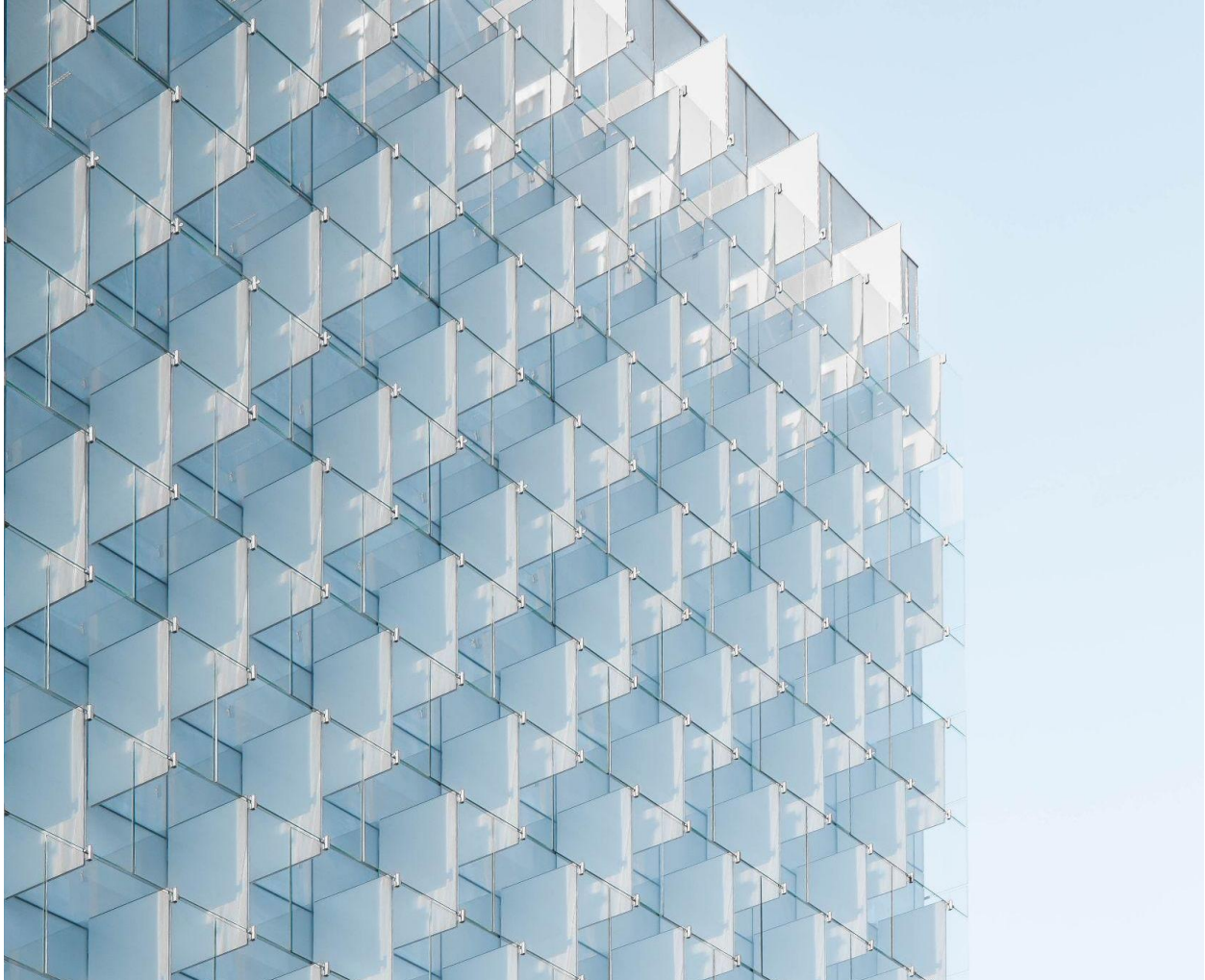


# WILLOWTREE PLANNING



7 March 2025

Ref: WTJ24-201  
Contact: Andrew Pigott



## **CLAUSE 4.6 VARIATION REQUEST HEIGHT OF BUILDING**

**DEMOLITION OF THE EXISTING ODOUR REMOVAL INFRASTRUCTURE  
AND INSTALLATION AND OPERATION OF AN UPGRADED FUME  
COLLECTION AND SCRUBBING SYSTEM**

