

Statement of Environmental Effects

Alternation and Addition to the Existing Lake Macquarie Private Hospital
3 Sydney Street, Gateshead (Lot 200 in DP1060815)

APPENDIX 8 – Clause 4.6 Variation Report



Clause 4.6 Variation Report Height of Buildings

Alterations and Additions to the Existing Lake Macquarie Private Hospital

3 Sydney Street, Gateshead

Lot 90 DP1233497

Prepared by Willowtree Planning Pty Ltd on
behalf of Ramsay Health Care

March 2018

Clause 4.6 Variation – Height of Buildings

Alterations and Additions to the existing Lake Macquarie Private Hospital
3 Sydney Street, Gateshead (Lot 90, DP1233497)

Document Control Table

Document Reference:	WTJ18-013 Gateshead, 3 Sydney Street		
Date	Version	Author	Checked By
27 February 2018	Draft	M Prince	A Cowan
15 March 2018	Final	M Prince	A Cowan

© 2018 Willowtree Planning Pty Ltd

This document contains material protected under copyright and intellectual property laws and is to be used only by and for the intended client. Any unauthorised reprint or use of this material beyond the purpose for which it was created is prohibited. No part of this work may be copied, reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system without express written permission from Willowtree Planning Pty Ltd.

Clause 4.6 Variation – Height of Buildings

Alterations and Additions to the existing Lake Macquarie Private Hospital
3 Sydney Street, Gateshead (Lot 90, DP1233497)

TABLE OF CONTENTS

PART A	PRELIMINARY	4
1.1	INTRODUCTION.....	4
1.2	PROPOSED NON-COMPLIANCE	4
PART B	THRESHOLDS THAT MUST BE MET	5
2.1	CLAUSE 4.6 OF THE LMLEP2014	5
2.2	CASE LAW	5
PART C	STANDARD BEING OBJECTED TO	7
3.1	CLAUSE 4.3 HEIGHT OF BUILDINGS OF THE LMLEP2014	7
PART D	PROPOSED VARIATION TO CLAUSE 4.3 HEIGHT OF BUILDINGS.....	8
4.1	OBJECTIVES OF THE CLAUSE 4.3 HEIGHT OF BUILDINGS STANDARD UNDER LMLEP2014	8
4.2	OBJECTIVES OF THE ZONE.....	8
4.3	ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY	8
4.4	SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD.....	9
4.5	PUBLIC INTEREST	9
4.6	PUBLIC BENEFIT IN MAINTAINING THE CLAUSE 4.3 HEIGHT OF BUILDINGS CONTROL.....	10
4.7	SUMMARY.....	10
PART E CONCLUSION		11
4.8	RECOMMENDATION	11

Clause 4.6 Variation – Height of Buildings

Alteration and Addition to Lake Macquarie Private Hospital
3 Sydney Street, Gateshead, Lot 90 in DP1233497

PART A PRELIMINARY**1.1 INTRODUCTION**

This Clause 4.6 Variation request has been prepared in support of a Development Application (DA) for the proposed refurbishment and extension of an existing hospital at 3 Sydney Street, Gateshead. The site is legally described as Lot 90 in DP1233497. The proposed non-compliance is related to the building height under Clause 4.3. of the *Lake Macquarie Local Environmental Plan 2014* (LMLEP2014). This Variation request has therefore been prepared in accordance with Clause 4.6 of LMLEP2014, which include the following objectives:

- (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.*

1.2 PROPOSED NON-COMPLIANCE

Under the provisions of Clause 4.3 in LMLEP2014, the site is subject to a maximum building height of 10m. The proposed development would result in a building height of 12.85m. The proposed development therefore exceeds the Clause 4.3 building height control of 10m applicable to the site.

LMLEP 2014 Clause	LMLEP 2014 Development Standard	Proposed Non-Compliance	Variation Percentage
Clause 4.3 Height of Buildings	10.0m	12.85m	28.5%

This Clause 4.6 Variation request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards under LMLEP 2014. It considers various planning controls, strategic planning objectives and existing characteristics of the site, and concludes that the proposed building height non-compliance is the best means of achieving the objective of encouraging orderly and economic use and development of land under section 5 of the *Environmental Planning and Assessment Act 1979*.

Clause 4.6 Variation – Height of Buildings

Lake Macquarie Private Hospital – 3 Sydney Street, Gateshead, Lot 90 in DP1233497, WTJ18-013

PART B THRESHOLDS THAT MUST BE MET**2.1 CLAUSE 4.6 OF THE LMLEP2014**

In accordance with Clause 4.6 of LMLEP2014 Council is required to consider the following Subclauses:

(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.*

These matters are responded to in Part D of this Clause 4.6 Variation.

