

101-105 Old Pittwater Road, Brookvale

Clause 4.6 Request – Height of Buildings

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REQUEST FOR AN EXCEPTION TO THE HEIGHT OF BUILDINGS DEVELOPMENT STANDARD

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the height of buildings development standard contained within Clause 4.3 of the Warrinagh Local Environmental Plan 2011 (WLEP 2011).

The request relates to an application for demolition, consolidation of all existing lots, and construction of a mixed-use development at 101-105 Old Pittwater Road, Brookvale (Lots 1-4 in DP 402645) comprising 46 self-storage units and 34 industrial units (light or general industry).

1.2 Clause 4.6 Exceptions to development standards

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

However, clause 4.6(3) states that development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant requests that the height of buildings development standard be varied.

1.3 Development Standard to be varied

In accordance with clause 4.3 'Height of Buildings' 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'. The maximum height shown for the site is 11 metres as shown in Figure 1.

Building height (or height of building) is defined in the Dictionary of the WLEP as:

- (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.

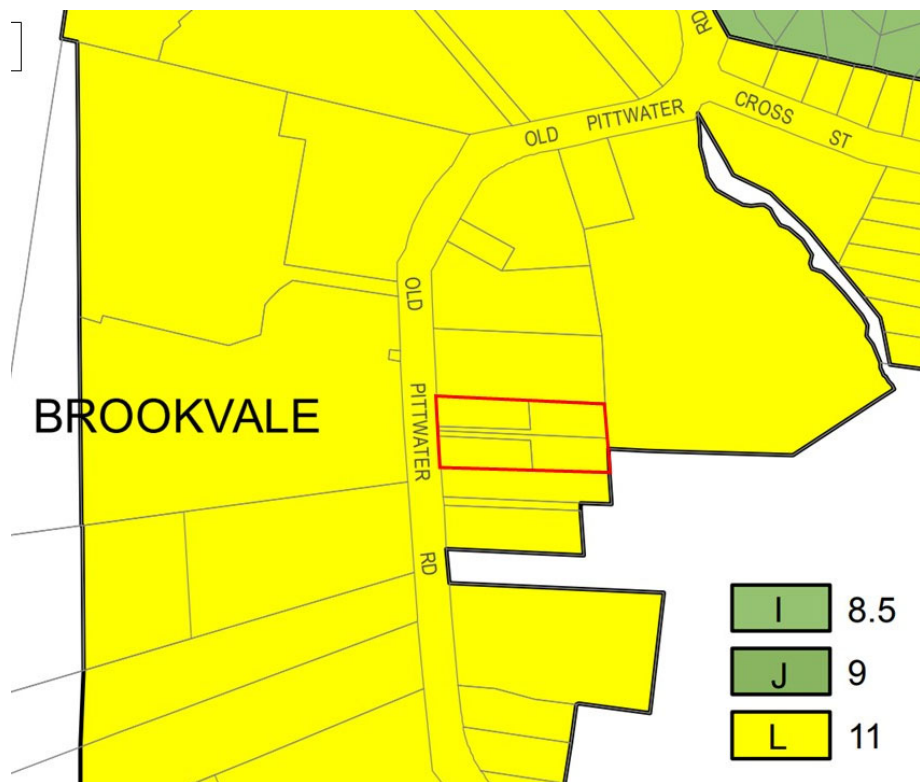


Figure 1:

Extract from the WLEP 2011 Height of Buildings Map

1.4 Extent of Variation to the Development Standard

The extent of variation to the height of buildings development standard is shown on the sections and height plane diagrams prepared by Rothelowman.

The height plane diagram prepared by Rothelowman (refer to Figure 2) demonstrates that the western side of the building complies with the 11 metre height of buildings standard. However, a variation of up to 0.662 metres is proposed for Units 27 and 28.

A variation is also proposed for the units on the northern side of Level 1. The extent of the variation gradually increases from 0.370 metres, starting at Unit 19, to 2.27 metres at the rear of the building (Unit 26).

A variation is also proposed for the units on the southern side of Level 1 of between 0.83 metres for Unit 29 to 2.468 metres for Unit 34 at the rear of the building. The maximum extent of the variation is 2.468 metres or 22.436%.

