

26 April 2018

**Urgent Attention: Mr Benjamin Price, Officer**

Chief Executive Officer  
Northern Beaches Council  
1 Belgrave Street  
**MANLY NSW 1655**

Dear Chief Executive Officer

**SECTION 4.55(1A) EPAA (S96) APPLICATION NO MOD2018/0180  
77 BOWER STREET MANLY  
MODIFICATION OF DEVELOPMENT CONSENT DA269/2015 GRANTED FOR  
CONSTRUCTION OF A DWELLING HOUSE**

**1.0 BACKGROUND**

We are town planners and act on behalf of Jason and Sharon Halliwell, who resides at No 81 Bower Street Manly. Our client's property is directly adjacent and to the west of No 77 Bower Street.

The relevant local statutory planning control, in this case, is the *Manly Local Environmental Plan 2013* (MLEP). Pursuant to the provisions in the MLEP, the subject property is zoned E3 Environmental Management. The maximum height of a building is 8.5m, and the maximum Floor Space Ratio (FSR) is 0.45:1, under this environmental planning instrument.

The total site area of the property is approximately 698.8 sqm.

Council is currently considering a S4.55(1A) Application, previously known as S96 (1A), in respect of the subject property which involves modification of Development Consent, DA269/2015, granted for the erection of a dwelling house.

**2.0 SITE LOCATION AND DESCRIPTION**

The property is located on the southern side of Bower Street and has a commanding north easterly aspect towards the Pacific Ocean (Cabbage Tree Bay) and Manly Beach.

The land in question is a parallelogram-shaped allotment and has a dual street frontage, facing Bower Street to the north and Montpelier Place to the south.

The property is legally described as Lot 74 in DP 8075.

The locality can be described as a residential area, with a somewhat green leafy character.

Manly is a diverse residential neighbourhood where smaller shops and community facilities cater for locals as well as tourists. The precinct contains dramatic topography, with attractive tree-lined streetscapes. Many properties on the southern side of Bower Street have pedestrian access only, set back behind masonry walls, with vehicular access via Montpelier Place to the south.

The residential allotment pattern and orientation in the immediate vicinity comprise long parallelogram shaped lots sloping downwards in a north-northeast direction (in the view cone of of the aspect) giving rise to a significant potential for environmental impacts as between neighbours.

### **3.0 THE PROPOSAL**

The application proposes significant amendments to the approved plans and consent conditions of DA269/2015.

**For reasons as stated hereunder, this application cannot be approved under clause 4.55(1A) EPAA because the nature of the proposal is such that it is not a modification involving minimal environmental impact. In our view, on the contrary, the proposal will cause significant environmental impacts, impacts which we are confident the Council Officers will agree are both significant and material. The application should be rejected out of hand and the applicant advised that it must be re-submitted under s4.55(2) EPAA.**

Proposed modifications include adjustments to the location of the swimming pool, changes to internal room configurations, removal of Condition ANS04 (a significant tree), changes to the roof plan, floor level RL adjustments, changes to window sizes and a proposed external staircase.

### **4.0 NATURE OF SUBMISSION**

Having considered the site and its surrounds, the details of the approved development consent and plans, and the application currently before Council; it is our view that many of the proposed modifications do not warrant support and Council should therefore not approve the application in the current form. This submission will, therefore, constitute an objection to the modification application as lodged.

The SEE states as follows at Page SEE02 *"the modifications do not adversely [sic] impact on the amenity of the surrounding area and as such the development is considered to be substantially the same as the approved DA269/2015 by Manly Council and can therefore be assessed in accordance with Section 79C of the Environmental Planning and Assessment Act 1979."*

This submission details with specificity the way the modification application contradicts the statement above, penned by the author. The objection is based various grounds described in the following paragraphs.

## **5.0 COMMENTS ON THE MODIFICATION APPLICATION**

There are matters in this modification application that, in our respectful opinion, require attention and alteration (quite apart from considerations relating to the proper making of the application).

### ***Swimming Pool***

The proposal suggests adjustments to the swimming pool location, so that the pool will be aligned with the masonry entry wall. This will result in a reduced setback to the western boundary from 4690mm to 3790mm, moving the pool 900mm closer to the boundary of 81 Bower Street Manly.

The swimming pool, as approved, is located within the front setback of the property. Clause 4.1.9(a) of the MDCP provides that swimming pools **should not be located within the front setback area**. The variation of this control would suggest consistency with the objectives of Clause 4.1.9 (Swimming Pools, Spas and Water Features) is paramount.

