



## **Clause 4.6 Variation Request**




Height of Buildings  
(Clause 4.3) Warringah LEP  
2011

**2 Cross Street, Brookvale**

Submitted to Northern Beaches Council  
On Behalf of Leda Holdings Pty Ltd

February 2021

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## 1. EXECUTIVE SUMMARY

This is a formal written request that has been prepared in accordance with clause 4.6 of the *Warringah Local Environmental Plan 2011* (WLEP 2011) to support an industrial and self-storage development at No. 2 Cross Street, Brookvale (the site).

The proposal generally involves:

- Demolition of all existing structures on the site;
- Minor earthworks and regrading;
- Construction of a new two-storey industrial development comprising:
  - Seventeen (17) self-storage units (of which five (5) have mezzanine levels);
  - Twenty-three (23) industrial units with ancillary office space at the mezzanine levels; and
  - Amenities;
- Provision of fifty-six (56) car parking spaces across two levels;
- Landscaping;
- Signage;
- Stormwater drainage works; and
- Strata subdivision.

As a result of the flood hazard of the land, the proposed development has been designed with raised floor levels, which requires fill of up to 1.57 metres across the site. However, portions of the building depart from the applicable 11m "height of buildings" development standard by a maximum of 3.1m, or 28.18%, along the southern elevation where a roof feature is located over the main pedestrian entry of the building. This maximum variation is only for a minor portion of the development, with the remainder of the variation being less. The variation of the building height (at the top of the parapet) differs across the site as a result of the site's topography, with the maximum variation being 2.4 metres, or 21.81%, at the site's south-eastern corner.

This formal request demonstrates that compliance with the 11m height development standard would be unreasonable and unnecessary in the circumstances of this development, and there are sufficient environmental planning grounds to justify the variation. Further, the proposal is consistent with the objectives of the zone for the subject site.

## 2. INTRODUCTION

This is a formal request that has been prepared in accordance with clause 4.6 of the WLEP 2011 to justify a variation to the height of buildings development standard proposed in a development application submitted to Northern Beaches Council for the proposed industrial and self-storage development at 2 Cross Street, Brookvale (site).

The objectives of clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by clause 4.6 in the particular circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)];
3. 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 [clause 4.6(4)]

This request also addresses the requirement for the concurrence of the Secretary as required by clause 4.6(4)(b).

### 3. STANDARD TO BE VARIED

The standard that is proposed to be varied is the height of buildings development standard which is set out in clause 4.3 of the WLEP 2011 as follows:

#### 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 numerical value of the development standard applicable in this instance is 11 metres (see Figure 1).

