



TOWN PLANNERS

Suite 2301, Quattro Building 2
Level 3, 4 Daydream Street
WARRIEWOOD NSW 2102

P > 02 9979 4922

F > 02 9979 4811

E > info@turnbullplanning.com.au

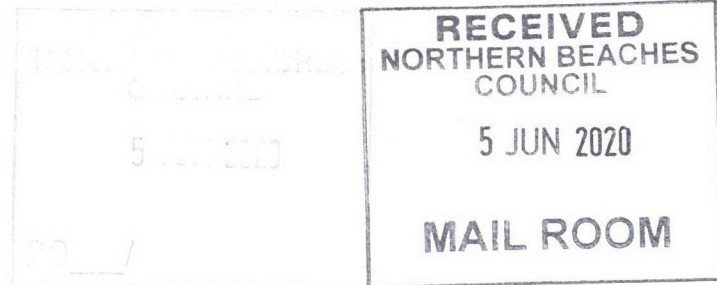
W > www.turnbullplanning.com.au

ABN 12 061 186 409

29 May 2020

Chief Executive Officer
Northern Beaches Council
PO Box 82
MANLY NSW 1655

BY EMAIL AND POST



Dear Chief Executive Officer

**DEVELOPMENT APPLICATION DA 2020/0431
1129 - 1131 PITTWATER ROAD COLLAROY - DEMOLITION WORKS
AND CONSTRUCTION OF A MIXED USE DEVELOPMENT COMPRISING
COMMERCIAL UNITS AND A BOARDING HOUSE**

We are consultant town planners and we act on behalf of Mr Steve Lydiate (our client), who is the owner of Unit No 11/1125-1127 (Lot 2) Pittwater Road Collaroy (our clients' property).

This submission responds to a proposal for development at 1129-1131 Pittwater Road Collaroy (the subject property), that has been notified to our client. The notification period ends on 7 June 2020.

We note that some of the matters raised in this submission also 'touch and concern' the broader interests of the Owners Corporation in SP66939 (at 1125-1127 Pittwater Road adjacent and to the south of the subject), and in that regard we have discussed certain issues with the Chairman of the Owners Corporation, and also act under the broader authority of the owners corporation for SP66939.

PURPOSE OF THIS DOCUMENT

This document is a submission by way of objection to Development Application 2020/0431 (the development application) relating to No 1129-1131 Pittwater Road Collaroy and the proposed intensified access thereto.

INTRODUCTION & BACKGROUND

The council is currently considering a development application in respect of the subject property. The development application seeks consent for demolition works and construction of a mixed use development comprising commercial units and a boarding house with a caretakers apartment above (the proposed development or proposal).

Our client's property is directly adjacent to, and to the south of the subject property on the western side of Pittwater Road, in the Collaroy town centre.

As mentioned above, this submission constitutes an objection to the development application as lodged.

SITE LOCATION & DESCRIPTION

The subject properties incorporate two single land parcels located on the western side of Pittwater Road. The property is legally described as Lot 4 in Deposited Plan 7445 and Lot 1 in Deposited Plan 859613 and is known as Nos 1129-1131 Pittwater Road Collaroy.

Currently situated on the subject properties are two commercial buildings, on Lot 4 is a two storey commercial building and on Lot 1 is a single storey commercial building. What appears to be a dwelling comprises the second storey of the southern most commercial building. There is no setback between the buildings on the east west common boundary between the lots.

Car parking is provided at the rear of the site, and the site is accessed via a right of carriageway of variable width from Collaroy Street over Lot 2 DP 859613 and SP 58961, known as Nos 1 – 5 Collaroy Street. No 1131 Pittwater Road is burdened by a right of footway of variable width running east west and providing pedestrian access from Pittwater Road to Lot 2, DP 859613, (SP 58961) and known as Nos 1 – 5 Collaroy Street.

The land parcel, excluding the easement access via Collaroy Street has frontage to Pittwater Road of 27.005 metres, variable depth of between 40.965 (southern boundary) and 27.9 metres (northern boundary) and a rear boundary width of 23.66 metres.

The subject site is adjoined by 'shop top housing' above commercial development at ground level with separate developments being located to the south and west. To the north is a single-storey retail facility and to the east on the other side of Pittwater Road is the Collaroy Hotel, 'The Beach Club Collaroy' and a number of other ground-floor retail tenancies.

Annexure 1 provides a location plan showing the spatial relationship between the subject property and SP SP66939.

Annexure 2 provides a photographic palette containing a number of photos showing the site, views from our client's dwelling, access to the subject site and the built form generally.

THE DEVELOPMENT PROPOSAL

The development application proposes demolition of the existing structures and the construction of a mixed use development incorporating 2 ground floor commercial tenancies, with a 23 room boarding house and caretakers apartment above car parking for 21 vehicles, which would be provided at one basement level. Vehicular access to the development is provided via Collaroy Street, which lies to the south. The access is of variable width (between 3.5 and 6.0 metres) and provided by way of an easement that runs past existing retail facilities at grade, in a north-south direction and forming part of the existing development at Nos 1-5 Collaroy Street.

