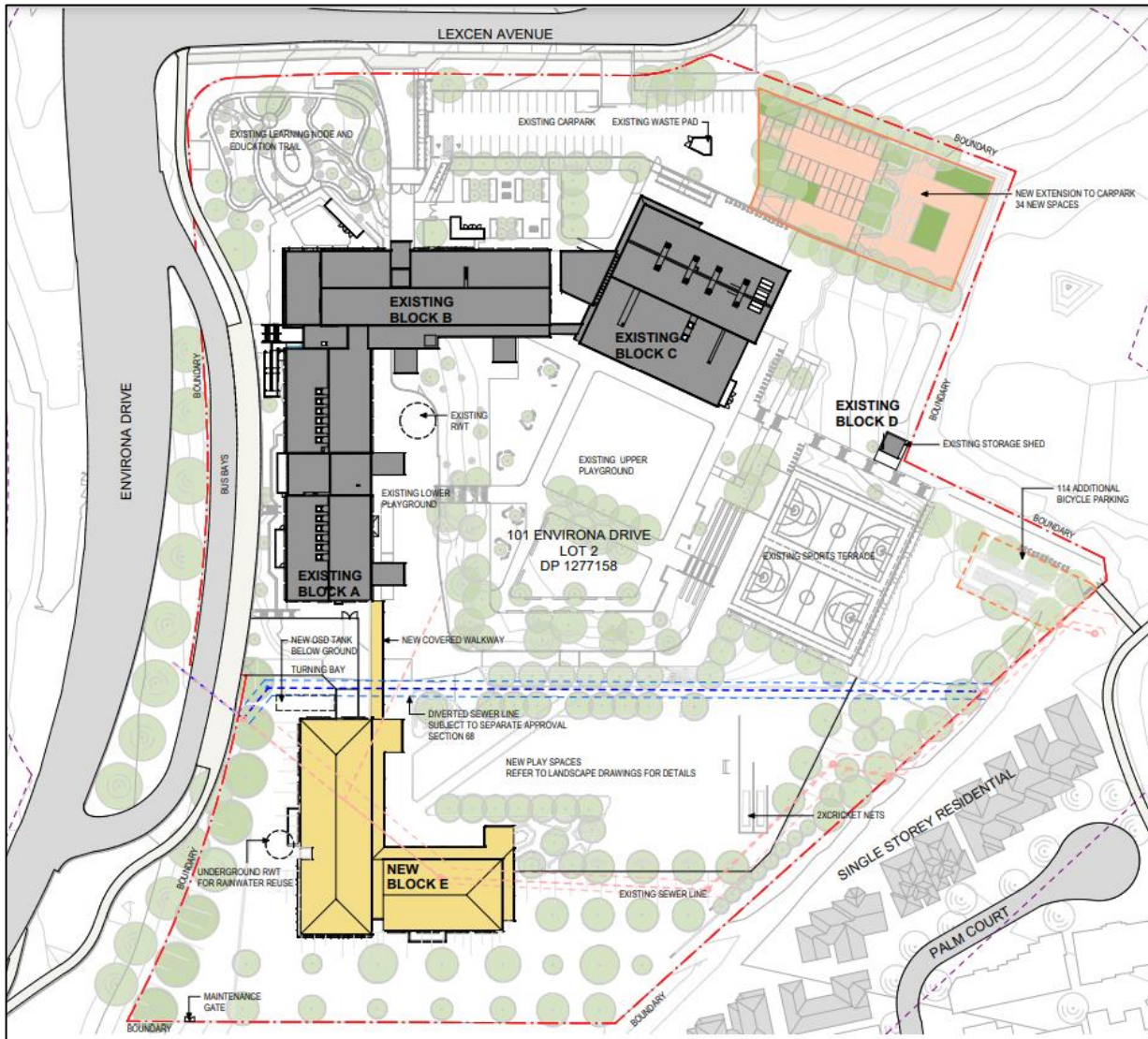
Source: MetroMap

The Development Application proposes alterations and additions to the approved Jerrabomberra High School including:

- construction of a new school building containing general learning spaces, kitchen, workshops and ancillary facilities,
- extension to the existing carpark with provision for an additional 34 parking spaces,
- provision of 114 bicycle parking spaces,
- construction of a large outdoor play space for student use,
- associated civil and landscape works; and
- internal alterations to the ground floor of Block B (already approved and constructed under SSD-24461956 to replace the existing kitchen, food and textiles facilities with a new science lab, general learning spaces, and ancillary facilities.

The objective of the proposal is to accommodate project demand for high school spaces in the area.





**FIGURE 2: SITE PLAN DEPICTING NEW BUILDING IN YELLOW**

Source: TKD Architects

This clause 4.6 written request has been prepared having regard to the LEC judgements in the matters of:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe),
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248,
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118,
- *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, and
- *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191

## 2 Queanbeyan-Palerang Regional Local Environmental Plan 2022

### 2.1 Clause 4.3 – Height of buildings

#### 2.1.1 Details of building height development standard

The relevant development standard sought to be varied under the Application is cl. 4.3 Height of buildings under Part 4 Principal Development Standards of *Queanbeyan-Palerang Regional Local Environmental Plan 2022 (QPLEP 2022)*. The development standard sought to be varied reads as follows.