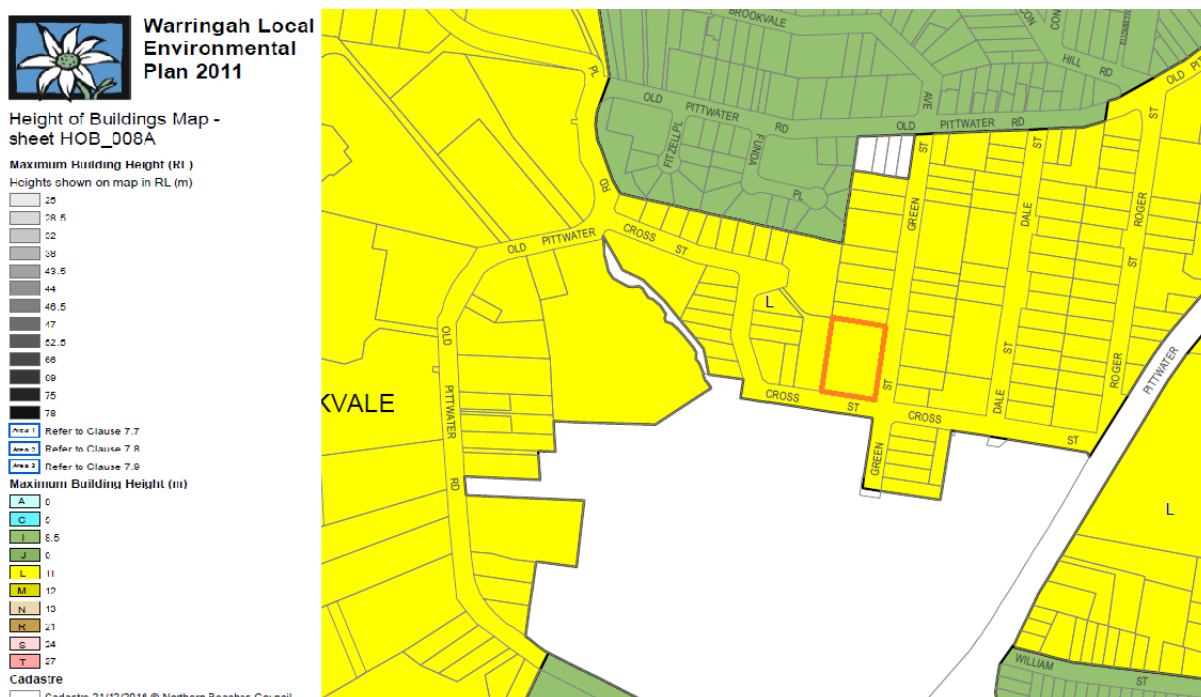


Figure 1: WLEP 2011 Height of Buildings Map extract - site outlined in orange (Source: NSW Legislation)

The development standard to be varied is not excluded from the operation of clause 4.6 of the WLEP 2011.

## 4. EXTENT OF VARIATION

The majority of the site is located within a medium risk precinct, and therefore has been designed in accordance with the flood planning level of RL 11.38 metres, which requires fill of up to 1.57 metres across the site.

As demonstrated on the architectural plans prepared by Pace Architects and included at **Appendix 1**, the proposed development has a maximum height at RL 24.31, which represents a maximum building height of 14.1 metres measured from the existing ground level below (i.e. RL 10.21). Subsequently, the proposed development varies the 11-metre maximum building height development standard prescribed for the site by 3.1 metres (i.e. 28.18% variation). The maximum breach of the standard relates to the roof feature over the pedestrian entry off Cross Street. However, it is important to note that the maximum variation is only for a minor portion of the development, with the roof feature only being 2.24 metres wide and the remainder of the variation being less. The building (at the top of the parapet) has a maximum height at RL 23.21, which represents a maximum building height of 13.4 metres measured from the existing ground level below (i.e. RL 9.81) at the corner of Cross and Green Streets and a variation of 2.4 metres, or 21.81%, to the 11-metre building height development standard. Of note, only part of the first floor contains built form, with a large portion comprising open air car parking.

The parts of the building that exceed the maximum height are shown in Figures 2 to 5 below.

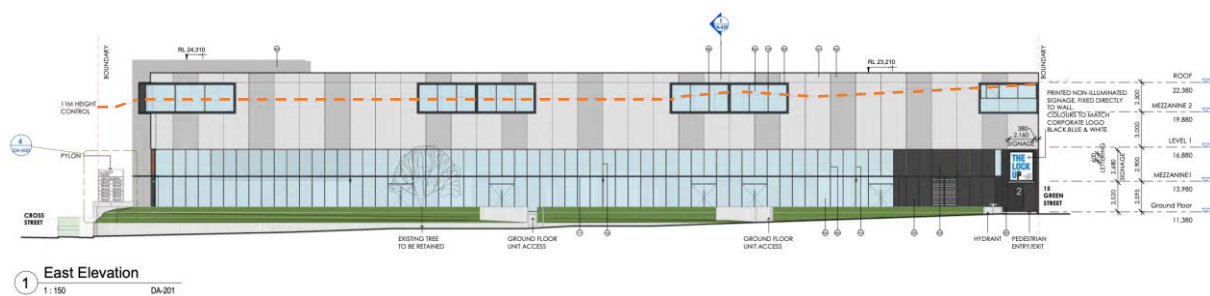


Figure 2: East Elevation extract (Source: Pace Architects)

