

**Clause 4.6 Variation Request**

**Clause 4.3 Height of Buildings of the Warringah Local Environmental Plan 2011**

**Proposed Alterations and a First Floor Addition**

## 1.0 INTRODUCTION

The Clause 4.6 Exception to Development Standards request has been prepared in support of the proposed alterations and first floor addition at 3 Paruna Place, Cromer as Lot 42 in Deposited Plan 239139.

The objectives of Clause 4.6 are to provide an appropriate level of flexibility in applying a certain development standard to types of development, and to achieve better outcomes for and from development, by allowing flexibility in particular circumstances.

The request has been prepared having regard to the *Department of Planning and Environment's Guidelines to Varying Development Standards* (November 2023) and various recent decision in the New South Wales (NSW) Land and Environment Court (LEC) and the NSW Court of Appeals (Appeals Court).

The Clause 4.6 Variation Request is made pursuant to the provisions of Clause 4.6 of the *Warringah Local Environmental Plan 2011*. In regard it is requested Council support a variation with respect to compliance with the height of buildings as described in Clause 4.3 of the *Warringah Local Environmental Plan 2011* (hereafter WLEP 2011). The proposed development proposes alterations and first floor additions to the existing dwelling. This requires an increase in height to facilitate the roofline over the north/eastern section of the dwelling. Overall, the changes are relatively minor, and the proposal ensures that the residential amenity is maintained and does not impede on neighbouring views or the negatively impact the streetscape.

Clause 4.3 prescribes a numerical building height of 8.5m to the subject site. The proposal results in as proposed maximum building height of 9.32m which represents a 0.82m departure, which is a percentage variation of 9.6%.

The request considers that compliance with the building height development standard is unreasonable and unnecessary in the circumstances of the proposed development because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. It is therefore considered appropriate in this circumstance to vary the development standard.

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### 3.0 VARIATION OF HEIGHT OF BUILDING STANDARD

The standard is proposed to be varied is the height of buildings development standard which is set out in clause 4.3 of the *Waringah Local Environmental Plan 2011* (WLEP 2011) and refers to the 'Height of Building Map'.

The site is identified 'Area I' of the height of buildings map which is 8.5m and is considered to be a development standard as defined by Section 4 of the *Environmental Planning and Assessment Act 1979*.

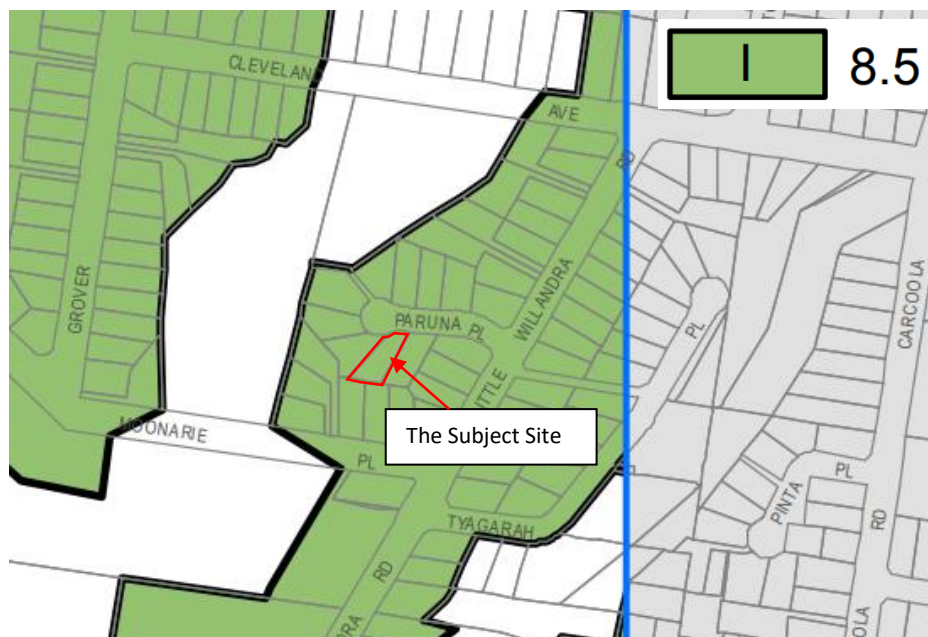


Figure 1: Height of Buildings Map pursuant to WLEP 2011 (NSW Legislation, 2024)

The proposal results in a variation of 0.82m, which is a percentage variation of 9.6% to the height standard.

