



Land and Environment Court New South Wales

Case Name: Ikus Pty Ltd t/as U+I Building Studio v Northern Beaches Council

Medium Neutral Citation: **[2018] NSWLEC 1534**

Hearing Date(s): 27 and 28 August 2018

Date of Orders: 10 October 2018

Date of Decision: 10 October 2018

Jurisdiction: Class 1

Before: Smithson C

Decision: (1) The appeal is dismissed;
(2) Development Application No. DA 2017/1200 for alterations and additions to the existing dwelling at 73 Marine Parade, Avalon Beach is refused;
(3) The exhibits are returned, except for Exhibits 2, A, B and D.

Catchwords: DEVELOPMENT APPLICATION: alterations and additions to dwelling – garage, workshop and storage area in front setback and forward of the established building line – variations to DCP controls sought but not justified – adequacy of landscaping – neighbour objections

Legislation Cited: Environmental Planning and Assessment Act 1979
Land and Environment Court Act 1979
Pittwater Local Environmental Plan 2014
Pittwater Development Control Plan

Cases Cited: Nil

Texts Cited: Australian Standard AS2890.1
Planning for Bushfire Protection 2006

Category: Principal judgment

Parties: Ikus Pty Ltd t/as U+I Building Studio (Applicant)
Northern Beaches Council (Respondent)

Representation:

Solicitors:

R Wilcher, Hicksons (Applicant)

M Winram, Maddocks Lawyers (Respondent)

File Number(s):

2018/95148

Publication Restriction:

No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal under s 8.7 of the *Environmental Planning and Assessment Act 1979* (the Act) against the deemed refusal of a development application by Northern Beaches Council (the Council), for alterations and additions to an existing dwelling house at 73 Marine Parade, Avalon Beach (the site).
- 2 The key issue associated with the application was the acceptability of a proposed structure comprising a double garage, workshop, enclosed manoeuvring area and storage in front of the existing dwelling (the structure or contended structure). The extent of proposed landscaping was also raised as a contention.

Summary of the appeal

- 3 Development Application No. DA 2017/1200 (the application) proposed alterations and additions to an existing dwelling house comprising a new two storey pavilion at the rear, stairs and a sunroom between the dwelling and that pavilion, and an extension in front of the dwelling for a rumpus room and terrace. The development also proposed a structure comprising a new double garage, workshop and storage area with a rooftop terrace in front of the dwelling serviced by a new driveway. The manoeuvring area for the garage was also to be enclosed as part of this structure. Associated earthworks, tree removal, landscaping and paths were also proposed.
- 4 The application was notified and submissions were received from the immediately adjacent neighbours at 71 and 75 Marine Parade. The submissions raised concerns with the accuracy of supporting technical reports, coastal and geotechnical hazards associated with cliff top development, maintenance of bushfire Asset Protection Zones and access to the site for fire-fighting purposes, view loss, overshadowing, visual and acoustic privacy, and the visual impact of the proposal.
- 5 The site is identified as Lot 114 DP 8394 and has an area of 1878m² with a 19.04m frontage to Marine Parade. It is on the eastern side of Marine Parade and is adjoined on both sides and opposite by dwelling houses. The site is

situated on the cliff face to Avalon Beach which adjoins to the rear, with the rear boundary comprising the Mean High Water Mark of the beach.

- 6 The site has a dual zoning under the provisions of the Pittwater Local Environmental Plan 2014 (the LEP). The majority western portion, or 1276m², is zoned E4 Environmental Living and the balance, 604m², zoned E2 Environmental Conservation. The aspects of the development of concern to the Council are located in the E4 zone and are permissible with consent in that zone. The objectives for the E4 zone contained in the LEP are:

- To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.
- To ensure that residential development does not have an adverse effect on those values.
- To provide for residential development of a low density and scale integrated with the landform and landscape.
- To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.

- 7 The site currently contains a two-storey dwelling over a single garage accessed from a relatively steep driveway from Marine Parade. The topography of the lot rises from the street frontage by approximately 16m over 64m at a slope of some 25% before a sheer drop to the rocky foreshore at the rear.

