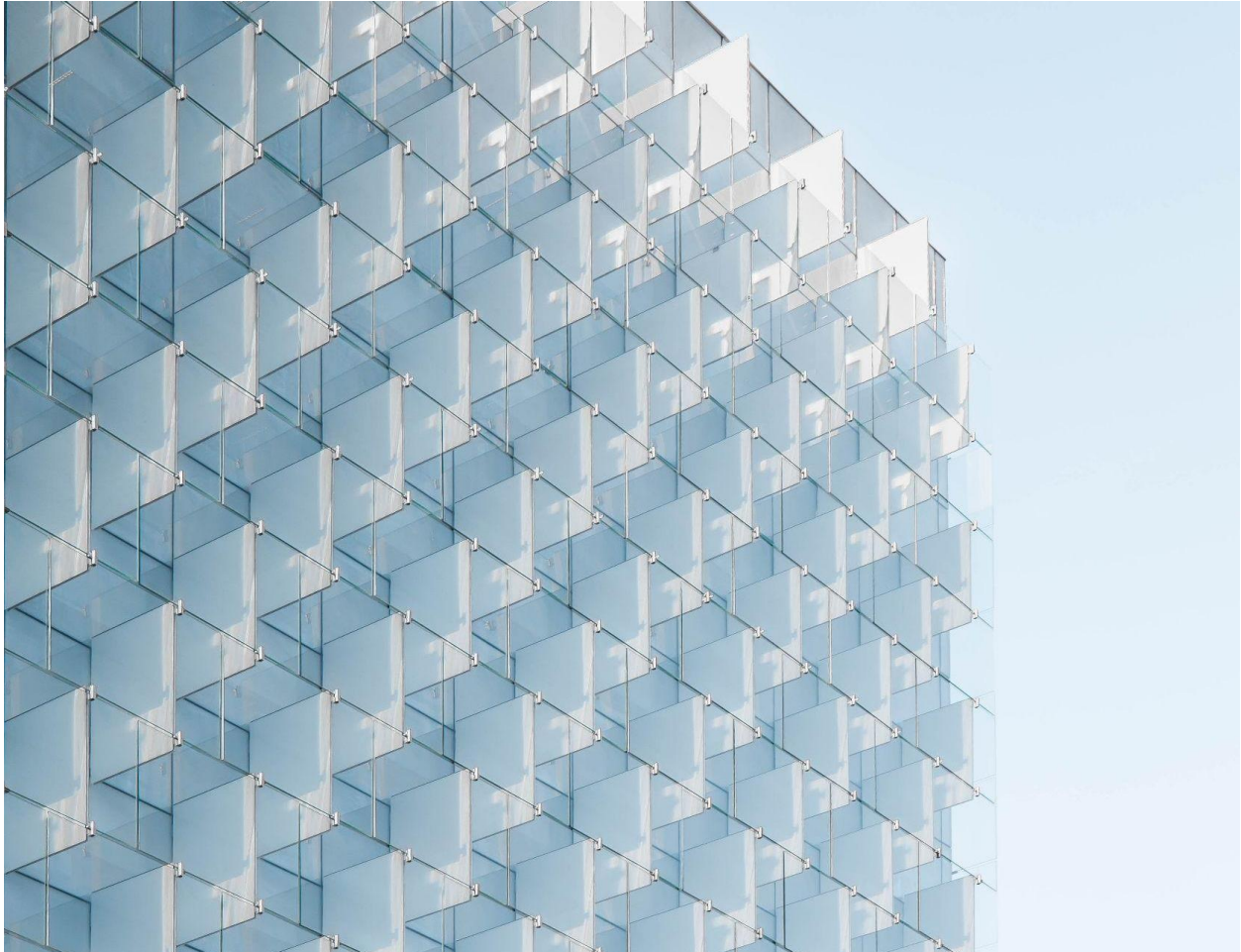


WILLOWTREE PLANNING



Ref: WTJ23-468
Contact: Richard Seaward



CLAUSE 4.6 VARIATION REQUEST HEIGHT OF BUILDING

PROPOSED AWNING TO EXISTING BULKY GOODS CENTRE

4 - 6 Niangala Close, Belrose
Lot 1 DP1104786

—

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Clause 4.6 Variation

Proposed Alteration and Additions to Belrose Supa Centre
4 - 6 Niangala Close, Belrose



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In the spirit of reconciliation and recognition, Willottree 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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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 proposed alterations and additions to Belrose Supa Centre at 4 - 6 Niangala Close, Belrose, (Lot 1 DP1104786) (the Site).

