

## CLAUSE 4.6 – EXCEPTIONS TO DEVELOPMENT STANDARDS

Clause 4.6(3) of Warringah LEP provides that development may contravene a development standard if the proposed development is consistent with the objectives of the standard and the zone, and a written request has justified 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.*

The consent authority must also 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.*

A Clause 4.6 request is a contravention of the height development standard as defined under Warringah LEP as,

***Building height (or height of building)*** is defined in the LEP 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 justification for the departure to the building height standard is outlined below.

### 1.1. PROPOSED VARIATION

Pursuant to Clause 4.3 of the LEP, and the accompanying height map, a maximum height limit of 12m applies to the site.

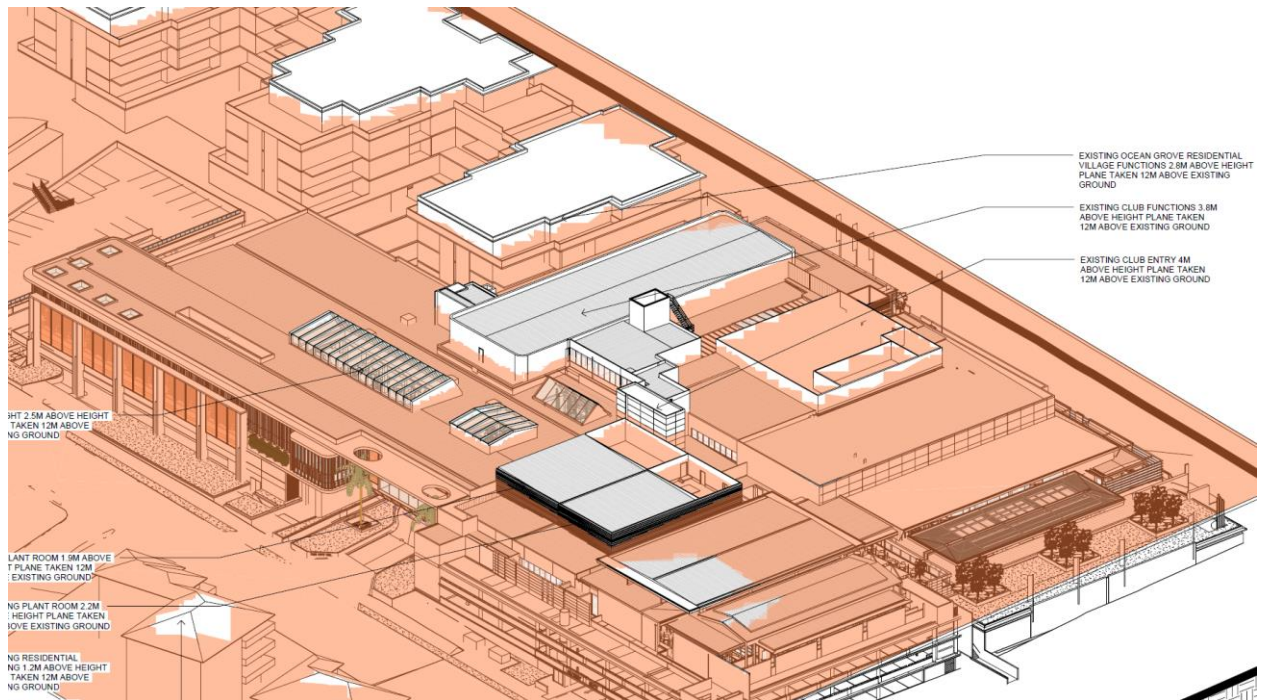
The proposed envelope has a variable height up to a maximum of 14.5m. The variable maximum height reflects the sloping topography of the site, with the vast majority of the envelope being compliant with the 12 metre building height development standard.

Drawing DA-0004 (included in the architectural package and illustrated in the extract in the figure below) illustrates the non-compliances across the site;

- The proposed skylight sits 2.5m above the height limit and is located in the centre of the proposed addition and not visible from the streetscape (*this non compliance forms part of this Clause 4.6 request*), and
- The proposed new plant room sits 1.9m above the height limit (*this non compliance forms part of this Clause 4.6 request*)
- There are a number of non compliant areas where the existing Club building exceeds 12m, namely the existing Club function spaces exceed by 3.8m, existing Clarence Avenue entry exceeds by 4m and the existing plant room which exceeds the height limit by 2.2m.

- Contextually, Oceangrove apartments (exceeding by 2.8m) and the rooves of the Clarence Avenue residential flats (exceeding by 0.9m) on the eastern side of the street are non compliant with the 12m height limit.