- 8 Given the location and characteristics of the site, various specific provisions of the LEP apply as follows:

- (1) A foreshore building line is designated on the Foreshore Building Line Map running through the site and dissecting the northern and southern boundaries between 64 and 62 metres from the western boundary. As a consequence, cl 7.8 of the LEP applies limiting development in the foreshore area;
- (2) The site is identified as Bluff/Cliff Instability on the Coastal Risk Planning Map and is therefore subject to the coastal risk planning provisions of cl 7.5;

- (3) The majority of the site is identified on the Geotechnical Hazards Map and therefore subject to the provisions of cl 7.7 dealing with geotechnical hazards;
 - (4) The E2 zoned portion of the site is shown on the Biodiversity Map and therefore subject to the provisions of cl 7.6. This portion of the site is also identified on the Land Reservation Acquisitions Map of the LEP as Regional Open Space and is subject to the provisions of cl 5.1A being development on land intended to be acquired for public purposes.
- 9 The site is located within the Avalon Beach locality (A4.1) in the Pittwater 21 Development Control Plan (the DCP). Of relevance to this appeal are the following extracts from the statement for the locality in terms of the desired future character.
- The most important desired future character is that Avalon Beach will continue to provide an informal relaxed casual seaside environment. The locality will remain primarily a low-density residential area with dwelling houses a maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape ...
- Carparking should be provided on site and where possible integrally designed into the building.
- Future development will maintain a building height limit below the tree canopy, and minimise bulk and scale. Existing and new native vegetation, including canopy trees, will be integrated with development. The objective is that there will be houses amongst the trees and not trees amongst the houses ...
- Most houses are set back from the street with low or no fencing and vegetation is used extensively to delineate boundary lines ...
- A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment ...
- 10 Various provisions of the DCP to achieve this desired character were contended by the Council to not be met and are dealt with in detail later.
- 11 The site is surrounded by low density residential development of varying age and character. Dwellings and structures are setback further on the eastern, higher (or cliff side) of Marine Parade than they are on the lower, western side.

- 12 The appeal was subject to mandatory conciliation in accordance with the provisions of s 34AA of the *Land and Environment Court Act 1979* (the Court Act). The conciliation commenced onsite where the Court and the parties and their experts heard from the two adjoining neighbours. The neighbours reiterated concerns raised in their written objections with the impact on the cliff, and therefore on their properties, from the construction in terms of rock falls and water flow. Bushfire risk concerns were also raised in terms of the maintenance of vegetation in the rear yard of the site and access to it. A view of the site was undertaken from the front and rear of No. 75.
- 13 The experts comprised town planners; Mr Sinclair for the applicant and Ms Englund for the Council. At the conciliation, the applicant's architects were also in attendance but they did not provide evidence at the hearing.
- 14 During the site view, the Council tabled an aerial photo of the site and the seven adjoining properties on either side on the eastern side of Marine Parade (Exhibit 4). This showed the existing front setbacks of development on these properties. The Court with the parties and experts walked the extent of Marine Parade which these properties front.
- 15 As agreement was not reached during the conciliation phase, the conciliation was terminated pursuant to s 34AA(2)(b) of the Court Act and the proceedings dealt with as a hearing held forthwith, pursuant to s 34AA(2)(b)(i).
- 16 The parties agreed that matters discussed in the conciliation conference could be considered by the Court in determination of the application: s 34(12). These discussions focused on possible alternatives for accommodating a double garage forward of the existing dwelling without the additional bulk associated with the workshop, storage areas and enclosed manoeuvring area.
- 17 Leave was sought, not opposed and granted to an amended plan arising from the conciliation. The amended plan reduced the area of the proposed structure but only by some 10m² to 120m² as a result of increasing the front setback of part of the structure by 1m. This comprised the application as amended (Exhibit A).

- 18 Mr Wilcher, solicitor for the applicant, was also advised at termination of the conciliation that, should the Court not support the structure in contention, the application in total would be refused unless there were submissions made to the Court to the contrary. No such submissions were made.

The issues

The proposed garage, storage and workshop structure

- 19 The only aspect of the development opposed by the Council, following amendments to the application and provision of additional information, was the double garage, workshop and storage area, including the enclosed car manoeuvring area, proposed in the front building line (or setback) area. Works associated with accommodating this structure, including vegetation removal, were also of concern as was the amount of landscaping provided on the site.
- 20 The Council contended that the structure breached a number of DCP controls which would consequently result in unacceptable impacts for the character of the streetscape and locality. Specifically, controls found at cl D1.1, D1.8 and D1.14 of the DCP.
- 21 Contested aspects of DCP cl D1.1, Character as viewed from a public place, are reproduced below:

Outcomes

To achieve the desired future character of the Locality.

To ensure new development responds to, reinforces and sensitively relates to the spatial characteristics of the existing built and natural environment. ...

To enhance the existing streetscapes and promote a scale and density that is in keeping with the height of the natural environment.

The visual impact of the built form is secondary to landscaping and vegetation.

...

Buildings do not dominate the streetscape and are at 'human scale'.

