Sent: 24/07/2020 11:37:58 AM
Subject: Application No. DA2020/0211 - 82-84 Bower St, Manly (HLH 19413)
Attachments: Submission to Northern Beaches Council with enclosures - 24.07.2020.pdf;

Dear Ms Sawyer,

Please see **attached** submission in relation to the above matter.

Regards,

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Our Ref: JBH:AB:19413

24 July 2020

Northern Beaches Council
PO Box 82
MANLY NSW 1655

By Email: carly.sawyer@northernbeaches.nsw.gov.au

Attention: Carly Sawyer

Dear Ms Sawyer

Application No. DA2020/0211
Address: 82-84 Bower Street Manly

We refer to Council's letter of 23 July 2020 inviting a submission in relation to the above development application.

This letter is a submission made for and on behalf of the owners of the subject property.

Executive Summary

1. The assessment report has mischaracterised the proposal. That is, the proposal seeks development consent for the construction of certain unconstructed walls and so, is not a development application for a new dwelling.

2. Properly characterised, the proposal is for alterations and additions to an approved dual occupancy (under construction).

3. The mischaracterisation of the development in the assessment report, if accepted by the panel, would lead the panel into legal error in the consideration of the application.

Submission

There are a number of development consents that apply to the subject site. Those development consents (including a modification of one of them) are set out on page 4 of the assessment report. Each of those consents are valid and subsisting.

Just prior to the making of the subject application, Council raised a query with the ability to rely upon the existing consents to found the subject application. An advice from Ian Hemmings SC was sought and obtained in answer to that query. A copy of that advice is appended to this

submission. In summary, Mr Hemmings opined that the existing consents could be relied upon to found the subject application.

More recently, there is judicial authority in the decision by Commissioner Gray in *Pritchard v Northern Beaches Council* [2020] NSW LEC 1310 that supports the conclusions and opinions set out in Mr Hemmings' advice. A copy of that decision is appended to this submission for convenience.

In that matter, the applicant sought development consent for alterations and additions to a dwelling in Balgowlah Heights that was in the process of construction (the approval to construct the dwelling having been given through a complying development certificate).

In analogist circumstances to those in *Pritchard*, the applicant in this case seeks development consent to carry out alterations and additions to the dual occupancy approved by the various development consents granted in relation to the land and which is in the course of construction. In this case, the alterations and additions are those nominated as such in the architectural plans prepared by Smith & Tzannes. Those works are denoted with the blue marking.

Relevantly and importantly, it is only those works that are the subject of the development application. That is, no additional prospective works are the subject of the development application.

In *Pritchard* at [44] – [51] the Commissioner analysed the authorities in relation to what was there proposed confirming that the purpose of the development application is for the proposed development, which in this case would be for alterations and additions to the dual occupancy (by analogy referenced from paragraph [47] of *Pritchard*).

What is however different to the decision in *Pritchard* is that in this case, the alterations and additions do not change the approved configuration or form of the dual occupancy. So much is accepted by the Council in its report.

Accordingly, unlike in *Pritchard,* there is no requirement for any clause 4.6 requests for variation, the application not having the effect of either increasing the height of the building nor of increasing its floor space ratio.

Applying the authorities referred to in *Pritchard,* and analysis set out in Mr Hemmings' advice, it is tolerably clear that the assessment task to be undertaken is to assess those prospective works to determine whether or not, as compared against the approved built form, they give rise to any adverse merit based concerns.

Given that there is no change to the location of walls, windows, balconies or any other feature of the already approved development, the result in that exercise must be a negative answer. That is, in our submission, there are no adverse amenity impacts arising as a consequence of the development application.

In the circumstances, it would be appropriate, in our submission, for the panel to depart from the recommendation set out in the assessment report and approve the proposal.

Yours faithfully
HONES LAWYERS

Jason Hones
Managing Partner
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Encl.

Pacific Plus Constructions Pty Ltd

MEMORANDUM OF ADVICE

Hones Lawyers
Level 4
66 Berry Street
North Sydney NSW 2060

Attention: Mr Jason Hones

1 THE FACTS

1. A series of development consents and modifications have been granted for the development of land at 82 and 84 Bower Street, Manly.

2. Development Application 2019/0126 granted consent for alterations and additions to 82 Bower Street. Development Application 2017/168 granted consent for alterations and additions to 82 and 84 Bower Street. That development consent (DA 2017/168) was modified on 10 January 2019. A further development consent (DA 2019/0125) was issued in relation to two garages.

3. Expressed in very general terms, the consents authorised:

    a) significant internal works to reconfigure each of the premises at the ground and first floor levels;
    b) the addition of a new storey to each of the dwellings;

c) the partial demolition and partial retention of external walls; and

d) some additional external works.

