

## Appendix A Clause 4.6 Exception to Height Control

### Clause 4.6 Exception Request for Height Control in Gosford LEP 2014

#### 1. Introduction

This request for an exception to a development standard is submitted in respect of the height control development standard within clause 4.3 of the Gosford Local Environmental Plan 2014 (LEP). The request refers to an application for construction of a homebase building and landscaping at Terrigal Public School – Havenview Drive Terrigal.

#### 2. Clause 4.6 Exceptions to Development Standards

Clause 4.6 is set out below (but without subsections (6)-(8) inclusive):

##### **4.6 Exceptions to development standards**

- (1) *The objectives of this clause are 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.*
- (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.*
- (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.*
- (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.*
- (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.*

....

The applicant requests that the maximum height of buildings development standard be varied in this application.

### **3. Development Standard to be varied**

Clause 4.3(2) of the LEP provides that the height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map. The maximum height shown on the relevant map is 8.5 metres. The LEP defines this as the height above existing ground level.

The existing ground level is about RL7.95 on the western side of the building and about RL4.45 on the eastern side. The building appears from the northern façade as two joined pavilions. The proposed height of the building is a parapet on the eastern side of RL15.66, giving a maximum total height of about 11.21 metres on the eastern side. The height above ground drops to about 9.36 metres at the undercover corridor between the ground floor administration and homebase pavilions. The exceedance of the height controls in the eastern pavilion varies between 2.71 metres to 0.86 metre (a 32% to 10% exceedance).

The western pavilion has an existing ground level of about RL7.95 in the west with a maximum roof height in the north western corner at RL14.44, giving a height above natural ground level of approximately 6.49 metres. In the centre of the pavilions (just to the west of the undercover corridor), the maximum lowest natural ground level is at about RL5.6, giving a height of the proposed building at about 8.84 metres (0.34 metres over the height limit or a 4% exceedance).

At the rear of the eastern pavilion the roof height is generally at about RL14.44 over a natural ground level of RL4.5 (at the minimum), giving a height of the building at this point of about 9.94 metres (1.44 metres over the height development control or a 17% exceedance).

### **4. Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?**

Traditionally, consideration of this requirement has been undertaken in accordance with the first test of the 5 part test set out in the judgement of Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 by showing that the objectives of the standard are achieved notwithstanding the non-compliance with the standard. This test was established to meet the

requirements of a SEPP 1 Development Standards objection. That judgement indicates that it is not the only way of establishing that compliance with the development standard is unreasonable or unnecessary, and presents another 4 methods of establishing unreasonableness or unnecessary.

#### 4.1 Wehbe v Pittwater Council

The first test identified under *Wehbe v Pittwater Council* is whether the objectives of the standard are achieved notwithstanding non-compliance with the standard. The objectives of the development standard in clause 4.3 are:

- (a) to establish maximum height limits for buildings,
- (b) to permit building heights that encourage high quality urban form,
- (c) to ensure that buildings and public areas continue to receive satisfactory exposure to sky and sunlight,
- (d) to nominate heights that will provide an appropriate transition in built form and land use intensity,
- (e) to ensure that taller buildings are located appropriately in relation to view corridors and view impacts and in a manner that is complementary to the natural topography of the area,
- (f) to protect public open space from excessive overshadowing and to allow views to identify natural topographical features.

In response to these objectives it is noted:

- (a) *to establish maximum height limits for buildings,*

Noted that maximum heights are set out.

- (b) *to permit building heights that encourage high quality urban form,*

The school is within a general residential area. The design has been undertaken by an architect and provides for articulation, different materials selection, natural ventilation, acoustic and visual privacy from the neighbours, and the height will not impose any additional overshadowing on the adjacent residential properties.

- (c) *to ensure that buildings and public areas continue to receive satisfactory exposure to sky and sunlight,*

As the building is on the southern side of the adjacent residences and on the northern side of the school, there will be no impact caused by overshadowing on public areas or buildings other than the existing school buildings. The proposed building faces north with good access to sunlight.

- (d) *to nominate heights that will provide an appropriate transition in built form and land use intensity,*

The building is set back about 7 metres from the rear boundaries of the residences to the north. The school as a whole is a relatively low intensity land use, with large open play areas on the east and west. The majority of buildings in the school are two storeyed and this will also be a two storey development.

- (e) *to ensure that taller buildings are located appropriately in relation to view corridors and view impacts and in a manner that is complementary to the natural topography of the area,*

The new building is located so as to give focus and structure to the enhanced pedestrian entrance off Havenview Drive. It creates a defined entrance to the school and will direct visitors to the administration area within the building. The pavilion style and undercover entranceway creates an entrance to the site. The building does not block any view corridors and does respond to the natural topography by a slight step down on the eastern side. Ramps and staircases give ready access to the different levels around the building.

