204 BANTRY BAY ROAD, FRENCHS FOREST
CONSTRUCTION OF A NEW TWO STOREY DWELLING

VARIATION OF A DEVELOPMENT STANDARD REGARDING THE MAXIMUM HEIGHT OF BUILDING CONTROL AS DETAILED IN CLAUSE 4.3 OF THE WARRINGAH ENVIRONMENTAL PLAN 2011

For: Construction of a New Two Storey Dwelling
At: 204 Bantry Bay Road, Frenchs Forest
Owner: Mr & Mrs Megerditchian
Applicant: Masterton Homes

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Warringah Local Environmental Plan 2013. In this regard, it is requested Council support a variation with respect to compliance with the maximum height of building development standard as described in Clause 4.3 of the Warringah Local Environmental Plan 2011 (WLEP 2011).

2.0 Background

Clause 4.3 of WLEP sets out the maximum height of building standard as follows:

(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.

The Height of Building Map specifies a maximum height of 8.5m.

The proposed dwelling house provides for a maximum height of 8.675m. This is a non-compliance of 175mm or a variation of 2.05%.

The proposal is considered acceptable and as discussed further within this request, 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 the 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 relates to the maximum height of building. Accordingly, Clause 4.3 is a development standard.

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 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 (the Height of Building Control) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of the LEP.

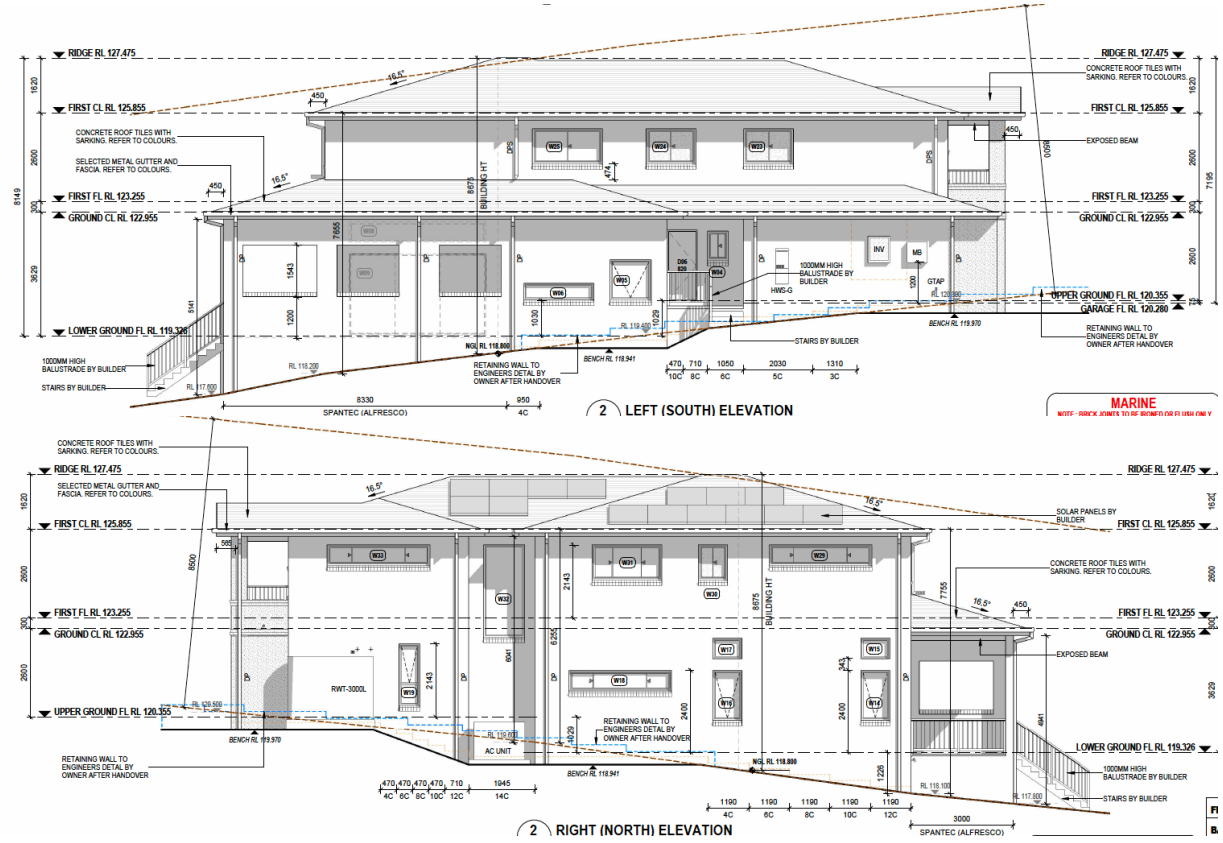
Clause 4.6(3) of the LEP provides:

> *(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 height of building development standard pursuant to Clause 4.3 of WLEP which specifies a maximum height of building of 8.5m in this area.

The proposed dwelling will result in a maximum height of 8.675m, resulting in a non-compliance of only 175mm or a variation of 2.05%.

The non-compliance with the height of building control is a result of the slope of the site and provides for an overall height less than the two adjoining properties. The area of non-compliance is restricted to a very small portion of the ridge at the rear of the dwelling as depicted in the architectural extract plan below:



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 WLEP 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) has been repealed. Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) has been repealed. 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 provide for the construction of a new dwelling on site. The non-compliance is a direct result of the slope of the site and provides for a ridge height that is below that of the two adjoining properties. It is considered that allowing for flexibility in this instance is reasonable given that the non-compliance is central on site and restricted to a small portion of the ridge, where the ridge level is below that of the two adjoining properties. The area of non-compliance is not visible from the street and amendment to the roof form to achieve technical compliance would not be discernible nor serve any benefit.