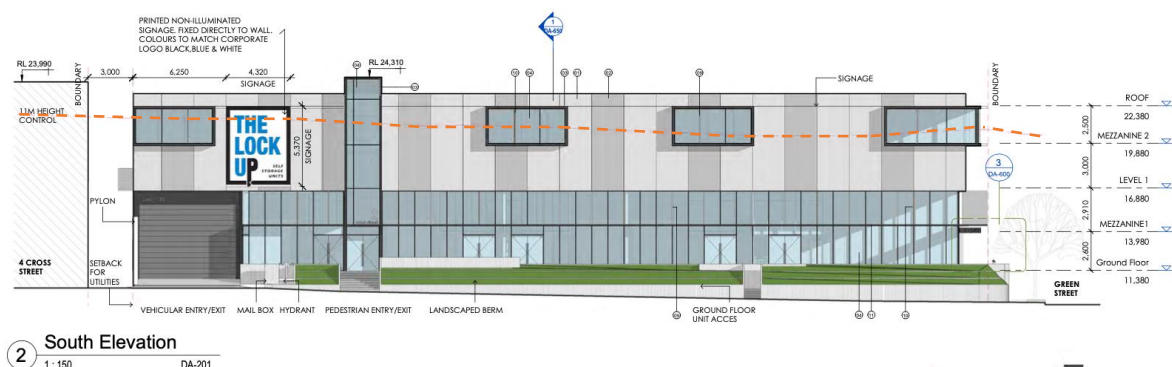


Figure 3: South Elevation extract (Source: Pace Architects)

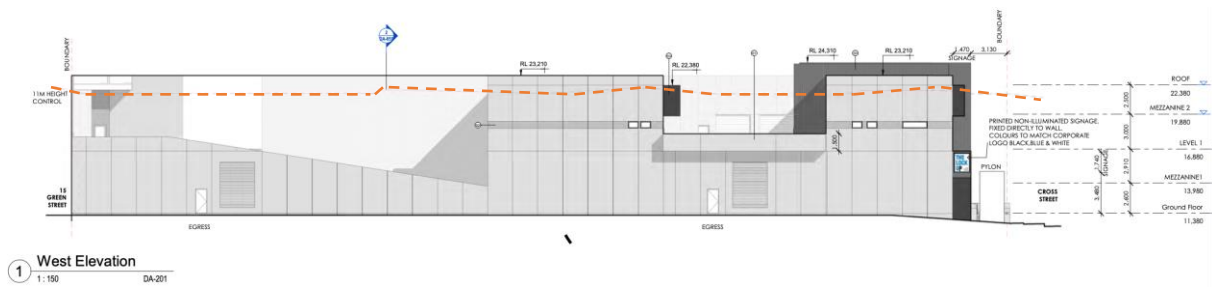


Figure 4: West Elevation extract (Source: Pace Architects)

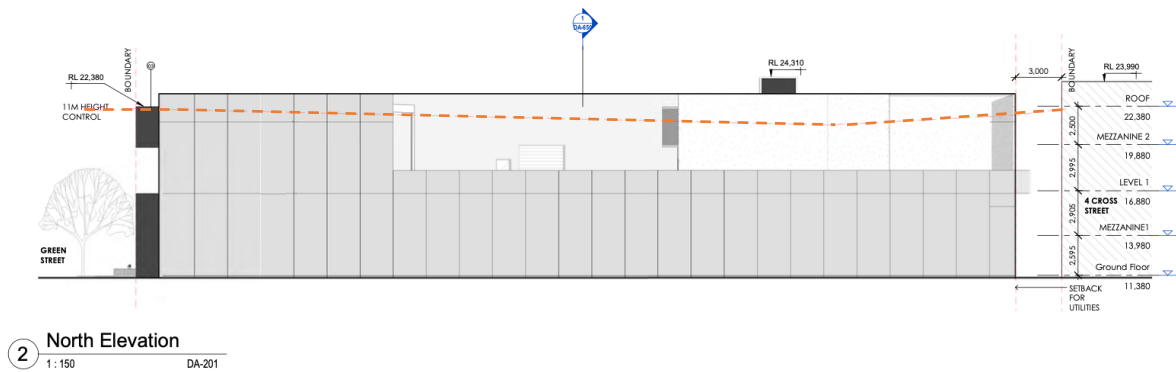


Figure 5: North Elevation extract (Source: Pace Architects)



## 5. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the LEP.

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The five ways of establishing that compliance is unreasonable or unnecessary are:

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

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

In this case, it is demonstrated below that Test 1 has been satisfied.

