

## STATEMENT OF FACTS AND CONTENTIONS

### COURT DETAILS

Court	Land and Environment Court of New South Wales
Class	1
Case number	2021/48099

### TITLE OF PROCEEDINGS

Applicant **COLLARROY STREET PTY LTD**

Respondent **NORTHERN BEACHES COUNCIL**

### FILING DETAILS

Filed for	<b>Northern Beaches Council</b> , Respondent
Legal representative	Stephen Patterson Wilshire Webb Staunton Beattie
Legal representative reference	SP:JE:118605
Contact name and telephone	Jonathon Ede 02 9299 3311

### PART A – FACTS

The Respondent says that the facts relevant to the determination of Development Application No. DA2020/1453 (“the development application”) are as follows:

#### THE PROPOSAL

1. The development application seeks approval for the demolition of existing structures and the construction of a 4/5 storey mixed use development (shop top housing) containing retail premises, 39 residential apartments and basement and ground level car parking and associated landscaping at No. 1 Alexander Street and No. 4 Collaroy Street, Collaroy (“the site”).
2. Specifically, the proposed development involves the following works:
  - Demolition of all existing structures.
  - Construction of a shop top housing development that includes:
    - Four (4) ground floor retail tenancies with a total GFA of 244 square metres and frontage to both Collaroy and Alexander Streets.

- Thirty-nine (39) residential apartments over three (3) levels. This would include the following apartment mix: four (4) x 1 Bedroom; twenty (20) x 2 bedroom; and fifteen (15) x 3 bedroom.
- Ground level communal games room, gymnasium, surfboard storage room and 2 x roof top communal open space areas.
- Ground level and basement level car parking for ninety-three (93) vehicles, comprising seventy-one (71) residential, eight (8) visitor and fourteen (14) retail spaces with access from Collaroy Street.
- Residential and retail waste areas are serviced via a loading dock accessed from the laneway.
- The proposal also provides a ground level through site connection from Alexander Street to Collaroy Street to the laneway.

## THE SITE

3. The site comprises the following Lots legally identified as:
  - Lots 1 to 7 in SP 5367 (No. 1 Alexander Street); and
  - Lot 1 in DP 881326 (No. 4 Collaroy Street).
4. No. 1 Alexander Street is presently occupied by a three (3) storey shop top housing development comprising five (5) residential units, three (3) retail shops and one (1) storage unit.
5. No. 4 Collaroy Street is presently occupied by a three (3) storey building providing short term accommodation operated as “Sydney Beachouse YHA”. The building contains 65 rooms, 226 beds and a swimming pool. The property has dual street access to Collaroy Street and Alexander Street.
6. The site has primary frontages to Collaroy Street to the north (21.95m) and Alexander Street to the south (70.18m) and a secondary frontage to a laneway to the east (47.935m).
7. The site has a total site area of 2,570sqm.
8. The site is generally flat falling approximately 1 metre across its surface in a south easterly direction. The site does not contain any significant trees.