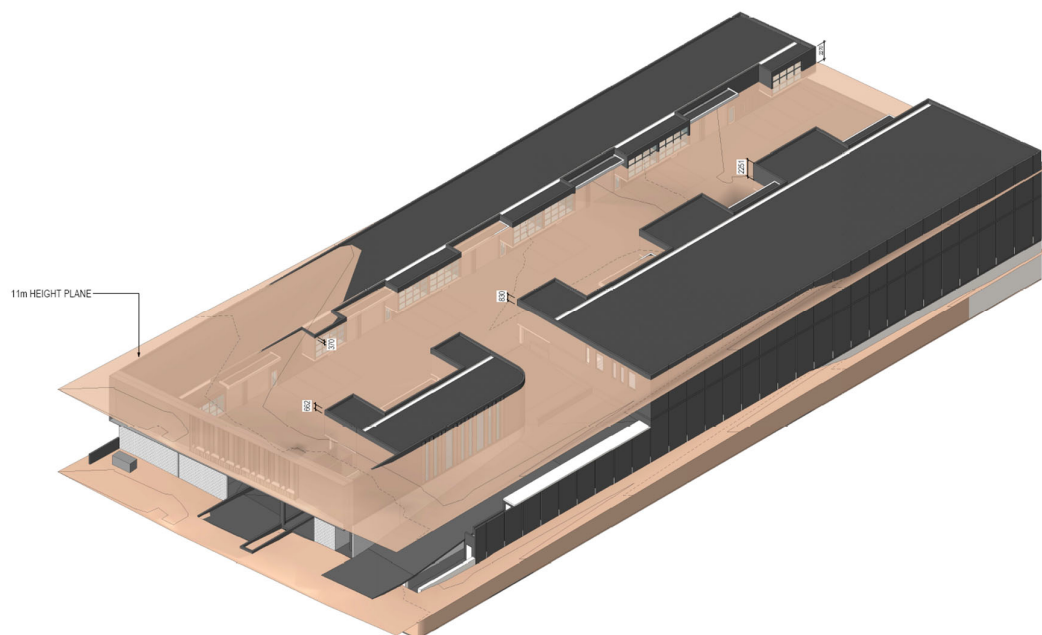


Figure 2:

Height Plane Diagram (Source: Drawing DA06.01 prepared by Rothelowman)

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

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

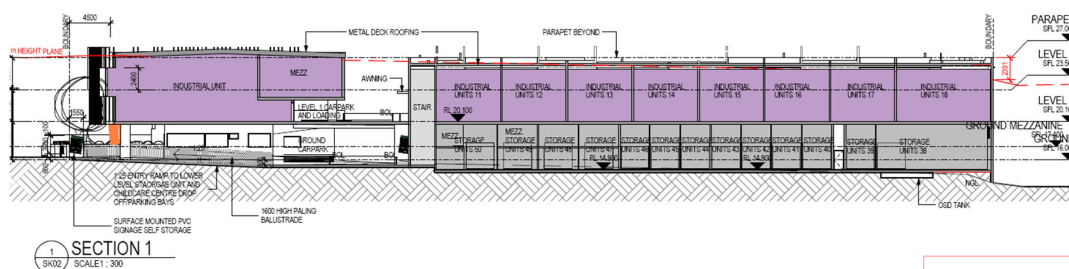
This was re-affirmed in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

Whilst it is only necessary to address the first method of the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827, which alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement, all five tests are addressed below followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

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

The specific objectives of the building height development standard, as specified in clause 4.3 of the WLEP are identified below. A comment on the proposal’s consistency with each objective is also provided.

A variation to the height standard for the adjoining building at 97 Old Pittwater Road was approved under DA2014/1360. The extent of variation varied across the length of the site. The variation was greatest on the eastern side of the building. The maximum extent of the variation was 2.391 metres as shown in the extract of the approved section.



The greatest variation to the development standard occurs to the rear of the site and will not be able to be viewed from the public domain.

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

The development is within an industrial locality which is at a low point within the catchment. The building generally complies with the maximum building height control, with only a minor variation proposed at the rear of the building. The proposal will not therefore unreasonably impact on any views available to the adjoining properties.

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

The proposed variation to the height control will not impact on the scenic quality of Warringah's coastal and bush environments having regard to the site's location within an existing industrial area which is physically and visually removed from the coast and bushland.

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

The minor variation to the height control on the western side of the building will not therefore result in any unreasonable impacts on the quality of the streetscape. The greatest variation occurs at the rear of the site and therefore will generally not be able to be viewed from the public domain.

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

The objectives and purpose of the height control is relevant to the proposed development. The proposed development is consistent with those objectives as detailed above.

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

The objective of the height control is to achieve an appropriate height on the site which is compatible with the context of the site and preserves the amenity of adjacent properties and does not adversely impact on the natural environment or built and cultural heritage. The proposed development the proposal successfully achieves these objectives.

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

The proposed building height responds to the heights of the surrounding development with the extent of the variation proposed, consistent with the variation approved for the adjoining development at 97 Old Pittwater Road. The height of buildings standard does not accurately reflect the heights of the surrounding development. As such strict compliance is not required to achieve consistency with objective (a) of the standard which seeks to ensure that buildings are compatible with the height and scale of surrounding and nearby development.

5. **the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and**

compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

The proposed zoning of the land is reasonable and appropriate.