### 5.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The following table considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (Test 1 under *Wehbe*).

Table 1: Achievement of Objectives of Clause number of LEP.

Objective	Discussion
(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,	Notwithstanding the proposed development's variation to the development standard, the building is compatible with the height and scale of surrounding and nearby development. Most recently, a development for self-storage premises was approved on the neighbouring property at 4 Cross Street, Brookvale (DA2020/0433) with a maximum height of 14.04 metres to the top of the lift overrun and 13.4 metres to the top of the roof. The proposed development has been designed to be consistent with the approved development on the neighbouring property and its height variation, with the roof feature over the pedestrian entry off Cross Street having a maximum height of 14.1 metres and the building (at the parapet) having a maximum height of 13.4 metres. Moreover, the RL heights of the proposed development at the top of the roof feature over the pedestrian entry off Cross Street and the building at the parapet are below the maximum RL heights for the lift overrun and roof of the

Objective	Discussion
	<p>approved development on the neighbouring property. It is noted that the proposed development and approved development on the neighbouring property have both had to raise their floor levels to ensure they comply with the required flood planning levels under the WLEP 2011. As more properties within the surrounding locality are redeveloped for industrial purposes, it is expected that the height and scale of development within the precinct will change, as new buildings are design and constructed in accordance with the applicable flood planning levels.</p> <p>More broadly the surrounding area provides for a range of building heights and scales, including the Westfield Warringah Mall opposite the site, which while located in the B3 Commercial Core zone, does include the provision of a multi-deck car park at the corner of Cross and Green Streets. This multi-deck car park is 5-storeys in height and will sit well above the proposed development. Other existing development such as that at 13 Green Street to the north of the site. Comprises a part three and part-four storey building.</p> <p><u>Public Interest</u></p> <p>The development as a whole achieves this objective of the development standard in that it comprises a two-storey industrial development that is compatible with the height and scale of surrounding and nearby development in the locality. The site is uniquely located at the interface between the IN1 General Industrial zone and B3 Commercial Core zone. The proposed development provides a land use and built form outcome that provides an appropriate transition between the two land use zones, while also ensuring it is compatible with the land's flood hazard.</p>
(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,	<p>The parts of the proposed development that sit above the 11-metre height limit prescribed for the site do not result in any adverse amenity impacts. However, it is noted that industrial development does not require the same high level of amenity of other types of development such as residential.</p> <p>The roof feature over the pedestrian entry off Cross Street is only approximately 2-metres wide and comprises light weight materials (i.e. glazing), which seek to minimise the visual impact of the maximum proposed variation to height. Moreover, the visual impact of the part of the second storey that seeks to vary the height limit has also been minimised through the use of different materials and colours and horizontal and vertical elements that distinguish it from the</p>

Objective	Discussion
	<p>ground floor level and reinforce the appearance of the proposed development as a two storey building.</p> <p>The proposed development is located on a relatively flat site within an established industrial area where there are no existing significant views.</p> <p>There are no windows along the north and west elevations of the proposed development as shown in the elevations included at <b>Appendix 1</b> to minimise the loss of privacy to neighbouring properties.</p> <p>Along the proposed development's southern and eastern elevations fronting Cross and Green Streets, any potential privacy impacts have been minimised through the consolidation of windows that are limited to the mezzanine office spaces at the first floor as shown in the figures below, noting the corner location of the site is such that it is setback from the surrounding development by roads. Moreover, the pedestrian entry off Cross Street is a transient area in which people will not linger, albeit noting that this part of the proposed development looks out onto a multi-deck car park.</p> <p>The proposed variation to the height of buildings development standard does not preclude surrounding industrial and commercial developments from achieving adequate solar access as demonstrated by the shadow diagrams included in the architectural plans at <b>Appendix 1</b>.</p> <p>The shadows cast by the parts of the proposed development that sit above the 11-metre height limit are limited to the multi-deck car park of the Westfield Warringah Mall to the south of the site and the Cross Street and Green Street road reserves. There are no windows located on the eastern elevation of the self-storage premises development approved on the neighbouring property west of the site at 4 Cross Street, Brookvale.</p> <p><u>Public Interest</u></p> <p>The proposed development has been designed to minimise any potential adverse impacts in terms of visual impacts, views, privacy and solar access. It has been appropriately setback, incorporates a mix of materials, finishes and vertical and horizontal elements and includes the provision of landscaping within the Cross Street setback area and public domain areas to minimise the potential for any adverse visual impacts. There are no significant views to or from the site that are required to be maintained by the development. No windows are proposed along the north and west elevations at the ground floor</p>

