
Clause 4.6 Request to vary a Development Standard

For:

**Lot 1667 DP 233439 & lot 1868 DP 233438
ILLAWARRA SPORTS COMPLEX**

Prepared for:

Wollongong City Council

Updated November 2021

Prepared by:

FACILITY DESIGN GROUP – ARCHITECTS

Ph: (02)4446 0777 Fax: (02)4446 1077

CONTENTS

1.Introduction

2.Planning Overview

3.Proposed Development (amended plans)

4.Legislative Context

4.1. Clause 4.6 Exceptions to Development Standards

4.1.1. Clause 4.6(3)

4.1.2. Clause 4.6(4)

4.1.3. Clause 4.6(5)

4.2. Relevant Judgements - NSW Land and Environment Court

4.2.1. Winten Property Group Limited v North Sydney Council (2001)

4.2.2. Wehbe v Pittwater Council (2007)

4.2.3. Four2Five Pty Ltd v Ashfield Council (2015)

5. Assessment of the Variation to building height development standard

5.1 Clause 4.6(3)(a) – Compliance is Unreasonable or Unnecessary

5.2 Clause 4.6(3)(b) – Grounds to Justify Contravening the Development Standard

5.3 Wehbe Tests

5.4 Clause 4.6(4) – Consistency with Objectives

5.5 Clause 4.6(5)(a) – Matters of Significance for State of Regional Planning

5.6 Clause 4.6(5)(b) – Public Benefit in Maintaining the Development Standard

5.7 How Would Strict Compliance Hinder the Attainment of the Objectives Specified in Section

5.8. Is the Objection Well Founded?

6. Conclusion

1. Introduction

This is a written request (the Request) to seek a variation to a development standard in accordance with the provisions of Clause 4.6 Exception to Development Standards of the *Wollongong Local Environmental Plan 2009* (WLEP 2009).

This Request relates to Clause 4.3 Height of Buildings of the WLEP 2009.

This Request has considered the detailed guidance within the NSW Department of Planning and Environment (DP&E) guideline *Varying Development Standards: A Guide, August 2011* (DP&E Guide) and planning system circular PS 17-006 *Varying Development Standards, December 2017*, and addresses the findings and established principles (as relevant) of the following judgements of the NSW Land and Environment Court (NSW LEC):

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*;
- *Wehbe v Pittwater Council [2007] NSWLEC 827*; and
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 and [2015] NSWCA 248*.

The following sections of this Request critically analyse the proposed encroachments into the height plane, their impact and reasonableness.

This analysis demonstrates that an exception to the building height development standard is warranted in this instance and will provide for a significantly better urban outcome than a compliant development.

2. Planning Overview

The *Standard Instrument (Local Environmental Plans) Order 2006* was introduced to create a common format for local environmental plans across NSW and all councils have now adopted local environmental plans based on the Standard Instrument (SI).

The SI includes various development standards as a means to achieving environmental planning objectives and these standards can be numerical or performance based.

The DP&E Guide recommends that any Request to vary a development standard should confirm the planning context and relevant controls to assist the consent authority's assessment.

Clause 4.6 of the SI allows a consent authority to consider and grant consent to a development even in the circumstance where that development would contravene a development standard. Importantly, on land where a SI applies and Clause 4.6 is relevant, the powers *State Environmental Planning Policy No.1 – Development Standards* do not apply.

The DP&E Guide confirms that the NSW planning system allows for flexibility in planning

controls, in certain circumstances, through the provisions of Clause 4.6 of the SI.

The DP&E Guide recommends that any Request to vary a development standard should confirm the planning context and relevant controls to assist the consent authority's assessment.

Table 1 provides a summary of the relevant planning context and provides a key numerical overview of the proposed variation.

