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Our Ref: 21300B.7TW_Clause 4.6

planning consultants

**WRITTEN REQUEST FOR EXCEPTION TO A DEVELOPMENT STANDARD
HEIGHT OF BUILDING DEVELOPMENT STANDARD
PROPOSED EDUCATIONAL ESTABLISHMENT (SCHOOL)
6 HARRISONS LANE, CARDIFF HEIGHTS**

1.0 Introduction

DFP has been commissioned by Aspect Schools to prepare a request pursuant to clause 4.6 of *Lake Macquarie Local Environmental Plan 2014* (the LEP) in respect of the proposed educational establishment (school) at 6 Harrisons Lane, Cardiff Heights (the site).

The proposed development has a maximum building height of 12.485m which exceeds the maximum building height development standard of 8.5m that applies to the site under clause 4.3 of the LEP. Accordingly, a clause 4.6 variation request is required.

Notwithstanding the contravention of the development standard, this cl4.6 written request demonstrates that:

- Compliance with the standard is unreasonable and unnecessary in the circumstances of the case (cl4.6(3)(a));
- There are sufficient environmental planning grounds to justify the contravention (cl4.6(3)(b)); and
- The proposed development is in the public interest. It is consistent with the objectives of the development standard and consistent with the objectives of the RU4 and R2 zones which apply to the site (cl4.6(4)(a)(ii)).

2.0 The Nature of the Variation

Clause 4.3 and the Height of Buildings Map of the LEP identify a maximum building height of 8.5m for the Site.

Clause 4.3 of the LEP defines 'building height' or 'height of building' as follows:

building height (or height of building) means—

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

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

The architectural drawings which accompany the DA show that the proposed building will have a maximum height of 12.485m which exceeds the height of buildings development standard that applies to the site by 3.985m or 46.9%.

Figure 1 details the location of the height breaches (shaded red) on the elevation drawings of the proposed development. The extent of variation is greatest to the southern elevation of the building, minor on the northern and eastern elevation. There is no height variation on the western elevation.