The Site is zoned E3 Productivity Support 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 E3 zone as an additional permitted use pursuant to Clause 3 of Schedule 3 of the WLEP2011 and is considered contextually appropriate. The proposal is generally consistent with the objectives and provisions of WLEP2011, 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 Site, and concludes that the proposed building height, despite the non-compliance, is the best means of achieving the objectives of encouraging orderly development of the Site under the *Environmental Planning and Assessment Act 1979* (EP&A Act).

1.2 RATIONALE FOR 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 the WLEP2011, the Site is subject to a maximum building height of **11m**; however, the existing building is **constructed in excess of the building height limit and works are proposed above the 11m height plane comprising the insertion of an awning.**

Notwithstanding, no additional building height is proposed to the existing building and no additional bulk, with the exception of the awning, is proposed above the 11m height plane.

The non-compliance will not have an adverse impact on the surrounding locality and is in-keeping with the existing building. The built form is compatible and accords with the prevailing pattern of development of the area.



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The scale of the works proposed need to be assessed having regard to the established height and scale of the existing building. To that extent there is no increase in height beyond that already established on site and the works have been designed to provide for an integrated outcome to the established development.

1.3 DEVELOPMENT STANDARD VARIATION

Under the provisions of Clause 4.3 of WLEP2011, the Site is subject to a maximum building height of **11m**. The existing building on the Site is 19m in height. The proposal will not result in any additional height to the existing built form.

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

TABLE 1: CLAUSE 4.3 OF WLEP2011 VARIATION SUMMARY		
WLEP2011 Clause	WLEP2011 Development Standard	Proposed Development Non-Compliance
Clause 4.3 - Height of Buildings	Maximum height of 11m	The proposal seeks consent to undertake works comprising a new awning within the area above the 11m height control and within the 19m maximum height of the building. The awning would be 14.3m in height.