**Figure 1** below shows an aerial view of the site (shaded in red).

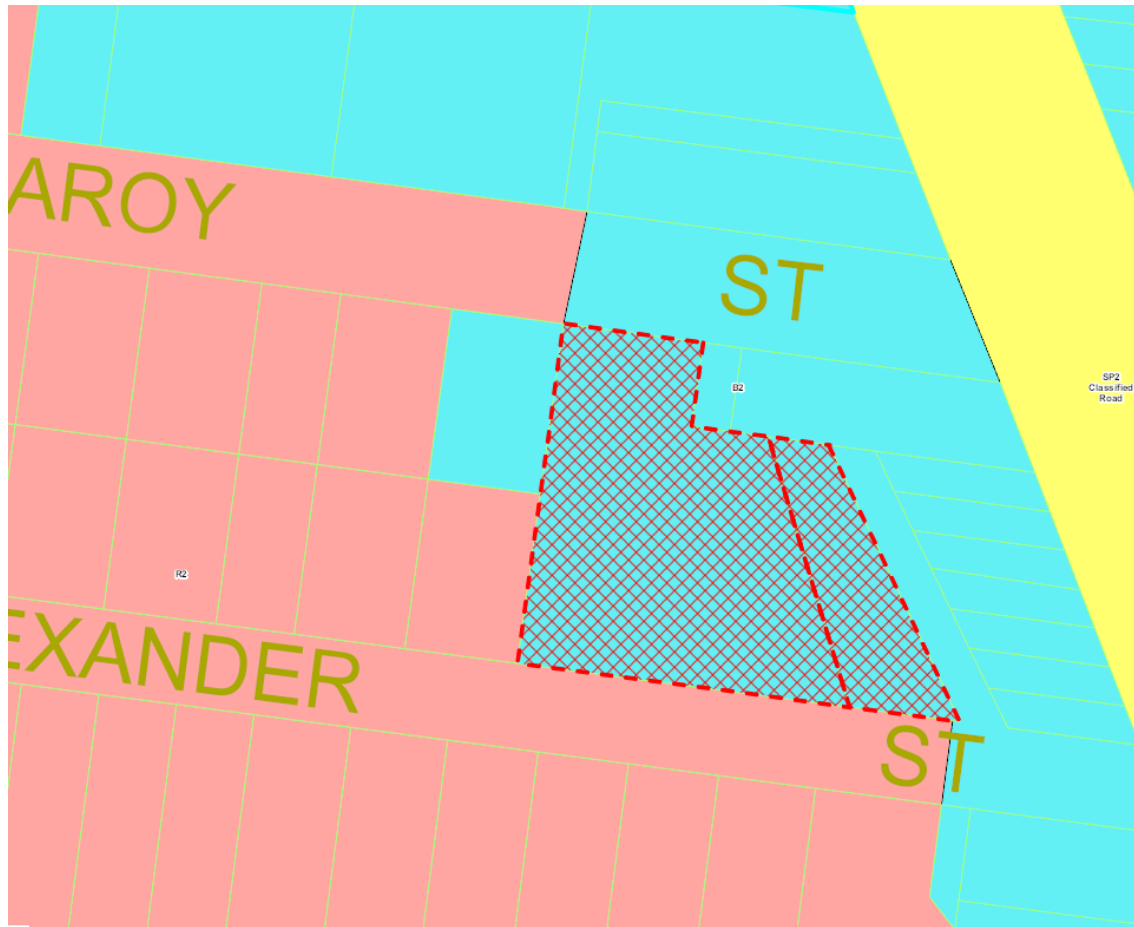


**Figure 1** – Aerial view of the site.

## THE LOCALITY

9. The subject site is zoned B2 *Local Centre* under the provisions of *Warringah Local Environmental Plan 2011* ("WLEP 2011").
10. Adjoining development located on the southern side of Collaroy Street includes a four (4) storey shop top housing development at No. 1119 Pittwater Road (east of the site) and a Council carpark accessed from Collaroy Street (west of the site).
11. The balance of the properties to the west of the site, including those located on the southern side of Alexander Street, are occupied by detached style dwellings reflecting the R2 Low Density Residential zoning.
12. Development to the east of the site has its frontage oriented to Pittwater Road and comprises one (1) and two (2) storey retail and business premises. Collaroy Beach and Beach Reserve is located beyond this.

**Figure 2** below shows the location of the site in context to the zoning.



**Figure 2** – Location of the site within zoning context.

### STATUTORY CONTROLS

13. The following Legislative Instruments, Environmental Planning Instruments and Development Control Plans are relevant to the assessment of this development application:
  - *Environmental Planning and Assessment Act 1979* (“EP&A Act”).
  - *Environmental Planning and Assessment Regulation 2000* (“EP&A Regulation”).
  - *State Environmental Planning Policy No. 55 – Remediation of Land* (“SEPP 55”).
  - *State Environmental Planning Policy No. 65 - Design Quality of Residential Apartment Development* (“SEPP 65”).
  - *State Environmental Planning Policy (Infrastructure) 2007* (“SEPP Infrastructure”).
  - *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004* (“SEPP BASIX”).
  - *Coastal Management Act 2016*.
  - *State Environmental Planning Policy (Coastal Management) 2018* (“SEPP Coastal Management”).

- *Water Management Act 2000.*
- *Warringah Local Environmental Plan 2011 (WLEP).*
- *Warringah Development Control Plan 2011 ("WDCP").*
- *Warringah Section 94A Development Contributions Plan.*

**14. Relevant provisions of the SEPP 55**

- Clause 7 Contamination and remediation to be considered in determining development application.

**15. Relevant provisions of SEPP BASIX**

- Clause 6 Buildings to which Policy applies.