Information Requirement	Comment
Relevant Applicable Planning Instrument	Wollongong LEP 2009
Zoning of the Land	RE1 – Public Recreation
Objectives of the Zone	Objectives of zone <ul style="list-style-type: none"> <i>To enable land to be used for public open space or recreational purposes.</i> <i>To provide a range of recreational settings and activities and compatible land uses.</i> <i>To protect and enhance the natural environment for recreational purposes.</i> <i>To cater for the development of a wide range of uses and facilities within open spaces for the benefit of the community.</i>
Development Standard to be varied	Building Height
Nature of the Development Standard	A numerical height control
Relevant Development Standard Clause	Clause 4.3 Height of Buildings of WLEP 2009
Objectives of the Development Standard	Objectives of this clause are as follows— <ul style="list-style-type: none"> <i>to establish the maximum height limit in which buildings can be designed and floor space can be achieved,</i> <i>to permit building heights that encourage high quality urban form,</i> <i>to ensure buildings and public areas continue to have views of the sky and receive exposure to sunlight.</i>
Development Standard Numeric Control for the Site	Maximum building height of 9 metres.
Proposed Numeric Control	Maximum Building Height of 12.715metres
Percentage Variation Between the proposal and the Planning Instrument	An increase of 3.715metres represents a 40% increase above the WLEP 2009 building height development standard of 9 metres.

3. PROPOSED DEVELOPMENT

This proposal seeks to redevelop the existing Illawarra Sports Stadium including the partial demolition of existing outdoor netball courts and structure and to carry out internal alterations including the addition of a multi purpose sports centre to the Illawarra Sports Stadium complex and ancillary works.

The proposed new development works at Illawarra Sports Stadium are to include the following:

- Demolition of the existing outdoor netball courts and existing building;
- Upgrade of the existing indoor courts being Hall No.1 and No.2;
- Construction of Hall No. 3 (Multi purpose sports centre) - three (3) new indoor courts with a mezzanine viewing area and tiered seating;
- Ancillary facilities comprising change rooms, toilets, disabled access toilet, storerooms, canteen/cafe, sports office areas, conference room, administration areas, staff area, control rooms, first aid rooms, gymnasium;
- Construct and formalise off-street parking area, provide accessible parking, bus and coach set down and tandem parking area that allows coaches to drive in and out in a forward direction.
- Hard and soft landscaping.
- Removal of existing trees surrounding existing building to be demolished.
- Building Identification Signage "Illawarra Sports Stadium".

4. Legislative Context

4.1. Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the PLEP 2011 sets out key assessment criteria which enables Council to consider and grant development consent for a development that contravenes a development standard.

The overarching objectives of this clause are contained in subclause (1) as detailed below:

- (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.*

Subclauses (3), (4) and (5) of Clause 4.6 are relevant and development consent can only be granted subject to their consideration.

4.1.1. Clause 4.6(3)

Clause 4.6(3) requires that development consent must not be granted for a 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 that:

(a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) there are sufficient environmental planning grounds to justify contravening the development standard.

4.1.2 Clause 4.6(4)

(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.

4.1.3. Clause 4.6.5

Clause 4.6(5) requires that 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.

4.2. Relevant Judgements - NSW Land and Environment Court

The following key Land and Environment Court (NSW LEC) judgements provide guidance on key considerations in the assessment of a Clause 4.6 variation Request. These judgements focus on the degree to which a consent authority may be satisfied about the matters in Clause 4.6 and therefore further refine the requirements for variation Requests:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*

- *Wehbe v Pittwater Council [2007] NSWLEC 827*; and
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 and [2015] NSWCA 248*.
The key findings and established principles (as relevant) of the above judgements of the Land and Environment Court are summarised below. *Winten Property Group Limited v North Sydney Council (2001)*

4.2.1. Winten Group Ltd v North Sydney Council (2001)

The *Winten Property Group Ltd v North Sydney Council (2001)* case posed the following questions to be addressed when considering objections to development standards:

- Is the planning control in question a development standard?
- If so, what is the underlying object or purpose of the standard?
- Is compliance with the standard consistent with the aims of the policy, and in particular, does compliance with the standard tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the *Environmental Planning & Assessment Act 1979*?
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (A related question is: would a development which complies with the standard be unreasonable or unnecessary?)
- Is the objection well founded?

4.2.2 Wehbe v Pittwater Council (2007)

This case expands on the findings of *Winten Property Group Limited v North Sydney Council (2001)* case and establishes a five-part test 'Wehbe tests' to ascertain whether strict compliance with a development standard is unreasonable or unnecessary, as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. 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

5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

It is noted that the DP&E Guide was formulated on the basis of the findings of the *Winten Property Group Limited v North Sydney Council (2001)* case and the Wehbe Tests.