75-79 Old Pittwater Road, Brookvale  
Lot 2 DP 600059 and Lot A DP 166808

—




Prepared by Willowtree Planning Pty Ltd  
on behalf of Harrison Manufacturing Pty Ltd

**Clause 4.6 Variation - Height of Buildings**

Demolition of the existing odour removal infrastructure and installation and operation of an upgraded Fume Collection and Scrubbing System  
75-79 Old Pittwater Road, Brookvale



In the spirit of reconciliation and recognition, Willowtree Planning acknowledges the Traditional Owners of this Country throughout Australia and their continuing and ongoing connections to land, waters and community. We show our respect to Elders - past and present. We acknowledge that we stand on this Country which was and always will be recognised as Aboriginal Land. We acknowledge the Traditional Owners of the Lands in this Local Government Area, belonging to the local Aboriginal People, where this proposal is located upon.

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|--------------------------------|---|--|---|
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|                                |   |  |   |
|                                |   |  |   |
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## PART A PRELIMINARY

### 1.1 INTRODUCTION

This Clause 4.6 variation request (Variation Request) has been prepared in support of a Development Application (DA) for the demolition of the existing odour removal infrastructure and the installation and operation of an upgraded fume collection and scrubbing system at 75-79 old Pittwater Road, Brookvale (Subject Site).