(2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

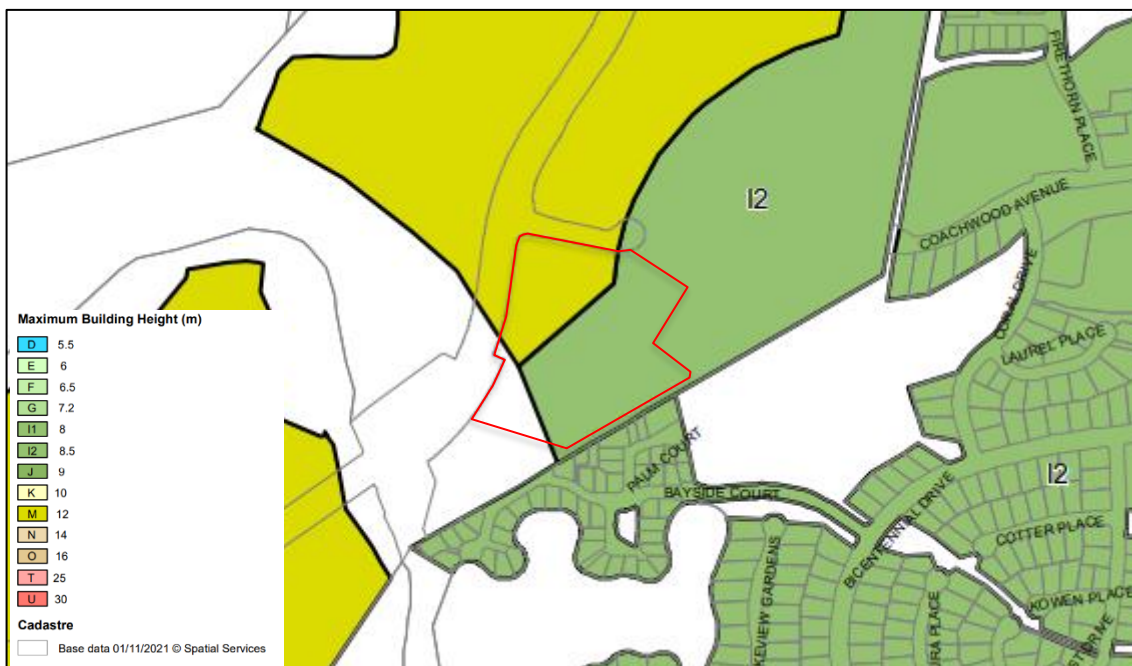


FIGURE 3: EXTRACT OF HEIGHT OF BUILDINGS MAP – SHEET HOB\_001A

Source: MetroMap

The objectives of clause 4.3 are as follows:

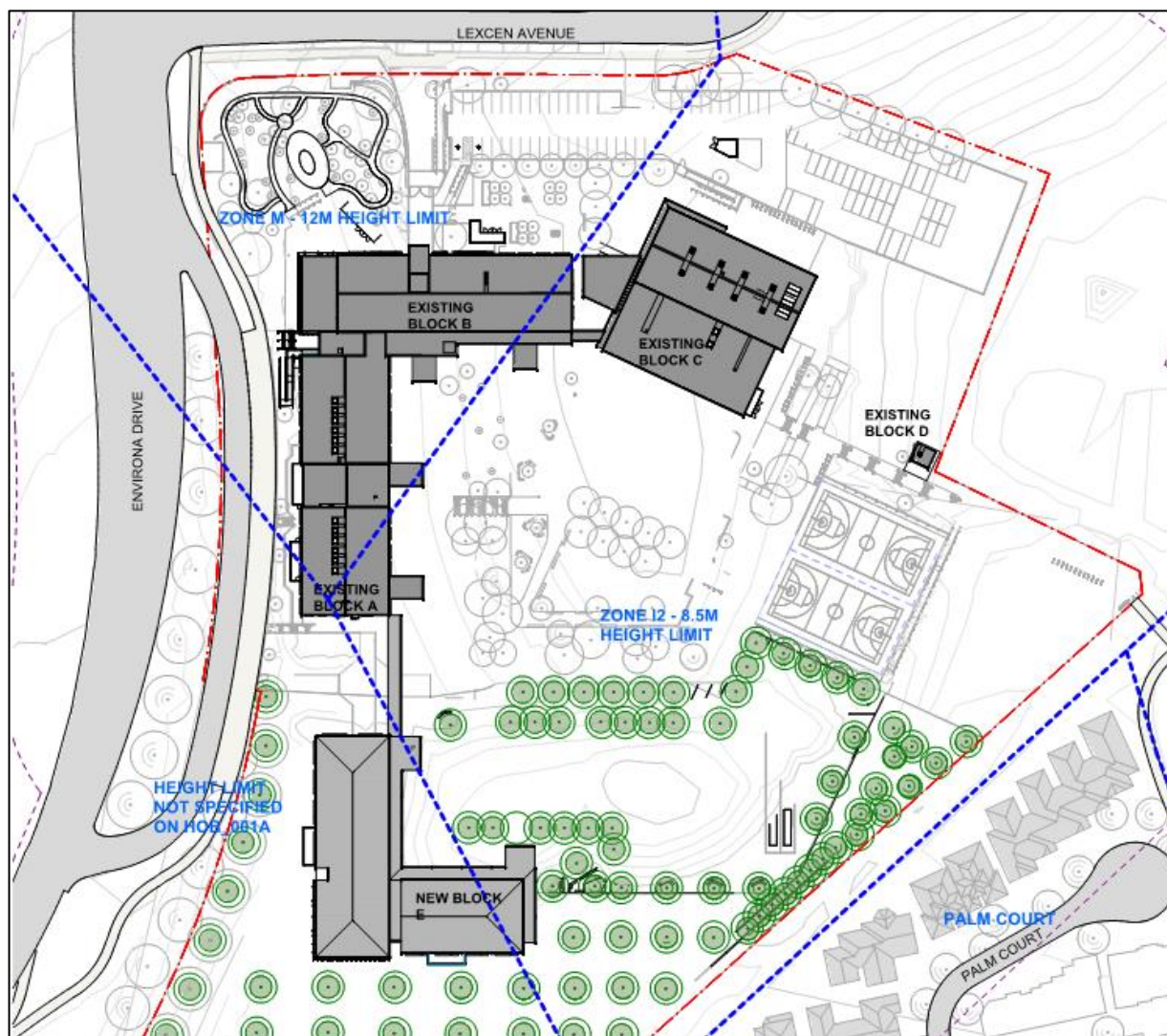
- (a) to establish the height of buildings consistent with the character, amenity and landscape of the area in which the buildings will be located,
- (b) to protect residential amenity and minimise overshadowing,
- (c) to minimise the visual impact of buildings,
- (d) to maintain the predominantly low-rise character of buildings in the Queanbeyan-Palerang Regional local government area,
- (e) to ensure the height of buildings complement the streetscape or the historic character of the area in which the buildings are located,
- (f) to protect the heritage character of the Queanbeyan-Palerang Regional local government area and the significance of heritage buildings and heritage items,
- (g) to provide appropriate height transitions between buildings, particularly at zone boundaries.