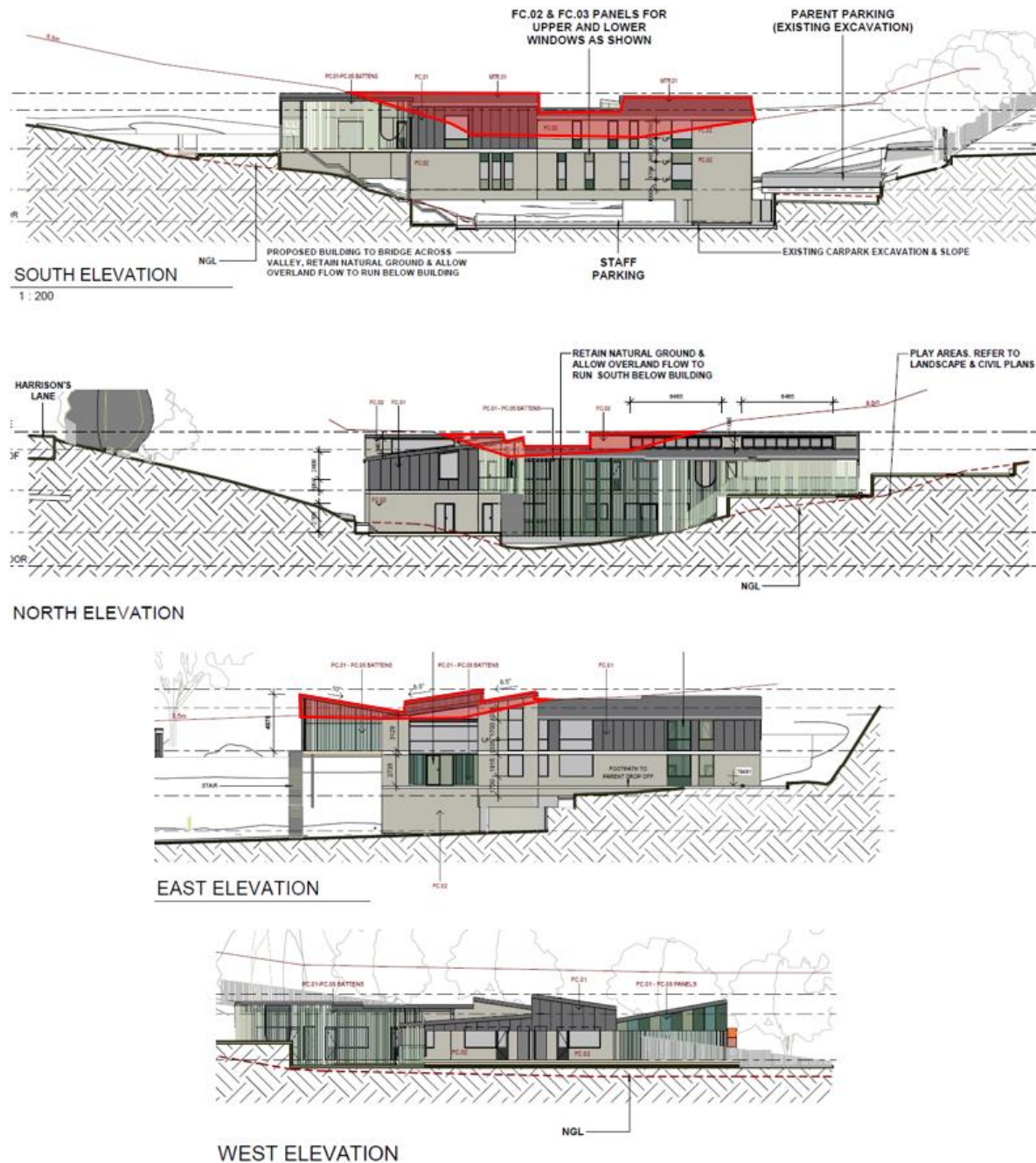


Figure 1 Location of Height Variation on Proposed Elevations

3.0 Clause 4.6 Assessment

3.1 Clause 4.6(1) – Objectives

Subclause 4.6(1) of the LEP states the objectives of the clause as follows:

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

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (“Initial Action”), Preston CJ ruled that there is no statutory provision that requires the applicant to demonstrate compliance with these objectives or that the consent authority must 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*”.

Therefore, the above objectives are the objectives of clause 4.6; they are not objectives with which the proposed development is required to be consistent or to satisfy.

The remaining subclauses of cl4.6 provide the preconditions which must be satisfied before a consent authority may grant development consent to a development that contravenes a development standard imposed by an environmental planning instrument. These preconditions are discussed hereunder.

3.2 Clause 4.6(2) – Consent may be granted

Subclause 4.6(2) provides that:

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

The height of buildings control in clause 4.3 of the LEP is a development standard, defined in Section 1.4 of the EP&A Act as follows:

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

...

- (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,*
- (b) *the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) *the cubic content or floor space of a building,*
- (e) *the intensity or density of the use of any land, building or work,*
- (f) *the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) *the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) *the volume, nature and type of traffic generated by the development,*
- (i) *road patterns,*
- (j) *drainage,*
- (k) *the carrying out of earthworks,*

- (l) *the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) *the provision of services, facilities and amenities demanded by development,*
- (n) *the emission of pollution and means for its prevention or control or mitigation, and*

Furthermore, the height of buildings development standard is not expressly excluded from the operation of cl4.6 (see **Section 3.9** below).

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

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

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

This report constitutes a written request for the purposes of cl4.6(3) and the following subsections address the justifications required under that subclause.

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

Subclause 4.6(4) provides that 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.*

The following subsections of this written request address these matters.