The Subject Site is zoned E4 General Industrial, pursuant to the *Warringah Local Environmental Plan 2011* (WLEP2011) and is located within the Northern beaches Local Government Area (LGA). The proposed development is permissible with consent within the zone and is considered contextually appropriate. The proposal is generally consistent with the objectives and provisions of WLEP202011, with the exception of Clause 4.3 - Height of Buildings, for which this Variation Request is sought.

This Variation Request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards prescribed under WLEP2011. It considers various planning controls, strategic planning objectives and existing characteristics of the Subject Site and concludes that the proposed non-compliance is the best means of achieving the objects of encouraging orderly and economic use and development under the *Environmental Planning and Assessment Act 1979* (EP&A Act).

### 1.2 RATIONALE OF VARIATION FROM DEVELOPMENT STANDARDS

This Variation Request has been submitted to assess the proposed non-compliance with Clause 4.3 - Height of Buildings of WLEP2011 and has been prepared in accordance with the requirements of Clause 4.6 of WLEP2011 which includes 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.

Under the provisions of Clause 4.3 of WLEP2011, the Subject Site is subject to an 11m height of buildings development standard. Clause 4.3 is detailed below:





### Clause 4.6 Variation - Height of Buildings

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#### 4.3 Height of buildings

(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,

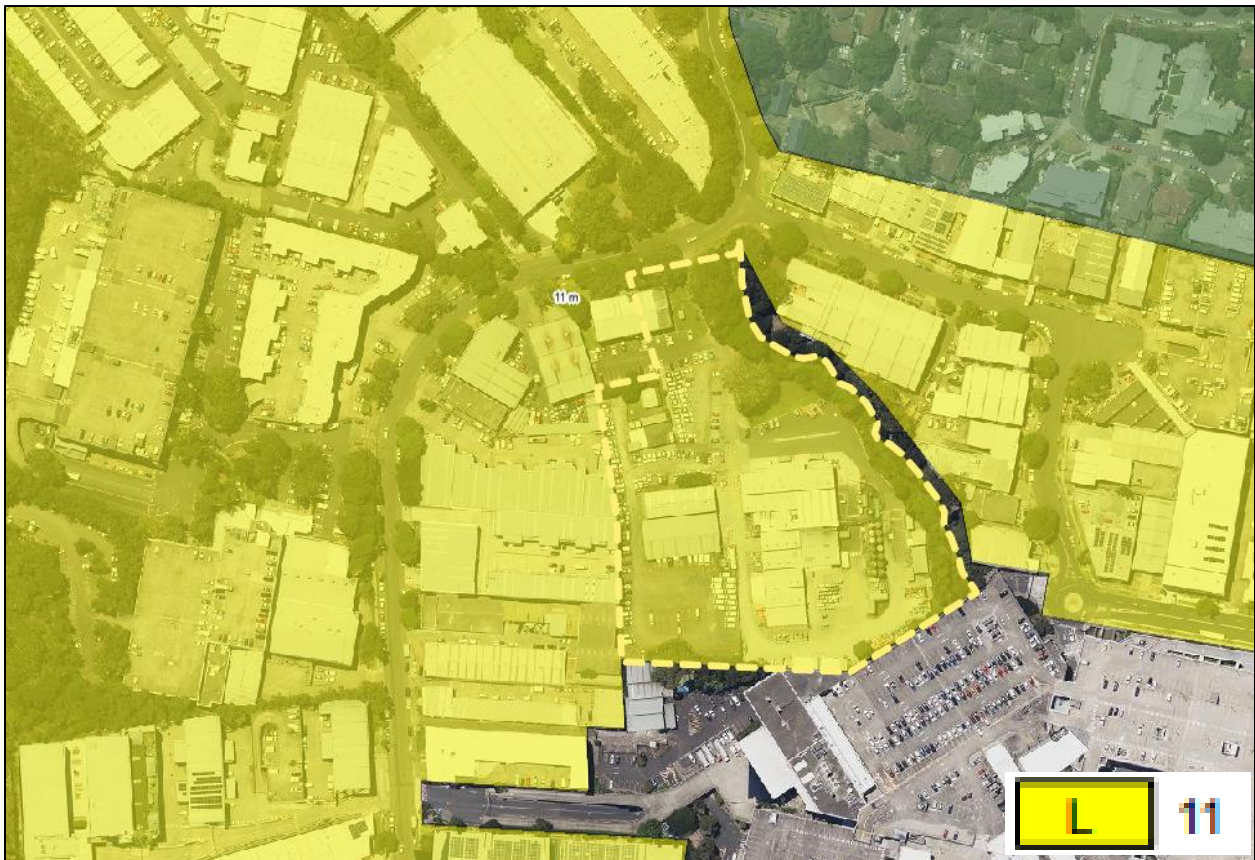
(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

