



Clause 4.6 Variation – Height of Building

Proposed Self-Storage Facility

4 Cross Street, Brookvale (Lot 2 DP543012)

Prepared by Willowtree Planning Pty Ltd on behalf of Motaland Pty Ltd

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PART A PRELIMINARY

1.1 INTRODUCTION

This Clause 4.6 Variation request has been prepared in support of a Development Application (DA) for the **construction of a storage premises in the form of self-storage units** within the property located at 4 Cross Street, Brookvale, legally described as Lot 2, DP543012 (the Site).

The proposal exhibits a technical non-compliance with **Clause 4.3 (Height of Building)** under the *Warringah Local Environmental Plan 2011* (WLEP2011).

This variation request 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.*

1.2 PROPOSED NON-COMPLIANCE

Under the provisions of Clause 4.3 in WLEP2011, the Site is subject to a maximum permissible building height of **11m**.

The proposed development comprises a non-compliant building height of **14.05m** to the top of the lift overrun which exceeds the maximum building height by **3.05m** and represents a departure from the development standard of **27%**. This is summarised further in **Table 1** below.

Table 1. Variation Summary			
WLEP2011	WLEP2011 Development Standard	Maximum Building Height	Proposed Development Non-Compliance
Clause 4.3 – Height of Building	Maximum Building Height of 11m	To top building: 13.39m	To top of building: 2.39m (21.7%)
		To lift overrun: 14.05m	To lift overrun: 3.05m (27%)

As demonstrated above, whilst the building height comprises a total of **14.05m**, this measurement is to the top of the lift overrun which would not be visible from the immediate surrounds. In this respect, the visible portion of the building envelope comprises a building height of **13.39m** which exceeds the maximum building height by **2.39m** and represents a departure from the development standards of **21.7%**.

Further to the above, proposal comprises a **compliant street frontage building height of 11m** with the maximum building height encroachment not occurring for the first 10m of the building length.

1.3 PLANNING JUSTIFICATION

This Clause 4.6 Variation request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards under WLEP2011. It considers the various planning controls, strategic planning objectives and existing characteristics of the Site, and concludes the proposed building height non-compliance is the best means of achieving the objective of encouraging orderly and economic use and development of land under Section 5 of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

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Further, this Clause 4.6 Variation Request has demonstrated that there are sufficient environmental planning grounds for the contravention of the building height development standard in accordance with Clause 4.6(3)(b) of the WLEP2011. In this respect, this Clause 4.6 Variation Request has provided the following:

- Identified the specific aspect or feature of the development that contravenes the relevant development standard.
- Justified why the contravention of the development standard is acceptable, rather than simply promoting the benefits of carrying out the development as a whole.
- Explained on what basis there are sufficient environmental planning grounds to justify contravening the development standard.

In justifying the proposed contravention and demonstrating sufficient environmental planning grounds, this request is considered to have demonstrated how the proposed contravention itself satisfies Section 1.3 of the *Environmental Planning and Assessment Act 1979* (EP&A Act). This is discussed further in **Section 4.4** of this request.

As discussed in **Section 4.5** and **Section 4.6** of this report, the proposed development provides a direct and positive response to both the *North District Plan* and the *draft Local Strategic Planning Statement - Towards 2020* to manage and retain industrial and urban services land. The proposed storage premises forms part of the collection of industries that enable businesses and residents to operate.

The built form, height and scale of the development have been carefully considered and designed to be consistent with the desired future character of the area. The proposed building form has been strongly defined by the desire to maintain the existing industrial character of the surrounding area.

Further, the proposal will introduce a development that complements the range of surrounding land uses and integrates with the variety of built forms in the industrial area.

For the reasons outlined above and within this written request, the proposed contravention to the building height development standard can and should be accepted.

PART B THRESHOLDS THAT MUST BE MET

2.1 CLAUSE 4.6 OF THE WLEP2011

In accordance with Clause 4.6 of WLEP2011 Council is required to consider the following subclauses:

- (3) 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 circumstances of the case, and*
 - (b) that there are **sufficient environmental planning grounds** to justify contravening the development standard.*
- (4) Development 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 Planning Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the Planning Secretary 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 Planning Secretary before granting concurrence.*

These matters are responded to in **Part D** of this Clause 4.6 Variation.