A BASIX Certificate dated 03 November 2020 was submitted with the development application. The Certificate is for thirty-nine (39) units within one (1) residential flat development and confirms that the development will meet sustainability requirements, if it is built in accordance with the commitments.

**16. Relevant provisions of SEPP Infrastructure**

- Clause 45 – Determination of development applications - other development.

**17. Relevant provisions of SEPP Coastal Management**

- Clause 14 – Development on land within the coastal use area.
- Clause 15 – Development in coastal zone generally—development not to increase risk of coastal hazards.

**18. Relevant Provisions of SEPP 65**

SEPP 65 applies to the erection of a new residential flat building (Clause 4).

A residential flat building is defined as a building that comprises or includes:

- 3 or more storeys (not including levels below ground level provided for car parking or storage, or both, that protrude less than 1.2 metres above ground level), and
- 4 or more self-contained dwellings (whether or not the building includes uses for other purposes, such as shops).

The following provisions of SEPP 65 are relevant:

- Clause 2 Aims and Objectives.
- Clause 6 Relationship with other environmental planning instruments.
- Clause 6A Development control plans cannot be inconsistent with Apartment Design Guide with respect to the following matters:

- (i) Visual privacy.
- (ii) Solar and daylight access.
- (iii) Common circulation and spaces.
- (iv) Apartment size and layout.
- (v) Ceiling heights.
- (vi) Private open space and balconies.
- (vii) Natural ventilation.
- (viii) Storage.
- (d) Clause 28 Determination of development applications.
- (e) Clause 30 Standards that cannot be used as grounds to refuse development consent or modification of development consent.
- (f) Schedule 1 Design Quality Principles:
  - (i) Principle 1: Context and neighbourhood character.
  - (ii) Principle 2: Built form and scale.
  - (iii) Principle 3: Density.
  - (iv) Principle 4: Sustainability.
  - (v) Principle 5: Landscape.
  - (vi) Principle 6: Amenity.
  - (vii) Principle 7: Safety.
  - (viii) Principle 8: Housing diversity and social interaction.
  - (ix) Principle 9: Aesthetics.

The EP&A Regulation contains the following provision in Clause 50:

*(1A) If a development application that relates to residential apartment development is made on or after the commencement of the Environmental Planning and Assessment Amendment (Residential Apartment Development) Regulation 2015, the application must be accompanied by a statement by a qualified designer.*

*(1AB) The statement by the qualified designer must:*

- (a) verify that he or she designed, or directed the design, of the development, and*

*(b) provide an explanation that verifies how the development:*

- (i) addresses how the design quality principles are achieved, and*
- (ii) demonstrates, in terms of the Apartment Design Guide, how the objectives in Parts 3 and 4 of that guide have been achieved.*

A statement was submitted with the development application and confirms that a qualified designer directed the design of the proposal together with an explanation of how the development addresses the design quality principles and the objectives of the Apartment Design Guide.

## 19. **Relevant Provisions of WLEP**

### Part 2 Permitted or prohibited development

- 2.1 Land use zones.
- 2.2 Zoning of land to which Plan applies.
- 2.3 Zone objectives and Land Use Table.
- 2.7 Demolition requires consent.

### Part 4 Principal development standards

- 4.3 Height of buildings.
- 4.6 Exceptions to development standards.

### Part 5 Miscellaneous provisions

- 5.3 Development near zone boundaries.
- 5.8 Conversion of fire alarms
- 5.9 Preservation of trees or vegetation
- 5.9AA Trees or vegetation not prescribed by development control plan

### Part 6 Additional local provisions

- 6.1 Acid sulphate soils.
- 6.2 Earthworks.
- 6.4 Development on sloping land.

The following Development Standard applies to the site:

#### Clause 4.3 Height of Buildings

Maximum permitted height: 11.0m.

#### Clause 4.6 Exceptions to development standards

A request to vary the Development Standard pursuant to Clause 4.6 was submitted with the development application.

## 20. **WDCP**

The following provisions of the WDCP are relevant in the assessment of the development application:

### Part A Introduction

- A.5 Objectives

### Part B Built Form Controls

- B2 Number of Storeys
- B6 Merit Assessment of Side Boundary Setbacks.
- B7 Front Boundary Setbacks.
- B10 Merit assessment of rear boundary setbacks.