NATURE OF SUBMISSION

In preparing this submission we have considered the following legislation, regulations and other statutory instruments and documents:

- *Environmental Planning and Assessment Act 1979* (EPAA);
- *Environmental Planning and Assessment Regulation 2000* (EPAR);
- *State Environmental Planning Policy (Infrastructure) 2007* (SEPP Infrastructure);
- *State Environmental Planning Policy (Affordable Rental Housing) 2009* (SEPP ARH);
- *State Environmental Planning Policy No 55 — Remediation of Land* (SEPP RL);
- *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004* (BASIX);
- *Warringah Local Environmental Plan 2011* (WLEP); and
- *Warringah Development Control Plan 2011* (WDCP).

We have reviewed the development application and the various reports, plans and other documents accompanying or otherwise associated with the proposal.

Secondly, we have undertaken legal research regarding the permissibility of the proposal generally and the proposed access to the subject site.

Lastly we have undertaken a view of our client's own property as well as various residential units in SP66939 and the local precinct in which the subject property is located.

During that inspection, we were able to gain appreciation of the impact of the proposed development on our client's property and the use and

enjoyment by our client of his own dwelling. We also gained an understanding of the broader impacts as regards the strata development in which our client resides.

Having considered the subject property and its surrounds and the details of the development application currently before Council including the proposed access thereto, it is our opinion that the proposal, in its present form, does not warrant support by the consent authority. Indeed, we are of the view that it is beyond power for the Council to grant development consent to the proposal. The reasons for forming this view are contained in the latter parts of this submission.

As mentioned above, this submission constitutes an objection to the development application as lodged (refer to Page 3).

This submission details the various ways the proposed development lacks finesse, is not consistent with the various planning controls and objectives, is beyond the power of Council to approve, and is also unreasonable as regards the impacts it causes to amenity for our client, SP66939 generally, the local environment and other surrounding properties.

The objection is based on the various grounds both legal and merit based and is detailed in the following paragraphs.

STATUTORY & WDCP PROVISIONS

The relevantly applicable local statutory environmental planning instrument is *Warringah Local Environmental Plan 2011* (WLEP), with the subordinate control being *Warringah Development Control Plan 2011* (WDCP).

The subject site is located within the B2 Local Centre Zone under the WLEP.

The stated objectives of the B2 Local Centre Zone are as follows:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area;
- To encourage employment opportunities in accessible locations;
- To provide an environment for pedestrians that is safe, comfortable and interesting;
- To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment;
- To minimise conflict between land uses in the zone and adjoining zones and ensure the amenity of any adjoining or nearby residential land uses.

We note that boarding houses are permissible in the B2 Local Centre Zone with consent pursuant to the WLEP. Commercial premises are also permitted with consent in the B2 Local Centre Zone.

In summary, the erection of the development is permissible development with consent under the WLEP, and subject to the exercise of discretion by Council as the consent authority.

The development contains a non-compliance with a principal development standard contained within the WLEP. This is a 'hurdle' for the applicant to overcome and without support to the non-compliance with the building height development standard, aside from other considerations, the Council is without power to grant consent to the development. This is separate from the legal issue outlined under 'Intensification of Use of ROW' later in this submission.

Whether or not the consent authority grants consent to the development is based on an assessment of the scheme under the legislative framework containing various planning controls, the various aims of the WLEP, objectives for the principal development standards, zone objectives, and on merit.

The B2 Local Centre Zone is a zone in which any development must respond sensitively to environmental constraints including both ecological (the natural environment) and aesthetic issues and is intended to cater to residential, retail, business, entertainment and community uses.

The proposed development involves a 4 storey, 13.2 metre high structure. By virtue of WLEP, the maximum permissible height of a building that may be erected on the site is 11.0m.

To assist generally, we request that Council direct the applicant to erect height poles, particularly as regards the absolute highest points and the westerly extent of the proposed building footprint.

Details of relevant non-compliances with controls, legal issues and our own merit assessment, are provided in the paragraphs below.

LOSS OF VIEWS

Control D7 ('Views') of WDCP requires that development shall provide for the reasonable sharing of views. The view objectives of WDCP are as follows:

- To allow for the reasonable sharing of views;
- To encourage innovative design solutions to improve the urban environment; and
- To ensure existing canopy trees have priority over views.

We note that the applicant has made the following statement in the SEE (refer P31):

The majority of existing views available from north and east facing apartments within the adjoining southern and western mixed use buildings will be maintained with view impact limited to those apartments which currently obtain views due to the underdeveloped nature of the site. In this regard, the impact is created by the fully compliant components of the development in particular those located below the 11 metre height standard. (SEE at P31)

The above words are effectively meaningless, as in one breath the applicant acknowledges that view loss will occur and in another admits that the development fails to comply with the relevant height standard. Despite this the applicant asserts that view loss will only occur by virtue of the height compliant part of the development. This is complete nonsense. Even a quick view of the drawings accompanying the application shows that the significantly non-compliant height extends along the majority of the frontage to Pittwater Road, and in doing so unacceptably exacerbates the impact of the development, as regards views. The non-compliance with height also extends along a significant part of the southern elevation where vulnerability to view loss is also significant.

