



planning consultants

13 February 2020
Our Ref: 20414A.11AJC_cl4.6 HOB

The General Manager
Wollongong City Council
Locked Bag 8821
WOLLONGONG DC NSW 2500

Dear Mr Doyle

**RE: WRITTEN REQUEST FOR EXCEPTION TO A DEVELOPMENT STANDARD
CLAUSE 4.3 HEIGHT OF BUILDINGS DEVELOPMENT STANDARD
PROPOSED ALTERATIONS AND ADDITIONS TO DAPTO PUBLIC SCHOOL
66 SIERRA DRIVE, HORSLEY**

1.0 Introduction

Update February 2020: This written request replaces the previous written request prepared by DFP Planning dated 3 July 2019. It has been prepared following amendment of the proposed development to relocate of Blocks H and I by three (3) metres to the east. This will enable the retention of additional trees located on the western site boundary.

DFP has been commissioned by Axiom Education Pty Ltd (the applicant) to prepare a request pursuant to clause 4.6 of *Wollongong Local Environmental Plan 2009* (WLEP 2009) in respect of the proposed alterations and additions to Dapto Public School at 66 Sierra Drive, Horsley (the site).

The Proposal exceeds the 9m height of buildings development standard under clause 4.3 of the WLEP 2009 with Block I having a maximum height of 11.3m measured to the top of the ridge at the highest point, representing a variation of 2.3m.

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. There are sufficient environmental planning grounds to justify the contravention in this instance, having regard to the following:

- The proposed development is consistent with the objectives of the height of buildings development standard, the objectives of the R2 zone, the objectives of *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2007* (the Education SEPP) and the design quality principles of the Education SEPP;
- Block I is located centrally within the site with deep setbacks to Sierra Drive and Fairwater Drive;
- There are no adverse overshadowing impacts on any adjoining development resulting from the height of the building;
- There are no adverse privacy impacts on any adjoining development resulting from the height of the building;

- The additional height does not result in a departure from the 0.5:1 Floor Space Ratio controls under Wollongong LEP 2009;
- Strict compliance with the height of buildings development standard would limit the ability to provide high quality cohesive learning spaces and would result in inefficient use of the site and reduce the quantity of open play space; and
- Block I has been designed as a high quality contemporary education building that responds to the low density residential character of Horsley and the existing character of Dapto Public School.

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 buildings development standard.

2.0 Nature of the Variation

Clause 4.3(2) of WLEP 2009 sets out the building height limit as follows:

The height of the building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

The WLEP 2009 defines building height (or height of buildings) as follows:

- (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 link.

The maximum height of Block I is 11.3 metres above ground level (existing), which exceeds the maximum building height of 9m by 2.3 metres. This is equivalent to variation of 26%.

A height plan diagram has been prepared by Perumal Pedavoli Architects (PPA) showing the existing of the proposed variation (**Attachment 1**).