Figure 1 – 12m Height Plane



## 1.2. FOUR2FIVE PTY LTD V ASHFIELD COUNCIL [2015] NSW LEC

Recently in the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

- Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
- “The applicant must satisfy the consent authority that **“the objection is well founded,”** and compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That there are sufficient environment planning grounds, ***particular to the circumstances of the proposed development*** (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity); and
- That maintenance of the development ***standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard*** and/or the land use zone which applies to site.

### 1.2.1. Clause 4.3 – Objectives

Clause 4.3 sets out the objectives of the maximum building height development standard. The consistency of the proposed development with these objectives is set out below.

Table 1 – Clause 4.3 Objectives

OBJECTIVES	PROPOSED DEVELOPMENT
(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,	<ul style="list-style-type: none"> <li>The proposed minor additional height responds to the sloping context of the site and relates to existing built form onsite. The built form ensures that the scale and desired character of the area is maintained. Part of the existing Club building as well as adjoining existing developments at the Oceangrove apartments exceed the height limit by 2.5m. The proposed variations are consistent with the existing scale of surrounding developments.</li> </ul>
(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,	<ul style="list-style-type: none"> <li>A view analysis is included in the DA submission. The view analysis has been taken from the apartment building on the western side of Pittwater Road which currently enjoys water views. The analysis clearly demonstrates the negligible impact of the proposed addition. There will be no loss of view as a result of the proposal. The addition will be consistent with existing Club building.</li> </ul>
(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,	<ul style="list-style-type: none"> <li>There would be no impact on the scenic quality of the area, including water views from surrounding residential developments as a result of the proposal.</li> </ul>
(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.	<ul style="list-style-type: none"> <li>The variation in height is contained to the central portion of the site and will not be visible from the public domain. The skylight feature is setback 22m from the eastern boundary and is within the building envelope controls of the DCP. The new plant room is proposed to be positioned adjacent to the existing plant room to the north and is well setback from the northern and eastern boundaries by 18m.</li> <li>This additional height is proposed to be incorporated into the built form and would be consistent with the LEP objective.</li> </ul>

The proposal is therefore consistent with the objectives of Clause 4.3 of the LEP.

### 1.2.2. Justification for the Variation

As per the decision in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, a variation must justify sufficient environmental planning grounds particular to the circumstances of the proposed development and development site rather than grounds that would apply to a similar development on the site or a development in the vicinity.

This Clause 4.6 Statement has been prepared in reference to the above decision. As such, the grounds for the variation are particular to the circumstances of the proposed development noting that the site is sloping and the proposed height responds to the existing topography.

In view of the particular circumstances of this case, strict compliance with Clause 4.3 of the LEP is considered to be both unnecessary and unreasonable on the following environmental planning grounds:

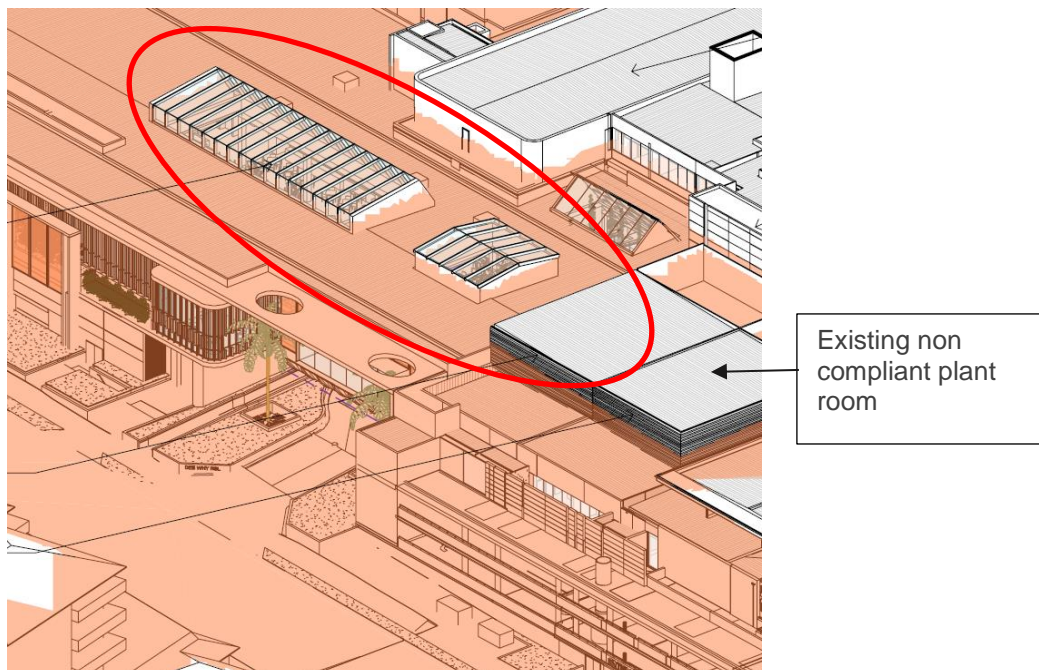
- The proposal responds to the sloping topography of the site which falls both south and east.
- The proposal is consistent with the intent of Clause 4.3 which is to maintain the character of the area and maintain existing views. The proposal achieves this outcome, notwithstanding the proposed numeric variation. This is evident from the accompanying view impact assessment.
- The exceedances in height are not GFA attributable. The proposal ensures an appropriate bulk and scale.
- In this instance, it is considered that removal of the non-complying elements to achieve strict compliance would not result in an improved planning outcome – the additional height does not cause any material impact in terms of privacy or view loss to neighbouring residential areas, or adverse overshadowing to residential properties or the public domain. The proposed minor variation of the skylight element results in an improved internal amenity for the occupants of this facility and a built form in keeping with adjoining development and in essence, would result in a better planning outcome. The provision of a skylight element allows for a quasi outdoor space internally to the building minimising any adverse acoustic impacts that potentially could have occurred if a balcony or external area was proposed as an alternative.
- Despite the additional height, the scale of development along Clarence Avenue will be comparable, thus creating a unified scale in this part of the locality, largely due to the substantial setback of the non compliant elements which at the ground plane would not be perceptible.
- The non-compliance does not result in additional floor area or storeys. It is plant and roof only. Strictly compliance would detract from the unique architectural design of the building, both internally and externally. The glass roof provides natural light to the centre of the building, an area which ordinarily would not receive sunlight. This will further enhance the entry experience and overall enjoyment of the building for occupants.
- DA-0004 (Figure above) demonstrates that the non-compliances are contained to the centre of the site and will not be visible from the public domain.
- The internal courtyard space which sits below the raised skylight is instrumental in containing any acoustic impact to the internal portions of the club. A key focus of the design is to respect the adjoining residential properties. This has been delivered through the provision of what would ordinarily be outdoor terrace areas in the form of indoor spaces centred around the central void



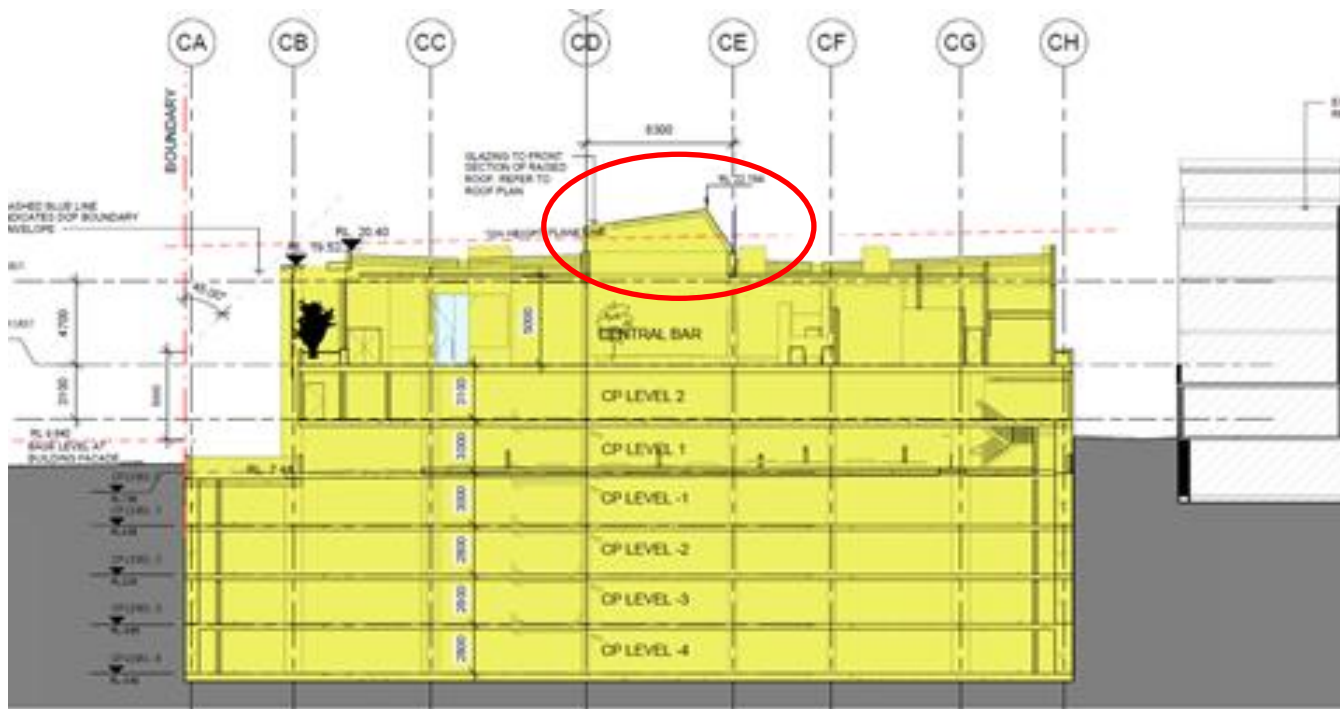
which receives natural light and solar access through the raised skylight. The non-compliance in height results as a measure to contain any acoustic impact on adjoining properties and enhancing the internal amenity of the club extension.

