

**WRITTEN REQUEST PURSUANT TO CLAUSE 4.6 OF WARRINGAH LOCAL ENVIRONMENTAL PLAN 2011  
166 PARR PARADE, BEACON HILL**

**For:** Proposed First Floor Addition  
**At:** 166 Parr Parade, Beacon Hill  
**Owner:** Brett and Sarah Baldwin  
**Applicant:** Beecraft P/L

## **1.0 Introduction**

This written request is made pursuant to the provisions of Clause 4.6 of Warringah Local Environmental Plan 2011. In this regard, it is requested Council support a variation with respect to compliance with the maximum building height as described in Clause 4.3 of the Warringah Local Environmental Plan 2011 (WLEP 2011).

## **2.0 Background**

Clause 4.3 restricts the height of a building in this locality to a maximum of 8.5m above ground level and considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The overall height of the proposed first floor addition will exceed the 8.5m maximum building height.

The proposed first floor addition will reach a maximum height of 10.17 metres measured from lower ground floor level.

The breach of the maximum building height by the proposed first floor addition is a result of the moderate fall in natural surface towards the rear of the property.

The controls of Clause 4.3 are considered a development standard as defined in the Environmental Planning and Assessment Act, 1979 and therefore the development as a whole inclusive of existing structure needs to be assessed in relation to current development controls.

## **3.0 Purpose of Clause 4.6**

The Warringah Local Environmental Plan 2011 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 118* have been considered in this request for a variation to the development standard.

#### **4.0 Objectives of Clause 4.6**

The objectives of Clause 4.6 are as follows:

- (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.*

The development will achieve a better outcome in this instance by providing additional bedroom accommodation within new first floor structure that has been designed to minimize any undue impact on adjoining properties. The site has a moderate fall in natural surface towards the rear which results in new structure exceeding the maximum building height.

To overcome any undue impact on adjoining properties the new first floor structure proposes generous setbacks of 10.185 metres to the east side boundary and a varying setback of 3.4 – 6.2 metres to the west side boundary. The new structure will also be located in the same building zone as the two adjoining residences minimizing visual impact on those residences from their primary living areas located at the rear. As detailed in the shadowing details accompanying the application the first floor addition will not result in any unreasonable shadowing impacts on the adjoining properties or interfere with their district views to the north. From the street the completed structure will appear as a conventional two storey dwelling.

We submit that considering the minimal impact the first floor addition will have on surrounding development it will be consistent with the stated Objectives of the R2 Low Density Residential Zone, which are noted as:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

#### **5.0 Onus on Applicant**

Clause 4.6(3) provides 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 (refer to Precondition 3 below)*
- (b) That there are sufficient environmental planning grounds to justify contravening the development standard. (refer to Precondition 4 below)*

This written request has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

#### **6.0 Justification of Proposed Variation**

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 11* *Samadi v Council of the City of Sydney [2014] NSWLEC 1199*.

Paragraph 27 of the Samadi judgement states:

*Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).*

#### **Precondition 1 - Consistency with zone objectives**

The site is located in an R2 Low Density Residential Zone. The objectives of the R2 zone are noted as:

- ***To provide for the housing needs of the community within a low density residential environment.***

The development allows for alterations and additions to an existing detached residence including a first floor addition that will provide additional bedroom accommodation and a 'work from home' study area to an existing modest dwelling.

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

Not applicable.

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

The proposed first floor addition will not result in any loss of vegetation with the development maintaining its generous landscaped area of 51.5% well in excess of the DCP requirement of 40%.

#### **Precondition 2 - Consistency with the objectives of the standard**

The objectives of Clause 4.3 are articulated at Clause 4.3(1):

*(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.*

Despite the variation to the maximum building height, the proposed first floor addition is considered in this instance to be in keeping with the relevant Objectives of Clause 4.3 for the following reasons:

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

When viewed from the street the completed structure will appear as a conventional two storey dwelling.

***(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,***  
As discussed above the proposed first floor addition will not result in any undue shadowing impacts on adjoining properties or interfere with district views. We submit that mature trees and vegetation along the fence lines will maintain the existing privacy levels to adjoining properties.

***(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,***  
The property is not located within close proximity to the coast or natural bushland.

***(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.***  
The property cannot be seen from any public parks, reserves or community facilities. As noted above the completed structure will appear as a typical two storey dwelling when viewed from Parr Parade.

**Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

It is unreasonable and unnecessary to require strict compliance with the development standard in this instance as the proposal provides additional bedroom accommodation in a well designed first floor addition that will not present any undue externalities or have any significant impact on the surrounding area and development.

Council's controls in Clause 4.3 provide a maximum building height of 8.5m above ground level.

It is considered that the proposal achieves the Objectives of Clause 4.3 and that the development is justified in this instance for the following reasons:

- The proposed first floor addition due to its generous separation from adjoining development will not result in any undue loss of amenity to surrounding properties.
- When viewed from Parr Parade the completed development will appear as a conventional two storey dwelling compatible to similar development in the surrounding area.

In the *Wehbe* judgment (*Wehbe v Pittwater Council* [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded, and that approval of the Objection may be consistent with the aims of the policy. These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

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

**Comment:** Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

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

**Comment:** It is considered that the purpose of the standard is relevant, but the purpose is satisfied.

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

**Comment:** Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

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;*

**Comment:** Not applicable.

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.*

**Comment:** The development standard is applicable to and appropriate to the zone.

For the above reasons, it would therefore be unreasonable and unnecessary to cause strict compliance with the standard.

**Precondition 4 - To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed.**

Council's controls in Clause 4.3 provide a maximum building height of 8.5m above ground level for the subject development.

The proposed first floor addition at its highest point will reach a maximum height of 10.17 metres.

Having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for maximum building height.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does not mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether every item of clause 4.6 of the LEP had been meticulously considered and

complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February of this year the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that "the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard." He held that this means:

*"the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".*

Accordingly, when assessed against the relevant Objects of the Environmental Planning & Assessment Act 1979, (NSW) outlined in s1.3, the following environmental planning grounds are considered sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The proposed first floor addition is a common and conventional style of development on the Northern Beaches. In this instance the moderate fall in natural surface along this part of Parr Parade challenges development by restricting overall height. We submit that by providing generous separation to adjoining development the design of the first floor addition suitably meets the objectives of the maximum building height control although numerically non-conforming. We note that the existing dwelling is relatively modest in size and the proposed first floor addition will provide much needed bedroom accommodation including a work at home study area guaranteeing the viability of the dwelling as a comfortable family home into the future.
- The proposal is considered an acceptable form of development within the local built environment as appropriate views, solar access and privacy will be maintained within acceptable levels for the surrounding properties. The design also respects the existing natural environment with new structure avoiding any disturbance to surrounding trees, vegetation.

The above are the environmental planning grounds which are the circumstance which are particular to the development which merit a variation to the development standard.

## **7.0 Conclusion**

This development proposes a departure from the maximum building height control, with the proposed first floor addition reaching a maximum height of 10.17 metres as defined in Clause 4.3 of Warringah LEP 2011.

This variation occurs due to a moderate fall in natural surface towards the rear of the property.

This written request to vary the maximum building height control specified in Clause 4.3 of the Warringah LEP 2011 adequately demonstrates that the objectives of the standard will be met.

The bulk and scale of the proposed first floor addition is appropriate for the site and will have no undue impact on the surrounding area and development.

Strict compliance with the maximum building height would be unreasonable and unnecessary in the circumstances of this case.

*John Wright*  
*Building Designer*