

## DEVELOPMENT APPLICATION ASSESSMENT REPORT

<b>Application Number:</b>	DA2022/2207
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<b>Responsible Officer:</b>	Jordan Davies
<b>Land to be developed (Address):</b>	Lot A DP 358783, 30 Abernethy Street SEAFORTH NSW 2092
<b>Proposed Development:</b>	Demolition works and construction of a dwelling house including swimming pool
<b>Zoning:</b>	Manly LEP2013 - Land zoned R2 Low Density Residential
<b>Development Permissible:</b>	Yes
<b>Existing Use Rights:</b>	No
<b>Consent Authority:</b>	Northern Beaches Council
<b>Delegation Level:</b>	DDP
<b>Land and Environment Court Action:</b>	No
<b>Owner:</b>	Adam Scott Mcdougall Jasmin Alicia Bobyk
<b>Applicant:</b>	Luxitecture Pty Ltd

<b>Application Lodged:</b>	03/01/2023
<b>Integrated Development:</b>	No
<b>Designated Development:</b>	No
<b>State Reporting Category:</b>	Residential - Single new detached dwelling
<b>Notified:</b>	22/08/2023 to 05/09/2023
<b>Advertised:</b>	Not Advertised
<b>Submissions Received:</b>	7
<b>Clause 4.6 Variation:</b>	4.3 Height of buildings: 29.4% 4.4 Floor space ratio: 8.25%
<b>Recommendation:</b>	Refusal

<b>Estimated Cost of Works:</b>	\$ 2,888,000.00
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### Executive Summary

This development application seeks consent for demolition of an existing dwelling and construction of a new dwelling house and swimming pool.

The application is referred to the DDP as seven (7) unique submission have been received and there is a departure of more than 10% from the height of buildings development standard.

The application is referred to the Development Determination Panel (DDP) due to an exceedance of

the 8.5m Height of Buildings (HOB) Development Standard under Clause 4.3 MLEP 2013. The height of the building is between 6.2m and 11m, a maximum departure of 29.4% from the development standard. The application is accompanied by a comprehensive Clause 4.6 variation request which identifies that breach of the standard is a result of the extremely steep site topography which consists of a series of rock boulders which sit within the building footprint and result in extremely steep fall across the site. Despite the technical building height breach, the height and scale of the building is compatible with the adjoining buildings which consist of three storey buildings with elevated balconies with a similar maximum height.

The proposal also results in a departure of 8.25% from the Floor Space Ratio (FSR) development standard. The Manly LEP 2013 prescribes an FSR of 0.4:1 for the site and the proposal has an FSR of 0.433:1. The application is accompanied by a Clause 4.6 variation request which explains that the variation to the FSR standard arises due to the site being an 'undersized allotment' as identified within the Manly DCP. It is noted that the FSR is consistent with the FSR variations permitted within Manly DCP for undersized allotments and as such, the exceedance is acceptable.

The application was notified and received seven (7) unique submissions from the surrounding properties. Concerns raised in the objections predominantly relate to view loss (from 4 properties), privacy impacts, building bulk and scale, stormwater and non-compliance with the building form controls DCP/LEP. Each of these issues are addressed in detail throughout the report. Of note, a detailed view sharing assessment is undertaken and the proposal has been found to result in an acceptable view sharing outcome for the surrounding properties, despite the departures from the height and FSR control.

There is a residual issue with the driveway gradient as the amended plans received during the assessment had not adequately addressed Council's Engineers concerns in relation to the gradient of the driveway (due to the development being shifted eastward to resolve view sharing). This issue could conceivably be addressed via a minor design amendment (i.e raising the garage level approximately 400mm) however, this information has not been forthcoming at the time of finalising the assessment report and as such, the recommendation is refusal due to the unresolved issue of the driveway gradient which does not comply with Council's low profile design specification.

Furthermore, Council's engineer is not satisfied with the information provided from the applicant's geotechnical engineer in relation to stormwater management. As such, until this information is provided, the application is recommended for refusal.

Whilst the assessment has found that the application is an acceptable built form and retains reasonable amenity for the surrounding properties, this report concludes with a recommendation that the DDP refuse the application due to the outstanding unresolved engineering matters at the time of finalising this assessment report.

## **PROPOSED DEVELOPMENT IN DETAIL**

The application seeks to demolish the existing structures on the site and construct a new dwelling house and swimming pool.

Specifically, the proposal consists of:

### **Basement Level (RL 50.65)**

- Rumpus Room which will open out to the entertaining deck and pool area.
- Storage and plant rooms
- Guest bedroom
- Bathroom

- The entertaining deck will include a breakfast bar and BBQ area.

#### **Ground Floor (RL53.85)**

- 3 bedrooms with ensuites. The master bedroom will include a walk-in-robe. The bedrooms will have access to a balcony.
- Study

#### **First floor (RL 57.05)**

- Open plan living/dining/kitchen. Kitchen will include a butlers pantry. This will open out to a rear facing balcony.
- Laundry
- Study
- Bathroom
- 2 car garage

An internal lift provides access to each level. A clerestory roof feature will house the lift overrun and provide increased solar access internally.

A new swimming pool with cabana is proposed. Stormwater management plans and landscape plans accompany this application.

### **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**

Manly Local Environmental Plan 2013 - 4.6 Exceptions to development standards

Manly Local Environmental Plan 2013 - 6.2 Earthworks

Manly Local Environmental Plan 2013 - 6.4 Stormwater management

Manly Local Environmental Plan 2013 - 6.5 Terrestrial biodiversity

Manly Local Environmental Plan 2013 - 6.9 Foreshore scenic protection area

Manly Local Environmental Plan 2013 - 6.12 Essential services

Manly Development Control Plan - 3.4.1 Sunlight Access and Overshadowing

Manly Development Control Plan - 3.4.2 Privacy and Security  
 Manly Development Control Plan - 3.4.3 Maintenance of Views  
 Manly Development Control Plan - 4.1.2 Height of Buildings (Incorporating Wall Height, Number of Storeys & Roof Height)  
 Manly Development Control Plan - 4.1.3 Floor Space Ratio (FSR)  
 Manly Development Control Plan - 4.1.4 Setbacks (front, side and rear) and Building Separation  
 Manly Development Control Plan - 4.1.9 Swimming Pools, Spas and Water Features

## SITE DESCRIPTION

<b>Property Description:</b>	Lot A DP 358783 , 30 Abernethy Street SEAFORTH NSW 2092
<b>Detailed Site Description:</b>	<p>The subject site consists of one (1) allotment located on the western side of Abernethy Street.</p> <p>The site is regular in shape with a frontage of 20.6m along Abernethy Street and a depth of 33.53m. The site has a surveyed area of 692.8m<sup>2</sup>.</p> <p>The site is located within the R2 Low Density Residential Zone zone and accommodates a two storey dwelling house and swimming pool.</p> <p>The site has a steep topography which falls sharply from the eastern to western boundary. There is a relatively level section of land at the eastern side of the site, before the site falls at a 1 in 2 grade beneath the existing building footprint. There are a series of rock outcrops which are situated beneath the building footprint. The land has an overall fall of 12m across the site.</p> <p>The site is void of significant vegetation within the site, with low lying shrubs and trees in the backyard. There are some well established canopy trees on adjoining sites, including a mature gum tree to the west of the site which is 26m tall.</p> <p><b>Detailed Description of Adjoining/Surrounding Development</b></p> <p>Adjoining and surrounding development is characterised by detached dwelling houses and parking structures. The buildings on the western side of Abernethy street are characterised by street level access, maintaining a single storey appearance fronting the street. As viewed from the west, the buildings present a three stories due to the topography of the land and filling of the lower levels of the building footprint. Directly to the north of the site is a three storey dwelling house. Directly to the south of the site is a three dwelling house. To the eastern side of the street are two storey dwellings with garage/basement beneath.</p>

Map:





## SITE HISTORY

The land has been used for residential purposes for an extended period of time. A search of Council's records has revealed the following relevant history:

- Application **10.2017.165.1** for Alterations and additions to the existing dwelling house was approved on 15/09/2017 by Northern Beaches Council. The works consisted of a fence.
- **DA 171/09** for Alterations and Additions to a dwelling house was approved on 2/12/09 by Manly Council.

### History of Subject Application

On 9 May 2023, Council wrote to the applicant requesting additional information and amendments in regards to the building height, view sharing, privacy, solar access and works within the road reserve.

On 16 August 2023, Council received a set of amended plans and additional information, including an updated Clause 4.6 variation in response to the RFI.

The application was re-notified between 22 August and 5 September due to the amended plans and additional information received.

On 27 October, Council received an amended set of plans in response to the second engineering and road asset referrals. The changes included the proposed demolition of the existing fencing within the road reserve and relocation of the proposed letterbox outside of the road reserve (as requested by Road Asset Team), raising of the garage level by 100mm to respond to Council's Engineers comments about the driveway profile.

The changes to the proposal are considered to be minor and do not give rise to additional impact, as such, the application was not required to be formally re-notified in accordance with the Northern Beaches Community Consultation Plan.

## 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	There are no current draft environmental planning instruments.
Section 4.15 (1) (a)(iii) – Provisions of any development control plan	Manly 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 2021 (EP&A Regulation 2021)	<p><u>Part 4, Division 2</u> of the EP&amp;A Regulation 2021 requires the consent authority to consider "Prescribed conditions" of development consent. These matters can be addressed via a condition of consent.</p> <p><u>Clause 29</u> of the EP&amp;A Regulation 2021 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 36 and 94</u> of the EP&amp;A Regulation 2021 allow Council to request additional information. Additional information was requested in relation to building height, road reserve, shadow diagrams and Clause 4.6. This information was provided and considered as part of the assessment.</p> <p><u>Clause 61</u> of the EP&amp;A Regulation 2021 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This matter can be addressed via a condition of consent.</p> <p><u>Clauses 62 and/or 64</u> of the EP&amp;A Regulation 2021 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> <p><u>Clause 69</u> of the EP&amp;A Regulation 2021 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This matter can be addressed via a condition of consent.</p> <p><u>Clause 69</u> of the EP&amp;A Regulation 2021 requires the consent</p>

Section 4.15 Matters for Consideration	Comments
	authority to consider the provisions of the Building Code of Australia (BCA). This matter can be addressed via a condition of consent.
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) <b>Environmental Impact</b> The environmental impacts of the proposed development on the natural and built environment are addressed under the Manly Development Control Plan section in this report.</p> <p>(ii) <b>Social Impact</b> The proposed development will not have a detrimental social impact in the locality considering the character of the proposal.</p> <p>(iii) <b>Economic Impact</b> 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 be contrary to the public interest.

## EXISTING USE RIGHTS

Existing Use Rights are not applicable to this application.

## BUSHFIRE PRONE LAND

The site is classified as bush fire prone land. Section 4.14 of the Environmental Planning and Assessment Act 1979 requires Council to be satisfied that the development conforms to the specifications and requirements of the version (as prescribed by the regulations) of the document entitled Planning for Bush Fire Protection.

A Bush Fire Report was submitted with the application that included a certificate (prepared by Kristan Dowdle, dated 17 March 2022) stating that the development conforms to the relevant specifications and requirements within Planning for Bush Fire Protection. The recommendations of the Bush Fire Report can be included as conditions of consent.

## NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited from 22/08/2023 to 05/09/2023 in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2021 and the Community Participation Plan.

As a result of the public exhibition process council is in receipt of 7 submission/s from:

<b>Name:</b>	<b>Address:</b>
Mr Richard Van Brugge	32 Abernethy Street SEAFORTH NSW 2092
Mark Horsley	34 Abernethy Street SEAFORTH NSW 2092
Mr Nigel Shaun Christopher Heap	35 Abernethy Street SEAFORTH NSW 2092
Corona Projects Pty Ltd	PO Box 1749 BONDI JUNCTION NSW 1355
Mr Ian Trevor McKnight Mrs Gayle Rosalee McKnight	28 Abernethy Street SEAFORTH NSW 2092
Mr Jingwei Xu The Planning Hub	23 Abernethy Street SEAFORTH NSW 2092
Ms Susan May Kluss Mr Sam Liuzzo	25 Abernethy Street SEAFORTH NSW 2092

One (1) submission was received in support, with six (6) submissions raising concerns with the proposal.

The following issues were raised in the submissions:

- Visual Privacy for two adjoining properties
- View sharing and view impacts for surrounding properties
- Visual Bulk and Scale of the building
- Overshadowing from development
- Stormwater impacts for downstream properties
- Geotechnical Risks and construction impacts due to vibration/excavation
- Non-compliance with side setbacks
- Gable roof form is not compatible with the streetscape
- Exceedance of development standards

The above issues are addressed as follows:

- *Visual Privacy for two adjoining properties*

Comment: Visual privacy is dealt with under the discussion against Clause 3.4.2 MDCP and the proposal is found to be reasonable with regards to visual privacy.

- *View sharing and view impacts for surrounding properties*

Comment: View sharing is dealt with under the discussion against Clause 3.4.3 Maintenance of Views MDCP and the proposal is found to be reasonable with regards to view sharing.

- *Visual Bulk and Scale of the building*

Comment: Visual bulk and scale is dealt with under the assessment of the building height

variation, within the Clause 4.6 Variation assessment later in this report. The proposal is found to be compatible with the bulk and scale of the surrounding buildings

- *Overshadowing from development*

Comment: Overshadowing and solar access is dealt with under the discussion against Clause 3.4.1 Sunlight Access and Overshadowing MDCP and the proposal is found to result in a compliant amount of solar access to be maintained for the surrounding properties.

- *Stormwater impacts for downstream properties*

Comment: The application has been considered by Council's development engineers with regard to stormwater drainage. The applicant was denied a downstream easement to dispose of stormwater and as such, has provided a concept stormwater plan which includes on-site detention and a level spreader. Whilst the design is generally acceptable, insufficient information has been provided in relation to address landslide risk in relation to stormwater discharge.

- *Geotechnical Risks and construction impacts due to vibration/excavation*

Comment: The application is accompanied by a geotechnical report which assesses the risks associated with the proposal. The geotechnical report concludes that subject to the recommendations within the report being followed, the proposal can be carried out within without geotechnical risk to the adjoining properties. Compliance with the geotechnical report will be included as a consent condition.

Council's engineers are not satisfied with the information in relation to landslip arising due to stormwater discharge, as insufficient information has been provided by the geotechnical engineer. Please see comments Council's engineering comments later in this report.

If consent were to be granted, conditions should be included for dilapidation reports to be carried out for the adjoining properties.

- *Non-compliance with side setbacks*

Comment: The side setbacks are discussed within the assessment report under Clause 4.1.4 Setbacks. The proposed garage has a nil setback to the southern boundary. However, this is an existing situation and the new garage replaces the existing garage, albeit in a more western position. The garage adjoins other parking structures/inclinators and as such will not result in unreasonable amenity impacts to the adjoining sites.

- *Gable roof form is not compatible with the streetscape*

Comment: The building maintains a low scale/single storey appearance to the streetscape and there are a variety of flat, curved and pitched roof forms on the surrounding buildings and street generally. Compatibility does not mean 'sameness' and as such, as the proposal presents an acceptable scale to the streetscape the proposed pitched roof is acceptable in the streetscape. The view sharing outcomes of the pitched roof are considered within the view sharing assessment later in this report.

