

**STATEMENT OF ENVIRONMENTAL EFFECTS**

**62 MACTIER STREET, NARRABEEN**

**CONSTRUCTION OF A NEW DWELLING AND DETACHED  
SECONDARY DWELLING**

**PREPARED ON BEHALF OF  
Mr & Mrs Popovski**

**AUGUST 2019**

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## APPENDIX

### CLAUSE 4.6 VARIATION - HEIGHT

## 1. INTRODUCTION

This application seeks approval for the construction of a new dwelling and detached secondary dwelling on Lot 7, Section A in DP 6445 which is known as **No. 62 Mactier Street, Narrabeen.**

In preparation of this development application consideration has been given to the following:

- Environmental Planning & Assessment Act, 1979.
- Warringah Local Environmental Plan 2011.
- Warringah Development Control Plan 2011.

The following details and documents have been relied upon in the preparation of this document:

- Survey Plan prepared by Sydney Surveyors, Ref No. 14750, dated 20/08/16.
- Architectural Plans prepared by Tullipan Homes Pty Ltd, DWG No. 7292-Wd5 and dated 28/08/2019.
- BASIX Certificate #1026114M\_03 and issued 17 July 2019.
- Flood Management Report prepared by Pittwater Data Services Pty Ltd and dated 15/08/2019.
- Stormwater Management Plan prepared by Ibrahim Stormwater Consultants, Job No. T8939-7292 and dated 19-8-19.

This Statement describes the subject site and the surrounding area, together with the relevant planning controls and policies relating to the site and the type of development proposed. It provides an assessment of the proposed development against the heads of consideration as set out in Section 4.15 of the Environmental Planning and Assessment Act 1979. As a result of that assessment it is concluded that the development of the site in the manner proposed is considered to be acceptable and is worthy of the support of the Council.

## 2. SITE DESCRIPTION AND LOCALITY

The subject site is identified as Lot 7, Section A in DP 6445 which is known as 62 Mactier Street, Narrabeen. The site is located on the southern side of Mactier Street between its intersection with Lindley Avenue and Walker Avenue. The site has an area of 888m<sup>2</sup>, a street frontage of 15.24m and a depth of 58.295m. The site is located opposite Narrabeen Lakes reserve. The locality is depicted in the following map:



Site Location Map

The site is currently occupied by a single storey brick dwelling with a tiled roof located on the front northern portion of the site. A detached clad garage is located to the rear of the dwelling and adjacent to the eastern boundary. A concrete driveway provides vehicular access to this garage. A detached shed is located in the rear yard adjacent to the western boundary. There are a number of shrubs and small trees on site, however there is no significant vegetation.

The site is depicted in the following photographs:



**View of Subject Site from Mactier Street**

The existing surrounding development comprises a mix of one and two storey detached residential dwellings on generally similar sized allotments to the subject site, interspersed with some three storey residential flat buildings. More recent development comprises larger two storey dwellings of modern appearance.

The subject site and existing surrounding development are depicted in the following aerial photograph:





**Aerial Photograph of Locality**

### 3. THE DEVELOPMENT PROPOSAL

This proposal seeks approval for the construction of a new two storey dwelling and detached secondary dwelling. Both the dwelling and secondary dwelling are to be constructed of masonry walls with a metal roof. The proposal also provides for landscaping of the site and stormwater management works.

The proposal provides for a setback of 7.8m from the wall of the primary dwelling to the street frontage with the patio/balcony setback 6.0m. The attached carport is located behind the front building line and setback 8.7m to the street frontage. Setbacks of 1.42m and 1.3m to the sites eastern and western boundaries, respectively.

A detached secondary dwelling is located in the rear yard. This structure is setback 6.0m from the rear boundary as measured from the rear with the attached deck setback 3.0m to this boundary. Setbacks of 1.94m and 1.0m are provided to the sites eastern and western boundaries, respectively.

The proposal also provides for stormwater disposal to discharge to the street gutter in accordance with the plans prepared by Ibrahim Stormwater Consultants and the Council controls.

The proposed primary dwelling will comprise the following:

**Ground Floor:** Entry, lounge/dining, kitchen, family, media, study, powder room, laundry and double carport.

**First Floor:** Five bedrooms (main with ensuite), bathroom, WC and living room.

The proposed secondary dwelling comprises the following:

**Ground Floor:** Kitchen, meals/living, two bedrooms and bathroom and laundry.

The proposal will result in the following numerical indices:

<b>Site Area:</b>	888m <sup>2</sup>
<b>Landscaped Area:</b>	480m <sup>2</sup> or 54%

Note: A separate application will be lodged for the for the swimming pool.

