

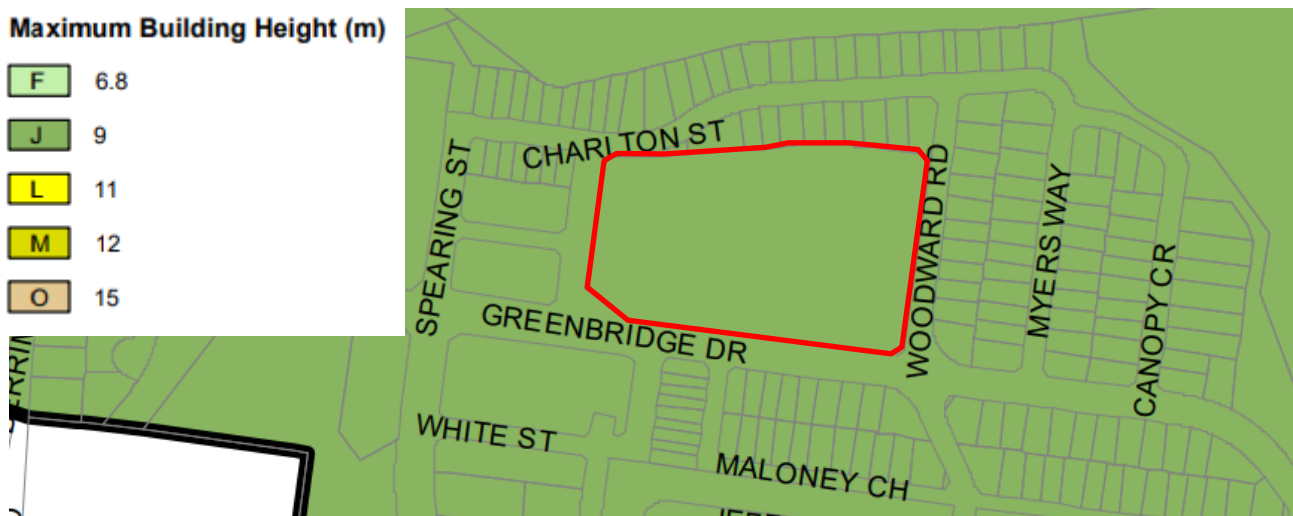
CLAUSE 4.6 VARIATION – HEIGHT OF BUILDINGS

WILTON PUBLIC SCHOOL – 11 GREENBRIDGE DRIVE, WILTON

1. INTRODUCTION

This request seeks to vary the maximum height of building development standard prescribed for the Wilton Public School located at 11 Greenbridge Drive, Wilton (Lot 18 DP270536) under clause 4.3 of *Wollondilly Local Environmental Plan 2011* (WLEP 2011). The Height of Building Map accompanying Clause 4.3 of the WLEP 2011 sets a maximum height of building standard of 9 metres for the site, refer to Figure 1.

Figure 1 – Height of Building Map



Source: WLEP 2011

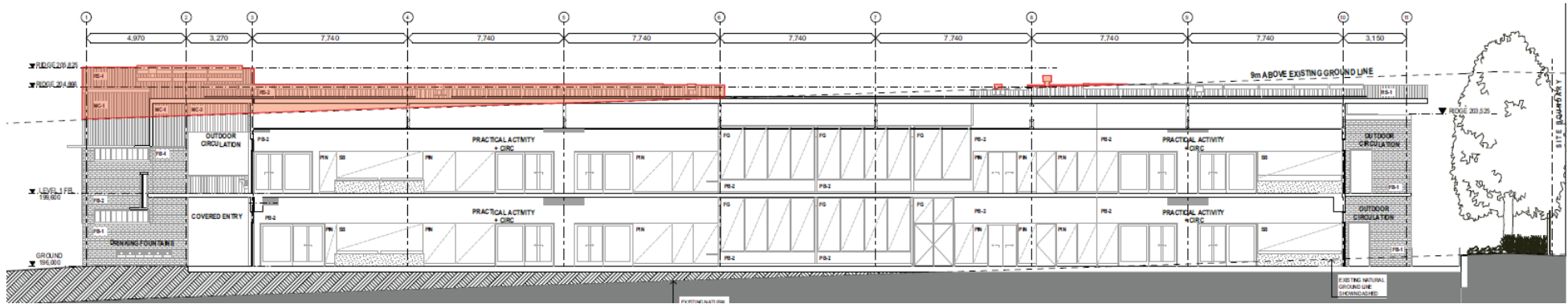
2. PROPOSED VARIATION

The development standard to which this request for variation relates is Clause 4.3 of the LEP – Height of Buildings. This clause operates in conjunction with the Height of Buildings Map which indicates that a maximum building height of 9 metres applies to the site. The proposal involves the construction of a new school building. The maximum height of the school building is 9.83 metres (see **Figure 2**). Due to the sloping topography of the site, the proposal does not comply. The non-compliance in height limit is considered acceptable for the following reasons:

- The site slopes towards the northern boundary at varying grades through the site. The proposal complies along the Woodward Road frontage and exceeds the height limit towards the middle of the site.
- The area of non-compliance relates to the roof space, which has no windows and will not impact on privacy.
- The proposed buildings reflect the current school facilities requirements including minimum ceiling heights of 2.7m with all classroom spaces achieving minimum ceiling heights and sufficient space for services.