- *Exceedance of development standards*

Comment: The exceedance to the FSR and building height standards are addressed in detail

within the Clause 4.6 assessment later in this report. The applicant's written request sets out sufficient environmental planning grounds to warrant departure from the development standards and a high level of amenity is maintained for the surrounding sites. As such, the exceedence does not warrant refusal of the application.

## REFERRALS

Internal Referral Body	Comments
Landscape Officer	<p><b>Supported - Subject to Conditions</b></p> <p>The proposal is supported with regard to landscape issues.</p> <p>Council's Landscape Referral section have considered the application against the Manly Local Environment Plan, and the following Manly DCP 2013 controls (but not limited to):</p> <ul style="list-style-type: none"> <li>• 3.3.1 Landscaping Design</li> <li>• 3.3.2 Preservation of Trees or Bushland Vegetation</li> <li>• 4.1.5 Open Space and Landscaping, including 4.1.5.2 (c) Minimum Tree Plantings</li> </ul> <p>Landscape Referral notes that significant encroachment into the road reserve is proposed, and review by Council's Road Reserve Referral team is required. The Landscape Referral has only assessed the proposed works within the property boundary. It is also noted that previous approval for the existing encroachment was granted by Council.</p> <p>An Arboricultural Impact Assessment (AIA) and Landscape Plans are included in the application and will be assessed as part of the Landscape Referral. No trees are located within the site boundary and as such all neighbouring trees must be retained and protected. The AIA supports the retention of all neighbouring trees with an acceptable impact, and Landscape Referral supports the tree protection recommendations outlined in the AIA, subject to the imposed conditions. Tree 7 is proposed to be transplanted and as such a transplanting methodology plan shall be prepared.</p> <p>The two proposed <i>Cupaniopsis anacardioides</i> are considered an environmental threat by Council, and as such they shall be substituted with a suitable alternative. Furthermore, the two substituted species shall be located a minimum of 3 metres from the dwelling and wholly within the site boundary, subject to the imposed conditions. All natural rock outcrops outside the approved construction footprint shall be retained and protected during works. The proposed planting over the OSD tank is supported; however, Council's minimum soil depth requirements must be achieved.</p>
NECC (Bushland and Biodiversity)	<p><b>Supported subject to conditions</b></p> <p>The proposal has been assessed against the following applicable biodiversity-related provisions:</p>

Internal Referral Body	Comments
	<ul style="list-style-type: none"> <li>• SEPP (Resilience and Hazards) - Coastal Environment Area</li> <li>• Manly LEP Clause 6.5 - Terrestrial Biodiversity</li> </ul> <p>The submitted arboricultural impact assessment confirms that no prescribed native trees are proposed for removal to facilitate the development. Additionally, the bush fire assessment report states that "No tree clearing will be required for bushfire protection purposes". Conditions recommended by the Landscape referrals team will ensure new tree plantings are consistent with locally native vegetation communities.</p>
NECC (Development Engineering)	<p><b>Not Supported on current plans</b></p> <p>The proposal is for demolition works and construction of a new dwelling. The submitted stormwater plan proposal disposal to a level spreader via an OSD system which is acceptable subject to conditions. Refusal of easement letters have been provided. The proposal involves significant works in the road reserve which requires comments and concurrence from Council's Road Asset team prior to final engineering assessment.</p> <p><b>Additional Information Provided 16/8/2023</b></p> <p><u>Driveway Access</u></p> <p>Insufficient information has been provided with regard to the proposed access driveway. The proposed gradients do not comply with current standards and the transition extends within the parking space. Any transitions proposed within the garage must be outside the parking space. The parking area must not exceed a 5% grade. It is recommended that Council's standard Maximum Low profile be adopted. This may require amendments to the proposed garage level. The Applicant shall provide a long-section at both edges of the proposed access driveway to the proposed garage and demonstrate compliance with AS2890.1.</p> <p><u>Stormwater</u></p> <p>It is noted that the rear neighbors have raised concerns regarding stormwater management. As the site falls to the rear and refusal of easement letters have been provided the discharge via level spreader is acceptable. However the design of the level spreader shall be in accordance with Appendix 4 of Council's Water Management for Development Policy. Total discharge including bypass flows and controlled flows through the level spreader must not exceed the 20% AEP state of nature storm event.</p> <p>The geotechnical report has indicated that an absorption system is not viable for the site. Please provide concurrence from the geotechnical engineering regarding the method of stormwater disposal and the location of the level spreader.</p> <p>Additionally the amended plans have not addressed the Road Assets teams requirements for the removal of the existing encroachment on</p>

Internal Referral Body	Comments
	<p>the road reserve. Amended plans are to address the requirements of the Road Asset team as well as address the engineering concerns as above.</p> <p><b>Additional Information Provided 27/10/2023</b></p> <p><u>Driveway Access</u></p> <p>The amended driveway profile has been reviewed. While the transition within the garage has been removed the proposed gradients do not comply. To comply with the Maximum Low profile the garage level will need to be raised by approximately 400mm. The link to the profile is as follows: <a href="https://files-preprod-d9.northernbeaches.nsw.gov.au/nbc-prod-files/documents/general-information/driveway-and-vehicle-crossings/standard-vehicle-crossing-profile-maximum-low-jul22.pdf?1698376820">https://files-preprod-d9.northernbeaches.nsw.gov.au/nbc-prod-files/documents/general-information/driveway-and-vehicle-crossings/standard-vehicle-crossing-profile-maximum-low-jul22.pdf?1698376820</a>.</p> <p><u>Stormwater</u></p> <p>A screen shot of the geotechnical engineer's email providing concurrence for the location of the level spreader has been provided which is insufficient. Please provide correspondence from the geotechnical engineering regarding the method of stormwater disposal, the rate of discharge and the location of the level spreader confirming that it will not cause any landslip issues.</p>
Road Reserve	<p><b>Supported subject to conditions</b></p> <p>It is noted there was an agreement made in 2017 between the Northern Beaches Council and the property owner of 30 Abernethy St Seaforth, which allowed property owner to the installation of a timber fence in reference to DA0165/2017.</p> <p>The proposed plan in DA2022/2207 to construct a masonry structure on the public road reserve, does not comply with Section 157 of the Road Act 1993. The Proposed masonry wall is considered a permanent structure and provisions of the Roads Act requires that the structure that are subject of a lease comprises a fence or a temporary structure of a kind that can easily be demolished or removed.</p> <p>Additionally, it gives the impression of taking over public land for private use, which is not acceptable.</p> <p>Given the redevelopment of the property involves demolition of the existing dwelling and creation of new private open space between the front of the new dwelling and the property boundary, it is recommended the encroachments on the road reserve be removed, including the private terraced areas, gardens and fencing.</p> <p>Consideration would be given to an alternate landscaping proposal that avoids the privatisation of the public road reserve and provides a wider verge area for pedestrian access.</p> <p>The application is therefore unsupported.</p> <p>Development Engineers may condition the driveway, retaining wall</p>



Internal Referral Body	Comments
	<p>and pedestrian entry works as part of a S138 civil works application in the public road reserve.</p> <p>06/10/2023 - Amended Comments</p> <p>It is noted the works initially proposed on the Council verge have been removed from the development Application.</p> <p>Such a proposal would not be approved in the current environment given the community's "opposition" at the privatisation of public land for private benefit.</p> <p>Given the new development application and the demolition of the existing dwelling, the historical privatisation of the public road reserve and the associated fencing encroachments on the public road reserve should be removed and the development application amended to illustrate the return and restoration of the public road reserve to full community access. Any proposed fencing must be removed from the road reserve and relocated on the property boundary.</p> <p>Given the location of the existing fence, we cannot support the application.</p> <p>26/10/2023 - final comments</p> <p>The amended plans including Sheet DA-A009-Rev 3 dated 16.10.23 with notations indicating relocation of letterbox and removal of timber fence on road reserve.</p> <p>Further details to be submitted to Council in a Minor Encroachment Application prior to undertaking any works on the public road reserve alternatively, Development Engineers may condition the driveway, retaining wall and pedestrian entry works as part of a S138 civil works application in the public road reserve.</p>

External Referral Body	Comments
Ausgrid - SEPP (Transport and Infrastructure) 2021, s2.48	The proposal was referred to Ausgrid who provided a response stating that the proposal is acceptable subject to compliance with the relevant Ausgrid Network Standards and SafeWork NSW Codes of Practice. These recommendations will be included as a condition of consent.

External Referral Body	Comments
Aboriginal Heritage Office	<p>Reference is made to the proposed development at the above area and Aboriginal heritage.</p> <p>No sites are recorded in the current development area and the area has been subject to previous disturbance reducing the likelihood of surviving unrecorded Aboriginal sites.</p> <p>Given the above, the Aboriginal Heritage Office considers that there are no Aboriginal heritage issues for the proposed development.</p>

### **ENVIRONMENTAL PLANNING INSTRUMENTS (EPIs)\***

All, Environmental Planning Instruments (SEPPs 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 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 (Building Sustainability Index: BASIX) 2004**

A BASIX certificate has been submitted with the application (see Certificate No. 1355618S dated 14 December 2022).

If consent is granted, a condition to be included requiring compliance with the commitments indicated in the BASIX Certificate.

#### **SEPP (Transport and Infrastructure) 2021**

##### Ausgrid

Section 2.48 of Chapter 2 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 who raised no objections.

## **SEPP (Resilience and Hazards) 2021**

### **Chapter 2 – Coastal Management**

The site is subject to Chapter 2 of the SEPP. Accordingly, an assessment under Chapter 2 has been carried out as follows:

#### **Division 1 Coastal Wetlands and littoral rainforest area**

##### **2.7 Development on certain land within coastal wetlands and littoral rainforests area**

- 1) The following may be carried out on land identified as “coastal wetlands” or “littoral rainforest” on the Coastal Wetlands and Littoral Rainforests Area Map only with development consent:
  - a) the clearing of native vegetation within the meaning of Part 5A of the Local Land Services Act 2013,
  - b) the harm of marine vegetation within the meaning of Division 4 of Part 7 of the Fisheries Management Act 1994,
  - c) the carrying out of any of the following:
    - i) earthworks (including the depositing of material on land),
    - ii) constructing a levee,
    - iii) draining the land,
    - iv) environmental protection works,
  - d) any other development

Comment: The land is not within coastal wetlands or littoral rainforest area.

##### **2.8 Development on land in proximity to coastal wetlands or littoral rainforest**

- 1) Development consent must not be granted to development on land identified as “proximity area for coastal wetlands” or “proximity area for littoral rainforest” on the Coastal Wetlands and Littoral Rainforests Area Map unless the consent authority is satisfied that the proposed development will not significantly impact on:
  - a) the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or littoral rainforest, or
  - b) the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland or littoral rainforest.

Comment: The land is not within coastal wetlands or littoral rainforest proximity area.

#### **Division 2 Coastal Vulnerability Area**

## **2.9 Development on land within the coastal vulnerability area**

Development consent must not be granted to development on land that is within the area identified as “coastal vulnerability area” on the Coastal Vulnerability Area Map unless the consent authority is satisfied that:

- a) if the proposed development comprises the erection of a building or works—the building or works are engineered to withstand current and projected coastal hazards for the design life of the building or works, and
- b) the proposed development:
  - i) is not likely to alter coastal processes to the detriment of the natural environment or
  - ii) other land, and
  - iii) is not likely to reduce the public amenity, access to and use of any beach, foreshore, rock platform or headland adjacent to the proposed development, and incorporates appropriate measures to manage risk to life and public safety from coastal hazards, and
- c) measures are in place to ensure that there are appropriate responses to, and management of, anticipated coastal processes and current and future coastal hazards.

Comment: The land is not within the coastal vulnerability area.

## **Division 3 Coastal environment area**

### **2.10 Development on land within the coastal environment area**

- 1) Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following:
  - a) the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,
  - b) coastal environmental values and natural coastal processes,
  - c) the water quality of the marine estate (within the meaning of the Marine Estate Management Act 2014), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,
  - d) marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,
  - e) existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,
  - f) Aboriginal cultural heritage, practices and places,
  - g) the use of the surf zone.

Comment: The application has been considered in relation to the matters listed (a) to (g) and the proposal will not have an adverse impact due to the proximity from the site to the waterway, which is separated by another dwelling. There will be no direct impacts upon the natural coastal processes or biodiversity associated with the coastal environment area. The proposal includes appropriate stormwater and sediment and erosion control measures.

- 2) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:
  - a) the development is designed, sited and will be managed to avoid an adverse impact referred to in subsection (1), or

- b) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or
- c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

Comment: Council is satisfied that the impacts to matters listed (a) to (g) have been avoided and minimised, with conditions recommended where appropriate.

## **Division 4 Coastal use area**

### **2.11 Development on land within the coastal use area**

- 1) Development consent must not be granted to development on land that is within the coastal use area unless the consent authority:
  - a) has considered whether the proposed development is likely to cause an adverse impact on the following:
    - i) existing, safe access to and along the foreshore, beach, headland or rock
    - ii) platform for members of the public, including persons with a disability,
    - iii) overshadowing, wind funnelling and the loss of views from public places to
    - iv) foreshores,
    - v) the visual amenity and scenic qualities of the coast, including coastal headlands, Aboriginal cultural heritage, practices and places, cultural and built environment heritage, and
  - b) is satisfied that:
    - i) the development is designed, sited and will be managed to avoid an
    - ii) adverse impact referred to in paragraph (a), or
    - iii) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or if that impact cannot be minimised—the development will be managed to mitigate that impact, and
  - c) has taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.

Comment: The proposal has been designed to have an appearance and scale that is generally consistent with the two adjoining buildings and as such, will not have a detrimental impact on the coastal area. Council is satisfied that the proposal is designed to avoid and minimise impacts to the matters listed (a) i) to v).

## **Division 5 General**

### **2.12 Development in coastal zone generally—development not to increase risk of coastal hazards**

Development consent must not be granted to development on land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land.

Comment: The proposal does not increase the risk of coastal hazards having regard to the distance to the foreshore and elevation from the foreshore area.

### **2.13 Development in coastal zone generally—coastal management programs to be considered**

Development consent must not be granted to development on land within the coastal zone unless the consent authority has taken into consideration the relevant provisions of any certified coastal management program that applies to the land.

Comment: There is not coastal management program applicable to this site.

As such, it is considered that the application complies with the requirements of Chapter 2 of the State Environmental Planning Policy (Resilience and Hazards) 2021.

#### **Chapter 4 – Remediation of Land**

Sub-section 4.6 (1)(a) of Chapter 4 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 sub-section 4.6 (1)(b) and (c) of this Chapter and the land is considered to be suitable for the residential land use.