#### 4. ZONING & DEVELOPMENT CONTROLS

The proposed development is identified as development requiring the consent of the Council under the provisions of the Environmental Planning and Assessment Act 1979, as amended. The following is an assessment of the proposal against the relevant provisions of the Act and all of the relevant planning instruments and policies of Warringah Council.

##### 4.1 State Environmental Planning Policy (Coastal Management) 2018



Extract of SEPP (Coastal Management Map)

This SEPP aims to manage development in the coastal zone and protect the environmental assets. The subject site is identified as 'coastal environment area' and 'coastal use area' on the Coastal Management Map and therefore the provisions of this SEPP apply. The following Clauses are relevant to the proposed development:

##### Clause 13 Coastal Environment Area

This clause provides:

- (1) *Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following:*



- (a) *the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,*
- (b) *coastal environmental values and natural coastal processes,*
- (c) *the water quality of the marine estate (within the meaning of the Marine Estate Management Act 2014), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,*
- (d) *marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,*
- (e) *existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,*
- (f) *Aboriginal cultural heritage, practices and places,*
- (g) *the use of the surf zone.*

Comment: The proposal will not have any detrimental impact on the integrity or resilience of the environment. The site is not identified as potential landslide and no further information is required in this regard.

The proposal provides for a new two storey dwelling which will not impact on existing water quality.

Further the works do not obstruct any public access to the foreshore. There are no known aboriginal or cultural heritage items, places or relics within the vicinity.

- (2) *Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:*
  - (a) *the development is designed, sited and will be managed to avoid an adverse impact referred to in subclause (1), or*
  - (b) *if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or*
  - (c) *if that impact cannot be minimised—the development will be managed to mitigate that impact.*

Comment: The subject site is provided with a substantial setback to the coastal area ('Narrabeen Lake') and is separated from Mactier Street. There will be no detrimental impact on the coastal area. Soil erosion and sedimentation controls will be implemented prior to the commencement of any work on site.

#### **Clause 14 Coastal Use Area**

This clause provides:

*Development consent must not be granted to development on land that is within the coastal use area unless the consent authority:*

- (a) *has considered whether the proposed development is likely to cause an adverse impact on the following:*

- 
- (i) *existing, safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,*
  - (ii) *overshadowing, wind funnelling and the loss of views from public places to foreshores,*
  - (iii) *the visual amenity and scenic qualities of the coast, including coastal headlands,*
  - (iv) *Aboriginal cultural heritage, practices and places,*
  - (v) *cultural and built environment heritage, and*
  - (b) *is satisfied that:*
    - (i) *the development is designed, sited and will be managed to avoid an adverse impact referred to in paragraph (a), or*
    - (ii) *if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or*
    - (iii) *if that impact cannot be minimised—the development will be managed to mitigate that impact, and*
  - (c) *has taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.*

Comment: The proposal does not affect any existing public access to the foreshore or beach. The proposal is for a new two storey carport and will not result in any overshadowing or wind funnelling to the foreshores. The dwelling is well articulated and setback and will not result in unreasonable bulk or scale. There are no known aboriginal or cultural heritage items, places or relics within the vicinity. The proposed works are not visible from any foreshore/lagoon area.

#### **Clause 15 Development in Coastal Zone Generally – Development not to increase risk of coastal hazards**

The subject site is level and is not identified as potential landslip. There is no increase risk to coastal hazards. No further information is required in this regard.