...

Controls

Buildings which front the street must have a street presence and incorporate design elements (such as roof forms, textures, materials, the arrangement of windows, modulation, spatial separation, landscaping etc) that are compatible with any design themes for the locality. Blank street frontage facades without windows shall not be permitted.

Walls without articulation shall not have a length greater than 8 metres to any street frontage.

Any building facade to a public place must incorporate at least two of the following design features:

- entry feature or portico;
- awnings or other features over windows;
- verandahs, balconies or window box treatment to any first floor element;
- recessing or projecting architectural elements;
- open, deep verandahs; or
- verandahs, pergolas or similar features above garage doors.

The bulk and scale of buildings must be minimised.

Garages, carports and other parking structures including hardstand areas must not be the dominant site feature when viewed from a public place. Parking structures should be located behind the front building line, preferably set back further than the primary building, and be no greater in width than 50% of the lot frontage, or 7.5 metres, whichever is the lesser.

Landscaping is to be integrated with the building design to screen the visual impact of the built form. In residential areas, buildings are to give the appearance of being secondary to landscaping and vegetation.

...

Variations

Council may permit parking spaces in front of building line where site constraints limit location such variation must be justified in the discussion below.

...

Advisory Notes

Articulation includes: architectural relief and facade modulation

Information to be included in the Statement of Environmental Effects

An analysis of the character of the proposed development as viewed from Public Place(s) demonstrating that the proposal:

- compliments the desired future character of the Locality;
- has a visual impact which is secondary to landscaping and vegetation;
- ...
- is of high quality and is designed to address the natural context of the area and any natural hazards; ...
- does not dominate the streetscape and is at human scale, and, within residential areas, buildings give the appearance of being two-storey maximum; ...
- ensures parking structures are minimised and secondary to the built form, landscaping and vegetation; ...

22 Contested aspects of DCP cl D1.8, Front building line, are reproduced below:

Outcomes

To achieve the desired future character of the Locality.

...

Vegetation is retained and enhanced to visually reduce the built form. ...

Vehicle manoeuvring in a forward direction is facilitated. ...
 To encourage attractive street frontages and improve pedestrian amenity.
 To ensure new development responds to, reinforces and sensitively relates to the spatial characteristics of the existing urban environment.

Controls

Land	Front Building Line (metres)
...	...
All other land zoned R2 Low Density Residential, R3 medium Density Residential or E4 Environmental Living	6.5, or established building line, whichever is the greater

The minimum front building line shall be in accordance with the above table.

Built structures (including swimming pools), other than driveways, fences and retaining walls are not permitted within the front building setback.

...

Variations

Other than Avalon Parade (No's 61 to 121 and 50 to 112 inclusive)

...

Where the outcomes of this control are achieved, Council may accept variation to these building lines in the following circumstances:

- considering established building lines;
- degree of cut and fill;
- retention of trees and vegetation;
- where it is difficult to achieve acceptable levels for building;
- for narrow or irregular shaped blocks;
- where the topographic features of the site need to be preserved;
- where the depth of a property is less than 20 metres.

On steeply sloping or constrained sites, reduced or nil setbacks for carparking structures and spaces may be considered, however all other structures on the site must satisfy or exceed the minimum building line applicable.

- 23 The DCP includes the following relevant definitions:

de facto building line

means the line of the facade of structures created by the location of structures on nearby properties. There may be separate de facto building lines for dwellings and decks, verandahs, etc. See also established building line.

established building line

means a building line that is established by map (foreshore building line) or a de facto building line.

- 24 The experts agreed that: the eastern side of Marine Parade is characterised by deep generous front setbacks creating an 'established building line' (EBL); the existing dwelling is setback some 19m from the front boundary; and this

setback aligns with the EBL. As the EBL is greater than 6.5m, the Council argued that the EBL is the prescribed front building line required to be met under cl D1.8 of the DCP not 6.5m. The application proposed extensive works forward of the existing dwelling resulting in non-compliance with the minimum EBL prescribed by cl D1.8.