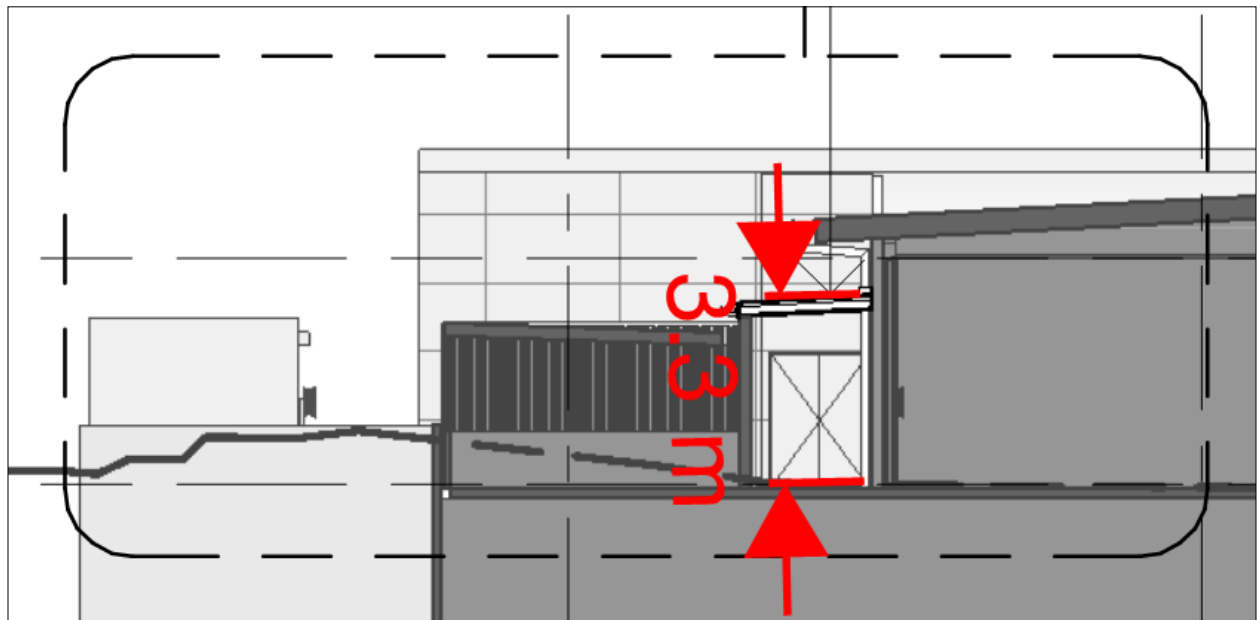


Figure 1 Location of Awning 3.4m above the 11m height plane (Buchans, 2023)

The proposed development represents the most efficient use of the Site and responds to the existing environmental constraints in comparison to a compliant building height development.



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Accordingly, this Clause 4.6 variation to building height seeks to extend the extension which was approved under **DA2014/1369**; it does not seek to add further height than what has already been approved. The built form of the extension will maintain the building setback from the parapet of the façade according with the existing pattern of development at the Site.



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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 must demonstrate that compliance with the development standard is "unreasonable or unnecessary" and that "there are sufficient environmental*



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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 "development standard" development standard at Clause 4.3 of WLEP2011.



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PART C STANDARDS BEING OBJECTED TO

3.1 OVERVIEW

The Site is zoned E3 Productivity Support and is subject to the underling objectives of the varied standard as well as the E3 zone under WLEP2011.

3.2 CLAUSE 4.3 - HEIGHT OF BUILDINGS UNDER WLEP2011

Clause 4.3 of WLEP2011 identifies the following objectives:

(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*

Pursuant to Clause 4.6, the proposal seeks exception to the maximum permissible Height of Building of 11m to insert an awning above the building height plane but below the maximum building height of the as-built building.

3.3 PROPOSED VARIATION TO DEVELOPMENT STANDARDS

The Site is subject to a maximum building height limit of 11m. The proposed development does not seek to increase the height of the existing building; however, it seeks to insert an awning within the existing built form above the building height limit of 11m.

It is noted that the awning needs to be assessed having regard to the established height and scale of the existing building. To that extent, there is no increase in height beyond that already established on site and the works have been designed as commensurate with the existing scale and built form.

The height of the existing building already exceeds the height standard contained within the WLEP2011 as approved under **DA2014/1369**.

The awning will not add additional height to the building and the scale and bulk of the building will be retained.



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Given the absence of compliance of the current development with the height standard of the WLEP2011 it is considered that the awning would not result in any additional bulk or height to the existing building.

Therefore, in consenting to the original development which exceeds the 11m height standard, it is no longer possible for the development to conform to the height of building standard of the WLEP2011.

awning matches the height of existing awnings so I would focus on this and the improved built form outcome from maintaining that height. It also looks like the awning is set about an existing plant enclosure so would be worth discuss the impacts of maintaining the 11m height limit on that enclosure and overall design of the building



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PART D PROPOSED VARIATION TO STANDARDS IN CLAUSE 4.3 OF WLEP2011

Clause 4.6(4)(a)(ii) requires that a request to vary a development standard must establish that the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the zone. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018]NSWLEC 118 at 27

Importantly, the word consistent has been interpreted as 'compatible' or 'capable of existing in harmony'. *Kingsland Developments Australia Pty Ltd City of Parramatta Council* [2018]NSWLEC 1241 at 20.

4.1 OBJECTIVES OF THE STANDARD

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 4.3 of WLEP2011 sets out specific objectives with regards to height. Those objectives under WLEP2011 are responded to below.

TABLE 2: CONSISTENCY WITH THE CLAUSE 4.3 OBJECTIVES	
Objective	Response
<i>to ensure that buildings are compatible with the height and scale of surrounding and nearby development,</i>	<p>The proposed development, by virtue of its existing height, is consistent with the prevailing pattern of development within the Austlink Business Park.</p> <p>The proposed development in excess of the building height limit is of a design and form consistent with the prevailing pattern of development and will not result in adverse impacts on the locality when viewed from the public domain.</p> <p>The awning will accord with the established form of the building and is in-keeping with the prevailing pattern of development. Awnings such as the one proposed are not out of character on buildings of this nature.</p>
<i>to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,</i>	<p>The awning is below the existing ridge height and so will not have any visual impacts on the scenic quality of the bushland location.</p> <p>No additional bulk is proposed as part of this DA above the building height limit - the works relate to an awning above the building height limit of 11m.</p>