(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 site identified as possessing a maximum permitted building height of 11m as per the WLEP2011 Height of Buildings map, displayed below at **Figure 1**:



**Figure 1:** WLEP 2011 Height of Buildings Map (Source: NSW Planning Portal Spatial Viewer, 2025)

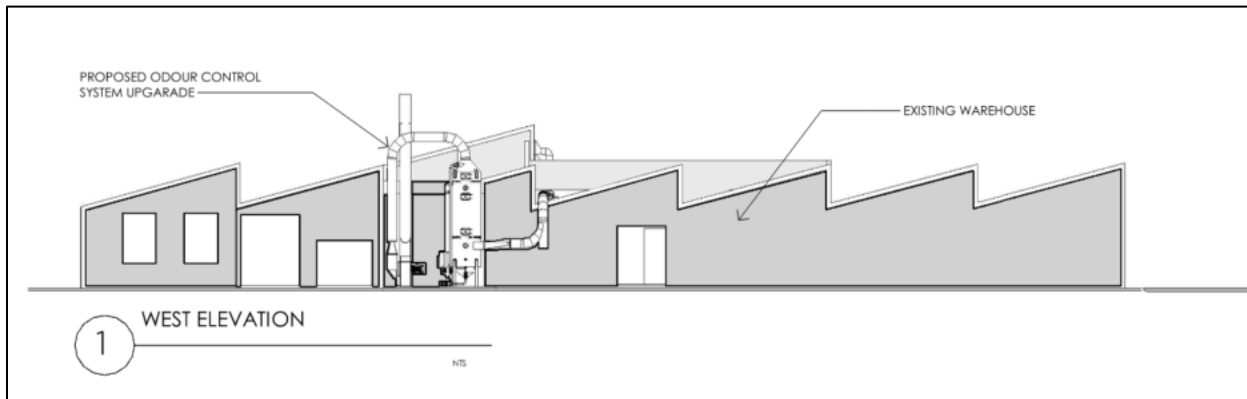


### Clause 4.6 Variation - Height of Buildings

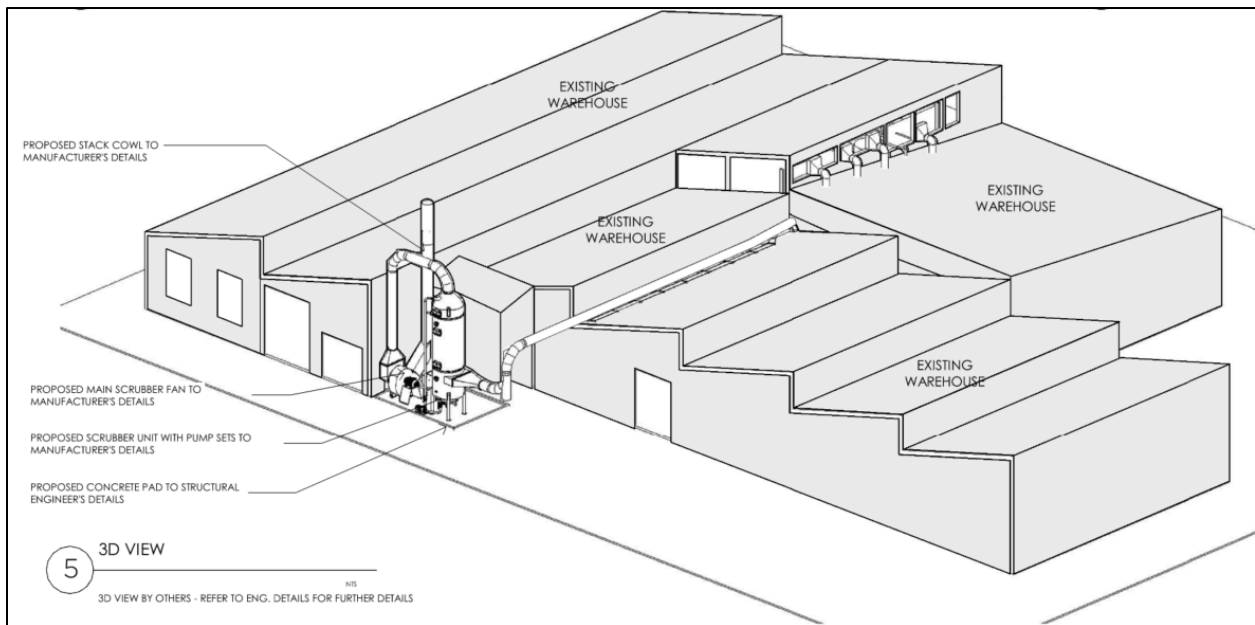
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The proposal seeks a maximum building height of 12m which exceeds the maximum standard by 1m or 9%. The height variation relates to a flume stack protruding 1m above the maximum permissible height of buildings afforded under Clause 4.3 of WLEP2011; not the actual building itself, this is displayed below at **Figure 2**, **Figure 3** and **Figure 4** below:



**Figure 2:** West Elevation of proposal (Source: Watch This Space Design, 2025)

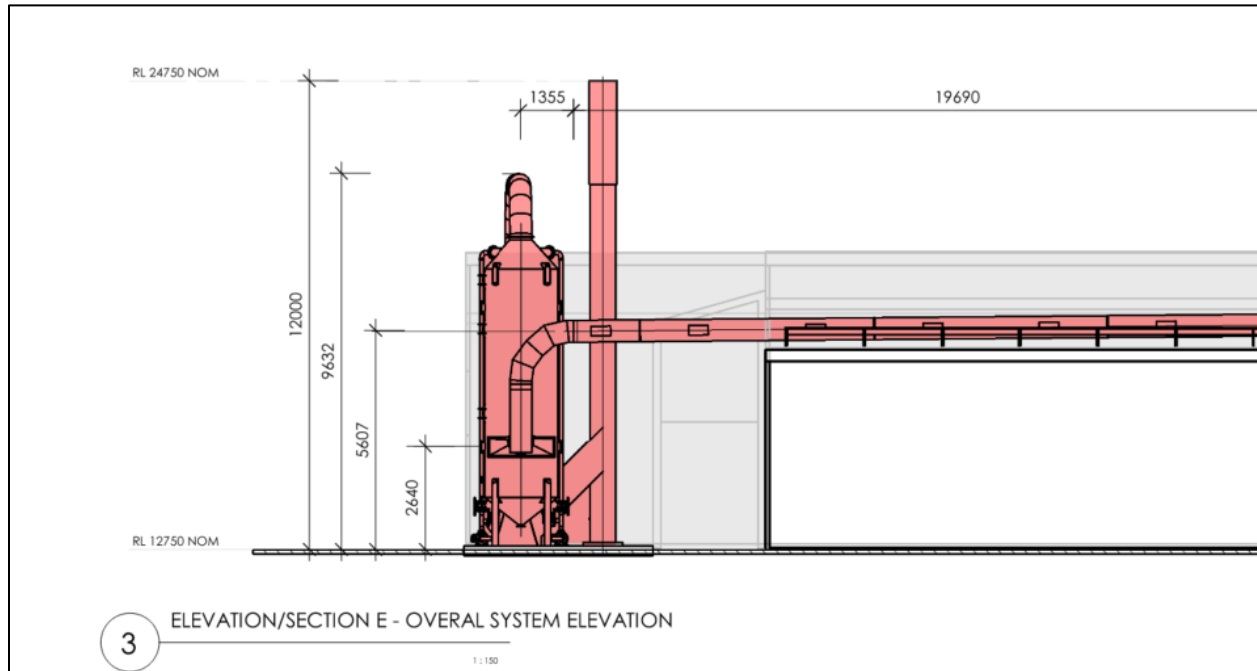


**Figure 3:** 3D View of proposal (Source: Watch This Space Design, 2025)



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**Figure 4:** Elevation/ Section of proposed flue (Source: Watch This Space Design, 2025)

The 1m protrusion is required to align with modelling provided for the proposal with reference to emissions and odour. Specifically, the design ensures effective initial plume dilution and dispersion and to allow provision of a stack cowl/sleeve to prevent any downdraft and the ingress of rain/debris. It can be stated that the variation is in relation to necessary design parameters in relation to environmental amenity. It is important to note that the proposal complies entirely with other development standards under the WLEP2011. The proposal also exhibits complaint setbacks under the WDCP2011.

The building height has been measured from the existing ground floor level to the peak of the flue structure, in accordance with the definition listed under WLEP2011. The proposal is considered to be within character of the surrounding locality, and the proposed height protrusion does not result in any negligible effects upon the locality.

This Variation Request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards prescribed by WLEP2011.



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### 1.3 DEVELOPMENT STANDARD VARIATION

**Table 1** below provides a summary of the variation.

| TABLE 1: CLAUSE 4.3 OF WLEP2011 VARIATION SUMMARY |                                       |  |  |             |      |
|---|---------------------------------------|--|--|-------------|------|
| WLEP2011  | WLEP2011                              | Proposal                                     | Proposed   | Development | Non- |
|   | Development                           |  | Compliance   |             |      |
|   | Standard                              |  |  |             |      |
| Clause 4.3 - Height of Buildings                  | Maximum permitted building height 11m | A maximum building height of 12m is proposed | The proposal seeks consent for a maximum building height of 12m which is a 9% variation from the development standard. |             |      |

Notwithstanding the above, curtailing the building height of the proposal to the current prescribed development standard would result in an undesirable outcome pertaining to effective initial plume dilution and dispersion within the structure. Additionally, the flue being provided at its current height allows provision for a stack cowl/sleeve to prevent downdrafts and ingress of rain/debris.

In its current form, the proposal therefore represents the most efficient use of the Subject Site which responds to the existing environmental constraints, compared to a development which is entirely compliant with the height of building standard administered under Clause 4.3 of the WLEP2011.





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## PART B THRESHOLDS THAT MUST BE MET

### 2.1 INTERPRETING CLAUSE 4.6

Clause 4.6 of WLEP2011 facilitates exceptions to strict compliance with development standards in certain circumstances. Clause 4.6(3) states (our emphasis added):

*Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

- (a) **compliance with the development standard is unreasonable or unnecessary** in the circumstances, and*
- (b) there are **sufficient environmental planning grounds to justify the contravention** of the development standard.*

*Note— The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be **accompanied by a document setting out the grounds** on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b)*

Accordingly, a successful Clause 4.6 variation must satisfy the below:

#### First Limb – cl 4.6(3)

Clause 4.6(3) provides that the consent authority must be satisfied that the applicant’s written request seeking to justify the contravention of the development standard has adequately addressed the following

- a. that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl 4.6(3)(a)); and
- b. that there are sufficient environmental planning grounds to justify contravening the development standard (Cl 4.6(3)(b)). To this end the environmental planning grounds advanced in the written request must justify the contravention, not simply promote the benefits of carrying out the development as a whole: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15].