### 2.1.2 Details of development standard to be varied

As demonstrated by Figure 44, pursuant to clause 4.3(2) of QPLEP 2022 the area of the site where the new building is to be located is partially subject to a building height development standard of 8.5m, partially 12m and partially identified with no height development standard. As depicted in the figure, it is clear that only a minor portion of proposed Block E is subject to the 8.5m height of building control.

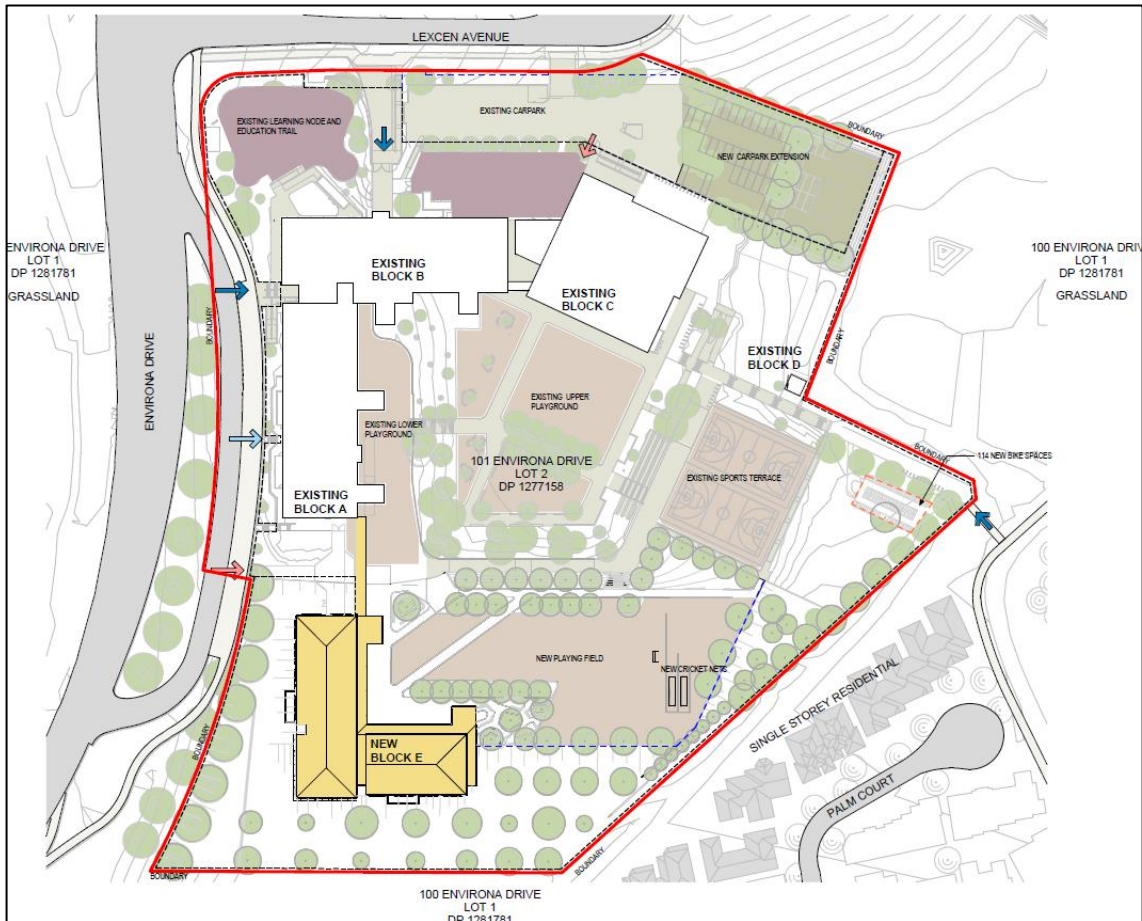
The new building proposed is identified as “Block E” and is located at the southern extent of the site, to the south of the approved Jerrabomberra High School, currently under construction (completion of the approved high school is anticipated in the next two months).