- (f) *to protect public open space from excessive overshadowing and to allow views to identify natural topographical features.*

As detailed above there is no increase in overshadowing of public open space, nor are any views impacted.

In conclusion it is demonstrated that the objectives of the standard are achieved notwithstanding non-compliance with the development standard, thereby satisfying the first test set out in *Wehbe v Pittwater Council*.

The next three ways of establishing unreasonable or unnecessary compliance are not relevant to establishing that the development standard is unreasonable or unnecessary however the fifth manner identified by *Wehbe v Pittwater Council* is to establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary”.

The school is established and despite there being SP2 Educational Establishment zoned land under the Gosford LEP in close proximity at Our Lady of the Sea School on Terrigal Drive, and at Wamberal Public School, this site (and Terrigal High School on Terrigal Drive) are both zoned R1 General Residential, where educational establishments are not a permissible use. Other examples of schools being zoned SP2 Educational Establishments are Avoca Beach Public School, Copocabana Public School, Holgate Public School. None of these have a height limit imposed by the LEP. There are other schools in the area which are also zoned R1 such as Gosford Public School and Henry Kendall High School at Gosford, but their height limit is 12 metres.

It does seem somewhat unusual that, in an LEP which does have an SP2 Educational Establishment zoning applicable to some existing public schools, that zoning does not apply to all such schools. Moreover, other schools which have not been given the SP2 zoning have a height limit which is 3.5 metres higher than this site (a 41% increase in height over that allowed for this site). It is therefore quite legitimate to consider that the zoning of this land as residential R1 is inappropriate. Further, that the height standard applying to that zoning on this site is unreasonable, notably because it does not face the street and not impact views. Hence compliance with the standard in this case is also unreasonable and unnecessary.

#### 4.2 Four2Five Pty Ltd v Ashfield Council

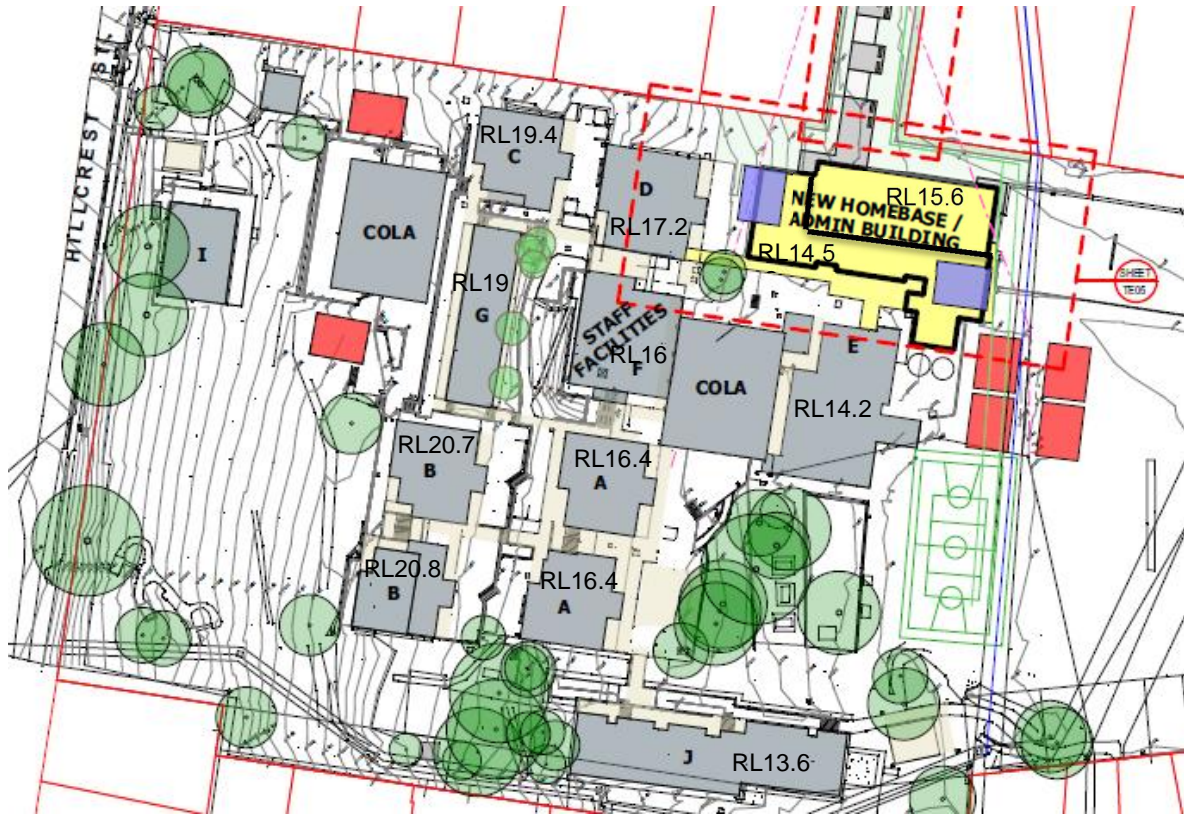
Requests for a clause 4.6 exception have received further recent judicial consideration in the Land & Environment Court appeal judgment by Justice Pain in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and further in the Court of Appeal decision *Four2Five v Ashfield Council* [2015] NSWCA 248 set out in the judgment of Leeming JA. These judgements considered the judgment of Commissioner Pearson in the Land & Environment Court. They