2.2 CASE LAW

Relevant case law on the application of the standard Local Environmental Plan Clause 4.6 provisions has established the following principles:

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, which emphasised that the proponent must address the following:
 - Compliance with the development standard is unreasonable and unnecessary in the circumstances;
 - There are sufficient environmental planning grounds to justify contravening the development standard;
 - The development is in the public interest;
 - The development is consistent with the objectives of the particular standard; and
 - The development is consistent with the objectives for development within the zone;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, which held that the degree of satisfaction required under Subclause 4.6(4) is a matter of discretion for the consent authority;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827, which emphasized the need to demonstrate that the objectives of the relevant development standard are nevertheless achieved, despite the numerical standard being exceeded. Justification is then to be provided on environmental planning grounds. Wehbe sets out five ways in which numerical compliance with a development standard might be considered unreasonable or unnecessary as follows:
 - The objectives of the standard are achieved notwithstanding the non-compliance with the standard;

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- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
 - The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
 - 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; or
 - The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.
- *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112, which highlighted that there is no maximum number or percentage by which a development standard may be varied, and no such numerical limitation on the size of a variation to a development standard such as height or FSR exists under the Standard Instrument Clause 4.6 wording.
 - *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191, acknowledged that 'compatibility' is different from 'sameness', as it allows for many different features to coexist together harmoniously.

These matters are responded to in **Part D** of this Clause 4.6 Variation Request.

PART C STANDARD BEING OBJECTED TO

3.1 CLAUSE 4.3 HEIGHT OF BUILDING OF WLEP2011

The development standard being requested to be varied is Clause 4.3 Height of Building of WLEP2011.

Table 2 outlines the proposed Clause 4.6 Variation to the building height development standard under Clause 4.3.

Table 2. Variation Summary			
WLEP2011	WLEP2011 Development Standard	Maximum Building Height	Proposed Development Non-Compliance
Clause 4.3 – Height of Building	Maximum Building Height of 11m	To top building: 13.39m	To top of building: 2.39m (21.7%)
		To lift overrun: 14.05m	To lift overrun: 3.05m (27%)

The proposed development seeks approval for the construction of a storage premises in the form of self-storage units including an ancillary office/meeting room and car parking spaces. The proposed development would result in a maximum building height of **14.05m** (to the lift overrun), representing a **27%** departure from development standard under Clause 4.3 of WLEP2011. It is important to note however that the lift overrun would not be visible from the immediate surrounds and the building envelope (to the top of the parapet) comprises a building height encroachment of **2.39m**, representing a departure of **21.7%**.

3.1.1 Lift Overrun

The lift overruns sit approximately 1,350mm above currently proposed roofline. It is important to note that the lift **overruns are setback 20m and 45.8m from the front building line**. Further, the lift overrun would **not be visible 90m to the west and 125m to the east** from the site, from height of 1.8m above the ground line.

3.1.2 Building Parapet

The maximum building height variation to the roofline of **2.39m (21.7%)** is located at the rear of the Site. It is important to note however that the proposed maximum building height of the building directly fronting Cross Street is **11m**. A compliant 11m building height is retained for 10m from the front building façade, and 14.5m from the front boundary to Cross Street.

The **10m recess provided of the upper level** results in the portion of non-compliant building height structure being almost undetectable from the public domain. Further, the upper level has been treated with a softer colour palette making this building element less distinguishable.

In this respect the maximum building height encroachment will have a negligible impact on surrounding properties as well as the public domain and adequate industrial precinct amenity will be retained in terms of overshadowing, solar access and visual and acoustic privacy as demonstrated in the ensuing sections of this report.

The proposed built form and massing of the building is the result of detailed analysis of the context of the Site and its surrounds with a desire to deliver a positive urban design outcome, whilst still facilitating a viable development.

The proposed building height delivers a built form which generates a high level of visual interest whilst appropriately responding to the surrounding industrial character, interface with Westfield Warringah Mall and public open space areas.

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The proposed design outcome is a significant improvement from the previously approved development for a storage premises at the Site (Council DA reference: DA6000/7442) as it comprises a modernised built form outcome more aligned with the desired character of the area.

The building height and form is illustrated in the elevation plans shown in **Figures 1 and 2** below.