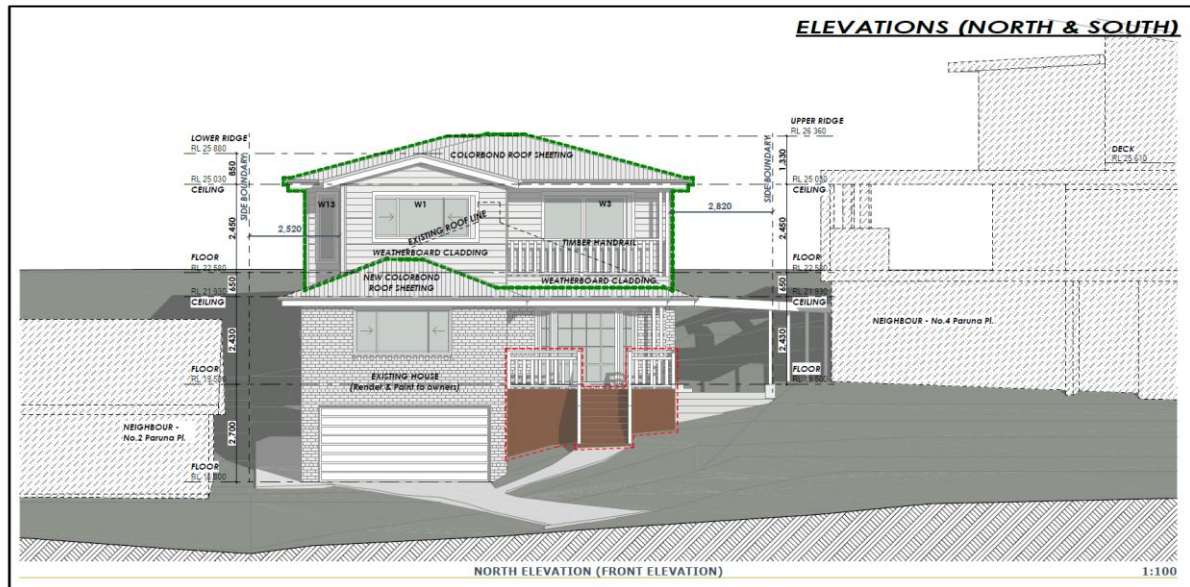
<b>Table 1. Height of Building Variation</b>				
Address	WLEP 2011 Clause	WLEP 2011 Development Standard requirement	Proposed Maximum Height of Building	Complies (Percentage of Variation)
3 Paruna Place, Cromer	Clause 4.3 Height of Buildings	8.5m	9.32m	0.82m (9.6%)

It is noted that if the building height were taken from "natural ground" the non-compliance would be 0.33m over the height at the front gable. This represents a 3.8% departure from the maximum building height standard and is considered negligible when applying to one small portion of the building due to the existing built form and the slope of the site.