The applicant appears to have taken nothing other than a perfunctory investigation of the extent of view loss, and the extract from the statement of environmental effects (SEE) above, reinforces this opinion.

The non-compliance with the height standard gives rise in part to the view loss, which in our opinion, is severe and contrary to the reasonable expectations of the occupant of Unit 11 and the occupants of our clients' development generally. In our opinion, the design fails to provide a reasonable level of view sharing, particularly as respects the roof top residential apartment design, which will contribute to destroying those views. With respect, we do not agree with the above statement as respects the impact upon our clients' property and the use and enjoyment by our clients of their land. Firstly, land water interface views will be lost. Secondly ocean views will be seriously impacted. The only views that would be preserved as regards the occupants of Unit 11 would be the tops of Norfolk Island Pines located on the eastern side of Pittwater Road to the north east and some narrow glimpses of the ocean.

Three earlier decisions of the Land and Environment Court of NSW which focus on the issue of loss of view are considered relevant to an examination of this aspect of the matter in addition to the more recent 'planning principles' espoused in *Tenacity Consulting v Warringah* [2004] NSWLEC 140 ('Tenacity'). The earlier decisions are *Stevens v North Sydney Council* No 10454 of 1989, *Jove Industries v North Sydney Council* No 10249 of 1992 and *The Presbyterian Church (NSW) Property Trust v Woollahra Municipal Council* No 10026 of 1994.

The earlier decisions relate, in significant part, to the question of view loss in respect of properties located in the immediate vicinity of the Sydney Harbour foreshore. In each of these cases, it is noted that the Court considered that the issue of views was critical in terms of determination of the relevant development application, one way or the other. The issue of view loss appears to have gained even greater prominence as being relevant and important with the effluxion of time, in terms of planning assessments generally.

In *Tenacity*, the Court established a series of tests to be applied in relevant planning assessments. We will proceed to analyse the view loss that would be likely in this particular case, in the context of that which is proposed in the development application, and sequentially apply the four relevant tests that were enunciated by the Court. The view loss assessment relates particularly to the views enjoyed by the occupant of Unit 11 at 1125 Pittwater Road but is also relevant in terms of the upper deck towards the rear of the existing development.

The following is a view assessment undertaken in accordance with the process adopted by then Senior Commissioner Roseth.

Test 1: View Assessment

The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (e.g. 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, e.g. a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

The views enjoyed by our clients are sweeping, valuable and dramatic, and contain significant locally iconic features including the aforementioned Norfolk Island Pines. The views that are in issue for our clients' property are north easterly water views towards Collaroy Beach and consist of whole views of the water and transitioning land to water views. If the proposed development proceeds as lodged, the view loss to our clients' property would be severe, and as mentioned the views to be lost are assessed as being valuable.

Test 2: Location of Views

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.

The views currently enjoyed by our clients are views that are enjoyed from both sitting and standing positions from the living room of our clients' dwelling and from the adjoining balconies/terrace areas on the northern side of our clients' property. We acknowledge that the views enjoyed from our clients' property are across a side boundary. Nonetheless, as a matter of fairness and equity, some elements of the development proposal appear to enjoy no purpose other than having the undesirable planning outcome of obscuring views currently enjoyed. As an example, we have difficulty accepting that a 'caretakers flat' actually needs to occupy floor space of 158 sqm and contain 3 bedrooms of accommodation.

Test 3: Extent of Impact

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.

In our opinion, the view loss that would be experienced by our clients would be assessed as severe. In that regard, the greatest effect is as respects the balcony and living areas of Unit 11, where there will be a severe view loss.

The assessment is based on a number of factors including the position of the dwelling relative to the existing view corridors, the degree of view loss in terms of the internal and external principal living spaces of the dwelling, the effect in terms of iconic elements, and the fact that from those living areas (including balconies) our client will lose a significant part of the current 'highly valued' view.

Test 4: Reasonableness

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.

In this case, a portion of the view loss arises due to the non-complying height of the development.

In the matter of *The Presbyterian Church (NSW) Property Trust v Woollahra Municipal Council* (LEC, No 10026 of 1994) Pearlman CJ at p5 stated:

... the question of whether development should be carried out in a location which will block views is one of reasonableness in the light of the available options.

Her Honour went on to state:

I do not think that consent should be refused on the ground of loss of view. I take into account that much of the view will be lost, but it is a loss suffered only by pedestrians and passengers in motor vehicles. It is not a significant loss of amenity to the majority of residents in Aston Gardens and on the western side of Victoria Road, all of whom will continue to enjoy significant harbour views.