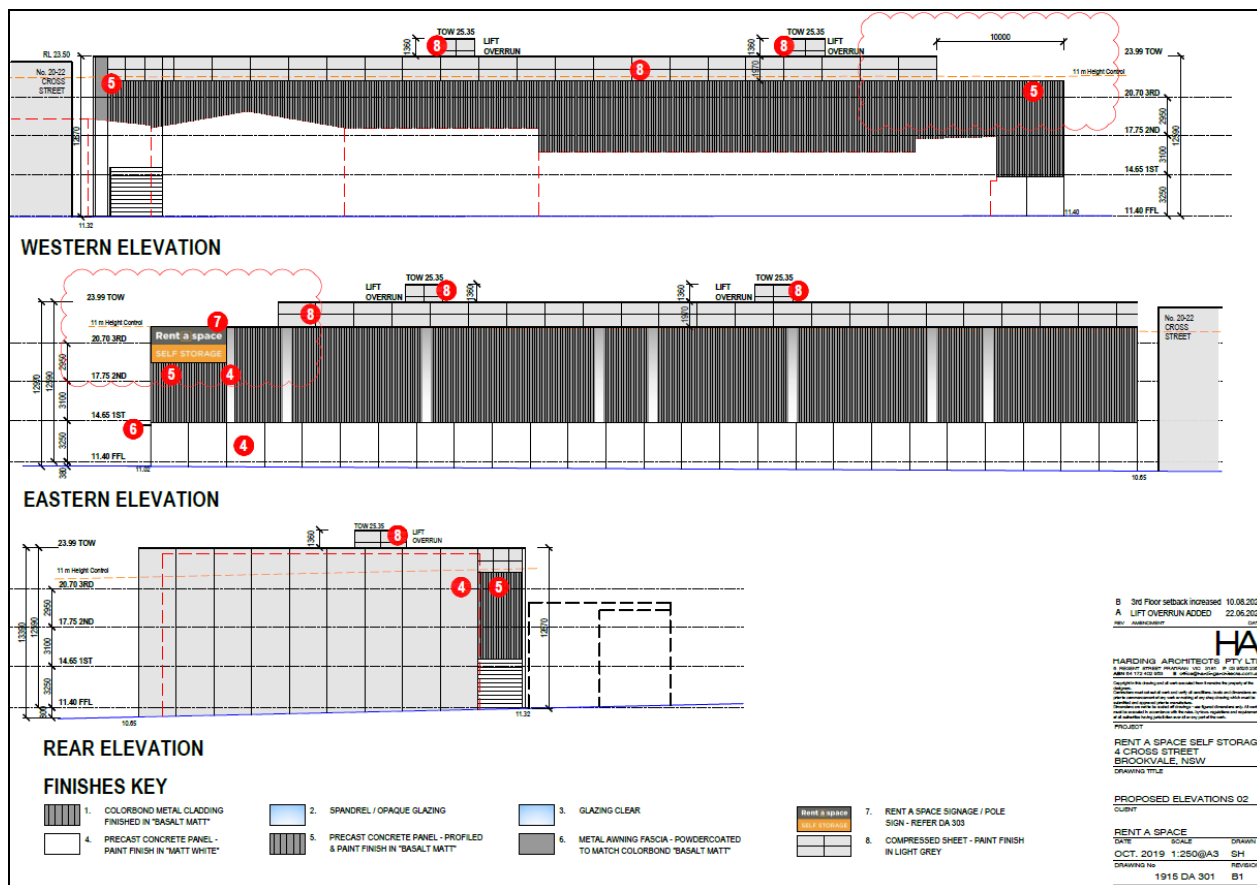


Figure 1. Western, Eastern and Rear Elevations (Source: Harding Architects, 2020)

A visual analysis has been provided in **Figures 3 – 5** below which provides 3D perspectives of the proposed development and visibility of the upper level and non-compliant building element. As illustrated in these perspectives, the upper level of the building is not visible at all from the southern view directly in front of the building from both sides of Cross Street. As illustrated in the perspectives, the upper level is on marginally visible from the eastern and western approaches where this building element recessed significantly and comprises a softer colour palette. In this respect, the upper level which exceeds the maximum building height will not give rise to any measurable visual impacts.

The visual analysis submitted to Council also provides an understanding of the Site context and potential built form on the adjoining sites to the east and west. In this respect, the shaded areas on these adjoining sites represent compliant building envelopes which completely screen the upper level of the proposed building from the eastern and western approaches.