**FIGURE 4: OVERLAY DEPICTING THE AREA OF THE PROPOSED BUILDING WITHIN THE 12M AND 8.5M CONTROL**

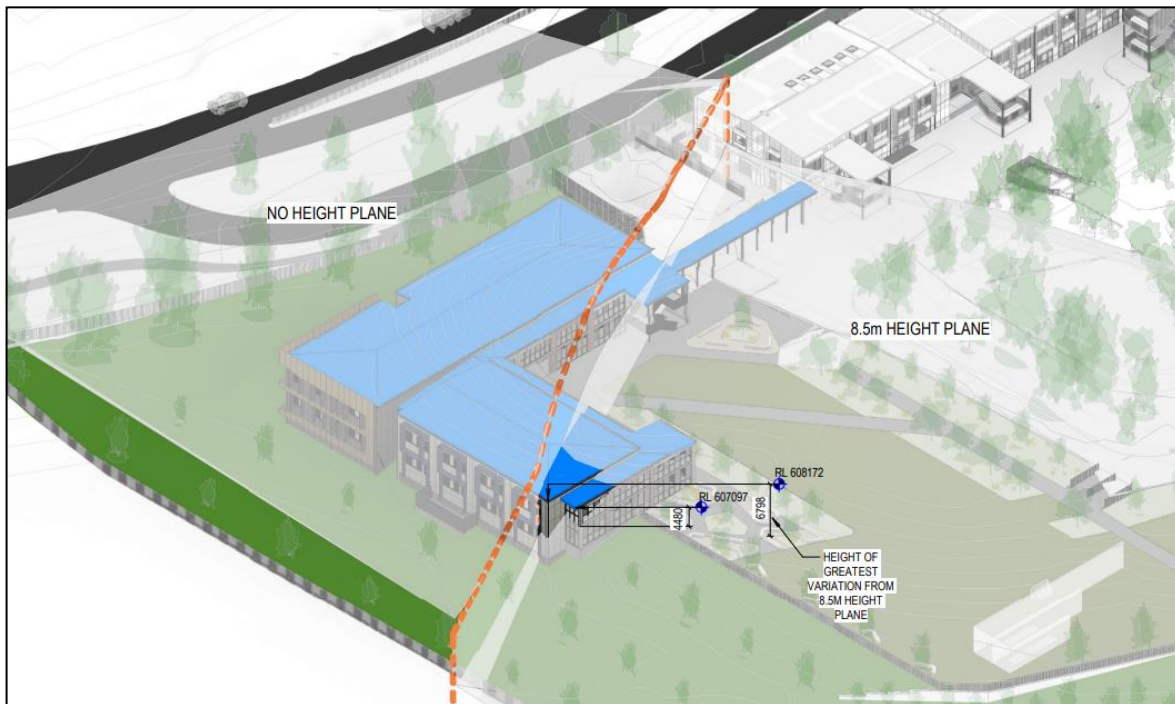
Source: TKD Architects





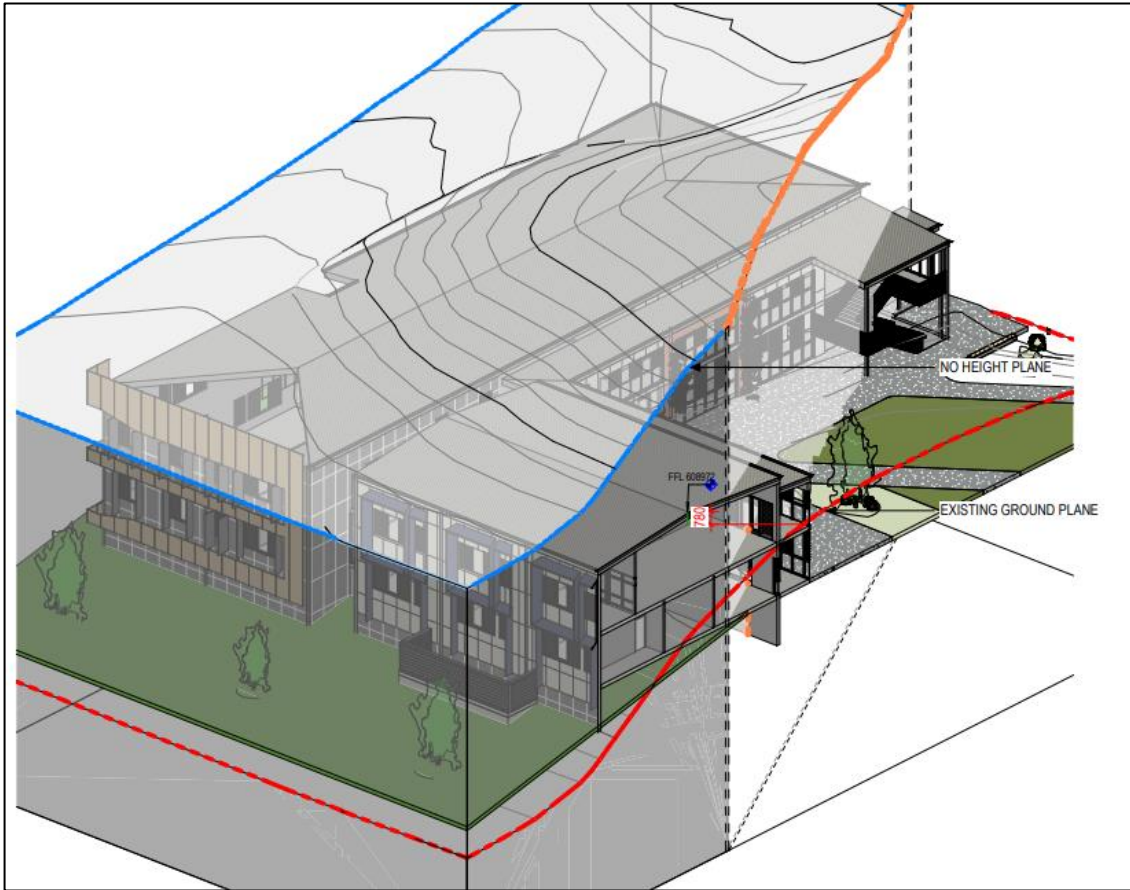
**FIGURE 5: LOCATION OF PROPOSED BLOCK E TO SOUTH OF APPROVED HIGH SCHOOL BUILDINGS**