3.4.1 Clause 4.6(4)(a)(i) - Written request to adequately address the matters in cl4.6(3)

Clause 4.6(4)(a)(i) requires the consent authority to be satisfied that this written request adequately addresses the matters in cl4.6(3) as follows:

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

Compliance is Unreasonable or Unnecessary

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

Potential Environmental Impacts


It is considered that the environmental impacts of the proposed development are appropriately avoided, minimised or mitigated as described below:

- **Solar Access:** The proposed development will not have adverse solar access impacts on adjoining properties. Due to the significant setback from the southern boundary, adjoining properties will receive adequate solar access between 9am to 3pm midwinter (refer to **Section 5.2.5** of the Statement of Environmental Effects (SEE) submitted with the DA for further discussion). With respect to overshadowing within the property it is predominantly over staff parking and does not result in an adverse decrease in the amenity of usable play/open space.
- **Earthworks:** The proposed development minimises earthworks as a result of the building being designed to bridge the overland flow path which traverses the property. The non-compliant building height is a consequence of this bridging and does not result from excessive fill or modification to the topography of the site.
- **Acoustic and Visual Privacy:** In order to maximise visual and acoustic privacy for adjoining residential properties, the building has been centrally located on the site which is the lowest part of the site (as shown in **Figure 1**). Therefore, in order to maintain the overland flow path through the site (and ensure the building is an accessible facility) the building had to be designed to bridge the overland flow path and this resulted in it having to be raised above the existing ground level on this part of the site.

Objectives of the Development Standard

The proposed development is considered to be consistent with the objectives of the Clause 4.3 Height of Buildings development standard as described below.

Objectives of Clause 4.3	Assessment
(a) <i>to ensure the height of buildings are appropriate for their location</i>	<p>The proposed height of building for the proposed school does not exceed the existing maximum height of building of the nursing home which is of an appropriate scale when viewed from the street and adjoining properties.</p> <p>The built-form of the proposed development is predominantly two storeys in height which is generally consistent with the heights of surrounding residential development.</p> <p>The height exceedance predominantly results from the topography of the site which includes a 'gully' (which also functions as an overland flow path) and the proposed building being designed to 'bridge' this part of the site.</p>

	<p>It is more appropriate to locate the building on the 'low point' of the site (and accordingly raise the technical building height) to maximise separation from adjoining residential properties.</p> <p>The height of building, despite the non-compliance, based on the characteristics of the site and its relationship with surrounding development, is appropriate for the location and the objective is satisfied.</p>
<p>(b) <i>to permit building heights that encourage high quality urban form</i></p>	<p>The proposed building design provides for a high quality urban form as shown in Figure 2 below.</p> <p>More than simply avoiding an overland flow path, the bridging of the gully of the site enables a high quality urban form by providing connected building modules that have an efficient internal layout as well as providing important connections and activation of open space areas throughout the site for use by students.</p>  <p><i>Figure 2 Proposed Urban Form</i></p> <p>The 'splitting' of the built form to minimise the extent of variation to building height would result in an inferior built form outcome as it would result in a less compact built form and inefficient and disconnected internal layouts which would be more problematic in the delivery of autism specific teaching services.</p> <p>Accordingly, the height of building variation will achieve a higher quality urban form and the objective is satisfied.</p>

Accordingly, for the reasons identified above it is considered that strict compliance with the Clause 4.3 development standard is unreasonable or unnecessary as the non-compliance will not cause environmental harm and the proposed development is consistent with the objectives of the clause 4.3 development standard, notwithstanding the non-compliance.

Sufficient Environmental Planning Grounds

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

development rather than public benefits that could reasonably arise from a similar development on other land.

In Initial Action, Preston CJ indicated that it is reasonable to infer that “*environmental planning grounds*” as stated in 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.

The development-specific environmental planning grounds that support the proposed variation to the height of buildings development standard in this circumstance include the following:

1. Comparison of Boundary Level and Building Height

Figure 3 is an aerial image of the site with the reduced level (RL) adjacent to the boundaries of the site identified as per the Survey Plan prepared by Total Surveying Solutions (and submitted with the DA). The building shown in **Figure 3** is the existing nursing home building which will be demolished to make way for the proposed school building.