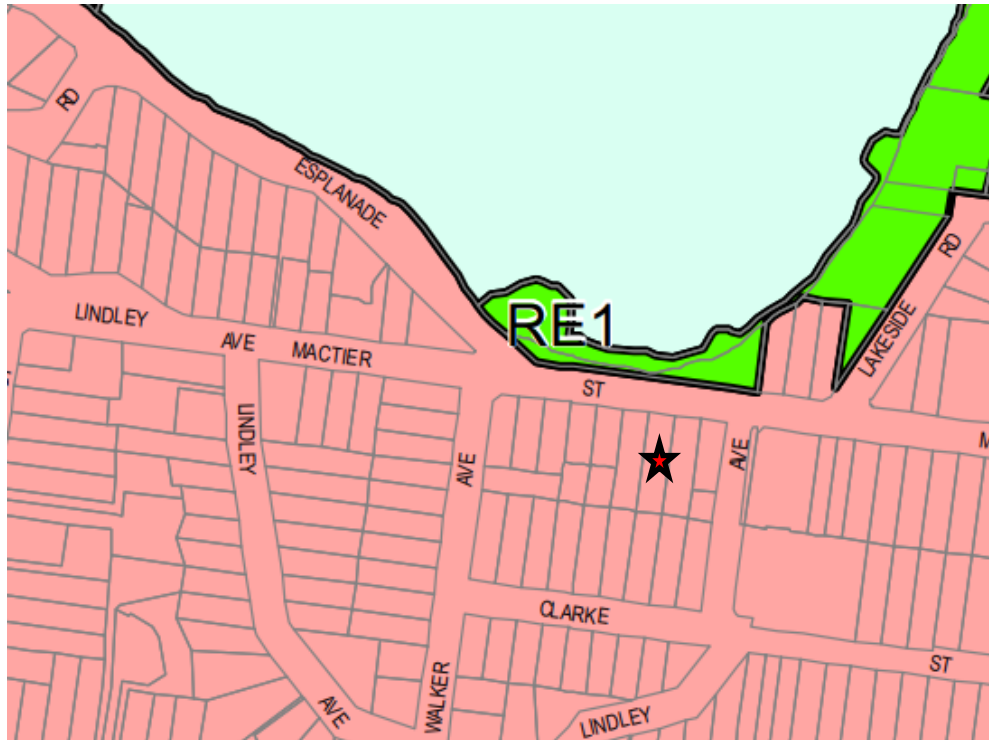
There are no other provisions of the SEPP that apply to the proposed development.

#### **4.2 Planning for Bushfire Protection 2006**

The subject site is not identified as bushfire prone land on Council's Bushfire Prone Land Map and therefore the provisions of Planning for Bushfire Protection 2006 do not apply.

### 4.3 Warringah Local Environmental 2011

The Warringah Local Environmental Plan 2011 (LEP 2011) came into effect on Friday 9 December 2011.



Extract of Zoning Map

The site is zoned R2 Low Density Residential. Development for the purposes of a dwelling house and secondary dwelling are permissible in this zone with the consent of Council. The following Development Standards specified in the LEP are relevant to the proposed development:

Clause	Development Standard	Proposal	Compliance
4.3 Height	8.5m	9.3m	Clause 4.6 variation in appendix A.

The following provision is also relevant:

## **Clause 5.4 Controls relating to Miscellaneous Permissible Uses**

Subclause (9) provides:

### *Secondary dwellings*

*If development for the purposes of a secondary dwelling is permitted under this Plan, the total floor area of the dwelling (excluding any area used for parking) must not exceed whichever of the following is the greater:*

- (a) 60 square metres,*
- (b) 11% of the total floor area of the principal dwelling.*

The proposal provides for a detached secondary dwelling which provides for an area of 60m<sup>2</sup> which complies with this clause.

## **Clause 6.3 Flood Prone Land**

The subject site is identified as potentially flood prone, High Risk Precinct and High Risk to Life. A Flood Management Report has been prepared by Pittwater Data Services which in summary provides:

*The main dwellings ground floor level (GFL) is 3.60 metres AHD which is above the FPL of 3.55AHD. The first floor level (FFL) of the main dwelling is at 6.6AHD which is above the PMF level of 5.05AHD. The FFL should be used as a Shelter in Place. The carport level is at 2.14AHD approximately 0.3 metres above the natural ground level. Bollards will need to be installed to secure vehicles during a major flood event.*

*In conclusion, considering the flooding processes at the site the proposed dwellings as detailed in Figures 7, 8, 9 & 10, it is my opinion the design and this flood evacuation plan as detailed in Appendix A will satisfy NBC DCP requirements Section B3.11 and B3.25.*

It is noted that the flood report relates to the pool and the dwelling houses. A separate application is be lodged for the swimming pool.

## **Clause 6.4 Development on Sloping Land**

The site is classified as Class A on Council's Landslip Map and therefore no further information is required in this regard.

There are no other provisions of the Warringah Local Environmental Plan 2011 that apply to the proposed development.

