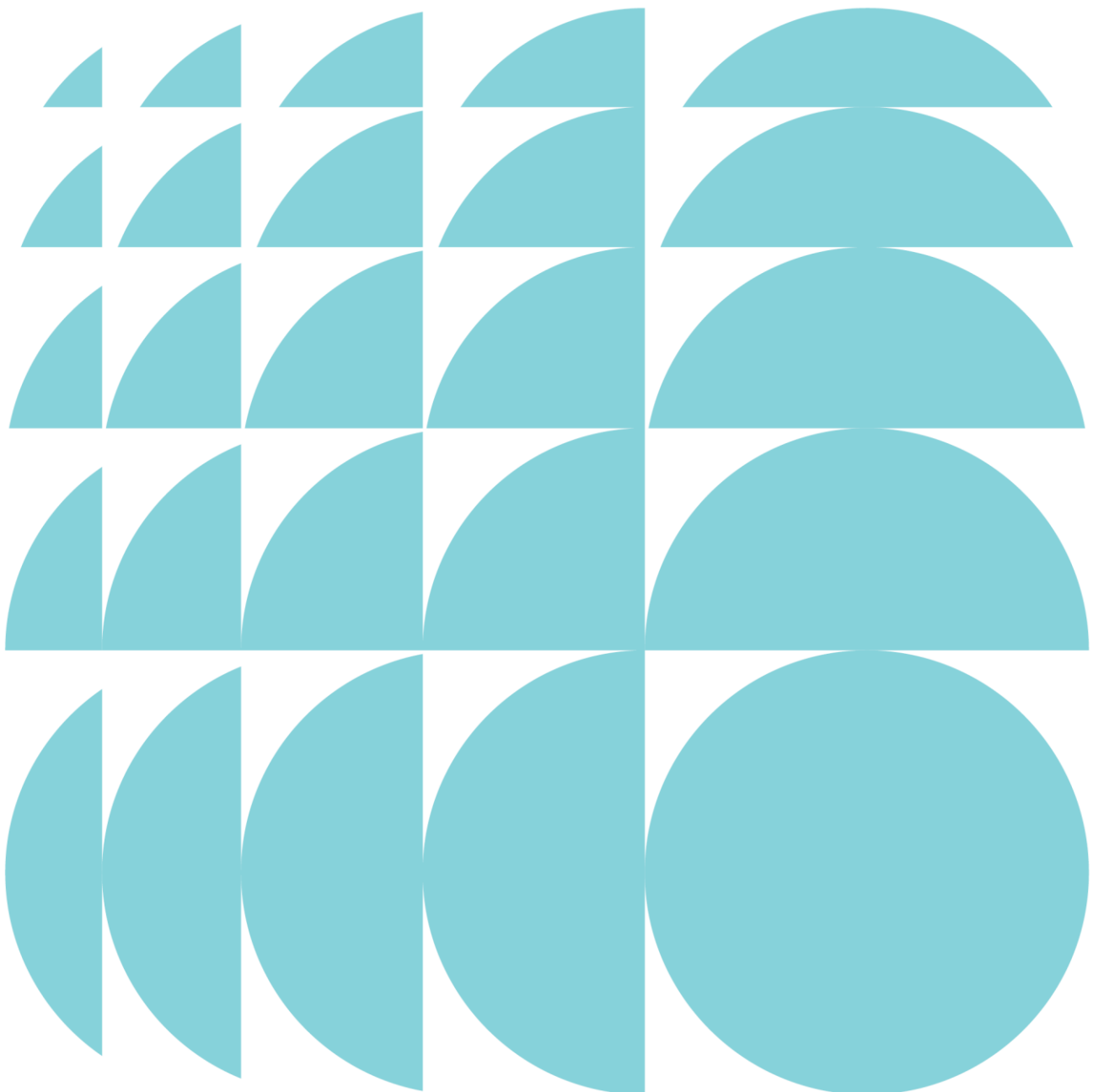


**Clause 4.6 Variation to  
Height of Buildings Control  
Wollondilly LEP 2011**

Picton High School Redevelopment  
480 Argyle Street, Picton

Submitted to Department of Planning  
and Environment  
On behalf of School Infrastructure  
NSW

07 September 2018 | 16734



## 1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of School Infrastructure NSW. It is submitted to Department of Planning and Environment (DPE) in support of a State Significant Development Application (SSDA) for the redevelopment of Picton High School, 480 Argyle Street, Picton.