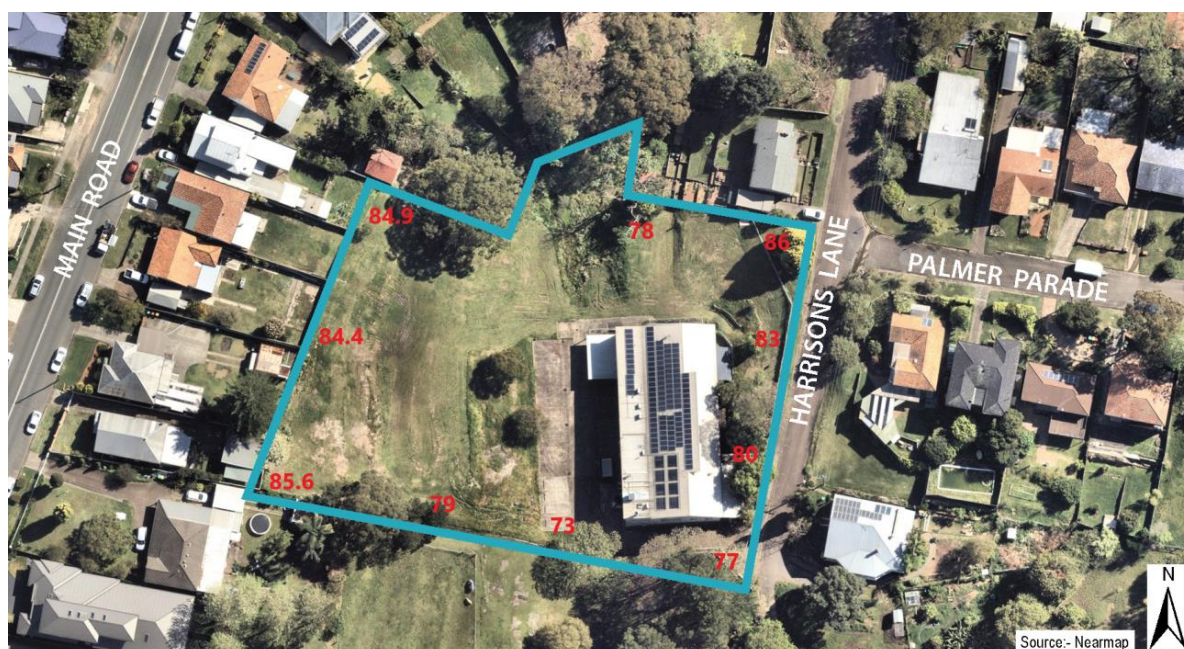


Figure 3 Site aerial showing RLs at cardinal and ordinal directions of the site

Table 1 compares the maximum height of the building to the natural ground level of the site, as measured at the boundary.

Where the difference between the proposed maximum height of the building (RL86.99) and the boundary level is less than the maximum building height development standard (8.5m) the cell is shaded green, and where greater shaded red.

Table 1: Maximum Building Height Comparison to Boundaries			
Boundary Location	Reduced Level (RL) at Boundary	Difference between boundary RL and max. Building Height (RL 86.99)	Metres Under/Over Height Limit (-/+)
North East	86	0.99m	-7.51m
North	78	8.99m	+0.49m

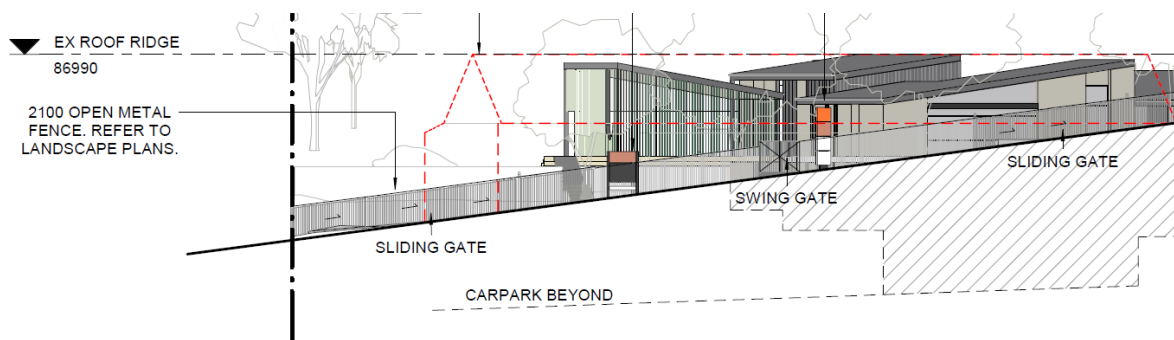
Table 1: Maximum Building Height Comparison to Boundaries

