

DEVELOPMENT APPLICATION ASSESSMENT REPORT

Application Number:	DA2020/0015
Responsible Officer:	Kevin Short
Land to be developed (Address):	Lot CP SP 4129, 48 A Queenscliff Road QUEENSCLIFF NSW 2096
Proposed Development:	Strata Subdivision of an existing and approved residential flat building
Zoning:	Warringah LEP2011 - Land zoned R2 Low Density Residential
Development Permissible:	No
Existing Use Rights:	Yes
Consent Authority:	Northern Beaches Council
Land and Environment Court Action:	No
Owner:	The Owners of Strata Plan 4129
Applicant:	The Owners of Strata Plan 4129
Application Lodged:	13/01/2020
Integrated Development:	No
Designated Development:	No
State Reporting Category:	Subdivision only
Notified:	03/02/2020 to 17/02/2020
Advertised:	Not Advertised
Submissions Received:	4
Clause 4.6 Variation:	Nil
Recommendation:	Approval
Estimated Cost of Works:	\$ 1.00

PROPOSED DEVELOPMENT IN DETAIL

Development Consent is sought to create two additional strata title units within an existing strata plan and also to transfer the car parking, storage, private terraces and private lift lobby currently with existing exclusive use to the title.

Each strata title unit is proposed to consist of an individual apartment area with provision for private open space areas, additional parking and access to shared common areas.

The approved plans from Development Consent DA2011/0360 for alterations and additions to an existing residential flat building, comprising undercroft Unit (Unit A) and lower ground level and split level unit (Unit B), are consistent with this strata plan.

ASSESSMENT INTRODUCTION

The application has been assessed in accordance with the requirements of the Environmental Planning and Assessment Act 1979 and the associated Regulations. In this regard:

- An assessment report and recommendation has been prepared (the subject of this report) taking into account all relevant provisions of the Environmental Planning and Assessment Act 1979, and the associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon the subject site and adjoining, surrounding and nearby properties;
- Notification to adjoining and surrounding properties, advertisement (where required) and referral to relevant internal and external bodies in accordance with the Act, Regulations and relevant Development Control Plan;
- A review and consideration of all submissions made by the public and community interest groups in relation to the application;
- A review and consideration of all documentation provided with the application (up to the time of determination);
- A review and consideration of all referral comments provided by the relevant Council Officers, State Government Authorities/Agencies and Federal Government Authorities/Agencies on the proposal.

SUMMARY OF ASSESSMENT ISSUES

There are no assessment issues.

SITE DESCRIPTION

Property Description:	Lot CP SP 4129 , 48 A Queenscliff Road QUEENSCLIFF NSW 2096
Detailed Site Description:	<p>The subject site is located on the southern side of Queenscliff Road and is battle axe in shape with an area of 1,081sqm. Existing apartment style housing adjoins the site to the north-west, west, south-west, west and north-east. These apartment style buildings vary in scale between two and five storeys in scale. A single-storey dwelling house occupies the site to the north, No.44 Queenscliff Road.</p> <p>The site is currently occupied by an eleven (11) storey residential flat building comprising of 15 units with two units on each floor, a top floor penthouse, foyer level and basement carparking level. All units have cantilevered and wrap around balconies. The apartment building was constructed in the early 1960's.</p> <p>The subject site contains a steep slope, which has a diagonal fall of 18% in a north to south direction (from Queenscliff Road) towards Queenscliff Beach. The southern boundary of the site adjoins a landscaped reserve which adjoins Queenscliff Beach. Landscaped open space on site is characterised by areas of rock outcrops within the north-</p>

eastern portion of the site and poor quality shrubs, medium size trees ground cover and weeds within the rear (southern) portion of the site.

The site has been subject to substantial cut and fill in order to provide a podium terrace for the existing tower like apartment building on the lower southern portion of the site. The building is the tallest structure and most visually prominent structure on the Queenscliff Headland.

