

REQUEST TO VARY THE MAXIMUM HEIGHT CONTROL PURSUANT TO CLAUSE 4.6 OF WARRINGAH LEP 2011

1. INTRODUCTION

- 1.1 This written request has been prepared in accordance with Clause 4.6 of the Warringah Local Environmental Plan 2011 ('LEP') to accompany a development application for alterations and additions to an existing dwelling house at 32 Greystoke Street, Wheeler Heights (the 'Site'). In this document, we refer to the written request as a "variation statement".
- 1.2 This variation statement relates to the maximum height development standard of **8.5m** applicable to the Site pursuant to clause 4.3 of the LEP and the relevant map.
- 1.3 It is important to note at the outset that clause 4.6 of the LEP "*is as much a part of [the LEP] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome.*" (SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 at [73]).
- 1.4 This variation request demonstrates that compliance with the maximum height development standard applicable to the Site pursuant to clause 4.3 of the LEP is both unreasonable and unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify the proposed contravention of the development standard, as required pursuant to clause 4.6(3).

2. DEVELOPMENT STANDARD TO BE VARIED

- 2.1 The land is zoned R2 Low Density Residential. Clause 4.3 of the LEP includes a development standard for Height and provides as follows:

Clause 4.3 – Height of Buildings, which states:

(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.

- 2.2 Clause 4.3 of the LEP and the digital LEP mapping on the NSW Planning Portal indicates that the site is subject to a height control of **8.5m** (see **Figure A** below).