4. As I understand my instructions the works have commenced. That includes the significant works for the internal reconfiguration of each of the dwellings. Relevantly, for the purposes of this advice, walls that were shown in the consents to be retained have been demolished. Some of those walls that were to be retained and have been demolished have been rebuilt.

5. The Council has issued a Stop Works Order. In essence, the Stop Works Order was issued because walls to be retained have been demolished (and/or rebuilt).

6. By its terms, the Stop Works Order in addition to requiring the cessation of works also required that there be submitted "*an application to Council for the unapproved building works*".

7. It is intended to lodge a Development Application that will (1) authorise the construction of walls that were to be retained, have been demolished and have not yet been rebuilt; and (2) authorise the use of walls that were to be retained, have been demolished and have been rebuilt.

8. Further, in relation to those portions of walls that have already been rebuilt, it is intended to lodge an application for a Building Information Certificate.

9. It is apparent that such a process is anticipated by the terms of Order 2.

10. Of course, that approach to the regularisation of the works assumes the continued reliance upon the underlying consents. Council has raised a concern that those consents are no longer capable of being acted upon. I have been asked to advise in relation to that concern. I set out that advice below.

2 ADVICE

11. As described by me briefly above, the Council's principal concern is that works have been carried out unlawfully.

12. A number of options are available to a Council as a consequence of the carrying out of unlawful works. One approach is to prosecute for the unlawful works. A second is to take civil action in order to restrain the use of any unauthorised works.

13. For an applicant, the *Environmental Planning and Assessment Act* provides alternatives for when works have been carried out that are unauthorised. Properly understood, there can be no doubt, that the *Environmental Planning and Assessment Act* permits the *regularisation* of unauthorised works. That regularisation is carried out in precisely the manner presently being embarked upon. That is new Development Applications for future works and Building Information Certificates for past works.

14. As I understand the Council's concern, it is a concern that sits outside any of those alternatives available to Councils and applicants. The Council is either suggesting that the carrying out of unauthorised works has somehow led to the invalidity of the consent. Alternatively, Council is suggesting that works having been carried out other than in accordance with the consent, the balance of the consent cannot be acted upon. I deal with each of these below.

15. Dealing with the first, it simply forms no part of the planning regime that the carrying out of unauthorised works can affect the *validity* of a development consent.

16. Further, even if it could be suggested that the carrying out of some unauthorised works affects the validity of the underlying consents – and in my opinion it cannot – nevertheless a development consent remains valid until declared invalid.

17. No step has been taken by the consent authority to have the consents declared invalid. For the reasons already touched upon by me briefly

above, the taking of those proceedings would be futile. The carrying out of the unauthorised works simply cannot affect the validity of the underlying consents.

18. I turn then to the second possible concern.

19. It is, of course, to be noted that there are significant works, able to be carried out (and indeed that have been carried out) that are authorised by the current consents. Those consents remaining valid, there is nothing to prevent those consents from being relied upon. Those consents authorised the carrying out of works and ultimately the use of those works when completed.

20. Of course, because the regime presently put in place will include additional consents, there will be the necessity to rely upon more than one development consent for the ultimate development of the land.

21. It is uncontroversial that more than one development consent can apply to land. Indeed, so much is made clear in the circumstances of this case where there are multiple development consents all of which must, of necessity, work together. To the extent there could be any doubt that was clearly resolved in *Hairis*[1].

22. Further, and in any event, the *Environmental Planning and Assessment Act* anticipates the granting of subsequent development consents which has the effect not only of impliedly altering earlier consents (like *Hairis*) but expressly (see s 4.17(1)(b)).

23. As a result, far from the carrying out of some unauthorised works resulting in an inability to rely upon the underlying consents, the clear intent of the *Environmental Planning and Assessment Act* is to:

    (1) permit the underlying consents to have continued validity;

[1] *Waverley Council v C M Hairis Architects* [2002] NSWLEC 180

(2) modify the underlying consents by the grant of future consents (either expressly or impliedly); and

(3) regularise any unlawful works by the issue of a Building Information Certificate (and further consents if necessary).

3 CONCLUSION

24. A series of consents have been granted, for alterations and additions, to two dwellings. Those consents authorise significant internal works, partial demolition of some external walls and the addition of a new floor.

25. In carrying out the works pursuant to the consents some unauthorised demolition and rebuilding has occurred.

26. In response to a Stop Works Order a regime has been implemented that seeks, in conformity with the *Environmental Planning and Assessment Act*, to regularise the works. The regime involves the continued reliance upon the underlying consents, the obtaining of a Building Information Certificate for unauthorised works and the grant of development consent for the construction of new works (being walls not authorised to be demolished by the consents).

27. The Council is concerned that regime is ineffective as the underlying consents can no longer be acted upon. That concern, by the Council, is plainly wrong.

