WRITTEN REQUEST PURSUANT TO CLAUSE 4.6 OF PITTWATER LOCAL ENVIRONMENTAL PLAN 2014

44 NAREEN PARADE, NORTH NARRABEEN FOR THE PROPOSED CONSTRUCTION OF A DETACHED SECONDARY DWELLING

VARIATION OF A DEVELOPMENT STANDARD REGARDING THE WORKS WHICH EXCEED COUNCIL'S MAXIMUM BUILDING HEIGHT AS DETAILED IN CLAUSE 4.3(2FA) OF THE PITTWATER LOCAL ENVIRONMENTAL PLAN 2014

For: Proposed construction of a detached secondary dwelling
At: 44 Nareen Parade, North Narrabeen
Owner: Mr & Mrs McCabe
Applicant: Mr & Mrs McCabe
C/- R. Conway

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Pittwater Local Environmental Plan 2014. 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 Pittwater Local Environmental Plan 2014 (PLEP 2014).

2.0 Background

Clause 4.3 restricts the height of secondary dwellings within this area of the North Narrabeen locality and refers to the maximum height noted within the "*Height of Buildings Map*."

The relevant building height for a secondary dwelling which is separate to the principal dwelling in this locality in within land zoned E4 Environmental Living is 5.5m and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

Due to the sloping topography of the site and the proposed south-east facing skillion roof form provided to allow solar access and light, a portion of the new roof will be up to approximately 6.8m in height or exceed Council's maximum height control by 1.3m or 23.6%.

The substantial majority of the secondary dwelling is comfortably under Council's maximum height control of 5.5m above natural ground level.

The proposal is considered acceptable and there are sufficient environmental planning grounds to justify contravening the development standard.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

Is Clause 4.3 of the LEP a development standard?

(a) The definition of "development standard" in clause 1.4 of the EP&A Act means standards fixed in respect of an aspect of a development and includes:

"(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,."

(b) Clause 4.3(2FA) relates to the maximum height of a building. Accordingly, Clause 4.3(2FA) is a development standard.

3.0 Purpose of Clause 4.6

The Pittwater Local Environmental Plan 2014 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 Standard Instrument 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 relied on 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 decision of Chief Justice Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in ***RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [1], [4] & [51]*** where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of the LEP provides:

> *(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.*

Clause 4.3(2FA) (the Maximum Building Height Control for secondary dwellings which are separate from the principal dwelling in zone E4 Environmental Living) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of the LEP.

Clause 4.6(3) of the LEP provides:

> *(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.*

The proposed development does not comply with the maximum building height development standard pursuant to Clause 4.3(2FA) of PLEP which specifies a maximum building height of 5.5m for secondary dwellings which are separate to the principal dwelling within Zone E4 Environmental Living. The proposed secondary dwelling results in a portion of the new roof form being up to 6.8m in height above the ground levels of the land in its natural state and exceeds the building height standard by 1.3m or 23.4%.

Strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

Clause 4.6(4) of PLEP provides:

> *(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.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Planning Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of the LEP provides:

> *(5) In deciding whether to grant concurrence, the Secretary must consider:*
>
> *(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
>
> *(b) the public benefit of maintaining the development standard, and*
>
> *(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Council has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), and should consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that

contravenes a development standard: *Fast Buck$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude Clause 4.3 of the LEP from the operation of clause 4.6.

The specific 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 as the site will provide for the construction of a new detached secondary dwelling, which is consistent with the stated Objectives of the E4 Environmental Living Zone, which are noted as:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- *To ensure that residential development does not have an adverse effect on those values.*
- *To provide for residential development of a low density and scale integrated with the landform and landscape.*
- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*

The non-compliance with the building height control arises as a result of the sloping topography of the site and location of existing development.

The new works maintain a bulk and scale which is in keeping with the extent of surrounding development, with a consistent palette of materials and finishes which will provide for high quality development that will enhance and complement the locality.