Source: TKD Architects



**FIGURE 6: HEIGHT BLANKET DEPICTING THE AREA OF THE PROPOSED BUILDING EXCEEDING 8.5M**

Source: TKD Architects

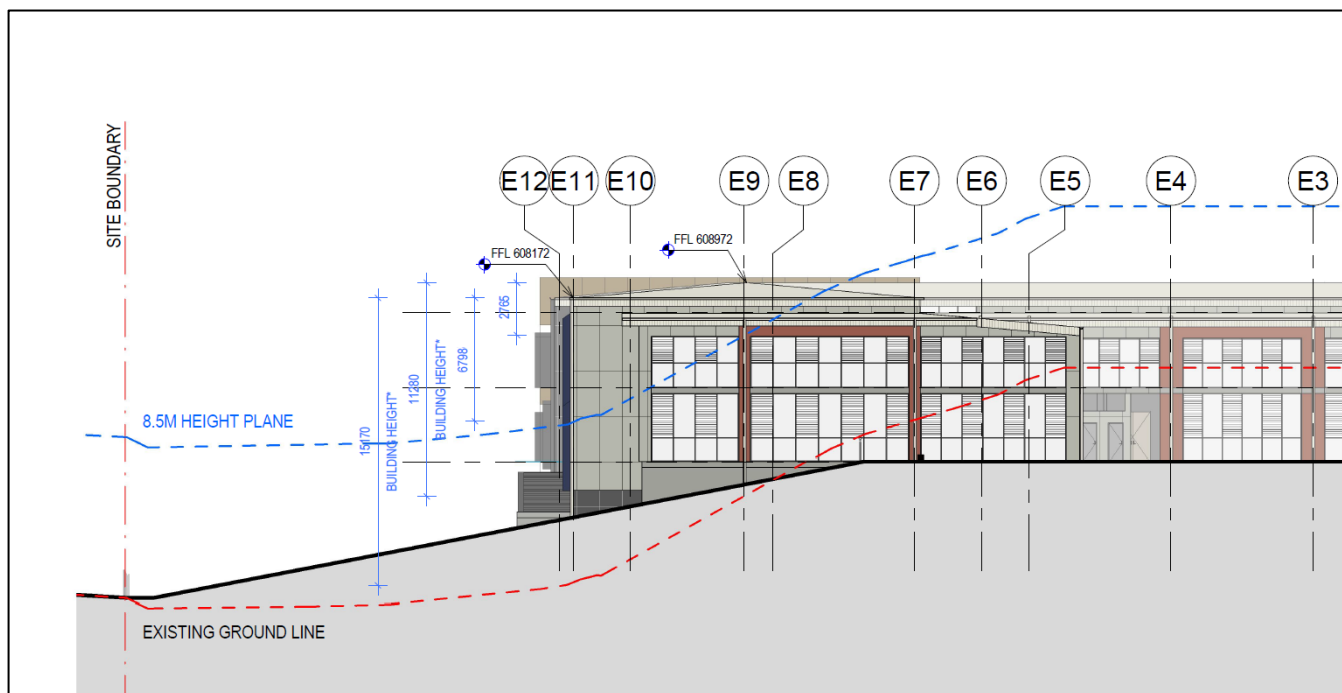


**FIGURE 7: HEIGHT OF BLANKET DEPICTING THE AREA OF THE PROPOSED BUILDING EXCEEDING 8.5M AND THE EXISTING GROUND PLANE**

*Source: TKD Architects*

The maximum height proposed when measured from existing ground levels, is in a location of the proposed Block E building at the at the south eastern extent of the building.

The maximum height proposed is 15.298m or 6.798m above the 8.5m height control. The variation is expressed as a 79.98% variation and results in relation to a small portion of the proposed building, which is sited over a very steep portion of the land where the existing ground level falls quickly, as depicted in the following figure.



**FIGURE 8: EASTERN SECTION DEPICTING STEEPLY UNDULATING EXISTING GROUND LEVEL**

Source: TKD Architects

## 2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of QPLEP 2022 provides the following:

- (1) *The objectives of this clause are as follows—*
  - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
  - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision handed down by Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action) provides guidance in respect of the operation of clause 4.6, subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] and [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to Section 56A of the *Land and Environment Court Act 1979* against the decision of a Commissioner.

At [90] of Initial Action, the Court held that:

*"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."*

The legal consequence of the decision in Initial Action is that clause 4.6(1) is not an operational provision, and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of QPLEP 2022 applies to clause 4.3 of QPLEP 2022, and 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 4.3 is not excluded from the operation of this clause and can be varied as a consequence.

Clause 4.6(3) of QPLEP 2022 provides that:

- (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 DA proposes contraventions to the height of buildings development standard pursuant to clause 4.3(2) of QPLEP 2022. Clause 4.3(2) prescribes a maximum building height for part of the site, however strict compliance is considered to be unreasonable or unnecessary in the specific circumstances of this case, and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

Relevant grounds establishing that compliance with the standard is unreasonable and unnecessary and environmental planning grounds are set out later within this written request.

Clause 4.6(4) of QPLEP 2022 provides that:

- (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.*

In Initial Action, the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] and [28]).

- The first precondition is found in clause 4.6(4)(a) and requires the formation of two positive opinions of satisfaction by the consent authority.
  - The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (Initial Action at [25]).
  - The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (Initial Action at [27]).
- The second precondition is found in clause 4.6(4)(b), and requires the consent authority to be satisfied that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (Initial Action at [28]).

Regarding the second precondition, pursuant to Section 55 of the *Environmental Planning and Assessment Regulation 2021*, the Secretary has given written notice dated 21 February 2018, attached



to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of QPLEP 2022 provides:

- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - (b) *the public benefit of maintaining the development standard, and*
  - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence*

By Planning Circular dated 5 May 2020 No. PS 20-002, the Secretary of the Department of Planning, Industry and Environment advised that consent authorities can assume concurrence to a clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings where the development is local and regionally significant development;
- Contraventions exceeding 10% where the decision is to be made by a delegate of a local Council; and
- Contraventions to non-numerical development standards where the decision is to be made by a delegate of a local Council.

Due to the proposed Capital Investment Value (CIV) of the proposed development, this DA is subject to determination by the Southern Regional Planning Panel; the Secretary's concurrence may therefore be assumed, even for contraventions to development standards that exceed 10%.

### 3 Relevant Case Law

In Initial Action, the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (*Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

- 1) *The first and most commonly invoked way is to 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) *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
- 3) *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
- 4) *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable.*
- 5) *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
- 6) *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in Initial Action (and the case law referred to in Initial Action) can be summarised as follows:

- 1) Is clause 4.3 of QPLEP 2022 a development standard?
- 2) Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - a) compliance is unreasonable or unnecessary; and
  - b) there are sufficient environmental planning grounds to justify contravening the development standard
- 3) Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.6 and the objectives for development in the zone?
- 4) Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
- 5) Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of QPLEP 2022?

The necessary detail and justification for these steps to be satisfied are provided within Section 4 of this request, as detailed following.

## 4 Written Request – Building Height

### 4.1 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

Wehbe v Pittwater Council set out the following five ways in which a variation may be well founded:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *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. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

It is generally understood that Clause 4.6(3) can be satisfied if it is established that the proposal satisfies one or more of those five points. In this instance, point 1 is investigated and is considered to be well-founded for the proposed development.

#### **DEVELOPMENT STANDARD OBJECTIVES**

The objectives of the building height development standard under clause 4.3(1) of QPLEP 2022 are provided below, with a response demonstrating how each objective is satisfied notwithstanding the proposed noncompliance with the building height standard.

- (a) to establish the height of buildings consistent with the character, amenity and landscape of the area in which the buildings will be located,*

The site is located within a transitioning area within Jerrabomberra which has been zoned for the purpose of a business park, with educational establishments provided as an additional permitted use, and provides two building height controls of 12m and 8.5m and a third area to the south of the site which provides no height of building control.

The existing topography of the site provides for a significant slope and necessitates the need for cut and fill to create a level, accessible building platform which provides continuity with the existing buildings. The existing topography results in a non-compliance at the southern end of proposed Block E. However, we refer to Figure 4 and note the minor portion of the building subject to the development standard, as much of the proposed building is not subject of a height control.

The design of proposed Block E will achieve an appropriate scale and built form across the site that is consistent with the built form and character of the approved Jerrabomberra High School. We note the high school is currently under construction and due for completion in 2023.

