

25 May 2021

General Manager  
Northern Beaches Council  
PO Box 82  
Manly NSW 1655

Dear Sir,

**Re: 316 Hudson Parade, Clareville – DA2020/1591  
Section 8.2 review of determination**

Introduction

DA2020/1591 for alterations and additions to a dwelling house and garage at 316 Hudson Parade, Clareville was approved on 4 May 2021.

The proposal includes a flexible living space to replace the existing workshop over the garage to be used in association with and ancillary to the dwelling house. The space is not intended for separate occupation. It has been designed with a high level of amenity but in a way that does not create any unreasonable impacts on the amenity of any neighbouring or nearby residents.

The applicant is now applying pursuant to Section 8.2 of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") for a review of Council's determination.

In particular, the applicant seeks a review of Condition 10 of the consent, which reads:

*"10. Amendments to the approved plans*

*The following amendments are to be made to the approved plans:*

- *The sliding doors on the west elevation of the "Gym/Studio" shown on Drawing No DA 20.00 are to be replaced with windows with fixed and angled privacy screens. The glass balustrade is to be deleted.*
- *The roof over the detached garage structure shall be reduced in length by 1m to the west where it extends over the existing balcony.*
- *The change wet area shall be reduced in size and comprise a WC and shower only.*
- *There shall be no kitchen, cooking facilities or wet bar.*

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*Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of the construction certificate.*

*Reason: To ensure development minimises unreasonable impacts upon surrounding land."*

Amended plans are attached to the application in support of the proposal.

West elevation of the gym/studio

Condition 10 reads in part:

- *The sliding doors on the west elevation of the "Gym/Studio" shown on Drawing No DA 20.00 are to be replaced with windows with fixed and angled privacy screens. The glass balustrade is to be deleted.*

The flexible living space has been designed to provide a high level of amenity and, in particular, to take advantage of views over Pittwater that are enjoyed by all residents in this part of Clareville.

The condition quoted above will have a negative impact on the flexible living space by limiting the extent to which those views are shared between the residents of this dwelling house and other residents in the area.

The intention of the condition is to maintain the privacy of the outdoor terrace located adjacent to the common boundary with the neighbour at 318 Hudson Parade. In this regard the Development Application Assessment Report states on both pages 27 and 28:

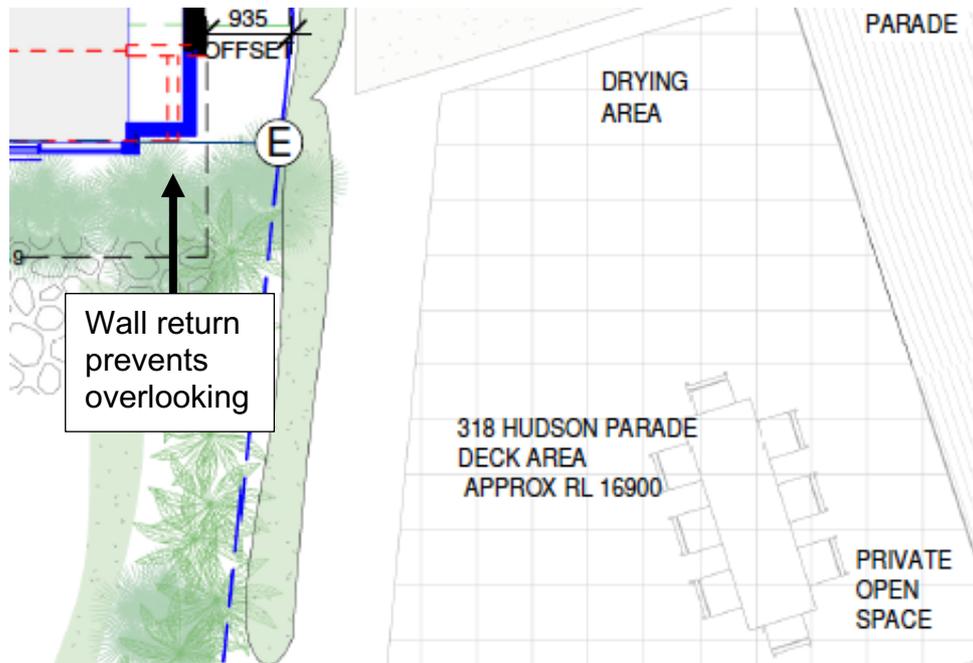
*"Privacy has been considered with the design not incorporating any windows into the southern elevation, thereby maintaining privacy to the principal outdoor space and courtyard on the adjoining property."*