Clause 4.6 of the Wollondilly Local Environmental Plan 2011 (WLEP) enables the consent authority to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This clause 4.6 variation request relates to the development standard for building height under clause 4.3 of the WLEP and should be read in conjunction with the Environmental Impact Statement (EIS) prepared by Ethos Urban dated 6 August 2018.

This clause 4.6 variation request demonstrates that compliance with the maximum height development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard.

Initial lodgement, test of adequacy and exhibition of the EIS justified the breach of height control under the provisions of Clause 42 of the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* (Education SEPP) which allows development consent to be granted for development for the purpose of a school that is State Significant Development (SSD) even though the development would contravene a development standard under any other environmental planning instrument which the consent is granted. Post exhibition, the DPE have requested this Clause 4.6 Variation statement for abundant caution to justify the breach.

This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the maximum height development standard, the proposed development:

- Is consistent with Clause 42 of the Education SEPP.
- Is consistent with the objectives of Clause 4.3 of the WLEP 2011 relating to height of building development standard;
- Will not give rise to inappropriate impacts, in terms of its scale, form and massing – primarily as the breach of the height development standard is in the centre of the site and a considerable distance from any site boundary;
- Will not impact on any significant view lines and vistas from the public domain; and
- Will not detract from the streetscape in relation to scale, materials and external treatments.

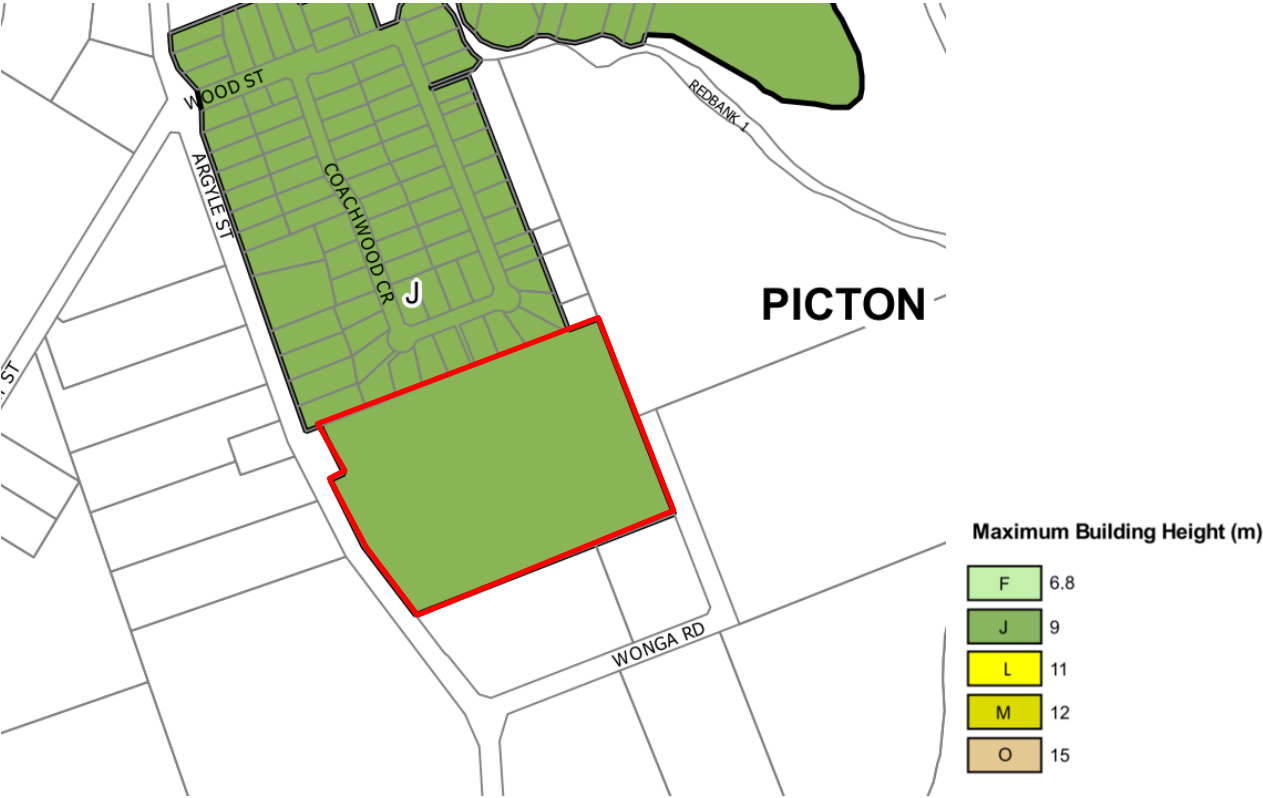
Therefore, the SSDA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the WLEP.