... The impact of the view loss should not, in this case, prevent the applicant from developing its land to a reasonable level. The alternatives which the Council suggested as being available are not sought by the applicant and may not be feasible. The applicant should not, by reason only of the impact on view, be prevented from developing its land.

The above paragraph is instructive in the present circumstances. In this case, we are not talking about '*a loss suffered only by pedestrians and passengers in motor vehicles*', but rather a loss suffered by our client (a resident/owner of the property)—and, what's more, an unnecessary loss in all the circumstances.

The views currently enjoyed by our client are from principal living areas of the dwelling and are enjoyed as an integral part of the lifestyle of the occupants of the dwellings on our clients' property, as demonstrated by the dwelling layout.

If the applicant were to embrace a revised scheme which included increasing the setbacks as respects the caretaker flat or eliminating it, it would assist in reducing the view impact on neighbours and would also provide a reduced amount of shadows cast onto 1125 Pittwater Road.

Given the above circumstances, whilst acknowledging that views are across a side boundary in this case, one can only conclude that the development proposal before Council must fail all of the tests in *Tenacity* given the non-compliance with the height control and other considerations relating to the juxtaposition of the properties.

HEIGHT NUMBER OF STOREYS & THE CLAUSE 4.6 VARIATION

The proposed development involves both a non-compliance with the height in metres control in WLEP and as well as non-compliance with the 4 storey control in WDCP.

We note that the applicant's scheme achieves a height of 13.2m with the maximum height being set at 11.0m in this case. This departure has the effect of requiring a 4.6 variation request be submitted with the application.

The variation request must be supported for the development to be capable of approval by the consent authority.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- that the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (see cl 4.6(3)(a) and 4(a)(i));
- that the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard (see cl 4.6(3)(b) and 4(a)(i)); and
- that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out (see cl 4(a)(ii)).

The consent authority's satisfaction as to those matters must be informed by the objective of providing flexibility in the application of the relevant control to achieve better outcomes for and from the development in question.

The Land and Environment Court has established questions to be addressed in variations to developments standards lodged under State *Environmental Planning Policy 1 – Development Standards* ('SEPP 1') through the judgment of Lloyd J in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89. The test enunciated by Lloyd J in that case was later rephrased by Preston CJ in *Wehbe v Pittwater Council* [2007] NSW LEC 827 ('*Wehbe*'). These tests and considerations can also be applied to the assessment of variations under clause 4.6 of the LEP and other standard LEP instruments.

More recently, the NSW Court of Appeal in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 has had some very important things to say about the use and construction of clause 4.6.

In our opinion, the applicant has failed in its objective of satisfying the consent authority as to the three indicia referred to in the bullet points on p10 of this document, for the following reasons:

The circumstances of the case suggest that the subject development should be compliant with the height control because of the impacts as regards view loss that are caused by the proposal. In this matter the view loss issue should be given determining weight due to the impact of the development on surrounding property owners. It is not only our clients site that will be impacted in terms of view loss, but view loss is certain to occur as regards the residential components of the development to the west at Nos 1-5 Collaroy Street. In our opinion this reason alone is sufficient grounds for the Council to decline to support the variation request.

The applicant has not provided sufficient grounds to justify the contravention of the control, although it is acknowledged that in the absence of the impacts referred to above, the heights of adjoining developments must go some way to justifying building to the maximum height that is permitted (11.0m).

The applicant has also failed to demonstrate that the development is consistent with the height control because the development does not minimise disruption of views, loss of privacy and loss of solar access. As such the development is inconsistent with the objectives of the height control and is therefore not in the public interest.

We agree with the applicant that the consent authority can be satisfied that the development proposal is consistent with the B2 zone objectives apart from as regards residential amenity of adjoining or nearby land users.

Under WDCP, the number of storeys proposed by way of the development plans is a non-compliant with the relevant control. The objectives of WDCP B2 number of storeys control are as follows:

- To ensure development does not visually dominate its surrounds.
- To minimise the visual impact of development when viewed from adjoining properties, streets, waterways and land zoned for public recreation purposes.
- To provide equitable sharing of views to and from public and private properties.
- To ensure a reasonable level of amenity is provided and maintained to adjoining and nearby properties.
- To provide sufficient scope for innovative roof pitch and variation in roof design.

- To complement the height of buildings control in the LEP with a number of storeys control.

As regards the objectives outlined above, we are of the view that the development should fail because of the dominance of the upper storey and the impacts that it has in terms of loss of views, exacerbation of overshadowing and potential impacts as regards visual and acoustic privacy. The caretakers flat simply does not need to contain 3 bedrooms and occupy such a significant level of floorspace and such an expansive terrace. It therefore follows that the development could function adequately without a 4th storey.

Having regard to the objectives of the height standard as previously identified, strict compliance with the control is in this case necessary, and as such the variation request should not be supported by the consent authority.