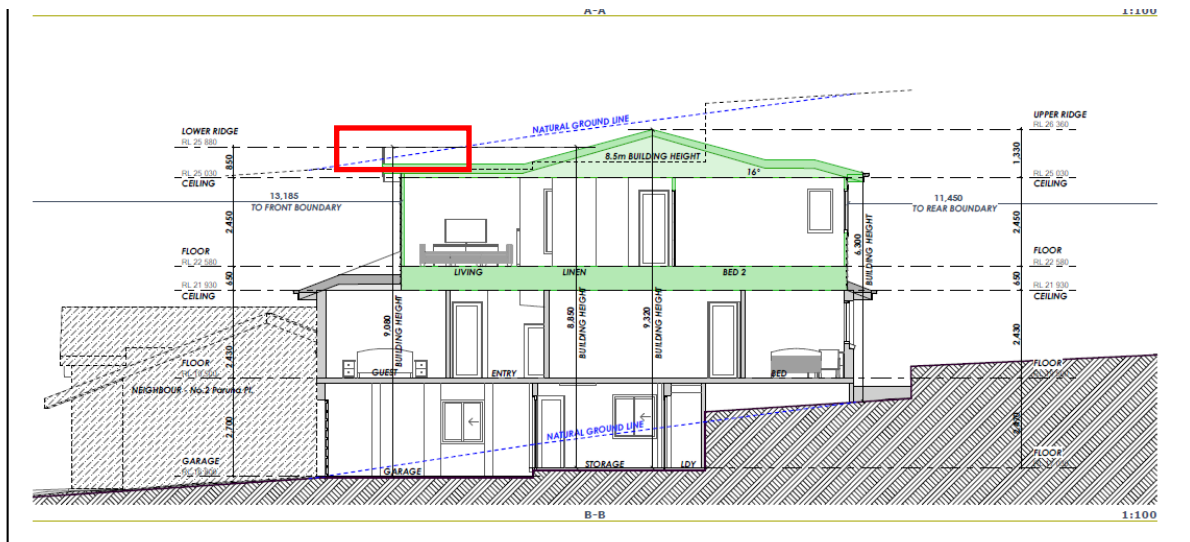
Furthermore, given its location at the north, it won't contribute to overshadowing to the south.

### 3.0 EXTENT OF VARIATION

The proposed variance to the building height development standard is to the north/eastern section of the dwelling. The existing structure comprises two levels due to part ground floor garage and the proposed front gable of the first-floor addition is the subject of this 4.6 variation request. It is noted that the proposed development is otherwise generally compliant with the height standard.



**Figure 2:** North Elevation (front elevation)



**Figure 3:** Eastern Elevation (Section B-B)



**Figure 4:** Front façade of the dwelling with proposed first floor above.

## 4.0 UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by Clause 4.6(3)(a) of the LEP.

The Court held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable and unnecessary. See *Wehbe v Pittwater Council [2007] NSWLEC 827 (Wehbe)*.

The five (5) ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objectives would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granted consents departing from the standard hence the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

It is sufficient to demonstrate only one of these ways to satisfy Clause 4.6(3)(a) (*Wehbe v Pittwater Council [2007] NSWLEC 827*, *Initial Action Pty Limited v Woollahra Municipal Council [2018] NSWLEC 118 at [22]* and *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]*).

In summary, the reason to support the variation due to the siting of the existing building and sloping topography of the site. The proposed development provides a coherent first floor addition with respect of the orientation and position of the existing dwelling and presents a built form which is consistent with size, bulk and scale of the immediate neighbours and the locality.

Nonetheless, we have considered each of the ways as follows.

### 4.1 The objectives of the development standard are achieved notwithstanding non-compliance with the standard

The following considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (First Test under *Wehbe*).

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

The proposed development is compatible with the neighbouring and surrounding development containing predominantly 2-3 storey dwelling houses. The sloping topography, specifically from the ridge to the west presents 3 storey dwellings to the cul-de-sac of Paruna Place representing ground floor garage and 2 storeys habitable area above.

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

The proposed development represents built form consistent with the locality and has been thoughtfully designed to reduce bulk and scale and respect the residential amenity of the site surrounds. The proposed development complies with the minimum solar access requirements of the *Warringah Development Control Plan 2011* (WDCP 2011) and presents limited overshadowing to private open space mainly owing to its north/south orientation.

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

The proposed development respects the bushland setting and doesn't detrimentally impact or hinder the environment.

*(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 enhances the current original dwelling and provides a visual offering which benefits the streetscape of Pruna Place. The proposed development cannot be viewed from parks, reserves or community facilities.

In accordance with the decision in *Wehbe v Pittwater Council [2007] NSWLEC 827*, *Initial Action Pty Limited v Woollahra Municipal Council [2018] NSWLEC 118*, *Al Maha Pty Ltd v Huajun Investments Pty Ltd (2018) 233 LGERA 170*; *[2018] NSWCA 245* and *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130* and *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 at [31]*, therefore, compliance with the Height of buildings development standard is demonstrated to be unreasonable or unnecessary and the requirements of Clause 4.6(3)(a) have been met on this way alone.