### Part C Siting Factors

- C2 Traffic, Access and Safety.
- C3 Parking Facilities.
- C4 Stormwater.
- C6 Building over or adjacent to Constructed Council Drainage Easements
- C7 Excavation and Landfill.
- C8 Demolition and Construction.
- C9 Waste Management.

### Part D Design

- D2 Private Open Space
- D3 Noise
- D6 Access to Sunlight
- D7 Views.
- D8 Privacy
- D9 Building Bulk.
- D10 Building Colours and Materials.

- D11 Roofs
- D12 Glare and Reflection
- D14 Site Facilities.
- D18 Accessibility and Adaptability.
- D20 Safety and Security.
- D21 Provision and Location of Utility Services
- D22 Conservation of Energy and Water
- D23 Signs

#### Part E The Natural Environment

- E1 Preservation of Trees or Bushland Vegetation
- E2 Prescribed Vegetation
- E6 Retaining unique environmental features
- E7 Development on land adjoining public open space
- E10 Landslip Risk.

#### Part F Zones and Sensitive Areas

- F1 Local and Neighbourhood Centres

#### Appendices

- Appendix 1 Car Parking Requirements.

### **ACTIONS OF THE RESPONDENT**

21. On 30 July 2020, the Council participated in a pre-lodgement meeting to discuss the proposed development of the site.
22. On 9 November 2020, the development application was lodged with Council.
23. On 24 November 2020, the development application was publicly advertised in a local newspaper and notified to 259 surrounding owners and occupiers in accordance with Council's Community Participation Plan. The public notification was for a period of 21 days and a notice was placed upon the site for the notification period.
24. Council received 152 submissions (not including multiple submissions from the same people) in response to the notification of the development application. Out of the 152 submissions, 136 submissions were in support of the proposal and 16 objected to the proposal.

25. The objections to the proposal raised the following issues:

- (a) That the proposal does not satisfy the WLEP 2011 and WDCP 2011 controls due to the non-compliance with the height and built form of the building.
- (b) The height of the proposal is unreasonable and would result in additional impact when viewed from the surrounding residential properties.
- (c) Excavation and construction impacts on adjoining development. Particularly in relation to noise and structural damage/integrity of adjoining property assets and sewer mains.
- (d) That the development will impact the visual privacy of adjacent properties.
- (e) That the development will impact the acoustic privacy of adjacent properties.
- (f) That the overall height will cause overshadowing and loss of solar access to adjacent properties.
- (g) The development causes unacceptable impacts on existing views and outlook.
- (h) The development has insufficient parking.
- (i) That the proposal will cause an increase in traffic that will raise safety concerns for pedestrians and local vehicle traffic.
- (j) The development is out of character and an overdevelopment of the site.
- (k) That the proposal has insufficient landscaped area.
- (l) Stormwater issues.
- (m) Accessibility issues.

26. The submissions in support of the proposal highlighted the following:

- (n) Improvement of public amenity.
- (o) Delivering much needed parking to the beach area.
- (p) Delivers a low-rise coastal built form that fits with its surrounds and in context of Collaroy's Town Centre.
- (q) Collaroy 'town' itself is in desperate need of considered modernisation.
- (r) Improving the retail offering and retail amenity.
- (s) Enhanced landscaping, green walls and rooftop gardens.
- (t) Revitalisation of the area.
- (u) The proposal would help surrounding business owners.
- (v) Removal of backpackers will be a positive.

27. Referral responses were received from the following external and internal departments:

- **Ausgrid** – No objection subject to conditions.
- **NSW Roads and Maritime Services** – No objection subject to conditions.
- **WaterNSW** – No objection subject to conditions.
- **Building Assessment (Fire and Disability upgrades)** – No objection subject to conditions.
- **Environmental Health (Acid Sulphate)** – No objection.
- **Environmental Health (Industrial)** – No objection subject to conditions.
- **Environmental Health (Contaminated Lands)** – No objection subject to conditions.
- **Landscape** – Objection raised to proposed landscaping.
- **Development Engineering** – Objection raised to stormwater details.
- **Coast and Catchments** – No objection subject to conditions.
- **Water Management** – Objection raised to insufficient stormwater management details.
- **Property Management and Commercial** – No objection subject to conditions.
- **Road Reserve** – No objection.
- **Strategic and Place Planning (Heritage Officer)** – No objection.
- **Strategic and Place Planning (Urban Design)** – Objection raised to the form, bulk and scale of the proposal.
- **Traffic Engineer** – No objection subject to conditions.
- **Waste** – No objection subject to conditions.