The proposal will result in an improvement to the neighbour's privacy. There exists a balcony on the western side of the existing habitable space over the garage that has direct sightlines to the neighbouring terrace at 318 Hudson Parade, as shown in the following photograph:



**Photo 1:** Existing view from southern end of balcony

The proposal is to enclose the balcony from which this overlooking is available and to provide a return to the wall at the south-western corner of the flexible living space which will eliminate this view.



In this way the proposal results in an improvement to the privacy of 318 Hudson Parade whilst, at the same time, enhancing the amenity of 316 Hudson Parade.

Overlooking from the centre and northern parts of the balcony to the neighbouring terrace is not available as they are effectively screened by landscaping, as shown in the following photograph:



**Photo 2:** Existing view from centre of balcony

The applicant would be satisfied with a condition that required the maintenance of this landscaped screening to its current height, to ensure that privacy is maintained in perpetuity.

In summary, the proposal results in an improvement to the privacy for the neighbour at 318 Hudson Parade. Condition 10 will have a significant negative impact on the amenity of 316 Hudson Parade and is considered to be unreasonable. In these circumstances it is requested that this part of condition 10 be deleted.

#### Roof over the garage structure

Condition 10 reads in part:

- *The roof over the detached garage structure shall be reduced in length by 1m to the west where it extends over the existing balcony.*

Compliance with the condition as currently worded would result in a building that does not satisfy BASIX requirements. The project architects have explored various

options with regards to the eaves overhang, including the use of double-glazing toned glass with either a timber frame or an aluminium frame, or a less reduction in the eaves overhang by 350mm or 650mm, but in all cases the proposal failed to satisfy BASIX requirements. A copy of this documentation is attached as Appendix 1.

Compliance with BASIX requirements is a legislative requirement and the condition, as currently worded, would impermissibly result in non-compliance with that legislation.

The eaves overhang is not excessive and does not unreasonably add to the bulk of the proposed building. The neighbour at 318 Hudson Parade retains solar access in excess of the requirements of the Pittwater 21 DCP. In these circumstances it is requested that this part of condition 10 be deleted.

#### WC and shower

Condition 10 reads in part:

- *The change wet area shall be reduced in size and comprise a WC and shower only.*

The bath has been removed from the proposal in accordance with this part of condition 10. The size of this room has not been amended because the residents want to have sufficient area in situation where there are multiple people using the gym and wanting to “freshen up” afterwards.

The flexible living area is located a considerable distance from the bathroom and toilet facilities within the dwelling house. The proposal is permitted under the variation to clause C1.14 of the Pittwater 21 DCP which provides that “*where the purpose of the structure or its distance from the nearest bathroom facility dictates, bathroom/toilet facilities may be allowed*”. Furthermore, clause C1.14 contains no provisions regarding the size of the bathroom/toilet facilities.

In these circumstances, it is requested that this part of condition 10 be deleted.

#### Kitchen, cooking facilities and wet bar

Condition 10 reads in part:

- *There shall be no kitchen, cooking facilities or wet bar.*

The proposal does not contain any kitchen or cooking facilities.

