
CLAUSE 4.6 VARIATION

REQUEST FOR AN EXCEPTION TO THE MAXIMUM HEIGHT OF BUILDING DEVELOPMENT STANDARD

43 Old Pittwater Road, BROOKVALE
DA2018/1610

Introduction

This request for an exception to a development standard is submitted to support a development application **DA2018/1610** in respect of the 'Height of Buildings' development standard contained within Clause 4.3(2) of the *Warringah Local Environmental Plan 2011* (WLEP 2011). The request relates to an application for the variation in Height to accommodate a freeboard level to the ground floor of the proposed multi-dwelling terrace house development at 43 Old Pittwater Road, BROOKVALE.

The variation is made pursuant to Clause 4.6 of the *Warringah Local Environmental Plan 2011* (WLEP 2011).

Clause 4.6 Exceptions to Development Standards

Clause 4.6(2) of the WLEP 2011 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the WLEP 2011, or any other environmental planning instrument.

However, clause 4.6(3) states that 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.*

In accordance with clause 4.6(3) the applicant requests that the maximum permitted Height of Buildings development standard contained within Clause 4.3(2) of the WLEP 2011 be varied.

Development Standard to be Varied

Clause 4.3 (Height of Buildings) of the WLEP 2011 states:

- (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.

(2) 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.

(2A) If the Height of Buildings Map specifies, in relation to any land shown on that map, a Reduced Level for any building on that land, any such building is not to exceed the specified Reduced Level.

The maximum Height of Buildings for the site shown on the map to which the proposed development relates is 8.5m as illustrated in **Figure 1**.

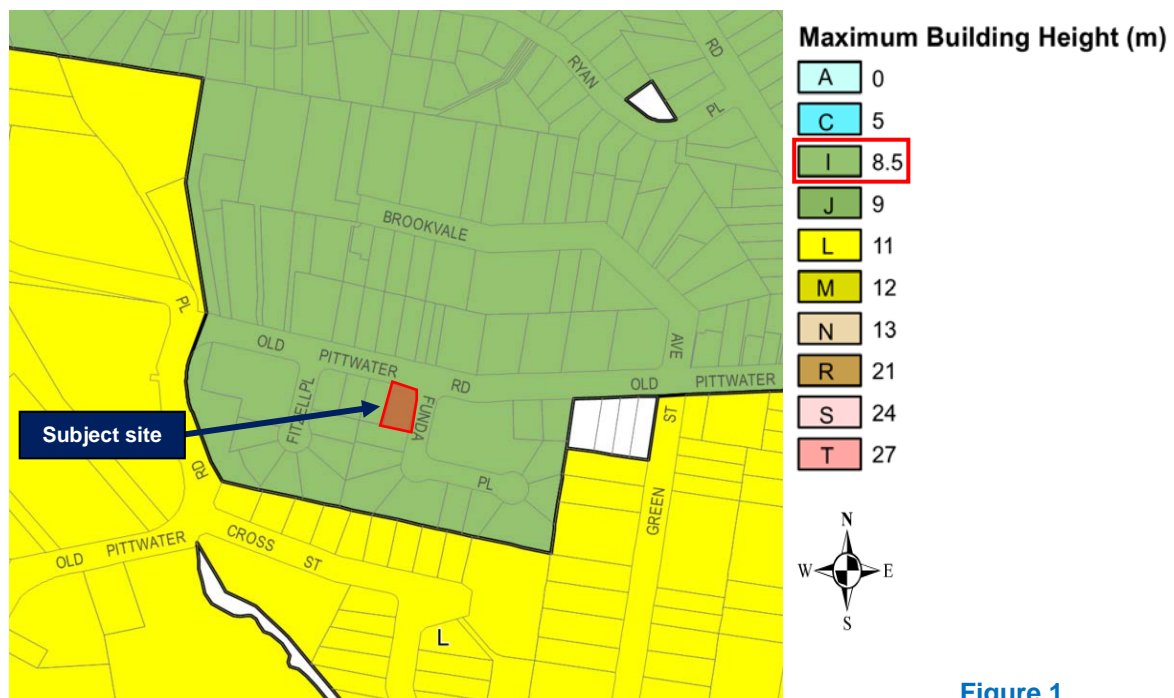


Figure 1

Extract from WLEP 2011, Height of Building Map

Extent of Variation to the Development Standard

The height of the proposed multi-dwelling terrace development is described in **Table 1** below:

Height of Buildings Control	8.5m
Max. Proposed Height (m) – measured from NGL	Varies between 8.9m (north) and 9m (south)
Variation (%)	4.7% (north) and 5.9% (south) The variation is due to the fall in the site north to south

The variation to the maximum height standard results from the fall of the site of approximately 1m from Old Pittwater Road to the north to the southern site boundary. During the course of assessment Northern Beaches Council has identified the site to be flood affected. This has required an increase in the minimum finished floor level (m AHD) from 16.00 to 16.78, based on the Annual Exceedance Probability (AEP) of 1% as informed by the submitted Flood Study dated June 2019 prepared by KD Stormwater Pty Ltd.

The extent of the height non-compliance is illustrated in **Figure 2** and **Figure 3** below:

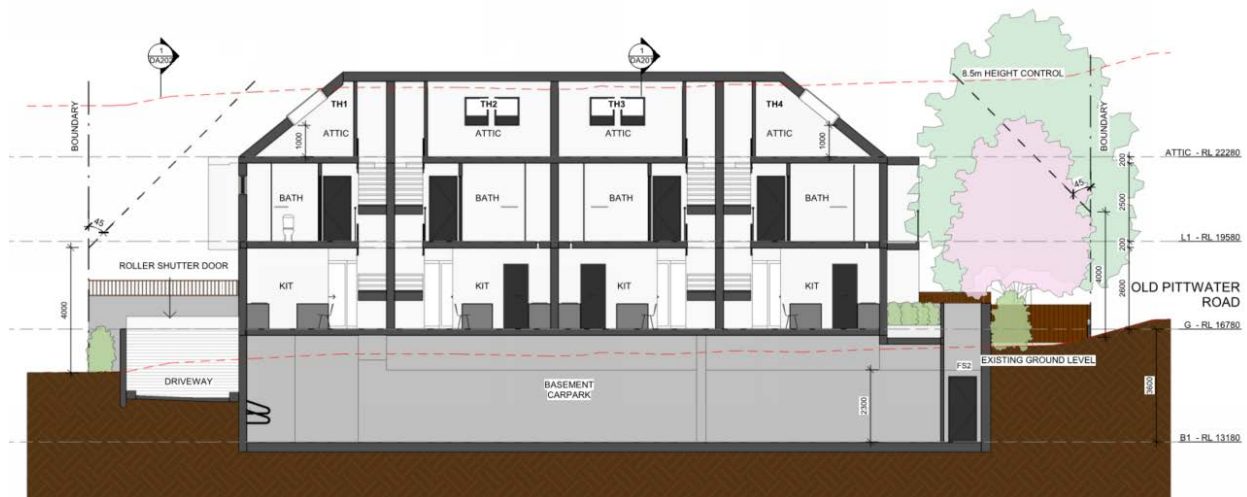


Figure 2

North-South Section

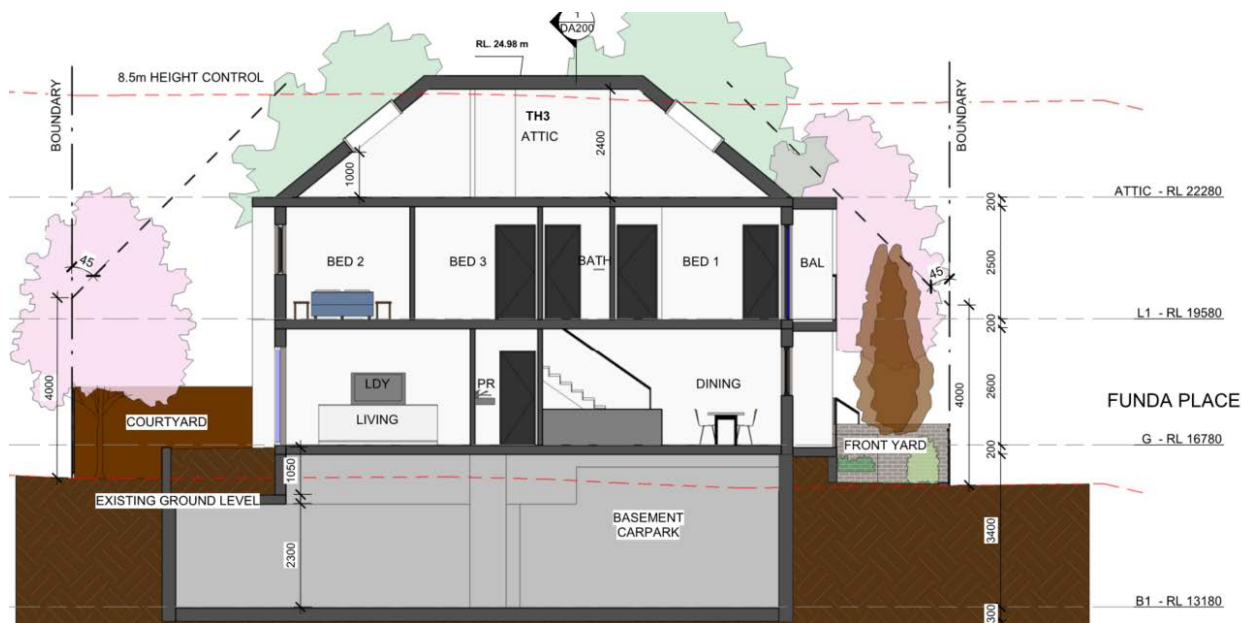


Figure 3

East-West Section

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

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council*. [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

The Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 has required additional ways of establishing that compliance is unreasonable or unnecessary beyond consistency with the standard and zone objectives to be established. For completeness, this request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The specific objectives of the Height of Buildings development standard, as specified in clause 4.3(1) of the WLEP 2011 are identified below. A comment on the proposal's consistency with each objective is also provided.

(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

The scale of surrounding development is a mix of single and two storey residential dwellings and part 2 / part 3 storey medium density residential apartment buildings. Diagonally opposite the site to the north east, along Old Pittwater Road, are 3 storey contemporary residential flat buildings. These sites are in the visual catchment of the subject site and when viewed in context the proposed development will be of a scale compatible with existing development.

The exceedance of the permitted maximum height is considered minimal and being contained within the central portion of the site and enclosed by the hipped roof design ensures that the building scale remains recessive with a compatible 2 storey street wall height presentation at each of its street frontages.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