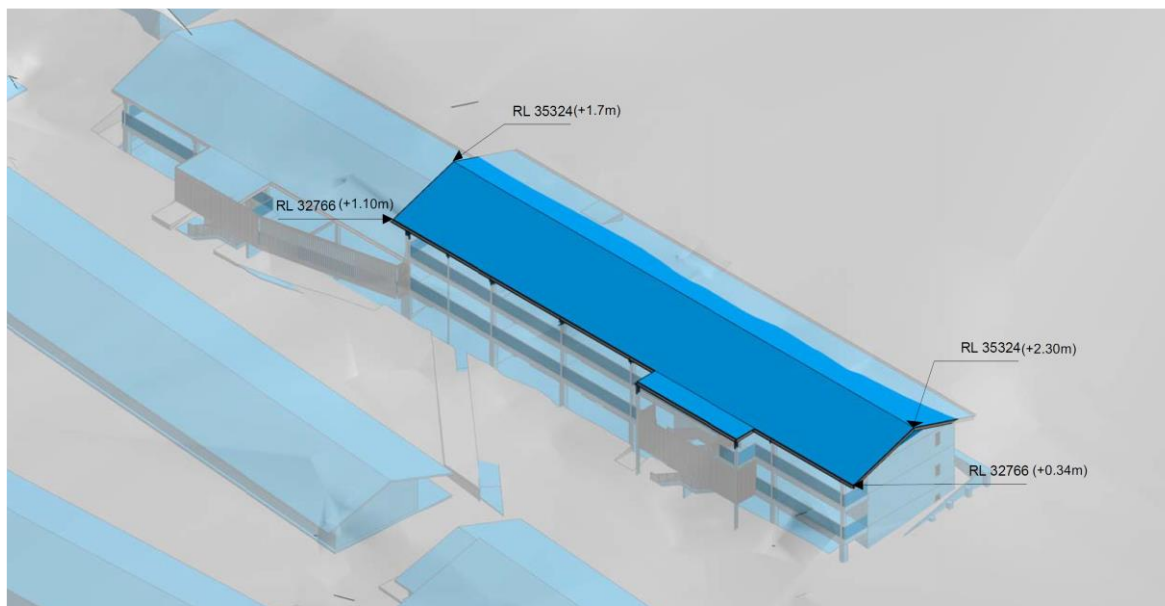


Figure 1 Extract of Height Plane Diagram prepared by PPA

3.0 Clause 4.6 Assessment

3.1 Subclause 4.6(1) – Objectives

Subclause 4.6(1) of the WLEP 2009 states the objectives of the clause as follows:

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

In the Judgement of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* ('Initial Action') Preston CJ rules that there is no provision that requires the applicant to demonstrate compliance with these objectives or that the consent authority be satisfied that the development achieves these objectives. Furthermore, neither clause 4.6(3) or clause 4.6(4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development".

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

3.2 Subclause 4.6(2) – Consent may be granted

Subclause 4.6(2) provides that:

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

The height of building development control in clause 4.3 of the WLEP 2009 is a development standard, defined in Section 1.4 of the EP&A Act as follows:

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

- (c) *The character, location, siting, bulk, scale, shape, size, **height**, density, design or external appearance of a building or work.*

The height of building development standard is not expressly excluded from the operation of clause 4.6 and accordingly, consent may be granted.

3.3 Subclause 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) *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 letter and information referred to herein, constitute a written request for the purposes of clause 4.6(3).

It will be a matter for the consent authority to consider the written request prior to granting development consent to this DA and as discussed in the Judgement of *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* ('Al Maha') the consent authority or the Court must, in determining the DA clearly enunciate the it has satisfied itself of the matters in clause 4.6(4). In the case of a consent authority, this might be by way of a statement in the reasons for approval authored by the consent authority.

3.4 Subclause 4.6(4) – Consent Authority to be Satisfied

Subclause 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 Director-General has been obtained."*

The following subsections address these matters.

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

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

Compliance is unreasonable or unnecessary

In his judgement 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 development would not cause environmental harm and is consistent with the objectives of the development standard.

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

Table 1 Environmental Impact Mitigation and Management	
Issue	Discussion
Streetscape	<p>Block I is located centrally in the site. It is setback approximately 112m from Sierra Drive to the east and 70m from Sierra Drive / Fairwater Drive to the south. Block I will be screened by the other school buildings from Sierra Drive and Fairwater Drive.</p> <p>The proposed development is visible from Orchid Close to the north of the school. Block I will read as two-storeys from this location. New planting along the northern elevation of Blocks H and I will assist in softening the appearance of the buildings.</p>
Visual Privacy	<p>Blocks H and I have been designed to minimise any potential overlooking into the adjoining residential properties. Block H is located a minimum of 8.8m from the western boundary to the north-west corner of the site. There is only one small window facing west towards the adjoining residential properties. Retention of the existing trees between Block H and the western site boundary will also assist in providing visual screening.</p> <p>It is also noted that classrooms (homebases) are only occupied between 9am and 3pm on school days. This daytime use combined with the setbacks and landscape screening is considered to provide for suitable mitigation measures to prevent overlooking of any adjoining private open space, which are typically used outside of these hours.</p>
Acoustic Privacy	<p>Acoustic related impacts from school operations are difficult to quantify or qualify. Dapto Public School is an existing and established school; therefore, it is not unreasonable to conclude that adjoining and nearby residents are adjusted to the sounds of general school activity. Nevertheless, it is noted that the new buildings (Blocks H and I) have deep setbacks to the site boundaries; the proposal does not include spaces with a high level of activity noise; and no new outdoor activity areas are being proposed. In addition, school activities are restricted to daytime periods on school days.</p> <p>A location for the mechanical equipment (air-conditioning condensers) has been identified as directly to the east of Block I. This location will not lend to adverse impacts upon neighbouring properties.</p>
Solar Access	<p>Shadow diagrams have been prepared by PPA to illustrate the existing and proposed shadows at 9am, noon and 3pm on 21 June (winter solstice). The shadow diagrams indicate that there will be a small amount of additional overshadowing of the back garden of No. 9 Arboreal Place. However, No. 9 Arboreal Place will receive a minimum of 3 hours of sunlight between 9am and 3pm on 21 June.</p>
Views	<p>A Visual Impact Assessment (VIA) has been prepared by DFP Planning. The VIA provides a review of the visual impact of the proposed development, as well as an analysis against the view sharing principles established by <i>Tenacity</i></p>

Table 1 Environmental Impact Mitigation and Management

Consulting v Warringah Council [2004] NSWLEC 140. In addition, photomontages have been prepared by PPA illustrating the existing and proposed views from No. 32 Denham Drive (**Figures 2 and 3**).

