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The General Manager
Central Coast Council
49 Mann Street
GOSFORD NSW 2250

Dear Sir/Madam,

**DEVELOPMENT APPLICATION NO. 59473/2020
89 BEACHVIEW ESPLANADE, MACMASTERS BEACH**

Introduction

I act on behalf of Rhys, Ben and Celia Connery in relation to the abovementioned matter which comprises a Development Application (DA) for the construction of a new dwelling house at No. 89 Beachview Esplanade, MacMasters Beach

My clients are the registered owners of the adjoining property to the west, identified as No. 91 Beachview Esplanade, MacMasters Beach.

I confirm that I have inspected the subject site and surrounding land, and reviewed the documentation submitted in support of the DA including the Architectural Plans and Statement of Environmental Effects (SEE).

I hold a Bachelor of Town Planning (Honours), and a Master of Environmental and Local Government Law. I have 25 years experience in the New South Wales (NSW) planning system, and have particular expertise in preparing and assessing DA's, and providing expert town planning evidence on behalf of both Applicant's and Council's in the NSW Land and Environment Court. I have also been appointed by the Court on multiple occasions as a Court Appointed town planner.

I support my client's objection to the proposed development on the basis that the documentation submitted with the DA is inadequate and incomplete, and the proposed development will cause a significant (and unreasonable) loss of views.

Site Context

The subject site is located on the northern side of Beachview Esplanade, approximately 200 metres to the east of The Scenic Road. The site is currently occupied by a single storey dwelling house. A detached double garage is located towards the front of the site.

My client's property accommodates a single storey dwelling house. A double carport is attached to the front of the dwelling. The habitable floor space is predominately elevated above existing ground level by a series of timber posts.

The main living rooms generally occupy the north-eastern portion of the dwelling, with direct access to/from a timber deck extending towards the north. The master bedroom occupies the north-western portion of the dwelling, with access to/from the deck.

My client's dwelling enjoys coastal views to the east and north-east, with spectacular views of the headland at the northern end of Copacabana Beach. The headland forms the portion of the view with a land/water interface.

In that regard, the topographical circumstances of MacMasters Beach (and surrounds) are such that the existing views are typically enjoyed from elevated positions, circumstances in which downward views are potentially affected by increased building heights.

The existing views from my client's property are currently enjoyed from the main living rooms, the contiguous timber deck, and the master bedroom. The existing dwelling was specifically designed to capture the available views, and the existing views are the essential element of the amenity of the property.

Proposed Development

The proposed development comprises the demolition of the existing dwelling house and the construction of a new dwelling house. The project is curiously described as the *"Tin Box House"*, with the hand-written notes on the Architectural Plans including *"The box as a lantern – a lighthouse"*, *"metal skin, wood heart"*, and *"a corrugated cloak"*.

The lower level accommodates three (3) bedrooms and a rumpus room. The lower level is elevated above existing ground level by at least 2.14 metres (RL83.31 – RL81.17). The lower level has access to a deck extending to/from the rumpus room and one (1) bedroom,

The upper level accommodates the master bedroom and an open plan lounge, dining and kitchen area. The upper level has access to a deck extending to/from the master bedroom and main living rooms.

The existing double garage located towards the front of the site is being retained. A new pedestrian pathway is proposed to extend between the street frontage and the dwelling entry.

The proposed dwelling extends to a height of approximately 1.98 metres above the floor (and deck) level of my clients dwelling. The proposed dwelling extends along the alignment of my clients main living rooms and beyond the outer edge of the deck to the north.

In the circumstances, the proposed dwelling will extend above the height of a person standing in my clients dwelling, and on the deck. Accordingly, any downward views within the viewing arc of the proposed building will be wholly obliterated.

Documentation

I have reviewed the documentation submitted with the DA, and in my opinion, the documentation is inadequate and incomplete, and does not satisfy the requirements of Part 1 – Schedule 1 of the *Environmental Planning and Assessment Regulation 2000*.