specifically drew a distinction between the test under SEPP 1 (from *Wehbe v Pittwater Council*) and the test under clause 4.6, most particularly with reference to the words in clause 4.6(3)(a) “in the circumstances of the case”. Leeming JA in the Court of Appeal noted that there are additional ways of establishing that compliance is unreasonable or unnecessary in the circumstances of the case, at [16].

Initial interpretation of this provision suggested that the consent authority had the discretion to require that an applicant identify circumstances particular to the site to satisfy clause 4.6(3)(a), that were in addition to simply identifying compliance with the objectives of the standard by generic planning benefits.

In this regard, the particular circumstances of the case to support an increase in the height are:

- The site has a reasonably sharp slope on the western side and continues in a flatter slope where the proposed building is sited. The Department of Education has requirements that seek the greatest accessibility for mobility impaired students and staff, and seek to reduce the number of stairs and ramps internally as much as possible. The eastern half of the homebase building might otherwise have been lowered to better follow the topography of the site, however this would impair accessible movement between the two pavilions. A compromise includes a short ramp and stairs between the two level 1 pavilions;
- The school generally has two level classroom buildings and the proposal follows that similar model;
- Development on the northern side of the school facing Havenview Drive is all two storey with pitched roofs;
- Schools have a duty to provide accessible classroom and circulation spaces and this proposal has sought to enable this duty with the complexities of the sloping site on which the school is situated. The levels of the floors have been determined by the connections to adjacent buildings which were thought to be desirable. For simplicity the pathway coming into the site from Havenview Drive sets the level for the reception and administration areas. The two kinder homebases relate to the courtyard created between them and the two other kinder homebases to the west. The upper levels connect into the homebases above the kinder homebases and also the existing upper level of the Hall. The buildings have been kept as low as possible whilst significantly improving accessibility around a much larger proportion of the school; and
- From the west on the northern side, the building heights fall as illustrated in Figure 1 below.



**Figure 1: Site with Ridgetop RL heights**

Source: EJE Architects and Monteath & Powys survey dated 27.2.17

Strict compliance with the development standard of the maximum height development standard is considered unreasonable and unnecessary because the objectives of the development standard are still achieved by the proposed development and there are specific circumstances peculiar to this building and site which support the increase in height which is proposed when considered against the objectives of the standard.

**5. Clause 4.6(3)(b) Are there sufficient environmental planning grounds to justify contravening the development standard?**

The conclusions arising from the two *Four2Five v Ashfield* cases regarding satisfaction of whether there are sufficient environmental planning grounds to justify contravening the development standard include:

- Merely pointing out the benefits arising from the development will not necessarily be sufficient to constitute environmental planning grounds to justify contravening the development standard in any particular case, at [15] per Leeming JA;
- The grounds found by the Commissioner that the environmental planning grounds relied upon were not particular to the circumstances of the proposed development on that site, is one of fact, at [29] per Pain J; and
- “sufficient” in this context is not a low bar, at [31] per Pain J.

The environmental planning grounds justifying the contravention of the development standard for maximum height in this case include:



- No view are impacted by the increase of height by the proposal;
- No privacy concerns are raised by the proposed increase in height;
- The visual impact on the streetscape from the increased height will be minimal given the setback of the building one lot behind Havenview Drive and the only visibility via the pedestrian access which will be fully landscaped;
- There is no reduction in solar access to any of the residential properties surrounding the site as the building is to the south of the residences;
- The scattering of classrooms over a number of demountable buildings will be prevented by centralised location of the classrooms, promoting efficiency of time management and improved surveillance of the students; and
- The increase in height of up to 2.71 metres does not have any significant environmental impacts.