However, the proposal contains a wet bar. In this regard, the provision of a wet bar is not inconsistent with the provisions of clause C1.14 of the Pittwater 21 DCP, which provides that “*a separately accessible structure may be permitted... provided that... it is not designed for separate habitation and does not contain any cooking facilities.*”

The Land and Environment Court has held that it is the provision of kitchen facilities that enable a structure to be capable of separate occupation; see, for example, *Warlam Pty Ltd v Marrickville Council* [2009] NSWLEC 23 at paragraph 36, where Bisoce J stated:

*“Rooms with ensuite bathrooms and toilets but without kitchens do not constitute a separate domicile. Nor, at least in the circumstances of this case, do rooms with kitchens but without ensuite bathrooms and toilets. Rooms with both ensuite bathrooms and toilets and kitchens constitute separate domiciles.”*

From my experience the provision of a wet bar within a studio does not lead to any concerns with regards to the separate occupation of a studio and this has been accepted by Council.

The Development Application Assessment Report states on page 28:

*“The neighbours note that the space has been used as an unauthorised secondary dwelling in the past...”*

It would be wrong at law for any weight to be placed upon this statement. In *Jonah Pty Ltd v Pittwater Council* [2006] NSWLEC 99, Preston CJ quoted with approval the decision of the Full Court of the South Australian Supreme Court in *Koufidis and Jenquin Pty Ltd v Corporation of the City of Salisbury* (1982) 29 SASR 321 at 323-324:

*“In my opinion, moreover, the past unlawful use is not a relevant factor in determining whether consent should be granted. That decision should be made upon the planning considerations envisaged by the Act and Regulations irrespective of the past or continuing conduct of the applicant. I do not think there is any warrant in the Act or Regulations for refusing or deferring an application or appeal by reason of the unlawful conduct of the applicant.*

Bignold J, in *Ireland v Cessnock City Council* [1999] NSWLEC 153, at 87, stated:

*“The approach taken in Koufidis has been consistently applied in this Court”* [ie: the Land and Environment Court of NSW]

Condition 30 of the approval ensures that the flexible living space will not be used as a separate occupancy, and reads:

*“30. Gym/Studio*

*The 'Gym/Studio' and all other associated areas located on the Studio Plan are not to be used for the purposes of separate habitation (i.e. secondary dwelling or similar). The use of cooking facilities, including an oven and stove are prohibited.*

*Reason: To ensure consistency with the approved development and stamped plans.”*

This condition may be enforced by Council in the event of any future concerns regarding the separate occupation of the flexible living space.

In these circumstances, it is requested that this part of condition 10 be deleted.

### Requirements of section 8.3 of the EPA Act

Section 8.3 of the EPA Act relates to an application for and the conduct of a review and provides:

- (1) *An applicant for development consent may request a consent authority to review a determination or decision made by the consent authority. The consent authority is to review the determination or decision if duly requested to do so under this Division.*

Comment: The applicant is requested that Council review its determination.

- (2) *A determination or decision cannot be reviewed under this Division—*  
(a) *after the period within which any appeal may be made to the Court has expired if no appeal was made, or*  
(b) *after the Court has disposed of an appeal against the determination or decision.*

Comment: The period within which an appeal may be made to the Court has not lapsed.

- (3) *In requesting a review, the applicant may amend the proposed development the subject of the original application for development consent or for modification of development consent. The consent authority may review the matter having regard to the amended development, but only if it is satisfied that it is substantially the same development.*

Comment: Amended plans accompany the request for a review of the determination. The proposal remains substantially the same development as that which was originally approved, both quantitatively and qualitatively, in accordance with *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280.

- (4) *The review of a determination or decision made by a delegate of a council is to be conducted—*  
(a) *by the council (unless the determination or decision may be made only by a local planning panel or delegate of the council), or*  
(b) *by another delegate of the council who is not subordinate to the delegate who made the determination or decision.*

Comment: The review of the determination must be carried out by another delegate of the Council who is not subordinate to the delegate who made the determination.

- (5) *The review of a determination or decision made by a local planning panel is also to be conducted by the panel.*

Comment: Not relevant to this application.

## Conclusion

The applicant is applying pursuant to Section 8.2 of the EPA Act for a review of Council's determination of DA2020/1591 for alterations and additions to a dwelling house and garage at 316 Hudson Parade, Clareville.