Notwithstanding the non-compliance with the maximum building height control, the new works will provide an attractive residential development that will add positively to the character and function of the local residential neighbourhood. It is noted that the proposal will maintain a consistent character with the built form of nearby properties, with the new roof form intended to complement the existing roofing by providing a low pitch skillion profile which assists with minimising the visual bulk of the development.

The proposed new works will not see any unreasonable impacts on the existing views enjoyed by neighbouring properties, with view corridors over and past the roof extension to be maintained.

The works are designed to ensure that there will not see any unreasonable adverse impacts on the solar access enjoyed by adjoining dwellings.

5.0 The Nature and Extent of the Variation

5.1 This request seeks a variation to the maximum building height standard contained in Clause 4.3(2FA) of PLEP.

5.2 Clause 4.3(2FA) of PLEP specifies a maximum building height of 5.5m for secondary dwellings which are separate to the principal dwelling in zone E4 Environmental Living.

5.3 The proposed new detached secondary dwelling will have a building height of 6.8m when measured above the ground level of the land in its undeveloped state and exceeds the building height control by 1.3m or 23.4% at the southern extremity of the proposed roof form.

6.0 Relevant Caselaw

6.1 In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

> *17. The first and most commonly invoked way is to 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: Wehbe v Pittwater Council at [42] and [43].*
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> *18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
>
> *19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
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> *20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
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> *21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However,*

this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

6.2 The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is Clause 4.3 of PLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

   (a) compliance is unreasonable or unnecessary; and

   (b) there are sufficient environmental planning grounds to justify contravening the development standard

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of Clause 4.3(2FA) and the objectives for development for in the E4 zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes Clause 4.3(2FA) of PLEP?

7.0. Request for Variation

7.1 Is compliance with Clause 4.3 unreasonable or unnecessary?

(a) This request relies upon the 1st way identified by Preston CJ in Wehbe.

(b) The first way in Wehbe is to establish that the objectives of the standard are achieved.

(c) Each objective of the maximum building height standard, as outlined under Clause 4.3, and reasoning why compliance is unreasonable or unnecessary, is set out below:

(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,

The surrounding area is predominantly characterised by development between one and three storeys.

The proposal provides for a development which follows the siting of existing dwelling and maintains a compatible building form, which is in keeping with the desired future character of the locality. The dwelling is in keeping with the extent of newer development in the locality.

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

The proposed development maintains consistency with the height and scale of existing surrounding development.

Whilst compliance with the height control is constrained by the sloping topography of the site and location of existing development, the development is considered appropriate and compatible within the locality and is therefore worthy of support.

(c) to minimise any overshadowing of neighbouring properties,

The proposal is accompanied by shadow diagrams which demonstrate that the proposal will not result in a substantial reduction in the solar access currently received by the internal and external living areas of the adjoining neighbour to the south. As noted within the shadow diagrams, the considered design assists with minimising the overshadowing of the development.

The adjoining properties will maintain suitable solar access throughout the day in accordance with Council's provisions, the majority of the new shadows cast by the development to be over the front yards and roadway area.

(d) to allow for the reasonable sharing of views,

The subject and adjoining properties enjoy views to the east towards Bilgola Beach. The proposal will provide a new flat roof form over the first floor level.

The proposed modest extent of the new works assists with minimising the impact on neighbouring properties. The proposal is therefore considered to maintain the view opportunities for the surrounding properties.

The proposal will not result in any loss of views from nearby public land.

(e) to encourage buildings that are designed to respond sensitively to the natural topography,

The external form of the dwelling has been stepped to follow the sloping topography of the site, which assists with minimising the visual impact of the development.

(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

The proposed development maintains a bulk, scale and character which is in keeping with that of existing surrounding development. The external finishes of the new works comprise earthy tones, which will effectively integrate with the landscaped character of the locality and will not be visually prominent. The proposal will not require the removal of any significant vegetation.

The proposal is not considered to detract from the significance of the nearby heritage items, and will not adversely impact the natural environment within the locality.