I have identified the following specific concerns in relation to the DA documentation:

- the Survey Plan does not identify the whole of the dwelling house on my client's property (or the adjoining property to the east);
- multiple dimensions are missing from the Architectural Plans, including boundary setbacks;
- the Architectural Plans do not identify the majority of the existing structures on my clients property;
- the Architectural Plans do not include any levels on any of the Elevations;
- no details are provided in relation to any existing or proposed fencing;
- no details are provided in relation to any existing or proposed landscaping;
- the Elevations do not depict the adjoining buildings to the east or west;
- the ground levels depicted in the Perspectives do not match the ground levels depicted on the Elevations;
- the Sections do not identify the roof height or overall building height, with only the "pitching point" of one (1) portion of the roof identified;
- the Architectural Plans do not identify those parts of the building that have been included in the calculation of gross floor area;
- the Architectural Plans include a line described as "Council Height Limit + 10%" where no such control is included in the applicable environmental planning instruments or development control plan;
- the Clause 4.6 "written request" to vary the building height control does not address the relevant assessment criteria, and does not identify any "environmental planning grounds" to justify the non-compliance;
- the view loss assessment contained in the SEE appears to be based on a computer-generated image that is effectively meaningless to the view loss assessment process;
- the Architectural Plans (Sheet DD-16) include an image described as "view from balcony of western neighbour (No. 91)" which has not been prepared in accordance with the "Photomontage Policy" established by the Land and Environment Court;
- the SEE clearly states the view loss assessment has been based on the image described as "view from balcony of western neighbour (No. 91)";

- the “*Photomontage Policy*” established by the Court specifies that a photomontage not prepared in accordance with the Policy cannot be relied upon “*as an accurate depiction of some intended future change*”;
- the SEE refers to Section 79C (which is incorrect) of the *Environmental Planning and Assessment Act 1979*, but does not include any specific assessment against Section 4.15 of the Act; and
- the SEE does not include any assessment of the view loss from my client’s property on the basis of the “*Planning Principles*” established in *Tenacity Consulting v Warringah Council [2004] NSWLEC 140*.

Relevant Planning Controls

The site is zoned R2 – Low Density Residential pursuant to the Gosford Local Environmental Plan (LEP) 2014, and “*dwelling houses*” are permissible in the zone with the consent of Council.

Clause 2.3 requires the consent authority to have regard to the objectives for development in a zone when determining a DA. The relevant zone objectives include “*To ensure that development is compatible with the desired future character of the zone*”, and “*To encourage best practice in the design of low-density residential development*”.

Clause 4.3 specifies a maximum building height of 8.5 metres. The Architectural Plans do not identify the level of the proposed roof, however the proposed building extends (by scaling) to a maximum height of approximately 9.5 metres.

Clause 4.4 specifies a maximum floor space ratio (FSR) of 0.5:1. The Architectural Plans do not identify those parts of the building that have been included in the calculation of gross floor area. Irrespective, I assume the proposed development complies with the applicable FSR control.

The Gosford Development Control Plan (DCP) 2013 is generally intended to supplement the provisions of the Gosford LEP 2014, and provide more detailed objectives and controls to guide future development.

Part 2 describes the existing and desired future character of specific localities, and Part 3.1 provides objectives and controls relating to dwelling houses, including Part 3.1.4.1 relating to views.

Building Height

Clause 4.3 of the LEP specifies a maximum building height of 8.5 metres, and proposed building extends (by scaling) to a maximum height of approximately 9.5 metres. The building height control is a “*development standard*”, and can only be varied on the basis of a “*written request*” pursuant to Clause 4.6 of the LEP.

Clause 4.6 of the LEP requires the Applicant 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 **[emphasis added]**.*

The objectives of the building height control are expressed as follows:

- (a) *to establish maximum height limits for buildings,*
- (b) *to permit building heights that encourage high quality urban form,*
- (c) *to ensure that buildings and public areas continue to receive satisfactory exposure to sky and sunlight,*
- (d) *to nominate heights that will provide an appropriate transition in built form and land use intensity,*
- (e) *to ensure that taller buildings are located appropriately in relation to view corridors and view impacts and in a manner that is complementary to the natural topography of the area,*
- (f) *to protect public open space from excessive overshadowing and to allow views to identify natural topographical features.*

The SEE includes what purports to be a “*written request*” to vary the building height control pursuant to Clause 4.6 of the LEP. In my respectful submission, the “*written request*” is completely inadequate, and demonstrates a misunderstanding of the provisions of Clause 4.6 of the LEP.

In that regard, the “*written request*” has not been prepared on the basis of “*Varying development standards: A Guide*” (August 2011), issued by the former Department of Planning, or the relevant principles identified in the following (well known) judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248;*
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;*
- *Moskovich v Waverley Council [2016] NSWLEC 1015;*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118; and*
- *Hansimikali v Bayside Council [2019] NSWLEC 1353*

In general terms, there are two (2) steps that must be satisfied when preparing an appropriate “*written request*” to vary a “*development standard*”. Firstly, it must be demonstrated that “*compliance with the development standard is unreasonable or unnecessary*

in the circumstances of the case", and secondly, it must be demonstrated *"that there are sufficient environmental planning grounds to justify contravening the development standard"*.