#### **Manly Local Environmental Plan 2013**

Is the development permissible?	Yes
After consideration of the merits of the proposal, is the development consistent with:	
aims of the LEP?	Yes
zone objectives of the LEP?	Yes

#### **Principal Development Standards**

Standard	Requirement	Proposed	% Variation	Complies
Height of Buildings:	8.5m	6.2m to 11m	29.4%	No
Floor Space Ratio	FSR: 0.4:1 (277.12m <sup>2</sup> )	FSR: 0.433:1 (300m <sup>2</sup> )	8.25%	No

#### **Compliance Assessment**

Clause	Compliance with Requirements
2.7 Demolition requires development consent	Yes
4.3 Height of buildings	No
4.4 Floor space ratio	No
4.5 Calculation of floor space ratio and site area	Yes
4.6 Exceptions to development standards	Yes
6.1 Acid sulfate soils	Yes
6.2 Earthworks	Yes
6.4 Stormwater management	No
6.5 Terrestrial biodiversity	Yes
6.9 Foreshore scenic protection area	Yes
6.12 Essential services	No

## Detailed Assessment

### **4.6 Exceptions to development standards**

#### **Clause 4.3 Building Height**

##### Description of non-compliance:

Development standard:	Height of buildings
Requirement:	8.5m
Proposed:	6.2m to 11m
Percentage variation to requirement:	29.4%

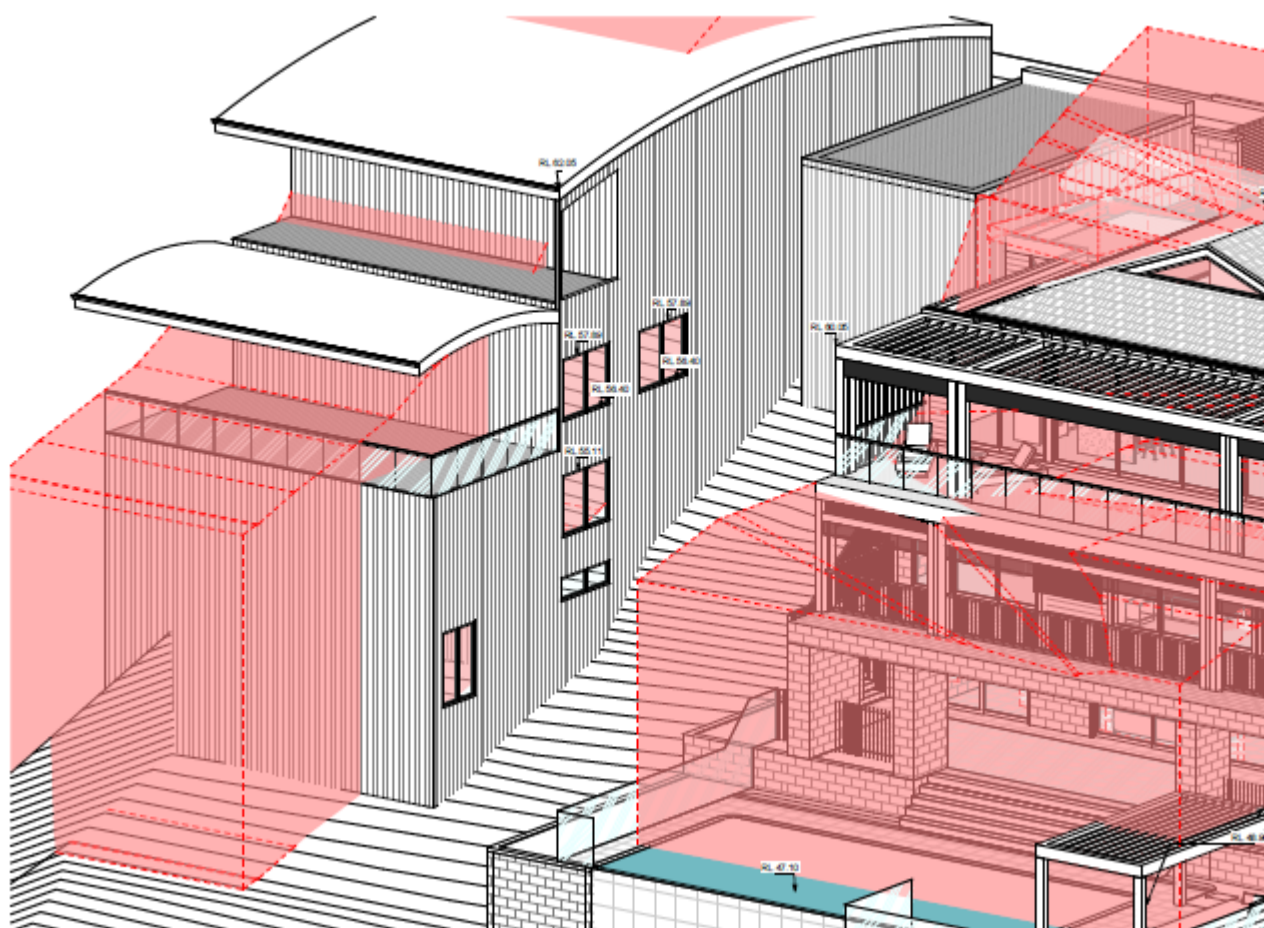


Figure 1 - Extract from plans showing 8.5m height blanket.

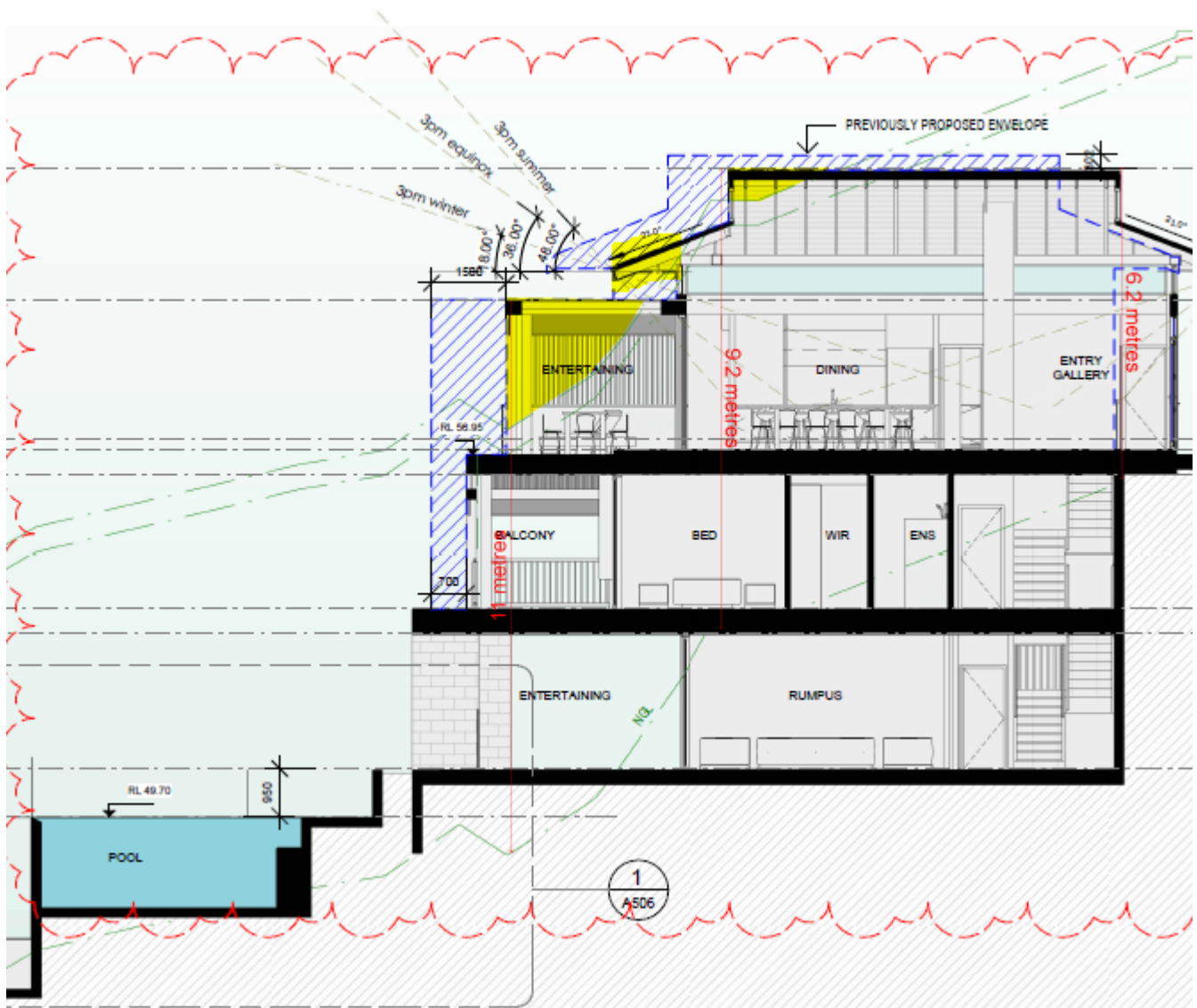


Figure 2 - Extract from plans showing a section plan and 8.5m height plane. Yellow areas represent areas of encroachment.

#### Assessment of request to vary a development standard:

The following assessment of the variation to Clause 4.3 – Height of Buildings development standard, has taken into consideration the recent judgement contained within *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

#### Clause 4.6 Exceptions to development standards:

(1) The objectives of this clause are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the



*development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

Comment:

Clause 4.3 – Height of Buildings development standard is not expressly excluded from the operation of this clause.

*(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

*(4) Development consent must not be granted for development that contravenes a development standard unless:*

*(a) the consent authority is satisfied that:*

*(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

*(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

*(b) the concurrence of the Secretary has been obtained.*

**Clause 4.6 (4)(a)(i) (Justification) assessment:**

Clause 4.6 (4)(a)(i) requires the consent authority to be satisfied that the applicant's written request, seeking to justify the contravention of the development standard, has adequately addressed the matters required to be demonstrated by cl 4.6(3). There are two separate matters for consideration contained within cl 4.6(3) and these are addressed as follows:

*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

Comment:

The Applicant's written request has demonstrated that the objectives of the development standard are achieved, notwithstanding the non-compliance with the development standard.

In doing so, the Applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by cl 4.6(3)(a).

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

Comment:

In the matter of Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Preston CJ provides the following guidance (para 23) to inform the consent authority's finding that the applicant's

written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard:

*‘As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.’*

s 1.3 of the EPA Act reads as follows:

*1.3 Objects of Act(cf previous s 5)*

*The objects of this Act are as follows:*

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The applicants written request argues, in part:

- *The steep topography makes strict compliance with the building height standard challenging in this instance*
- *The topography gradient averages 43.5% across the site with vertical rock shelves present in the buildable area. Images below demonstrates the rocky and steep topography*



Figure 1 - Extract from Clause 4.6 titled 'Figure 9: Steep rock shelves on site'.



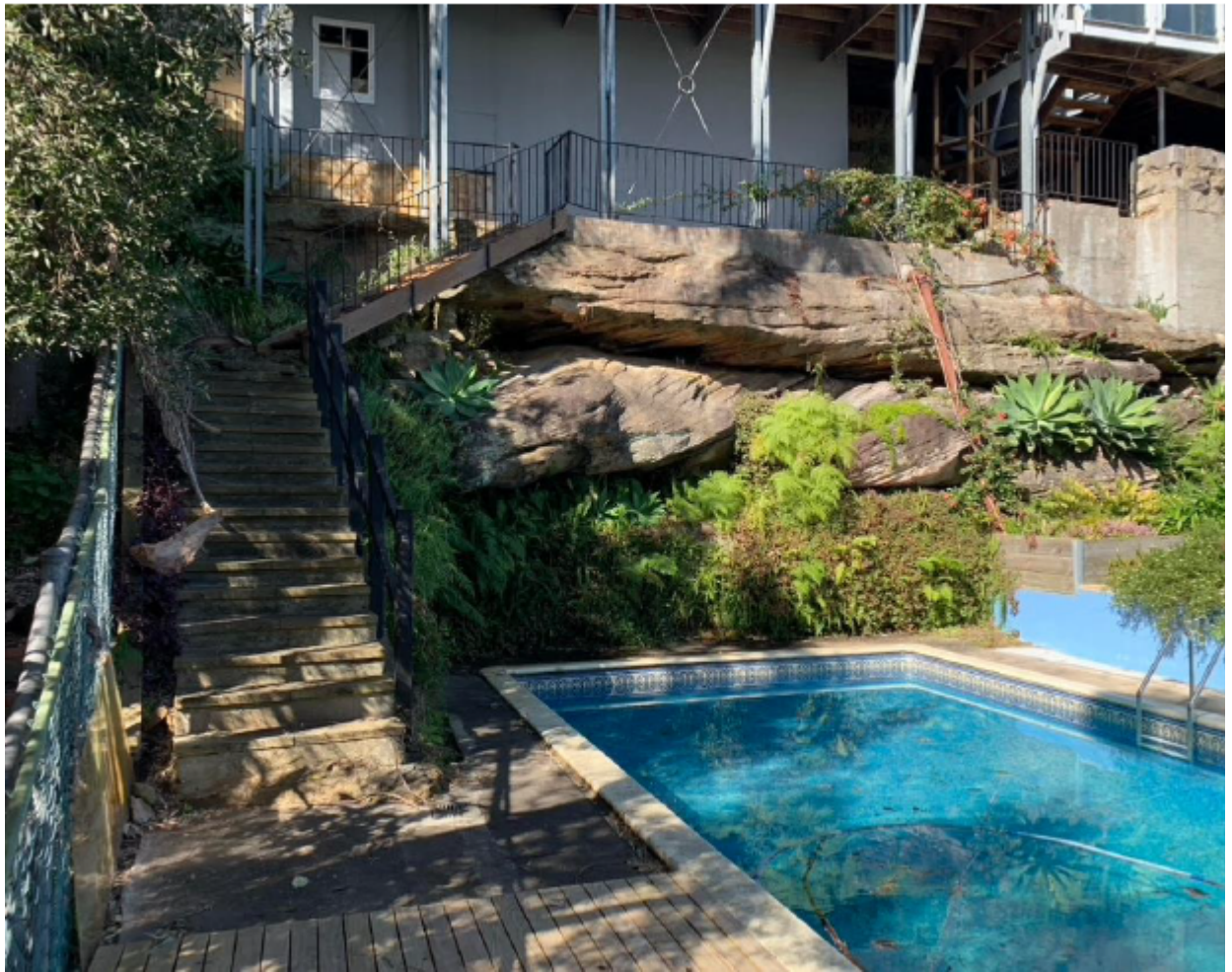
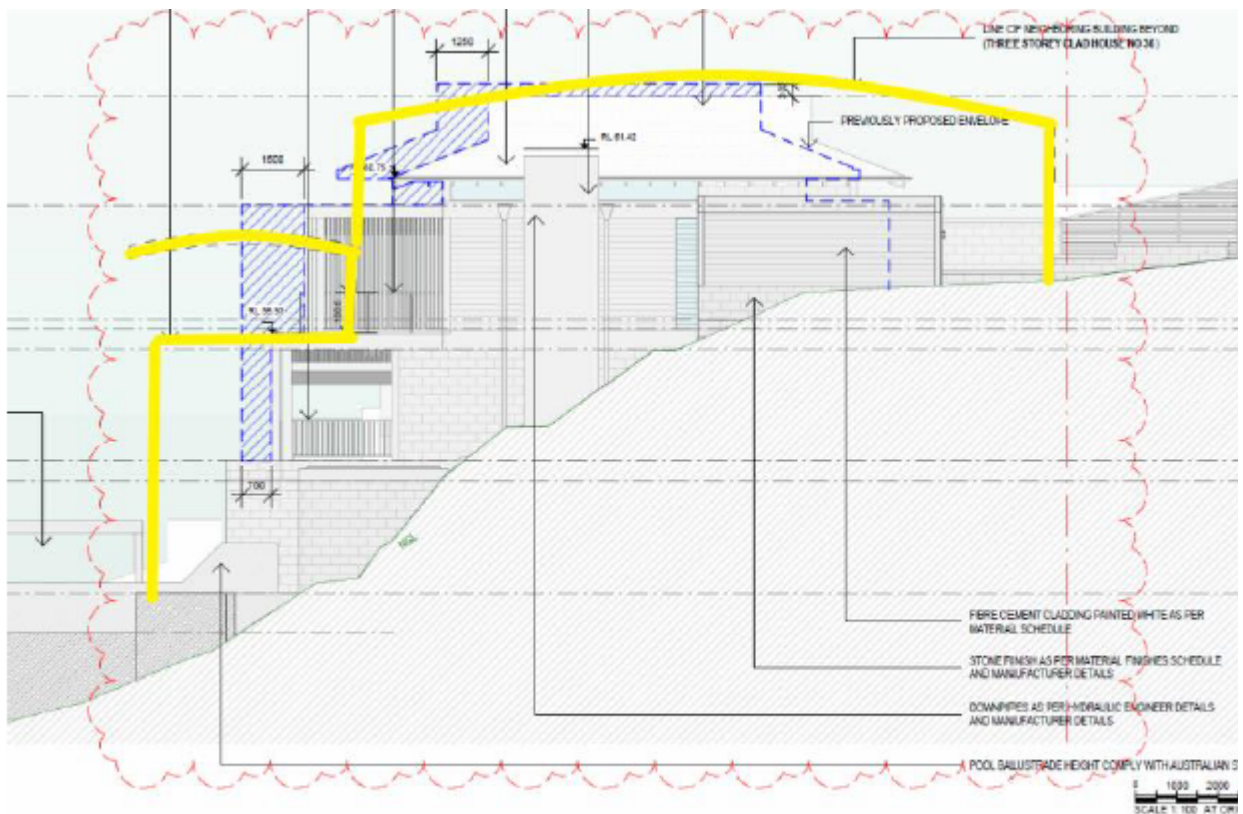