The building form and architectural detailing remains unchanged with the proposed building continuing to have a 2 storey street wall height. The exceedance of the height limit is contained to the central portion of the site within a 'traditional' roof form, and as such will not contribute to any appreciable change to bulk, scale, overshadowing or privacy impacts at the street edge along Funda Place and Old Pittwater Road or any interface with adjoining residential development to the south and west.

The proposed development will not result in the loss of any significant views from any adjoining or adjacent development.

(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

The site is not located within the catchment of any coastal or bushland environments. The location of the site is highly urbanized with predominantly residential development located to the north, industrial development located to the south, east and west and business and commercial core located to the south along Condamine Street.

(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

The roof design transitions from a traditional hipped roof form to a flat roof which reduces any apparent change to building height. This design also ensures that the bulk and scale of the 2 storey building envelope remains unchanged when viewed from anywhere in the public domain. The proposed multi-dwelling terrace development effectively sits on a plinth structure with stairs leading to each of the respective entrances. Notwithstanding the introduction of this element, the scale relates to the topography of the site and retaining its vertical and horizontal proportions has no impact to its setting or context.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objectives and purpose of the Height of Buildings development standard is relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the proposed height is compatible with the existing and emerging scale of development within the site's visual catchment and will sit comfortably within the context of the site with no significant adverse impacts to adjacent properties.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objective of the Height of Buildings development standard is to achieve an appropriate height on the site which is compatible with the context of the site and preserves the amenity and privacy of adjacent properties.