Notwithstanding the non-compliance in relation to a small portion of the building, the proposed building demonstrates consistency with the approved development and provides a two storey high school building, which not only accords with the character of the area but also facilitates and enhances streetscape amenity by ensuring a consistent built form.

Moreover, the building height non-compliance has a positive effect on the landscape character of the area as the reduced building footprint of a two storey building allows greater landscape areas and tree cover across the site, than would be available with a single storey design. The proposed landscaping accords with the landscaping provided for the approved high school.

The campus façade along Environa Drive is thoughtfully scaled and articulated, contributing to the overall visual quality of the area. Noting that the western elevation depicts a compliant building height, with a 12m height control to the western elevation and due to the location of the 8.5m control. No variation is present when the school is viewed from the west at Environa Drive.

The proposed landscaping on the southern portion of the campus provides a visual softening of proposed Block E from Environa Drive as well as from residences to the south and east.

Despite the proposed non-compliance, the building maintains height of buildings consistent with the character, amenity, and landscape of the area. It ensures an appropriate scale, built form, and visual integration with the surrounding context while maintaining the desired quality and compatibility with the established development. Therefore, the proposed non-compliance is found to align with this objective.



**FIGURE 9: VIEW FROM ENVIRONA DRIVE LOOKING NORTH EAST**

Source: TKD Architects

(b) to protect residential amenity and minimise overshadowing,

The proposed non-compliance does not result in any adverse amenity impacts on residential properties to the south and east, as a consequence of the separation available between the proposed building and the existing residential development. The setback from the southeastern boundary is 36.6m and incorporates appropriate landscaping to mitigate any potential visual impact on adjoining residential properties, safeguarding their privacy and amenity.

The accompanying shadow diagrams depict the potential overshadowing effects of the proposed development and confirm that the small area of non-compliance does not result in any significant increase in overshadowing beyond what would be expected from a development that fully complies with the height control. Noting that the southern extent of the building is located within an area which provides no height control and the limited location of the non-compliance, within the south eastern corner.

(c) to minimise the visual impact of buildings,

As detailed at objective (a) above, the proposed non-compliance does not result in any adverse visual impacts from the streetscape or surrounding residences. The proposed building is found to enhance the character of the streetscape by facilitating a consistent built form along Environa Drive. The



campus façade along Environa Drive is thoughtfully articulated and contributes to the overall visual quality of the streetscape, reducing any potential visual impact associated with the non-compliance.

Additionally, the architectural design incorporates materials that are inspired by the local landscapes and their seasonal changes. This material selection not only enhances the visual interest of the development as a whole but also reduces any visual impact of the proposal.

- (d) *to maintain the predominantly low-rise character of buildings in the Queanbeyan-Palerang Regional local government area,*

The maximum height of building control to which the non-compliance relates is 8.5m. This control indicates that a built form of two storeys is envisioned for the subject site. It is important to note that the proposed development maintains a height of two storeys, adhering to the predominantly low-rise character of buildings in the Queanbeyan-Palerang Regional local government area. The non-compliance is not intended to establish a taller building form but rather to accommodate the topography of the site while still adhering to the predominant low-rise character and maintain an accessible campus for Jerrabomberra High School.

- (e) *to ensure the height of buildings complement the streetscape or the historic character of the area in which the buildings are located,*

The subject site is not situated in a heritage conservation area, nor does it contain an item of heritage significance. Therefore, the relevance of this objective to this clause 4.6 variation request is limited to ensuring that the non-compliance complements the streetscape character of the area.

The arguments presented in support of the first objective regarding the non-compliance largely apply to the fifth objective as well. The proposed non-compliance ensures that the height of the buildings across the site maintains a consistent built form and character that aligns with the existing streetscape context. As depicted in Figure 8 and Figure 9, the proposed Block E is designed to complement the approved development and positively contribute to the visual quality of the streetscape.

- (f) *to protect the heritage character of the Queanbeyan-Palerang Regional local government area and the significance of heritage buildings and heritage items,*

The proposed non-compliance does not result in any adverse impacts on the heritage character of the Queanbeyan-Palerang Regional local government area. The focus of this objective is primarily to safeguard the existing heritage fabric of the area, which is not directly applicable to the subject site. The subject site is not situated in a heritage conservation area, nor does it contain an item of heritage significance, and the arguments presented in support of the first objective demonstrate that the non-compliance does not compromise the character of the area.

- (g) *to provide appropriate height transitions between buildings, particularly at zone boundaries.*

The proposed non-compliance does not compromise the provision of appropriate height transitions between buildings, particularly at zone boundaries. The proposed non-compliance occurs within proximity of the B7 zone and the 12.5 maximum height of building control, both of which are located on the subject site. The residential development located to the south and east of the subject site primarily consists of one- and two-storey buildings. The proposed building also provides for a two storey building and is found to have appropriate regard for the residential development in close proximity.

The proposed built form ensures a gradual transition between the proposed Block E and the adjacent residential buildings, ensuring compatibility and minimising any visual or scale disparities. Furthermore, the setback from the southeastern boundary is 36.6m, providing a generous buffer zone and reinforcing the appropriate height transition between Block E and the residential development and allows for landscape planting which will provide an additional buffer to the residential development.

Based on the above assessment and application of the first Wehbe Test, it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the development application.

## ZONE OBJECTIVES

The subject site is located within both the B7 Business Park and RE2 Private Recreation zones. However, the proposed Block E building and area subject of this variation is located within the RE2 zone.

The proposed development is considered to be in the public interest as it is broadly consistent with the relevant objectives of the particular standard as demonstrated above. Moreover, an assessment of the objectives for development within the zone in which the development is proposed to be carried out is demonstrated below.