4.2.3 Four2Five Pty Ltd v Ashfield Council (2015)

The outcome of these cases (initially heard and then upheld at appeal) concluded that in addition to considering the Wehbe Tests, Requests must also demonstrate that:

- the grounds for departing from the development standard must be particular to the circumstances of the proposed development on the subject site; and
- compliance with the development standard is unreasonable or unnecessary, in addition to demonstrating that the proposal was consistent with the objectives of the development standard and/or land use zone.

5. Assessment of the Variation to building height development standard

The WLEP 2009 contains a 9 metre (approximately 2 storeys) maximum building height control for the entire site. This maximum building height is the same as the existing nearby low-density residential areas of 9 metres (approximately 2-storeys).

The maximum building height constitutes the built form baseline from which any variation request is measured and assessed.

The proposal seeks to increase the maximum 9 metre height control by 3.715 metres to accommodate the development of an indoor sports facility and address potential flooding and stormwater issues as discussed in the following sections of this report.

The following assessment comprehensively considers the provisions of CI 4.6 which has also been informed by an analysis of the relevant case law.

5.1. Clause 4.6(3)(a) – Compliance is Unreasonable or Unnecessary

Following requests by Council Officers to further address flooding and stormwater including overland flow issues, strict compliance of the 9 metre height control is considered to be unreasonable or unnecessary as the benefits of addressing flooding and overland flow issues far outweigh the negligible impacts to the increase in building height.

5.2. Clause 4.6(3)(b) – Grounds to Justify Contravening the Development Standard

The development, including the minor height non-compliance, will provide for an extension to an

existing indoor sporting complex for the locality consistent with a previously approved Concept Plan. In this context, there are sound planning grounds and significant benefits to justify contravening the building height development standard.

The proposed increase in the ground level and building height are considered to result in a useable and superior built form outcome for the following reasons:

- the existing recreational precinct is capable of accommodating the proposed built form with no significant impact on the existing character of the area;
- the resultant public domain interface has been carefully designed to ensure a smooth transition from public to private places – this includes a well-designed front façade and entrance, stairs, ramps and landscape treatments to ensure legibility, sense of place as well as privacy for adjoining residents;
- the development will be visually attractive and sympathetic to the existing character of the area;
- the development will maintain the neighbourhood amenity and character of the local area;
- improved design of the complex in terms of relationship with the adjacent public domain;
- improved sporting complex facility catering to a growing number of different sports;
- the resultant ground floor levels maintain safety and appropriate mitigation measures to address stormwater and potential overland flow issues as identified and workshopped with Council Officers;
- it is considered that there will be no significant adverse amenity impacts arising from the extent to which the building exceeds the maximum building height development standard in relation to overlooking, overshadowing, obstruction of light or air, obstruction of views or any other such impacts on nearby existing or future residential properties as a result of the height of the development;
- the proposed increase in building height is:
 - minor in the context of the existing approved built form;
 - given the increased ground levels the exceedance of the height control will not be perceived as an increase in approved bulk or scale;
 - consistent with the height of the existing centre;
 - extends to essentially the roof features

- to enable indoor sporting activities to occur to comply with minimum internal clearance distances;
 - the minimum internal clearance height requirement by Netball NSW for regional, state, and national competition is 8.3 metres. The clearance height as proposed, is the minimum height under the roof structure, mechanical services, and lighting at the roofs lowest point.
 - is necessitated in order to accommodate the retractable seating and tiered seating sizing & arrangement required to satisfy the brief whilst ensuring spectator views are not obstructed by mechanical services and lighting;
 - will not lead to any adverse impacts upon the existing streetscape, adjoining properties and amenity of the existing locality.
- the proposed increase in height appropriately responds to the use of the site and its' current constraints.

The height of the development is considered to be consistent with the objectives of the relevant planning instruments and will result in no significant adverse environmental planning impacts. The inherent characteristics of the site including its size, nature of surrounding locality make the proposal suitable and entirely justifiable on environmental planning grounds.

For the reasons above, the proposed re-development of the existing indoor sporting complex provides for a significantly superior urban design outcome for the site, when compared to a strictly height compliant scheme.