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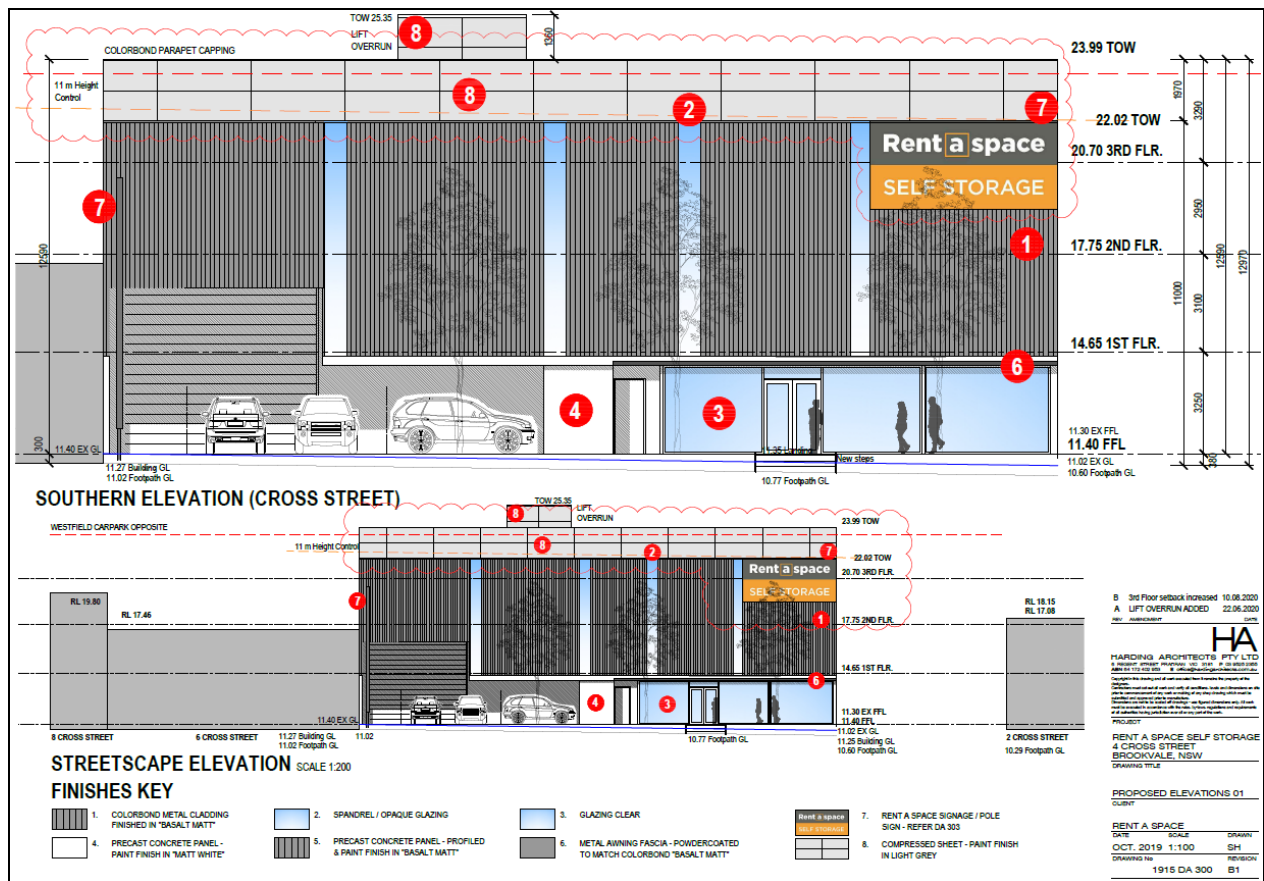


Figure 2. Southern Elevation (Source: Harding Architects, 2020)



Figure 3. Front (South) Perspective) (Source: Harding Architects, 2020)

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Figure 4. East Perspective (Source: Harding Architects, 2020)



Figure 5. West Perspective (Source: Harding Architects, 2020)

PART D PROPOSED VARIATION TO CLAUSE 4.3 HEIGHT OF BUILDING

4.1 OBJECTIVES OF CLAUSE 4.3 HEIGHT OF BUILDING UNDER WLEP2011

A key determination of the appropriateness of a Clause 4.6 Variation to a development standard is the proposed development's compliance with the underlying objectives and purpose of that development standard. Indeed, *Wehbe v Pittwater Council* recognised this as one of the ways in which a variation to development standards might be justified (refer to **Section 2.2**). In *Four2Five Pty Ltd v Ashfield Council*, it was found that the proponent must demonstrate compliance with these objectives (refer to **Section 2.2**).

Therefore, while the Site is subject to relevant numerical standards for height of buildings, the objectives and underlying purpose behind these development standards are basic issues for consideration in the development assessment process.

The proposed development is consistent with the relevant objectives of the control for the reasons outlined in **Table 3**.