Boundary Location	Reduced Level (RL) at Boundary	Difference between boundary RL and max. Building Height (RL 86.99)	Metres Under/Over Height Limit (-/+)
North West	84.9	2.09m	-6.41m
West	84.4	2.59m	-5.91m
South West	85.6	1.39m	-7.11m
South South West	79	7.99m	-0.51m
South	73	13.99m	+5.49m
South East	77	9.99m	+1.49m
East	80	6.99m	-1.51m
East North East	83	3.99m	-4.51m

The proposal is less than 8.5m relative to the RLs of height of land at the boundary of the site for the majority of the property boundary. The areas where the difference is greater is either negligible (to the north) or is offset by greater building setbacks (to the south and south east). This is a site and development specific environmental planning ground supporting the proposed variation.

2. Same Height as Existing Structure

The maximum height of the proposed building is no greater than the maximum height of the existing building. As provided in **Figure 4** below, the existing roof ridge of the nursing home building is shown dotted in red and is the same height as the proposed school building.



2 ELEVATION / SECTION FROM HARRISONS LANE - PROPOSED
1 : 200

Figure 4 Proposed Elevation / Section from Harrisons Lane

3. Southern Boundary Setback

The proposed building is sited further away from the southern site boundary than the existing building. **Figure 5** below shows the location of the proposed school building and the nursing home building as shown dashed in red.

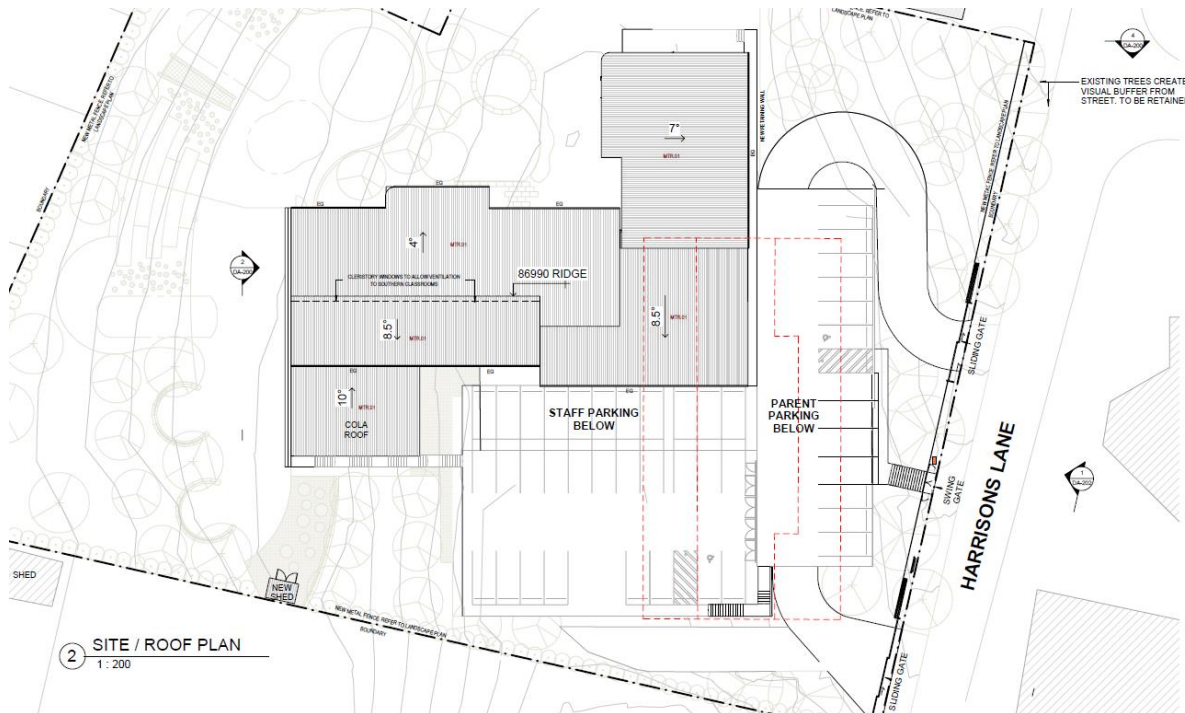
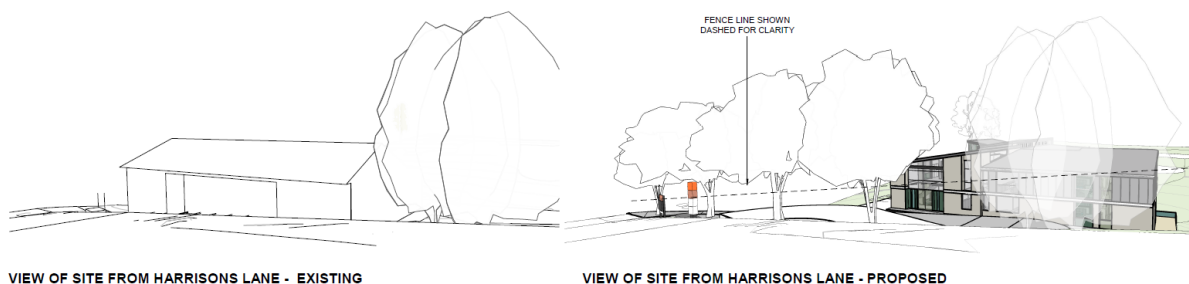