7.2 Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

> *23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
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> *24. The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that*

> *contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see* Four2Five Pty Ltd v Ashfield Council *[2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see* Four2Five Pty Ltd v Ashfield Council *[2015] NSWLEC 90 at [31].*

There are sufficient environmental planning grounds to justify contravening the development standard.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposed development will maintain the general bulk and scale of the existing surrounding development and maintains architectural consistency with the prevailing development pattern which promotes the orderly & economic use of the land (cl 1.3(c)).

- Similarly, the proposed development will provide for improved amenity within a built form which is compatible with the streetscape of Nareen Parade the which also promotes the orderly and economic use of the land (cl 1.3(c)).

- The proposed new development is considered to promote good design and enhance the residential amenity of the buildings' occupants and the immediate area, which is consistent with the Objective 1.3 (g).

- The proposed development improves the amenity of the occupants and respects surrounding properties by locating the development where it will not unreasonably obstruct views across the site and will maintain the views from the site (1.3(g)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the provision of a building that provides sufficient floor area for future occupants and manages the bulk and scale and maintains views over and past the building from the public and private domain. These are not simply benefits of the development as a whole, but are benefits emanating from breach of the maximum building height control.

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The

requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

7.3 Is the proposed development in the public interest because it is consistent with the objectives of Clause 4.3 and the objectives of the E4 Environmental Living Zone?

(a) Section 4.2 of this written request suggests the 1st test in Wehbe is made good by the development.

(b) Each of the objectives of the E4 Environmental Living Zone and the reasons why the proposed development is consistent with each objective is set out below.

I have had regard for the principles established by Preston CJ in *Nessdee Pty Limited v Orange City Council [2017] NSWLEC 158* where it was found at paragraph 18 that the first objective of the zone established the range of principal values to be considered in the zone.

Preston CJ also found that "*The second objective is declaratory: the limited range of development that is permitted without or with consent in the Land Use Table is taken to be development that does not have an adverse effect on the values, including the aesthetic values, of the area. That is to say, the limited range of development specified is not inherently incompatible with the objectives of the zone".*

In response to *Nessdee,* I have provided the following review of the zone objectives:

It is considered that notwithstanding the variation of to the building height control, the proposal which involves the construction of a detached secondary dwelling, will be consistent with the individual Objectives of the E4 Environmental Living Zone for the following reasons:

- ***To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.***

The proposed dwelling maintains consistency with the single dwelling character of the locality. The proposal will not require the removal of any significant vegetation, and maintains a suitable area of soft landscaping.

- ***To ensure that residential development does not have an adverse effect on those values.***

  The proposed development will not detract from the ecological or aesthetic values within the locality.

- ***To provide for residential development of a low density and scale integrated with the landform and landscape.***

  The built form of the development is stepped to follow the sloping topography of the site, and is therefore effectively integrated into the landform. The bulk and scale of the dwelling is in keeping with that of newer development in the locality.

  The proposal will not require the removal of any significant vegetation, and will maintain a generous area of soft landscaping.

- ***To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.***

  The site is not within the immediate vicinity of riparian land or wildlife corridors.

7.4 Has council obtained the concurrence of the Director-General?

The Council can assume the concurrence of the Director-General with regards to this clause 4.6 variation.

7.5 Has the Council considered the matters in clause 4.6(5) of PLEP?

(a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed minor alterations and additions to the dwelling house for the particular site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.

(b) As the proposed development is in the public interest because it complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.

(c) there are no other matters required to be taken into account by the secretary before granting concurrence.

8.0 Conclusion

This development proposes a departure from the maximum building height development standard, with the proposed new roof form of the detached secondary dwelling which is separate to the principal dwelling to provide a maximum building height of 6.8m to the southern extremity of the building when measured above the natural ground level.

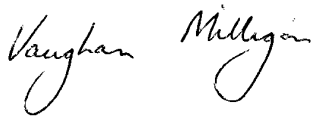
This variation occurs as a result of the sloping topography of the site.

The extent of the variation to the building height control is minimised by the low profile roof form, and the area of non-compliance does not result in any significant impact for the views and outlook for the neighbouring properties.

This written request to vary to the maximum building height standard specified in Clause 4.3(2FA) of the Pittwater LEP 2014 adequately demonstrates that that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

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



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