The applicant seeks to have condition 10 of the approval deleted. The plans have been amended and the amended plans should be included as part of condition 1 of the consent if this application is approved.

This letter provides a sound and logical basis upon which the approval may be amended as requested in this review. In particular, approval of this request would result in an improvement to the amenity of the dwelling house at 316 Hudson Parade whilst ensuring that there are no unreasonable impacts on any neighbouring or nearby residents.

If you have any questions or require any information with regards to the application for a review of Council's determination please feel free to contact me.

Yours sincerely,



Geoff Goodyer

**Symons Goodyer Pty Ltd**

/volumes/data/planning/walls tony/21-003/review application 2021/letter council 1.0.docx

**Appendix 1.**

# Appendix 1

## ORIGINAL DA SUBMISSION BASIX\_GLAZING

### DOOR #51 GYM/STUDIO\_ with 1100 eaves, single glazed, clear glass, timber framed **PASS**

<input type="checkbox"/>	D35	✓	W	6.6	0.0	0.0	eave/verandah/ pergola/balcony >=900 mrr	timber or uPVC, single clear
<input type="checkbox"/>	W50	✓	N	2.0	0.0	0.0	eave/verandah/ pergola/balcony >=750 mrr	timber or uPVC, single clear
<input type="checkbox"/>	W51	✓	N	1.7	0.0	0.0	eave/verandah/ pergola/balcony >=750 mrr	timber or uPVC, single clear
<input type="checkbox"/>	W52	✓	N	0.5	0.0	0.0	eave/verandah/ pergola/balcony >=750 mrr	timber or uPVC, single clear
<input type="checkbox"/>	W53	✓	N	1.7	0.0	0.0	eave/verandah/ pergola/balcony >=750 mrr	timber or uPVC, single clear
<input type="checkbox"/>	W54	✓	E	0.5	0.0	0.0	eave/verandah/ pergola/balcony >=600 mrr	timber or uPVC, single clear
<input type="checkbox"/>	D51	✓	W	15.0	0.0	0.0	pergola (adjustable shade) >=900 mm	timber or uPVC, single clear

Calculate Add window Remove window

**Glazing and Shading notes**

You have selected one or more standard windows or glazed doors (i.e. standard aluminium or timber frames and single clear or toned glass). Your windows must either match the description or have better performance than the typical performance of that type of window or glazed door. [Click here for more information](#)

There are criteria for how eaves, pergolas, balconies or awnings are constructed to ensure adequate shading of the window or glazed door. [Click here for more information](#)

If your shading device is a pergola with fixed polycarbonate, you will need to use a tinted polycarbonate capable of blocking a required proportion of the sun's heat. [Click here for more information](#)

External louvres and blinds must fully shade the window or glazed door beside which they are situated when fully drawn or closed. [Click here for more information](#)

If your shading device is a pergola, the frame only is not sufficient. You will need to provide battens to ensure it adequately shades the window or glazed door. There are criteria for the batten spacing. [Click here for more information](#)



### DOOR #51 GYM/STUDIO\_ with no eaves **FAIL**

<input type="checkbox"/>	D34	✓	W	6.6	0.0	0.0	eave/verandah/ pergola/balcony >=900 mrr	timber or uPVC, single clear
<input type="checkbox"/>	D35	✓	W	6.6	0.0	0.0	eave/verandah/ pergola/balcony >=900 mrr	timber or uPVC, single clear
<input type="checkbox"/>	W50	✓	N	2.0	0.0	0.0	eave/verandah/ pergola/balcony >=750 mrr	timber or uPVC, single clear
<input type="checkbox"/>	W51	✓	N	1.7	0.0	0.0	eave/verandah/ pergola/balcony >=750 mrr	timber or uPVC, single clear
<input type="checkbox"/>	W52	✓	N	0.5	0.0	0.0	eave/verandah/ pergola/balcony >=750 mrr	timber or uPVC, single clear
<input type="checkbox"/>	W53	✓	N	1.7	0.0	0.0	eave/verandah/ pergola/balcony >=750 mrr	timber or uPVC, single clear
<input type="checkbox"/>	W54	✓	E	0.5	0.0	0.0	eave/verandah/ pergola/balcony >=600 mrr	timber or uPVC, single clear
<input type="checkbox"/>	D51	✗	W	15.0	0.0	0.0	none	timber or uPVC, single clear

Calculate Add window Remove window

**Suggested improvements for window/doors currently failing**

D51 is allowing too much heat, try improving shading, using toned or pyrolytic low-e glass, or a combination of both.