Figure 5 Proposed Site / Roof Plan with location of existing nursing home building shown in dashed red line

4. Streetscape Appearance

The proposed development will not be out of character with the existing streetscape. As shown in **Figure 4** above and **Figure 6** below the building will sit comfortably within the Harrison's Lane streetscape being generally perceived as two storey with the undercroft area not discernible.



VIEW OF SITE FROM HARRISONS LANE - EXISTING

VIEW OF SITE FROM HARRISONS LANE - PROPOSED

Figure 6 Streetscape Presentation

In Micaul and Initial Action, Preston CJ also clarified that sufficient environmental planning grounds may also include demonstrating a lack of adverse amenity impacts. As summarised above, the proposal satisfactorily avoids, manages or mitigates adverse amenity impacts.

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

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

Pursuant to cl4.6(4)(a)(ii) and as discussed by Preston CJ in Initial Action, if the development is consistent with the objectives of the development standard and the objectives of the zone, the consent authority can be satisfied that the development will be in the public interest.

The site is zoned R2 and RU4 under the LEP as shown in **Figure 7**.

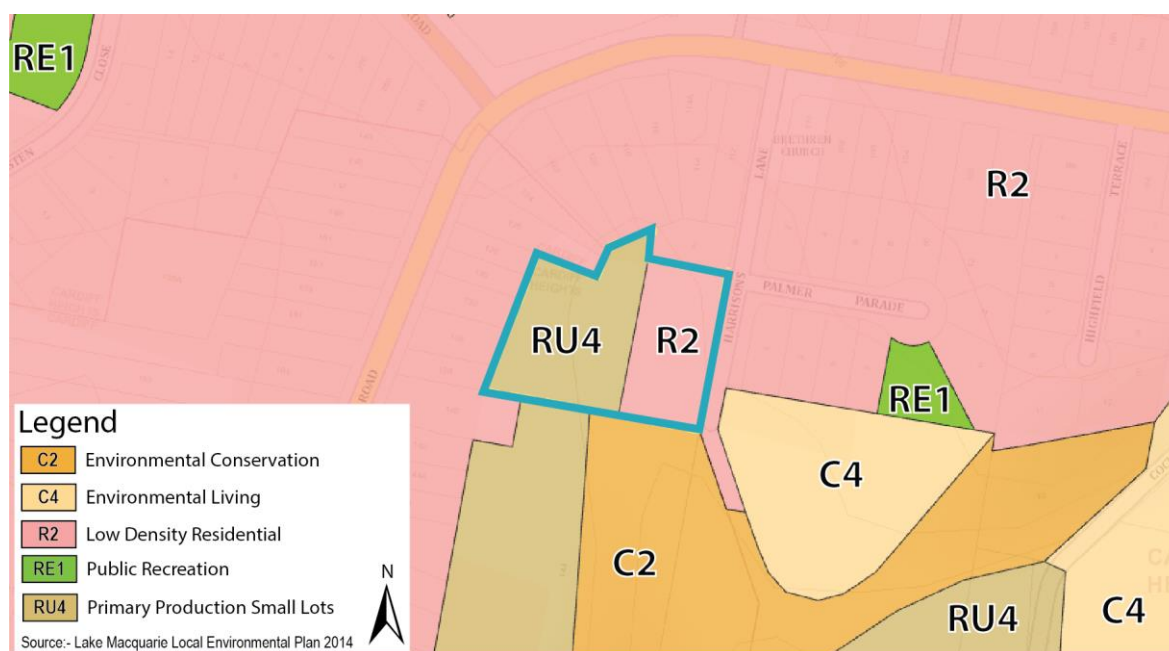


Figure 7 Extract of Zoning Map

An assessment of the proposal against the objectives of the Clause 4.3 development standard is provided at **Section 3.4.1** and an assessment of the proposed development against the objectives of the R2 and RU4 zones which apply to the site is provided below.

Table 3 – Assessment against objectives of the R2 and RU4 zones

R2 Zone Objectives	Assessment
<i>To provide for the housing needs of the community within a low density residential environment.</i>	As detailed in Figure 3 , the nearest residents are located to the north, east and west of the site. Table 1 shows that the building will appear considerably lower than 8.5m when considering the natural ground level of the adjoining residential properties. Therefore, the housing needs of nearby residents and the locality are unlikely to be adversely affected by the proposed building, and the objective of the zone satisfied.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	The proposal provides for a land use that provides educational services to the locality.