Vehicular access to the site is provided by a steep driveway from Queenscliff Road. On-site parking is provided on site by an outdoor parking area located to the north of the existing building on the ground floor, within the ground floor foyer area and within the basement level.

The subject site is zoned as R2 Low Density Residential and within Land Slip Risk Map - Area B and C.

Map:



SITE HISTORY

Development Consent - DA2009/1471

Development Application DA2009/1471 for Alterations and additions to an existing residential flat building, comprising new tiling of the ground floor car park area and enclosing an undercroft area as a storeroom on the basement level was approved on 6 January 2010.

Development Consent - DA2011/0360

Development Application DA2011/0360 was lodged for alterations and additions to an existing residential flat building. In summary, the proposal comprised the construction of two (2) units, comprising an undercroft Unit (Unit A) and lower ground level and split level unit (Unit B), within the southern portion of the existing apartment building was approved 16 September 2011.

Modification Application - MOD2012/0262

Modification S96 (2) - MOD2012/0262 of Development Consent DA2011/0360 was approved 8 May 2013.

Modification Application - MOD2016/0077

Modification S96 (1A) - MOD2016/0077 of Development Consent DA2011/0360 was approved on 26 July 2016.

Development Consent DA2018/1273

Strata Subdivision of two additional units within an existing residential flat building was granted consent 29 August 2018.

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

The relevant matters for consideration under the Environmental Planning and Assessment Act, 1979, are:

Section 4.15 Matters for Consideration'	Comments
Section 4.15 (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on "Environmental Planning Instruments" in this report.
Section 4.15 (1) (a)(ii) – Provisions of any draft environmental planning instrument	None applicable.
Section 4.15 (1) (a)(iii) – Provisions of any development control plan	Warringah Development Control Plan applies to this proposal.
Section 4.15 (1) (a)(iiia) – Provisions of any planning agreement	None applicable.
Section 4.15 (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation 2000)	<p><u>Division 8A</u> of the EP&A Regulation 2000 requires the consent authority to consider "Prescribed conditions" of development consent. These matters have been addressed via a condition of consent.</p> <p><u>Clause 50(1A)</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer at lodgement of the development application. This clause is not relevant to this application.</p> <p><u>Clauses 54 and 109</u> of the EP&A Regulation 2000 allow Council to request additional information. No additional information was requested in this case.</p> <p><u>Clause 92</u> of the EP&A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This clause is not relevant to this application.</p> <p><u>Clauses 93 and/or 94</u> of the EP&A Regulation 2000 requires the consent authority to consider the upgrading of a building (including fire safety upgrade of development). This clause is not relevant to this application.</p>

Section 4.15 Matters for Consideration'	Comments
	<p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This clause is not relevant to this application.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider the provisions of the Building Code of Australia (BCA). This clause is not relevant to this application.</p> <p><u>Clause 143A</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer prior to the issue of a Construction Certificate. This clause is not relevant to this application.</p>
Section 4.15 (1) (b) – the likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality	<p>(i) Environmental Impact The environmental impacts of the proposed development on the natural and built environment are addressed under the Warringah Development Control Plan section in this report.</p> <p>(ii) Social Impact The proposed development will not have a detrimental social impact in the locality considering the character of the proposal.</p> <p>(iii) Economic Impact The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.</p>
Section 4.15 (1) (c) – the suitability of the site for the development	The site is considered suitable for the proposed development.
Section 4.15 (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs	See discussion on “Notification & Submissions Received” in this report.
Section 4.15 (1) (e) – the public interest	No matters have arisen in this assessment that would justify the refusal of the application in the public interest.

EXISTING USE RIGHTS

- Does the existing use satisfy the definition of "existing use" under the Environmental planning and Assessment Act, 1979 (the 'Act')?

Section 106 of the Act defines an existing use as meaning:

"(a) the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part, have the effect of prohibiting that use, and

(b) *the use of a building, work or land:*

- (i) *for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and*
- (ii) *that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse."*

This necessarily requires the following questions to be answered.