The VIA concludes that the Block I will have a high-moderate impact on district views to the south and south-east from Nos 32, 34 and 36 Denham Drive. However, the view sharing is considered reasonable as Block I is located in the centre of the school site with deep setbacks to the site boundaries (approximately 48m from the northern boundary). It has been designed to respond to the topography of the site. Whilst, Block I is three (3) storeys overall, it will appear as only two (2) storeys from the north, due to the ground floor being excavated into the existing embankment. The building adopts a similar architectural language to the existing building with a pitched roof. A one or two storey building would have a much larger footprint and would reduce the open play space and pervious site area. The proposed planting along the northern elevation of the building also assists in reducing its visual impact.

Reducing the height of Block I will not provide a discernible improvement. This is because of the distance between Block I and the adjoining residential properties.



Figure 2 Existing view from the kitchen window at No. 32 Denham Drive



Figure 3 Proposed view from the kitchen window at No. 32 Denham Drive

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

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

Objective	Assessment
(a) <i>to establish the maximum height limit in which buildings can be designed and floor space can be achieved,</i>	<p>The proposed alterations and additions to Dapto Public School will result in a total gross floor area of 5,564.13m², which is equivalent to a Floor Space Ratio (FSR) of 0.19:1. This is much lower than the maximum floor space ratio for the site of 0.5:1. Therefore the building height variation is not a result of an exceedance of the FSR control.</p> <p>Block I is located centrally within the site with deep setbacks to Fairwater Drive, Sierra Drive and Orchid Close.</p>
(b) <i>to permit building heights that encourage high quality urban form,</i>	<p>Block I is designed as a high quality contemporary education building containing 12 Home-bases. It is designed to respond to the low-density residential character of Horsley and the existing character of Dapto Public School. Block I responds to the design quality principles detailed under Schedule 4 of the Education SEPP.</p> <p>The design of the building responds to the topography of the site creating a new playground / free play area between Blocks H / I and Blocks D / E. The finished floor level of the first floor of Block I is established by the existing ground level of the northern playing fields and the need to provide level access between.</p> <p>This design ensures that suitable accessibility is achieved between existing classroom and play areas, and these levels essentially set the design levels for the two lower floors of the building. The additional floor above has been designed to be setback from the side boundary as far as possible.</p> <p>When viewed from the north, Block I will read as two storeys.</p>

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

Objective	Assessment
(c) <i>to ensure buildings and public areas continue to have views of the sky and receive exposure to sunlight.</i>	<p>The proposed Block I is located centrally within the site and will not be visible from Sierra Drive or the surrounding public domain as it is screened by the existing buildings and COLA. Block I will not overshadow any public open spaces or public domain areas.</p> <p>A Visual Impact Assessment has been prepared for the proposed development. This includes a view analysis using the planning principle relating to view sharing established by <i>Tenacity Consulting v Warringah Council [2004] NSWLEC 140</i>. This view analysis concludes that the impact on views west towards the Illawarra Escarpment are negligible. There are high-moderate impacts to district view to the south and south-east of the site.</p> <p>Adjoining residential development and public areas will continue to have view of the sky and receive exposure to sunlight.</p>

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 specific environmental planning grounds are outlined in **Table 3**.

Table 3 Environmental planning grounds supporting the proposed variation

Environmental Planning Ground	Discussion
Topography	The design of Block I takes advantage of the existing topography of the site. The ground floor of Block I is excavated into an existing embankment so that the ground floor of Block I corresponds with the ground floor of the adjoining buildings to the south, with the first floor level relating to the existing ground level of the playing fields to the north.
Site Coverage and Planning	The proposal comprises the removal of 14 demountable classrooms and construction of a new part-two (2) and part-three (3) storey building containing 20 home-bases. A single or two (2) storey building would require a much larger footprint; increase site coverage; and would reduce the amount of open play space and pervious site area. The design is considered to achieve an efficient use of the site, favourable to the alternatives of lower building height.
Design Quality	The proposed development is consistent with the design quality principles outlined in Schedule 4 of the <i>State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017</i> (Education SEPP).