In the decision of *Rebel MH v North Sydney Council* [2019] NSWCA 130 (**Rebel**) Payne JA held (our emphasis added):

*“Although it was unnecessary finally to decide the correct construction of cl 4.6(4) in *Al Maha*, I agree with the construction advanced in that case by Basten JA, with whom Leeming JA agreed, at [21]-[24]. **Properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).** Clause 4.6(3) requires the consent authority to have “considered” the written request and identifies the necessary evaluative elements to be satisfied. To comply with subcl (3), the request*



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*must demonstrate that compliance with the development standard is “unreasonable or unnecessary” and that “there are sufficient environmental planning grounds to justify” the contravention. It would give no work to subcl 4.6(4) simply to require the consent authority to be satisfied that an argument addressing the matters required to be addressed under subcl (3) has been advanced.”*

Accordingly, a consent authority must be satisfied:

- a) that the Clause 4.6 variation application addresses the matters in Clause 4.6(3); and
- b) of those matters itself which means that there is greater scope for a consent authority to refuse a Clause 4.6 variation.

These matters are addressed in **Sections 4.3** and **4.4** of this Variation Request.

This written request has been prepared under Clause 4.6 to request a variation to the "Height of Buildings" development standard at Clause 4.3 of WLEP2011.



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## PART C STANDARDS BEING OBJECTED TO

### 3.1 OVERVIEW

The Subject Site is zoned E4 General Industrial and is subject to the underling objectives of the varied standard as well as the E4 zone under WLEP2011.

### 3.2 CLAUSE 4.3 BUILDING HEIGHT CONTROL UNDER WLEP2012

Clause 4.3 of WLEP2011 identifies the following objectives:

- (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.*

Pursuant to Clause 4.6, the proposal seeks exception to the maximum permissible height of buildings control of 11m. For clarity, building height is defined under the dictionary accompanying WLEP 2011 as:

**building height** (or **height of building**) means—

- (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.*

Having regard for the above definition specifically excluding 'flues', it is arguable that a Clause 4.6 request is not required. However, out of abundant caution, this request is provided.

## PART D PROPOSED VARIATION TO STANDARDS IN CLAUSE 4.3 OF WLEP2012

Pursuant to Clause 4.6 of WLEP2011 exception is sought from the height of buildings standard applicable to the Subject Site pursuant to Clause 4.3 of WLEP2011.

### 4.1 OBJECTIVES OF THE STANDARD



## Clause 4.6 Variation - Height of Buildings

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A key determinant of the appropriateness of a Clause 4.6 Variation to a development standard is the proposal's compliance with the underlying objectives and purpose of that development standard.

Clause 35B of the EP7A Regulation 2021 requires that a request to vary a development standard must demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances, and there are sufficient environmental planning grounds to justify the contravention of the development standard. The proposal seeks exception to the maximum building height pursuant to Clause 4.3 of WLEP2011

Clause 4.3 of WLEP2011 sets out specific objectives. Those objectives under WLEP202011 are responded to in **Table 2** below:

| <b>TABLE 2: CONSISTENCY WITH THE CLAUSE 4.3 OBJECTIVES</b>   |   |
|--|---|
| <b>Objective</b>   | <b>Response</b>   |
| <i>(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,</i>                              | The Site is situated within an established industrial area within Brookvale. The proposal is compliant with applicable controls as well as DCP controls such as setbacks. This compliance ensures a built form that does not result in bulk, scale or massing considered out of character or dissimilar to surrounding development within the area. The proposal is consistent with objective (a) of Clause 4.3 |
| <i>(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,</i>   | The built form of the proposal will not result in any negligible impact upon solar access to surrounding development, similarly it does not result in any unreasonable overshadowing. The proposal is consistent with objective (b) of Clause 4.3   |
| <i>c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,</i>                      | The site location and the structure's positioning within the site itself results in the flue being primarily shielded by surrounding development. The 1m protrusion of the flue above the maximum allowed 11m height will not result in any negligible impact upon scenic quality of Warringah's coastal and bush environment. The proposal is compliant with objective (c) of Clause 4.3.                      |
| <i>(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.</i> | The flue's height will not be visually obtrusive to community views. The proposal is consistent with objective (d) of Clause 4.3.   |



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## 4.2 OBJECTIVES OF THE ZONE

