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Clause 4.6 Variation Request to the Height of Buildings Development Standard under Clause 4.3 of Camden LEP 2010

Demolition of existing buildings, tree removal, construction of a new school building and expansion of existing car park

347 Narellan Road, Currans Hill

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1 Introduction

1.1 Commission

DFP Planning Pty Ltd (DFP) has been commissioned by EPM Project Managers on behalf of Mt Annan Christian College to prepare a written request ("Variation Request") pursuant to cl4.6 of *Camden Local Environmental Plan 2010* (the LEP) for the proposed new three storey Year 7 – 12 classroom building at 347 Narellan Road, Currans Hill (the Site).

The Proposal includes:

- Demolition of existing buildings, known collectively as Building 11;
- Removal of trees;
- Site excavation;
- Construction of a three storey building to be known as Block C;
- Expansion and relocation of the playing courts near Building 11;
- Realignment of path around the perimeter of the building and new courts and then connecting to a pedestrian track; and
- Alterations to the existing car parking area, including an increase in car parking spaces.

The Stage 3 works will facilitate an increase in student and staff numbers at the school. This DA also seeks approval to increase the site 'population' from the current approved population of 850 students and staff to a population of 1,410 comprising 1,300 students and 110 staff.

The proposed building substantially complies with the 9.5m Height of Buildings development standard under cl4.3 of the LEP although there are minor elements including the screen around the plant/lift overruns, parts of the roof slab and small perimeter roof parapet wall, and minor elements of the uppermost walls exceed the height limit. The maximum height is 10.4m at the north-eastern corner of the roof of the building. This constitutes a maximum variation of 900mm or a 9.5% variation.

Notwithstanding the contravention of the development standard, it is considered 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 because it is consistent with the objectives of the development standard and consistent with the objectives of the RU2 Rural Landscape Zone (cl4.6(4)(a)(ii)).

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 to satisfy the provisions of cl4.6(4) of the LEP.

1.2 Material Relied Upon

This Variation Request has been prepared by DFP based on the Architectural Drawings prepared by Alleanza Architecture, including Drawing No. DA C-910/A – Block C Height Limit Comparison Plan dated 15/09/2021.

2 The Nature of the Variation

Clause 4.3 and the Height of Buildings Map of the LEP designates a maximum building height of 9.5m for the site. The LEP defines 'building height' as:

- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
- (b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*
- including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

The proposed building will exceed the 9.5m limit with the extent of the non-compliance shown in **Figure 1** and generally described as follows:

- Sections of the 'butterfly' roof over the learning street. The maximum variation of this roof is 300mm (9.8m).
- Part of the northern edge of the northern 'wing' of the building. The height of this wall is 9.7m (a variation of 200mm).
- A centrally located metal deck roof which will exceed the building height limit by 500mm at its northern edge and 498mm at its southern edge.
- The roof plant and screen wall around the plant – 10.3m (or 800mm above the 9.5m height limit).
- The western end of a centrally located metal deck roof – 9.63m above ground level (or a variation of 13mm).
- The north eastern corner of the building – 10.4m above ground level (a variation of 900mm).

Figure 1 is an extract from Drawing No. DA C-910/A – Block C Height Limit Comparison Plan prepared by Alleanza Architects showing those sections of the proposed building which exceed the 9.5m building height limit.