Figure 2 - **Extract from Clause 4.6 titled 'Figure 10: Rock Shelves'**

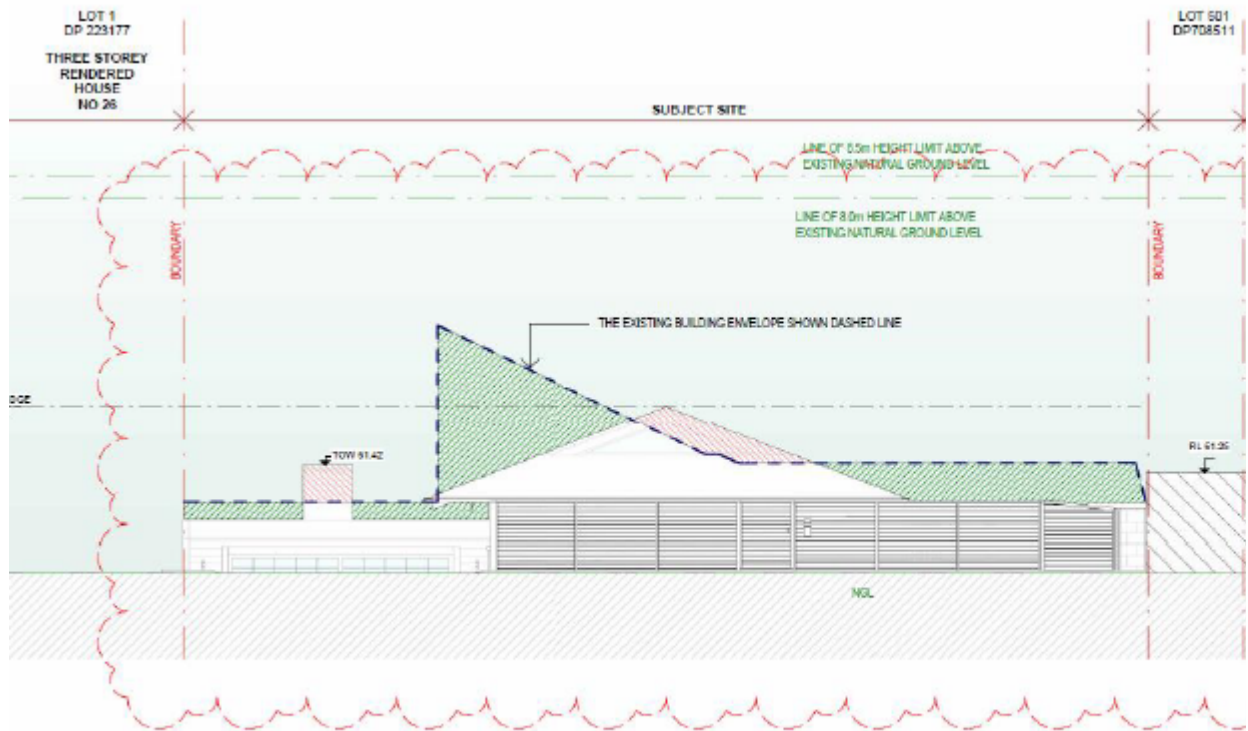
- *The proposed dwelling is consistent with the scale and number of storeys with regard to development within the immediate vicinity. Dwellings in the area are multistorey which reflects the steep topography. Drawing A201, southern elevation, provides an outline of the adjoining dwelling at No. 36. The outline is highlighted in yellow and demonstrates the reasonable scale in terms of height of the proposal.*



**Figure 10: Southern Elevation showing the height compatibility**

**Figure 3 - Extract taken from Clause 4.6**

- *The ability of the dwelling to step down the slope is negated by the steepness however amendments have been made to push the first floor back towards the front boundary. The dwelling will better reflect the topography of the site in that regard which generally encourages development to step down sloping sites.*
- *The proposal will reduce the height of the dwelling as it relates to the streetscape and will contribute positively to its character above that of the existing dwelling. Streetscape analysis is provided below which shows the existing unusual built form to be demolished to be replaced with a more traditional cohesive design. The height of the dwelling as it presents to the streetscape will be reduced.*



**Figure 11: Existing and Proposed streetscape view**

**Figure 4 - Extract taken from applicant's Clause 4.6**

- The undersize lot size, existing canopy trees and existing overshadowing of the subject site make providing adequate internal solar access difficult. The design choice for a clerestory window achieves adequate solar access into the dwelling. It has been centrally located to minimise any adverse impacts on neighbours.
- In this regard, I consider the proposal to be of a skilful design which responds appropriately and effectively to the above constraints by appropriately distributing floor space, building mass and building height across the site in a manner which provides for appropriate streetscape and residential amenity outcomes including a view sharing scenario.
- Such outcome is achieved whilst realising the reasonable development potential of the land.
- The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically: The proposal promotes the orderly and economic use and development of land (1.3(c)). The development represents good design (1.3(g)). The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).
- It is noted that in Initial Action, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:  
87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.



*There are sufficient environmental planning grounds to justify contravening the development standard.*

### **Council's Comment on Environmental Planning Grounds**

The environmental planning grounds as set out within the Clause 4.6 request are agreed with. In particular, the steepness of the site and the series of rock boulders toward the center of the site creates a steep drop off that makes compliance difficult to achieve, particularly when there is a balance to be achieved with the siting of the dwelling with regards to view sharing and achievement of high quality solar access having regard to the position of the dwellings on the adjoining sites.

In this regard, the applicant's written request has demonstrated that the proposed development is an orderly and economic use and development of the land, and that the structure is of a good design that will reasonably protect and improve the amenity of the surrounding built environment, therefore satisfying cls 1.3 (c) and (g) of the EPA Act.

Therefore, the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by cl 4.6 (3)(b).

Therefore, Council is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

### **Clause 4.6 (4)(a)(ii) (Public Interest) assessment:**

cl 4.6 (4)(a)(ii) requires the consent authority to be satisfied that:

*(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out*

#### **Comment:**

In considering whether or not the proposed development will be in the public interest, consideration must be given to the underlying objectives of the Height of Buildings development standard and the objectives of the R2 Low Density Residential zone. An assessment against these objectives is provided below.

### **Objectives of development standard**

The underlying objectives of the standard, pursuant to Clause 4.3 – 'Height of buildings' of the MLEP 2013 are:

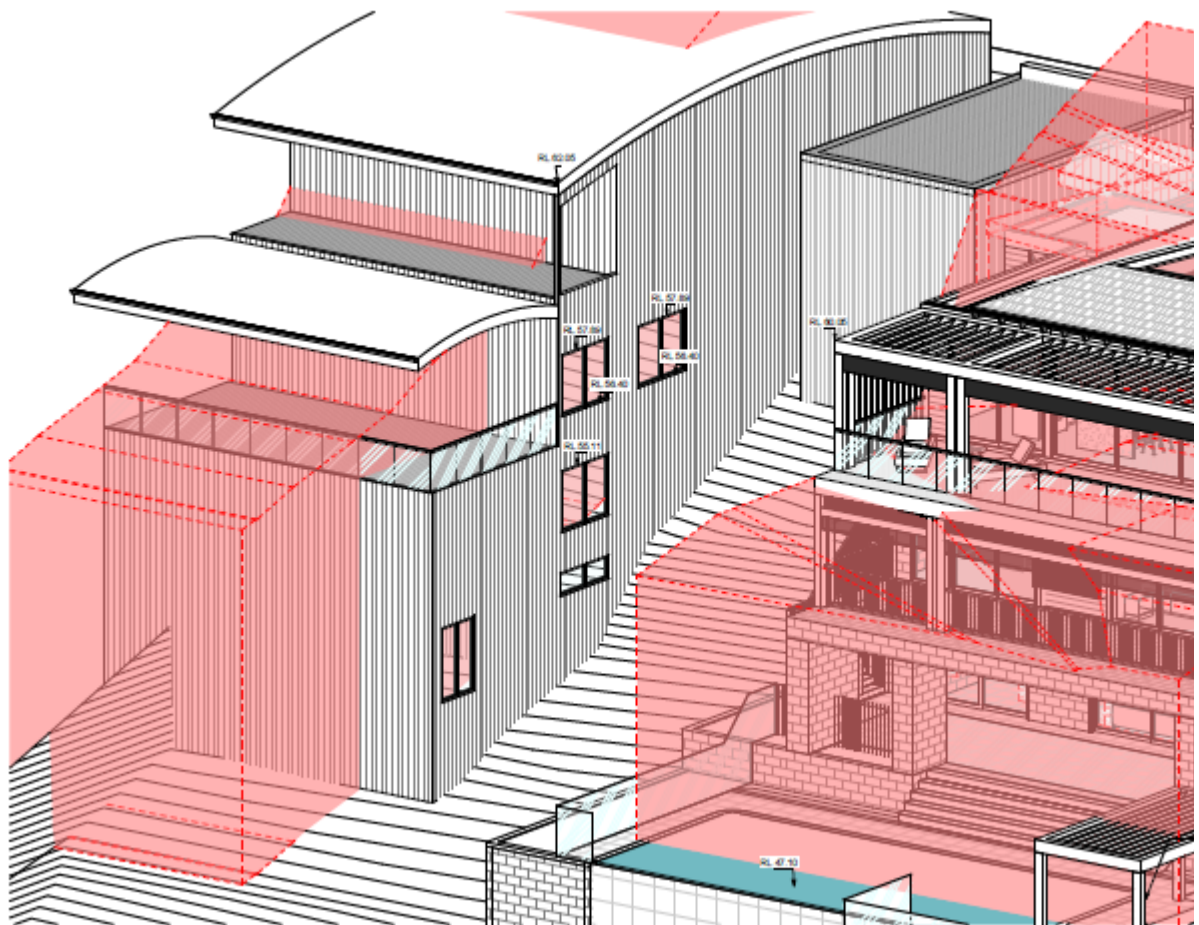
(1) The objectives of this clause are as follows:

*a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*

**Comment:** The roof form has been stepped appropriately to respond to the slope of the land, with the largest portion of encroachment a result of the pergola over the upper level entertaining area/deck. The two adjoining dwellings are also characterised by multi storey dwellings with upper level decks which are covered by a pergola or shade structure. The proposal will sit

comfortably in the context of the two surrounding buildings and will be consistent with the prevailing building heights of the adjoining buildings as established by the existing dwellings on the western side of Abernethy Road. The building at 26 Abernethy has a roof pergola roof form at the western extent of the building at RL59.24 and the building at 36 Abernethy has a upper level pergola to RL 62.05. The proposed pergola has a height of 60.05 and therefore is generally consistent with the heights of the two adjoining buildings. The centralised gable roof form represents a minor breach of the 8.5m height limit at is at RL 62.68, however a point encroachment that does not render the development of a bulk/scale out of character for the locality.

The topographic landscape is very steep, with a significant drop off from a rock shelf central to the site. This is what causes the numerical breach of the building height. However, the building has stepped back in a reasonable way to suit the topographic conditions and maintains consistent win bulk and scale with the adjoining buildings. It is noted that the pergola is a more lightweight structure in breach of the height limit and therefore, limits the apparent bulk of the building. The roof form is of a height that is generally consistent with the surrounding buildings, with the central roof form at RL 62.68 and the adjoining building at RL62.05.



It is also noted that the proposed upper level balcony is setback behind the alignment of the two adjoining buildings, therefore reducing the visual prominence of the building when viewed from the adjoining sites. This also promotes view sharing.





environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

Comment: The site is not in an environmental protection zone of recreation zone. However, the building will sit below the predominant tree canopy of the surrounding locality and sit comfortably in the context of the adjoining buildings on the escarpment when viewed from the waterway.

### **Zone objectives**

The underlying objectives of the R2 Low Density Residential zone are:

- *To provide for the housing needs of the community within a low density residential environment.*

Comment: The proposal provides for a new dwelling, within a landscape setting, to result in a low density residential environment consistent with the size and scale of those surrounding.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comment: Not relevant to this proposal.

### Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the R2 Low Density Residential zone.

### **Clause 4.6 (4)(b) (Concurrence of the Secretary) assessment:**

cl. 4.6(4)(b) requires the concurrence of the Secretary to be obtained in order for development consent to be granted.

Planning Circular PS20-002 dated 5 May 2020, as issued by the NSW Department of Planning, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument. In this regard, given the consistency of the variation to the objectives of the zone, and in accordance with correspondence from the Deputy Secretary on 2 November 2021, Council staff under the delegation of the Development Determination Panel, may assume the concurrence of the Secretary for variations to the Height of building Development Standard associated with a single dwelling house (Class 1 building).

### **Clause 4.4 Floor Space Ratio**

Description of non-compliance:

Development standard:	Floor space ratio
Requirement:	0.4:1 (277.12m <sup>2</sup> )
Proposed:	0.433:1 (300m <sup>2</sup> )
Percentage variation to requirement:	8.25%

Assessment of request to vary a development standard:

The following assessment of the variation to Clause 4.1 - Minimum subdivision lot size OR Clause 4.3 – Height of Buildings OR Clause 4.4 - Floor space ratio OR 7.8 Limited development on foreshore area development standard, has taken into consideration the recent judgement contained within *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

Clause 4.6 Exceptions to development standards:

*(1) The objectives of this clause are as follows:*

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

*(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

Comment:

Clause 4.1 - Minimum subdivision lot size OR Clause 4.3 – Height of Buildings OR Clause 4.4 - Floor space ratio OR 7.8 Limited development on foreshore area development standard is not expressly excluded from the operation of this clause.