**TABLE 1: ZONE OBJECTIVES ASSESSMENT**

ZONE	OBJECTIVE	ASSESSMENT
RE2	To enable land to be used for private open space or recreational purposes.	<p>The site is zoned RE2 Private Recreation and Educational establishments are prohibited in the RE2 zone. Notwithstanding, the proposed works within the RE2 zone is permitted with consent on the site pursuant to clause 2.5 and Schedule 1 of the QPLEP 2022, which permits the additional use of an educational establishment at the site.</p> <p>The proposed built form facilitates the cohesive completion of the school and encloses the central open play space to the west, providing a large, uninterrupted, and secure area for outdoor student recreation.</p> <p>Furthermore, the consolidated built form is necessary to reduce the total building footprint and maximise the amount of land able to be used for recreational purposes.</p>
	To provide a range of recreational settings and activities and compatible land uses.	The proposed use as a school has clearly been found to be a compatible land use as it is identified as an additional permitted use in the RE2 zone, pursuant to the provisions of the QPLEP 2022.
	To protect and enhance the natural environment for recreational purposes.	<p>As stated above, the proposed built form has endeavoured to reduce the total building footprint and maximise the amount of land able to be used for recreational purposes in the central open play space and surrounding to the south and east.</p> <p>The proposed landscaping plans will improve the natural environment for recreational activities by incorporating vegetation and offering shade opportunities through the inclusion of canopy trees.</p>
	To protect and enhance the scenic and environmental resources of the land.	<p>The proposed landscaping provides a visual softening of the development and mitigates any potential visual impacts that could detract from the scenic and environmental resources of the land.</p> <p>Moreover, the architectural design incorporates materials that are inspired by the local landscapes and their seasonal changes so as to protect and enhance the scenic and environmental resources of the land.</p>

To ensure the scale and character of development is compatible with the established land uses of the locality.

The proposal relates to Block E, which is two-storeys in height and consistent with the desired further character of the business park location and transition to the residential land.

The height of building control that relates to the non-compliant area of the building is 8.5m, which indicates that the envisaged scale of development is two-storeys, aligning with a low-rise character of development.

The proposed Block E, accommodates the topography of the site to facilitate a two-storey building, consistent with the envisaged scale and the approved Jerrabomberra High School development on the site.

In addition to the proposal's compliance with the relevant objectives of the zone and development standard, the proposal is considered to be in the public interest notwithstanding non-compliance with the development standard for the following reasons.

- there are no adverse amenity impacts to adjoining residences, due to the significant setback from the southeastern boundary;
- there would be a negligible difference between the proposed development on this site with a compliant development when viewed from the streetscape;
- the proposal reduces the total building footprint by providing a two storey design, allowing more space for recreation and landscaping than would be afforded by a single storey design; and
- the proposed development is in character with the area and consistent with the Jerrabomberra High School approval on the site.

## 4.2 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

*23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*

*24. The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

*25. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

In this regard, we submit that there are substantive environmental planning grounds to justify the proposed contraventions of the building height development standard; these are detailed below.

Despite the contravention of the building height development standard, the proposed development maintains the existing and desired future character of the area

When considering compatibility with surrounding residential environments, reference is made to the planning principles within *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191; such principles determined that compatibility is not about 'sameness' but rather about a proposal's ability to exist in harmony with its surroundings. Compatibility also relates to the acceptability of a proposal's physical impacts on surrounding development. When considering the proposal's compatibility with the surrounding area, the two tests used in Senior Commissioner Roseth's findings are as follows:

***Test 1 - Is the proposal's appearance in harmony with the buildings around it and the character of the street?***

The subject site is located in an area of change and is situated in the Poplars precinct as identified in the SJDCP 2015. The current context of the area is that it is located on the interface between an existing urban area to the east comprising mostly of low density residential development and largely undeveloped land to west. However, the Poplars precinct is rapidly developing. Part 10 of the SJDCP 2015 states that "The desired future character of the Poplars will be a mix of office, light industrial, small scale retail, business and community uses that serve the needs of the people who live or work in the locality in a high quality urban designed setting."

The proposed development addresses three distinct settings in the local area:

- Low density residential to the south and east;
- "Character in Transition" represented by the business components of Poplars Precinct to the north and north-west;
- Conservation Area to the west of the site and the Jerrabomberra Creek riparian zone to the south.

Proposed Block E responds to the setting by completing the western enclosure of the central outdoor play spaces. The larger grained school buildings along the western boundary provide an appropriate barrier to Environa Drive. The grain of these buildings is in keeping with the anticipated future character of the business park to the north. The location of the outdoor play areas to the east of the subject site provides a suitable transition in built form to the low density residential areas. Moreover, the campus façade to Environa Drive is appropriately scaled and articulated, the landscaping on the southern portion of the campus provides a visual softening of proposed Block E, and when viewed from the residential areas to the south and east, the outdoor play spaces are enhanced by the additional proposed landscaping.

Given the above, it is considered that the built form will appropriately respond to the future context of the subject site and will have positive impacts on the built form in the locality.

***Test 2 - Are the proposal's physical impacts on surrounding development acceptable? The physical impacts include constraints on the development potential of surrounding sites.***

The proposal will not impact the development potential of the surrounding sites.

The amenity of surrounding properties will not be significantly impacted as a result of the proposed school building subject of this written variation request.

There will be no physical impacts on established residential areas surrounding to the south and east of the subject site.

From a qualitative perspective the subject school building will not give rise to adverse visual impacts when viewed from surrounding areas. As indicated elsewhere within this written request, the proposed height non-compliance is attributable to changed ground levels and existing topography, with such changes necessary to provide an accessible school.



Further, as a result of such level changes, the size and location of the building height variation when viewed from internal and surrounding streetscapes will not be discernible if compared to built forms with compliant building heights. This is further confirmed through the intersection of building height controls provided in the location of the proposed building, with areas of 12m, 8.5m and areas of no height control.

The small portion of the building which provides a non-compliant height is limited to the south east corner and will be imperceptible to any observer of the building, without the necessary overlay from QPLEP 2022 to demonstrate which area of the building is subject to a non-compliance.

As demonstrated by Figure 6, the non-compliance is limited to a small portion of the south eastern corner of the building and the western and southern elevations of the proposed building do not discriminate between areas of the building providing compliance and non-compliance. The design simply provides a regular and consistent built form when viewed from the street of surrounding development.

Further, due to the sloping and undulating form of the site, to provide a building which complies with the building height standard would result in a built form with inconsistent and therefore incongruous apparent heights and poor streetscape presentation.

To increase the building height beyond those permitted by the 8.5m building height development standard in a small location, will therefore provide for both:

- A congruent built form that will further enhance the visual appearance of the development, (both from surrounding dwellings and publicly accessible areas),
- A positive visual appearance of being able to provide more surrounding landscaping due to the proposal reducing the total building footprint with a two storey form, when compared to a larger single storey building; and
- The maximisation of an accessible school building, which does not provide a stepping of the building to address to existing topography, that will not result in adverse impacts upon the surrounding area.