The objectives for 'swimming pools' per Clause 4.1.9 of the MDCP are repeated below:

- *To be located and designed to maintain the privacy (visually and aurally) of neighbouring properties and to minimise the impact of filter noise on neighbouring properties;*
- *To be appropriately located so as not to adversely impact on the streetscape or the established character of the locality;*
- *To integrate landscaping; and*
- *To become an emergency water resource in bush fire prone areas.*

The relocation of the swimming pool closer to the western boundary will only work to amplify the imposition of visual and aural privacy impacts caused to the occupants of 81 Bower Street, as a result of the pool being located in the front setback area. The proposed changes are totally inconsistent with the objectives for swimming pools, per the MDCP. Further, swimming pools naturally encourage the congregation of people into overflow entertainment areas, another reason for their exclusion from the front setback zone. Moving the pool closer to the western boundary not only results in any users of the pool being physically closer to 81 Bower Street but also increases the allowable area for entertainment and associated noise, resulting in greater visual/aural interference to the outdoor living spaces at 81 Bower Street Manly.

### ***Landscaping***

Per *Manly Local Environmental Plan (2013)*, erection of a dwelling house is permissible in zone E3 with development consent subject to the discretion of

Council and based on an assessment against development controls, zone objectives and merit. The subject property is zoned E3 per MLEP 2013.

In E3 zone any development must respond sensitively to environmental constraints including as regards ecological and aesthetic issues. One of the objects of E3 zones per the MLEP is... *'To ensure that the height and bulk of any proposed buildings or structures have regard to existing **vegetation [our emphasis]**, topography and surrounding land uses'*.

In addition, the landscaped area is a fundamental standard that is provided in the MDCP to assist in controlling development density. Landscaping allows increased privacy and shade. The aforementioned objectives of MLEP and MDCP will be compromised and indeed defeated, if the consent authority approves the proposed modification. The subject application proposes to strike out Condition ANS04 of DA269/2015, which provides:

#### **ANS04**

**The existing tree near the western boundary, adjacent to the proposed terrace to Level 01, is to be retained and protected during all stages of construction. Plans are to be suitably amended, prior to the issue of any Construction Certificate.**

**Reason: To preserve privacy between No. 77 and No.81 Bower St.**

This condition is essential to the preservation of visual privacy afforded to 81 Bower Street. Page SEE02 states that *"there is no change to the impact of the proposed on the neighbouring properties with the exception of item 7 - tree to be removed"*. This statement suggests **that the applicant in fact acknowledges that the removal of the existing tree near the boundary WILL cause amenity impacts** to the occupants of the neighbouring property, 81 Bower Street.

The applicant has attempted to justify the removal of Condition ANS04 by stating that the tree is deciduous, and, as such, provides privacy only in the spring to summer months. It should be noted that it is during the warmer spring to summer months that the occupants of 81 Bower Street are more likely to use the outdoor living spaces and therefore placing even greater importance on the maintenance of privacy during the warmer months of the year. Further, the bulk of the tree would still work to provide an obscured line of sight and some form of privacy, even when bare of its leave in the winter months. The fact that the tree is deciduous is a nonsensical argument on the applicants part and demonstrates a lack of sincerity. It appears that this so called argument is simply a cynical attempt to 'pull the wool over the Councils eyes', in circumstances where it was always intended to remove the tree or at least bring about its demise through a lack of protection and maintenance.

It is noted that consent was granted, by the former Manly Council, in light of a number of both persuasive and valid submissions made by various nearby residents, including our client.

The consent that issued was strictly conditioned in a number of significant respects. One such condition included ANS04. At present, ANS04 is a condition that applies and therefore the existing tree near the western boundary, adjacent to the proposed terrace to Level 01, must be protected until such time as Council advises that it no longer requires protection (by virtue of removal of the condition – an outcome that we just cannot see as being in any way reasonable). Our observation is that the tree **is not being protected**. A recent site visit to our client's property has identified the tree to have been lopped, is looking very sickly, with there being no visible physical protection provided to the tree. A breach of Condition 46 (4LD02) of DA269/2015 is also noted regarding tree protection measures. The current state of the subject tree and the pending S4.55(1A) application would suggest the applicant's intentions were never to retain or protect this tree.

The tree in question is a mature tree, and any proposed replacement tree would take years to achieve the same level of maturity and thus privacy that is, or was, provided. Further, we note condition ANS05 provides that '*a landscaped buffer is to be provided along the western boundary*' **in additional to** retention of the existing tree. Removal of the former condition in this case, affects compliance with the other.