### 4.3 Warringah Development Control Plan 2011

The Warringah Development Control Plan (DCP) has been prepared by Council and was due to come into effect upon the gazettal of the LEP 2011. The new DCP contains detailed planning controls that support LEP 2011.

The following table provides a summary of the relevant controls of the DCP:

Clause	Requirement	Compliance
B1 – Wall heights	7.2m	Yes Wall height of 7.2m complies.
B2 – Number of storeys	Not Applicable	Not Applicable
B3 - Side Boundary Envelope	Building envelope 45 degrees from 4m. Eaves up to 675mm are an allowable encroachment	There is a non-compliance with the side boundary envelope. This non-compliance is a direct result of the complying with the flood planning level. Notwithstanding the non-compliance it is considered that the proposal will achieve the objectives of this clause for the following reasons: <ul style="list-style-type: none"> <li>• The proposed development will not be dominant in the streetscape. The proposed two storey dwelling is provided with appropriate setbacks and landscaping.</li> <li>• The proposal ensures appropriate solar access and privacy to the adjoining properties as has been demonstrated throughout this report.</li> </ul>



Clause	Requirement	Compliance
		<ul style="list-style-type: none"> <li>The proposal maintains appropriate setbacks to the boundaries of the site to ensure sufficient visual separation to the adjoining built form.</li> <li>The elevated ground floor level is a direct result of ensuring compliance with Council's flood planning level.</li> </ul>
B4 – Site Coverage	Not Applicable	Not Applicable
B5 - Side Boundary setbacks	Minimum: 0.9m	Yes Setbacks of 1.42m and 1.3m are provided to eastern and western side boundaries, respectively.
B7 – Front Boundary Setbacks	Minimum 6.5m	<p>The wall of the dwelling is setback 7.8m from the street frontage. The patio/balcony is setback 6.0m to the street frontage. The setbacks as proposed are considered appropriate and to achieve the objectives of this DCP for the following reasons:</p> <ul style="list-style-type: none"> <li>The setbacks provided are compatible with the established building line in this portion of Mactier Street. It is noted that both adjoining dwellings are provided with a setback of 6.0m to the street frontage.</li> </ul>

Clause	Requirement	Compliance
		<ul style="list-style-type: none"> <li>The front elevation is well articulated with the carport setback behind the wall of the dwelling and incorporate of the balcony structures.</li> </ul>
B9- Rear Boundary Setbacks & B10 Merit Assessment of Rear Setbacks	6.0m	<p>Yes</p> <p>A setback of 13.58m is provided to the rear boundary.</p> <p>Proposed pool does not occupy more than 50% of rear setback area.</p>
B11 – Foreshore Building Setback	Not applicable	Not Applicable
B12 – National Parks Setback	Not applicable	Not Applicable
B13 – Coastal Cliffs Setback	Not applicable	Not Applicable
B14 – Main Roads Setback	Not applicable	Not Applicable
B15 – Minimum Floor to Ceiling Height	Not applicable	Not Applicable
C2 – Traffic, Access and Safety	Vehicular crossing to be provided in accordance with Council's Vehicle Crossing Policy	<p>Yes</p> <p>New crossing to be provided in accordance with Council requirements.</p>

<b>Clause</b>	<b>Requirement</b>	<b>Compliance</b>
C3 – Parking Facilities	Garages not to visually dominate façade Parking to be in accordance with AS/NZS 2890.1	Yes The proposal provides for an attached carport which provides parking for two cars. This structure is located behind the front building line and does not dominate the streetscape.
C4 - Stormwater	To be provided in accordance with Council's Stormwater Drainage Design Guidelines for Minor Developments & Minor Works Specification.	Yes The proposal provides for all collected stormwater to drain to the street gutter in accordance with the submitted stormwater management plan and with the Council controls.
C5 – Erosion and Sedimentation	Soil and Water Management required	Yes A Soil Erosion Management Plan has been prepared and forms part of the submission to Council.
C6 - Building over or adjacent to Constructed Council Drainage Easements	Not Applicable	Not Applicable
C7 - Excavation and Landfill	Site stability to be maintained	Yes The proposal does not require any excessive excavation or fill.
C8 – Demolition and Construction	Waste management plan required	Yes Waste Management Plan submitted.
C9 – Waste Management	Waste storage area to be provided	Yes There is sufficient area on site for waste and recycling bins.