*(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

*(4) Development consent must not be granted for development that contravenes a development standard unless:*

- (a) the consent authority is satisfied that:*
  - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
  - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- (b) the concurrence of the Secretary has been obtained.*

**Clause 4.6 (4)(a)(i) (Justification) assessment:**

Clause 4.6 (4)(a)(i) requires the consent authority to be satisfied that the applicant's written request, seeking to justify the contravention of the development standard, has adequately addressed the matters required to be demonstrated by cl 4.6(3). There are two separate matters for consideration contained within cl 4.6(3) and these are addressed as follows:

*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

Comment:

The Applicant's written request has / has not demonstrated that the objectives of the development standard are achieved, notwithstanding the non-compliance with the development standard.

In doing so, the Applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by cl 4.6(3)(a).

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

Comment:

In the matter of Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Preston CJ provides the following guidance (para 23) to inform the consent authority's finding that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard:

*'As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.'*

s 1.3 of the EPA Act reads as follows:

*1.3 Objects of Act(cf previous s 5)*

*The objects of this Act are as follows:*

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The applicants written request argues, in part:

- *The proposed FSR is reasonable within its context of the locality whilst the proposed built form is considered to be reasonable when compared to existing development within the streetscape. The subject site is consistent with the undersized lot provisions (cl: 4.4.3.1) with the Manly DCP which states that Council may consider exceptions to the maximum FSR under LEP clause 4.6 when both the relevant LEP objectives and the provisions of this DCP are satisfied. In this regard, we note that the minimum lot size applicable is 750m<sup>2</sup> resulting in a maximum GFA of 300m<sup>2</sup>. The proposed GFA is compliant with the 300m<sup>2</sup> control and this report has demonstrated consistency with the FSR and zone objectives within the LEP.*
- *The works have been designed to maintain a predominately 2 storey form to the street to ensure consistency with established development. Significant side setbacks to the ground and first floor provides relief from any visual impact with the proposed wall heights also being compliant. Total open space and landscaping are also compliant with the DCP control. Compliance with the numerical controls within the LEP and DCP is reflective of the considered design approach to limit any potential bulk and scale and visual impact concerns despite the FSR variation.*
- *The development does not raise any unreasonable amenity impacts with regard to overshadowing, privacy and view loss. As outlined in the statement of environmental effects view loss assessment, views will be maintained from the immediately adjoining properties. The developments across the road to the rear will be unaffected as they sit well above the subject site and will still access views over the proposed dwelling.*
- *We note that Council has applied the FSR development standard flexibility in this locality and have approved variations provided that the undersized lot provisions within the DCP can be met.*

### **Council's Comment on Environmental Planning Grounds**

The above environmental planning grounds are agreed to be sufficient, in particular, the 'undersized' nature of the allotment as identified within the Manly DCP. The proposal meets the 'undersized allotment' requirement of the Manly DCP, not exceeding 300m<sup>2</sup> of GFA. The other ground identified in relation to the maintenance of reasonable amenity for the surrounding properties is agreed with and discussed within this report. It is agreed that the building is compatible with the bulk of the surrounding buildings.

In this regard, the applicant's written request has demonstrated that the proposed development is an orderly and economic use and development of the land, and that the structure is of a good design that will reasonably protect and improve the amenity of the surrounding built environment, therefore satisfying cls 1.3 (c) and (g) of the EPA Act.

Therefore, the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by cl 4.6 (3)(b).

Therefore, Council is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

### **Clause 4.6 (4)(a)(ii) (Public Interest) assessment:**

cl 4.6 (4)(a)(ii) requires the consent authority to be satisfied that:

*(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out*

Comment:

In considering whether or not the proposed development will be in the public interest, consideration must be given to the underlying objectives of the Height of Buildings development standard and the objectives of the R2 Low Density Residential zone. An assessment against these objectives is provided below.

**Objectives of development standard**

The underlying objectives of the standard, pursuant to Clause 4.4 – ‘Floor space ratio’ of the MLEP 2013 are:

(1) The objectives of this clause are as follows:

*a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*

Comment: The building presents as a single storey building to the streetscape, well below the building height at the street frontage. The visual bulk of the building as viewed from the surrounding properties will be compatible with the adjoining buildings.

*b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*

Comment: The proposal maintains a good level of spatial separation between the adjoining sites, with the highest part of the building providing 3m side setbacks that can be landscaped to enhance the landscape setting. There is a suitably sized area of landscaping within the front and rear setback. The rock outcrops within the centre of the site do not have any particular landscape or townscape significance due to their location beneath the existing dwelling undercroft and that are not visually prominent when viewed from surrounding sites.

*c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*

Comment: The existing character is made up of two and three storey dwellings in a landscape setting. The proposal is consistent with the existing character and will site comfortably in the context of the surrounding buildings.

*d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*

Comment: The proposal maintains a high level of solar access to the surrounding buildings and privacy is maintained through screening and spatial separation. View sharing is discussed in detail later within this report and the proposal is found to maintain sharing of views. It is important to note that the portions of the building which generate any new view impacts (in relation to water views) are elements that do not constitute 'floor space' within the building, these being a pitched roof form and an pergola. As such, the view sharing principles established within Tenacity v Warringah Shire Council addressed.

*e) to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.*

Comment: Not applicable to this development.

## **Zone objectives**

The underlying objectives of the R2 Low Density Residential zone are:

- *To provide for the housing needs of the community within a low density residential environment.*

Comment: The proposal provides for a new dwelling, within a landscape setting, to result in a low density residential environment consistent with the size and scale of those surrounding.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comment: Not relevant to this proposal.

## Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the R2 Low Density Residential zone.

## **Clause 4.6 (4)(b) (Concurrence of the Secretary) assessment:**

cl. 4.6(4)(b) requires the concurrence of the Secretary to be obtained in order for development consent to be granted.

Planning Circular PS20-002 dated 5 May 2020, as issued by the NSW Department of Planning, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument. In this regard, given the consistency of the variation to the objectives of the zone, and in accordance with correspondence from the Deputy Secretary on 2 November 2021, Council staff under the delegation of the Development Determination Panel, may assume the concurrence of the Secretary for variations to the Height of building / Floor space ratio Development Standard associated with a single dwelling house (Class 1 building).

## **6.2 Earthworks**

The objectives of Clause 6.2 - 'Earthworks' require development:

- (a) to ensure that earthworks for which development consent is required will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land, and*
- (b) to allow earthworks of a minor nature without requiring separate development consent.*

In this regard, before granting development consent for earthworks, Council must consider the following matters:

- (a) the likely disruption of, or any detrimental effect on, existing drainage patterns and soil stability in*

*the locality of the development*

Comment: The proposal is unlikely to unreasonably disrupt existing drainage patterns and soil stability in the locality.

*(b) the effect of the proposed development on the likely future use or redevelopment of the land*

Comment: The proposal will not unreasonably limit the likely future use or redevelopment of the land.

*(c) the quality of the fill or the soil to be excavated, or both*

Comment: The excavated material will be processed according to the Waste Management Plan for the development. A condition has been included in the recommendation of this report requiring any fill to be of a suitable quality.

*(d) the effect of the proposed development on the existing and likely amenity of adjoining properties*

Comment: The proposed earthworks will not result in unreasonable amenity impacts on adjoining properties. Conditions have been included in the recommendation of this report to limit impacts during excavation/construction.

*(e) the source of any fill material and the destination of any excavated material*

Comment: The excavated material will be processed according to the Waste Management Plan for the development. A condition has been included in the recommendation of this report requiring any fill to be of a suitable quality.

*(f) the likelihood of disturbing relics*

Comment: The site is not mapped as being a potential location of Aboriginal or other relics.

*(g) the proximity to and potential for adverse impacts on any watercourse, drinking water catchment or environmentally sensitive area*

Comment: The site is not located in the vicinity of any watercourse, drinking water catchment or environmentally sensitive areas.

*(h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.*

Comment: Conditions are included in the recommendation of this report that will minimise the impacts of the development.

## **6.4 Stormwater management**

Under this clause, development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:

*(a) is designed to maximise the use of water permeable surfaces on the land having regard to the soil characteristics affecting on-site infiltration of water, and*

Comment: Insufficient information has been provided with regard to the design of the level spreader in relation to geotechnical risks that may arise due to the discharge of stormwater. For this reason, the



application is recommended for refusal. See Council's engineers comments.

*(b) includes, if practicable, on-site stormwater retention for use as an alternative supply to mains water, groundwater or river water, and*

Comment: On-site stormwater retention has been incorporated into the development.

*(c) avoids any significant adverse impacts of stormwater runoff on adjoining properties, native bushland and receiving waters, or if that impact cannot be reasonably avoided, minimises and mitigates the impact.*

Comment: The proposal has been assessed by Council's Development Engineers are not satisfied stormwater has been resolved as insufficient information has been submitted in relation to stormwater management and geotechnical risk. As such, the application is recommended for refusal.

## **6.5 Terrestrial biodiversity**

The objective of this clause is to maintain terrestrial biodiversity by:

- (a) protecting native fauna and flora, and*
- (b) protecting the ecological processes necessary for their continued existence, and*
- (c) encouraging the conservation and recovery of native fauna and flora and their habitats.*

In this regard, before determining a development application for development on land to which this clause applies, the consent authority must consider:

- (a) whether the development is likely to have:*
  - (i) any adverse impact on the condition, ecological value and significance of the fauna and flora on the land, and*
  - (ii) any adverse impact on the importance of the vegetation on the land to the habitat and survival of native fauna, and*
  - (iii) any potential to fragment, disturb or diminish the biodiversity structure, function and composition of the land, and*
  - (iv) any adverse impact on the habitat elements providing connectivity on the land, and*
- (b) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.*

Comment:

The application has been referred to Council's Biodiversity team who are satisfied that impacts have been mitigated or avoided to biodiversity. The proposal does not involve the removal of any significant trees.

Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:

- (a) the development is designed, sited and will be managed to avoid any significant adverse environmental impact, or*
- (b) if that impact cannot be reasonably avoided by adopting feasible alternatives—the development is designed, sited and will be managed to minimise that impact, or*
- (c) if that impact cannot be minimised—the development will be managed to mitigate that impact.*

Comment:

The application has been referred to Council's Biodiversity team who are satisfied that impacts have

been mitigated or avoided to biodiversity. The proposal does not involve the removal of any significant trees.

## **6.9 Foreshore scenic protection area**

Under this clause, development consent must not be granted to development on land to which this clause applies unless the consent authority has considered the following matters:

- (a) impacts that are of detriment to the visual amenity of harbour or coastal foreshore, including overshadowing of the foreshore and any loss of views from a public place to the foreshore,*
- (b) measures to protect and improve scenic qualities of the coastline,*
- (c) suitability of development given its type, location and design and its relationship with and impact on the foreshore,*
- (d) measures to reduce the potential for conflict between land-based and water-based coastal activities.*

Comment: The proposed dwelling is compatible in size and scale of the two adjoining buildings and wider surrounding area. As such, the proposal will not have a detrimental impact of the scenic qualities of the foreshore area.

The proposal will have a high quality appearance and will be compatible with the surrounds. No trees of high value are removed as part of the development. There will be no impact on water based coastal activities.

## **6.12 Essential services**

Under this clause, development consent must not be granted to development unless the consent authority is satisfied that any of the following services that are essential for the development are available or that adequate arrangements have been made to make them available when required:

- (a) the supply of water,*
- (b) the supply of electricity,*
- (c) the disposal and management of sewage,*
- (d) stormwater drainage or on-site conservation,*
- (e) suitable vehicular access.*

Comment:

The application has not satisfied pre-condition (e) of Clause 6.12, as there is a residual issue with the driveway gradient as the amended plans received during the assessment have not adequately addressed Council's Engineers concerns in relation to the gradient of the driveway (due to the development being shifted eastward to resolve view sharing). This issue could conceivably be addressed via a minor design amendment (i.e raising the garage level approximately 400mm) however, this information has not been forthcoming at the time of finalising the assessment report and as such, the recommendation is refusal due to the unresolved issue of the driveway gradient which does not comply with Council's low profile design specification.

See Council's engineers comments in the referral response.

## **Manly Development Control Plan**

### Built Form Controls

Built Form Controls - Site Area: 692.8m <sup>2</sup>	R
4.1.1.1 Residential Density and Dwelling Size	Dens:
4.1.2.1 Wall Height	N: 8m (bas S: 8m (bas
4.1.2.2 Number of Storeys	
4.1.2.3 Roof Height	h Paral Pitch: m:
4.1.4.1 Street Front Setbacks	Preva (Prev *Exi
4.1.4.2 Side Setbacks and Secondary Street Frontages	North fac Nort  Soutl South Fa South (base V
4.1.4.4 Rear Setbacks	
4.1.5.1 Minimum Residential Total Open Space Requirements Residential Open Space Area: OS1/2/3/4	Open spa:  Open space abo
4.1.5.2 Landscaped Area	Landscaped :  3
4.1.5.3 Private Open Space	18sc
4.1.6.1 Parking Design and the Location of Garages, Carports or Hardstand Areas	Maximum 50% of l
4.1.9 Swimming Pools, Spas and Water Features	1m hei 1m curtilage/1.5
Schedule 3 Parking and Access	Dw

#### Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
3.1 Streetscapes and Townscapes	Yes	Yes

<b>Clause</b>	<b>Compliance with Requirements</b>	<b>Consistency Aims/Objectives</b>
3.1.1 Streetscape (Residential areas)	Yes	Yes
3.3.1 Landscaping Design	Yes	Yes
3.3.2 Preservation of Trees or Bushland Vegetation	Yes	Yes
3.4 Amenity (Views, Overshadowing, Overlooking /Privacy, Noise)	Yes	Yes
3.4.1 Sunlight Access and Overshadowing	Yes	Yes
3.4.2 Privacy and Security	Yes	Yes
3.4.3 Maintenance of Views	Yes	Yes
3.4.4 Other Nuisance (Odour, Fumes etc.)	Yes	Yes
3.5 Sustainability - (Greenhouse Energy Efficiency, Thermal Performance, and Water Sensitive Urban Design)	Yes	Yes
3.5.1 Solar Access	Yes	Yes
3.5.3 Ventilation	Yes	Yes
3.5.4 Energy Efficient Appliances and Demand Reduction and Efficient Lighting (non-residential buildings)	Yes	Yes
3.5.5 Landscaping	Yes	Yes
3.5.7 Building Construction and Design	Yes	Yes
3.7 Stormwater Management	No	No
3.8 Waste Management	Yes	Yes
3.9 Mechanical Plant Equipment	Yes	Yes
3.10 Safety and Security	Yes	Yes
4.1 Residential Development Controls	Yes	Yes
4.1.1 Dwelling Density, Dwelling Size and Subdivision	Yes	Yes
4.1.1.1 Residential Density and Dwelling Size	Yes	Yes
4.1.2 Height of Buildings (Incorporating Wall Height, Number of Storeys & Roof Height)	No	Yes
4.1.3 Floor Space Ratio (FSR)	Yes	Yes
4.1.4 Setbacks (front, side and rear) and Building Separation	No	Yes
4.1.5 Open Space and Landscaping	Yes	Yes
4.1.6 Parking, Vehicular Access and Loading (Including Bicycle Facilities)	Yes	Yes
4.1.8 Development on Sloping Sites	Yes	Yes
4.1.9 Swimming Pools, Spas and Water Features	No	Yes
4.4.1 Demolition	Yes	Yes
4.4.5 Earthworks (Excavation and Filling)	Yes	Yes
5.4.1 Foreshore Scenic Protection Area	Yes	Yes
Schedule 1 – Maps accompanying the DCP	Yes	Yes

#### Detailed Assessment

#### **3.4.1 Sunlight Access and Overshadowing**

A concern has been raised by No. 26 Abernethy Street regarding overshadowing and solar access. The application is accompanied by shadow diagrams and 'view from sun' diagrams to demonstrate the solar access outcomes for 26 Abernethy Street. An assessment against the controls is carried out below:

#### 3.4.1.1 Overshadowing Adjoining Open Space

The control states in relation to sunlight to private open space of adjacent properties:

*a) New development (including alterations and additions) must not eliminate more than one third of the existing sunlight accessing the private open space of adjacent properties from 9am to 3pm at the winter solstice (21 June)*

Comment: The view from sun diagrams show at 9am there will be some overshadowing of the western facing deck and backyard of 26 Abernethy (these two areas are considered to form part of the private open space). By 10am, these areas will not be impacted by the proposal and receive sunlight throughout the day. Therefore, the property will retain 5 hours solar access to the private open space areas being the western deck and backyard/pool area.