Whilst the ground level of the terraces will now include steps leading to the elevated ground floor, this outcome is not inconsistent with the topography of the site which falls from north to south. Whilst this effectively creates a plinth to the ground floor this is largely screened by fencing and landscaping maintaining the interface and presentation to the street edge as originally intended and therefore not causing any significant scale disparities

Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the height control because it would encourage a less desirable outcome for the subject site, especially when viewed in context of surrounding contemporary residential apartment development.

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 Height of Building development standard has not been virtually abandoned or destroyed by Council's own actions.

5. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

The 2 storey multi-dwelling terrace development is located within the R3 Medium Density Residential zone. The zoning of the land is considered to be reasonable and appropriate.

Strict compliance with the Height of Building development standard is unreasonable and unnecessary in the circumstances of the case in that:

- The proposed height represents only up to a 5.9% exceedance of the Height of Building development standard located to the central portion of the site only representing only 18% of the site area.
- The exceedance in height is located to the central portion of the site such that there will be no disparity in scale with existing or future development, and consequently will not be readily visible from either of the primary or secondary street frontages. Further, the site is a corner site and as such is able to accommodate a minor variation to height forming a natural terminating point with adjacent sites to west.
- The increase to the height of the ground floor slab, which effectively creates a plinth, is consistent with the topography of the site which falls from north to south and as such will not be an anomaly within the streetscape or immediate context of the site.
- The proposed height non-compliance does not result in any unreasonable privacy or amenity impacts to surrounding sites.
- The height variation does not materially impact significant views from adjacent residential properties. The visual impacts associated with the additional height is minor and are generally in line with those anticipated by a height compliant scheme.
- The required increase in the ground floor finished floor level has reduced the amount of bulk excavation required across the site for the basement level car park with the basement level RL increasing from RL12.6 to RL 13.18, a difference of 580mm.
- It is considered that a reduction to the building height to achieve strict compliance would not result in an improved planning outcome – the additional height does not cause loss of significant views from neighbour's properties, or adverse additional overshadowing to residential properties or the public domain or causes any additional privacy impacts to surrounding development, and maintains the scale relationship to the street.

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

The following environmental planning grounds are sufficient to justify contravention of the Height of Building development standard:

- The variation to the height is minor (up to 5.9%) and will not be readily visible from the street being centrally located within the site, represents only a small proportion of the site area (18%) and is made recessive due to the proposed roof form.
- The proposed development facilitates increased housing to the Northern Beaches Local Government Area with the subject site situated within a zone that encourages increased housing density.
- The proposed variation is a product of the site's topography which falls north to south by up to 1m and its flood affectation which requires that a freeboard level be provided.
- The proposed variation to the height control will not result in any significant additional adverse amenity impacts to surrounding development.
- The non-compliant height will continue to relate to its context and will not form an impediment to future development within the locality. Within the context of the site, the proposed development will sit comfortably with surrounding buildings within the visual catchment of the site.
- The required increase in the ground floor finished floor level has reduced the amount of bulk excavation required across the site for the basement level car park with the basement level RL increasing from RL12.6 to RL 13.18, a difference of 580mm. This is considered a positive benefit as a result of the change.

Clause 4.6(4)(a)(i) – Consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

Clause 4.6(4)(a)(ii) – Consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is 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.

Whilst the objectives of the development standard have already been addressed previously in this written request, for the purpose of completeness these objectives are again considered below in specific reference to Clause 4.6(4)(a)(ii).

Objective of the Development Standard:

The specific objectives of the Height of Buildings development standard, as specified in clause 4.3(1) of the WLEP 2011 are identified below. A comment on the proposal's consistency with each objective is also provided.

(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

The scale of surrounding development is a mix of single and two storey residential dwellings and part 2 / part 3 storey residential apartment buildings. Diagonally opposite the site to the north east, along Old Pittwater Road, are 3 storey contemporary residential flat buildings. These sites are in the visual catchment of the subject site and when viewed in this context will be of a scale compatible with existing development.