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TABLE 2: CONSISTENCY WITH THE CLAUSE 4.3 OBJECTIVES

Objective	Response
<i>to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.</i>	No additional bulk is proposed as part of this DA - the works relate to the awning above the building height limit of 11m.
<i>to minimise visual impact, disruption of views, loss of privacy and loss of solar access</i>	As demonstrated in the architectural plans submitted with the DA, the proposed development will not result in any unreasonable overshadowing impacts surrounding the Site. No additional bulk is proposed as part of this DA - the works relate to the awning above the building height limit of 11m.
<i>to allow for the reasonable sharing of views</i>	The proposed development would not result in any adverse impacts on the views experienced by the surrounding properties.
<i>to encourage buildings that are designed to respond sensitively to the natural topography</i>	No additional bulk is proposed as part of this DA above the building height limit - the works relate to the awning above the building height limit of 11m.

4.2 OBJECTIVES OF THE ZONE

The Site is zoned E3 Productivity Support zone pursuant to WLEP2011. Therefore, consideration has been given to the E3 zone objectives in **Table 3** below:

TABLE 3: CONSISTENCY WITH THE E3 PRODUCTIVITY SUPPORT ZONE OBJECTIVES

Objective	Response
<i>To provide a range of facilities and services, light industries, warehouses and offices</i>	The proposal relates to an existing specialised retail centre which is permissible within the E3 zone.
<i>To encourage employment opportunities</i>	The use of the Site as specialised retail is employment generating.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.</i>	The land use as a specialised retail center is not inconsistent with this objective.
<i>To create business park employment environments of high visual quality that relate favourably in architectural and landscape treatment to neighbouring land uses and to the natural environment</i>	The reconfiguration of the Site and insertion of the awning will not impact on the architectural or prevailing landscape of neighbouring Sites.



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TABLE 3: CONSISTENCY WITH THE E3 PRODUCTIVITY SUPPORT ZONE OBJECTIVES

Objective	Response
<i>To minimise conflict between land uses in the zone and adjoining zones and ensure the amenity of adjoining or nearby residential land uses.</i>	The development of the Site for the intended purpose of a specialised retail centre and does not impact on the amenity of the neighbouring Sites.

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 2.1**) emphasise the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances.

In view of the particular circumstance of this case, strict compliance with Clause 4.3 of WLEP2011 cannot be achieved as the building height plane has already been breached (the works subject to this Clause 4.6 variation request relate to the insertion of an awning above the 11m height plane at 14.4m in height) as such, strict compliance with this clause is considered to be both unnecessary and unreasonable. The awning will be in-keeping with the existing building and will tie in to the built form.

The non-compliance is not likely to have an adverse impact on the area and simply seeks to insert an awning above the prevailing 11m height control.

In accordance with the Court's findings in *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) the way to establish that compliance with the development standard is unreasonable or unnecessary is because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

We have set out above a detailed assessment against the objectives of the development standard and adopted the first test in *Wehbe* to establish that compliance is unreasonable or unnecessary because the objectives of the height controls are satisfied notwithstanding the variation.

The proposal does not conflict with the intent of the development standard and zone objectives as demonstrated above. The proposal is consistent with the objectives of the E3 Productivity Support zone.

The abovementioned justifications are considered valid, and in this instance the proposed Clause 4.6 Variation is considered to be acceptable given that no alterations are proposed to the bulk or scale. The proposed development represents a more efficient use of the Site.

Furthermore, the height of building control at the Site has already been breached and no alterations to the built form are proposed. Accordingly, the application of the height of buildings development standard is therefore unreasonable and unnecessary in response to the insertion of an awning as it will facilitate the existing tenants.