- When looking at the context of the surrounding development, we note that adjoining development to the south has a height limit of 13m under the LEP. Therefore the proposed development will be consistent with any future development that will occur on the adjoining sites. The proposal is consistent with the future envisaged character for the area as per WLEP 2011.
- The proposed non-compliance will not result in any view impacts given the building is comparable with the existing Club and Oceangrove and a view analysis has been undertaken ensuring compatibility with the adjoining and surrounding buildings.
- The areas of non-compliance do not have any privacy impacts.
- Shadow diagrams show that the areas of non-compliance will not impact on the solar access of adjoining properties.
- The amenity of adjoining properties is not significantly impacted on by the non-compliance.
- The scale of development is generally consistent with the Masterplan approval and the proposal will not reduce views or overshadowing.

Figure 2 – Areas of Non-compliance



Picture 1 – Areas of non-compliance in white. Those circled in red are proposed elements.



Picture 2 – The area of non compliance, internalised on the site

### 1.2.3. Public Benefits

The principle aim of the proposal is to provide additional Club offering and car parking and enhanced landscaping and entry treatment along Clarence Avenue. The proposed variation to the height control of the LEP does not result in the loss of amenity to the adjoining properties and is therefore considered to be acceptable particularly when balanced against the benefits of the project which are:

- Provide expanded Club space connecting to an established Club site and use.
- Visual improvements to the Clarence Avenue streetscape and the area with a high quality building design and finishes.
- Activation of the Clarence Avenue frontage through the inclusion of a unique façade including a design that addresses the streetscape and engages with the public domain.
- The additional required building height will not reduce privacy, increase overshadowing or present visual impact to surrounding properties. The shadow diagrams accompanying the application demonstrate that appropriate solar access will be retained to the adjoining properties.
- The design approach to internalise external areas or improve the internal amenity through the provision of a skylight through the centre of the building as ensured that there is no acoustic impact on the surrounding residential properties.
- It is considered that the proposed height variation will not be contrary to the public interest. The Figures above demonstrates that the proposal is consistent with the objectives of the building height standard.

#### **1.2.4. Concurrence of the Secretary**

Clause 4.6(4)(b) requires that the concurrence of the Secretary has been obtained.

Clause 4.6(5) 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, and*
- (b) The public benefit of maintaining the standard*
- (c) Any other matters required to be taken into consideration by the Secretary before granting concurrence.*

The contravention of the standard does not result in a matter of regional or state significance. Whilst the proposal results in a variation to the height standard, it is considered that strict compliance with the standard would not itself result in a public benefit. The additional height relates predominantly to an architectural feature and essential plant services of the building improving the space for the public and patrons of the club.

The proposal is consistent with the existing scale of development. The additional height is complementary to the surrounding built form.

### **1.3. SUMMARY**

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

- The proposed increase in height (of a maximum of 2.5m) is negligible when assessed in the context of the existing development onsite and that of the surrounding built form.
- The proposed variation is minor in nature and allows for the development of a constrained site in keeping with scale and context of surrounding development and of that envisaged by the WDCP.
- The exceedances in height are not GFA attributable and the proposal complies with FSR to ensure an appropriate bulk and scale.
- The non-compliance with the height standard does not result in any loss of view, over-shadowing or privacy impacts on any surrounding or adjoining development or from the public domain.

Therefore strict compliance with the development standard is therefore considered to be unnecessary and unreasonable in this case.