The Subject Site is zoned E4 General Industrial pursuant to WLEP2011. Therefore, consideration has been given to the E4 zone objectives in **Table 3** below:

| <b>TABLE 3: CONSISTENCY WITH THE E4 ZONE OBJECTIVES</b>   |  |
|---|--|
| <b>Objective</b>  | <b>Response</b>  |
| <i>To provide a range of industrial, warehouse, logistics and related land uses.</i>  | The proposal provides industrial related use on site. Therefore, the proposal is consistent with this objective.   |
| <i>To ensure the efficient and viable use of land for industrial uses.</i>  | The use of the proposal is consisted as an efficient and viable utilisation of the land. The use is consistent with the objectives of the E4 zone, the built form is within character of the area and is indicative of the industrial character of the site. The proposal is therefore consistent with this objective. |
| <i>To minimise any adverse effect of industry on other land uses</i>  | The use of the site is not anticipated to have any effect on other land uses. The environmental impact of the proposal has been addressed within the SEE provided for this DA. The proposal is consistent with this objective.   |
| <i>To encourage employment opportunities.</i>   | The proposal provides an employment generating use. The proposal is consistent with this objective.  |
| <i>To enable limited non-industrial land uses that provide facilities and services to meet the needs of businesses and workers.</i> | The proposal does not need to address this objective as it relates to an industrial use.   |
| <i>To provide areas for land uses that need to be separated from other zones.</i>   | The proposal is situated within an established industrial area, the use is considered appropriate within its local context and is afforded separation to sensitive residential areas. The proposal is consistent with this objective.  |
| <i>To provide healthy, attractive, functional and safe light industrial areas.</i>  | The proposal will mitigate odour impacts for the subject site and is therefore consistent with this objective.   |

## 4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY



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Subclause 4.6(3)(a) (refer to **Section 2.1**) emphasises the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances.

The ways in which compliance with a development standard may be held to be “unreasonable or unnecessary” are well established. In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*), Preston CJ provided a non-exhaustive list through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), in *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*) the Court held that the common ways of demonstrating that compliance with a development standard is unreasonable or unnecessary as outlined in *Wehbe* are equally applicable to clause 4.6.

The five methods outlined in *Wehbe* include:

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).*
- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).*
- *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).*
- *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 (Fourth Method).*
- *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 (Fifth Method).*

It is sufficient to demonstrate only one of these methods to satisfy clause 4.6(3)(a) of LCLEP 2009 (*Wehbe*, *Initial Action* at [22], *Rebel* at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

However, in this case, it is demonstrated below that:

- (a) the First Method has been satisfied, and the objectives of the height of buildings standard are achieved notwithstanding the non-compliance with the numerical standard (see also Section 4.1 above); and

When considering whether a development standard is appropriate and/or necessary, one must take into account:

- the nature of the proposed variation;
- the Site context; and





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- the design of the proposed development.

Following the decision in *Initial Action*, it was established that Clause 4.6 does not require an applicant to demonstrate that a development which contravenes a development standard have a better (or neutral) environment planning outcome than a development that complies with the development standard.

By providing a building at the height proposed, a site layout is achieved that:

- enables plant and equipment to be located away from public view;
- results in a built form that is substantially the same as a development of the same scale compliant with the maximum building height.

The standard is unreasonable and unnecessary in the circumstances of the case on the following basis:

- the proposal is consistent with the existing and desired future character of the site, locality and the surrounding area. The scale of the proposal is not considered as dominant in terms of bulk and scale when viewed from the streetscape.
- The height proposed is required to ensure correct and adequate plume dilution and dispersion as supported by technical modelling
- The proposal does not result in any negligible effects upon the amenity of any surrounding sites.
- Strict adherence and therefore reduction of the flue height to achieve compliance with Clause 4.3 of WLEP2011 in this instance would result in a less effective design and operation of the proposal.

The abovementioned justifications are considered valid, and in this instance the proposed Clause 4.6 Variation is considered to be acceptable. The proposed development represents a more efficient use of the Subject Site. The objectives of the relevant clause and E4 General Industrial zone would be upheld as a result of the proposed development. In light of the above, the application of the height of building development standard is therefore unreasonable and unnecessary in response to the proposed development.

### 4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

In *Initial Action*, Preston CJ observed that in order for there to be “sufficient” environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

The environmental planning grounds to justify the departure of the development building height development standard are as follows:

- The proposal is entirely consistent with the underlying objectives of the building height standard demonstrated in Section 4.1
- The proposal is entirely consistent with the objectives of the E4 General Industrial zone, as described in Section 4.2



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- Compliance with the standard would be unreasonable and unnecessary for the reasons outlined in Section 4.3
- The proposal remains in character with the locality and surrounding land uses and presents a built form similar to that of a development compliant with height of buildings standard.
- The additional building height of 1m does not cause any impact on surrounding development in regard to visual impact, view loss, privacy loss and solar access.
- The proposal is entirely compliant with boundary setbacks and FSR standards, providing an appropriate built form and separation between surrounding sites.
- The proposal is compliant with relevant EPA measures in regards to odour and emissions.