Dated: 28 February 2020

Ian Hemmings SC
Martin Place Chambers
32/52 Martin Place
Sydney NSW 2000
T: 8227 9600
Liability limited by a scheme approved under Professional Standards Legislation

Land and Environment Court

New South Wales

Case Name:	Pritchard v Northern Beaches Council
Medium Neutral Citation:	[2020] NSWLEC 1310
Hearing Date(s):	19, 22 June 2020
Date of Orders:	21 July 2020
Decision Date:	21 July 2020
Jurisdiction:	Class 1
Before:	Gray C
Decision:	The Court orders that: (1) The appeal is dismissed. (2) The development application for alterations and additions to a dwelling at 11 Adelaide Street, Balgowlah Heights (DA2019/1303) is refused. (3) The exhibits are returned, except for Exhibit A.
Catchwords:	APPEAL – development application – alterations and additions to a dwelling house approved by a complying development certificate – whether a development application can be made with respect to a dwelling approved by a complying development certificate – breach of floor space ratio development standard – clause 4.6 of the local environmental plan – whether written request adequate
Legislation Cited:	Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000 Interpretation Act 1987 Land and Environment Court Act 1979 Manly Local Environmental Plan 2013 State Environmental Planning Policy (Exempt and Complying Development Codes) 2008

Cases Cited:	Abrams v Council of the City of Sydney [2019] NSWLEC 1583 Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61 Chambers v Maclean Shire Council (2003) 57 NSWLR 152; (2003) 126 LGERA 7; [2003] NSWCA 100 Dean v Minister for Planning and Andros Australia Pty Limited [2007] NSWLEC 779 Gejo Pty Ltd v Canterbury-Bankstown Council [2017] NSWLEC 1712 Gordon & Valich Pty Ltd v City of Sydney Council [2007] NSWLEC 780 Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118 Pasminco Cockle Creek Smelter Pty Ltd (subject to Deed of Company Arrangement) v Minister for Planning [2018] NSWLEC 130 Progress and Securities Pty Ltd v North Sydney Municipal Council (1988) 66 LGRA 236 RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 Waverley Council v C M Hairis Architects (2002) 100 LGERA 123; [2002] NSWLEC 180 Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 Windy Dropdown Pty Ltd v Warringah Council (2000) 111 LGERA 299; [2000] NSWLEC 240
Category:	Principal judgment
Parties:	John Pritchard (First Applicant) Leanne Pritchard (Second Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: M Staunton (Applicants) J Lazarus SC (Respondent) Solicitors: Sattler and Associates Pty Ltd (Applicants) Wilshire Webb Staunton Beattie Lawyers (Respondent)
File Number(s):	2020/19060
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER**: The applicants, John and Leanne Pritchard seek development consent for alterations and additions to a dwelling at 11 Adelaide Street, Balgowlah Heights. The dwelling to which alterations and additions are sought is in the process of construction. The approval to construct the dwelling was given through a Complying Development Certificate ("CDC"), issued pursuant to the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 ("SEPP ECDC") and Div 4.5 of the *Environmental Planning and Assessment Act 1979* ("EPA Act"). They lodged a development application with Northern Beaches Council ("the Council") on 20 November 2019 seeking development consent, under Div 4.3 of the EPA Act, for the alterations and additions to the approved dwelling (DA2019/1303). Following the expiry of the period after which a development application is deemed to be refused, the applicants lodged an appeal to the Court pursuant to s 8.7 of the EPA Act. The development application was subsequently refused by the Council on 8 April 2020.

2 The Council remains opposed to the grant of development consent based on a number of contentions, which can be summarised as falling within two grounds. The first ground is that the Court, in exercising the functions of the consent authority, has no power to determine the development application because a development consent granted under the EPA Act cannot amend or modify a CDC. The second is that the floor space ratio ("FSR") of the dwelling, as altered by the development application, breaches the FSR development standard and the request concerning that breach is not adequate to satisfy the matters required by cl 4.6 of the Manly Local Environmental Plan 2013 ("MLEP 2013"). The applicants dispute both grounds.

3 The Court was required to arrange a conciliation conference between the parties, pursuant to s 34AA(2)(a) of the *Land and Environment Court Act 1979* ("LEC Act"). An application for the first ground above to be dealt with as a separate question before a judge of the Court, made by the Council by notice of motion, was refused on 14 May 2020. The conciliation conference commenced on 19 June 2020. I presided over the conciliation conference. The parties were unable to reach an agreement and the conciliation was

terminated. Pursuant to s 34AA(2)(b)(i), the appeal then proceeded to a hearing forthwith.

4 At the commencement of the hearing, leave was granted to the applicants to amend the development application in accordance with sketch plans, with the intention that any grant of consent would be subject to a condition requiring the plans to be amended to reflect the sketch plans. The sketch plans reduce the area of the proposed upper level terrace, and also depict a modification to the CDC (to be sought by a separate process) to reduce the area of the upper level bedroom.