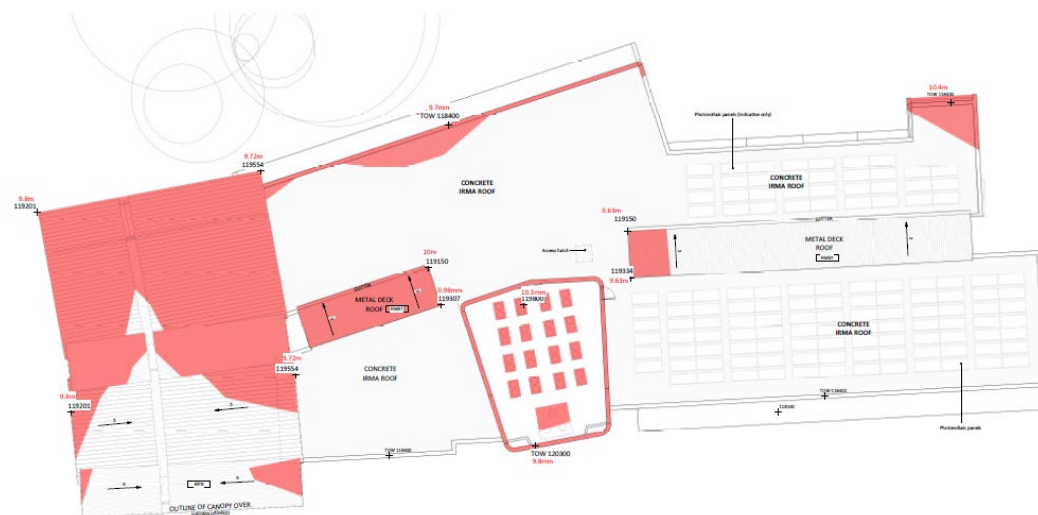


Figure 1 Building Height Diagram (Source: Alleanza Architecture).

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3.1 Clause 4.6(1) - Objectives

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

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

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”), Preston CJ ruled that there is no statutory provision that requires the applicant to demonstrate compliance with these objectives or that the consent authority be satisfied that the development achieves these objectives. Furthermore, neither cl4.6(3) nor cl4.6(4) expressly or impliedly requires that development that contravenes a development standard “*achieve better outcomes for and from development*”.

Accordingly, the remaining subclauses of cl4.6 provide the 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

Clause 4.6(2) provides that:

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

The height of building control in cl4.3 of the LEP is a development standard, defined in Section 1.4 of the EP&A Act as follows (underline emphasis added):

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*

Furthermore, the height of buildings development standard is not expressly excluded from the operation of cl4.6.

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

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

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from 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 and information referred to herein, constitute a written request for the purposes of cl4.6(3) and the following subsections address the justifications required under that subclause.

It will be a matter for the consent authority to consider this written request prior to granting development consent to the DA and when determining the DA, to enunciate that it has satisfied itself of the matters in cl4.6(4) as discussed in the Judgment of *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (“Al Maha”).

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

Clause 4.6(4) provides that consent must not be granted for development that contravenes a development standard unless:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the 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 address 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. It is considered that the environmental impacts of the proposed development are appropriately minimised or mitigated as described in **Table 1**.

Table 1 Summary of Environmental Impact Management

Issue	Discussion
Views	There are no significant views across the site that will be lost as a consequence of the non-compliance or the proposed building more generally, noting that the building has significant setbacks to the site boundaries.
Visual Impact	<p>Due to the topography of the site, which falls from south to north, the height of the proposed building will be similar to that of the recently approved Stage 2 (K – Year 2) buildings. Figure 2 (overpage) demonstrates the height relationship between the approved Stage 2 buildings and the proposed Stage 3 building as well as other existing buildings on the site which will be replaced with new stock over time.</p> <p>Those parts of building that exceed the building height limit will not be able to be seen from the public domain.</p> <p>Views of the building from adjoining properties will not be impacted by the minor breaches in the building height. Notwithstanding that trees adjacent to the northern part of the western boundary are proposed to be removed, the removal of these trees will not result in views of the building from residences to the west of the site as the recently constructed administration building is located between those residences and the proposed building.</p>
Solar Access	As demonstrated in the shadow diagrams included in the architectural plan set, the proposed building will not overshadow any adjoining properties.
Heritage Impact	The site is adjacent to the Upper Canal system which is a State listed heritage item. The scale of the proposed building will not overwhelm or detract from the heritage-listed canal. There are limited view lines to the heritage-listed canal. This, together with the significant buffer between the site of the building and the canal, and the general undulating topography of the area means that the development will not result in a negative impact on the heritage-listed canal.

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Table 1 Summary of Environmental Impact Management

	Figure 3 (overpage) is a perspective view showing the existing view from the canal and the view with the new building
Traffic	The height exceedance does not give rise to any traffic generating floorspace and hence, does not contribute to the traffic generated by the proposed development.

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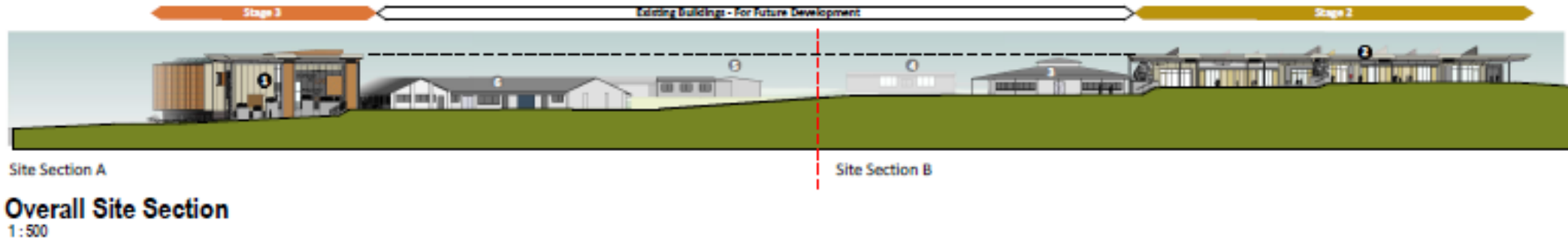