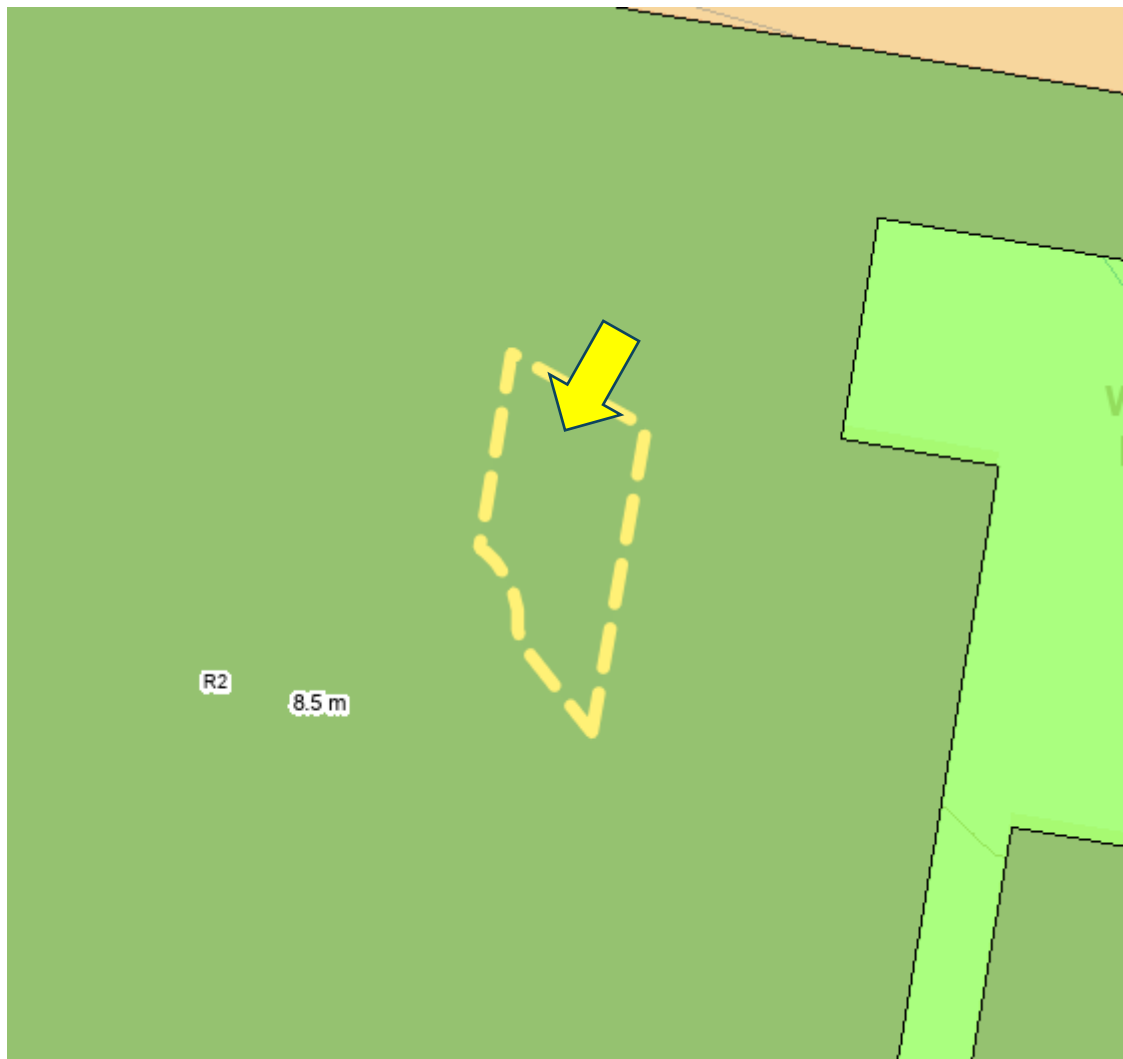


Figure A – Warringah LEP Height Map extract

Source – NSW Spatial Viewer 2024

3 PROPOSED NUMERICAL VARIATION TO THE HEIGHT STANDARD

- 3.1 The proposal has a maximum height of 9.24m. The majority of the roof form however is below the 8.5m height limit.
- 3.2 The existing dwelling on the site has a maximum height of 11.2m. see drawing 07.
- 3.3 The maximum height for this site under the current controls is 8.5m.
- 3.4 Figure 1 below shows the area where the variation is sought (shown in red).

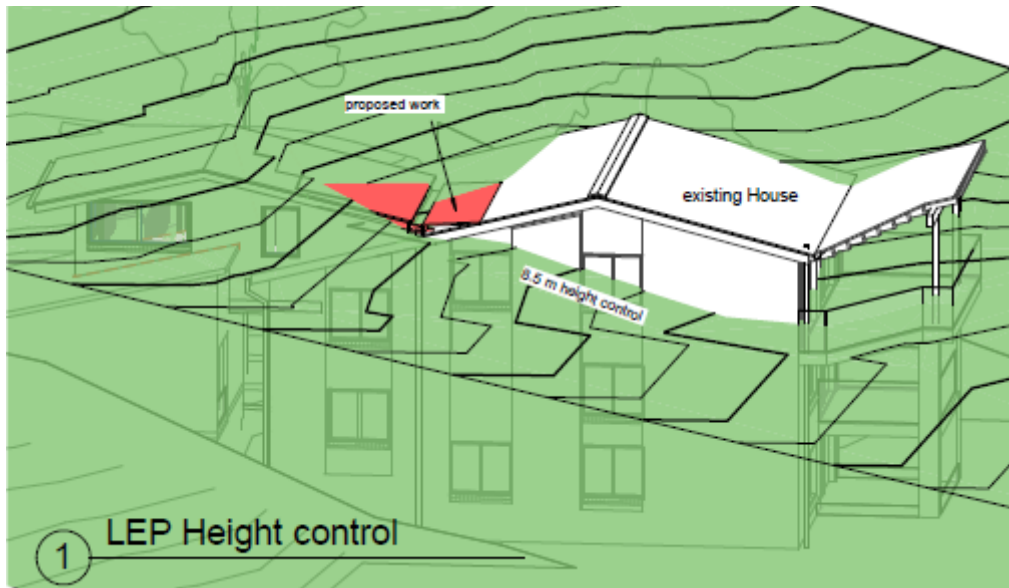


Figure 1 showing in red the area of non compliance. This occurs at the rear of the new roof form as the slope falls away below.

4 CLAUSE 4.6 AND RELEVANT CASE LAW

- 4.1 *The relevant parts of clause 4.6 of the LEP which relate to the subject application are:*
 - (1) *The objectives of this clause are as follows—*
 - (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.*
 - (2) *Development 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.*
 - (3) *Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

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

Note—

The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note—

When this Plan was made it did not contain Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU6 Transition or Zone R5 Large Lot Residential.

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

- (a) a development standard for complying development,
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

4.2 The development standard in clause 4.3 of the LEP **is not** excluded from the operation of clause 4.6 for this Site by clause 4.6(2). Nor does it contravene matter raised in 4.6 (6) or (8).

4.3 The purpose of this written request is to demonstrate the matters required by clause (3)(a) and (b) above. In preparing this request, regard has been had to the document: “Varying development standards: A Guide (August 2011)” prepared by the NSW Department of Planning & Infrastructure and relevant Land Environment Court judgments including but not limited to the following:

- 4.3.1 *Wehbe v Pittwater Council* [2007] 156 LGERA 446; [\[2007\] NSWLEC 827](#);
- 4.3.2 *Four2Five Pty Ltd v Ashfield Council* [2007] 156 LGERA 446; [\[2015\] NSWLEC 90](#);
- 4.3.3 *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [\[2018\] NSWCA 245](#);
- 4.3.4 *Initial Action Pty Ltd v Woollahra Council* [\[2018\] NSWLEC 118](#);
- 4.3.5 *Baron Corporation Pty Limited v Council of the City of Sydney* [\[2019\] NSWLEC 61](#);
- 4.3.6 *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [\[2018\] NSWLEC 191](#);
- 4.3.7 *SJD DB2 Pty Ltd v Woollahra Municipal Council* [\[2020\] NSWLEC 1112](#);

4.3.8 *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115.