Table 3. Consistency of the Proposed Development with the Building Height Objectives	
OBJECTIVE	COMMENT
(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,	The proposal is appropriate in terms of its bulk and scale when compared to other existing and potential future development in the area. The floor has been raised to accommodate flood storage and to meet the requirements of Flood Planning Levels while still providing a viable development. The surrounding area provides for a broad range of building heights. The Westfield Warringah Mall located opposite the Site to the south provides a tall building and decked park structure in excess of 8 storeys and provides a building height of approximately 30m. The proposed development adjoins the site at No. 2 Cross Street, Brookvale to the east, which comprises a maximum building height of RL 16.43. No. 6 Cross Street, Brookvale adjoining the Site to the west has a maximum building height of RL 17.08. Refer to the Cross Street elevation Plan included in Figure 2 showing the relationship between these buildings and the proposed development. These adjoining sites have the potential to be developed to comprise a maximum building height of 11m. The proposed development does not adversely impact the existing or future industrial character of the surrounding area and will exist in harmony with its surrounds. The proposed land use and associated built form represents the most appropriate development and design outcome for the Site as it is in direct response to demand for self-storage units in the immediate locality and provides an optimal urban design outcome, whilst respecting the existing built form character of the surrounding context. The proposed development will form part of the <i>Brookvale Industrial Area West</i> that complements the range of surrounding land uses, integrates with the variety of built form densities in the general area, responds to the Brookvale-Dee Why strategic centre and leverages on the existing community infrastructure.

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	Overall, the design outcome will respect the surrounding scale in terms of height, bulk and density whilst providing a self-storage premises which is compatible with the surrounding character. In light of the above, the height, density and scale of the development is considered to be appropriate for the Site and provides a form of storage premises and thus satisfies objective (a).
(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,	The proposed development and resultant building height facilitate the highest standard of design and ensures that future development can continue to achieve an equally high standard of surrounding industrial amenity. It is noted that the building provides a significant upper level recess at the interface with Cross Street (14.5m from Cross Street and 10m from front building facade) resulting in the non-compliant building height element being virtually unidentifiable from the public domain. The Site is not located within any important views to natural or topographical features and there are no view sharing or solar amenity issues relevant to the Site and its adjacent uses. Accordingly, the building height has very limited potential to cause adverse visual impacts. Nevertheless, the proposed development seeks to minimise any potential for adverse impact by providing a compliant front boundary setback of 4.5m to Cross Street, which provides a generous landscaped area and will positively contribute to the visual amenity of the streetscape from the public domain. This is further achieved through the upper level building recess. As a result, the proposed building height encroachment would not result in any disruption of views or give rise to any measurable visual impacts. Further to the above, the proposed variation will have negligible impacts on the adjoining properties in terms of solar access, overshadowing and acoustic and visual privacy. The proposed development layout and orientation has been configured to face Cross Street, consistent with the previously approved layout and orientation approved under DA6000/7442. An appropriate level of privacy is achieved to neighbouring properties. In light of the above, it is reasonable to conclude that objective (b) has been satisfied in that the built form design facilitates a sympathetic industrial development outcome which contributes to the streetscape and public domain, within a location with negligible amenity impact on surrounding properties.
(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,	The Site is within the IN1 General Industrial zone of the WLEP2011 and the <i>Brookvale Industrial Area West</i> of the Draft Brookvale Structure Plan. The Site is not within proximity to coastal and bush environments. The Site is within a visual catchment that is not of a high scenic quality and as such there is limited potential for the development to cause adverse visual impact. The proposed development is consistent with the objective as it will not adversely impact the scenic quality of Warringah's coastal and bush environments.

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(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.	The proposed development is predominantly visible from the public domain at the Site's southern Cross Street frontage. The Cross Street road reserve adjoins the Site's southern boundary which forms part of the public domain. Pedestrian footpaths form part of this road reserve and extend along both sides of Cross Street. The Site is not readily visible from parks and reserves, and community facilities. The proposed development minimises any visual impact by comprising compliant boundary setbacks including a 4.5m front boundary setback, a nil setback to the west and east, and a 40.7m setback to the rear (measured to the north-eastern boundary on Cross Street) which is consistent with industrial development within the precinct. The 10m recess of the upper level from the front building façade results in minimal visibility of the upper level and non-compliant building height element of the development. Through the incorporation the appropriate colours, materials and finishes, the development has been designed to visually relate to, and be commensurate with, its surrounding urban environment. The proposed development satisfies objective (d) given the strategic design of the built form and any perceived visual impact of the development when viewed from the public domain is appropriate within the context of the Site and surrounding industrial area.
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As demonstrated in **Table 3**, the proposed development still achieves the underlying objectives of the development standard and therefore strict compliance with that development would be unreasonable and unnecessary given the circumstances of the case.

4.2 OBJECTIVES OF THE ZONE

The Site is currently zoned IN1 General Industrial under WLEP2011. The proposed development is located within an established industrial area and is permissible at the Site. The proposed development is consistent with the following IN1 zone objectives.