TRAFFIC & ACCESS

The merit issue in terms of access to the site is summed up neatly in a submission prepared by Ms Kim Hildebrand of Unit 42 at 1-5 Collaroy Street Collaroy as follows:

.....The right of way through 1-5 Collaroy Street is frontage for a number of commercial tenants as well as a busy pedestrian area frequently used as a pathway by residents and other local people as a shortcut to access the shops and beach. It is also already regularly congested, particularly during peak times. To increase the traffic volume by such a degree would impact air quality for the commercial tenants at 1-5 Collaroy Street, greatly increase traffic noise levels and also present a hazard for the considerable number of pedestrians. Further, it would increase the difficulty resident vehicles already experience trying to enter and exit the lower car park at 1-5 Collaroy Street.

We as planners, endorse the above commentary. We note as well that Collaroy Street near to the intersection of Pittwater Road and the driveway serving 1-5 Collaroy Street serves as a 'turn bay' for traffic travelling south on Pittwater Road having emerged from a street further south that in turn serves the residents of Collaroy Plateau. The intention of those users is to take the benefit of the traffic controlled intersection of Pittwater Road and Collaroy Street to turn south into Pittwater Road.

INTENSIFICATION OF USE OF ROW

Car parking is provided at the rear of the site, and the site is accessed via a right of carriageway of variable width from Collaroy Street over property, legally described as Lot 2 DP 859613 (SP 58961), and known as Nos 1 – 5 Collaroy Street. The width of the Right of Way (ROW) at its minimum is 3.5m, so precluding two way traffic onto the subject property at the northern extremity of the ROW.

In this case, the SEE, The Traffic Impact Assessment (TIA) (Urbis March 2020), and the architectural drawings specifically refer to and describe the above mentioned ROW that runs from Collaroy Street and across the land providing access to Lot 1 in DP 859613 and Lot 4 in DP 7445. As regards the TIA, refer Figure 1 showing the 'Right of Way' and the description regarding access provided in Section 2.2, 'Details of the Proposed Development' as well as vehicle swept path diagrams over the ROW in Section 4.12. Section 4.13 refers to 'Conflict Management at Ramp Access Points'. This section suggests vehicle detection loops would be provided at the top of the ramp with red lights indicating the driver that should give way in this area. Although little detail is provided it is assumed that some work on the ROW would be required to implement this system, as it appears that vehicles would have to wait on the ROW to access the ramp providing access to the basement carpark. Presumably, traffic lights would be installed in the ROW. The Traffic Impact Assessment does not however provide enough detail to make this clear. Lastly, the TIA does acknowledge there would be an increase in intensity of use of the ROW by acknowledging a 'minor increase in midblock turning movements' [presumably at the entrance to Nos 1-5 Collaroy Street] (refer p15).

Given the scale of the proposed development and the relatively 'low key' nature of the existing development it is proposed to replace, there can be no question that there will be an intensification of use of the ROW currently burdening Nos 1-5 Collaroy Street, if the development were to proceed.

We contend that the intensification of use of the ROW comprises development as defined in the EPAA. In this regard 'development' includes, inter alia, 'the use of land'.

The application, in our opinion, 'relates' to the land upon which there exists the ROW, as without use (and intensification) of the existing vehicular access, the development could not proceed. If we are wrong in that regard, and the present development does not 'relate' to the ROW, then for the present development to be carried out, a separate development consent would nonetheless be required for the intensification of the use of the ROW. For this separate development application to succeed, land owners consent from the owners corporation relating to Nos 1-5 Collaroy Street, would still be required. We note that the issue with land owners consent may not be dealt with and resolved by use of a 'deferred commencement consent condition', refer *RVA Australia Pty Ltd v Sutherland Shire Council* [2017] NSWLEC 1161, at [88].

We are instructed that the owners corporation relating to No 1-5 Collaroy Street has not been approached to provide 'land owners consent' to the lodgement of the subject development application and that land owners consent has not been provided to the Council, as regards the land comprising the ROW. In order for the Council to have jurisdiction to determine the

development application, in the above circumstances, the owners consent of the above mentioned owners corporation must be provided. In support of this proposition her Honour Justice Paine, in *Huntington & Macgillivray v Hurstville City Council & Ors* [2004] NSW LEC 694 concluded as follows at [26]:

The intensification of the use by Lot 32 of the right of way burdening Lot A requires development consent in accordance with the EP&A Act given that the use of land is “development”. This is also in accordance with Ligon at p 478. Accordingly, the Applicant needs to apply for and obtain development consent for the intensification of the use of the right of way for Lot 32 if this development application is to ultimately proceed. Obviously, the consent of the Second Respondents will be necessary for any such development application lodged for Lot A.

The above approach was followed in *Opera Properties v Northern Beaches Council & Anor* [2017] NSWLEC 1507, where Dickson C [at 117] found as follows:

I find that the identified intensification of the use of the ROW (refer paragraph 115) falls within the definition of development under the Act. Consistent with *Huntingdon & Macgillivray v Hurstville City Council*, the applicant needs to apply for and obtain development consent for the intensification of the use of the right of way (or obtain a varied or new easement).