In addition, in Micaul and Initial Action, Preston CJ clarified that sufficient environmental planning grounds may also include demonstrating a lack of adverse amenity impacts. As summarised in **Table 1**, the proposal satisfactorily manages and 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 clause 4.6(4)(b) and as discussed by Preston CJ in Initial Action, if the development is consistent with the objectives of the development standard and the objectives of the zone, the consent authority can be satisfied that the development will be in the public interest.

An assessment of the proposal against the objectives of the height of buildings development standard is provided at **Table 2** and an assessment of the proposed development against the objectives of the R2 Low Density Residential Zone expressed in the Land Use Table to clause 2.3 of the WLEP 2009 is provided in Error! Reference source not found..

Table 4 Assessment against the objectives of the R2 Zone

Objective	Assessment
<ul style="list-style-type: none"> To provide for the housing needs of the community within a low density residential environment. 	Not relevant
<ul style="list-style-type: none"> To enable other land uses that provide facilities or services to meet the day to day needs of residents. 	<p>Dapto Public School is a public educational establishment for students in Kindergarten through to Year 6. The school caters to the local residents of Dapto and Horsley and meets the educational needs of the locality.</p> <p>Block I is a three storey building containing 12 home-bases.</p>

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

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

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under cl64 of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under cl4.6 of the SILEP or SEPP 1 subject to certain conditions.

The Secretary's concurrence may not be assumed by a delegate of Council if:

- The development contravenes a numerical standard by greater than 10%; or
- The variation is to a non-numerical standard.

The proposed development comprises a new building (Block I) that is 3 storeys, result in a building which exceeds the maximum building height control of 9m. Block I has a maximum height of 11.3 m – therefore representing a maximum variation of 2.3m or 26%.

In any event, the DA is regionally significant development and will need to be determined by the Southern Regional Planning Panel due to the type (Crown development) and cost (Capital Investment Value of over \$5 million) of the proposed development. The above restrictions on the Secretary's concurrence do not apply to the decisions made by the Planning Panel.

3.6 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:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning,*

The proposed non-compliance does not of itself raise any matter of significance for State or regional Environmental Planning.

- (b) *the public benefit of maintaining the development standard,*

The proposed variation does not set a precedent given the educational use of the site, and the specific land use requirements of the school. In this instance there is not considered to be a public benefit in maintaining the development standard.

- (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

It is considered that there are no other matters of relevance that need to be taken into consideration.

3.7 Clause 4.6(6) – Subdivision on Certain Land

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

3.8 Clause 4.6(7) – Keeping of Records

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

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

Clause 4.6(8) of WLEP 2009 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,*
 - (ca) *clause 4.2A, 6.1 or 8.3.*

Clause 4.6(8) is not relevant to the proposed development as it is subject to a DA and does not constitute Complying Development, does not seek to vary any requirements of SEPP BASIX and does not relate to a standard under clauses 4.2A, 5.4, 6.1 or 8.3.

4.0 Conclusion and Recommendations

We have assessed the proposed exceedance of the height of buildings development standards against the relevant statutory provisions of clause 4.6 of WLEP 2009 and prepared this written request which provides justification that compliance with the height of buildings development standard is unreasonable or unnecessary in the circumstances of the case, as follows:

- The proposed development is consistent with the objectives of the height of buildings development standard, the objectives of the R2 zone, the objectives of *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2007* and the design quality principles of the Education SEPP;

- Block I is located centrally within the site with deep setbacks to Sierra Drive and Fairwater Drive;
- There are no adverse overshadowing impacts on any adjoining development resulting from the height of the building;
- There are no adverse privacy impacts on any adjoining development resulting from the height of the building;
- The additional height does not result in a departure from the 0.5:1 Floor Space Ratio controls under Wollongong LEP 2009;
- Strict compliance with the height of buildings development standard would limit the ability to provide high quality cohesive learning spaces and would result inefficient use of the site and reduce the quantity of open play space; and
- Block I has been designed as a high quality contemporary education building that responds to the low density residential character of Horsley and the existing character of Dapto Public School.

Accordingly, the justification within this written request is considered to be well founded.

Should you have any queries please do not hesitate to contact the undersigned.