**Glazing and Shading notes**

You have selected one or more standard windows or glazed doors (i.e. standard aluminium or timber frames and single clear or toned glass). Your windows must either match the description or have better performance than the typical performance of that type of window or glazed door. [Click here for more information](#)

There are criteria for how eaves, pergolas, balconies or awnings are constructed to ensure adequate shading of the window or glazed door. [Click here for more information](#)

DOOR #51 GYM/STUDIO\_ with 450 eaves\_ **FAIL**

<input type="checkbox"/>	D35	✓	W	6.6	0.0	0.0	eave/verandah/ pergola/ balcony >=900 mm	timber or uPVC, single clear
<input type="checkbox"/>	W50	✓	N	2.0	0.0	0.0	eave/verandah/ pergola/ balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W51	✓	N	1.7	0.0	0.0	eave/verandah/ pergola/ balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W52	✓	N	0.5	0.0	0.0	eave/verandah/ pergola/ balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W53	✓	N	1.7	0.0	0.0	eave/verandah/ pergola/ balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W54	✓	E	0.5	0.0	0.0	eave/verandah/ pergola/ balcony >=600 mm	timber or uPVC, single clear
<input type="checkbox"/>	D51	✗	W	15.0	0.0	0.0	eave/verandah/ pergola/ balcony >=450 mm	timber or uPVC, single clear

Calculate Add window Remove window

**Suggested improvements for window/doors currently failing**  
D51 is allowing too much heat, try improving shading, using toned or pyrolytic low-e glass, or a combination of both.

**Glazing and Shading notes**  
You have selected one or more standard windows or glazed doors (i.e. standard aluminium or timber frames and single clear or toned glass). Your windows must either match the description or have better performance than the typical performance of that type of window or glazed door. [Click here for more information](#)  
There are criteria for how eaves, pergolas, balconies or awnings are constructed to ensure adequate shading of the window or glazed door. [Click here for more information](#)

DOOR #51 GYM/STUDIO\_ with 750 eaves\_ **FAIL**

<input type="checkbox"/>	D35	✓	W	6.6	0.0	0.0	eave/verandah/ pergola/ balcony >=900 mm	timber or uPVC, single clear
<input type="checkbox"/>	W50	✓	N	2.0	0.0	0.0	eave/verandah/ pergola/ balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W51	✓	N	1.7	0.0	0.0	eave/verandah/ pergola/ balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W52	✓	N	0.5	0.0	0.0	eave/verandah/ pergola/ balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W53	✓	N	1.7	0.0	0.0	eave/verandah/ pergola/ balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W54	✓	E	0.5	0.0	0.0	eave/verandah/ pergola/ balcony >=600 mm	timber or uPVC, single clear
<input type="checkbox"/>	D51	✗	W	15.0	0.0	0.0	eave/verandah/ pergola/ balcony >=750 mm	timber or uPVC, single clear

Calculate Add window Remove window

**Suggested improvements for window/doors currently failing**  
D51 is allowing too much heat, try improving shading, using toned or pyrolytic low-e glass, or a combination of both.