Figure 2 Site section plan showing height relationship between approved Stage 2 buildings (to the right) and proposed Stage 3 building to the left

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Perspective A | Existing view from the canal



Perspective A | Proposed view from the canal

Figure 3 Perspective views from the heritage listed Upper Canal – Existing and Proposed

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Furthermore, the proposed development is considered to be consistent with the objectives of the height of buildings 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 ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,</i>	<p>The proposed development is substantially compliant with the 9.5m height limit with the exception of the roof plant screen and those components of the roof as detailed in Section 2 and Figure 1.</p> <p>The building will not be visible from the public domain.</p> <p>The site is within a rural landscape setting and adjoins a low density residential area. There are a number of large buildings on the site including the existing church, the multi purpose hall and the recently completed administration building – refer perspective view B and view C in the architectural plan set which are reproduced in Figures 4 and 5 below and show the building's contextual fit.</p> <p>Therefore, contextually, the proposed building will not be out of character with existing built form on the site.</p>
(b) <i>to minimise the visual impact, disruption of views, loss of privacy and loss of solar access to existing development,</i>	<p>As discussed in Table 1, the proposal is considered to have negligible impacts on views and will not impact on privacy or solar access.</p>
(c) <i>to minimise the adverse impact of development on heritage conservation areas and heritage items.</i>	<p>As discussed in Table 1, the minor breach in building height will not impact the Upper Canal to the east of the site.</p>



Perspective B | Existing view from the roundabout



Perspective B | Proposed view from the roundabout

Figure 4 Existing and future views towards the proposed building from the northern part of the expanded car park

The proposed building is circled in red in **Figure 5** for clarity.

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Perspective C | Existing view from the car park



Perspective C | Proposed view from the car park

Figure 5 Existing and proposed perspective view looking north east towards the Stage 3 building from the southern end of the car park

Accordingly, for the reasons identified above it is considered that strict compliance with the height of buildings 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 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 site-specific environmental planning grounds that support the proposed variation to the height of buildings development standard in this circumstance include the following:

- **Design** - The new building has been sited at the northern end of the existing campus in order to provide for the integration of the building with the existing campus and the continued operation of the College with minimal disruption during the construction phase.

The building has also been sited to minimise the number of trees required to be removed. Whilst there are large areas of unbuilt upon area within the site, from a functionality and operational perspective, it was determined that providing space for all

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Year 7 to 12 students within one building was an essential design outcome. The accommodation requirements of the forecast student numbers has driven the ultimate size of the building.

The learning spaces of the building have been specifically designed and sized to accommodate a range of learning areas which are capable of being used for a variety of functions, activities and group sizes to maximise opportunities for contemporary teaching and learning.

The proposed building is partly cut into the hillside, in part, reducing its apparent height whilst providing the necessary floor space required to facilitate learning across the 7-12 year group cohorts.

Parts of the butterfly form of the roof of the Learning Street do breach the building height limit. The roof has been designed in this manner for largely practical reasons to allow natural light and ventilation into the Learning Street over the adjacent building parapets.

- **Topography** – The northern part of the site falls away from the southern and central parts of the site. The building has been designed to achieve accessibility to all buildings across the campus. This is considered desirable from a usability perspective and avoids the need for ramps which would result in the building being less integrated with the rest of the campus.
- **Context** – As demonstrated in **Figure 2**, the proposed building has been designed as the northern ‘bookend’ of the buildings located along the eastern side of the campus. The building has been designed to match the height of the recently approved Stage 2 (K – Year 2) buildings which comprise the southern ‘bookend’ of the campus. In this regard the building height is contextually appropriate.

The height breaches will not be seen from the public domain. When viewed from a distance, the minor height breaches would not be readily discernible or offensive from a visual impact perspective.

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 in **Table 1**, the proposal satisfactorily 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.