Whilst it may not be one of the 5 'tests' outlined in *Wehbe v Pittwater Council [2007] NSWLEC 827* (*Wehbe*), we are of the opinion that compliance is unreasonable or unnecessary because the existing building at the subject site already exceeds the standard (and the proposal will remain below the existing maximum height). We are of the opinion that this reason is sufficient in itself to demonstrate that compliance is unreasonable or unnecessary.

4.2 The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

4.3 The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable.

The objective would not be defeated or thwarted if compliance was required. This reason is not relied upon.

4.4 The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary.

The standard has not been abandoned by Council in this case and so this reason is not relied upon.

4.5 The zoning of the land is unreasonable or inappropriate.

The zoning of the land is reasonable and appropriate and therefore is not relied upon.

## 5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 118*, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, Plain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

Clause 4.6(3)(b) of the NSLEP 2013, requires the consent authority to be satisfied that the applicant's written request has adequately addressed clause 4.6(3)(b), by demonstrating:

*"That there are sufficient environmental planning grounds to justify contravening the development standard".*

The environmental planning grounds relied on in the written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as summarised in *(Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118)*.

The proposed development is supportable on environmental planning grounds for the following reasons:

- The proposal (notwithstanding the LEP contravention) is consistent with the objectives of the development standard as provided in clause 4.3 of the WLEP 2011.
- The proposed development is generally consistent with the built form controls of the WDCP 2011.
- The departure to the height of building standard will not introduce any significant adverse environmental or amenity related impacts on neighbouring properties.
- The proposed works will maintain consistency with the general height and scale of residential development in the area and the character of the locality.
- The proposed works have been designed to respect the sloping topography of the site.
- The proposed height and the overall scale of the new works will maintain amenity and appropriate solar access for the subject site and neighbouring properties.
- The proposed use is consistent with the existing and character of the area.
- The proposed development will enable the use to correspond with the general nature of the site and building form of the existing development.
- The proposal will not result in any unreasonable privacy intrusion as the existing amenity is retained and will maintain the existing high-level of amenity of adjoining occupiers.

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

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Accordingly, in regard to the proposed development at 3 Pruna Place Cromer, the following environmental planning grounds are considered to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The variation to the height of building is inconsequential as it is of negligible impact to the streetscape and the amenity of neighbouring properties.

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.

The environmental planning grounds to justify the departure of the Height of Buildings development standard are as follows:

- **Object 1.3(c) and 1.3(d) of the EP&A Act** - The development assists in promoting "the orderly and economic use of land" by using land that contains residential development.
- **Satisfies the objectives of the R2 Low Density Residential zone.**

The proposal, inclusive of the non-compliance, is also consistent with the objectives of the R2 Low Density Residential Zone:

- *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.*

As sought by the zone objectives, the proposal will provide for the alterations and additions to an existing dwelling which are sensitive to the location and topography of the locality.

The proposal includes modulated wall lines and a consistent palette of materials and finishes in order to provide for high quality development that will enhance and complement the locality.

Notwithstanding the non-compliance with the maximum height control, the proposed works will provide an attractive residential development that will add positively to the character and function of the local residential neighbourhood.

For completeness, we note that the size of the variation is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6: *GM Architects Pty Ltd v Strathfield Council [2016] NSWLEC 1216 at [85]*.

In short, Clause 4.6 is a performance-based control, so it is possible (and not uncommon) for variations to be approved in the right circumstances.



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## 6.0 CONCLUSION

This submission requests a variation under clause 4.3 of the *Warringah Local Environmental Plan 2011*, to the building height development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development
- The development achieves the objectives of the development standard (Wehbe Test 1) and is consistent with the objectives of the R2 Zone
- There are sufficient environmental planning grounds to justify the contravention.

On this basis, therefore, it is appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.



Max Chipchase BTP (Hons)  
Town Planner  
Chipchase Planning