

Clause 4.6 variation request – Height of buildings

Pursuant to the height of buildings map, the site has a maximum building height limit of 11 metres.

The objectives of this control 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.*

Building height is defined as follows:

building height (or height of building) means the vertical distance between ground level (existing) and 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

The proposed development has a maximum roof parapet height of 11.44 metres measured at the south western corner of the development with the architectural corner roof feature “light disk” extending to a maximum height of 13.44 metres. The lift overruns breach the height control by between 160mm and 800mm.

The extent of non-compliance can be summarised as a maximum of 440mm (4%) to the roof parapet, a maximum of 800mm (7.2%) to the lift overruns and maximum of 2.44 metres (22.18 %) to the architectural corner roof feature. The non-compliant building elements are depicted on plan A08 an extract of which is at Figure 1 over page.

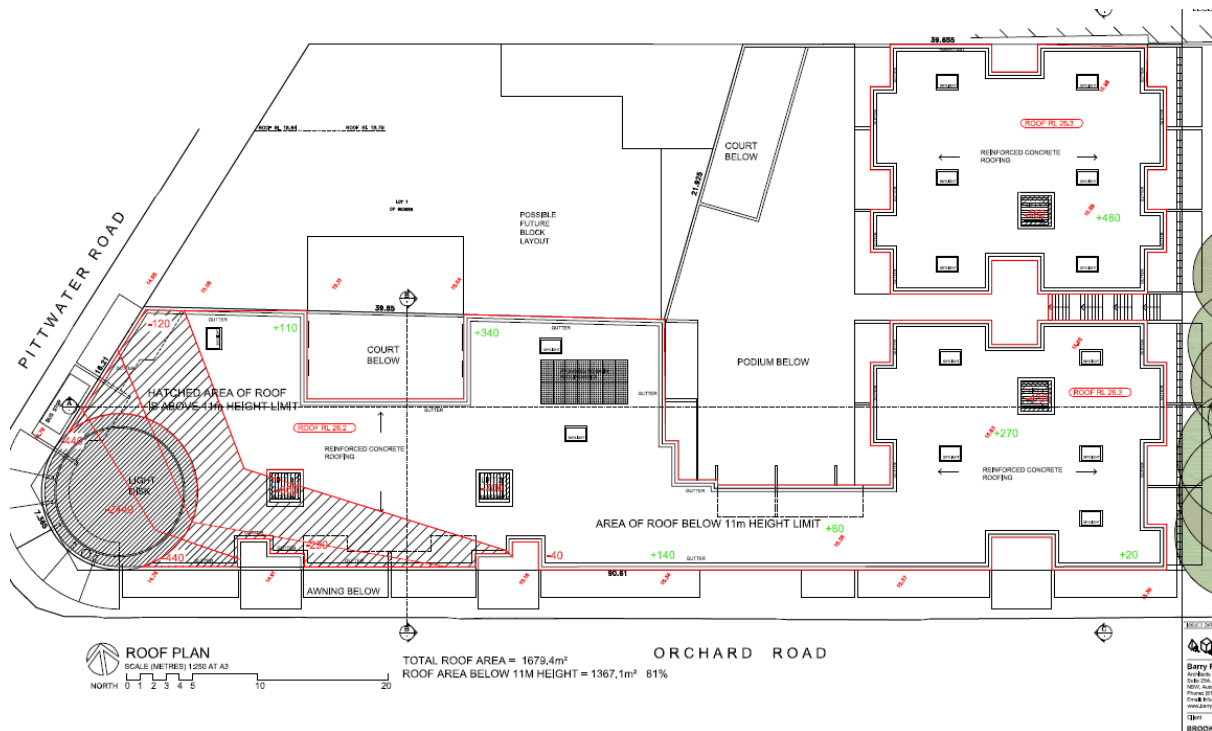


Figure 8 – Plan extract showing extent of 11 metre building height breach

Clause 4.6 of WLEP 2011 provides a mechanism by which a development standard can be varied. The objectives of this clause are:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Pursuant to clause 4.6(2) consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