28. On 17 December 2020, the development application was presented to the Northern Beaches Design and Sustainability Advisory Panel (“DSAP”). The DSAP concluded that the proposed development could not be supported in its current form due to the following issues:

- Non-compliance with heights and built form controls.
- Concerns in relation to ground and first level common spaces and raised planters, interface and integration with the public domain and lane, retail ceiling heights, provision of deep soil, and the proposed through site link.
- Recommendations were provided by the panel to facilitate a desirable re-design.

29. On 23 February 2021, the Council sent a letter to the applicant advising that there were numerous inconsistencies with relevant controls and identified the issues raised by Northern Beaches Design and Sustainability Advisory Panel; Urban Design Officer; Development Engineer and Landscape Officer.
30. On 24 February 2021, the applicant lodged its appeal against the deemed refusal of the development application.
31. As at the date of filing the Council's Statement of Facts and Contentions, the Council has not determined the development application.

## **PART B - CONTENTIONS**

The Respondent says that the contentions relevant to the refusal of the development application are as follows:

### **B1 - CONTENTIONS THAT WARRANT THE REFUSAL OF THE APPLICATION**

#### **Character**

1. The proposed development should be refused as it is inconsistent with the character of the local area contrary to the provisions of SEPP 65 and WLEP.

#### **Particulars**

- (a) The excessive height of the proposal and the proposed upper storey combined with the lack of setback at the upper storeys has the effect of the building reading as excessive in scale and symptomatic of an overdevelopment of the site.
- (b) The proposal provides insufficient landscape setbacks with no meaningful planting along the front setback to maintain landscape character of the area. The proposal does not integrate with the landscape character of the locality and the proposal is unable to support landscape planting of a size that is capable of softening the built form.
- (c) The proposal provides insufficient setback and stepping to ensure adequate transition between the B2 *Local Centre* and adjoining R2 *Low Density Residential* zoned sites.
- (d) The proposal is inconsistent with the following objectives of the WLEP for the B2 *Local Centre* zone:
  - *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.*
- (e) The proposed development is inconsistent with the provisions of SEPP 65 with respect to the following Design Quality Principles:

- Principle 1 – Context and neighbourhood character;
- Principle 2 – Built form and scale;
- Principle 3 – Density;
- Principle 5 – Landscape; and
- Principle 6 – Amenity.

## Height

2. The proposed development should be refused due to its excessive height and failure to comply with cl.4.3 *Height of Buildings* set out in WLEP which requires a maximum height of 11 metres.

### Particulars

- (a) The proposal has a maximum height of 17.0m exceeding the maximum height control of 11m by approximately 54%.
- (b) The submitted cl 4.6 written request, which seeks to vary the height of buildings development standard in cl.4.3 of WLEP, has not demonstrated that the proposal is consistent with the objectives of the development standard.
- (c) The submitted cl 4.6 written request which seeks to vary the height of buildings development standard has not demonstrated that the proposed development is consistent with the objectives of the B2 *Local Centre* zone and the objectives that underpin the height of buildings development standard.
- (d) The proposal is inconsistent with objectives (a), (b) and (d) set out in cl.4.3 of WLEP as the proposed height is not compatible with the height and scale of surrounding and nearby development, does not minimise visual impact, disruption of views, loss of privacy and loss of solar access and does not minimise the visual impact of development when viewed from public places.
- (e) The submitted cl 4.6 written request is not well founded as it does not demonstrate that compliance with the height of buildings development standard is unreasonable or unnecessary in the circumstances of the case or that there are sufficient environmental planning grounds to justify its contravention.
- (f) The adverse impacts of the proposed development, including on the amenity of neighbouring properties, are directly attributable to the exceedance of the height of buildings development standard.
- (g) The failure of the submitted cl 4.6 written request to demonstrate the outcomes required by cl 4.6(3) and (4) of WLEP means that the variation cannot be supported and, therefore, the development application should be refused.
- (h) The proposal is inconsistent with cl 4.6(5)(b) as there is a public benefit in maintaining the building height development standard in this particular case.

## Built Form

3. The proposed development should be refused as it does not provide a built form which is consistent with and complementary to the existing built forms in the surrounding area.