The non-compliance results in a development that is compatible with the existing surrounding development in this portion of Bantry Bay Road providing for a maximum height of RL127.475 with the adjoining properties providing for ridge heights of RL127.97 (No. 206 Banty Bay Road) and RL127.91 (No. 202 Banty Bay Road) and which is 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 The Nature and Extent of the Variation

5.1 This request seeks a variation to the maximum height of building standard contained in Clause 4.3 of WLEP.

5.2 Clause 4.3 of WLEP specifies a maximum building height of 8.5m in this area of Warringah.

5.3 The proposal provides for the construction of a new dwelling. The works proposed result in a development that is compatible with the existing surrounding development in this portion of Bantry Bay Road. The non-compliance is a result of the slope of the site and is restricted to a small portion of the roof ridge located centrally on the dwelling.

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].*

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]*
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].*
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 WLEP 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 and the objectives for development for in the R2 zone?

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 height of building development standard, as outlined under Clause 4.3, and reasoning why compliance is unreasonable or unnecessary, is set out below:

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

The proposed additions have been designed to present as a two storey dwelling with a bulk and scale compatible with the existing surrounding development. The proposal provides for an overall building height of RL 127.475, which is below that of the two adjoining properties being RL127.97 (No. 206 Banty Bay Road) and RL127.91 (No. 202 Banty Bay Road). This is compatible with the existing surrounding development.

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

The proposed dwelling has been designed with appropriate setbacks to all boundaries of the site and which comply with the Council's Development Control Plan. All facades of the dwelling are well articulated with modulated wall planes.

The subject and adjoining properties do not enjoy any significant views. The site and adjoining dwellings have a vista of bushland on the opposite side of the Bantry Bay Road. The non-compliance with the height control is restricted to the rear of the dwelling and will not obstruct any views.

The area of non-compliance does not reduce privacy of the adjoining properties.

Detailed shadow diagrams have been prepared. The proposal will ensure an appropriate level of solar access to adjoining properties in accordance with Council's Development Control Plan.

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

The subject site is well separated from coastal and bush environments, as such the proposal will not be prominent from the surrounding coastal or bush environments. Amendment to the plan to ensure strict compliance would not be discernible form the coast or bush environments.

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

The proposed additions result in a dwelling that is compatible with the existing streetscape. The non-compliance is at the rear of the dwelling and is not visible from the public domain.

7.3 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.*

> *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 site is constrained by the slope of the site. The proposed development is consistent with the objectives of the zone and objectives of the building height control. The non-compliance does not result in any adverse impacts on the adjoining properties. The non-compliance does not result in any loss of views. The area of exceedance does not contribute to visual bulk.

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

- The proposal provides for a pitched roof form and a dwelling that is compatible in height with the two adjoining properties. Therefore, the proposal will promote good design (cl 1.3(g)).
- The proposal provides for an appropriate bulk and scale when viewed from the public domain and surrounding properties and therefore strict compliance is therefore unreasonable.

Further, the proposed works do not have any detrimental impact on the adjoining properties for the following reasons:

- The proposed dwelling has been designed with appropriate setbacks to all boundaries of the site. The non-compliance relates to a small portion of the rear roof form which is a direct result of the slope of the site. The non-compliance is centrally on the dwelling and does not impact on privacy of the adjoining properties.
- Shadow diagrams have been provided indicating that all adjoining properties receive appropriate solar access. The very minor non-compliance does not contribute to any unreasonable shadowing to adjoining properties.
- The non-compliance with the building height control does not result in any loss of privacy or amenity to the adjoining properties.
- The resultant dwelling is compatible in terms of bulk and scale with the existing surrounding dwelling, particularly the two adjoining properties, as previously noted.

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the significant slope of the site. Further, the resultant development and in particular the very minor non-compliance with the building height standard, is compatible with the existing surrounding development.

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.

The area of non-compliance does not result in any detrimental impact and is a direct result of the slope of the site. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

7.4 Is the proposed development in the public interest because it is consistent with the objectives of Clause 4.3 and the objectives of the R2 Low Density Residential 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 R2 Low Density Residential 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 height of building control, the resultant building as proposed will be consistent with the individual Objectives of the R2 Low Density Residential Zone for the following reasons:

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

  The proposal results in a single detached dwelling house which is consistent with this objective. The very non-compliance relates to a very small portion of the rear of the roof form and does not detract from the low density residential environment.

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

  This objective is not relative to the proposal.

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

  The proposed dwelling is located within a residential environment. The development provides for appropriate landscaping around the proposal does not require the removal of any vegetation. The development, and in particular the non-compliance, does not detract from the landscape setting or the natural environment.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed height of building control, whilst maintaining consistency with the zone objectives.

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

(a) Clause 4.6(5) has been repealed.

8.0 Conclusion

This development proposed a departure from the maximum height of building development standard, with the proposed works providing for a maximum height of 8.913m.

The non-compliance is a result of the slope of the site. The resultant dwelling provides for a height that is compatible with the two adjoining properties, as noted previously.

The extent of the variation to the height of building control does not result in any significant impact on the amenity, views and outlook for the neighbouring properties.

This written request to vary to the maximum height of building standard specified in Clause 4.3 of the Warringah LEP 2011 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 height of building control would be unreasonable and unnecessary in the circumstances of this case.

Natalie Nolan
DIRECTOR