- 25 Mr Sinclair argued that the EBL should consider the building lines on the opposite, that is western, side of Marine Parade which were generally substantially less than on the eastern side.
- 26 However, Ms Englund argued that, in order to determine the EBL for the site, the 'de facto building line' needs to be determined. By definition, a line of the existing setbacks of structures on nearby properties can only meaningfully be drawn for the properties on the same side as the site. This was the method for determining an EBL that the Council had always used in assessments.
- 27 The original application proposed the structure to be setback a minimum 8.45m from the front boundary with a total area of 97m². The setback was reduced in the amended application to a minimum 6.8m with the area increased to 130m². Arising from the conciliation, the final application proposed a minimum setback of 6.8m for part of the structure, being the bicycle storage and manoeuvring and workshop area, with the main garage wall setback being increased by 1m to 9.3m. The area of the revised structure was 120m² (Exhibit A).
- 28 Ms Englund noted that the proposed breach of the EBL was not limited to this structure but also included other aspects of the application namely the enlarged deck and new rumpus room on the ground floor and enlarged deck on the first floor. The Council was prepared to support these other non-compliant elements but not the contended structure. Further, there would be conflict between using the manoeuvring area as a workshop and for access and there was disagreement between the parties as to the manoeuvring area required for vehicles to enter and exit in a forward direction and how and where this should be accommodated.
- 29 Ms Englund also argued that the dwelling already had an existing garage that complied with the DCP, being integrated into the dwelling and setback 22m from the street. No justification had been provided as to why this existing

parking arrangement was now unsatisfactory resulting in an EBL breach for a substantial new garage and additional uses.

- 30 Even accepting the steep slope as a site constraint whereby the DCP allows a reduced front setback for a parking structure, namely the garage, the DCP requires all other structures behind the EBL.
- 31 Ms Englund argued that the proposed structure was not confined to a parking structure as the majority of the area was to be used as a workshop, for storage, or for manoeuvring, with only 27.5m² of the 120m² proposed for parking. The minimum dimensions of a double garage prescribed by Australian Standard AS2890.1 results in only 29.16m² being required for the garage. She therefore disagreed with Mr Sinclair that the whole structure could be categorised as a garage with ancillary uses which would enable the DCP variations to apply.
- 32 Even if all of the structure was accepted as a parking structure, in order to achieve a reduced setback and enable the structure within the EBL, the outcomes of the DCP controls need to be met. The Council contended they were not.
- 33 Ms Englund, as part of the Joint Expert Report (Exhibit 3), provided a number of options which she said demonstrated alternative designs for a double garage with some storage in an enclosed area at the front of the dwelling but which maintained the manoeuvring area as open hardstand. She advised that any of these options would be considered favourably by the Council, or any other more skilful design which reduced the extent of the structure.
- 34 Mr Sinclair did not provide comment on any of the suggested alternatives as the applicant opposed all options which did not involve enclosing the manoeuvring area to form part of a large workshop area as well as the provision of storage areas.
- 35 Ms Englund argued that the proposed structure was excessive and inconsistent with the desired future character of the locality which provides that the bulk and scale of development should be minimised. It was not a sensitive design solution considering the EBL on this higher side of Marine Parade. It extended more than 11m further down the site towards the street than the

existing dwelling. It did not enhance the streetscape, being inconsistent with generous front setbacks of neighbouring properties that characterise the high side of the street, and did not appropriately respond to, reinforce or sensitively relate to the spatial characteristics of the existing urban environment.

- 36 In addition, the Council was concerned that the proposed structure required the removal of existing established vegetation and prevented the enhancement of vegetation within the front setback area, also inconsistent with the outcomes of the building line control. Furthermore, the Landscape Plan proposed the removal of all existing exotic non-native vegetation. This would include palms currently in the front setback area. The visual impact of the development would therefore not be secondary to the landscaping
- 37 Mr Sinclair argued that, due to the topography and resultant steep slopes, there was a wide variation in building setbacks of development on the eastern side of Marine Parade. On the western side, where site slopes are not so extreme, there were lesser setbacks and less variation in setbacks.
- 38 His argument was that the proposed development had a variable setback from the front boundary but in all cases it was greater than 6.5m. However, he accepted that the proposed front setback was less than surrounding development on the eastern side of Marine Parade.
- 39 Mr Sinclair also argued that, by excavating the structure, there would be less visual impact than exists now with the only portion visible being behind the driveway, as the balance would be screened by vegetation.
- 40 Mr Wilcher submitted that the proposal met the DCP objectives for development in the locality being low density, two storey development in a landscaped setting, arguing that the site was one of the most vegetated in the vicinity. The structure would be below tree canopy level such that the dwelling remained a house amongst the trees. Further, the locality must comprise both sides of the street in the vicinity of the site and there were lesser front setbacks on the opposite side of the street. In any event, the DCP provisions are required to be flexibly applied for a use permissible in the LEP and it was not necessary for all of the DCP outcomes to be achieved.

- 41 Mr Wilcher also submitted that no neighbours had raised concerns with the proximity of the structure to the street or with reduced landscaping. He also referenced the assessment of the application undertaken by the Council's Senior Landscape Architect which states :

The landscape proposal is generally acceptable.