Table 4. Consistency of the Proposed Development with the Zone Objectives	
Objective	Comment
To provide a wide range of industrial and warehouse land uses.	The proposed development would provide a storage premises within an established industrial locality. It would also positively contribute towards managing and retaining industrial and urban services land, as outlined in the North District Plan. The height and scale of the building are commensurate to the desired and future character of the surrounding locality.
To encourage employment opportunities.	The proposed development would require 2-3 staff to occupy the premises during the operational period. Employment opportunities would also be created during the construction phase. The proposed use of the Site will support the viability of the Brookvale area and encourage employment opportunities.
To minimise any adverse effect of industry on other	The proposed development is for a storage premises in the form of self-storage units and will not adversely impact surrounding land

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land uses.	uses. The proposed operational hours and staff numbers will remain the same as the previously approved development under DA6000/7442 for self-storage units. As such, the proposed development will not result in an intensification of the Site's previously approved use. The proposed development would provide industrial development in the form of a storage premises as opposed to the dominant existing warehouse or distribution centres in the immediate area. The proposed storage premises is therefore less intensive than other development within the area and would not adversely impact other land uses in the vicinity of the Site. In light of the above, the proposed development satisfies the zone objective.
▪ To support and protect industrial land for industrial uses.	The proposed development allows for a considerable and immediate contribution to industrial development stock, supporting the management and retention of industrial and urban services land, as outlined in the North District Plan. The proposed development satisfies the zone objective.
▪ To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.	This objective is not affected by the variation sought.
▪ To enable a range of compatible community and leisure uses.	This objective is not affected by the variation sought.
▪ To maintain the industrial character of the land in landscaped settings.	The proposed development comprises a compliant 4.5m front (southern) boundary setback to Cross Street which provides a landscaped area which will positively contribute to the visual amenity of the streetscape. Further, the proposal comprises a compliant street frontage building height of 11m with the maximum building height encroachment not occurring for the first 10m of the building length. The proposed development comprises a nil boundary setback to the west and east. The rear boundary of the Site is adjoined by buildings that comprise a nil setback. As such, the rear of the Site is predominantly screened from view. Landscaping within the Site is suitable and consistent with the landscape character of the surrounding industrial land. The proposed development satisfies the zone objective.

4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

In *Wehbe v Pittwater Council [2007] NSWLEC 827*, Preston CJ set out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation:

1. *Establish that compliance with the development standard is **unreasonable or unnecessary** because **the objectives of the development standard are achieved notwithstanding non-compliance with the standard**.*
2. *Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
3. *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
4. *Establish that 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.*
5. *Establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".*

In applying the tests of *Wehbe v Pittwater Council [2007] NSWLEC 827*, only one of the above rationales is required to be established. Notwithstanding the proposed variation, the development is consistent with the underlying objectives of the standard for Building Height and the Zoning of the Site as prescribed under WLEP2011.

In view of the particular circumstances of this case, strict compliance with Clause 4.3 of WLEP2011 is considered to be both unnecessary and unreasonable. The proposed development does not conflict with the intent of Clause 4.3 as demonstrated above and satisfies the objectives, notwithstanding the proposed numerical variation.

The proposed development is justified on the following environmental outcomes:

- It represents logical and co-ordinated development of the Site for industrial development;
- It will result in improvements to the functionality and operations of the Site through a carefully designed built form that is responsive to the Site context and its desired character;
- The architectural design provides a superior built form outcome for the Site and is functional for the proposed outcomes;
- The architectural and built form design achieves a development outcome which results non-compliant building element from being almost unidentifiable from the public domain;
- Development will be compatible with the desired and future character of the immediate locality;
- The proposed variation to the building height will not give rise to any environmental or amenity impacts to surrounding development in relation to views, overshadowing, solar access, noise and visual privacy;
- Compliance may be achieved by reducing the scale of the development, but this would undermine the visual quality and functionality of the design, and the requirements of the storage premises would not be achieved; and
- Reducing the building height to achieve a compliant building height would not deliver any measurable environmental or amenity benefits.

In light of the above, the abovementioned justification for the proposed building height variation is considered valid and, in this instance, the proposed Clause 4.6 Variation is considered to be acceptable.

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The proposed development represents a more efficient use of the Site when compared to a compliant building height scenario and one that does not give rise to any additional environmental impacts compared to a fully compliant development outcome.

The objectives of Clause 4.3 as well as the IN1 General Industrial zone would be upheld as a result of the proposed development. Therefore, in light of the above, the application of the building height standard is therefore unreasonable and unnecessary in response to the proposed development.