5 For the reasons set out below, I have determined that there is power to grant development consent for alterations and additions to a dwelling approved by a CDC. However, I have also determined that there is no power to grant consent to the present development application, as I am not satisfied that the written request adequately addresses that there are sufficient environmental planning grounds to justify the contravention of the FSR development standard.

The site and the locality

6 The site is known as 11 Adelaide Street, Balgowlah Heights and is legally described as Lot 17 Sec D in DP 2610. It is located on the southern side of Adelaide Street and is a regular shaped allotment with an area of 520.1m2 and a site frontage of 12.19m to Adelaide Street (northern boundary), rear boundary of 12.19m (southern boundary) and a lot depth of 42.67m (east and west boundary).

7 The site is currently vacant following the demolition of the two-storey dwelling house and attached garage that were previously situated on the site. Construction has commenced on a swimming pool in the southern half of the site in accordance with the CDC. Vehicle access and pedestrian access is obtained from Adelaide Street.

8 The immediate locality is characterised by detached two and three-storey dwelling houses of varying ages, with a streetscape of generous landscaped areas within the front setback and medium height canopy trees within the road reserve.

The complying development certificate

9 A CDC was issued on 7 November 2019 for the demolition of the existing dwelling, the construction of a new dwelling and swimming pool. The CDC approved dwelling has a front setback to Adelaide Street of 6.5m, side setbacks of at least 1m, and a rear setback of 17m. It comprises 3 bedrooms across three levels, an entry level living and dining area, a rumpus room on the ground level below (lower ground level), a first floor bedroom, study and bathroom, a lift well, stairs and a pool and pool deck on the ground floor. The CDC approved dwelling falls away from the street with the gradient land, such that it is no more than two storeys at any given point.

10 As a result of the gradient of the land, there is also an undeveloped area under the two-storey section of the proposed dwelling, in the north western area of the proposed dwelling.

11 Figure 1 shows the lower ground floor plan (labelled as ground floor plan) and west elevation of what was approved by the CDC. The west elevation demonstrates the void area, described by the applicants as an undercroft area.