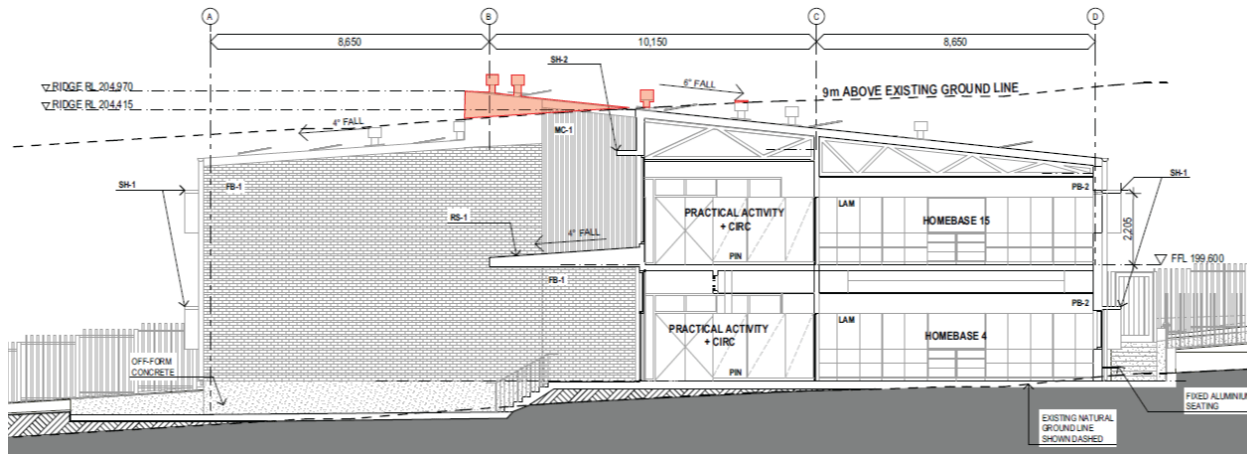
Figure 2 shows the point of variation to the maximum 9 metre height of buildings development standard measured in accordance with the WLEP 2011 definition.

Figure 2 – Proposed view from the south of Block J with non-compliant height identified in red



Source: LahzNimmo Architects

Figure 3 – Proposed view from Woodward Road of Block J with non-compliant height identified in red



Source: LahzNimmo Architects

3. NSW LAND AND ENVIRONMENT COURT CASE LAW (TESTS)

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgements have refined the way variations to development standards are required to be approached.

The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118:

[13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.

*[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [28]; *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].*

[15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.

This clause 4.6 request has been prepared as per the approach set out in *Initial Action Pty Ltd v Woollahra Municipal Council*.

4. COMPLIANCE WITH DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* summarised the five common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council* at [42]-[51].

These five ways are not exhaustive, and 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. These are discussed in the following sections.

4.1 Compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved

Clause 4.3 of the WLEP 2011 outlines objectives for the height of buildings development standard. These objectives are outlined in Table 1. This table demonstrates that the variation is consistent with the objective of this development standard.

Table 1 – Assessment of Consistency with Development Standard Objectives

Objective	Comment
<i>To minimise the impact of new development on neighbouring properties and the streetscape with regard to bulk, overshadowing, privacy and views</i>	The area of non-compliance is non-trafficable and non-habitable roof area, with no windows that will cause privacy impacts. There are no views over the site that will be impacted. Solar access impacts are minimal with the majority of shadows being cast onto Woodward Road. Section 5 of this report outlines the overall impacts of the breach in height which are minimal from a streetscape perspective.
<i>To maintain a size and scale of development that is compatible with the existing and emerging character of the locality,</i>	The proposal is two storeys, which is compatible with the height of the surrounding development including Building G, located south along the Woodward Road frontage. The proposed development remains a two storey building which is the perceived intention of the 9 metre height control and maintains the low-density character of the area.
<i>To ensure that the height of buildings is compatible with the landscape and environmental constraints of the land.</i>	A compliant 9 metre building which meets the standards expected of a school building cannot be attained due to the topography of the site.

4.2 The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary

This way is not relevant in the circumstances of this particular application.