Yours faithfully

DFP PLANNING PTY LTD



AMY CROPLEY
URBAN DESIGNER / PRINCIPAL PLANNER

Reviewed: _____



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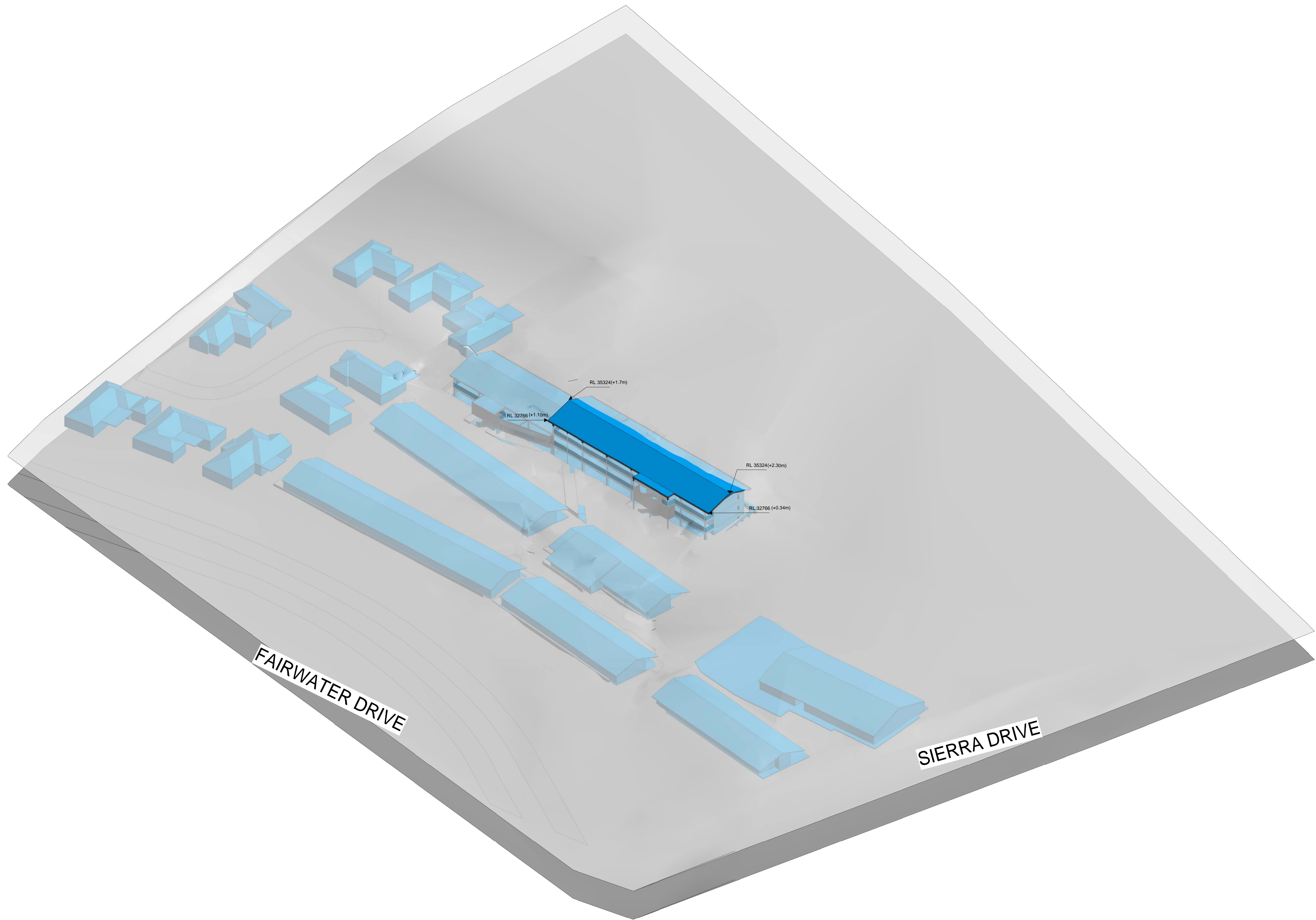
Attachment 1: Height Plane Diagram prepared by Perumal Pedavoli Architects



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ATTACHMENT I

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AMMENDMENTS				LEGEND
REV	BY	DATE	DESCRIPTION	
A	AC	20/02/04	ISSUED FOR INFORMATION	



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NORTH

DRAWN	CHECKED	VERIFIED	DATE
Author	Checker	Approver	20/02/04
DRAWING NUMBER			REVISION
PROJECT CODE	DISCIPLINE	PHASE	SERIES NUMBER
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