5 THE REQUIREMENTS OF SUBCLAUSE (3)(a) OF CLAUSE 4.6 OF THE LEP

5.1 **Subclause 4.6(3)(a) of the LEP: Whether compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

5.2 Whilst it pertained to SEPP 1, the Land and Environment Court judgment *Wehbe v Pittwater Council* [2007] NSWLEC 827 (21 December 2007) (*'Wehbe'*), remains equally applicable to addressing this subclause. Specifically, in *Wehbe* the Court identified 5 different 'ways' in which it can be established that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. This list of ways, reproduced in the DP&I Guide referred to above, is not exhaustive and provides as follows:

1. the objectives of the standard are achieved notwithstanding noncompliance with the standard;
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. the underlying objective or purpose would be defeated or thwarted if compliance was required and therefore 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 compliance with the standard is unnecessary and unreasonable;
5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

5.3 In regard to the circumstances of the proposed development and this Clause 4.6 variation request, reliance is placed on *Wehbe* ways 1 and 3 (as underlined above).

5.4 It is sufficient to demonstrate **only one** of these ways to satisfy clause 4.6(3)(a) (*Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22], *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]. Further, it is only necessary to demonstrate that strict compliance is either unreasonable or unnecessary.

Wehbe Way 1 - the objectives of the Height standard are achieved notwithstanding non-compliance with the standard

5.4.1 The applicable objectives of the height development standard in clause 4.3 of the LEP pertaining to development on land in an R2 Low Density Residential zone are responded to as follows:

- (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.*

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

Objective (a) Comment - The existing building is three storeys in height. The proposed new infilled area of floorspace is located at the front of the site and will be viewed as a second storey over the garage. It will therefore not increase the overall number of storeys in the building. Because it is set close to the street, it does not increase the bulk, scale and height of the building when viewed from the rear. The building will remain 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,

Objective (b) Comment – the visual impact has been discussed above in terms of its height, bulk and scale. It appears as a second storey over the garage and does not increase the overall bulk, height and scale of the building. The visual impact has therefore been minimised.

No significant views are identified across this site by any mapping within the associated DCP.

The dwellings on the low side of the street (ie the immediate neighbours on each side) have continue to have unrestricted district views of the surrounding bushland. Public views will also be retained from Greystoke Street towards the bushland.

The dwellings on the high side of the street (which are located above street level) will continue to gain views over the site and down the side setbacks, the proposal is satisfactory in regard to the preservation of any public views in this neighbourhood.

As part of the submitted architectural set, the drawings 10.11 and 12 deal with view impact. It is shown that due to the slight profile of the roof and its location of the site and being below the street level ensures that views are retained.

Accordingly, this proposal will facilitate equitable view sharing.

The proposal is for an additional room at the front of the house, spatially separated from side boundaries. The side setback of the new floorspace aligns with the living room area (located at the rear of the upper level) of the dwelling. Privacy is maintained.

The solar access to adjoining sites is maintained. Solar access diagrams are provided as part of the architectural plan set (Refer to plans 15,16,17). In the circumstances of this case, there is no additional overshadowing given the location of the proposed increased height.

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

Objective (c) Comment – the proposal, notwithstanding its height variation, does not seek to alter the landscaped area of the site or footprint of the dwelling. It will maintain its current spatial separation to all boundaries. Due to the distance and established landscaping in this locality, the new floorspace not be highly discernible from any vantage point in the bushland. The proposed changes to the roof form, while increasing height at the front of the dwelling to allow for the new room will not be discernible from the north.

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

Objective (d) Comment – This has been largely dealt with above. The visual impact is limited from the street due to the slope of the land and would only appear as part of a second storey. Due to the positioned of the floorspace at the front of the site it will not be discernible from the north or the public reserve to the east.

Overall, the proposal maintains a very suitable balance between landscaping and built form and is comparable with adjacent developments height, bulk and scale and character.

Wehbe Way 3 - the underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable

- 5.4.2 As discussed above, the proposal has been designed to upgrade the overall external appearance of the property by proposing one roofing material over the entire roof form while also providing for an additional room and bathroom at the front of the site over the existing footprint. Given the location of the site in amongst other dwellings on the hillside, the proposed roof does not alter the perceived bulk and scale of the building when viewed from outside the site. The prevailing built form character is medium to large two to three storey dwellings and the topography of the street adequately separates the dwellings on the low side from dwellings on the higher side of the street.
- 5.4.3 Although the height of the proposal slightly exceeds the existing building height and applicable height development standard, this is appropriate in the specific context of the hillside location. In this context the proposal cannot be seen as an overdevelopment of the Site but rather a logical and appropriate built form for the Site. Landscape area is retained and no excavation is required.
- 5.4.4 For the reasons set out above compliance with the development standard is both unreasonable and unnecessary.
- 5.5 **Subclause 4.6(3)(b): Whether there are sufficient environmental planning grounds to justify contravening the development standard.**