5.3. Wehbe Tests

Wehbe Test 1: *The objectives of the standard are achieved notwithstanding non-compliance with the standard*

The proposed variation to the building height development standard will be achieved notwithstanding the non-compliance with the standard as outlined in this report.

Wehbe Test 2: *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary*

The underlying objective and purpose of the height development standard, (including built form, minimise impacts, respect existing character and overshadowing) is considered relevant to the development.

However (as discussed above) it is considered that the localised minor increase in height will facilitate a far more useable indoor sporting facility including an improved response to flooding and overland flow issues while resulting in an improved public domain interface that is respectful of the existing urban character, including a substantially positive urban design impact and acceptable amenity impacts upon the adjoining locality.

The development is raised to accommodate anticipated increased flood levels due to global warming, but also to ensure that internal sporting clearance specs are adhered too for the various competitions being it's target market.

As such, the increase in height will represent a useable indoor sports stadium design and will therefore better achieve the objectives of the development standard.

Wehbe Test 3: *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable*

The provision of a development that strictly complied with the development standard would result in an un-useable indoor sporting complex facility and a significantly inferior urban design outcome for the site. In particular the public domain, ground level interface, poor response to flooding and overland flow issues lack of internal clearance distances for various sporting codes, lack of internal facilities for spectators, all in all it would fail the residents and future economic growth through the lack of sporting competition and facilities for the Illawarra.

Wehbe Test 4: *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*

The proposed increase in height is in response to specific contextual issues associated with the proposed development and the site as a whole. As such it is not considered to result in the development standard being virtually abandoned or destroyed.

Wehbe Test 5: *The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone*

The land has been zoned appropriately and the controls applicable to the site are generally acceptable, despite the proposed increase in height. As discussed in this report, the proposed development is consistent with the objectives of the zone.

For the reasons outlined in in this report, the proposed variation in height is considered to be minor and the built form design response better achieves the intended use and the objectives of the zone than a strict height compliant scheme.

5.4. Clause 4.6(4) – Consistency with Objectives

This Request has adequately addressed the matters required to be demonstrated by subclause (3), as outlined in Section 5 of this submission. The proposed development is consistent with the objectives of the RE1 – Public Recreation zone as outlined in Table 3 and the building height development standard as outlined in Table 4.

In addition, the proposed development is a superior development to a strictly height compliant scheme and therefore better achieves the objectives of the building height development standard and the zone. The proposal is therefore in the public interest.

RE1 Public Recreation Zone	
Objectives	Achievement of Objectives
<i>To enable land to be used for public open space or recreational purposes.</i>	The proposed variation to the building height development control enables this objective to be better met encouraging a multi-use indoor sports stadium that is able to cater to a varying range of indoor sports.
<i>To provide a range of recreational settings and activities and compatible land uses.</i>	<p>The proposal maintains compatible land uses with the surrounding area.</p> <p>The development has no significant adverse visual impact, view loss, loss of privacy or loss of solar access to existing and future development and to key elements of the public domain.</p>
<i>To protect and enhance the natural environment for recreational purposes.</i>	The proposed variation to the building height development control enables this objective to be better met through a better response to stormwater and flooding issues for the community and visitors to the site.
<i>To cater for the development of a wide range of uses and facilities within open spaces for the benefit of the community.</i>	The proposed variation to the building height development control enables this objective to be better met encouraging a multi-use indoor sports stadium that is able to cater to a varying range of indoor sports for the benefit of the community.

CLAUSE 4.3 HEIGHT OF BUILDINGS DEVELOPMENT STANDARD	
OBJECTIVES	ACHIEVEMENT OF OBJECTIVES
<i>To establish the maximum height limit in which buildings can be designed and floor space can be achieved,</i>	The variation of the building height development control will ensure the development provides a varied and interesting built form which provides for an appropriate scale of development, which is functional and useable for its intended use.
<i>To permit building heights that encourage high quality urban form,</i>	The proposed scale is appropriate for the site and the variation of the building height standard is warranted having significant positive visual, usage and urban design impacts. The proposal would not have an adverse impact on the character and scale of the nearby low density

	residential area as it is consistent with the existing sporting complex.
<i>To ensure buildings and public areas continue to have views of the sky and receive exposure to sunlight.</i>	The variation to the building height control would not have an adverse impact on sky exposure and daylight to the site or to key areas of the adjoining public domain. Furthermore, the additional height would not have any adverse impacts on existing (or likely future) neighboring residential properties as it is generally consistent with the existing complex on site.