A concern has been raised by 26 Abernethy about a courtyard along the side northern passage of the building. This will be impacted between 9am and 1pm, however is considered a secondary private open space and is located in a vulnerable position, due south of the proposal. Given 5 hours is received to the backyard and western facing terrace, the proposal complies with the DCP.

#### 3.4.1.2 Maintaining Solar Access into Living Rooms of Adjacent Properties

The control states in relation to sunlight to living rooms of adjacent properties:

*a) for adjacent buildings with an east-west orientation, the level of solar access presently enjoyed must be maintained to windows or glazed doors to living rooms for a period of at least 2 hours from 9am to 3pm on the winter solstice (21 June);*

Comment: The view from sun diagrams show that the upper level north facing living room windows of 26 Abernethy will receive full sunlight from 11am onwards providing 4 hours solar access, compliant with the control. Sunlight to the living room windows is partially impacted between 9am and 11am, which is a result of the chimney. However, as this chimney only services a gas fireplace, a condition should be included if consent to be granted to reduce the height of the chimney by a further 0.5m to afford further solar access to 26 Abernethy.

#### 3.4.1.3 Overshadowing Solar Collector Systems

The control requires a minimum of 6 hours solar access be retained to solar collectors on neighbouring properties.

Comment: The view from sun diagrams demonstrate that there will be no impact to the solar panels on the roof of 26 Abernethy Street.

#### 3.4.1.4 Overshadowing Clothes Drying Areas

The control requires a minimum of 6 hours solar access be retained to a suitable clothes drying area.

Comment: Ample opportunity will remain available for clothes a clothes drying area capable of receiving 6 hours solar access.

### 3.4.2 Privacy and Security

Privacy has been dealt with via full height privacy screening on the upper level balcony that forms part of the principal private open space for the dwelling. The privacy screening will minimise looking between the adjoining two properties, who also have elevated balconies to capture views.

The balcony off the ground floor plan (mid-level) services only bedrooms and as such, will be a less utilised space that impacts upon privacy. There is approximately 9m of separation to the dwelling to the north and approximately 7m separation to the south.

The side elevations have limited window openings, with only a laundry window facing north and a narrow living room window facing south, which is reasonable to allow some ambient light into the living room corner. The size of the south facing living room window is not considered to give rise to unreasonable privacy impacts.

### 3.4.3 Maintenance of Views

#### Merit consideration:

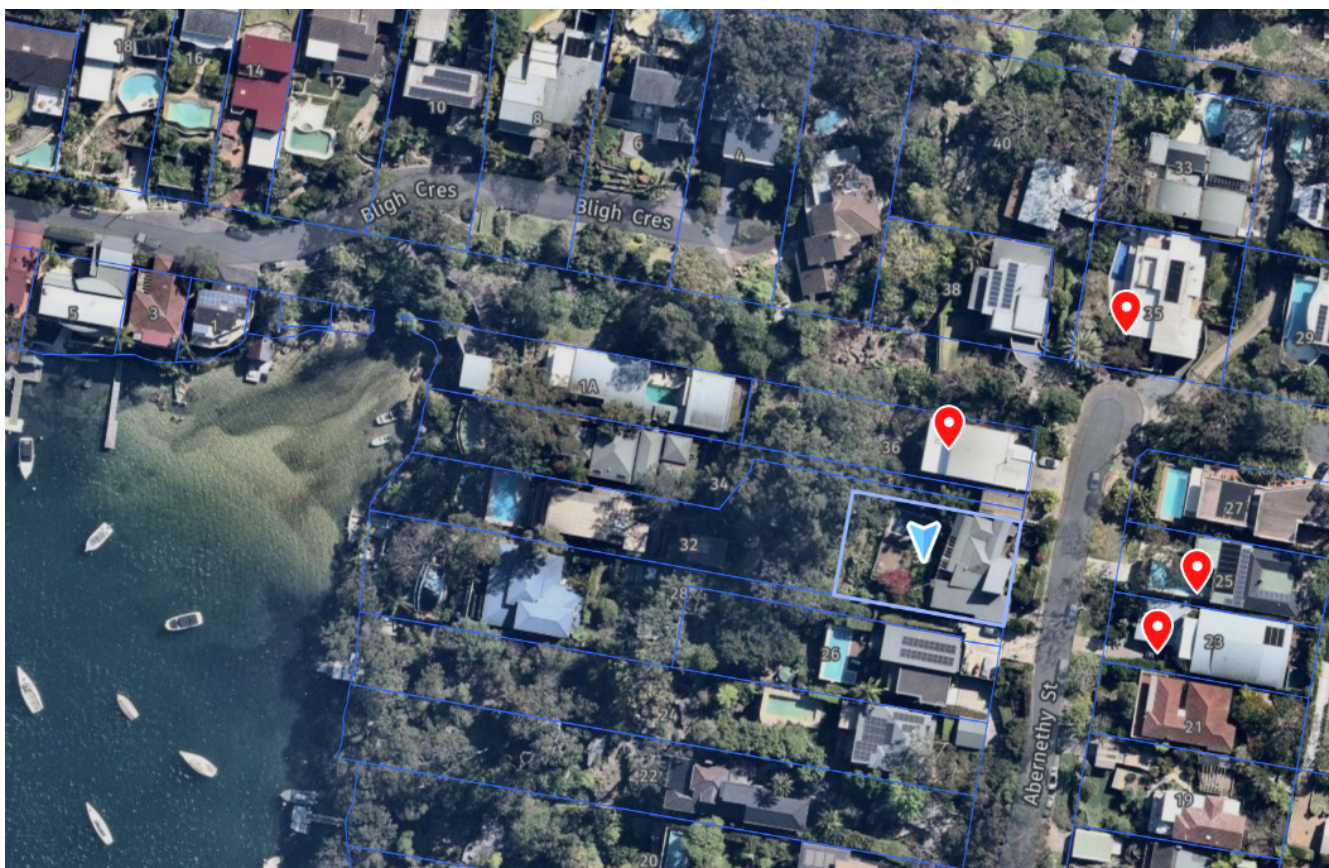
The development is considered against the Objectives of the Control:

*Objective 1) To provide for view sharing for both existing and proposed development and existing and future Manly residents.*

*Objective 2) To minimise disruption to views from adjacent and nearby development and views to and from public spaces including views to the city, harbour, ocean, bushland, open space and recognised landmarks or buildings from both private property and public places (including roads and footpaths).*

*Objective 3) To minimise loss of views, including accumulated view loss 'view creep' whilst recognising development may take place in accordance with the other provisions of this Plan.*

During the notification of the application there were four (4) properties who raised concerns about view impacts and view sharing. These being 23, 25, 35 and 36 Abernethy Street and are identified on the below map (red markers).



**Figure 1** - Red markers identify properties who have raised view impact concerns.

Four (4) height poles were erected and surveyed (survey certificate provided) in the following locations:

- 1) North-western corner of the upper level pergola;
- 2) South-western corner of the upper level pergola;
- 3) Western point of the pitched roof form;
- 4) Eastern point of the pitched roof form.

In determining the extent of potential view loss to adjoining and nearby properties, the four (4) planning principles outlined within the Land and Environment Court Case of *Tenacity Consulting Pty Ltd Vs Warringah Council (2004) NSWLEC 140 (Tenacity)* are applied to the proposal.

A view sharing assessment is undertaken within Attachment 1 to this report and is provided as a separate document, given the length of the assessment, Each property is considered individually against the Tenacity Planning Principle within the view sharing assessment.

Having regard to the assessment contained within Attachment 1, it is concluded that the proposed development is consistent with the View Sharing Planning Principle Established in *Tenacity* and relevant objectives of MLEP 2013 / MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979.

#### **4.1.2 Height of Buildings (Incorporating Wall Height, Number of Storeys & Roof Height)**

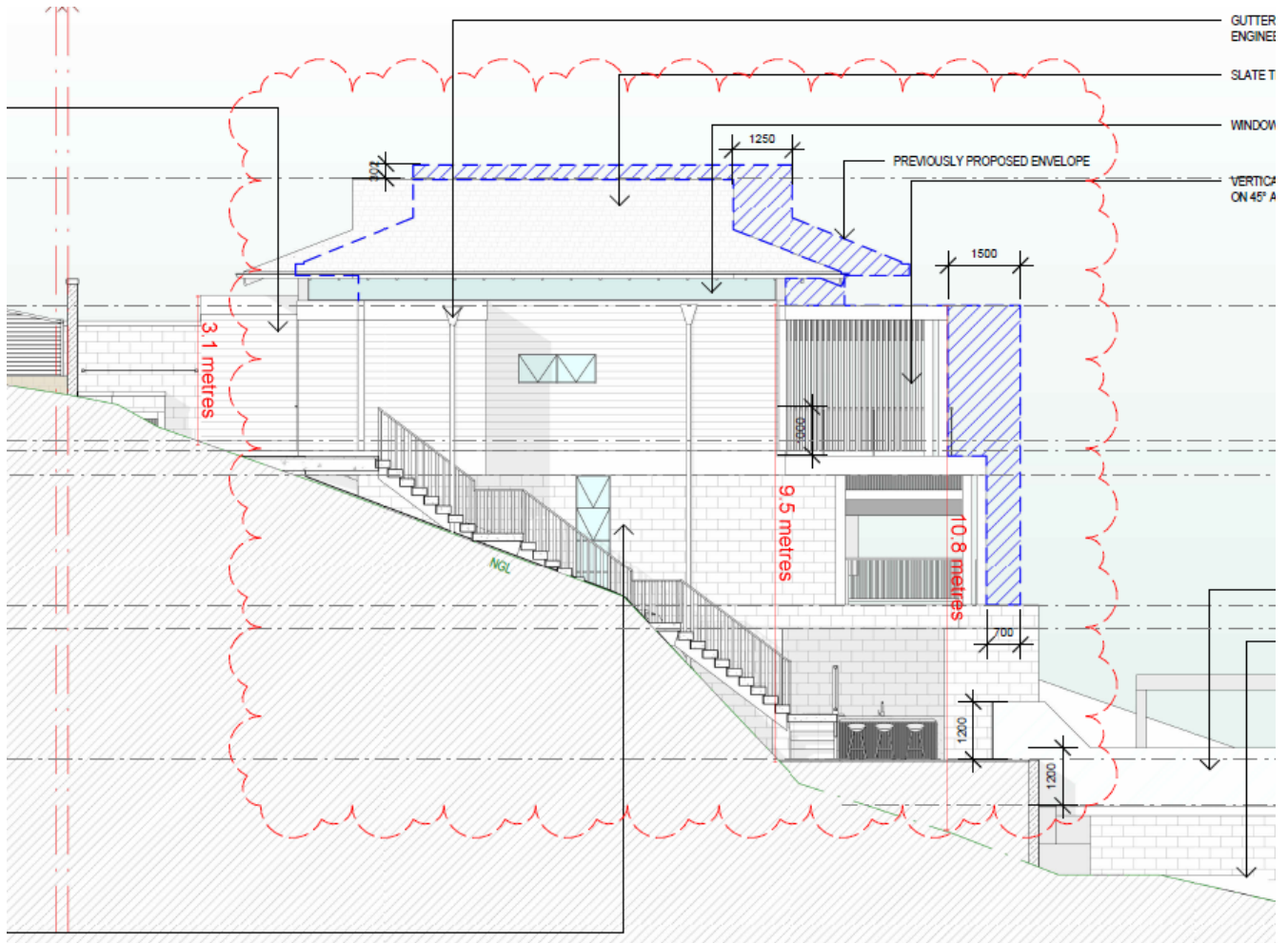
##### Description of non-compliance

The DCP requires a maximum wall height of 8m when the site slope of 1:4+ gradient. The site, in

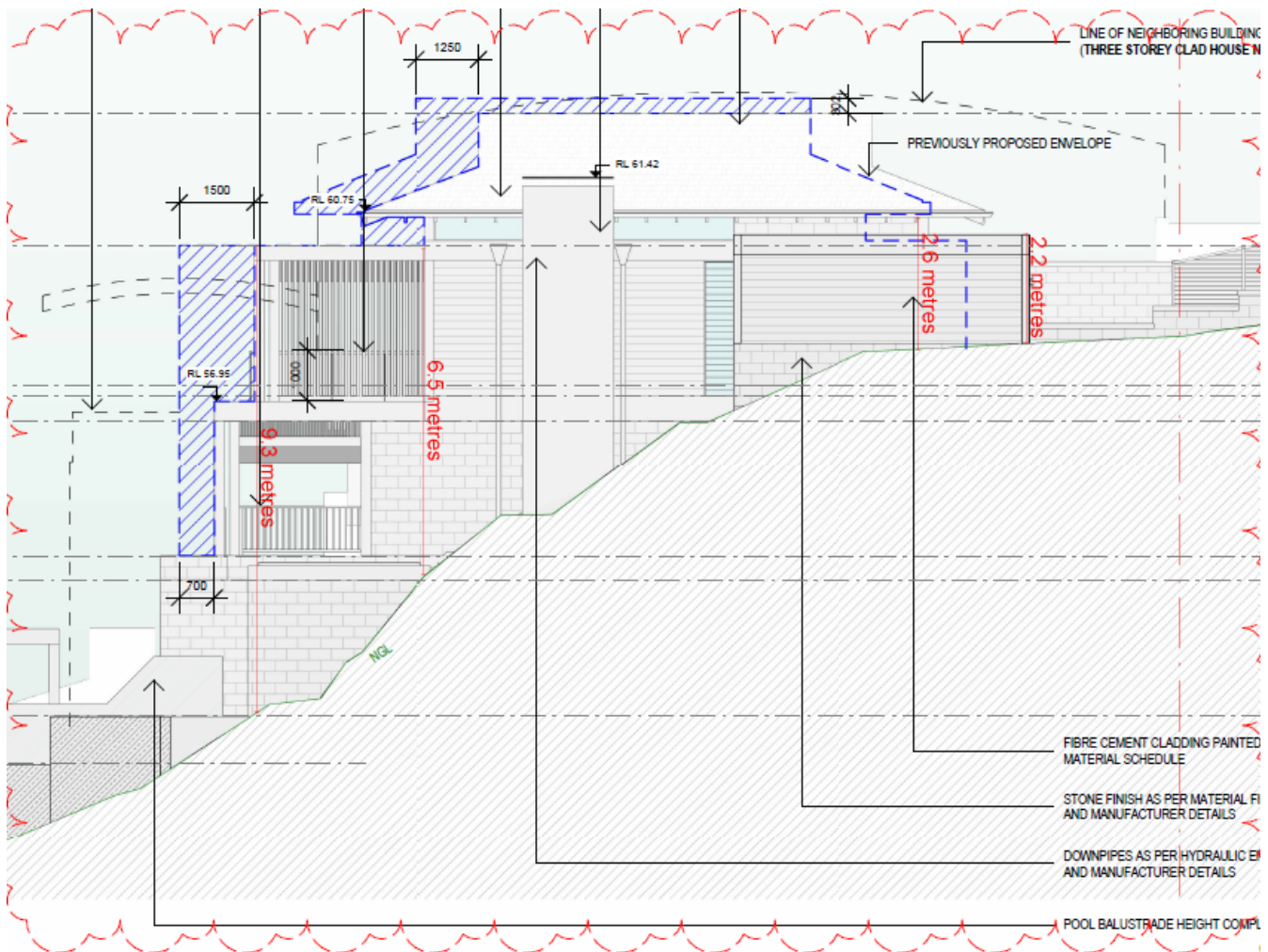


particular in the area of non-compliance, has a slope of 1:2 and in some locations, a near vertical drop due to a rock outcrop.