The retention of the existing vegetation within the front setback will maintain the current positive impact to the built form of the development, with the built form softened and complimented by landscaping, that includes additional tree canopy planting to the front setback.

The landscape plan provides a co-ordinated approach that considers the requirements of the Ecological Impact Assessment and the Bushfire Hazard Assessment.

- 42 Ms Englund argued that these comments related to the earlier proposal with a smaller area (and therefore built form) with less vegetation removal. It also assumed vegetation retention and enhancement which had not been demonstrated would be the resultant outcome.
- 43 In this regard, the applicant provided a photo montage (Exhibit B, Tab 13) indicating that the proposed development, including the dwelling, would be almost completely screened by vegetation other than the portion behind the driveway. Mr Wilcher submitted that the montage demonstrated that there would be reduced visibility of the built form resulting in an outcome consistent with the desired future character of the locality.
- 44 However, the Council argued that the montage had not been prepared in accordance with Court policy and Ms Englund questioned its accuracy. It assumed existing vegetation remained which was being removed, vegetation in the Council road reserve which may not remain, and new vegetation being planted which may not be possible to plant. If the montage showed the proposed vegetation post development, Ms Englund considered there would be a greater view of the two storey dwelling behind than currently exists thus resulting in adverse visual impacts.
- 45 Specifically, Ms Englund considered that the existing on-site vegetation, including exotic vegetation, proposed or required to be removed currently acts to soften the dwelling as seen from the street and neighbours. In addition, vegetation in the road reserve could not be assumed to be retained, if, for

example, the Council constructed a footpath. Therefore, it could not be relied upon to provide screening or a landscaped setting for the development.

- 46 Mr Sinclair had not prepared the montage and was unable to confirm the accuracy of the vegetation outcome shown. Further, there was no montage of the current view for comparative purposes.
- 47 However, in terms of meeting the front setback objectives of the DCP at cl D1.8, Mr Sinclair argued that the development was designed to respond to local site conditions, including integrating various built form and landscape elements, and would thus contribute significantly to the desired future character of the locality. Further, it was important that the design allowed vehicles to manoeuvre within the site and the garage had been set at a lower level to reduce the driveway gradient in order to comply with Council requirements. This would also make pedestrian entry to the site easier than currently exists.
- 48 Mr Sinclair also submitted that vegetation cover was highly variable on a number of neighbouring properties including within the front setback area with less screening of some dwellings than was proposed in the application. A number of dwellings also had garages at the front. In contrast, the proposed development responded sensitively to its context by placing the majority of new additions towards the rear. Setting the development further back would impact views and vistas of neighbouring properties contrary to DCP objectives.
- 49 Mr Sinclair also argued that the development would be screened by the existing front brushwood fence. However, the Council argued that the brushwood fence is inconsistent with the provisions of *Planning for Bushfire Protection 2006* which requires boundary fences to be made from non-combustible materials. As a consequence, the proposed conditions of consent (Exhibit 5) included a condition requiring removal of the brushwood fence. The applicant had accepted this condition.
- 50 Mr Sinclair maintained that the design was of a high standard utilising a difficult site in an effective manner without impacting the overall density of development. The scale of the development was also appropriate in its context with views protected. Therefore, he concluded that the variations allowed for in cl D1.8 of the DCP should be applied as the outcomes were achieved thus

permitting a setback at half the front building line given the merits of the design of the entire development on a steeply sloping site.

- 51 However, in addition to the breach of the EBL, Ms Englund was concerned that the front façade of the contended structure was 12.5m wide in the original application and increased to 16.165m in the amended plans. This was 83.3% of the total width of the lot frontage despite the DCP requirement at cl D1.1 that any parking structure in the forward building line be not greater in width than 50% of the lot frontage or 7.5m, whichever is the lesser. Also, that any wall without articulation not exceed 8m in length to the street frontage.
- 52 Mr Sinclair argued that the front facade incorporated a number of design elements including the longest, 9.775m, portion of the wall being setback 2.5m from the balance, windows on either side of the garage entry, and intensive landscaping in the setback. In his opinion, articulation, in terms of, architectural relief and façade modulation, was achieved with the entry, windows and varied setback.
- 53 Ms Englund disagreed that the garage door and windows provided articulation to the 9.77m wide continuous portion of the facade. In her view, articulation could only be achieved by setbacks or forward projections in the wall not window details unless they were bay windows or had similar relief in elevation.
- 54 Mr Sinclair maintained that the development minimised bulk by distributing elements across the site in an integrated manner. The dominant feature of the development seen from a public place, being the street, would be the landscaping at the front of the property punctuated only by the entrance driveway to the garage with the garage component of the internal space proposed at the front less than 7.5m in width.