The exceedance to the permitted maximum height is considered minimal and being contained within the central portion of the site and enclosed by the hipped roof design ensures that the building scale remains recessive with a compatible 2 storey street wall height presentation.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

The building form and architectural detailing remains unchanged with the proposed building continuing to have a 2 storey street wall height. The exceedance of the height limit is contained to the central portion of the site within a 'traditional' roof form, and as such will not contribute to any appreciable change to bulk, scale, overshadowing or privacy impacts at the street edge along Funda Place and Old Pittwater Road or any interface with adjoining residential development to the south and west.

The proposed development will not result in the loss of any significant views from any adjoining or adjacent development.

(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

The site is not located within the catchment of any coastal or bushland environments. The location of the site is highly urbanized with predominantly residential development located to the north, industrial development located to the south, east and west and business and commercial core located to the south along Condamine Street.

(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

The roof design transitions from a traditional hipped roof form to a flat roof which reduces any apparent change to building height. This design also ensures that the bulk and scale of the 2 storey building envelope remains unchanged when viewed from anywhere in the public domain. The proposed multi-dwelling terrace development effectively sits on a plinth structure with stairs leading to each of the respective entrances. Notwithstanding the introduction of this element, the scale relates to the topography of the site and retaining its vertical and horizontal proportions has no impact to its setting or context.

Objective of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the R3 Medium Density Residential zone. The objectives of the zone are as follows:

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To ensure that medium density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.
- To ensure that medium density residential environments are of a high visual quality in their presentation to public streets and spaces.

The proposed development provides for the housing needs of the community by providing additional housing stock within an area capable of facilitating increased density. The multi-dwelling terrace development provides a housing type which compliments and is differentiated from existing housing stock contained within residential apartment buildings.

The proposed development has been designed to sit comfortably within its setting with a landscaped front setback area consistent with the existing streetscape character and is of a design, bulk and scale compatible with surrounding contemporary development.

For the reasons given the proposal is considered to be consistent with the objectives of the R3 Medium Density Residential zone.

Objectives of Clause 4.6

The specific objectives of Clause 4.6 (1) 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.*

The overall outcomes for the site to provide a greater diversity of housing type, an increase in housing density to accommodate population growth within the locality and the Northern Beaches Local Government Area and the benefits and contribution to the streetscape is well served by permitting the proposed variation to the Height in Building development standard. The proposed development continues to respond well to the streetscape with no appreciable change in bulk or scale. The proposal sits comfortably within its setting and context and relates to the scale of medium density development within its visual catchment.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the Height of Building development standard and will achieve a better design outcome in accordance with objective 1(b), by ensuring:

- that the scale and proportions of the proposed building is maintained; and
- that flood related issues are appropriately addressed and mediated,

the latter of which represents an increased level of environmental performance for this site.

Conclusion

The proposed development exceeds the maximum height limit for the site and therefore requires a Clause 4.6 variation. The variation is minimal exceeding the height standard by only up to 5.9% (0.5m) contained within the central portion of the site only. The variation to height has resulted from the site being located within a flood prone area and the necessity to provide a freeboard level to ensure the proposed dwellings are not inundated by flood waters during a storm event.

Considering the particular circumstances of this development, strict compliance with the numerical standard is both unreasonable and unnecessary with sufficient environmental planning grounds to justify the variation, as follows:

- The proposal is consistent with the objectives of the Height of Buildings development standard;
- The development will not result in adverse environmental or amenity impacts above those that are anticipated by a fully compliant development;
- The introduction of a freeboard level increases the level of environmental performance for the site by ensuring that it is not impacted by floodwaters during a storm event;
- The additional height is compatible with existing contemporary medium density development within the sites visual catchment and will consequently not impact the existing or future setting envisaged by Councils controls;
- The site continues to present as a two story development with a scale and proportion that is not materially impacted by the variation to the height limit;
- The additional height does not cause any loss of significant views from neighbouring residential areas, adverse impacts to privacy, or adverse overshadowing to residential properties or the public domain;
- The change in ground floor level reduces the level of bulk excavation across the site required for the basement car park.

Based on the reasons outlined above, it is concluded that the request is well founded and that the particular circumstances of the case warrant flexibility in the application of the development standard to the extent proposed.