<i>To encourage development that is sympathetic to the scenic, aesthetic and cultural heritage qualities of the built and natural environment.</i>	The variation to the development standard will not result in a development that is unsympathetic to the scenic and aesthetic qualities of the built and natural environment.

Table 3 – Assessment against objectives of the R2 and RU4 zones

	There are no known cultural heritage values on the site. The scenic and aesthetic qualities are not offended by the variation as the 'variations' are screened by 'compliant' sections of the building and provides suitable separation to the more naturally vegetated southern adjoining property.
RU4 Zone Objectives	Assessment
<i>To enable sustainable primary industry and other compatible land uses.</i>	The variation to the development standard does not thwart this objective and minimises the extent of 'built form' by maximising the buffer from adjoining properties that may be used or capable of use as primary industry. The variation to the building height will not impact on the ability of the adjoining RU4 zoned land to be used for primary industry purposes.
<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>	This objective is not relevant to the school as it is a compatible land use, not a primary industry land use. Notwithstanding, the proposal will provide for employment opportunities for up to 35 staff.
<i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i>	The land uses on adjoining sites have been considered and the impacts of the proposal on these land uses are addressed in the SEE submitted with the DA. The SEE concludes that the proposed development can be conducted in such a way that it minimises adverse impacts (and conflicts) between land uses.
<i>To provide for a rural lifestyle and other compatible activities.</i>	The proposal provides for large areas of open space and is not antithetic to a rural lifestyle.
<i>To maintain or improve the quality of the environment.</i>	The environmental impacts have been considered in detail as part of the SEE submitted with the DA. The SEE concludes that the proposed environmental impacts are avoided, mitigated and/or capable of being managed in such a way to minimise adverse impacts. The proposed development maintains the quality of the existing environment and will likely improve it through the development of a currently underutilised site including significant landscape planting.