1. Was the use of the building, work or land a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part 4 of the Act, have the effect of prohibiting that use?

Comment:

The existing eleven-storey unit block constructed in the early 1960s comprises a total of 15 units with two units on each floor and a top floor penthouse suite. This development would have been constructed under the County of Cumberland Planning Scheme Ordinance, 27 June 1951, prior to the first EPI for the Warringah LGA which was in 1985

The additional units approved under DA2011/0360 were approved pursuant to WLEP 2000 at which time WLEP 2011 was a draft instrument. Accordingly, the site is considered to benefit from existing use rights applicant with the use of the building commencing as a lawful purpose, prior to the coming into force of Warringah Local Environmental Plan 2011 on 9 December 2011.

The applicant has not provided any additional evidence to substantiate that the use of the building was carried out within one year from the date on which the provision having the effect of prohibiting the use commenced.

- **What is "the land on which the existing use was carried out" for the purposes of cl 42(2) (b) of the Environmental Planning and Assessment Regulation 2000 ("the Regulation")?**

Meagher JA in *Steedman v Baulkham Hills Shire Council* [No. 1] (1991) 87 LGERA 26 stated (at 27) the rule to be applied as follows: *"that if the land is rightly regarded as a unit and it is found that part of its area was physically used for the purpose in question it follows that the land was used for that purpose"*.

Comment:

Having regard to the above case law, it is noted that a part of the area of the land was physically used for the purpose in question and therefore, it is considered that the land was used for that purpose and that existing use rights apply to the whole of the subject site.

- **What are the planning principles that should be adopted in dealing with an application to alter enlarge or rebuild and existing use?**

The judgement in *Fodor Investments v Hornsby Shire Council* (2005) NSWLEC 71, sets out the planning principles which should be applied in dealing with development applications seeking to carry out development on the basis of existing use rights.

The following four principles adopted by the court in this case will have general application in dealing with Development Applications that rely on existing use rights:

1. How do the bulk and scale (as expressed by height, floor space ratio and setbacks) of the proposal relate to what is permissible on surrounding sites?

While planning controls, such as height, floor space ratio and setbacks do not apply to sites with existing use rights; they have relevance to the assessment of applications on such sites. This is because the controls apply to surrounding sites and indicate the kind of development that can be expected if and when surrounding sites are redeveloped. The relationship of new development to its existing and likely future context is a matter to be considered in all planning assessments.

Comment:

The subject application is to strata subdivide the approved additional apartments to be Unit 17 and Unit 18. There are no further physical works proposed.

2. What is the relevance of the building in which the existing use takes place?

Where the change of use is proposed within an existing building, the bulk and scale of that building are likely to be deemed acceptable, even if the building is out of scale with its surroundings, because it already exists. However, where the existing building is proposed for demolition, while its bulk is clearly an important consideration, there is no automatic entitlement to another building of the same floor space ratio, height or parking provision.

Comment:

The existing building is not proposed to be demolished.

3. What are the impacts on adjoining land?

The impact on adjoining land should be assessed as it is assessed for all development. It is true that where, for example, a development control plan requires three hours of sunlight to be maintained in adjoining rear yards, the numerical control does not apply. However, the overshadowing impact on adjoining rear yards should be reasonable.

Comment:

The strata subdivision of the approved works will not result in any further impacts on adjoining properties.

4. What is the internal amenity?

Internal amenity must be assessed as it is assessed for all development. Again, numerical requirements for sunlight access or private open space do not apply, but these and other aspects must be judged acceptable as a matter of good planning and design. None of the legal principles discussed above suggests that development on sites with existing use rights may have lower amenity than development generally.

Comment:

There is no adverse impact on the internal amenity of the development as a result of the proposed strata subdivision.

Conclusion

The use has been approved under a previous EPI (County of Cumberland Planning Scheme Ordinance, 27 June 1951) and therefore, is a lawful use. Subsequently, the use can be retained under the current EPI (WLEP 2011).

NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the relevant Development Control Plan.

As a result of the public exhibition process council is in receipt of 4 submission/s from:

Name:	Address:
Mr Stephen Bruce Simpson	17 Curl Curl Parade CURL CURL NSW 2096
Mrs Virginia Paige Mounsey	8 Glen Street FRESHWATER NSW 2096
Mr Bruce Edward Propert	3 / 42 Queenscliff Road QUEENSCLIFF NSW 2096
Adrienne Robyn Hunter Ranken	Tribella QUIRINDI NSW 2343

The following issues were raised in the submissions and are addressed below:

- Illegal works and work damage from Development Consent DA2011/0360 to adjoining properties including No. 42 Queenscliff Road

Comment:

Development Consent is sought to create two additional strata title units within an existing strata plan and also to transfer the car parking, storage, private terraces and private lift lobby currently with existing exclusive use to the title. The strata plan development will incorporate Development Consent DA2011/0360 granted for alterations and additions to an existing residential flat building, including the construction of two (2) units, comprising an undercroft Unit (Unit A) and lower ground level and split level unit (Unit B).

Raised matters of illegal works and associated adverse neighbour impacts, including privacy, security and loss of views and light, are not a relevant matter of consideration for the strata plan development. These matters should be referred to the certifying authority for investigation as they relate directly to previously approved development applications which involve alterations and additions to the building.

REFERRALS

Internal Referral Body	Comments
Building Assessment - Fire and Disability upgrades	No objections subject to conditions to ensure compliance with the Consent issued and Building Code of Australia.
NECC (Development Engineering)	No objections are raised to the proposed development.

External Referral Body	Comments

External Referral Body	Comments
Ausgrid: (SEPP Infra.)	The proposal was referred to Ausgrid. No response has been received within the 21 day statutory period and therefore, it is assumed that no objections are raised and no conditions are recommended.

ENVIRONMENTAL PLANNING INSTRUMENTS (EPIs)*

All, Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the merit assessment of this application.

In this regard, whilst all provisions of each Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the assessment, many provisions contained within the document are not relevant or are enacting, definitions and operational provisions which the proposal is considered to be acceptable against.

As such, an assessment is provided against the controls relevant to the merit consideration of the application hereunder.

State Environmental Planning Policies (SEPPs) and State Regional Environmental Plans (SREPs)

SEPP 55 - Remediation of Land

Clause 7 (1) (a) of SEPP 55 requires the Consent Authority to consider whether land is contaminated. Council records indicate that the subject site has been used for residential purposes for a significant period of time with no prior land uses. In this regard it is considered that the site poses no risk of contamination and therefore, no further consideration is required under Clause 7 (1) (b) and (c) of SEPP 55 and the land is considered to be suitable for the residential land use.

SEPP (Infrastructure) 2007

Ausgrid

Clause 45 of the SEPP requires the Consent Authority to consider any development application (or an application for modification of consent) for any development carried out:

- within or immediately adjacent to an easement for electricity purposes (whether or not the electricity infrastructure exists).
- immediately adjacent to an electricity substation.
- within 5.0m of an overhead power line.
- includes installation of a swimming pool any part of which is: within 30m of a structure supporting an overhead electricity transmission line and/or within 5.0m of an overhead electricity power line.

Comment:

The proposal was referred to Ausgrid. No response has been received within the 21 day statutory period and therefore, it is assumed that no objections are raised and no conditions are recommended.

Warringah Local Environmental Plan 2011

Is the development permissible?	No
After consideration of the merits of the proposal, is the development consistent with:	
aims of the LEP?	Yes
zone objectives of the LEP?	Yes

Compliance Assessment

Clause	Compliance with Requirements
Part 1 Preliminary	Yes

THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES

The proposal will not significantly effect threatened species, populations or ecological communities, or their habitats.

CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN

The proposal is consistent with the principles of Crime Prevention Through Environmental Design.