Landscaped area

- 55 The Council contended that the application did not provide the DCP required provision of 60% of the site area as “Landscaped Area” as that term was defined in the LEP. The definition is as follows:

landscaped area means a part of a site used for growing plants, grasses and trees, but does not include any building, structure or hard paved area.

- 56 The Council further contended that the landscaping did not meet the outcomes of the DCP controls at cl D1.14, Landscaped Area – Environmentally Sensitive Land, in order to achieve dispensation. Clause D1.14 reads as follows:

Outcomes

Achieve the desired future character of the Locality. ...
The bulk and scale of the built form is minimised. ...
Vegetation is retained and enhanced to visually reduce the built form. ...
Conservation of natural vegetation and biodiversity. ...
To preserve and enhance the rural and bushland character of the area. ...
Soft surface is maximised to provide for infiltration of water to the water table, minimise run-off and assist with stormwater management. ...

Controls

The total landscaped area on land zoned ... E4 Environmental Living shall be 60% of the site area.

...

Any alterations or additions to an existing dwelling shall provide a minimum 60% of the site area as landscaped area.

Split Zones

On lots where there is a split zoning and part of the lot is zoned ... E2 Environmental Conservation ..., the calculation for total landscaped area will be based only on that area not zoned ... E2 Environmental Conservation It will not be based on the site area of the whole lot.

Variations

Provided the outcomes of this control are achieved, the following may be permitted on the landscaped proportion of the site:

- i) impervious areas less than 1 metre in width (e.g. pathways and the like);
- ii) for single dwellings on land zoned R2 Low Density Residential, R3 Medium Density Residential or E4 Environmental Living, up to 6% of the total site area may be provided as impervious landscape treatments providing these areas are for outdoor recreational purposes only (e.g. roofed or unroofed pergolas, paved private open space, patios, pathways and uncovered decks no higher than 1 metre above ground level (existing)).

- 57 Mr Sinclair claimed the application as amended would provide 59.6% of landscaped area without seeking the variations available under the DCP or 61.2% if these variations were allowed. The same calculations by Ms Englund resulted in 56.8% and 59.6% respectively. The difference in the percentages was primarily due to Mr Sinclair including within his calculations areas under stairs, elevated terraces, and roof overhangs which he considered could be landscaped and/or used for recreation.

- 58 Mr Wilcher submitted that at least the area under the rear terrace overhang, which is up to 4.5m above the ground, should be included as this area could be grassed and used for recreation.
- 59 Ms Englund argued areas under structures could not be included given the LEP definition. Neither could vegetation required to be removed or which could not be planted given bushfire or structural setback requirements.
- 60 In this regard, Ms Englund was concerned that, as well as requiring the removal of established vegetation, the structure would prevent the enhancement of vegetation within the front setback given the limited distance in which to plant or retain trees. In particular, a 5m clearance was required for new canopy trees, reflected in a proposed condition that the applicant had agreed to. However, this distance was not achieved in the tree planting proposed or would result in proposed trees being too close to retained trees.
- 61 The applicant's Landscape Plan also noted the requirement for all new plantings to achieve the requirements for bushfire planning and a minimum 2m clearance from all structures. The Council argued that this meant that some of the proposed planting could not be undertaken given proposed new structures including at the rear of the site. The clearance distance could be reduced to 3m where pier and beam footings were used but this was not proposed. Thus, it was likely the amount of landscaped area would be further reduced if existing plantings had to be removed and new plantings could not meet required separation distances.
- 62 As Ms Englund did not consider that the DCP objectives had been met in terms of landscaped outcomes, she argued that the variations available for dispensation in the amount of landscaped area provided should not be applied. However, even if they were applied, the proposal would remain non-compliant with still less than 60% of landscaped area provided.
- 63 Mr Sinclair argued that the overall built form would not exceed 40% site cover; by inference therefore 60% of the site would constitute uncovered area. However, the Council argued there was no site cover control. The only control was a minimum 60% landscaping provision and this was not met.