### Particulars

- (a) The proposed built form incorporates 4 – 5 storeys which exceeds the permitted 11.0m building height by up to 54%.
- (b) The excessive height of the proposal and the proposed upper storey combined with the lack of setback at the upper storeys has the effect of the building reading as excessive in scale and symptomatic of an overdevelopment of the site.
- (c) The proposal does not comply with the provisions of cl.B2 (*Number of Storeys*), cl.B6 (*Merit Assessment of Side Boundary Setbacks*), cl.B7 (*Front Boundary Setbacks*), cl.D9 (*Building Bulk*) and cl.F1 (*Local and Neighbourhood Centres*) of WDCP resulting in an unsatisfactory scale of built form.
- (d) The height, siting and proximity of the proposal to adjoining development will result in unreasonable impacts upon the amenity of adjoining dwellings with regard to visual dominance, privacy, view sharing and solar access.
- (e) The proposal provides insufficient setback and stepping back at upper levels of the building to the western boundary to ensure adequate transition between the B2 *Local Centre* and R2 *Low Density Residential* zoned sites.
- (f) The proposal is a large-scale development that provides no articulation to the side boundaries. In this context, the proposed scale of the development will not be commensurate to that of adjoining sites, the development will visually dominate its surrounds and will be noticeable from the streetscape.
- (g) The development does not integrate with the landscape character of the locality and the proposal is unable to support landscape planting of a size that is capable of softening the built form.
- (h) Insufficient communal open space is provided. The communal open space provided on the ground floor would not receive adequate solar access given its location and the design of the roof overhangs. The proposed communal open space on the northern block roof is not easily accessed for residents of the southern blocks that contain the majority of units.
- (i) The cumulative effect of the non-compliances with the relevant development controls result in an over development of the site with the site being not suitable for the scale and bulk of the proposal.
- (j) The proposal is inconsistent with the provisions of SEPP 65 with respect to the following Design Quality Principles:
  - Principle 1 – Context and neighbourhood character;

- Principle 2 – Built form and scale;
  - Principle 3 – Density;
  - Principle 5 – Landscape;
  - Principle 6 – Amenity.
- (k) The proposal is contrary to the following provisions of ADG:
- 3A – Site Analysis;
  - 3B – Orientation;
  - 3D – Communal and public open space;
  - 3E – Deep Soil Zones;
  - 3F – Visual privacy;
  - 4A – Solar and Daylight Access;
  - 4D – Apartment Size and Layout;
  - 4O – Landscape Design;
  - 4P – Planting on Structures.

#### **Public Interest**

4. The proposed development should be refused as it is not in the public interest and will establish an undesirable precedent in the immediate locality.

#### **Particulars**

- (a) The proposal was notified in the circumstances set out in Part A.
- (b) The proposed development is not in the public interest having regard to the matters raised in the submissions that have been received by Council to the extent that such submissions are consistent with the contentions raised above.
- (c) The proposed development should be refused having regard to the broader public interest of providing development that meets the requirements of design quality, is compliant with the controls and minimises impacts to neighbouring developments.
- (d) The proposed development will establish an undesirable precedent for future development in the locality.

#### **B2 – CONTENTIONS THAT MAY BE RESOLVED BY THE IMPOSITION OF CONDITIONS**

Nil

#### **B3 – CONTENTIONS THAT RELATE TO A LACK OF INFORMATION**

**Solar Access Analysis**

5. The applicant has not provided sufficient information to verify if the proposal will meet Solar and Daylight Access requirements.

**Stormwater**

6. The applicant has not provided sufficient information to enable a proper stormwater assessment.

Particulars

- (a) The submission of the DRAINS model is required to verify the site storage requirements and post development discharges.
- (b) The point of connection to the existing Council pit in Alexander street is not acceptable as this area is subject to minor/major flooding which impacts the property at 1097 Pittwater Road( Entrances in Alexander street). As such the stormwater discharge from the property is to be connected to the existing Council Inlet Pit on the opposite side of Alexander street. A pipe longsection is to be provided drawn at a suitable scale detailing clearances to gas, water and sewer services. The minimum pipe size is to be 375mm RCP.
- (c) The stormwater drainage plans are to make provision for upstream overland flow entering the property.
- (d) A statement addressing how the water in the 20KL rainwater tank will be used in and around the building as well as a MUSIC model file (.sqz).

**SIGNATURE****Signature:****Name:**

Louise Kerr

**Position:**

Director Planning and Place

**Date of signature:**

13 April 2021