4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENTING THE DEVELOPMENT STANDARD

The justification for the proposal variation to the development standard for Height of Building is considered to be well founded and this report demonstrates sufficient environmental planning grounds for support as, notwithstanding the proposed departure from the development standard, the feature of the development that contravenes the development standard (height of building):

- Does not give rise to any measurable or unreasonable visual impacts from the public domain. As illustrated in **Figures 4 – 6** above, the upper level of the building where the contravention occurs, is not visible from the southern elevation on both sides of Cross Street, and is only marginally visible from the eastern and western approaches to the Site. Where the upper level is visible from the public domain, a softer colour palette has been used to ensure this is not a prominent feature. In this respect, the building element which exceeds the maximum building height would not dominate the streetscape or result in any visual amenity impacts greater than that of a compliant building height. In the absence of any identifiable visual impacts associated with the proposed contravention, the proposal is considered to represent a development outcome which is compatible with the desired future character of the area.
- Does not result in any environmental or amenity impacts to the surrounding or adjoining properties. In this respect, the proposal, including the building height encroachment, is commensurate to the context of the Site and the available outlook from surrounding sites to the development does not provide opportunity for any unreasonable or unwarranted visual impacts.

For the reasons outlined above, the proposed contravention to the building height development standard is considered to demonstrate sufficient environmental planning grounds for support. Further to the above:

- The proposed development is consistent with the underlying objective or purpose of the standard as demonstrated;
- The scale of the proposal is appropriate for the Site and the proposed use;
- The breach in building height is a result of the topographical characteristics of the Site including orientation of the built form and the provision of the increased setback to Cross Street. The proposal provides a design outcome that responds to the Site constraints and considers the context as well as the existing and anticipated built form;
- The proposed development would not create any measurable visual or overshadowing impacts for surrounding land users. Limiting the building height to a strict 11m compliance would have a negligible improvements on any such impacts to surrounding land users;
- The proposed development will not give rise any unreasonable amenity impacts to adjoining properties;
- Strict compliance with the building controls would unreasonably restrict the potential to develop the Site to its full potential as a self-storage premises;
- The proposed development is consistent with the desired and future character of the Site and will not result in measurable or unreasonable environmental or amenity impacts; and
- Reducing the building height to achieve a compliant building height would not deliver any measurable environmental or amenity benefits.

In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (SJD DB2), Acting Commissioner Philip Clay handed down his judgement, approving the proposed six-storey shop top housing development, having a height of 21.21m where the control was 14.7m – representing a maximum variation of approximately 44% (or 6.51m) – and a floor space ratio (FSR) of 3.54:1 where the control

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was 2.5:1 – representing a variation of approximately 41%. The Court accepted that the clause 4.6 variations were well-justified, and ultimately better than a compliant (smaller) scheme on the subject site. The Court referred to the proposed development as “an excellent response to its context” and a “high quality architectural design”.

SJD DB2 emphasised that there is no maximum number or percentage by which a development standard may be varied, and no such numerical limitation on the size of a variation to a development standard such as height or FSR exists under the Standard Instrument Clause 4.6 wording. The proposed development comprised a variation of approximately **27%** and resulted in a built form that is appropriate within the context of surrounding development.

While the proposal may result in a building slightly higher either those existing or those permitted to be constructed, this does not mean it would be incompatible with other buildings. It is important to acknowledge that ‘compatibility’ is different from ‘sameness’, as it allows for many different features to coexist together harmoniously. In this respect, the proposed minor departure from the building height standard still achieves a compatible outcome as it will not visually dominate the streetscape and will not result in any measurable amenity impacts to either the public domain or adjoining properties. This is evident in *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191. There, Roseth SC stated, “**Compatibility** is thus different from **sameness**. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.” As such, all buildings of all typologies must be incorporated into the assessment of the local area character.

When considering the context of the streetscape and surrounding amenity, the proposal will have less of an impact on the streetscape than existing development in the locality, including the existing Westfield Shopping Centre located directly opposite the Site. The proposed development is surrounded to the north, west and east by industrial development and would coexist together harmoniously with surrounding development, acknowledging the proposal may feature a more modern form and increased building height.

4.5 PUBLIC INTEREST

As outlined in **Section 2.2**, *Four2Five Pty Ltd v Ashfield Council* emphasised that it is for the proponent to demonstrate that the proposed non-compliance with the development standard is in the public interest. Subclause 4.6(4)(a)(ii) requires the proposed development 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.

Sections 4.1 and **4.2** have already demonstrated how the proposed development is consistent with the objectives of Clause 4.3 as well as the objectives of the IN1 General Industrial zone under the WLEP2011.