Objective	Discussion
	or first floor levels and the site's corner location are such that there will be no adverse privacy impacts, noting the roads provide for separation to neighbouring development to the south and east. The proposed development does not result in any loss of solar access to residential development and results in minimal overshadowing to surrounding industrial development due to site's north-south orientation.
(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,	The site is located over 2 kilometres from the coastline and approximately 640 metres east of the nearest bush environment being Allenby Park. Its location within an established industrial area on a relatively flat parcel of land is such that the proposed variation to the 11-metre height of buildings development standard and the proposed development as a whole will not result in any potential adverse impacts 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.	Refer to the response under objective (b) above. The site is located within an established industrial area, neighbouring Westfield Warringah Mall, and is not visible from any parks, reserves or community facilities in accordance with this clause. The site and proposed development is only visible from surrounding development and the public domain areas of Cross and Green Streets.

As demonstrated in Table 1 above, the objectives of the height of buildings development standard are achieved notwithstanding the proposed variation.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the height of buildings development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

## **5.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;**

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

## **5.3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.**

The objective would not be defeated or thwarted if compliance was required. This reason is not relied upon.

**5.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or**

The standard has not been abandoned by Council actions in this case and so this reason is not relied upon. However, it is noted that Council recently approved a variation to the height of buildings development standard as part of the DA for a self-storage development on 4 Cross Street adjacent the site.

**5.5. The zoning of the land is unreasonable or inappropriate.**

The zoning of the land is reasonable and appropriate and therefore is not relied upon.

## 6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, 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.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

As discussed in Section 4, the elements of the development which contravene the height of buildings development standard are the roof feature over the pedestrian entry off Cross Street and the upper portion of the second storey across the site.

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

- Compliance with the height of buildings development standard would prevent the development of the upper floor and result in a poorer environmental outcome due to less employment GFA being delivered.
- The site is generally located with a medium risk precinct in terms of flooding and is affected by the 1% annual exceedance probability (AEP) and 1:100 average recurrence interval (ARI) flood events. Subsequently, a minimum finished floor level (FFL) of RL 11.38 is required for the proposed development to ensure that it is compatible with the flood hazard of the land. The requirement for this FFL directly contributes to the extent of the variation that is proposed, noting at the location of the maximum variation to the height of buildings development standard, the required FFL of RL 11.38 is 1.17 metres higher than the existing ground level (RL 10.21) directly below.
- The provision of a roof feature over the pedestrian entry off Cross Street provides visual interest and assists in breaking up the bulk of the building when viewed from Cross Street. Furthermore, the roof feature clearly delineates the pedestrian entry and makes it more easily identifiable to visitors.
- The topography of the site is generally flat but it does fall slightly to the corner of Cross and Green Streets. This slight variation within the site's topography does contribute to the maximum variation to the height of buildings development standard in relation to the building at the top of the parapet.
- The building has been skilfully designed to meet the operational needs of future tenants, noting the variation to the height of buildings development standard is required to allow for trucks to access the loading bays within the warehouse units located at the first floor of the proposed development.
- The variation to the height of buildings development standard and the proposed development as a whole do not result in any adverse amenity impacts on neighbouring properties or the public domain areas of Cross Street and Green Street in terms of visual impact, views, privacy and overshadowing.
- The variation to the standard will provide additional employment opportunities on the site, noting that the Northern Beaches *Local Strategic Planning Statement* (LSPS) is targeting growth of 3,000 to 6,000 jobs by 2036 within the Brookvale-Dee Why centre in which the site is located. Further, the variation allows for additional employment/industrial floor place to be included on a site considered suitable for this particular use and compatible with the zone and neighbouring properties. The site is also highly accessible in terms of public transport such as the B Line bus services and is also located directly opposite the Westfield Warringah Mall and its various offerings.
- The proposed development is consistent with the Greater Sydney Commission's (GSC) views in terms of the economic significance of industrial and urban services lands in Greater Sydney. The Greater Sydney Region Plan, *A Metropolis of Three Cities*, released by the GSC in 2018, identifies the planning, retention and management of industrial and urban services land as a key objective. The proposed development is consistent with this objective of the Greater Sydney Region Plan in that it seeks to provide for industrial-type land uses on land that is zoned for industrial purposes.