5.5. Clause 4.6(5)(a) – Matters of Significance for State of Regional Planning

The proposed exceedance of the maximum height development standard for the site does not raise any matters of State or Regional Planning significance as:

- the development is not of a size or nature to have more than a local impact;
- the proposed height exceedance is considered to be minor and localised to facilitate the intend use of the site and the increased levels to address flooding and potential overland flow;
- the increase in the height development standard is minor in the context of the development and broader recreational/community precinct of Fred Finch Park;
- the higher building elements are acceptable in terms of bulk and scale;
- the exceedance in height development standard will have a positive impact with respect to the use of the sports stadium including the public domain interface and future safety of residents;
- it is considered that there will be no significant adverse amenity impacts arising from the noncompliance in relation to overlooking, obstruction of light or air, obstruction of views or any other such impacts on nearby residential properties;
- there are no significant amenity or environmental impacts; and
- the site is not a site designated to be of State significance.

5.6. Clause 4.6(5)(b) – Public Benefit in Maintaining the Development Standard

As demonstrated in the previous sections of this report, the variation to the development standard would establish the best urban design response for the usage of the site and in response to flooding and overland flow issues.

Conversely, a strictly compliant development would result in a substantially inferior outcome. In light of the significant public benefits arising from allowing a variation, it cannot be reasonably assumed that there is any public benefit in maintaining the existing building height development standard.

5.7. How Would Strict Compliance Hinder the Attainment of the Objectives Specified in Section 5(a)(i) and (ii) of the Act?

Sections 5(a)(i) and (ii) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) are quoted below:

The objects of the Act are:

(a) to encourage:

- (i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- (ii) The promotion and coordination of the orderly and economic use and development of land.*

The development is wholly consistent with the objectives specified in Section 5(a)(i) and (ii) of the EP&A Act, as:

- the site is located within an existing urban area and within a zone that has encouraged the development of an indoor sports facility;
- the redevelopment of the site for recreational purposes will create a new vibrant facility, maximise the efficient use of the land and will contribute to maintaining/managing and reducing demand to develop more environmentally sensitive lands;
- the development promotes the orderly and economic use and development of the land as it delivers a redeveloped sports facility within an established recreational environment located on adjacent to Hooka Creek without significant or unreasonable environmental impact; and
- the proposal addresses potential flooding and stormwater issues and leads to an improved public domain interface and urban design built form outcome for residents and visitors alike. Strict compliance with the building height development standard would hinder the attainment of the objective of the EP&A Act, and as such the development.

5.8. Is the Objection Well Founded?

For the reasons outlined in previous sections, it is considered that the objection is well founded in this instance and that granting an exception to the development can be supported in the circumstances of the case.

6. Conclusion

Clause 4.6 allows for flexibility in the application of development standards in appropriate circumstance and this Request has been shown to satisfy the provisions of Clause 4.6 of the Wollongong LEP 2009.

It has been demonstrated that compliance with the 9 metre height development standard is unnecessary and unreasonable given the specific circumstances of the proposal. In addition, clear planning grounds have been provided that justify contravening the development standard.

The proposal is consistent with the objectives of the development standard and the RE1 Public Recreation zone. Given the high standard of the proposal and potential public benefit of the development, it is considered to be in the public interest. The objection to the standard is well founded for the following reasons:

- The development is appropriate in this location;
- The development does not undermine the underlying objectives of the standard;
- The non compliance does not result in any significant adverse environmental impacts on the amenity of the surrounding area in general, or on the amenity of nearby residential properties;
- The scale of the proposal, notwithstanding the non compliance, is compatible with the desired future character of the recreational precinct and is appropriate in the current context.

Overall, and for the reasons set out in this report, the proposed development represents a superior outcome for the site and it is therefore justified and appropriate that the development standard be varied as proposed.

