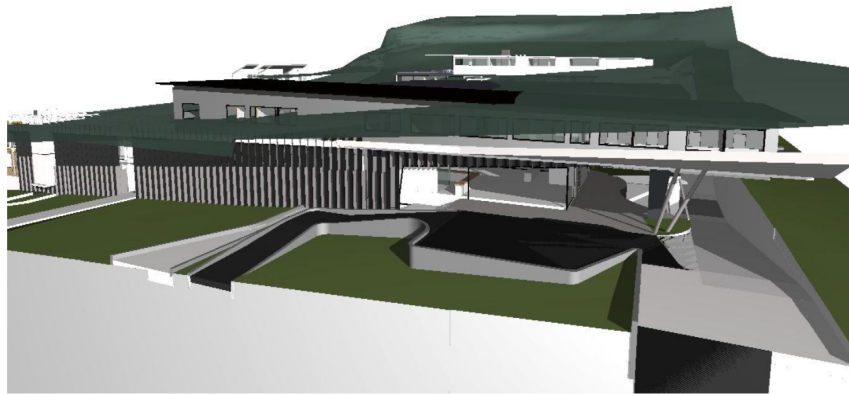


ANNEXURE 1: CLAUSE 4.6 VARIATION

Height Departures

As shown on the sections below, the proposed development comprises a 2-3 storey built form that predominantly complies with the 8.5 maximum building height control with the exception of a small proportion of the building, lift over-run and roof that is shown on the 3D extract below.



As shown on the 3D height plane diagram above the majority of the development is below the height limit, with the exception of a small portion of the hospital wing and roof form.

Given the building height departures a Clause 4.6 variation request has been prepared, noting that the request addresses a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*.

The key tests or requirements arising from the above judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is “*consistent with*” the objectives of the development standard and zone is not a requirement to “*achieve*” those objectives. It is a requirement that the development be compatible with the objectives, rather than having to ‘achieve’ the objectives.
- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.

- When pursuing a clause 4.6 variation request it is appropriate to demonstrate how the proposal achieves a better outcome than a complying scheme; and
- The proposal is required to be in 'the public interest'.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the building height standard;
- Demonstrating consistency with the LEP including the RU4 zoning; and
- Satisfying the relevant provisions of Clause 4.6.

These matters are addressed below, noting that the proposal presents a site responsive development by responding to the cross-fall on the site that means that small portions of the building are beyond the height limit. This could be eliminated with the cutting of the building but this would be a sub-optimal design outcome.

Further the proposal is designed to retention of the required view corridors.

Building Height Context Considerations: Better Development Outcome

The proposed non-compliance occurs as a means of achieving a better development outcome because it enables the development to achieve the following.

Response to Topography: It is also noted that the stepped building form is a direct design response to the cross-fall experienced by the site.

Consideration of Clause 4.6

Clause 4.6 of the Warringah Local Environmental Plan 2011 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

(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 Director-General has been obtained.

(5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

Each of these provisions are addressed in turn.

Clause 4.6(3)

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved. The objectives of the building height development standard are stated as:

(1) The objectives of this clause are as follows:

- (a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
- (d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

It is noted that Schedule 1 of the WLEP 2011 permits additional land uses within the subject site including hospitals.

The current proposal remains consistent with the objectives under the LEP based on the following:

- The extent of departure is not visible at street level;
- Buildings have been stepped to address the site's cross-fall that will contribute towards minimising building height, bulk and scale when viewed from the street level.
- The size of the site permits sufficient separation of building on site and also from neighbouring land parcels and also have negligible impacts in terms of privacy and overshadowing to adjoining properties.
- The proposed development will permit the site to develop to its full zoning potential whilst providing valuable health services to the local community.
- The proposed development complies with key planning controls applying to the proposal including landscaping requirements and prescribed setbacks.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances.

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

Clause 4.6(4)

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the public interest as it remains consistent with the objectives of the building height control. In addition, the proposal is predominantly consistent with the objectives of the RU4 zone (noting compliance with Schedule 1 of the WLEP 2011) being:

- *To enable sustainable primary industry and other compatible land uses.*
- *To encourage and promote diversity and employment opportunities in relation to primary industry enterprises, particularly those that require small lots or that are more intensive in nature.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
 - *To minimise the impact of development on long distance views of the area and on views to and from adjacent national parks and bushlands.*
- *To maintain and enhance the natural landscape including landform and vegetation*
- *To ensure low intensity of land uses other than land uses that are primary industry enterprises.*
- *To maintain the rural and scenic character of the land.*

The proposal ensures that the development site is able to be developed to its full zoning potential whilst undertaking relevant environmental protection and bushfire protection measures. The proposal will ensure valuable health services and subsequent employment opportunities are made available to the local community

It is understood that the concurrence of the Director-General can be assumed in the current circumstances.

Clause 4.6(5)

As addressed, it is understood the concurrence of the Director-General may be assumed in this circumstance, however the following points are made in relation to this clause:

- a) The contravention of the building height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal; and
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the building height control is acceptable in the circumstances given the underlying objectives are achieved and it will not set an undesirable precedent for future development within the locality based on the observed building forms in the locality and also not result in amenity impact to neighbouring properties. The significant public benefit of the proposal must be emphasised in considering the merits of the departure to the height control- i.e. delivery of valuable health services.

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances.

The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed.

The objection is well founded and taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.