The *"written request"* generally attempts to demonstrate that compliance with the building height control is *"unreasonable or unnecessary"* on the basis that the objectives of the control are satisfied notwithstanding the non-compliance.

In general terms, the *"written request"* argues that the additional building height will achieve a higher quality urban form through the use of a *"pop-up roof with clerestory windows"*, that *"much of the existing housing in the area was developed under an earlier 10.5m height limit and a less abrupt transition would be achieved"*, the building will *"not dominate the streetscape"*, and that the portion of the building adjacent to my clients property is *"the least over-height portion"*.

Firstly, the proposed building has a northern orientation, and there is no need for a *"pop-up roof with clerestory windows"* extending above the building height control to achieve good solar access.

Secondly, the surrounding buildings do not extend anywhere near any former building height control of 10.5 metres, and in any event, the provisions of any former controls are irrelevant in terms of the assessment of the DA, and/or the building height control as an expression of the desired character of the locality.

Thirdly, I do not understand the phrase *"least over-height portion"*, and in any event, the numerical extent of non-compliance (major or minor) is an irrelevant consideration.

In my opinion, there are no environmental, topographical or town planning reasons why the proposed building cannot comply with the building height control. A compliant building can achieve a very good level of amenity, maintain the natural topographical conditions of the site, minimise the impacts on the amenity of surrounding properties, and contribute to the desired future character of the locality.

In the circumstances, the *"written request"* has demonstrably failed to demonstrate that compliance with the building height control is *"unreasonable or unnecessary"* in the circumstances of the case.

Further, the *"written request"* has not attempted to identify any *"environmental planning grounds"* to justify the non-compliance. Accordingly, the provisions of Clause 4.6 have not been satisfied, and the consent authority has no power to approve the proposed development in its current form.

Irrespective, I have formed the considered opinion that, in this instance, there are no *"environmental planning grounds"* to justify the non-compliance. That is, there are no environmental, topographical or town planning reasons why the proposed building cannot comply with the building height control.

The proposed development will cause a significant (and unreasonable) loss of views from my client's property, and a building form that breaches the building height control (without legitimate reason) does not contribute to the desired future character of the locality.

Further, Part 3.1.2.1 of the DCP reflects the 8.5 metre building height control incorporated in the LEP, and includes the following specific objectives:

- *To ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality.*
- *To ensure that the height of buildings protects the amenity of neighbouring properties in terms of visual bulk, access to sunlight, privacy and views.*
- *To ensure that building height is compatible with the scenic qualities of hillside and ridgetop locations and respects the sites natural topography.*

In general terms, the desired future character of a locality is achieved by consistently applying the applicable planning controls. The desired future character of a locality is not achieved by building forms that unnecessarily breach planning controls, and particularly, planning controls with the hierarchical importance of a "development standard" (in this instance the building height control).

Further, the proposed development will cause a significant (and unreasonable) loss of views from my client's property. The existing dwelling was specifically designed to capture the available views, and the existing views are the essential element of the amenity of the property. The substantial loss of that essential view does not "protect" the amenity of my client's property.

View Loss Assessment

The site is located within the *Woodland Hillsides Character Area* within the *MacMasters Beach Locality*. The desired future character for the area includes "very leafy low-density residential hillsides, conserving natural and scenic qualities of the bushland backdrops..." and "minimise the scale and bulk of buildings by strongly-articulated forms that sit beneath the canopy, with floor-levels that step to follow natural slopes and irregular floorplans...".

The objectives of the R2 – Low Density Residential zone include "To ensure that development is compatible with the desired future character of the zone". The Council must have regard to that objective pursuant to Clause 2.3 of the LEP.

Part 3.1.4.1 of the DCP provides objectives and controls relating to views. The objectives are expressed as follows:

- *To encourage view sharing as a means of ensuring equitable access to views from private property*
- *To facilitate reasonable view sharing whilst not restricting the reasonable development of the site*

The controls (described as requirements) are expressed as follows:

- a. *Where relevant, applications must address the NSW Land and Environment Court Planning Principles relating to view sharing.*
- b. *Development is sited and designed to enable a sharing of views with surrounding private properties, particularly from habitable rooms.*
- c. *Development steps down the hillside on a sloping site.*
- d. *The design of the roof form provides for view sharing. This may be achieved by consideration of the roof pitch and type (including flat roofs), increasing the setback on an upper level or by lowering the proposal in whole or in part.*

The "Planning Principles" established in *Tenacity Consulting v Warringah Council [2004] NSWLEC 140* are considered as follows:

26 The first step is the assessment of views to be affected. *Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured [emphasis added].*

The proposed dwelling extends to a height of approximately 1.98 metres above the floor (and deck) level of my clients dwelling. The proposed dwelling extends along the alignment of my clients main living rooms and beyond the outer edge of the deck to the north.