The SEE accompanying the s4.55(1A) application states that a landscape plan is attached to the proposal (page SEE01); however, no landscape plan appears to be included in the proposal nor provided as a separate document per the Council DA tracking system. We believe that absence of necessary plans diminishes the chances of determining the actual adverse impacts of the proposed modifications. If any of the landscaping, as approved in DA269/2015, is proposed to be changed then detailed landscape plans should be provided with the S4.55(1A) application so any modification proposed, can be fully assessed by the Council officers hopefully with the support of local residents and their respective advisers.

Condition ANS04 is imperative to the maintenance of privacy between 77 and 81 Bower Street. This condition was provided as a precursor to the grant of consent, because it was recognised by the consent authority that it would reduce the impact of the vast bulk and form created by the dwelling house proposed to be approved. The condition 'had work to do'. We strongly believe that condition ANS04 should NOT be deleted but rather condition ANS04 must be policed by Council and the tree subject to the condition must in turn, be stringently protected, as a matter of particular urgency. **This requires action on the part of Council NOW.**

### ***Floor Space Ratio***

Clause 4.4 of the MLEP provides that the maximum Floor Space Ratio (FSR) for a building on any land is not to exceed the FSR shown for the land on the *Floor Space Ratio Map*. No 81 Bower Street Manly is highlighted to have a maximum floor space ratio of 0.45:1. This measure of development density provides a useful measure in testing building bulk and scale.

DA269/2015 was approved with a variation to this development standard. The approved dwelling has a maximum FSR of 0.51:1, a 6% variation. The departure

from the FSR control, as approved, is relatively minor, notwithstanding our belief that the building, as approved, is excessive, no matter the purported justification.

The subject s4.55(1A) application proposes to increase the Gross Floor Area by 95.22 square metres and thus **increasing the FSR to 0.65:1**.

Proposed modifications include extensive reconfiguration of floor space, primarily at the 'entry level' where 'service' areas have been converted to floor space, resulting in significant increases to the FSR. It should be noted that the applicant has not addressed changes to the FSR in its modification application nor the provided plans. FSR calculations are briefly mentioned in the provided SEE with no further justification as regard to increased departure from the FSR standard. No longer can the departure from the development standard be considered 'minor' but rather demonstrates the enormous scale of the proposed built form. The development is such that it exceeds the maximum FSR to an unsatisfactory level, and again the planning control must have some 'work' to do.

The manner in which the applicant has attempted to increase the FSR shows complete disregard for the planning controls. It is questionable if compliance was ever the applicant's intentions, as the objectives of the FSR control to reduce bulk and scale have been completely ignored. In all the circumstances, Council ought not to take a backwards step on that which is required by the consent which, we submit, was appropriately conditioned in the interests of those who would be detrimentally affected by the development, in particular, our client and his family and the occupant of No 75 Bower Street.

### ***Insufficient Provision of Information***

The application proposes 15 changes to existing plans and consent conditions in total, and it also includes six different changes to doors and windows. Modifications are proposed to the orientation and size of the windows at the western boundary. The provided plans do not provide sufficient information, including elevations, to determine the level of impact that may be caused to the neighbours. Council must call for additional information to allow a proper assessment.

Furthermore, a landscape plan is not provided; though the SEE states that same is provided. As addressed above, there is a 20% departure from the FSR standards per the submitted application. Nonetheless, no information and justification are provided in the application with regard to FSR standards. In our opinion, the lack of information provided makes it difficult to fully assess and determine the proposed s4.55(1A) application notwithstanding that a clause 4.55 application does not need to be supported by a clause 4.6 variation request, as a matter of law.

## **7.0 CONCLUSION**

In a 'cumulative sense' and bearing in mind the objectives of the EPI, LEP and DCP, the adverse consequences of the proposed modifications lead us to a conclusion that impacts will be completely unacceptable by virtue of the current iteration. Whilst currently approved plans are likely to create some visual and aural privacy impacts to our client, changes proposed will further increase these

amenity impacts to the point where they become intolerable and make such impacts nothing short of calamitous for our clients. The proposal is an example of a development which lacks sensitivity to its surrounds and does not respond at all well to the character of the local area, in a zone where there is an emphasis on protection of the environment.

In our opinion, the modification application currently with the Council should not be approved. It should be rejected. If the applicant lodges a further similar application pursuant the correct provisions, then this should be refused. The Council should not allow removal of the existing tree at the western boundary which provides pivotal privacy protection to 81 Bower Street. The development contravenes the FSR control even further and is inconsistent with several of the objectives of both the MLEP and the MDCP. The proposal is completely unacceptable from a planning perspective

Yours faithfully,

**TURNBULL PLANNING INTERNATIONAL PTY LIMITED**



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