Strict compliance with the building height control is unreasonable and unnecessary under the circumstances for the following reasons:

- The site has a fall from the street to the rear, and the variation predominantly occurs as a result of this fall, noting that the front of the building facing the street is compliant with the height control and approximately 65% of the building is also below the height plane. The variation occurs as the site falls away to the rear.
- The proposed development consistent with the WLEP objectives for building height as detailed above.
- The proposed development is consistent with the objectives of the IN1 zone as detailed below.
- The proposed building height responds to the heights of the surrounding development with the extent of the variation proposed, consistent with the variation approved for the adjoining development at 97 Old Pittwater Road. The height of buildings standard does not accurately reflect the heights of the surrounding development. As such strict compliance is not required to achieve consistency with objective (a) of the standard which seeks to ensure that buildings are compatible with the height and scale of surrounding and nearby development.
- The proposed height non-compliance does not result in any unreasonable impacts on the amenity of the surrounding properties.
- The proposed variation allows for the most efficient and economic use of the land.
- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Having regard to the planning principle established in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

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

The Land & Environment Court matter of *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.
- the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature. The adjectival phrase "environmental planning" is not defined,

but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the Environmental Planning & Assessment Act 1979 (EP&A Act).

Further guidance is also provided in *Eather v Randwick City Council [2021] NSWLEC 1075* and *Petrovic v Randwick City Council [202] NSW LEC 1242* which indicates that the small departure from the actual numerical standard and the lack of any material impacts are environmental grounds.

The environmental planning grounds relevant to the standard that is to be varied are:

- The site has a fall from the street to the rear, and the variation predominantly occurs as a result of this fall, noting that the front of the building facing the street is compliant with the height control and approximately 65% of the building is also below the height plane. The variation occurs as the site falls away to the rear.
- The variation is entirely consistent with the extent of the variation granted for the building on the adjoining property. Many of the surrounding buildings also exceed the height standard. Compliance with the numeric standard therefore has little relevance to the attainment of objective (a) of the standard which seeks to ensure that buildings are compatible with the height and scale of surrounding and nearby development. As such, requiring compliance with the numeric standard is unreasonable and unnecessary.
- There are no unreasonable environmental impacts arising from the departure from the standard.
- The variation requested does not hinder the attainment of the objects of the Environmental Planning and Assessment Act 1979.
- The proposed variation to the height of buildings standard is not associated with any inconsistencies with the objects of the Act. The absence of any inconsistencies with the objects of the Act demonstrates that the proposed development as a whole is an acceptable outcome on the site, despite the variation to one aspect of the development. The proposal's consistency with the objects of the Act (other than those detailed above) is as follows:
 - The development provides an employment generating use on land that has been zoned for such a use. As such the development is consistent with object (c) of the EP&A Act which seeks to promote the orderly and economic use and development of land and object (a) of the act which promotes the social and economic welfare of the community.
 - The required services and utilities are available to the site (object c of the EP&A Act).
 - The site has not been identified as having built or cultural heritage significance and as such the development is compatible with object (f) of the EP&A Act.
 - The pattern and form of the development is compatible with the character of the local area as detailed in the Statement of Environmental Effects that accompanies the application. The development is therefore consistent with object (g) of the EP&A Act despite the variation proposed.
 - The development will not impact on any threatened species, ecological communities and their habitats. In this regard the development is consistent with object (e) of the EP&A Act which seeks to protect the environment including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats.

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

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

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

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

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

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

Objective of the Development Standard

The proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

Objective of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the IN1 General Industrial zone are:

- To provide a range of office and light industrial uses.
- To encourage employment opportunities.
- To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.
- To provide healthy, attractive, functional and safe business areas.
- To provide a wide range of industrial and warehouse land uses.
- To encourage employment opportunities.
- To minimise any adverse effect of industry on other land uses.
- To support and protect industrial land for industrial uses.
- To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.
- To enable a range of compatible community and leisure uses.
- To maintain the industrial character of the land in landscaped settings.

The development includes 35 industrial units and storage premises. The proposed industrial premises will generate employment opportunities and the mix of uses proposed will not result in any adverse impact on other land uses.

The development will provide a landscaped front setback and the scale and setbacks of the building proposed are consistent with the industrial character of the locality.

In this regard the development is consistent with the objectives of the IN1 zone.

1.9 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(5) In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are significant environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

1.10 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The development application and clause 4.6 request demonstrate that it is appropriate in this circumstance to provide flexibility in the application of the height of buildings development standard because it will allow for a form of development which is consistent with scale of developments in the vicinity of the site and will deliver a built form that is responsive to the character of development in the street. The development also does not result in any unreasonable impacts on the amenity of the surrounding properties.

1.11 Conclusion

The proposed variation to the height of buildings development standard contained within clause 4.3 of the WLEP has been found to be reasonable and appropriate in the circumstances of the case. In addition there are sufficient environmental planning grounds to justify the variation. In this regard it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.