The above assessments demonstrate that the proposed development is consistent with all the relevant objectives of the development standard to be varied and the relevant objectives of the R2 and RU4 zones within which the development is to be carried out. Accordingly, the proposed development is in the public interest.

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

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under cl. 64 of the *Environmental Planning and Assessment Regulation 2000* (now Section 55 of the *Environmental Planning and Assessment Regulation 2021*) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under cl4.6 of the *Standard Instrument – Principal Local Environmental Plan*.

The LEP adopts cl4.6 of the SILEP and therefore, that prerequisite of the Notice is met.

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

Condition 2 of the Notice provides that concurrence may not be assumed by a delegate of the consent authority (i.e. a Council Officer) if the development will contravene a development standard by more than 10%. Notwithstanding that the proposed variation is greater than 10%, the cost of works exceeds \$5 million and accordingly, the application will be required to be determined by the Hunter and Central Coast Regional Planning Panel. Condition 2 of the Notice does not apply to regionally significant development.

3.6 Clause 4.6(5) - Concurrence Considerations

Notwithstanding that concurrence can be assumed pursuant to the Notice and notwithstanding the Court's powers under s39(6) of the Court Act, in Initial Action, Preston CJ clarified that the Court should still consider the matters in cl4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

The matters to be considered under cl4.6(5) are:

- (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.*

The proposed contravention of the height of buildings 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 specific to the design of the proposed development for this particular site and the nature of the variation and the scale of the proposed works do not trigger any requirement for augmentation of regional or State infrastructure or services;
- As indicated above, the proposed contravention of the height of buildings development standard is considered to be in the public interest because it is consistent with the objectives of the zone and the objectives of the development standard. Accordingly, there would be no significant public benefit in maintaining the development standard in this instance; and
- It is considered that there are no other matters of relevance that need to be taken into consideration by the consent authority.

3.7 Clause 4.6(6) – Subdivision on Certain Land

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

3.8 Clause 4.6(7) – Keeping of Records

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

3.9 Clause 4.6(8) – Restrictions on use of cl4.6

Clause 4.6(8) of the LEP states as follows:

- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*
- (a) *a development standard for complying development,*
 - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) *clause 5.4,*
 - (caa) *clause 5.5,*
 - (ca) *clause 2.8, 6.1 or 6.2.*

Clause 4.6(8) does not exclude the proposed development or Clause 4.3 of the LEP from the operation of Clause 4.6.

4.0 Conclusion and Recommendations

The proposed development contravenes the height of buildings development standard under cl 4.3 of Lake Macquarie Local Environmental Plan 2014.

This written request to vary the development standard has been prepared in accordance with cl4.6(3) of the LEP and demonstrates that the preconditions under cl4.6 for granting of development consent have been met.

The height of buildings control under cl4.6 of the LEP is a development standard and is not excluded from the application of cl4.6 (cl4.6(2)).

Strict compliance with the development standard is unreasonable and unnecessary (cl4.6(3)(a)) because, notwithstanding the contravention of the height of buildings development standard, the proposed development:

- will not result in environmental harm;
- is consistent with the objectives of the height of buildings development standard pursuant to cl4.3 of the LEP; and
- is consistent with the objectives of the R2 and RU4 zones which apply to the site.

There are sufficient environmental planning grounds (cl4.6(3)(a)) to justify the contravention of the height of buildings development standard including:

- A satisfactory height when compared to the levels at the boundary and the unique topographical characteristics of the site;
- A streetscape appearance that is not out of character with the locality;

- A building height that does not exceed the existing building; and
- A substantive southern setback which provides for additional curtilage and avoids solar access impacts.

Furthermore the proposed development is in the public interest (cl4.6(4)(a)(ii)) because the proposed development is consistent with.

- the objectives of the height of buildings development standard; and
- the objectives of the R2 and RU4 Zones.

The consent authority can assume the concurrence of the Secretary pursuant to the Notice issued on 21 February 2018 and can exercise its power pursuant to cl4.6(2) to grant development consent to the proposed development notwithstanding the contravention of the development standard.

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.