The northern wall is between 3.1m and 9.5m, with the pergola up to 10.8m, see below:



The southern wall is between 2.1m and 6.5m, with the pergola up to 9.3m, see below:



### Merit consideration

There are no underlying objectives of this control under which to consider the merits of this variation. This control instead relies on the objectives for the Height of Buildings at clause 4.3 in the Manly LEP 2013. The proposal has been assessed against these objectives under clause 4.6, above in this report. In summary, the non-compliance to the wall height is a direct result of the extremely steep topography of the land and the proposal is found to meet the objectives of the building height standard (as discussed in Clause 4.6 assessment earlier in this report). Therefore, the DCP variation is supported in this particular circumstance.

### **4.1.3 Floor Space Ratio (FSR)**

See discussion under Clause 4.4 and Clause 4.6 MLEP 2013.

### **4.1.4 Setbacks (front, side and rear) and Building Separation**

#### Description of non-compliance

The DCP requires side setbacks to be 1/3 of the height of the wall on the side elevations. The setback requirements across the site are varied due to the sloping nature of the site.

The northern elevation has a wall height of between 3.1m to 10.8m, requiring a side setback of between 1.1m to 3.16m façade and 3.6m to the balcony.

The proposed setback to the northern elevation is between 0.9m and 3m, including the balcony at 3m, a variation of up to 600mm.

The southern elevation has a wall height of between 2.1m to 9.3m, requiring a side setback of between 1.2m to 2.16m to the façade, and 3.1m to the balcony. The proposed garage requires a 0.7m side setback.

The proposed setback to the northern elevation is 3m, compliant with the control. The proposed setback to the balcony is 3m, non-compliant by 100mm. The garage is proposed to have a nil setback, non-compliant with the control.

Merit consideration:

With regard to the consideration for a variation, the development is considered against the underlying Objectives of the Control as follows:

*Objective 1) To maintain and enhance the existing streetscape including the desired spatial proportions of the street, the street edge and the landscape character of the street.*

Comment:

The provided front setback and side setbacks are consistent with the street character. The minor breaches to the side setbacks will not have a visible street appearance or influence the character of the street.

*Objective 2) To ensure and enhance local amenity by:*

- *providing privacy;*
- *providing equitable access to light, sunshine and air movement; and*
- *facilitating view sharing and maintaining adequate space between buildings to limit impacts on views and vistas from private and public spaces.*
- *defining and adding character to the streetscape including the provision of adequate space between buildings to create a rhythm or pattern of spaces; and*
- *facilitating safe and adequate traffic conditions including levels of visibility around corner lots at the street intersection.*

Comment:

The proposal is well designed to retain privacy between sites, allow for view sharing and maintain solar access as detailed elsewhere within this assessment report. The minor breaches to the side setbacks do not detract from the street character.

*Objective 3) To promote flexibility in the siting of buildings.*

Comment:

The development has been sited flexibly to respond to the site constraints and retain reasonable amenity for and from the development.

*Objective 4) To enhance and maintain natural features by:*

- *accommodating planting, including deep soil zones, vegetation consolidated across sites, native vegetation and native trees;*
- *ensuring the nature of development does not unduly detract from the context of the site and particularly in relation to the nature of any adjoining Open Space lands and National Parks; and*
- *ensuring the provisions of State Environmental Planning Policy No 19 - Urban Bushland are satisfied.*

Comment:

The 1.1m to 3m side setbacks provided allow for a meaningful landscape buffer alongside of the development to plant vegetation.

*Objective 5) To assist in appropriate bush fire asset protection zones.*

Comment:

Not applicable to this site.

Having regard to the above assessment, it is concluded that the proposed development is consistent with the relevant objectives of MLEP 2013 / MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979.

#### **4.1.9 Swimming Pools, Spas and Water Features**

The control for swimming pools requires that:

##### 4.1.9.1 Height above ground

*a) Swimming pools and spas must be built on or in the ground and not elevated more than 1m above natural ground level. Consideration of any exception to exceed the height above ground must demonstrate that any swimming pools and/or spa and their curtilage and/or concourse more than 1m above natural ground level:*

- i) would not detract from the amenity or character of the neighbourhood; and*
- ii) is a minimum distance from any side boundary equivalent to the height of the swimming pools and/or spa and their curtilage and/or concourse at any point above existing ground level.*

Comment: The swimming pool at the rear of the site protrudes above the ground level up to 2.7m due to the sloping nature of the site. The swimming pool itself has a setback of 5.7m to the rear (west) boundary, a 5.9m setback to the south side boundary and a 3m setback to the northern side boundary. The swimming pool provides a 'wet edge' along the western side to break up the height of the pool presenting to the west.

The pool is considered to meet i) and ii) above as follows:

- i) The surrounding sites are dwellings, pools, decks and structures on a steeply sloping which results in elements protruding above ground level, however sitting within a landscape setting with landscape setbacks. The proposal responds to this by providing generous landscape setbacks to the pool to mitigate bulk and scale. There is a substantial setback to the western dwelling to the rear which means the pool will not be visually prominent for the downslope properties;
- ii) The pool provides at least a 2.7m setback to the boundaries and therefore meets the requirement.

#### **THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES**

The proposal will not significantly affect 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 2022**

The proposal is subject to the application of Northern Beaches Section 7.12 Contributions Plan 2022.

A monetary contribution of \$28,880 is required for the provision of new and augmented public infrastructure. The contribution is calculated as 1% of the total development cost of \$2,888,000.

## **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 2021;
- All relevant and draft Environmental Planning Instruments;
- Manly Local Environment Plan;
- Manly 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, in this regard the application is not considered to be acceptable and is recommended for refusal.

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 EPs
- Consistent with the objects of the Environmental Planning and Assessment Act 1979

Council is satisfied that:

1) The Applicant's written request under Clause 4.6 of the Manly Local Environmental Plan 2013 seeking to justify a contravention of Clause 4.3 Height of Buildings and Clause 4.4 Floor Space Ratio has adequately addressed and demonstrated that:

a) Compliance with the standard is unreasonable or unnecessary in the circumstances of the case; and

b) There are sufficient environmental planning grounds to justify the contravention.

2) The proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

This development application seeks consent for demolition of an existing dwelling and construction of a new dwelling house and swimming pool.

The application is referred to the DDP as seven (7) unique submission have been received and there is a departure of more than 10% from the height of buildings development standard.

The departure from the building height development standard is supported due to the extremely steep topography of the site, compatibility with the surrounding buildings and acceptable view sharing outcome for the surrounding sites. The departure from the FSR standard is due to the site being an 'undersized allotment' as identified within the DCP. As such, there are sufficient environmental planning grounds to support the breaches to the development standard in this circumstance.

The concerns raised in the objections have been addressed within the assessment report (including a detailed view sharing assessment).

The critical assessment issues relating to views, privacy, building height/scale have been resolved to the satisfaction of Council's planner and are detailed within this assessment report.

However, the residual issue with the driveway gradient due to the amended plans has not been adequately addressed to the satisfaction of Council's Engineers. This issue could conceivably be addressed via a minor design amendment (i.e raising the garage level approximately 400mm) however, this information has not been forthcoming at the time of finalising the assessment report and as such, the recommendation is refusal due to the unresolved issue of the driveway gradient which does not comply with Council's low profile design specification.

Furthermore, Council's engineer is not satisfied with the information provided from the applicant's geotechnical engineer in relation to stormwater management. As such, until this information is provided, the application is recommended for refusal.

Whilst the assessment has found that the application is acceptable from a built form and retains reasonable amenity for the surrounding properties, this report concludes with a recommendation that the DDP refuse the application due to the outstanding unresolved engineering matters at the time of finalising this assessment report.

It is considered that the proposed development does not satisfy the appropriate controls and that all processes and assessments have been satisfactorily addressed.

## **RECOMMENDATION**

THAT Council, as the consent authority REFUSE Development Consent to Development Application No DA2022/2207 for the Demolition works and construction of a dwelling house including swimming pool on land at Lot A DP 358783,30 Abernethy Street, SEAFORTH, for the reasons outlined as follows:

1. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 6.4 Stormwater Management of the Manly Local Environmental Plan 2013. Specifically, insufficient information

has been provided with regard to the design of the level spreader in relation to geotechnical risks that may arise due to the discharge of stormwater.

2. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 6.12 Essential Services of the Manly Local Environmental Plan 2013. Specifically, the application has not satisfied pre-condition (e) of Clause 6.12, as the driveway gradient does not comply with Council's Maximum Low profile driveway gradient requirement.



## **Attachment 1 – Manly DCP Clause 3.4.3 Maintenance of View**

### **Merit consideration:**

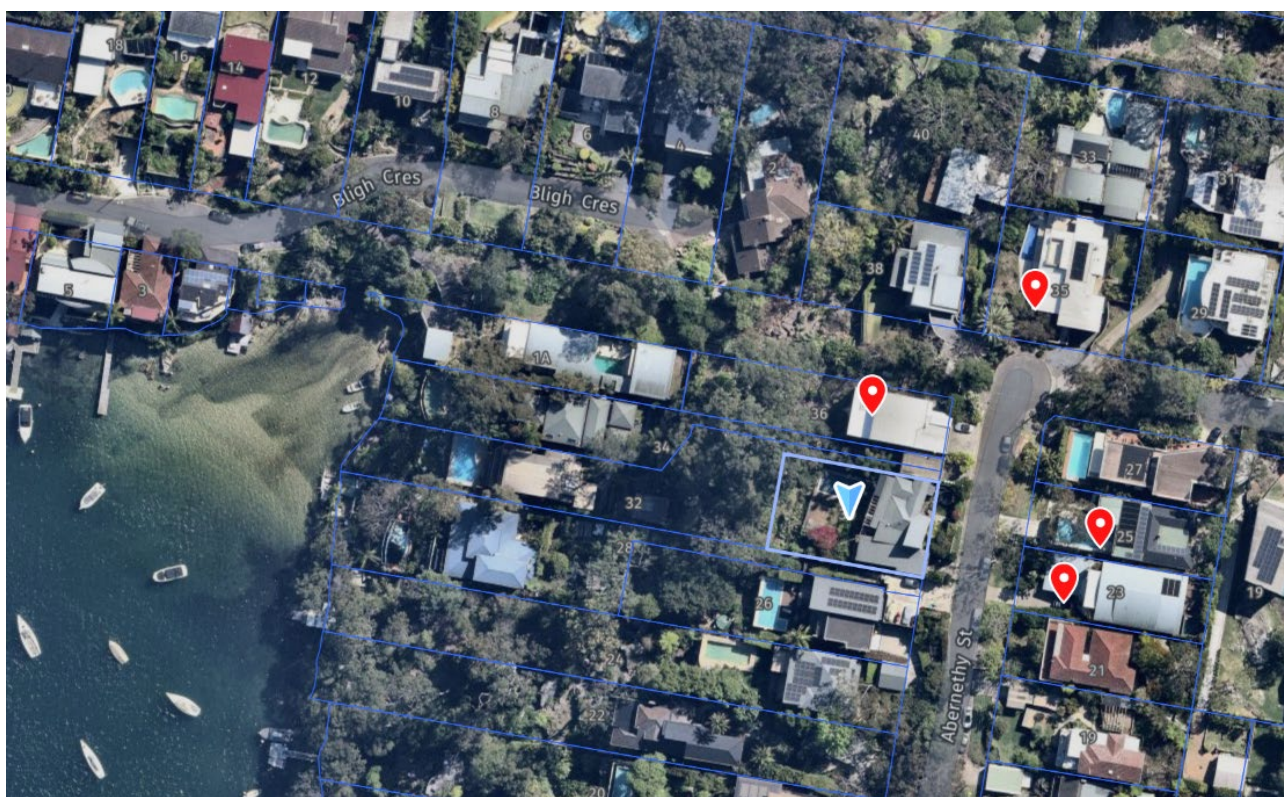
The development is considered against the Objectives of the Control:

*Objective 1) To provide for view sharing for both existing and proposed development and existing and future Manly residents.*

*Objective 2) To minimise disruption to views from adjacent and nearby development and views to and from public spaces including views to the city, harbour, ocean, bushland, open space and recognised landmarks or buildings from both private property and public places (including roads and footpaths).*

*Objective 3) To minimise loss of views, including accumulated view loss 'view creep' whilst recognising development may take place in accordance with the other provisions of this Plan.*

During the notification of the application there were four (4) properties who raised concerns about view impacts and view sharing. These being 23, 25, 35 and 36 Abernethy Street and are identified on the below map (red markers).



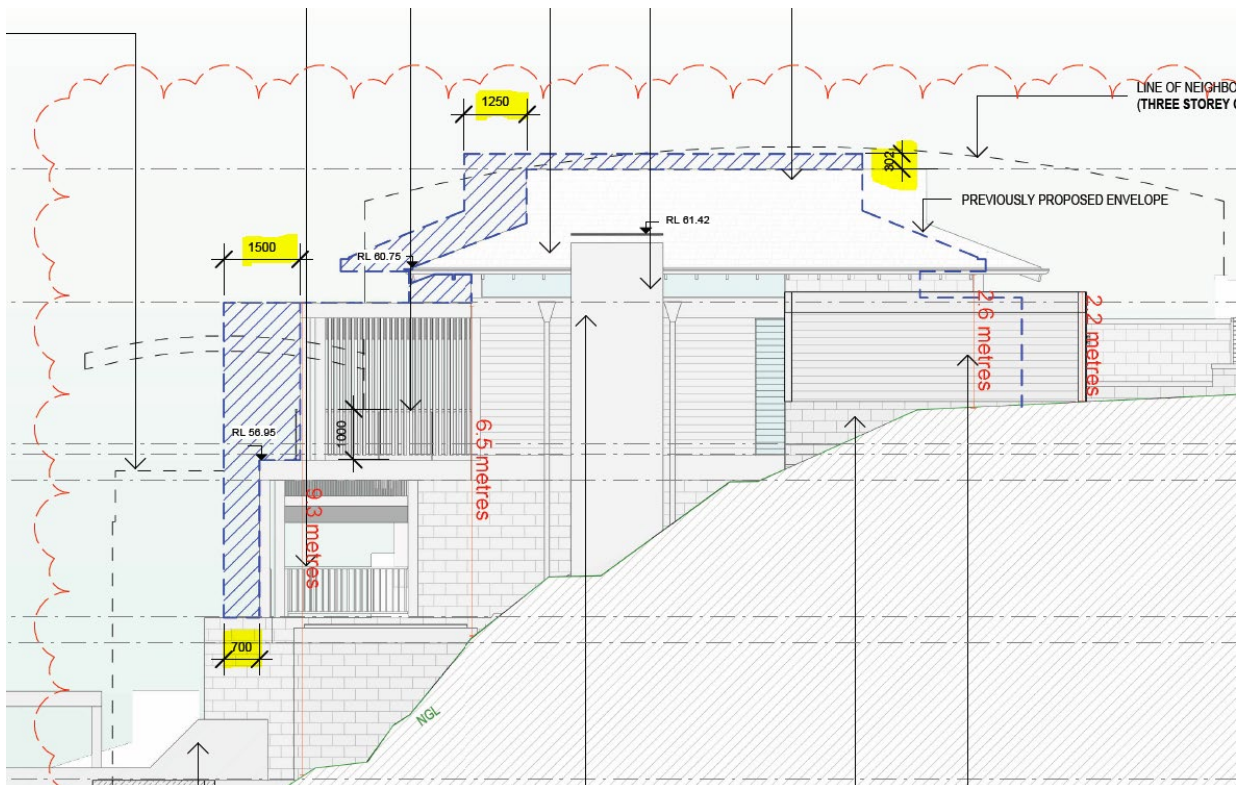
**Figure 1** - Red markers identify properties who have raised view impact concerns.