4.3 The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable

The proposed development provides a two storey learning building, consistent with the built form of existing school buildings along the Woodward Road frontage. A 9 metre height limit should result in a two storey development based on a ceiling to floor level of 3.2 metres. Due to the sloping topography of the site, a two storey development exceeds the height limit at the for a proportion of the roof space within the site away from the site boundary.

The proposal consolidates the footprint of the existing demountables providing an improved learning spaces for students. If the proposed building was reduced in height, a greater footprint would be required to facilitate additional learning spaces which would result in a loss of high quality outdoor play. Compliance in the circumstances is therefore unreasonable.

4.4 The development standard has been virtually abandoned or destroyed by the Council's own decisions

This way is not relevant in the circumstances of this particular application.

4.5 The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate

WLEP 2011 includes objectives for the B4 Mixed Use zone. The relevant objectives of the B4 Mixed Use zone are:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
- *To encourage local employment by facilitating home-based business and employment opportunities.*

The proposal satisfies the above objectives as the proposed works are intended to meet the education needs of residents in the Bingara Gorge estate and the broader Wilton community.

4.6 Unreasonable or Unnecessary

Compliance with the development standard is considered unreasonable and unnecessary in the circumstances of the application based on the following:

- The proposal is consistent with the objectives of the development standard as provided in clause 4.3 of the WLEP 2011 and the relevant objectives of the B4 Mixed Use zone;
- The area of non-compliance relates to the non-trafficable roof space, and will not result in overlooking, overshadowing or privacy issues to surrounding residential uses.
- The proposed Block J will replace demountable classrooms which will improve the overall physical appearance and use of the site. The design is responsive to the topography of the site and provides greater opportunity for collaborative learning within the building and improved outdoor learning spaces.

Considering the above and the particular circumstances of this application, it is unreasonable and unnecessary to require compliance with the height of building standard.

5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* states that 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. 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].*

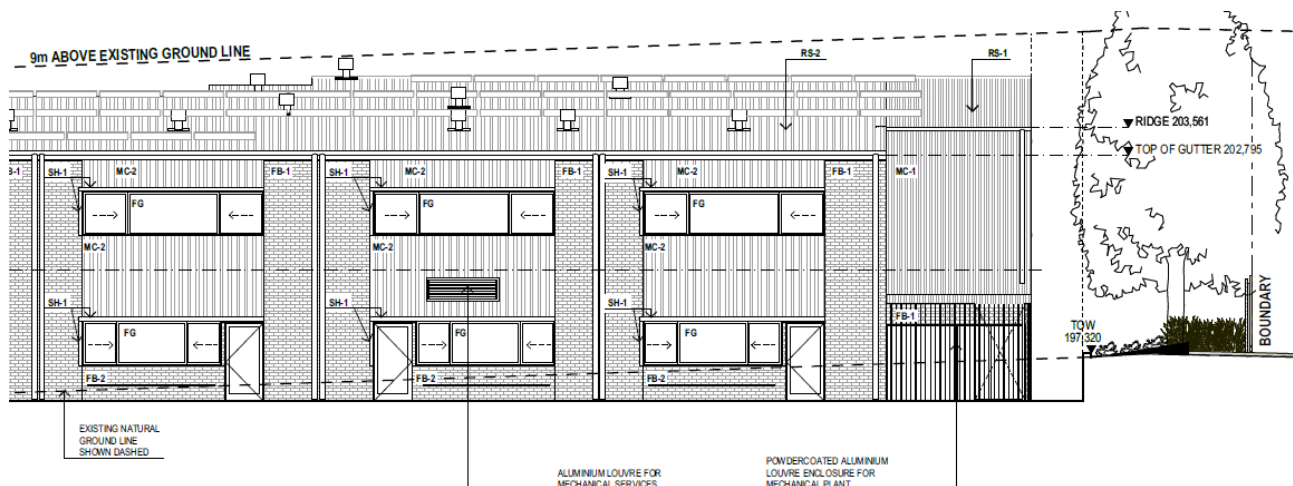
The environmental planning grounds that justify the contravention for the development standard are discussed below.

5.1 Privacy

The proposal has been appropriately designed to prevent privacy impacts on surrounding residents and future students. The proposed Learning Building is located approximately 26 metres from the closest residential properties located on Woodward Road frontage providing sufficient separation distance. Significant tall trees are proposed along the street frontage, screening the building from the street as illustrated in Figure 4.

Along the Woodward Road frontage the proposal is well below the 9 metre height plane and does provide any perceived privacy impacts. The school will continue to generally operate during standard school hours, when most residents are at work. This will ensure privacy is maintained during the early morning, evenings and at night.