- The proposed development is compatible with the height and scale of surrounding development, noting that the Brookvale Industrial Area comprises development of varying heights and scales, including an approved but unconstructed development west of the site at 4 Cross Street, Brookvale, which involved a maximum variation of 27% to the height of buildings development standard.



## 7. PUBLIC INTEREST

In this section it is explained how 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. This is required by clause 4.6(4)(a)(ii) of the LEP.

In Section 5 it was demonstrated that the proposed development overall achieves the objectives of the development standard notwithstanding the variation of the development standard (see comments under "public interest" in Table 1).

The table below considers whether the proposal is also consistent with the objectives of the zone.

*Table 2: Consistency with Zone Objectives.*

Objectives of Zone IN1 General Industrial	Discussion
To provide a wide range of light industrial, warehouse and related land uses.	The proposed development will provide a mix of industrial and self-storage units within Brookvale's existing and established industrial area, and in doing so increase the small-scale industrial offerings that are available in this locality, while also providing for more self-storage units that are located close to residents and businesses.
To encourage employment opportunities and to support the viability of centres.	The proposed development will provide jobs within an existing and established industrial area during the demolition, construction and operation phases, both directly on the subject site and indirectly via the supply chain multiplier effect. These jobs will also increase the workforce population in proximity to Westfield Warringah Mall, thereby supporting the viability of this retail centre.
To minimise any adverse effect of industry on other land uses.	The proposed development is of a light industrial nature such that it will not generate any harmful emissions that would have the potential to adversely impact on other land uses and the environment, including noise and air and water quality.
To support and protect industrial land for industrial uses.	The proposed development will provide industrial type land uses on industrial zoned land. These uses will contribute to the strengthening of the existing and established Brookvale industrial area, which is one of the main industrial areas that is located within the Northern Beaches region.
To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.	The proposed development does not preclude the site or neighbouring properties from being redeveloped in the future for facilities or services to meet the day to day needs of the area's workers.
To enable a range of compatible community and leisure uses.	The proposed development does not preclude the site or neighbouring properties from being redeveloped in the future for a range of compatible community and leisure uses.



Objectives of Zone IN1 General Industrial	Discussion
	permitted with consent in Zone IN1 General Industrial.
To maintain the industrial character of the land in landscaped settings.	The proposed development will provide a landscaped setback to Cross Street that will include trees that will grow up to 6 metres. Additionally, landscaping is also proposed within the Cross Street and Green Street public domain areas.

As demonstrated in Table 2, the proposal is consistent with the objectives of the zone and in Section 5 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

## **8. STATE OR REGIONAL ENVIRONMENTAL PLANNING**

This section considers whether contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

## 9. CONCLUSION

This submission requests a variation, under clause 4.6 of the WLEP 2011, to the height of buildings development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- The development achieves the objectives of the development standard (Wehbe test 1) and is consistent with the objectives of the IN1 General Industrial zone;
- There are sufficient environmental planning grounds to justify the contravention;

The consent authority can be satisfied to the above and that the development achieves the objectives of the development standard and is consistent with the objectives of Zone IN1 General Industrial notwithstanding non-compliance with the height of buildings standard and is therefore in the public interest.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 18-003.

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.

# APPENDIX 1: ARCHITECTURAL PLANS