For the reasons outlined above, it is considered that the proposed variation to the maximum height of buildings under Clause 4.3 is appropriate and can be clearly justified having regard to the matters listed within clause 4.6(3)(b) under WLEP2011.

### 4.5 OBJECTIVES OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

All planning determinations made under the EP&A Act are required to be made with regard to the objects of the Act in accordance with section 1.3 of the EP&A Act. **Table 4** below assesses the proposed development against the objects of the EP&A Act.

| TABLE 4: EP&A ACT OBJECTIVES  |   |
|---|---|
| Objective   | Response  |
| <i>(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,</i>      | The proposal is considered to promote to social and economic welfare of the community as it would contribute towards employment generation within the Northern Beaches LGA.   |
| <i>(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,</i> | The proposal is compliant with relevant EPA measures in regards to odour and emissions. The proposal does not result in any risk of serious or irreversible damage to the environment. The site is currently operating under an Environmental Protection License which permits petroleum and fuel production, this proposal does not alter the relevant capacity permitted under the EPL. |
| <i>(c) to promote the orderly and economic use and development of land,</i>   | The proposal promotes orderly development of the site that provides economic benefit in the form of employment generation.  |



#### Clause 4.6 Variation - Height of Buildings

Demolition of the existing odour removal infrastructure and installation and operation of an upgraded Fume Collection and Scrubbing System  
75-79 Old Pittwater Road, Brookvale



**TABLE 4: EP&A ACT OBJECTIVES**

| <b>Objective</b>   | <b>Response</b>   |
|--|---|
| <i>(d) to promote the delivery and maintenance of affordable housing,</i>  | The proposal does not relate to this development.   |
| <i>(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,</i> | The proposal relates to a long-established use of the site for industrial purpose. The site is highly disturbed, and no vegetation is included in the proposal.   |
| <i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),</i>  | The site is not identified as possessing any Aboriginal built and cultural heritage.  |
| <i>(g) to promote good design and amenity of the built environment,</i>  | The proposal presents a design and built form that is within the local character and respects the existing amenity.   |
| <i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,</i>                          | Construction of the building will comply with the BCA and NCC. Safety of occupants will be achieved.  |
| <i>(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,</i>                 | The DA will be assessed and determined by Northern Beaches Council.   |
| <i>(j) to provide increased opportunity for community participation in environmental planning and assessment.</i>  | The DA will be subject to mandatory and relevant notification requirements of Northern Beaches Council. Any submissions from the general public will be considered within the assessment of the DA and responded to by the applicant. |

#### 4.6 MATTERS OF STATE AND REGIONAL SIGNIFICANCE

The proposed non-compliance with Clause 4.3 of WLEP2011 will not give rise to any matters of significance for State or regional environmental planning. They will also not conflict with any State Environmental Planning Policy or Ministerial Directives under section 9.1 of the EP&A Act.



### Clause 4.6 Variation - Height of Buildings

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## PART E CONCLUSION

For the reasons outlined above, it is requested that Council support the Variation Request, which seeks approval for non-compliance with Clause 4.3 of WLEP2011 for the following reasons:

- The development is consistent with the objectives of the particular standard (refer to **Section 4.1**);
- The development is consistent with the objectives for development within the zone and long term strategic intentions to maintain and preserve employment land (refer to **Section 4.2**);
- Compliance with the development standard is unreasonable and unnecessary in the circumstances (refer to **Section 4.3** as part of the First Limb satisfied);
- There are sufficient environmental planning grounds to justify contravening the development standard (refer to **Section 4.4** as part of the First Limb satisfied);
- The Proposal is consistent with the objectives of the EP&A Act (refer to **Section 4.5**); and
- The development does not give rise to any matter of significance for the State or regional environmental planning and is consistent with the visions and objectives of the relevant strategic plans (refer to **Section 4.6**);

Given the justification provided above, the Variation Request is well founded and should be favourably considered by Northern Beaches Council.