POLICY CONTROLS

Northern Beaches Section 7.12 Contributions Plan 2019

As the estimated cost of works is less than \$100,001.00 the policy is not applicable to the assessment of this application.

CONCLUSION

The site has been inspected and the application assessed having regard to all documentation submitted by the applicant and the provisions of:

- Environmental Planning and Assessment Act 1979;
- Environmental Planning and Assessment Regulation 2000;
- All relevant and draft Environmental Planning Instruments;
- Warringah Local Environment Plan;
- Warringah Development Control Plan; and
- Codes and Policies of Council.

This assessment has taken into consideration the submitted plans, Statement of Environmental Effects, all other documentation supporting the application and public submissions, and does not result in any unreasonable impacts on surrounding, adjoining, adjacent and nearby properties subject to the conditions contained within the recommendation.

In consideration of the proposal and the merit consideration of the development, the proposal is considered to be:

- Consistent with the objectives of the DCP

- Consistent with the zone objectives of the LEP
- Consistent with the aims of the LEP
- Consistent with the objectives of the relevant EPIs
- Consistent with the objects of the Environmental Planning and Assessment Act 1979

It is considered that the proposed development satisfies the appropriate controls and that all processes and assessments have been satisfactorily addressed.

RECOMMENDATION

THAT Council as the consent authority grant Development Consent to DA2020/0015 for Strata Subdivision of an existing and approved residential flat building on land at Lot CP SP 4129, 48 A Queenscliff Road, QUEENSCLIFF, subject to the conditions printed below:

DEVELOPMENT CONSENT OPERATIONAL CONDITIONS

1. **Approved Plans and Supporting Documentation**

The development must be carried out in compliance (except as amended by any other condition of consent) with the following:

a) Approved Plans

Architectural Plans - Endorsed with Council's stamp		
Drawing No.	Dated	Prepared By
Sheet 1 of 13 Sheets, Sheet 2 of 13 Sheets, Sheet 3 of 13 Sheets, Sheet 4 of 13 Sheets, Sheet 5 of 13 Sheets, Sheet 6 of 13 Sheets, Sheet 7 of 13 Sheets, Sheet 8 of 13 Sheets, Sheet 9 of 13 Sheets, Sheet 10 of 13 Sheets, Sheet 11 of 13 Sheets, Sheet 12 of 13 Sheets & Sheet 13 of 13 Sheets,	1/11/2019	Total Surveying Solutions

b) Any plans and / or documentation submitted to satisfy the Conditions of this consent.

In the event of any inconsistency between conditions of this consent and the drawings/documents referred to above, the conditions of this consent will prevail.

Reason: To ensure the work is carried out in accordance with the determination of Council and approved plans.

CONDITIONS THAT MUST BE COMPLIED WITH PRIOR TO THE ISSUE OF ANY STRATA SUBDIVISION OR SUBDIVISION CERTIFICATE

2. **Compliance with Relevant Legislation**

Prior to the issue of the Strata Plan of Subdivision (including any Stratum), all relevant matters pertaining to this Plan, are to be satisfied to the satisfaction of the Certifying Authority, and evidence provided that the Plan complies with clause 17 Strata Schemes Development

Regulation 2016 and the relevant parts of Section 58 Strata Schemes Development Act 2015.

Reason: To ensure compliance with the Consent issued, compliance with relevant legislation, and to ensure adequate provision is made, where required for fire safety, occupant safety, egress, access and appropriate facilities in the premises for building occupants.

3. **Occupation Certificate**

Prior to the issue of any Strata Subdivision Certificate, a Final Occupation Certificate is to be provided to the Certifying Authority.

Reason: To ensure compliance with the Consent issued, compliance with relevant legislation, and to ensure adequate provision is made, where required for fire safety, occupant safety, egress, access and appropriate facilities in the premises for building occupants.

In signing this report, I declare that I do not have a Conflict of Interest.

Signed



Kevin Short, Planner

The application is determined on //, under the delegated authority of:



Claire Ryan, Acting Development Assessment Manager