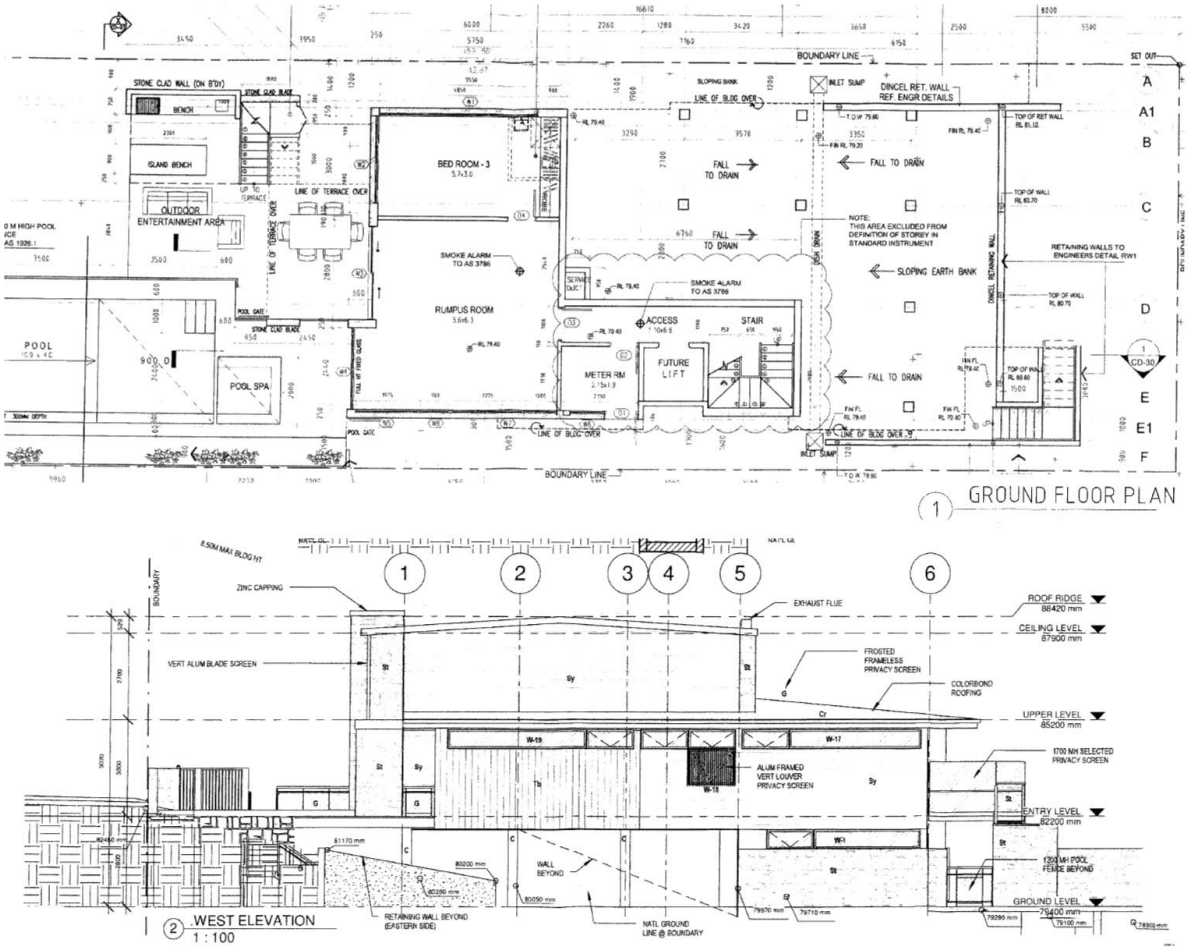

Figure 1: Approved Complying Development Certificate Ground Floor Plan (Lower Ground Floor) and West Elevation

The proposed development

12 The proposed development, for which development consent is sought, seeks to alter the approved dwelling by the addition of 59.46m2 floor area on the lower ground floor for the purpose of three bedrooms and a bathroom. It also seeks to alter the dwelling by the relocation of a cabana wall on the south western side boundary of the site, the addition of floor space to the terrace on the south western elevation of the building, the addition of a bin storage area on the entry level, the addition of a terrace off the main bedroom on the first floor upper level and the partial extension of the roof over that terrace. The gross floor area to be added to the dwelling by the proposed development is only that contained on the lower ground floor, which is 59.46m2.

13 These alterations and additions to the entry level (ground floor) and the lower ground floor (shown as the ground floor) are highlighted on two of the floor plans and west elevation shown in Figure 2. The first floor (third storey) is shown later at Figures 3 and 4.