Based on the above, our primary submission therefore, is that given that the present development application does not enjoy land owners consent from the owners corporation through which the ROW traverses, it is beyond power for the Council to grant consent to the application. If we are wrong in that regard, and the present development does not relate to the ROW, then a separate application would be required, supported by land owners consent, to seek development consent to the intensification of use of the ROW, to allow this application to proceed.

PRELIMINARY CONTAMINATION ASSESSMENT

The contamination report accompanying the development application acknowledges the existence of various contaminants on the subject site. In our view and in all of the circumstances, the applicant should be required to provide a ‘detailed investigation’ having regard to the provisions of clause 7(3) of SEPP RL.

BOARDING HOUSES

The subject site is zoned Local Centre B2 pursuant to WLEP 2011. As such, the provisions of the SEPP ARH apply to the proposed development. The proposed development is appropriately defined as containing a boarding house as it would enjoy the following features:

- It is proposed to be wholly let in lodgings,
- It will provide lodgers with a principle place of residence for 3 months or more, and
- Will have shared communal open space and common living area, and
- Will have rooms that accommodate 1 or more lodgers.

We note that rooms 7, 14 and 18 have areas below the 12 square metre minimum for single occupancy rooms with such shortfall not being properly justified.

We note that indicative furniture layouts have been provided to demonstrate that the room geometry is capable of accommodating the necessary furniture whilst maintaining appropriate circulation spaces.

The proposed development includes a 7.2 square metre communal private open space area at Level 1 and a 20.1 square metre communal private open space area on Level 2. The level 2 area has spaces less than 3 metres wide, and notwithstanding that each boarding room has access to a private open space balcony there is no justification for the departure. The yield should be reduced so that the non-compliant spaces can be enlarged. If the number of rooms and lodgers were to be reduced (to under 20), there would be no need to provide a caretakers flat, under SEPP ARH. We invite the Council to consider this circumstance as without a caretakers flat the height of the development could be reduced and many of the impacts of the scheme would be reduced including overshadowing, view loss, privacy and intensification of use of the access.

PRIVACY

Privacy is dealt with in WDCP Control D8 which aims to ensure that the siting and design of buildings provide a high level of visual and acoustic privacy for occupants and neighbours.

We submit that the applicant has given insufficient consideration to this aspect of the proposal. The design fails to take account of the aural privacy issues that are likely to occur given the proximity of the managers flat at the top level. We ask that Council take this issue into account in its assessment of the proposal. In this regard, appropriate privacy and security should be maintained between the subject and the adjoining development to the south.

The SEE (at p32) refers to use of privacy screening devices to ensure that visual privacy is maintained. Whilst we are unsure as to where such screens are proposed, the south elevation shows that there is potential for privacy impact caused by an occupant looking south from the deck level on the 4th storey. The proximity of the proposed development to our clients' property (generally SP66939) and the overall height of certain aspects of the

proposed development have the potential to create an unacceptable privacy impact on our clients' property. We note that landscaping is used to 'attempt' to afford privacy to the occupants of our clients property at the topmost level and towards the east.

Council will be aware of the well-established general planning principle relating to privacy set out in *Meriton v Sydney City Council* [2004] NSWLEC 313. In that decision Roseth SC stated (at [45]-[46]):

When visual privacy is referred to in the context of residential design, it means the freedom of one dwelling and its private open space from being overlooked by another dwelling and its private open space. ...

... Overlooking of neighbours that arises out of poor design is not acceptable. A poor design is demonstrated where an alternative design that provides the same amenity to the applicant at no additional cost, has a reduced impact on privacy.

... Landscaping should not be relied on as the sole protection against overlooking. While existing dense vegetation within a development is valuable, planting proposed in a landscaping plan should be given little weight. ...

It is clear from *Meriton v Sydney City Council* and subsequent cases in which the planning principle has been fairly consistently applied, that separation rather than landscaping is the main safeguard in the protection of privacy. In *Davis v Penrith City Council* [2013] NSWLEC 1141 Moore SC confirmed, at [121], the following as the criteria for assessing impact on neighbouring properties:

How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?

How reasonable is the proposal causing the impact?

How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?

Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?

Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?

As Dickson C pointed out in *Rose & Sanchez v Woollahra Municipal Council* [2016] NSWLEC 1348 (19 August 2016) at [78]:

In applying these criteria *Meriton v Sydney City Council* [2004] NSWLEC 313 at [45] clarifies the scope of visual privacy in the context of residential

design as: the freedom of one dwelling and its private open space from being overlooked by another dwelling and its private open space.

That is the heart of the matter – the freedom of one dwelling and its private open space from being overlooked by another dwelling and its private open space.

Control D8 ('Visual privacy') of WDCP makes provision for visual privacy, as follows:

Building layout should be designed to optimise privacy for occupants of the development and occupants of adjoining properties.

Orientate living areas, habitable rooms and windows to private open space areas or to the street to limit overlooking.