<b>Clause</b>	<b>Requirement</b>	<b>Compliance</b>
D1 – Landscaped Open Space and Bushland	Min 40% Landscaped Area to be maintained	Yes The proposal provides for a landscaped area of 54% which complies with this clause.
D2 - Private Open Space	Dwelling houses with three or more bedrooms Min 60m <sup>2</sup> with min dimension 5m	Yes The site provides for ample private open space in the rear yard which can be utilised by both the primary and secondary dwellings. Each dwelling is provided with an attached deck directly accessible from the living areas.
D3 - Noise	Mechanical noise is to be attenuated to maintain adjoin unit amenity. Compliance with NSW Industrial Noise Policy Requirements	Not Applicable
D4 – Electromagnetic Radiation	Not Applicable	Not Applicable
D5 – Orientation and Energy Efficiency	Dwellings to be orientated to receive northern sun Appropriate construction to enhance thermal properties and ventilation/natural cooling Compliance with SEPP (BASIX) requirements	Yes The proposed dwellings will receive good solar access throughout the year. A BASIX certificate has been issued and forms part of the submission to Council.

Clause	Requirement	Compliance
D6 – Access to sunlight	The controls require that sunlight to at least 50% of the private open space of both the subject and adjoining properties' private open space receives not less than three hours sunlight between 9am – 3pm on 21 June winter solstice.	Yes Shadow diagrams, have been prepared which depict both the existing and the proposed shadowing. These diagrams depict that adjoining properties will maintain 3 hours of solar access to at least 50% of their private open space in accordance with Council controls.
D7 - Views	View sharing to be maintained	Yes The subject site and surrounding properties currently enjoy views of Narrabeen Lagoon. The proposal provides for appropriate setbacks to ensure that oblique views across the site will be maintained. The low line roof conjunction with the topography of the site will ensure views to the southern properties will be maintained.
D8 - Privacy	This clause specifies that development is not to cause unreasonable overlooking of habitable rooms and principle private open space of adjoining properties.	Yes The dwellings have been designed to ensure privacy of the adjoining properties is maintained. The proposal provides for the majority of high use living areas on the ground level. Whilst the upper level provides for a living area with a deck, this room is orientated to maximise views over Narrabeen Lagoon.



Clause	Requirement	Compliance
		The proposal provides for only two slimline windows on the side elevation of this room which will not provide for direct views into the adjoining dwelling.
D9 – Building Bulk	This clause requires buildings to have a visual bulk and architectural scale that is consistent with structures on nearby properties & not to visually dominate the street.	Yes The proposal provides for a two storey dwelling and detached secondary dwelling. The is well articulated, provided with appropriate setbacks and of a bulk and scale compatible with the surrounding development, particularly the more recent developments.
D10 – Building Colours and materials	External finishes and colours sympathetic to the natural and built environment	Yes External finishes selected to be compatible with the existing surrounding development and the natural environment.
D11 - Roofs	The LEP requires that roofs should not dominate the local skyline.	Yes The proposal provides for a conventional pitched roof form which is compatible with the variety of roof forms in the locality.
D12 – Glare and Reflection	Glare impacts from artificial illumination minimised. Reflective building materials to be minimized.	Yes The proposal will not result in unreasonable glare or reflection.

<b>Clause</b>	<b>Requirement</b>	<b>Compliance</b>
D13 - Front Fences and Front Walls	Front fences to be generally to a maximum of 1200mm, of an open style to complement the streetscape and not to encroach onto street.	Not Applicable
D14 – Site Facilities	Garbage storage areas and mailboxes to have minimal visual impact to the street Landscaping to be provided to reduce the view of the site facilities.	Yes There is ample area on site for storage and site facilities.
D15 – Side and Rear Fences	Side and rear fences to be maximum 1.8m and have regard for Dividing Fences Act 1991.	Yes Proposal will comply
D16 – Swimming Pools and Spa Pools	Pool not to be located in front yard or where site has two frontages, pool not to be located in primary frontage. Siting to have regard for neighbouring trees.	Not Applicable
D17 – Tennis Courts	N/A	Not Applicable
D18 - Accessibility	Safe and secure access for persons with a disability to be provided where required.	Not Applicable
D19 – Site Consolidation in the R3 and IN1 Zone	Not Applicable	Not Applicable