Findings

- 64 If approved, the proposed development would result in a substantial structure well forward of the established building line (EBL) for adjoining development and contrary to various provisions of the DCP. It would be the closest structure to the street in the vicinity of the site on the eastern side of Marine Parade.
- 65 Other than where variations may be considered in accordance with the provisions of the DCP, the DCP does not permit any building structure within 6.5m of the street or within the EBL, whichever is greater. It was agreed by the experts that the EBL is in the order of 19m. The proposed structure is setback a minimum of only 6.8m and a maximum of 9.3m.
- 66 It was also agreed that the only structures which may be considered to breach this front setback or building line control under the DCP, and only on the basis of site constraints, are parking structures and no other structures.
- 67 Given the consequences of these breaches and the lack of justification for the extent, location, width or nature of the structure proposed in the front setback area, for the reasons that follow, the application is not supported.
- 68 Firstly, the bulk of what is proposed is not a parking structure. On the evidence of the Council, not disputed by the applicant, only some 30m² of the 120m² structure (or 25%) comprises the double garage. The balance, or majority, is for storage, a workshop and enclosed manoeuvring.
- 69 I do not accept the applicant's submissions that the workshop, storage and enclosed manoeuvring areas are ancillary uses to the garage, and therefore part of the parking structure, when they comprise the majority of the structure.
- 70 Secondly, the development does not retain and enhance vegetation to reduce built form, as required by the DCP, with the evidence indicating vegetation would in fact be reduced, potentially exposing more of the existing and proposed built form on the site than is currently visible from the street.
- 71 The development also does not meet the DCP requirement for 60% of the site to be landscaped. This is, in part, a result of the additional works proposed to accommodate the contended structure involving removal of vegetation and a reduction in landscaping area.

- 72 In addition, I was not persuaded by the evidence that additional trees proposed by the applicant could in fact be planted in the locations indicated for the species proposed (or required) given the fire asset protection zone requirements and required tree protection zones. For example, new canopy trees are to be a minimum of 5m from existing and built structures, and an agreed condition requires this. However, this distance was not achieved in the canopy tree planting proposed in the front setback area. This distance could be reduced to 3m where pier and beam footings are used but this was not proposed albeit such a construction method may be achievable.
- 73 Furthermore, whilst I accept that areas under elevated structures at a certain height may be reasonably used for and therefore counted as part of the onsite landscaping, I do not agree the same applies for landscaping under stairs as the applicant sought. Therefore, the area of landscaping has an even greater non-compliance than argued by the applicant.
- 74 The applicant's Landscape Plan itself identified a number of constraints to achieving the enhanced landscaped outcome argued by the applicant. There was no evidence that these constraints could be overcome to the extent that it would result in landscaped area compliance or the outcomes sought by the DCP for the streetscape and the locality, namely a 'house amongst the trees' with the built form being secondary to the landscaping.
- 75 Finally, the DCP at cl D1.1 requires all parking structures not to be the dominant site feature when viewed from a public place (in this instance, the street) and therefore should be behind the front building line, preferably setback behind the primary building and be no greater in width than 50% of the lot width or 7.5m, whichever is the lesser. None of these requirements are met. Nor does the façade to the structure incorporate, as required, at least two of the design elements listed in cl D1.1.
- 76 In this regard, I agree with Ms Englund that the windows, garage entry and partial setback proposed to the front wall do not meet the objectives for articulation of the front wall sought by the DCP particularly given the proximity and length of this wall to the street. Only a setback increase of 2.5m for the longer 9.775m portion, windows and the garage entry is proposed. This does

not constitute articulation. Furthermore, the DCP requires a maximum wall width to the street of 8m for any structure. What is proposed is a total wall width more than double that with only a 2.5m variation in setback and without articulation. This has the potential to increase the visibility of the structure from the street given its close proximity to Marine Parade.

- 77 At DCP cl D1.8, there are seven circumstances listed whereby the Council may support variations to the front building line. None of those circumstances apply to this application. On steeply sloping sites, reduced setbacks may also be considered, but only for a parking structure.
- 78 Whilst the applicant claimed excavating the structure would improve the visual impact, no conclusive expert evidence on this was provided. I prefer the evidence of Ms Englund that excavating the structure and removing vegetation would only increase the prominence of the (enlarged) dwelling behind.
- 79 Whilst the contended structure may not be the dominant site feature when viewed from the street, the evidence did not demonstrate this and therefore I am unable to conclude that the development overall would meet the DCP objectives of enhancing the existing streetscape or result in a built form that was secondary to landscaping and vegetation.
- 80 In this regard, the proposed breach of the EBL is not limited to the contended structure but also includes enlarged decks at two levels and a new rumpus room. The Council was prepared to support these elements notwithstanding they breach the EBL given the location of the existing dwelling. As indicated, the Council was also prepared to support a new double garage in breach of the EBL. However, the Council was not prepared to support an extra 100m² of new built form in breach of the EBL so that the manoeuvring area for the garage could be enclosed and a large workshop and storage area created.
- 81 I consider this to be a more than reasonable approach by the Council in flexible application of the DCP controls.
- 82 Whilst I accept that there are existing dwellings on the eastern side of Marine Parade with little screening vegetation and where built form dominates landscaping even with generous setbacks, this does not define the majority of

dwellings on the eastern side of Marine Parade and does not reflect the current DCP controls or desired future character of the locality. None of these properties have structures as close as the structure proposed, all having front setbacks in excess of 10m with the majority exceeding 20m. The application proposes a minimum of 6.8m and a maximum of 9.3m, a significant reduction in the building line established by properties on the eastern side of Marine Parade.