**6. Clause 4.6(4)(a)(i) The Consent Authority must be satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)**

**6.1 Micaul Holdings Pty Limited v Randwick Council**

In *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386 Morris C considered two clause 4.6 exception requests for FSR and height and was satisfied that the grounds under clause 4.6 had been made out. On appeal (*Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7), Preston CJ did not overturn the finding of the Commissioner to be satisfied about the matters in clause 4.6(4)(a). The Commissioner noted the unusual location and proximity to larger residential flat buildings, and the design excellence and internal amenity of the proposal.

In *Randwick v Micaul* [at 39] Preston CJ indicated:

*“the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary.”*

On its face therefore, the Chief Justice has indicated that the consent authority must be satisfied that the applicant's written request itself has adequately addressed the matters in subclause (3), rather than being directly satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

This Request has considered the objectives of the development standard and found that compliance with the objectives can be achieved. The Request has detailed many factors which are specific to this site and the circumstances of the case which lead to the conclusion that it is unreasonable and unnecessary in the circumstances of the case for compliance with the development standard to be required. The Request has detailed a number of environmental planning grounds to justify contravening the development standard and the consent authority should be satisfied that the Request has adequately addressed the matters set out in clause 4.6(3).

**7. Clause 4.6(4)a)(ii). The Consent Authority must be satisfied that 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**

7.1 Objectives of the Development Standard

The objectives of the development standard are set out in section 4.1 of this Request. That section also carefully considers the proposal's consistency with the objectives of the development standard and finds that the proposal is consistent with the standard's objectives. Additional factors which are in the public interest in respect of those objectives include:

- The building provides a high quality built form which provides for a modern approach to the school, improving wayfinding;
- There is no impact on solar access for any adjoining properties on access to sun and privacy; and
- The building continues the general reduction in height of the buildings as they position down the slope of the school reflecting the topography of the site.

7.2 Objectives of the R1 zone

The objectives of the R1 zone are:

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To ensure that development is compatible with the desired future character of the zone.
- To promote best practice in the design of multi dwelling housing and other similar types of development.
- To ensure that non-residential uses do not adversely affect residential amenity or place demands on services beyond the level reasonably required for multi dwelling housing or other similar types of development.

The proposal is consistent with the objectives of the R1 zone because:

- The proposal upgrades the fundamental requirement to provide satisfactory educational facilities for the residents of the area;
- The proposal is compatible with the desired future character of the area as detailed in section 4.4.1 of the Statement of Environmental Effects. The desired future character is to continue to provide educational resources for the surrounding residential population, protect the scenic and civic qualities of prominent vegetated backdrops to waterfronts, major roads and residential areas and to protect the habitat and scenic values of remnant bushland, wetlands and salt marsh. The desired character clearly references the Terrigal High School



rather than Terrigal Public School. However it is clear that the proposal will provide improved educational resources able to accommodate future technology and students for many years to come; and

- The non-residential use will not adversely affect residential amenity due to the setback from their rear boundaries, the position of the building to the south, and the protection of privacy by the increased landscaping.

As the proposed development is consistent with both the objectives of the standard and the objectives of the zone, clause 4.6(4)(a)(ii) indicates that the proposal is therefore in the public interest.

#### **8. Clause 4.6(4)(b) The concurrence of the Secretary has been obtained**

It is considered that the consent authority can assume concurrence (see *Moskovich v Waverley Council* [2016] NSWLEC 1015 Tuor C at [70].)

#### **9. Clause 4.6(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...**

It is not considered that contravention of the development standard would raise any matter for State or regional environmental planning. The minimal environmental impacts are very localized and will not impact upon the adjoining neighbours or the streetscape. The school will have an improved public face and improved accessible provisions for students and staff.

There are sufficient circumstances particular to this site and this development as detailed above that satisfy the matters set out in clause 4.6(4) such that the public benefit of maintaining the development standard should not preclude the granting of concurrence. There is a public benefit in maintaining the development standard, however, given the objectives of clause 4.6 to provide flexibility and achieve better outcomes, the standard should not be dogmatically followed when there are no significant adverse environmental planning grounds arising from the exceedance.

#### **10. Objectives of clause 4.6**

The specific objectives of Clause 4.6 are:

- (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.*

As demonstrated above the proposal is consistent with the objectives of the development standard and the zone notwithstanding the variation sought to the maximum height. This Request seeks flexibility in applying the standard because of the limited environmental impacts, and because the redevelopment as a whole will improve the amenity and accessibility for the students and teaching staff with sufficient environmental planning grounds to justify the contravention of the standard.

Approval of this clause 4.6 Request will allow for flexibility to relax the development standard in this circumstance, given the public benefit of achieving the improved outcome of accessible classrooms which are collected in a single building rather than over 8 demountable buildings, achieved with minimal environmental impact. This will achieve a better planning outcome for this school than if compliance with the development standard was required.



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