This Clause applies to the Clause 4.3 Height of Buildings Development Standard. Clause 4.6(3) states that 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.*

Clause 4.6(4) states consent must not be granted for development that contravenes a development standard unless:

- (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- (b) *the concurrence of the Director-General has been obtained.*

Clause 4.6(5) states that in deciding whether to grant concurrence, the Director-General must consider:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

Clause 4.6 Claim for Variation

Zone and Zone Objectives

The Warringah Local Environmental Plan (LEP) 2011 applies to the subject site and this development proposal. The subject site is located within the B5 Business Development zone. The stated objectives of the zone are as follows:

- *To enable a mix of business and warehouse uses, and bulky goods premises that require a large floor area, in locations that are close to, and that support the viability of, centres.*
- *To provide for the location of vehicle sales or hire premises.*
- *To create a pedestrian environment that is safe, active and interesting by incorporating street level retailing and business uses.*

A range of uses are permissible in the zone with site specific additional permissible uses detailed in Clause 5 of Schedule 1 of WLEP 2011 namely:

5 Use of certain land in the vicinity of Pittwater Road and Roger Street, Brookvale

- (1) *This clause applies to land in the vicinity of Pittwater Road and Roger Street, Brookvale, shown as “Area 5” on the [Additional Permitted Uses Map](#).*
- (2) *Development for the following purposes is permitted with consent:*
 - (a) *office premises,*
 - (b) *retail premises,*
 - (c) *shop top housing.*

Shop top housing is defined as follows:

shop top housing means one or more dwellings located above ground floor retail premises or business premises.

In this regard, all residential dwellings are located above the level of the permissible ground floor retail and business floor space below. This can also be said for the work/ live SoHo style apartments whereby internal connection between the 2 separately defined and permissible uses enables such floor space to be purchased or leased by the same owner/ occupier.

Importantly, these 2 uses can function entirely independently with the ground level retail/ business use accessed from the either the ground level courtyard from Orchard Road or directly from the Charlton Lane frontage. We note that the residential component is separately accessed from the residential floor plate and corridor above. The uses are entirely independent and separately defined apart from the internal staircase connection.

As such, we have formed the considered opinion that the proposed development is appropriately defined as shop top housing in accordance with the judgement in the matter of *Hrsto v Canterbury City Council* (No. 20 [2014] NSWLEWC 121).

Finally, pursuant to clause 5(3) of Schedule 1 WLEP 2011 consent must not be granted under this clause to development for the purposes of shop top housing unless the consent authority is satisfied that the development will not have a significant adverse impact on any adjoining land in Zone IN1 General Industrial.

Given the spatial separation afforded by Charlton Lane and the maintenance of the established Brush Box plantings along the boundary/ zone interface we have formed the considered opinion that the shop top housing development proposed will not have a significant adverse visual or physical impact on land within such zone by virtue of overshadowing, privacy or view loss or visual amenity.

Further, the proposed shop top housing development will not have a significant adverse impact on either existing uses or other permissible uses in the zone as reflected by the immediate relationship of the R2 Low Density Residential zone to the IN1 General Industrial zone along Wattle Street to the south of the site a built form and land use relationship considered compatible by the policy makers.

In any event the acoustic attenuation measures required for the residential apartments pursuant to the provisions of SEPP (Infrastructure) 2007 will ensure that no acoustic conflict will occur between such land uses. Such acoustic measures can be dealt with by way of an appropriately worded condition of consent requiring an acoustic report to be prepared as a component of the Construction Certificate documentation.

Accordingly, Council can be satisfied that the proposed shop top housing satisfies the clause 5(3) Schedule 1 WLEP 2011 considerations and accordingly is permissible with consent in the zone.

We have also formed the considered opinion that the proposal is consistent with the zone objectives by:

- *Providing large floor plate retail/ business tenancies in a location that is close to, and that support the viability of, the Brookvale Centre (first dot point objective); and*
- *Creating a pedestrian environment that is safe, active and interesting by incorporating street level retailing and business uses. (third dot point objective).*

The second dot point objective is not relevant to the permissible land use proposed.