## 2.0 Development Standard to be Varied

This clause 4.6 variation request seeks to justify contravention of the development standard set out in clause 4.3 of the WLEP. Clause 4.3 provides that the maximum height development standard for the Site is 9m.

The proposed maximum height of the building is RL228.664 (at a point of the site where the ground level is RL 214.240), or 14.42m, which equates to a variation of 5.42m.

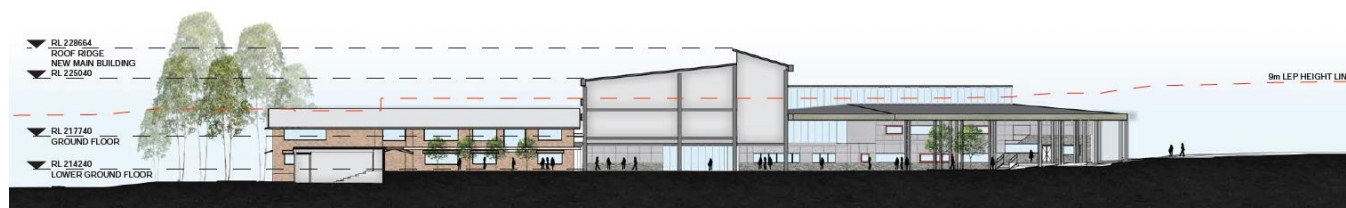
The remainder of the development is compliant with the height development standard and this variation is confined to one part of the building (refer to **Figure 2** and **Figure 3** for location of height breach).



**Figure 1** Extract of Height of Buildings Map (site outlined in red)  
Source Wollondilly Local Environmental Plan 2013



**Figure 2** Plan of Picton High School redevelopment indication location of maximum height under proposal  
Source Billard Leece Partnership



**Figure 3 Elevation of New Main Building Ridge with LEP Height Limit Indicated**

Source Billard Leece Partnership

### 3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the WLEP provides that:

#### 4.6 Exceptions to development standards

- (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.*

Further, clause 4.6(4)(a) of the WLEP provides that:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) *the consent authority is satisfied that:*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
  - (b) *the concurrence of the Secretary has been obtained.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court and the NSW Court of Appeal in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in clause 4.6 of the WLEP, with respect to the maximum building height development standard, are each addressed below, including with regard to these decisions.

#### 3.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the NSW Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the WLEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five methods outlined in *Wehbe* include:

- **First Method:** The objectives of the standard are achieved notwithstanding non-compliance with the standard.
- **Second Method:** The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
- **Third Method:** The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
- **Fourth Method:** The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.
- **Fifth Method:** The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the **First Method**.

### 3.1.1 The underlying objectives or purposes of the development standard are achieved notwithstanding non-compliance with the standard

The objectives of the development standard contained in clause 4.3 of the WLEP are summarised in **Table 1**.

**Table 1 Assessment of the Objectives of the Height Development Standard**

Objective	Proposal
<b>Clause 4.3 (1) The objectives of this clause are as follows:</b>	
(a) to minimise the impact of new development on neighbouring properties and the streetscape with regard to bulk, overshadowing, privacy and views.	<p>The proposed development meets this objective as:</p> <ul style="list-style-type: none"> <li>• the location of the height breach of the WLEP is in the centre of the site in excess of 50m from the northern site boundary, and has no visual impact from the streetscape or any neighbouring properties;</li> <li>• all proposed development fronting the streetscape and adjacent to neighbouring properties is compliant with the 9m height development standard of WLEP;</li> <li>• the proposed height variation will not give rise to an adverse impact on overshadowing, privacy or view impact on the streetscape of any neighbouring properties.</li> </ul>
(b) to maintain a size and scale of development that is compatible with the existing and emerging character of the locality.	<p>The proposed development meets this objective as:</p> <ul style="list-style-type: none"> <li>• there is an existing building that breaches the height control which is proposed to be retained. Block I is being retained, with works proposed including enclosing the internal courtyard with a roof. The proposed main building exceeds the Block I roof line by 1.5m. Therefore, the proposed development is compatible with existing heights on site;</li> <li>• the height transitions from its tallest point in the centre of the site to the residential areas to the north;</li> <li>• whilst the proposed main building is larger than neighbouring development in terms of size and scale, this floorspace is primarily distributed horizontally rather than vertically, and is appropriate for a land use such</li> </ul>