In the circumstances, the proposed dwelling will extend above the height of a person standing in my clients dwelling, and on the deck. Accordingly, any downward views within the viewing arc of the proposed building will be wholly obliterated.

In the absence of height poles (verified by a registered surveyor), it is not possible to precisely identify the view loss caused by the proposed development. Irrespective, based on the approximate height of the proposed building, and its alignment relative to the existing dwelling, it is possible to make some critical observations.

To that end, it is likely the proposed development will obstruct the substantial majority of the existing ocean view from my client's main living rooms, including the critical land/water interface formed by the headland at the northern end of Copacabana Beach.

In the unfortunate absence of height poles, I have attempted to depict (as accurately as possible) the likely view loss from my clients main living rooms, and the eastern end of the deck, on the photographs below. The depiction is based on the proposed building extending to a height of approximately 1.98 metres above the floor (and deck) level of my clients dwelling, and with the proposed building extending closer to my clients property, along the approximate northern alignment of the existing dwelling on the subject site.



View Loss from Main Living Rooms



View Loss From Eastern End of Deck

27 The second step is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic **[emphasis added]**.

The view loss will occur from my clients main living rooms, and from a portion of the contiguous deck. To a lesser extent, the proposed development will also obstruct views from my client's master bedroom.

The proposed dwelling extends to a height of approximately 1.98 metres above the floor (and deck) level of my clients dwelling, circumstances in which the same view loss will be experienced from both a standing and sitting position.

28 The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from

living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating [emphasis added].

My client's property will retain a portion of the existing view from the northern and western portions of the deck. The existing view will be substantially lost from the main living rooms. I would qualitatively describe the view loss as severe to devastating.

29 The fourth step is to assess the reasonableness of the proposal that is causing the impact. *A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable [emphasis added].*

The proposed development includes a breach of the 8.5 metres building height control, with the building extending to a maximum height of approximately 9.5 metres. The SEE suggests that *"Primary views from the property's rear deck & living areas to the north across their rear boundary are wholly unaffected. It should be noted that the part of the proposed roof nearest this property is the least over-height portion"*.

Firstly, the *"primary views"* from my client's property are in a north-easterly (not northerly) direction, with the north-easterly view encompassing the critical land/water interface formed by the headland at the northern end of Copacabana Beach.

Secondly, I do not understand the phrase *"least over-height portion"*, and any view loss resulting from a non-compliant building should not be supported.

Irrespective, even if the proposed development achieved full compliance with the building height control (which it does not) the fourth step in *Tenacity* still requires consideration of *"whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours"*.

In that regard, the existing dwellings to the east of the subject site are typically located closer to the Beachview Esplanade frontages. Accordingly, a dwelling on the subject site will enjoy expansive views to the east and north-east from multiple positions in the site. That is, it is not necessary to construct the proposed dwelling over the northern portion of the site to capture the available views to the east and north-east.

Further, I note that the existing double garage on the site is being retained. On that basis, a more skilfull design could involve constructing the new dwelling as an extension of the existing garage. A new dwelling in that position on the site would capture the same views to the east and north-east, and have significantly less impact on the views from my clients property.

Further, as noted in *Tenacity*, *"the notion of view sharing is invoked when a property enjoys existing views and a proposed development would share that view by taking some of it away for its own enjoyment"*. *Tenacity* also establishes that *"Taking it all away cannot be called view sharing..."*.

Finally, my clients are concerned that a chimney is proposed immediately adjacent to their deck. The chimney will contribute to additional view loss, and potentially generate a smoke nuisance.

Conclusion

I support my client's objection to the proposed development on the following grounds:

- the documentation prepared to accompany the DA is inadequate and incomplete;
- the Council has no power to approve the DA in the absence of an appropriate *"written request"* pursuant to Clause 4.6 of the Gosford LEP 2014;
- the proposed development will have a severe to devastating impact on the existing views from my client's property; and
- there are more skilful designs for a dwelling house on the subject site that could achieve the same (or better) level of amenity for the new dwelling, without imposing severe or devastating impacts on my client's property.

I trust this submission is of assistance, and ask that I be kept informed prior to any determination being made, and/or in relation to any further information submitted by the Applicant. Further, my clients would welcome a site inspection by relevant Council staff to more fully explain their concerns.

In the meantime, should you require any further information or clarification please do not hesitate to contact the writer.

Yours Sincerely,



James Lovell
Director
James Lovell and Associates Pty Ltd