The effective location of doors, windows and balconies to avoid overlooking is preferred to the use of screening devices, high sills or obscured glass.

The windows of one dwelling are to be located so they do not provide direct or close views (i.e. from less than 9 metres away) into the windows of other dwellings.

In this case, we have reviewed the development plans and have concluded that privacy impacts have not been properly addressed for our clients, by reason of the proposed terrace at the top level. The roof top terrace—if it is to remain as part of the scheme (something which our clients strongly oppose)—would need to have increased setbacks from the southern elevation and landscaping and screens should not be relied on. Regrettably, the applicant has chosen not to provide these increased setbacks.

We also believe it is important that Council request that the applicant implement obscure glazing or high sill windows (these are provided to the caretakers flat) on the windows on the southern elevation, in order to alleviate any overlooking issues from internal living spaces.

CONCLUSION

Our primary submission to Council is that the present development cannot proceed in the absence of land owners consent from the owners of the land burdened by a ROW traversing Nos 1-5 Collaroy Street Collaroy. This is because the development the subject of the development application relates to the ROW. If we are wrong in that regard, and the present development does not relate to the ROW, then a separate application would be required, supported by land owners consent, to seek development consent to the intensification of use of the ROW (bearing in mind that 'use' is development), to in turn allow the present application to proceed.

In assessing the impact of a development proposal upon a neighbouring property, what was said by Roseth SC in *Pafburn v North Sydney Council* [2005] NSWLEC 444 (16 August 2005), at [19]-[24], is, in our respectful submission, extremely helpful:

19 Several judgments of this Court have dealt with the principles to be applied to the assessment of impacts on neighbouring properties. *Tenacity Consulting v Warringah* [2004] NSWLEC 140 dealt with the assessment of views loss; *Parsonage v Ku-ring-gai Council* [2004] NSWLEC 347 dealt with the assessment of overshadowing; while *Meriton v Sydney City Council* [2004] NSWLEC 313 and *Super Studio v Waverley Council* [2004] NSWLEC 91 dealt with the assessment of overlooking.

20 Five common themes run through the above principles. The first theme is that change in impact may be as important as the magnitude of impact. ...

21 The second theme is that in assessing an impact, one should balance the magnitude of the impact with the necessity and reasonableness of the proposal that creates it. ...

22 The third theme is that in assessing an impact one should take into consideration the vulnerability of the property receiving the impact. ...

23 The fourth theme is that the skill with which a proposal has been designed is relevant to the assessments of its impacts. Even a small impact should be avoided if a more skilful design can reduce or eliminate it.

24 The fifth theme is that an impact that arises from a proposal that fails to comply with planning controls is much harder to justify than one that arises from a complying proposal. People affected by a proposal have a legitimate expectation that the development on adjoining properties will comply with the planning regime.

In the case of the present development proposal:

- the magnitude of impact upon the amenity, use and enjoyment by our clients of their property is certainly not insignificant, in that:
 - the views that are in issue for our clients' property are north east from living areas and balconies on the northern side of the development;
 - the views are 'whole' views of the water, transitioning land to water and including iconic elements;
 - these views are currently enjoyed from both sitting and standing positions from the living rooms of the neighbouring development to the south and from the adjoining balcony/terrace, which forms an integral part of the lifestyle of our clients in their dwelling;

- the applicant could provide an amended scheme, which involves better design to ensure that view sharing is maintained from nearby dwellings including those from 1-5 Collaroy Street;
 - the severe view impacts also arise by reason of non-compliances with the WLEP height control and the WDCP storeys control, which are in place to protect adjacent properties views; and
 - an amended scheme which was more compliant with these controls would result in more reasonable view sharing;
- our clients' property is vulnerable, being directly adjacent and to the south of the subject;
 - the lack of attention in the design of the development proposal as regards the impacts of the proposed development on our clients' property in terms of height, bulk, visual privacy, overshadowing is relevant to the assessments of those impacts, such that even a small impact should be avoided if a more skilful design can reduce or eliminate it;
 - the fact that proposal fails to comply with a number of important planning controls is much more difficult to justify than would otherwise be the case with a complying proposal; and
 - the proposal involves 4 storeys and a non-compliance with a principal planning control and this is an indicator of overdevelopment of the site.

In short, our clients have, as Roseth SC pointed out in *Pafburn*, a legitimate expectation that the development to take place on the subject property 'will comply with the planning regime' in the present circumstances.

In addition, the close proximity of the proposed development to our clients' property and the overall height of the proposed development will create an unacceptable privacy impact for our clients, as respects the use and enjoyment of their land.

In our opinion, the proposal the subject of the development application requires significant modification so as to render it acceptable and consistent with the current planning controls.

In the event that Council is not minded to refuse consent to the development application, but on the contrary approves the application in its present form, being a course of action which, in our respectful submission, would be inappropriate both as a matter of planning principle and law, then we respectfully submit that it is essential that appropriately worded conditions are imposed on any consent that issues in order to reduce the adverse

impacts that would otherwise arise for our clients, from the carrying out of the proposed development.