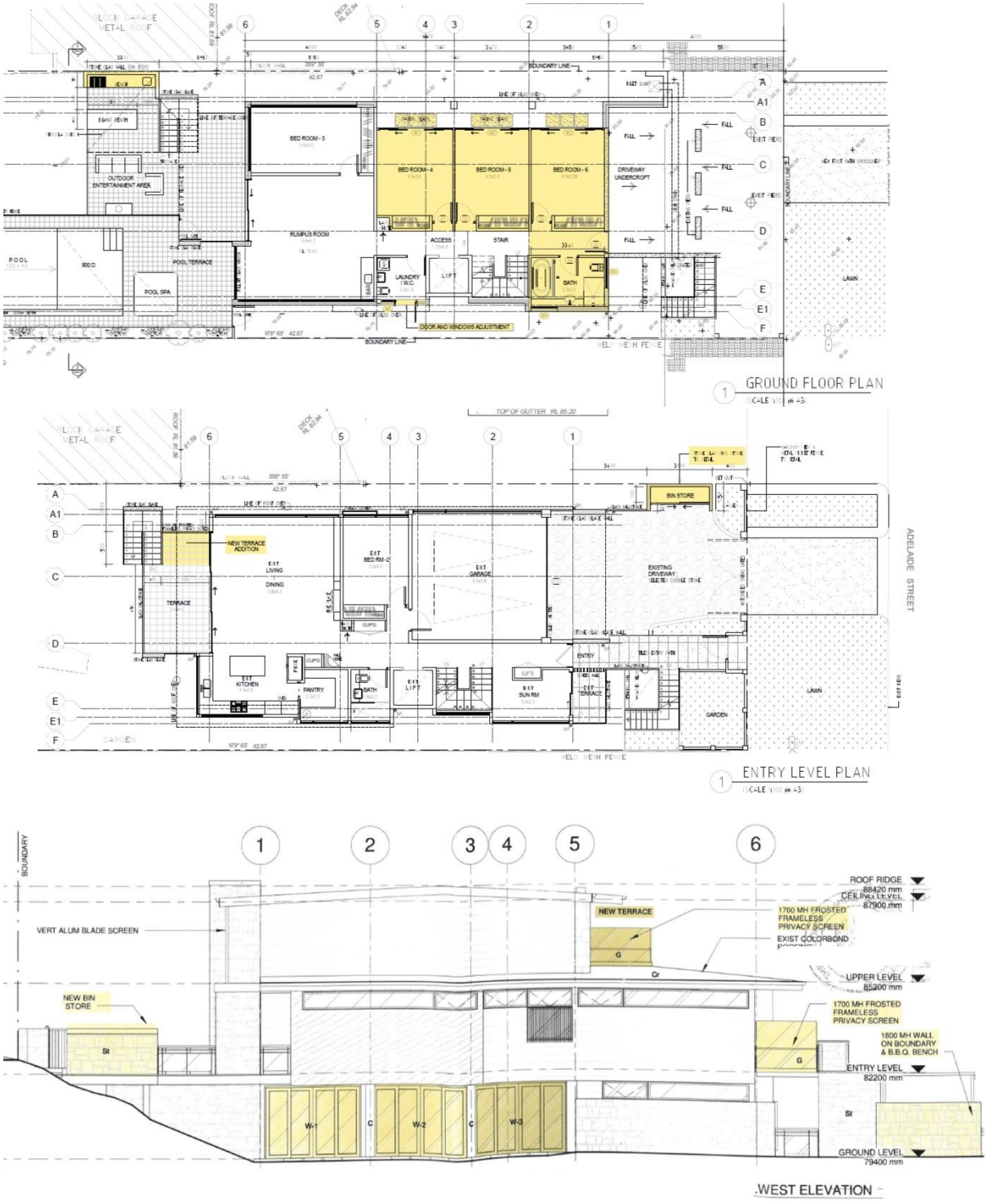

Figure 2: Proposed development as shown on the ground floor and entry level plans and the west elevation (subject to the sketch plans shown in Figures 3 and 4)

14 Two of the sketch plans, which are referred to at [4] above and for which leave was granted, are shown at Figures 3 and 4. Figure 3 depicts the alterations to the first floor that are sought by the development application, which includes a smaller upper level terrace than what was originally proposed. Figure 4 depicts

a modification to the CDC (intended to be sought by a separate process) to reduce the area of the upper level bedroom. The purpose of the changes depicted in the sketch plans is to open a view corridor over the altered dwelling.