Objective	Proposal
	as a school which differs in form and function to neighbouring residential development.
(c) to ensure that the height of the building is compatible with the landscape and environmental constraints of the land.	<p>The proposed development meets this objective as:</p> <ul style="list-style-type: none"> <li>the height breach of the WLEP is due to topographical features of the site. The site slopes downwards as it moves east from Argyle Street. This slope allows for a two storey street frontage with a central three storey element, stepping back to a two storey built form toward the rear of the site following the natural contours of the land. Whilst this built form is appropriate for the longitudinal sloping east west axis of the site, the 9m height limit descends with the topography, resulting in a breach in the centre of the site whilst the roof line from the street is retained.</li> <li>the school's design therefore utilises the natural gradient and allows for equitable access to all areas of the site with the incorporation of minimal ramps and a single central lift.</li> </ul>

### 3.1.2 Height Variation Permitted by Clause 42 of the Education SEPP

Compliance with the maximum building height is also unreasonable and unnecessary in this instance as Clause 42 of the Education SEPP states that consent may be granted for development for the purpose of a school that is SSD even though the development would contravene a development standard imposed by this or any other environmental instrument under which the consent is granted.

### 3.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

The following site specific environmental grounds further justify the proposed variation to the maximum height development standard:

- The proposed development will not generate any unacceptable adverse environmental impacts to adjoining or nearby landowners;
- The proposal fulfils the objectives of the relevant objectives of the building height control applying to the site (as demonstrated in Section 3.1.1); and
- The proposed variation will not result in a development which is out of character with the prevailing character of the site and area, as well as the desired future character for the Picton area.

### 3.3 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

#### 3.3.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the maximum building height development standard, for the reasons discussed in section 3.1.1 of this report.

#### 3.3.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the R2 Low Density Residential Zone, as demonstrated in **Table 2**.

**Table 2 Assessment of the Objectives of the R2 Low Density Residential Zone**

Objective	Proposal
R2 Low Density Residential Zone	
To provide for the housing needs of the community within a low density residential environment.	As an educational establishment, no housing needs are provided under this proposal.

Objective	Proposal
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The proposal meets this objective by providing an educational establishment that will meet the day to day needs of residents. It will provide for modern education facilities to be provided in the only public high school in the Wollondilly LGA. Many of the buildings at the school are at the end of their usable life and require redevelopment.

### 3.3.3 Overall public interest

The proposed development is in the public interest in that it provides for the redevelopment of an educational facility. Picton High School is the only public high school in the Wollondilly LGA and its redevelopment is required to ensure the ongoing education of an expanding catchment size.

As noted above, the Picton High School redevelopment will provide for modern education facilities to be provided at the site. Many of the buildings at the school are at the end of their usable life and require redevelopment.

The breach of height will have no conceivable impact from the public domain along Argyle Street.

### 3.4 Other Matters for Consideration

Under clause 4.6(5), in deciding whether to grant concurrence, the Director-General must consider the following matters:

(5) *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, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

These matters are addressed in detail below.

#### 3.4.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the maximum height development standard does not raise any matter of significance for State or regional planning. We do note, however, that the proposal is consistent with the most recent metropolitan plan for Sydney, the Greater Sydney Region Plan in that it:

- will provide services and social infrastructure to meet people's changing needs;
- provides for a new and innovative use for an existing school; and
- will assist in providing educational services for a growing catchment in south-western Sydney.

#### 3.4.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

There is no public benefit in maintaining the development standard in terms of State and regional planning objectives. As noted in the preceding sections, the additional height does not give rise to any adverse environmental impacts and is contemplated under Clause 42 of the Education SEPP.

#### 3.4.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence.

There are no other relevant matters requiring consideration.

## 4.0 Conclusion

The assessment above demonstrates that compliance with the maximum building height development standard contained in clause 4.3 of the WLEP is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the maximum height development standard, the proposed development:

- Is consistent with Clause 42 of the Education SEPP.
- Is consistent with the objectives of Clause 4.3 of the WLEP 2011 relating to height of building development standard;
- Will not give rise to inappropriate impacts, in terms of its scale, form and massing – primarily as the breach of the height development standard is in the centre of the site and a considerable distance from any site boundary;
- Will not impact on any significant view lines and vistas from the public domain; and
- Will not detract from the streetscape in relation to scale, materials and external treatments.

Therefore, the SSDA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the WLEP.