- 5.6 The following factors demonstrate that sufficient environmental planning grounds exist to justify the proposed variation to the maximum height standard. It noted that *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [24], indicated that the focus of consideration of environmental planning grounds should be on the aspect or element of the development that contravenes the development standard and not on the development as a whole, in this case, it is the infill of the existing space between the garage and the living room zone of the house with a small some area exceeding the height standard although overall it will be lower when compared with the existing height of the building. This is adequately demonstrated on the plans.
- 5.7 The sites topography makes strict compliance with the standard challenging in this instance. The dwelling will present as 2 storeys to the street and as the land falls away to the rear the roof of the new addition begins to encroach above the 8.5m. The location of the new room between the carport roof and roof of the main dwelling is appropriately located however the new roof will slightly exceed the height plane as shown in Figure 1 due to the levels already established by the main dwelling.
- 5.8 The sites that are down slope to the rear are significantly distanced from the subject site that the resultant height of the proposal would have a negligible amenity impact on these dwellings given the location of the new floorspace is over the existing carport at the front of the site.
- 5.9 The area of non-compliance relates to the rear of the new roof form. Th is small area of non compliance does not give rise to any unreasonable bulk and scale or visual impact concerns.
- 5.10 The development maintains the existing footprint of the dwelling which will have a minimal impact on the local environment. Expanding the footprint of the dwelling or proposing increased excavation at the lower level to pick up additional floorspace is considered to be a worse outcome than providing a modest additional storey.
- 5.11 The variation does not give rise to any unreasonable adverse amenity impacts with regard to privacy, view loss or overshadowing. Shadow diagrams have been provided which demonstrate consistency with the solar access provisions.
- 5.12 The variation proposed is reasonably minor and within 10% of the control.

Consistency with character of the area

- 5.12.1 The proposed bulk and scale of the building is generally equal to other buildings in the same visual catchment.
- 5.12.2 The SEE outlines how the site conforms with the character of the area. This hillside has many different buildings of varied architectural styles and colours and materials. The additional height will allow the proposal to continue to conform with that established character while ensuring that there is no change to the existing footprint and therefore retention of the entire landscaped area of the site. That ability to conform is an

environmental planning ground that, of itself, is sufficient to justify the height contravention.

Lack of impact

- 5.12.3 As noted above and elsewhere in the DA documentation, the proposal does not have any unreasonable adverse amenity impacts on surrounding development in relation to overshadowing, loss of privacy or visual impacts.
- 5.12.4 As determined in *Randwick City Council v Micaul Holdings Pty Ltd*, and supported by Preston CJ in *Initial Action*, lack of impact is a sufficient ground for allowing a breach of a development standard pursuant to Clause 4.6.

The relationship between controls

- 5.12.5 In this case, an opportunity has presented itself to provide an additional room and bathroom infilling an existing space between the garage and the upper level of the dwelling and in doing so to upgrade the appearance of the entire property by changing the roof to one material. The visual bulk of the site is not unduly increased due to maintaining the front setback, side and rear setbacks, and landscaping. Materials and finishes of the proposal are high quality superior. The opportunity to improve the amenity of this site should not be penalised by a numerical control.

6 THE REQUIREMENTS OF CLAUSE 4.6

6.1 Can the consent authority be satisfied that this written request adequately addressed the matters required to be demonstrated by subclause (3)?

6.1.1 Based on the comments in Section 5 above, yes.

6.1.2 In relation to the objectives of the subject R2 zoning the following comments are made:

1 Objectives of zone

- ***To provide for low-impact residential development within a low density residential environment.***

Comment – The proposal will continue to provide for housing within a low-impact residential environment.

- ***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***

Comment – N/A

- ***To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.***

The proposal will not adversely affect any special values of the site. In particular, there is no adverse impact on the aesthetic appearance of the site. Its altered appearance will sit comfortably within the locality and the one roofing material over the entire built form will improve appearance.

The retention of all landscaped area on the site will continue to provide a satisfactory balance between the built upon and non-built upon areas.

6 CONCLUSION

- 6.1 Having regard to the above it is considered that this written request satisfies the requirements of clause 4.6 of the LEP and that the consent authority can be satisfied that the proposal also meets the other requirements of clause 4.3.
- 6.2 The proposed contravention of the height standard will meet the objectives of clause 4.6, in particular objective (b) as it achieves *“better outcomes for and from development by allowing flexibility in particular circumstances”*.
- 6.3 It is considered that the proposal represents a high quality planning outcome for the site given the sensitive placement of the new floorspace and for the reasons as outlined above.

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