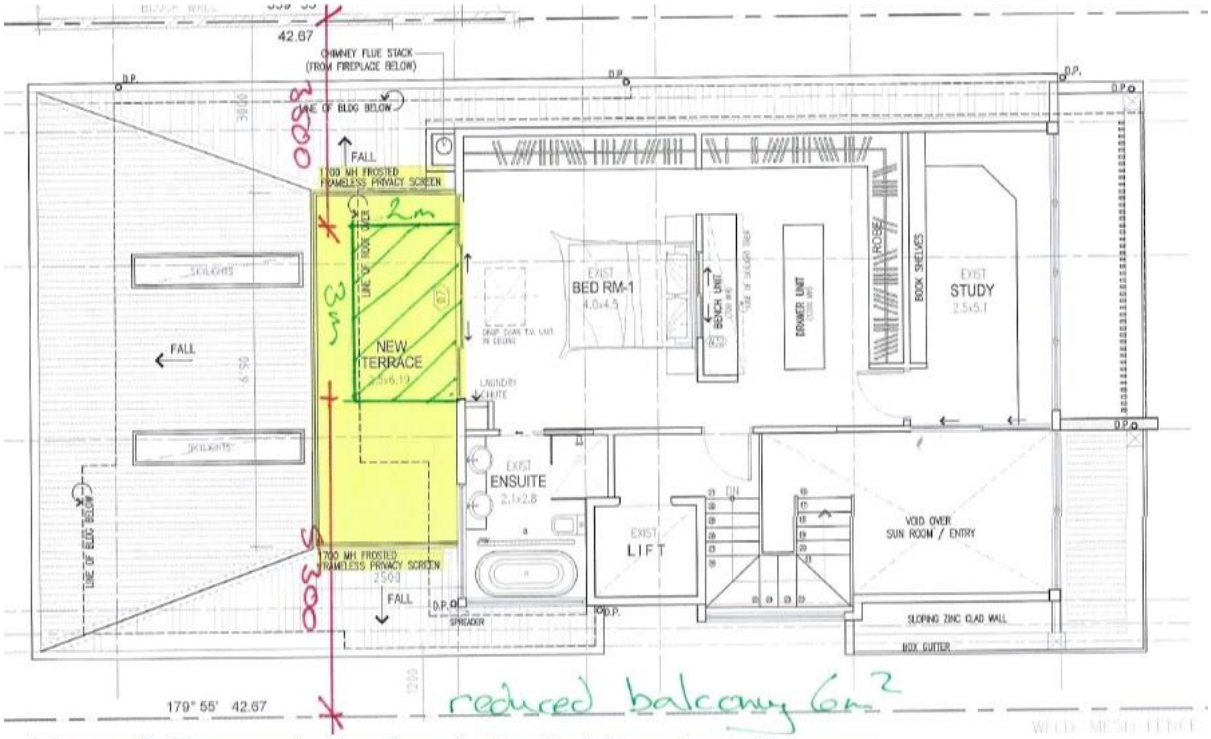

Figure 3: Proposed alterations to the first floor shown in green

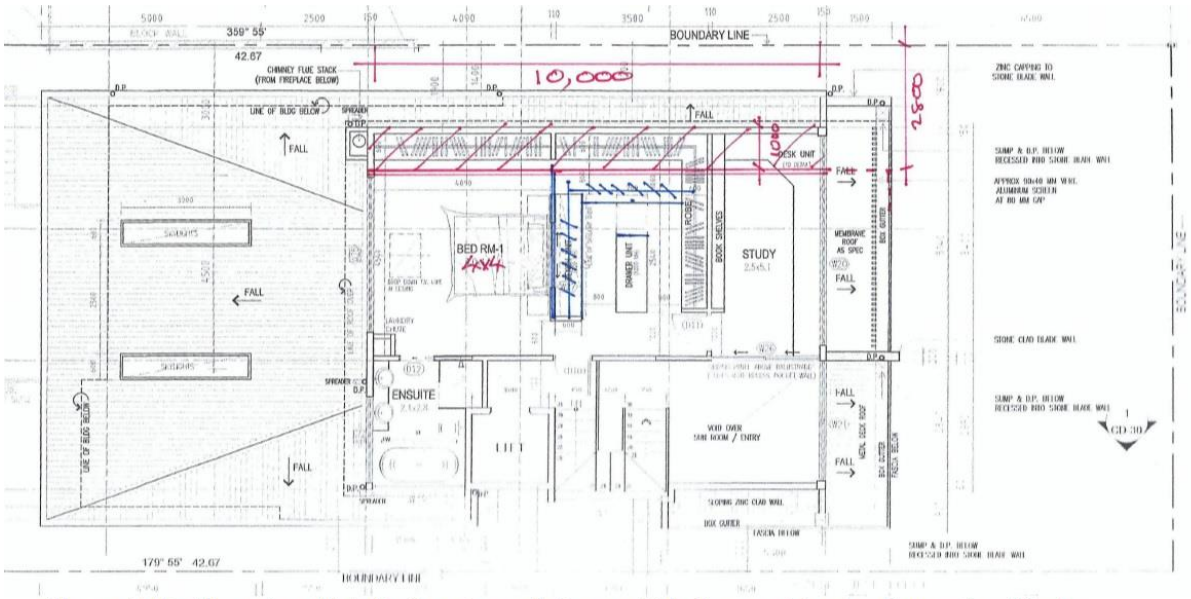

Figure 4: First floor plan with indicative change to be sought to the complying development certificate shown in red and blue

The planning framework

15 The site is zoned R2 Low Density Residential pursuant to the MLEP 2013, in which dwelling houses are permissible with consent. Clause 2.3(2) requires the Court to "have regard to the objectives for development in a zone when determining a development application in respect of land within the zone". The zone objectives are:

> • To provide for the housing needs of the community within a low density residential environment.
>
> • To enable other land uses that provide facilities or services to meet the day to day needs of residents.

16 Clause 4.3 of the MLEP 2013 establishes a 8.5m building height development standard in accordance with the Height of Buildings Map, with which the proposed development complies.

17 Clause 4.4 establishes a FSR development standard for the site of 0.4:1. The proposed development results in an altered dwelling with a FSR (on the Council's calculations) of 0.563:1, which represents a variation of 40% or an additional area of 84.76m2 above the development standard. As such, consent cannot be granted except in accordance with cl 4.6(2) of the MLEP 2013. Clause 4.6 provides, at (3) and (4):

> (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.

Evidence

18 Expert opinion evidence on the town planning impacts of the proposed development and on the adequacy of the cl 4.6 request, was given by Mr Charles Hill, a consultant town planner engaged by the applicants, and Ms Lashta Haidari, a town planner employed by the Council. The general matters that are agreed between them are:

- That overlooking to the rear of neighbouring properties is inevitable given the topography and the design of dwellings in the locality.
- That the proposed terrace is built forward of 13 Adelaide Street, and set back from the rear of 9 Adelaide Street.
- That with respect to privacy, there are no windows on the western elevation of 9 Adelaide Street which might create an impact on privacy, and the terrace on the eastern elevation of 13 Adelaide Street is built to the site's boundary with the only screening limited to a spa that is set back and screened from view.

19 Ms Haidari’s evidence is also that there is no adverse impact caused by the additional floor space added by the proposed development, and the additional floor space does not create any issue with respect to the streetscape appearance of the dwelling.

20 A number of resident objectors made submissions on the notification of the development application, and made further submissions at the commencement of the conciliation process. The issues they raise can be summarised as follows:

- Loss of views,
- The inappropriate height, bulk, scale and density of the dwelling,
- Adverse impacts on visual and acoustic privacy,
- Inconsistent information in the Statement of Environmental Effects, including a reference to townhouses,
- The method of approval of the dwelling by CDC and subsequent development application is not an appropriate use of the planning system,
- Non-compliance with the FSR,
- The absence of a requirement for dilapidation reports concerning potential damage to adjoining properties, and
- Potential impacts on solar access.

Is there power to grant a development application following a complying development certificate?

21 I ought first consider whether there is power to grant a development application for alterations and additions to a dwelling approved by a CDC and under construction.