<b>Clause</b>	<b>Requirement</b>	<b>Compliance</b>
D20 – Safety and Security	Buildings to enhance the security of the community. Buildings are to provide for casual surveillance of the street.	Yes The primary dwelling will provide a good outlook of dwelling approach and street. The secondary dwelling will provide for good views of the dwelling approach.
D21 – Provision and Location of Utility Services	Utility services to be provided.	Yes Existing facilities on site.
D22 – Conservation of Energy and Water	A BASIX Certificate is required.	Yes
D23 - Signs	Not Applicable	Not Applicable
E1 – Private Property Tree Management	Arboricultural report to be provided to support development where impacts to trees are presented.	Not Applicable
E2 – Prescribed Vegetation	Not identified on map	Not Applicable
E3 – Threatened species, populations, ecological communities	Not identified on map	Not Applicable
E4 – Wildlife Corridors	Not identified on map	Not Applicable
E5 – Native Vegetation	Not identified on map	Not Applicable
E6 - Retaining unique environmental features	Unique or distinctive features within a site to be retained	Not Applicable
E7 – Development on land adjoining public open space	N/A – not identified on map	Not Applicable
E8 – Waterways and Riparian Lands	Not identified on map	Not Applicable
E9 – Coastline Hazard	Not identified on map	Not Applicable

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<b>Clause</b>	<b>Requirement</b>	<b>Compliance</b>
E10 – Landslip Risk	Identified on map as A	No further information required.
E11 – Flood Prone Land	Site is identified as flood prone.	Yes Refer to previous comments and the Flood Management Report submitted with the application.

There are no other provisions of the DCP that apply to the proposed development.

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## **5. EP & A ACT - SECTION 4.15**

### **The Provisions of any Environmental Planning Instruments**

The proposal is subject to the provisions of the Warringah Local Environmental Plan 2011. The site is zoned R2 Low Density Residential under the provisions of the LEP. Construction of a new dwelling house and secondary dwelling are permissible with the consent of Council in this zone. It is considered that the provisions of this document have been satisfactorily addressed within this report and that the proposal complies with the relevant provisions.

There are no other environmental planning instruments applying to the site.

### **The Likely Impacts of the Development**

It is considered that the development will provide for a new dwelling and secondary dwelling without any detrimental impact on the environment, social and economic status of the locality.

### **The Suitability of the Site for the Development**

The subject site is zoned R2 Low Density Residential and the construction of a new dwelling house and detached secondary dwelling in this zone is permissible with the consent of Council. The resultant dwelling is of a bulk and scale that is consistent with the existing surrounding development.

For these reasons it is considered that the site is suitable for the proposed development.

### **The Public Interest**

It is considered that the proposal is in the public interest in that it will provide a new single dwelling and detached secondary dwelling that provide for an alternative form of housing and that is consistent with other development in this locality without impacting the amenity of the adjoining properties or the public domain.



## 6. CONCLUSION

This application seeks approval for the construction of a new dwelling and detached secondary dwelling. As demonstrated in this report the proposal is consistent with the aims and objectives of the Warringah Local Environmental Plan 2011. The proposed dwelling does not have any detrimental impact on the amenity of the adjoining properties or the character of the locality.

It is therefore considered that the proposed construction of a new dwelling and detached secondary dwelling at **No. 62 Mactier Street, Narrabeen** is worthy of the consent of Council.

Natalie Nolan  
Grad Dip (Urban & Regional Planning) Ba App Sci (Env Health)  
**Nolan Planning Consultants**  
August 2019

**APPENDIX 1 – CLAUSE 4.6 VARIATION  
WRITTEN REQUEST PURSUANT TO CLAUSE 4.6 OF WARRINGAH LOCAL  
ENVIRONMENTAL PLAN 2011**

**62 MACTIER STREET, NARRABEEN**

**PROPOSED CONSTRUCTION OF A NEW TWO STOREY DWELLING AND  
DETACHED SECONDARY DWELLING**

**For:** Proposed Construction of a New Two Storey Dwelling and Detached  
Secondary Dwelling  
**At:** 62 Mactier Street, Narrabeen  
**Applicant:** Mr & Mrs Popovski

### **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 (MLEP 2011).

### **2.0 Background**

Clause 4.3 restricts the height of a building and refers to the maximum building height noted within the “*Height of Buildings Map*.”