Four (4) height poles were erected and surveyed (survey certificate provided) in the following locations:

- 1) North-western corner of the upper level pergola;
- 2) South-western corner of the upper level pergola;
- 3) Western point of the pitched roof form;
- 4) Eastern point of the pitched roof form.

In determining the extent of potential view loss to adjoining and nearby properties, the four (4) planning principles outlined within the Land and Environment Court Case of *Tenacity Consulting Pty Ltd Vs Warringah Council* (2004) NSWLEC 140 (**Tenacity**) are applied to the proposal.

It is important to note that the location of the height poles **represent the original plans as submitted**. The amended plans reduce the height of the central roof pitch by 302mm and move the roof 1.25m closer to the front (eastern) boundary. The upper-level pergola is also setback 1.5m and the lower-level pergola setback 0.7m.



**Figure 2 – Southern elevation showing the revised plans with increased setback to the western boundary and reduced ridge height of the roof form.**

Each property is considered individually against the Tenacity Planning Principle below.

### **23 Abernethy Street**

*The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (for example of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, for example a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

#### **Comment:**

The views to be impacted are water views of Middle Harbour, with the 'land water interface' retained over the top of the building. The views are locally significant, however are not considered 'iconic' in the meaning of the Tenacity planning principle.





**Figure 3** - View from upper level terrace, looking west, standing position.



**Figure 4** - View from inside living/kitchen area, upper level, standing position looking west.





**Figure 5** - View from lower level bedroom on southern side of building, standing position looking west.



**Figure 5** - View from lower-level bedroom on northern side of building, standing position looking west.

The second step is to consider from what part of the property the views are obtained. For example, the protection of views across side boundaries is more difficult than the protection of views from front and

*rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.*

Comment:

The views are obtained from two ground level bedrooms and the upper floor kitchen/living/dining areas, along with the elevated terrace adjoining these areas on the western side of the building. Views are obtained from both a standing and sitting position. The views are obtained across the front boundary of the site.

*The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20 percent if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*

Comment:

There are minor impacts to filtered views through existing vegetation on the lower ground floor. There is some minor impact of filtered views from the upper floor. However, it is important to note that the existing triangular portion of roof on the subject site will be demolished and replaced with a lower height pitched roof and therefore, any view impacted because of the development will be offset but the view gained due to the removal of the existing building. The view gained will be a more 'whole view' and therefore on balance, the proposal is an improvement over the existing situation in relation to view sharing. Overall, the proposal is considered to have a negligible or even neutral outcome with regards to view impacts, having regard to the triangular roof form to be removed.

*The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.*

Comment: The FSR breach is discussed earlier within this report. However, the 8% exceedance FSR is not considered to generate any of the additional view impacts as impacting portions of the development are open pergolas and the pitched roof form, which do not contribute to the FSR of the building. The FSR of the building has been skillfully distributed across the site, including maintaining a single level appearance at the street frontage and using the excavated lower levels to provide for FSR to minimise view impacts.

The height breach is due to the extremely steep topography of the site and sharp fall of the land due to the rock outcrops central to the site. The height of the building has been minimised at the front of the site (single storey only) which allows increased levels of view sharing, as opposed to seeking a first floor closer to the street which could be achieved within the 8.5m height limit which would likely increase the level of view obstruction, particularly for the lower floor rooms. By keeping the house lower at the front of the site, this spreads the building bulk further to the west and therefore, results in the height encroachment due to the site topography. It is noted that the height of the encroaching pergola is consistent with the adjoining buildings (as discussed within the Clause 4.6 assessment) and this is a direct result of the site topography and design that maintains a single storey appearance at the site frontage. The encroaching pergola sits behind the alignment of the two adjoining buildings and is setback further from the western (rear boundary) as to minimise view impacts.

The pitched roof form, although having a minor building height encroachment in the centre, allows for the maintenance of views either site and is a better outcome when compared to the existing building on the site with the triangular roof to be demolished. On balance, there is a neutral outcome in terms of view impact due to the existing building to be removed.



Although there is a numerical non-compliance to building height, this is a direct result of the extreme site topography and desire to maintain a single storey street appearance and aim to achieve view sharing for the site itself. It is noted that the majority of the building is kept below the height limit (particularly at the front) and this enhances view sharing. Pushing the building further towards the street (east) for the sake of numerical non-compliance will further compromise view sharing for the subject site itself, and this is not in the spirit of view sharing particularly in the context where the vast majority of high-quality views for the surrounding properties are maintained and the impact is minor.

Overall, the proposal strikes a well-balanced outcome in relation to view sharing and is considered to be a skilful design.

### **25 Abernethy Street**

*The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (for example of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, for example a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

#### **Comment:**

The views to be impacted are water views of Middle Harbour from the ground level and the upper level. A very minor portion of the 'land water interface' is impacted from the ground floor, however, is largely retained over the top and either side of the building. The amended plans include an increased upper level setback of 1.25m to the roof form and therefore additional view will be retained when compared to the erected height poles. The views are locally significant, however are not considered 'iconic' in the meaning of the Tenacity planning principle.



**Figure 6 - View from upper floor balcony (adjoins living), standing position looking west.**





**Figure 7** - View from upper floor living room, standing position looking west.



**Figure 8** - View from lower floor bedroom, standing position looking west.





**Figure 9** - View from lower level pool area, standing position looking west.

*The second step is to consider from what part of the property the views are obtained. For example, the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.*

Comment:

The views are obtained from the upper level terrace/private open space (Figure 6), upper-level living room (Figure 7), ground level bedroom (Figure 8) and ground level pool area (level 9). The views are available over the front boundary of the site from a sitting and standing position.

*The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20 percent if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*

Comment:

The views from the upper level are largely retained, with a minor impact to a filtered portion of views as a result of the pitched roof form. It is noted that the existing triangular portion of roof will be demolished and as such, an equivalent portion of filtered water views will be gained, including an increased portion of the land/water interface from the ground level and pool area.

On balance of the views impacted and the views to be gained, the impact is considered to be a minor.

*The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying*

*proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.*

Comment:

The pitched roof form, although having a minor encroachment in the centre, allows for the maintenance of views either side and is a better outcome when compared to the existing building on the site with the triangular roof to be demolished. On balance, there is a neutral outcome in terms of view impact due to the existing building to be removed.

Although there is a numerical non-compliance, this is a direct result of the extreme site topography and desire to maintain a single storey street appearance. It is noted that the majority of the building is kept below the height limit (particularly at the front) and this enhances view sharing. Pushing the building further towards the street (east) for the sake of numerical non-compliance will further compromise view sharing for the subject site itself, and this is not in the spirit of view sharing particularly in the context where the vast majority of high-quality views for the surrounding properties are maintained and the impact is minor.

**35 Abernethy Street**

*The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (for example of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, for example a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

Comment:

The view to be impacted is a view to Middle Harbour with a portion of land-water interface and some moored boats in Middle Harbor. The view is considered to be a partial view which is impacted by building in the foreground and trees to varying degrees.





**Figure 10** - View from upper floor balcony adjoining bedroom, standing position looking south-west.



**Figure 11** - View from upper floor bedroom, standing position looking south-west.



**Figure 12** - View from lower level lounge room, standing position looking west.

The second step is to consider from what part of the property the views are obtained. For example, the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side

*views and sitting views is often unrealistic.*

Comment:

The view to be impacted is from an upper-level bedroom. The view is technically over the 'front' boundary of the site; however, the site is largely orientated towards the western (side) boundary to capture the high-quality whole views of middle harbour from the living room (Figure 12). The views are enjoyed from a sitting and standing position in the bedroom.

*The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20 percent if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*

Comment:

In consideration of the views available from the whole property, the overall view impact is minor. Of note, from the bedroom the view to the south-west of Middle Harbour is impacted, however, the view directly west will be retained in full and is the higher quality view (Figure 11). Also having regard to the high-quality view that is maintained in full from the living room looking west (Figure 12) the overall impact of the development upon the totality of views currently enjoyed from the property is considered to be minor.

*The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.*

Comment:

The FSR breach is discussed earlier within this report. However, the 8% exceedance FSR is not considered to generate any of the additional view impacts as impacting portions of the development are open pergolas and the pitched roof form, which do not contribute to the FSR of the building. The FSR of the building has been skilfully distributed across the site, including maintaining a single level appearance at the street frontage and using the excavated lower levels to provide for FSR to minimise view impacts.

The proposal has a point encroachment of the western portion of the central roof form, with this central roof form having an impact upon the view towards middle harbour. It is considered that even if the pitched roof form was brought into full compliance with the 8.5m height limit (by pushing it eastward) there would still be an impacted to approximately half the view to the harbour. It is considered redesigning the roof form to achieve numerical compliance, for the sake of preserving half of a secondary view corridor, is not reasonable in the circumstances where there will remain a high-quality view looking west from the bedroom. In the spirit of 'view sharing', pushing the development further eastward will diminish view corridors for the development and for this reason, the proposal is skilfully designed on balance. Furthermore, the pitched roof form remains an important architectural feature for the applicant's design of the building (with the gable allowing eastern/western sunlight) and as such, to further diminish this feature to preserve a secondary view corridor from a bedroom is unwarranted.

Overall, the proposal strikes a well-balanced outcome in relation to view sharing and is considered to be a skilful design.

**36 Abernethy Street**

*The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (for example of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, for example a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

Comment:

Figure 13 and 14 of the view sharing photographs show the original position of the proposed upper and mid-level terrace (which is represented by the height pole) and amended position of the upper level terrace which has been pushed back 1.5m and the middle terrace setback 0.7m (represented by the green line – marked up by applicant).

As per the amended proposal (green line), the view impacted is a portion of middle harbour water views and views towards the CBD, North Sydney and Kirribilli Skyline. The view is impacted to varying degrees depending on where one stands within the building or on the balcony.

The city skyline views (including the harbour bridge and Centre Point tower) will be retained in full from the balcony when standing to the west of the privacy screen (Figure 18).

When standing in the living room and kitchen, the partial views of the Sydney City CBD skyline, including Centre Point Tower and the Harbour Bridge, will be impacted from within the living room and kitchen. However, high quality water views will still be retained over the side boundary. Whilst the view of Centre Point Tower and the Harbour Bridge through the south facing window are somewhat available, they are considered 'partial views' which are obtained through existing vegetation, across a side boundary and through the balcony of 26 Abernethy. As such, they are partial views that are highly vulnerable to an impact.





**Figure 13** - View from ground floor living room, standing position looking south.



**Figure 14** – Zoomed in view from ground floor living room, standing position looking south. Two circles highlight centre point tower (left) and harbour bridge (right).



**Figure 15** – View from ground floor living room, standing position looking south-west.





**Figure 16** – View from ground floor kitchen, standing position looking south-west.



**Figure 17** – View from ground floor balcony, standing position looking south-west.





**Figure 18** – View from ground floor balcony, standing position looking south-west. Image taken from applicant's Clause 4.6 written request.



**Figure 19** – View from upper floor bedroom, standing position looking south-west.

The second step is to consider from what part of the property the views are obtained. For example, the protection of views across side boundaries is more difficult than the protection of views from front and

*rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.*

Comment:

The views that will be impacted is from a seated and standing position, directly across the side boundary of the site. The views are available from the living room, kitchen, dining room and balcony adjoining these spaces. Views are also available from the upper-level bedroom. As mentioned in the planning principle, retaining side boundary views are often unrealistic. In this circumstance, the proposal impacts a portion of the side boundary view, however, still retains high quality water views over the side boundary. The side boundary view from the balcony of the CBD (including the Harbour Bridge and Centre Point Tower) are retained in full.

*The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20 percent if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*

Comment:

In relation to the water view of Middle Harbour, as a result of the amended proposal the view impact is minor given the proportion of views that will be retained over the western (rear) boundary and also a large portion of water views retained from the south facing living room window. Views from the upper-level bedroom will largely be retained.

In relation to the view impact of the CBD skyline, Kirribilli Skyline and North Sydney Skyline, the impact is different depending on which part of the dwelling you stand in.

Standing on the balcony, there is no impact of the CBD skyline, Kirribilli Skyline and North Sydney Skyline, which includes full retention of the view of Centre Point Tower and the Harbour Bridge. From the south facing living room window (also visible from the kitchen) the view of the Harbour Bridge and Centre Point tower will be impacted.

The 'iconic' view of the Harbour Bridge, CBD and Centre Point Tower will be retained from the balcony, whilst high quality views of Middle Harbour will be retained from the living room, balcony, dining room, kitchen and upper floor bedroom over the rear and side boundary. Whilst it is recognised the iconic view of the Harbour Bridge and Centre Point Tower will be lost from inside the house, on balance of high-quality views retained from elsewhere in the house (and the retention of the iconic city views from the balcony), the overall impact is considered minor or at worst, moderate.

*The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.*

Comment:

It is the western (rear) setback to the building which is the determining factor within regard to view retention of the CBD Skyline, Centre Point Tower and Harbour Bridge view. The DCP requires a minimum 8m rear setback. The proposed development has a rear setback of 15.2m to the upper-level terrace/balcony and 14.4m setback to the mid-level terrace/balcony. When looking at the alignment of the adjoining two buildings, the proposal is setback behind the predominant alignment of the two nearest buildings, as shown in Figure 20 below. In relation to 'view sharing', by pushing back the proposed dwelling further, this restricts views being obtained from the balcony of the subject site. The

Planning Principle is a principle of 'view sharing', not 'view retention'. Given that the 'iconic' view of the Harbour Bridge, CBD and Centre Point Tower will be retained across a side boundary from the balcony of 36 Abernethy Street and high quality views of middle harbour will be obtained from multiple rooms over the rear and side boundary of the site, this assessment finds that view sharing is achieved.

**Figure 20** – Extract of plans showing the alignment of the building relative to the two adjoining buildings.

As such, the proposal is skilfully designed and responds to the planning control in a satisfactory way.

Having regard to the above assessment, it is concluded that the proposed development is consistent with the View Sharing Planning Principle Established in *Tenacity* and relevant objectives of MLEP 2013 / MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is supported, in this particular circumstance.