**Glazing and Shading notes**  
You have selected one or more standard windows or glazed doors (i.e. standard aluminium or timber frames and single clear or toned glass). Your windows must either match the description or have better performance than the typical performance of that type of window or glazed door. [Click here for more information](#)  
There are criteria for how eaves, pergolas, balconies or awnings are constructed to ensure adequate shading of the window or glazed door. [Click here for more information](#)

DOOR #51 GYM/STUDIO\_ with no eaves, double glazed toned glass timber frame\_ **FAIL**

<input type="checkbox"/>	D34	✓	W	6.6	0.0	0.0	eave/verandah/ pergola/balcony >=900 mm	timber or uPVC, single clear
<input type="checkbox"/>	D35	✓	W	6.6	0.0	0.0	eave/verandah/ pergola/balcony >=900 mm	timber or uPVC, single clear
<input type="checkbox"/>	W50	✓	N	2.0	0.0	0.0	eave/verandah/ pergola/balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W51	✓	N	1.7	0.0	0.0	eave/verandah/ pergola/balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W52	✓	N	0.5	0.0	0.0	eave/verandah/ pergola/balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W53	✓	N	1.7	0.0	0.0	eave/verandah/ pergola/balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W54	✓	E	0.5	0.0	0.0	eave/verandah/ pergola/balcony >=600 mm	timber or uPVC, single clear
<input type="checkbox"/>	D51	✗	W	15.0	0.0	0.0	none	timber or uPVC, toned/air gap/clear

Calculate Add window Remove window

**Suggested improvements for window/doors currently failing**  
D51 is allowing too much heat, try improving shading, using toned or pyrolytic low-e glass, or a combination of both.

**Glazing and Shading notes**  
You have selected one or more standard windows or glazed doors (i.e. standard aluminium or timber frames and single clear or toned glass). Your windows must either match the description or have better performance than the typical performance of that type of window or glazed door. [Click here for more information](#)  
You have selected one or more high performance windows or glazed doors (i.e. improved frames, pyrolytic low-e glass or clear/air gap/clear glazing, or toned/air gap/clear glazing). You will need to provide certification that the installed window or glazed door has the required performance. [Click here for more information](#)  
There are criteria for how eaves, pergolas, balconies or awnings are constructed to ensure adequate shading of the window or glazed door. [Click here for more information](#)

DOOR #51 GYM/STUDIO\_ with no eaves, dbl glazed low e glass alum frame\_ **FAIL**

<input type="checkbox"/>	D34	✓	W	6.6	0.0	0.0	eave/verandah/ pergola/balcony >=900 mm	timber or uPVC, single clear
<input type="checkbox"/>	D35	✓	W	6.6	0.0	0.0	eave/verandah/ pergola/balcony >=900 mm	timber or uPVC, single clear
<input type="checkbox"/>	W50	✓	N	2.0	0.0	0.0	eave/verandah/ pergola/balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W51	✓	N	1.7	0.0	0.0	eave/verandah/ pergola/balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W52	✓	N	0.5	0.0	0.0	eave/verandah/ pergola/balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W53	✓	N	1.7	0.0	0.0	eave/verandah/ pergola/balcony >=750 mm	timber or uPVC, single clear
<input type="checkbox"/>	W54	✓	E	0.5	0.0	0.0	eave/verandah/ pergola/balcony >=600 mm	timber or uPVC, single clear
<input type="checkbox"/>	D51	✗	W	15.0	0.0	0.0	none	aluminium: thermally broken, double Lo-Ts

Calculate Add window Remove window

**Suggested improvements for window/doors currently failing**  
D51 is allowing too much heat, try improving shading, using toned or pyrolytic low-e glass, or a combination of both.

**Glazing and Shading notes**  
You have selected one or more standard windows or glazed doors (i.e. standard aluminium or timber frames and single clear or toned glass). Your windows must either match the description or have better performance than the typical performance of that type of window or glazed door. [Click here for more information](#)  
You have selected one or more high performance windows or glazed doors (i.e. improved frames, pyrolytic low-e glass or clear/air gap/clear glazing, or toned/air gap/clear glazing). You will need to provide certification that the installed window or glazed door has the required performance. [Click here for more information](#)  
There are criteria for how eaves, pergolas, balconies or awnings are constructed to ensure adequate shading of the window or glazed door. [Click here for more information](#)