Our clients may well choose to make their own submission to Council as well and otherwise reserve all of their rights and entitlements.

Yours faithfully

TURNBULL PLANNING INTERNATIONAL PTY LIMITED



Nic Najar

BA (ICMS)

Assistant Town Planner

nic@turnbullplanning.com.au



Pierre Le Bas

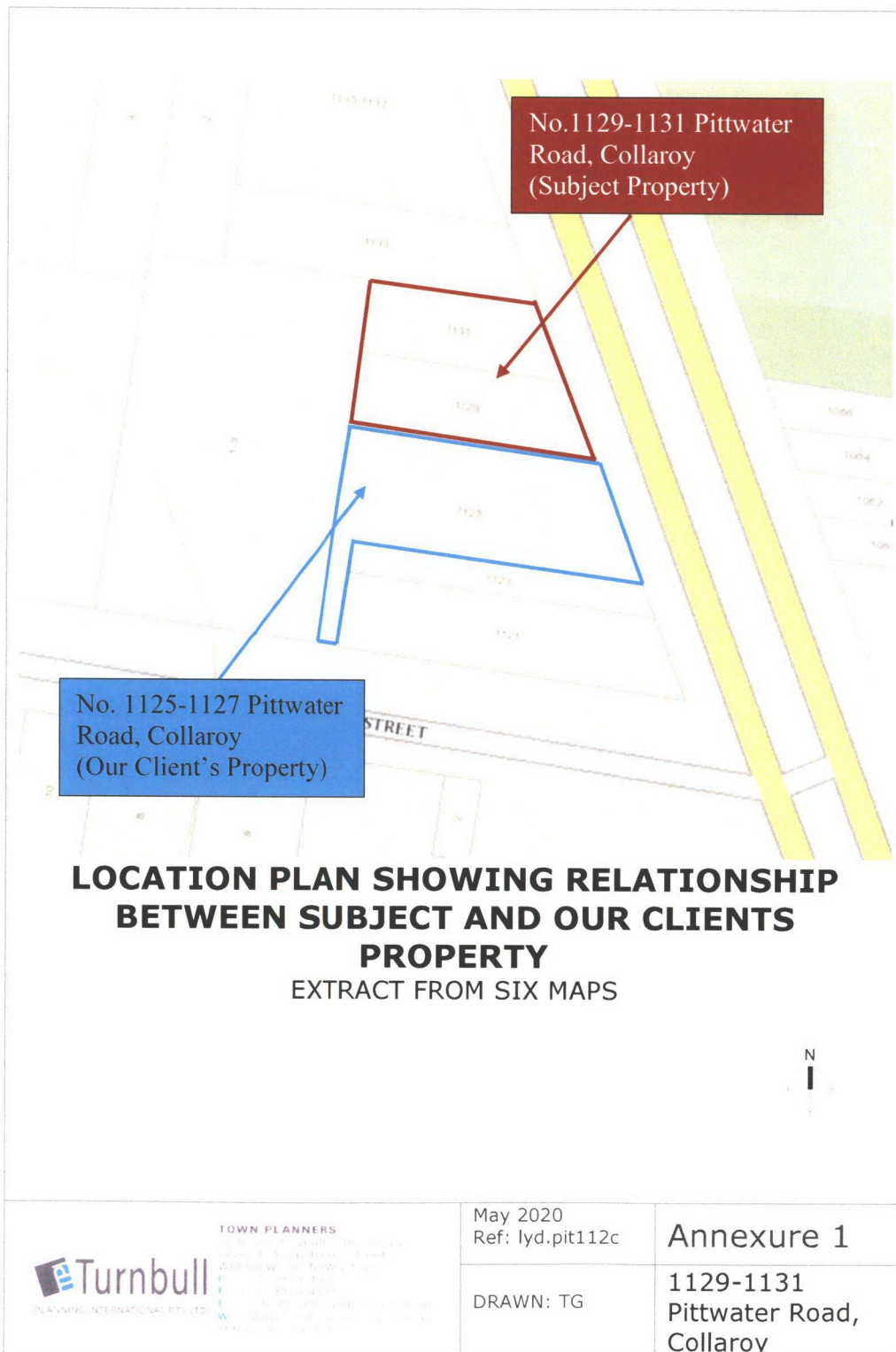
BA (Geog) (UNE) LLB (Hons1) Grad Cert Leg P (UTS) MTCP (Syd)

Director & Legal Counsel

pierre@turnbullplanning.com.au

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ANNEXURE 1



ANNEXURE 2



Photograph 1 – Subject site viewed from eastern side of Pittwater Road



Photograph 2 – Access to site viewed from entrance to 1-5 Collaroy Street



Photograph 3 – Existing retail premises adjacent to access from 1-5 Collaroy Street



Photograph 4 - view from balcony of occupier of Unit 11/1125 Pittwater Road looking east north east



Photograph 5 – View from top living level of building 1125 Pittwater Road looking north