Figure 4 – Relationship of new building with site boundary

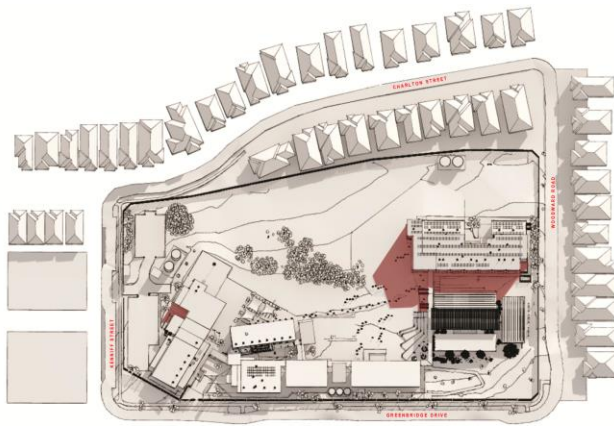


Source: LahzNimmo Architects

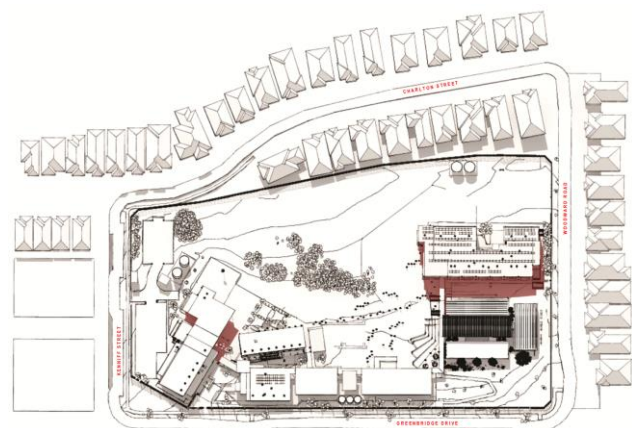
5.2 Overshadowing

Shadow diagrams for 9am, 12pm and 3pm during winter solstice have been prepared by LahzNimmo Architects and are included in the Architectural Package located in **Appendix A**. The shadow diagrams show that there are no significant overshadowing impacts on neighbouring properties with the majority of additional shadowing occurring between 12pm to 3pm and falling onto Woodward Road. Minimal overshadowing falls onto open space provided within the school grounds.

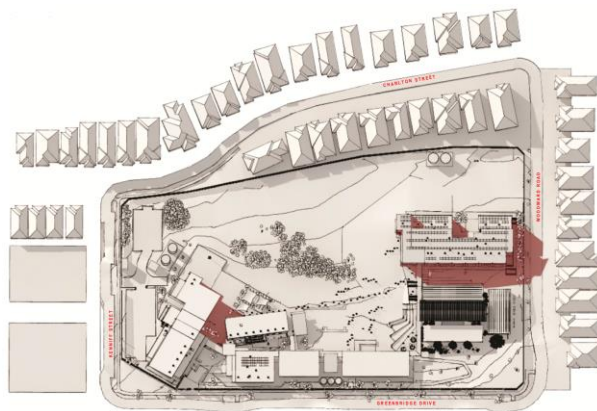
6 Figure 5 - Shadow Impacts on Winter Solstice



Picture 1 - 9.00am shadow impacts

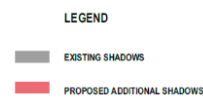


Picture 2 - 12.00pm shadow impacts



Picture 3 – 3.00pm shadow impacts

Source: LahzNimmo Architects



5.3 Streetscape

The bulk and scale of the development has been designed to integrate with the existing Building G to provide a cohesive built form along the Woodward Road frontage. Additional trees are proposed within the front setback along Woodward Road to maintain the green canopy along the street. Additional works are within the site and will not be viewed from the street.

5.4 Public Benefit

The principal aim of the proposal is to provide improved infrastructure to service the education needs of the community within a low-density environment. The proposed variation to the height control of the WLEP does not result in the loss of amenity to the adjoining properties from overshadowing or loss of privacy. The proposed height is therefore considered to be acceptable, particularly when balanced against the benefits of the project which are:

- Improved educational facilities for an existing education establishment;
- The construction of the new Block J will allow for the removal of existing temporary demountables and provide a permanent teaching facility to accommodate future enrolments at Wilton Public School; and
- The siting, scale and design of the new building has been designed having regard to the character of the area.

6. CONCLUSION

In summary, the proposal is considered appropriate and consistent with the objectives and intent of Clause 4.3 of WLEP 2011. Strict compliance with the WLEP in this case is unreasonable and unnecessary because:

- The proposal is consistent with the objectives of Clause 4.3 and the B4 Mixed Use zone;
- The area of non-compliance relates to a non-trafficable and non-habitable area. Accordingly, the potential for adverse privacy and overlooking impacts is considered negligible;
- The design responds positively to the site conditions and the surrounding environment;
- The proposal does not raise significant matters of state or regional significance; and
- The proposal provides critical community infrastructure within an existing educational establishment to meet the needs of the community.

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the height. In the circumstances of this case, flexibility in the application of the height of building development standard should be applied.