2.2 CASE LAW

Relevant case law on the application of the standard Local Environmental Plan Clause 4.6 provisions has established the following principles:

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, which emphasised that the proponent must address the following:
 - Compliance with the development standard is unreasonable and unnecessary in the circumstances;
 - There are sufficient environmental planning grounds to justify contravening the development standard;
 - The development is in the public interest;
 - The development is consistent with the objectives of the particular standard; and
 - The development is consistent with the objectives for development within the zone;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, which held that the degree of satisfaction required under Subclause 4.6(4) is a matter of discretion for the consent authority;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827, which emphasised the need to demonstrate that the objectives of the relevant development standard are nevertheless achieved, despite the numerical standard being exceeded. Justification is then to be provided on environmental planning grounds. Wehbe sets out five ways in which numerical compliance with a development standard might be considered unreasonable or unnecessary as follows:
 - The objectives of the standard are achieved notwithstanding the non-compliance with the standard;

Clause 4.6 Variation – Height of Buildings

Lake Macquarie Private Hospital – 3 Sydney Street, Gateshead, Lot 90 in DP1233497, WTJ18-013

- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- 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; or
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

These matters are responded to in Part D of this Clause 4.6 Variation.

Clause 4.6 Variation – Height of Buildings

Lake Macquarie Private Hospital – 3 Sydney Street, Gateshead, Lot 90 in DP1233497, WTJ18-013

PART C STANDARD BEING OBJECTED TO**3.1 CLAUSE 4.3 HEIGHT OF BUILDINGS OF THE LMLEP2014**

The development standard being requested to be varied is **Clause 4.3 Height of Buildings** of LMLEP2014.

Table 1 outlines the proposed Clause 4.6 Variation to the LMLEP2014 Clause 4.3.

Table 1 Proposed Building Height Variation – LMLEP2014			
LMLEP2014 Clause	LMLEP2014 Development Standard	Proposed Development Non-Compliance	Percentage of Variation
Clause 4.3 of Height of Buildings	Clause 4.3 of LMLEP2014 prescribes a maximum building height of 10m for the subject site.	The proposed development seeks consent for a building height of 12.85m	The proposed variation is 28.5%

The proposed development seeks approval for the refurbishment and extension of the existing private hospital facility at 3 Sydney Street, Gateshead. The proposed development would result in a building height of 12.85m under Clause 4.3 of LMLEP2014.

Clause 4.6 Variation – Height of Buildings

Lake Macquarie Private Hospital – 3 Sydney Street, Gateshead, Lot 90 in DP1233497, WTJ18-013

PART D PROPOSED VARIATION TO CLAUSE 4.3 HEIGHT OF BUILDINGS**4.1 OBJECTIVES OF THE CLAUSE 4.3 HEIGHT OF BUILDINGS STANDARD UNDER LMLEP2014**

A key determination of the appropriateness of a Clause 4.6 Variation to a development standard is the proposed development's compliance with the underlying objectives and purpose of that development standard. Indeed, *Wehbe v Pittwater Council* recognized this as one of the ways in which a variation to development standards might be justified (refer to **Section 2.2**). In *Four2Five Pty Ltd v Ashfield Council*, it was found that the proponent must demonstrate compliance with these objectives (refer to **Section 2.2**).

Therefore, while the site is subject to a specified numerical control for building height, the objectives and underlying purpose behind the development standard are basic issues for consideration in the development assessment process.

The objectives of Clause 4.3 under the LMLEP2014 are as follows:

- (a) to ensure the height of buildings are appropriate for their location,*
- (b) to permit building heights that encourage high quality urban form.*

The height of the proposed development would be in keeping with the surrounding built form elements of this health and education precinct, including the Lake Macquarie Specialist Medical Centre immediately south across from the subject site, Wiripaang Public School further south down Pacific Highway, and St Mary's Catholic College to the east of the subject site across Pacific Highway.

4.2 OBJECTIVES OF THE ZONE

The site is currently zoned R3 Medium density residential under LMLEP2014. The proposed development is consistent with the following R3 zone objectives:

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposed development would allow for further provision of facilities and services to meet the day to day needs of the residents within the immediate vicinity of the subject site and greater Hunter Region.

4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

Subclause 4.6(3)(a) and the judgement in *Four2Five Pty Ltd v Ashfield Council* (refer to **Section 2.2**) emphasise the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances.

The proposed development is consistent with the existing (and desired) character of the site and the surrounding area. The proposed contravention of the development standard will not result in any built amenity impacts such as view loss or privacy loss or increased overshadowing.

The development will significantly retain the original built form, including roof form and massing of the building, whilst providing materials which are not considered to result in any adverse impact on the existing building materials.

The proposed exceedance of the building height will retain compatibility with the surrounding development and the environmental planning framework in terms of visual appearance, and adverse

Clause 4.6 Variation – Height of Buildings

Lake Macquarie Private Hospital – 3 Sydney Street, Gateshead, Lot 90 in DP1233497, WTJ18-013

environmental impacts as the proposed height non-compliance relates to works undertaken on the portion of the site with the lowest RL level.