Building Height Objectives

Having regard to the objectives of the height standard as previously identified strict compliance has been found to be both unreasonable and unnecessary for the following reasons:

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

Comment: The 11 metre height standard anticipates a 3 storey building form with the breaching elements limited to small areas of roof parapet, lift overruns and the architectural roof feature proposed at the Pittwater Road/ Orchard Road intersection. The non-compliance can be directly attributed to the desire to provide 4.75 metre ground floor ceiling heights to accommodate a range of permissible commercial uses with a mezzanine at ground floor level and the provision of an architectural roof feature to reinforce the visual importance of the site as the southern gateway to the Brookvale Business precinct. The building heights proposed are compatible with the heights established by development along Pittwater Road and those anticipate by the 11 metre/ 3 storey height standard.

The building and design are entirely appropriate for this prominent corner site as it reinforces the building as a strong, robust and defining element within the street block. In this regard, we have formed the considered opinion that the height, bulk and scale of the development are entirely consistent with the height and scale of surrounding and nearby development and that anticipated by the standard.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the proposed development by virtue of its height offensive, jarring or unsympathetic in a streetscape and urban context. In this regard, it can be reasonably concluded that the development is compatible with surrounding and nearby development and accordingly this objective is satisfied.

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

Comment: Having undertaken a detailed site and context analysis and identified available view lines over the site we have formed the considered opinion that the height of the development, and in particular the non-compliant height components, will not give rise to any visual, view, privacy or solar access impacts with appropriate spatial separation maintained to adjoining properties. This objective is satisfied.

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

Comment: The non-compliant building height will not be readily discernible as viewed to or from Warringah's coastal or bush environments. This objective is satisfied.

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

Comment: The non-compliant building height elements will not be visually prominent as viewed from the street or any public area and will certainly not compromise the amenity of these public places.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the proposed development, in particular the non-compliant portions of the building, offensive, jarring or unsympathetic in a streetscape context.

We have also formed the considered opinion that the proposal will maintain appropriate amenity in terms of solar access and privacy and will not give rise to any adverse public or private view affectation. In this regard, the development satisfies the objectives of the height of buildings standard and accordingly strict compliance is unreasonable and unnecessary under the circumstances.

In our opinion, there are sufficient environmental planning grounds to justify the variation including the desire to provide 4.75 metre ground floor ceiling heights to provide greater flexibility in terms of future commercial uses (consistent with the zone objectives), the slight fall across the surface of the land and the desire for single level floor plates and the appropriateness of an architectural roof feature to reinforce the visual importance of the site as the southern gateway to the Brookvale Business precinct. The building heights proposed are compatible with the heights established by development along Pittwater Road and those anticipate by the 11 metre/ 3 storey height standard.

Further, the architectural roof feature and future proofing of the building represent a skilful response to the prominent corner location of the site and the future proofing of the development having regard to the informally exhibited Brookvale Structure Plan. Such outcomes also promote/ facilitate the orderly and economic use and development of the land consistent with objectives 1.3(c) and (g) of the Act.

In accordance with Clause 4.6(5) the contravention of the development standard does not raise any matter of significance for State or Regional environmental planning with the public benefit maintained by Council's adoption of an application specific merit based assessment as it relates to building height within the 11 metre height precinct in which the site is located.

Conclusions

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- a) that the site specific and contextually responsive development is consistent with the zone objectives, and
- b) that the site specific and contextually responsive development is consistent with the objectives of the building height standard, and
- c) that there are sufficient environmental planning grounds to justify contravening the development standard, and
- d) that having regard to (a), (b) and (c) above that compliance with the building height development standard is unreasonable or unnecessary in the circumstances of the case, and
- e) that given the design quality of the development, and the developments ability to comply with the zone and building height standard objectives that approval would not be antipathetic to the public interest, and

- f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning.

As such we have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.