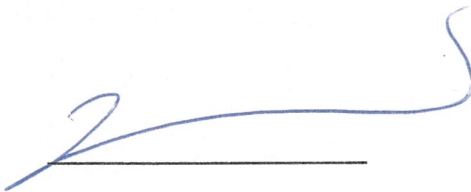
- 83 In this regard, I agree with the Council that the 'de facto building line' on which to determine the 'established building line', and therefore the required front setbacks for new development, can only meaningfully be one derived from drawing a line between the setbacks of existing development on the same side of the street. This is particularly relevant in a street such as Marine Parade where there is a clear distinction between the setbacks on one side, which comprises dwellings on elevated lots having a cliff at their rear, and the other side where lots are generally smaller and lower.
- 84 Even if regard was had to the lesser front setbacks on the western side of Marine Parade, there was no evidence provided by the applicant of what these setbacks were or how they might establish an appropriate front building line for the site.
- 85 In conclusion, I agree with the Council that the outcomes sought by the DCP controls, on which variations to the required front building line may be considered, are not met by the application. In any event, such variations are only for parking structures not the associated uses proposed including an enclosed manoeuvring area.
- 86 I also accept the Council's evidence that, with a reasonable redesign, the extent of the DCP breaches could be significantly reduced and still accommodate a double garage, the required onsite landscaping and screening, some storage and appropriate unenclosed access, as the Council was prepared to support. However, the proposed structure is four times the required size for a double garage.

- 87 No evidence was presented as to the basis for the extent of the structure sought notwithstanding the breaches of DCP controls other than it would provide improved amenity for the applicant.
- 88 The Council, and the Court, accepts the site is a sloping site and has constraints. However, these constraints alone do not warrant the nature of the structure proposed. In particular, there was no evidence provided of a specific constraint which warrants the location, width, or extent of the structure sought.
- 89 Furthermore, no attempt was made by the applicant to consider alternative design options or make any substantive reduction to the extent of the structure proposed. Only the Council's planner, Ms Englund, had prepared possible design alternatives.
- 90 All other aspects of the development, despite also breaching front setbacks and involving vegetation removal, were not opposed by the Council.
- 91 In summary, there was much reliance by the applicant on the effectiveness of landscaping, retained and proposed, to screen the proposed structure. However, the evidence did not demonstrate that the vegetation relied upon could be retained or planted, or would effectively screen the overall development of the site.
- 92 In any event, there is an over-reliance on landscaping as a means of screening the contended structure when, on the evidence, the amount of landscaping is likely to be less than currently exists so that, even if most of the proposed structure was screened by it and excavated below the level of the existing vegetation, the removal of vegetation, and the inability to replant significant vegetation to replace it, would likely expose the more substantive elements of the enlarged two storey dwelling behind it, contrary to the controls.
- 93 The non-complying elements of the application collectively indicate that the development is an overdevelopment of a constrained site and proposes significantly more development forward of the established building line than is supported by the DCP or appropriate given the circumstances. This is particularly having regard to the extent of development proposed at the rear and to the front of the dwelling not opposed by the Council.

- 94 I do not consider that there is any justification to allow DCP control breaches simply to provide extra amenity to the applicant and agree with the Council that the proposed structure is excessive when a parking structure, located in an excavated position on the site, could be supported within the established building without such a significant structure or breach of DCP controls. The applicant has simply chosen not to consider this.
- 95 As I find that the contended structure does not meet the DCP objectives for the locality, the minimum landscaped area requirements for the site, or the controls for structures forward of dwellings, given the outcomes that would result and that no alternative development was sought by the applicant, the application in its entirety is refused.

Orders

- 96 The orders of the Court are:
- (1) The appeal is dismissed;
 - (2) Development Application DA 2017/1200 for alterations and additions to the existing dwelling at 73 Marine Parade, Avalon Beach is refused;
 - (3) The exhibits are returned, except for Exhibits 2, A, B and D.



Jenny Smithson

Commissioner of the Court