No adverse environmental impacts onto the surrounding environment have been identified.

The abovementioned justifications are considered valid and in this instance the proposed Clause 4.6 Variation is considered to be acceptable. The proposed development is integrated within the existing Lake Macquarie Private Hospital precinct and represents a more efficient use of the site. The objectives of the relevant clause and R3 medium density residential zone would be upheld as a result of the proposed development.

4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

The variation to the development standard for height of buildings is considered well founded in this instance as:

- The proposed development is consistent with the underlying objective or purpose of the standard as demonstrated in **Section 4.1**;
- The proposed contravention of the development standard results from an addition to the existing portion of the building for the purposes of a passenger lift shaft that contravenes the building height provision by 2.85m, pursuant to Clause 4.3 of the LMLEP 2014. In this regard, no adverse environmental impacts with regard to excessive bulk and scale, overshadowing, loss of views or privacy due to the physical composition of the lift shaft in relation to the rest of the buildings at the facility. It should be noted that the subject parcel of land falls from the west to the east, with the building height contravention located in the eastern portion of the site.
- The proposed development will remain compatible with existing adjoining residential land uses in light of the above;
- Compliance with the remaining development standards applicable to the site is achieved.

4.5 PUBLIC INTEREST

As outlined in **Section 2.2**, *Four2Five Pty Ltd v Ashfield Council* emphasised that it is for the proponent to demonstrate that the proposed non-compliance with the development standard is in the public interest. Subclause 4.6(4)(a)(ii) requires the proposed development be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

Sections 4.1 and **4.2** have already demonstrated how the proposed development is consistent with the objectives of both Clause 4.3 and the R3 Medium density residential zone under the LMLEP2014.

In *Lane Cove Council v Orca Partners Management Pty Ltd (No 2)* [2015] NSWLEC 52, Sheahan J referred to the question of public interest with respect to planning matters as a consideration of whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development.

The public advantages of the proposed development are as follows:

- Attracting a greater number and diversity of medical practitioners into the locality;
- Making efficient use of a site consistent with the Lake Macquarie City Lifestyle 2030 Strategy;
- Enabling an opportunity for increased employment due to increased hospital capacity;
- Increased public benefit in the form of a day surgery;

Clause 4.6 Variation – Height of Buildings

Lake Macquarie Private Hospital – 3 Sydney Street, Gateshead, Lot 90 in DP1233497, WTJ18-013

There are no significant public disadvantages which would result from the proposed development.

The proposed development is therefore considered to be justified on public interest grounds.

4.6 PUBLIC BENEFIT IN MAINTAINING THE CLAUSE 4.3 HEIGHT OF BUILDINGS CONTROL

Given that strict compliance with the Clause 4.3 building height control would result in the existing facility not being able to provide further required health care services in the locality, there is no genuine public benefit in maintaining this strict building height control at the site.

4.7 SUMMARY

For the reasons outlined above, it is considered that the objection to Clause 4.3 of LMLEP2014 is well-founded in this instance and the granting of a Clause 4.6 Variation to the development standard is appropriate in the circumstances. Furthermore, the objection is considered to be well founded for the following reasons as outlined in Clause 4.6 of the LMLEP2014, *Four2Five Pty Ltd v Ashfield Council* and *Wehbe v Pittwater Council*:

- Compliance with the development standard is unreasonable and unnecessary in the circumstances;
- There are sufficient environmental planning grounds to justify contravening the development standard;
- The development is in the public interest;
- The development is consistent with the objectives of the particular standard;
- The development is consistent with the objectives for development within the zone;
- The objectives of the standard are achieved notwithstanding the non-compliance with the standard;
- The public benefit in maintaining strict compliance with the development standard would be negligible.

Overall, it is considered that the proposed Clause 4.6 Variation to the maximum building height control is entirely appropriate and can be clearly justified having regard to the matters listed within LMLEP2014 Clause 4.6.

Clause 4.6 Variation – Height of Buildings

Lake Macquarie Private Hospital – 3 Sydney Street, Gateshead, Lot 90 in DP1233497, WTJ18-013

PART E CONCLUSION**4.8 RECOMMENDATION**

It is requested that Lake Macquarie City Council exercise its discretion (as identified in *Randwick City Council v Micaul Holdings Pty Ltd* – refer to **Section 2.2**) and find that this Clause 4.6 Variation adequately addresses the matters required to be demonstrated by Subclause 4.6(3) of the LMLEP2014 (refer to **Section 2.1**).

This is particularly the case given the proposed development's otherwise compliance with the LMLEP2014 and LMDCP2014, and the site's strategic suitability for the proposed development at both a local and State government level.