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4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

The Variation Request is considered well founded because, notwithstanding the proposed non-compliance with the maximum permitted building height:

- The proposal is entirely consistent with the underlying objectives and purposes of the standard, as demonstrated in Section 4.1
- The proposal is entirely consistent with the underlying objective or purpose of the E3 zone, as demonstrated in **Sections 4.2 and 4.3;**
- Compliance with the standard would be unreasonable and unnecessary for the reasons outlined in **Section 4.3;**
- The proposed non-compliance results in a built form and land use, which is permitted at the Site.
- The proposal is consistent with the desired future character of the Site within the surrounding locality and generally complies with the relevant built form controls;
- The awning will allow for the existing specialised retail premises to functionally operate and thus constitute the ongoing sustainable development of the Site;
- The proposal has been designed to be sympathetic and respectful to the existing surrounding amenity and local character, particularly regarding visual bulk, privacy and overshadowing whilst expanding on the existing functional residential building Site.

For the reasons outlined above, it is considered that the variation to the height of buildings control 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.



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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 will positively contribute to the specialised retail use on the Site within the Northern Beaches LGA. The proposal can furthermore be progressed without any significant environmental impacts.
<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 avoids the need for non productive site excavation
<i>(c) to promote the orderly and economic use and development of land,</i>	The proposal allows for the development of the Site in accordance with the objectives of the E3 zone pursuant to WLEP2011.
<i>(d) to promote the delivery and maintenance of affordable housing,</i>	The proposal will not impact the delivery and maintenance of affordable housing.
<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 proposed development has been appropriately sited, resulting in minimal impacts on the surrounding environment.
<i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),</i>	The existing Site is not identified as a Heritage Item, within a heritage conservation area or as containing Aboriginal or cultural heritage significance. The proposal will not impact any Aboriginal or cultural heritage significance of the surrounding land.
<i>(g) to promote good design and amenity of the built environment,</i>	The proposal will be constructed out of complementary materials to the existing development.
<i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,</i>	The proposal can be constructed and maintained without health and safety risks to future tenants.
<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 is required to be determined by Northern Beaches Council.
<i>(j) to provide increased opportunity for community participation in environmental planning and assessment.</i>	The DA is subject to the relevant public notification requirements.

4.6 MATTERS OF STATE AND REGIONAL SIGNIFICANCE



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

Planning Circular PS 08-014, issued by the former NSW Department of Planning, requires that all development applications including a variation to a standard of more than 10% be considered by full Council rather than under delegation. It is noted that this variation does not seek to increase the height of the building above the existing building height.



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4.7 PUBLIC BENEFIT IN MAINTAINING THE STANDARD

Strict compliance with Clause 4.3 of WLEP2011 will result in:

- Providing a less efficient development which would result in the contrived development of the Site;
- Preventing the Site being developed to its full potential; and
- Inhibit the needs of future tenants, the existing set-up results in deliveries to the tenancies being exposed to the elements which can result in the stock becoming damaged.

As such, there is no genuine or identifiable public benefit to be achieved in maintaining the height of building development standard for the Site. Furthermore, the height of building control has already been breached under development consent **DA2014/1369**.

4.8 SUMMARY

For the reasons outlined above, it is considered that the variation to Clause 4.3 of WLEP2011 is well-founded and appropriate in the circumstances. Furthermore, the Variation Request is considered to be well-founded for the following reasons as outlined in Clause 4.6 of WLEP2011, *Four2Five Pty Ltd v Ashfield Council* and *Wehbe v Pittwater Council*:

- 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 development is consistent with the objectives of the particular standard (refer to **Section 4.1** as part of the Second Limb satisfied);
- The development is consistent with the objectives for development within the zone and long term strategic intentions to provide employment generating land use (refer to **Section 4.2** as part of the Second Limb satisfied);
- 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** as part of the Third Limb satisfied); and
- The objectives of the standard are achieved notwithstanding the non-compliance with the standard.

Overall, it is considered that the variation to the height of building development standard is appropriate and is justified having regard to the matters listed within Clause 4.6 of WLEP2011.



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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:

- Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case;
- There are sufficient environmental planning grounds to justify contravening the development standards;
- The Proposal will capitalise on the Site's full planning potential;
- The Proposal satisfies the objectives of the E3 zone and Clause 4.3 of WLEP2011;
- No unreasonable environmental impacts are introduced as a result of the proposal; and
- There is no public benefit in maintaining strict compliance with the standards.

Council should be satisfied that the Variation Request has addressed and meets the requirements of clause 4.6 and should be favourably considered by Council.