The maximum building height for this locality is 8.5m and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposed new dwelling will provide a height of up to 9.3m which exceeds Council’s maximum building height by 800mm or 9.4% and therefore does not comply with this control.

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

### **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 as the site will provide for the construction of a new dwelling which complies with Council's flood planning level. The proposal is also 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.*

The proposal will provide for the construction of a new dwelling to provide for improved amenity for the site's occupants.

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, in order to provide for high quality development that will enhance and complement the locality.

The maximum ridge level will stand at RL 11.30m. Notwithstanding the non-compliance with the maximum overall height, the new works will provide an attractive residential development that will add positively to the character and function of the local residential neighbourhood.

The proposed dwelling has been located to mitigate any adverse impacts of overshadowing and loss of view towards any neighbouring properties.

The development will not see any unreasonable impacts on view sharing.

## 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*
- (b) That there are sufficient environmental planning grounds to justify contravening the development standard.*

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 the 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.*
- *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.*

## Comments

It is considered that notwithstanding the extent of the non-compliance with the maximum building height control (800mm), the proposed new dwelling will be consistent with the individual Objectives of the R2 Low Density zone for the following reasons:

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

The R2 Low Density Residential Zone contemplates low density residential uses on the land. The housing needs of the community are appropriately provided for in this instance through the proposed residential dwelling which will provide form an appropriate level of family accommodation and in a form which respect the predominant height and scale of the surrounding dwellings.

The development will see a minor noncompliance with the building height control of up to 800mm and the contemporary building form with low pitch skillion roof and the appropriate external finishes considered to suitably reduce the visual bulk of the dwelling.

Further, the modulation of the front façade and building elevation, together with the increased side setbacks and recessive external finishes will ensure the development minimises the visual impact when viewed from the surrounding public and private areas.

The non-compliance with the height control is confined to the ridge of the dwelling which is central on site and will not result in loss of amenity or unreasonable bulk to the adjoining properties.

The proposal will be consistent with and complement the existing detached style single dwelling housing within the locality and will not be a visually element in the area. The proposed ridge height RL11.30 is compatible with the more recent development in this area including No. 64 Mactier, immediately to the west, which provides for a ridge height of RL11.27 and which is pictured below.





**View of No. 64 Mactier Street**

The compatible form and scale of the new dwelling will meet the housing needs of the community within a single dwelling house which is a permissible use in this low density residential zone.

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

The development does not suggest any alternate land uses and this Objective is not directly relevant to the subject single residential proposal.

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

The proposal appropriate setbacks to all boundaries of the site and ensures ample area of the site to be available for landscaping (54% of the site is soft landscaping). The areas available for landscaping are capable of supporting screen planting, large shrubs and trees.

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

## 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 provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- (b) to control the bulk and scale of buildings,*
- (c) to minimise disruption to the following:*
  - (i) views to nearby residential development from public spaces (including the harbour and foreshores),*
  - (ii) views from nearby residential development to public spaces (including the harbour and foreshores),*
  - (iii) views between public spaces (including the harbour and foreshores),*
- (d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*
- (e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

### Comments

Despite the minor variation to the maximum building height, the proposed alterations and additions are considered 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,***

The Objective of Clause 4.3 (1)(a) seeks to ensure buildings, by virtue of their height and scale are compatible with nearby and surrounding development.

The surrounding area is predominantly characterised by single and two storey development. More recent development is required to comply with the Council's Flood Planning Levels which results in elevated habitable floor levels. This increases the overall height of the resultant development.

The proposal seeks to accommodate the new dwelling within a contemporary building form, with the slope of the site towards the street resulting in a portion of the central ridge line roof being up to 9.3m in height.

The overall building height respects the surrounding character and the design seeks to minimise the visual height by providing for a low pitched skillion roof with only a portion of the central ridge line encroaching the height controls. Amending the proposal to comply by providing for a flat roof would not be as aesthetically pleasing and result in reduced amenity to the residents.

The proposed external colour and materials palette utilises darker finishes to the upper floor level and is intended to ensure that the building's visual height and scale is further minimised.

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

The proposed new dwelling will not result in any unreasonable impacts on adjoining properties in terms of views, privacy or overshadowing.

The subject and adjoining properties enjoy views of Narrabeen Lagoon and the surrounding reserve. Given the proposed boundary setbacks the proposal will not obstruct existing views from the adjoining properties. Further, the views from the property to the rear will not be obstructed as a result of the non-compliance.