In summary, the following environmental planning grounds are put forward to justify contravening the development standard.

- The proposed non-compliance would ensure the bulk and scale of development is consistent with the existing and desired streetscape character,
- The proposed design encourages high-quality architectural design that complements the approved high school development and enhances the streetscape,
- The proposed non-compliance will facilitate the orderly and economic development of the site for the purposes of a 'high school' as identified in the South Poplars Neighbourhood Structure Plan contained in the *South Jerrabomberra Development Control Plan 2015*.

In addition to the above environmental planning grounds, the proposed non-compliance is justified through adherence to the relevant objectives under s.1.3 of the *Environmental Planning & Assessment Act 1979* as demonstrated below.

**TABLE 2: EPA ACT SECTION 1.3 ASSESSMENT**

SECTION 1.3	OBJECT	ASSESSMENT
(a)	<i>To promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,</i>	The proposed non-compliance does not adversely impact the proper management, development, and conservation of the State's natural and other resources.

(b)	<i>To facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,</i>	<p>The proposed non-compliance will facilitate the overall development of Block E. The construction of Block E will result in positive economic impacts on the locality due to employment opportunities created for local tradespeople during construction and new job opportunities created at the school. No adverse economic impacts are anticipated to arise as a result of the non-compliance.</p> <p>The height non-compliance does not result in a larger building footprint or any other environmental impact than would be expected of a development compliant with the height of buildings control. No adverse environmental impacts are anticipated to arise as a result of the non-compliance.</p> <p>In terms of social impact, the proposed non-compliance facilitates the provision of seniors' learning spaces, resulting in greater student capacity that will reduce pressure on surrounding public schools. No adverse social impacts are anticipated to arise as a result of the non-compliance.</p>
(c)	<i>To promote the orderly and economic use and development of land,</i>	The proposed non-compliance will facilitate the orderly and economic development of the site for the purposes of a 'high school' as identified in the South Poplars Neighbourhood Structure Plan contained in the <i>South Jerrabomberra Development Control Plan 2015</i> .
(d)	<i>To promote the delivery and maintenance of affordable housing,</i>	This objective is not relevant to the proposed development because the subject site is not intended for residential purposes pursuant to the <i>Queanbeyan-Palerang Regional Local Environmental Plan 2022</i> and the <i>South Jerrabomberra Development Control Plan 2015</i> .
(e)	<i>To protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,</i>	<p>As previously stated, the height non-compliance does not result in a larger building footprint or any other environmental impact than would be expected of a development compliant with the height of buildings control. No adverse environmental impacts are anticipated to arise as a result of the non-compliance.</p> <p>A positive environmental impact which results from the proposed two storey design is the opportunity for more landscaping and tree cover than would be available with a larger building footprint for a single storey design.</p>
(f)	<i>To promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),</i>	This objective is not relevant to the proposed development because the subject site does not contain any items or sites of heritage (European or Aboriginal). Refer to the statement of environmental effects for further discussion regarding the heritage significance of the site.
(g)	<i>To promote good design and amenity of the built environment</i>	The non-compliance facilitates the good design and amenity of the built environment by ensuring a consistent built form along Enviro Drive.
(h)	<i>To promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,</i>	This objective is not relevant to the proposed non-compliance. The non-compliance does not result in any adverse impacts relating to the construction and maintenance of buildings.
(i)	<i>To promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,</i>	The non-compliance does not hinder the sharing of responsibility for environmental planning and assessment between different levels of government in the State.

(j)	<i>To provide increased opportunity for community participation in environmental planning and assessment.</i>	The non-compliance does not hinder the opportunities available for public participation in the environmental planning and assessment process.
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### 4.3 Clause 4.6(4)(a)(ii) – Is the proposed development in the public interest because it is consistent with the objectives of Clause 4.3 and the objectives of the RE2 Public Recreation zone

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone(s).

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

*“The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).”*

This written request has demonstrated that the proposed development is consistent with the objectives of the development standard and the objectives of the zones within which the development is proposed to be carried out. Refer to the assessment of Clause 4.6(3)(a) (i.e. Section 4.1 of this written request) above for assessments of the objective of the development standard and of the zones.

It is our opinion that the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied, given its consistency with the objectives of the building height development standard and the objectives the RE2 zone.

### 4.4 Secretary’s concurrence

By Planning Circular dated 5 May 2020 No. PS 20-002, the Secretary of the Department of Planning, Industry and Environment advised that consent authorities can assume concurrence to a clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings where the development is local and regionally significant development;
- Contraventions exceeding 10% where the decision is to be made by a delegate of a local Council; and
- Contraventions to non-numerical development standards where the decision is to be made by a delegate of a local Council.

Due to the proposed Capital Investment Value (CIV) of the proposed development, this DA is subject to determination by the Southern Regional Planning Panel; the Secretary’s concurrence may therefore be assumed, even for contraventions to development standards that exceed 10%.

## 5 Conclusion

Having regard to the clause 4.6 contravention provisions we have formed the considered opinion:

- a) that the contextually responsive development is consistent with the objectives of the RE2 zone, and
- b) that the contextually responsive development is consistent with the objectives of clause 4.3 of the QPLEP 2022, and
- c) that there are sufficient environmental planning grounds to justify contravening the development standard, and
- d) that having regard to (a), (b) and (c) above, compliance with the height of buildings development standard is unreasonable or unnecessary in the circumstances of the case, and
- e) that given the development's ability to comply with the objectives of both the affected zones and the height of buildings standard objectives that, approval of the DA will not be antipathetic to the public interest, and
- f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and
- g) Concurrence of the Secretary can be assumed by the Regional Planning Panel as the determining authority in this case.

Pursuant to clause 4.6(4)(a) of QPLEP 2022, the consent authority can be satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3), being:

- a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

In conclusion, we believe that in working with the constraints of the site, the proposed building height contravention is consistent with the intent of the site's zoning and present superior planning and design outcomes when compared to alternate options that were explored throughout the design process. Further, we have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a building height contravention in this instance. We therefore believe the proposed development be approved for the reasons outlined above.