In *Lane Cove Council v Orca Partners Management Pty Ltd (No 2)* [2015] NSWLEC 52, Sheahan J referred to the question of public interest with respect to planning matters as a consideration of whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development.

The public advantages of the proposed development are:

- Contributes to the revitalisation of the Site;
- Provides opportunities for greater industrial land use diversity in the Northern Beaches LGA and assists in *managing and retaining industrial and urban services land* as outlined in the North District Plan;
- Contributes to pedestrian amenity;
- Results in a significant improvement to the development across the Site, from under-utilised land, commensurate of the surrounding locality;
- The proposed architectural design significantly improves the streetscape interface with the public domain, improving the southern frontage towards Cross Street;

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- No adverse impact on the surrounding road network;
- Provides additional employment opportunities within the area;
- Is supported by transport infrastructure in proximity and will benefit from the proximity to and amenity of Westfield Warringah Mall to the south; and
- The proposed storage premises would contribute to diversity within the surrounding industrial precinct, supporting growth and increasing supply;
- The proposed development will deliver self-storage units to meet the needs of a growing population, which is compounded by a rise in apartment living and downsizing throughout Sydney; and
- Provides a development outcome that is compatible with the existing industrial area, being a permissible land use and consistent with the land use zone objectives.

There are no significant public disadvantages which would result from the proposed development. Accordingly, the public advantages of the proposed development is therefore considered to far outweigh the public disadvantages.

The proposed development is therefore considered to be justified on public interest grounds.

4.6 MATTERS OF STATE AND REGIONAL SIGNIFICANCE

The proposed non-compliances with Clause 4.3 would not raise any matters of significance for State or regional environmental planning. It would also not conflict with any State Environmental Planning Policies or Ministerial Directions under Section 9.1 of the *Environmental Planning and Assessment Act* (EP&A Act).

NSW Department of Planning requires that all development applications including a variation to a standard of more than 10%, such as the one requested in this report, be considered by the Northern Beaches Local Planning Panel for determination.

Furthermore, by including this non-compliance with Clause 4.3, the proposed development would be better be able to meet the objectives of the *Draft Local Strategic Planning Statement - Towards 2040* (draft LSPS) and the North District Plan by:

- Providing jobs that match the skills and needs of the community;
- The proposed development will provide a built form consistent with the objectives of the Local Environmental Plan;
- The proposed development is appropriate for the Site and context, and achieves a high level of amenity for staff and patrons within and surrounding the Site; and
- Providing a direct and positive response to the draft LSPS Planning Priority 24 *Brookvale as an employment centre* as it would provide employment opportunities at the Site during construction and operational hours previously approved under DA6000/7442, supporting Brookvale as an *employment-based centre*.

4.7 PUBLIC BENEFIT IN MAINTAINING THE STANDARD

Strict compliance with Clause 4.3 would result in:

- Greater impacts to the functional operation of the proposed use of the Site; and
- Potentially rendering the proposed development unfeasible due to the removal of an entire level of self-storage units within the development.

Further to the above, in the event the development standards were maintained, the resulting benefits to the adjoining properties and wider public would be nominal.

As such, there is no genuine public benefit in maintaining this strict building height control at the Site.

4.8 SUMMARY

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

- Compliance with the development standard is unreasonable and unnecessary in the circumstances;
- There are sufficient environmental planning grounds to justify contravening the development standard;
- The development is in the public interest;
- The development is consistent with the objectives for development within the zone;
- The objectives of the standard are achieved notwithstanding the non-compliance with the standard;
- The development does not negatively impact on any matters of State or regional significance; and
- The public benefit in maintaining strict compliance with the development standard would be negligible.

It is furthermore submitted that:

- Strict compliance with the standards would hinder the achievement of the objects of the EP&A Act;
- The proposed development is consistent with the surrounding locality;
- There is no maximum number or percentage by which a development standard may be varied, as demonstrated in SJD DB2; and
- No unreasonable impacts are associated with the proposed development.

Overall, it is considered that the proposed Clause 4.6 Variation to the existing and maximum Building Height control is entirely appropriate and can be clearly justified having regard to the matters listed within Clause 4.6 of the WLEP2011.

PART E CONCLUSION

For the reasons outlined in this Clause 4.6 Variation request, it is requested that the Northern Beaches Council exercise its discretion and find that this Clause 4.6 Variation request adequately addresses the relevant heads of consideration under Subclause 4.6(3) of the WLEP2011.

This is particularly the case given the relatively minor nature of the proposed exceedance, as well as the proposal being otherwise compliant with the WLEP2011, consideration and satisfaction of the objectives of the WDCP2011, and the strategic suitability of the proposed development at both a Local and State Government Level.