The area of non-compliance results only to a portion of the central ridge line which does not impact on the existing privacy of the surrounding properties. The privacy of the surrounding residents has been considered in the design of the dwelling, locating the majority of high use living areas on the ground floor. The upper level provides for one living area with attached balcony, however this is located on the front façade to maximise Lagoon views without impacting on the adjoining residents privacy.

Shadow diagrams have been prepared which demonstrate all adjoining properties continue to maintain 3 hours of solar access on the winter solstice.

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

The proposal results in a two storey dwelling that is compatible in terms of bulk and scale with the existing surrounding development. The proposal incorporates appropriate setbacks to all boundaries of the site. The dwelling is well articulated particularly on the front elevation which is well modulated and will not result in unreasonable bulk when viewed from the Lagoon or its surrounding reserve.

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

The proposal results in a two storey dwelling that is compatible in terms of bulk and scale with the existing surrounding development. The proposal incorporates appropriate setbacks to all boundaries of the site. The dwelling is well articulated particularly on the front elevation which is well modulated and will not result in unreasonable bulk when viewed from the Lagoon or its surrounding reserve.

Despite the variation to the building height control which occurs as a result of the required flood planning level, the proposal is generally consistent with the height and scale of newer development in the locality.

Accordingly, we are of the view that the proposal is consistent with the objectives of the development standard.

**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 as the proposal provides for the construction of a new dwelling, which is constrained by the flood potential and Council's flood planning levels.

Council's controls in Clause 4.3 provide a maximum building height of 8.5m. As a result of the required minimum floor level (to achieve compliance with Council's flood controls), a portion of the roof will be up to 9.3m 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 development will maintain a compatible scale relationship with the existing residential development in the area. More recent and future development within this portion of Mactier Street are required to comply with the flood planning levels established by Council resulting in two storey dwellings likely to exceed the maximum height controls. The proposal presents as a two storey building which is compatible with the existing surrounding development.
- The proposed dwelling will maintain amenity and appropriate solar access for the subject site and neighbouring properties.
- The proposal will maintain a generous area of soft landscaping (54% of the site) which readily complies with Council's landscaping requirements, and the site will maintain an appropriate balance between the landscaping and the built form.

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:** Whilst it is not suggested that Council has abandoned its control, variations to the maximum building height control have been granted in the immediate vicinity, where Council has considered it appropriate to do so for development that meets the objectives of the zone. In this instance it is considered that the proposed development appropriately addresses the zone objectives and is worthy of the support of Council.

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 for the subject development.

The proposed new dwelling the dwelling will provide a height of 9.3m or a 800mm/9.4% variation to the control.

The development is justified in this instance for the following reasons:

- The variation to the building height control occurs as a result of the requirement to comply with the flood planning levels established by Council. The new dwelling is considered to be compatible with the form and nature of the surrounding development. The proposal complies with the height controls as measured from the flood planning level.
- The proposal is consistent with the character of development in the locality.
- The development will maintain a compatible scale relationship with the existing residential development in the area. Development in the vicinity has a wide range of architectural styles and the given the variety in the scale of development, this proposal will reflect a positive contribution to its streetscape.
- The proposed new works do not present any unreasonable additional impacts in terms of view loss for neighbours, or bulk and scale.
- The proposed development is considered to promote good sustainable design and enhance the residential amenity of the buildings' occupants and the immediate area, which is consistent with the Objective 1.3 (g) and (h) of the EPA Act which is a suitable environmental planning ground which justifies the flexible application of the development standard.

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 to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The proposal provides for a low pitched roof which results in a dwelling which is compatible in scale to its surrounding neighbours, which promotes the orderly & economic use of the land.

- Similarly, the proposed development will provide for an appropriate level of family accommodation and improved amenity within a built form which is compatible with the streetscape of Mactier Street, which also promotes the orderly and economic use of the land.
- The proposal is considered to promote good design and amenity to the local built environment as appropriate views, solar access and privacy will be maintained for the neighbouring properties.
- The proposal has been designed to comply with Council's flood planning levels which ensures the proper construction of buildings to ensure the health and safety of its occupants.

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 new dwelling to provide a maximum building height of 9.3m.

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

This objection to the maximum building height control 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 building height would be unreasonable and unnecessary in the circumstances of this case.