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 RU2 Rural Landscape Zone is provided at **Table 3**.

Table 3 Assessment against the objectives of the RU2 Rural Landscape Zone

Objective	Assessment
<ul style="list-style-type: none"> • <i>To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.</i> 	The site is not currently used for the purposes of primary industry production. The site has been used for school purposes since at least 1997 (about 25 years) and is unlikely to be used for primary industry production.
<ul style="list-style-type: none"> • <i>To maintain the rural landscape character of the land.</i> 	The site is currently used for the purposes of a school and contains a number of buildings of a character that is not typical of a rural landscape. The proposed building has been designed to complement other existing buildings on the site and is not considered to be out of character with

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Table 3 Assessment against the objectives of the RU2 Rural Landscape Zone

	existing development on the site. The proposed building has been sited in the location of existing buildings which retains the open character of the remainder of the site.
<ul style="list-style-type: none"> To provide for a range of compatible land uses, including extensive agriculture. 	The continued use of the site for the purposes of a school is a use which is compatible with surrounding land uses, including the rural land uses to the east of the site.
<ul style="list-style-type: none"> To protect and enhance areas of scenic value by minimising development and providing visual contrast to nearby urban development. 	The minor breach in the building height limit will not impact on the scenic quality of the rural setting in which it is located. The building will not be readily visible from the urban area to the west of the school site or from Narellan road.
<ul style="list-style-type: none"> To maintain the visual amenity of prominent ridgelines. 	Views towards the ridge to the east of the school site from the west will not be impacted by the minor breach in the building height. As demonstrated in Perspective View C in the architectural plan set, the building will not be readily visible from the west due to other intervening buildings on the site. Perspective View C is reproduced in Figure 5 . This view is looking north east from the southern end of the car park.
<ul style="list-style-type: none"> To permit non-agricultural uses (including tourism-related uses) that are compatible with the agricultural, environmental and conservation values of the land. 	The proposed building will facilitate continued use of the site for the purposes of a school and will allow for increase in student numbers to ensure the school use can continue to be viable. The use of the site for the purposes of a school is one which is considered compatible for the environmental and conservation values of the land and agricultural uses on land to the east.

The assessment in **Table 3** demonstrates that the proposed building is consistent with all the relevant objectives of the building height development standard (being the development standard to be varied) and all 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 *Standard Instrument – Principal Local Environmental Plan (SILEP)* or SEPP 1 subject to conditions.

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%. The proposed variation is a maximum of 10.4m or 9.5% and accordingly, a Council Officer with delegation to determine the DA or the Local Planning Panel may assume concurrence in respect of the variation requested to the height of buildings development standard.

3.6 Clause 4.6(5) - Concurrence Considerations

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

- whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
- the public benefit of maintaining the development standard, and

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- (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 building for this particular site and the nature of the variation and the scale of the proposed development are minor and do not trigger any requirement for substantial augmentation of regional or State infrastructure or services.
- As indicated above, the proposed contravention of the height of buildings development standard is 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.
- 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 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) *clauses 6.1, 6.2 and 6.3.*

The provisions of clause 4.6(8) are not relevant to either the proposed development and/or the height of buildings development standard. Therefore, development consent can be granted to the proposed building.

4 Conclusion

The proposed development contravenes the Height of Buildings development standard under cl4.3 of Camden LEP 2010.

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 cl4.3 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)), notwithstanding the contravention of the Height of Buildings development standard, because the proposed building:

- will not result in environmental harm that cannot be mitigated or minimised to an acceptable level; and
- is consistent with the objectives of the development standard pursuant to cl4.3 of the LEP as:
 - It is substantially compliant with the 9.5m height limit with the exception of minor areas of the roof and the roof plant screen. The building will not be visible from the public domain.
 - Whilst the site is within a rural landscape setting and adjoins a low density residential area, there are a number of large buildings on the site including the existing church, the multi purpose hall and the recently completed administration building. Therefore, contextually, the proposed building is not an inappropriate addition to the landscape and will not be out of character with existing built form on the site.
 - The minor breaches in the building height will not impact on views, privacy and solar access.

There are sufficient environmental planning grounds (cl4.6(3)(a)) to justify the contravention of the Height of Buildings development standard including the sloping topography, maintaining accessibility throughout the school site without the need for ramps which would interrupt the integration of the school campus, design and operational considerations and the absence of adverse environmental amenity 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 development standard (as outlined above); and
- the objectives of the RU2 Rural Landscape Zone.

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.