The relevant statutory provisions

22 A number of defined terms are set out in the definitions in the EPA Act, found at s 1.4. Amongst the defined terms are the following:

> ***complying development*** is development for which provision is made as referred to in section 4.2(5).
>
> ***complying development certificate*** means a complying development certificate referred to in section 4.27.
>
> …
>
> ***development application*** means an application for consent under Part 4 to carry out development but does not include an application for a complying development certificate.
>
> …
>
> ***development consent*** means consent under Part 4 to carry out development and includes, unless expressly excluded, a complying development certificate.
>
> ***…***
>
> ***erection*** of a building includes—
>
> > (a) the rebuilding of, the making of alterations to, or the enlargement or extension of, a building, or
> >
> > (b) the placing or relocating of a building on land, or
> >
> > (c) enclosing a public place in connection with the construction of a building, or
> >
> > (d) erecting an advertising structure over a public road, or
> >
> > (e) extending a balcony, awning, sunshade or similar structure or an essential service pipe beyond the alignment of a public road,
>
> but does not include any act, matter or thing excluded by the regulations (either generally for the purposes of this Act or only for the purposes of specified provisions of this Act).

23 Section 1.5 concerns the meaning of "development", which, at subs (1), is any of the following:

> (a) the use of land,
>
> (b) the subdivision of land,
>
> (c) the erection of a building,

(d) the carrying out of a work,

(e) the demolition of a building or work,

(f) any other act, matter or thing that may be controlled by an environmental planning instrument.

24 Part 4 of the EPA Act concerns development assessment and consent. Division 4.1 contains provisions allowing the carrying out of development that does not need consent (s 4.1), requiring consent for development that can only be carried out with development consent (s 4.2), and preventing the carrying out of development that is prohibited (s 4.3). Section 4.2 provides:

> **4.2 Development that needs consent** (cf previous s 76A)
>
> (1) **General** If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless—
>
> (a) such a consent has been obtained and is in force, and
>
> (b) the development is carried out in accordance with the consent and the instrument.
>
> Maximum penalty—Tier 1 monetary penalty.
>
> (2) For the purposes of subsection (1), development consent may be obtained—
>
> (a) by the making of a determination by a consent authority to grant development consent, or
>
> (b) in the case of complying development, by the issue of a complying development certificate.
>
> (3), (4) (Repealed)
>
> (5) **Complying development** An environmental planning instrument may provide that development, or a class of development, that can be addressed by specified predetermined development standards is complying development.
>
> (6)–(9) (Repealed)

25 Division 4.3 contains the provisions concerning the making of a development application, and at s 4.9(b) the division "does not apply to complying development". The heading of Div 4.3 is "Development that needs consent (except complying development)".

26 Section 4.15 sets out the matters that are required to be considered by a consent authority determining a development application, s 4.16 concerns the determination of the application, and s 4.17 specifies the conditions that can be imposed. In particular, s 4.17(1)(b) allows a condition of development consent

to be imposed if "it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 4.11 in relation to the land to which the development application relates." Section 4.17(5) then provides:

> (5) **Modification or surrender of consents or existing use rights** If a consent authority imposes (as referred to in subsection (1)(b)) a condition requiring the modification or surrender of a consent granted under this Act or a right conferred by Division 4.11, the consent or right may be modified or surrendered subject to and in accordance with the regulations.

27 Clause 97 of the Environmental Planning and Assessment Regulation 2000 ("EPA Regulation") then sets out the requirements for a "notice of modification or surrender of a development consent or existing use right, as referred to in section 4.17(5) of the Act".

28 Division 4.5 of the EPA Act sets out the provisions concerning the carrying out of complying development, including obtaining a complying development certificate. Section 4.26 provides:

> **4.26 Carrying out of complying development** (cf previous s 84A)
>
> (1) A person may carry out complying development on land if—
>
> (a) the person has been issued with a complying development certificate for the development, and
>
> (b) the development is carried out in accordance with—
>
> (i) the complying development certificate, and
>
> (ii) any provisions of an environmental planning instrument, development control plan or the regulations that applied to the carrying out of the complying development on that land at the time the complying development certificate was issued.
>
> (2) An application for a complying development certificate may be made—
>
> (a) by the owner of the land on which the development is proposed to be carried out, or
>
> (b) by any other person, with the consent of the owner of that land.
>
> (3) The regulations may provide for the procedures for making an application, the fees payable in connection with an application and the procedures for dealing with an application.
>
> (4) (Repealed)
>
> (5) Nothing in this Division prevents a consent authority from considering and determining a development application for the carrying out of complying development.

29 Section 4.55 of the EPA Act allows a consent authority to modify "a consent granted by the consent authority".

The Council's position on the jurisdictional issue

30 The Council's position is that, in the EPA Act there is neither an explicit power, nor an implied power, that allows a development consent to be granted to modify a development that was approved by a CDC. The Council describes this as an approval pathway that is not a valid means of obtaining approval and is contrary to the scheme of the EPA Act.

31 The Council submits that the scheme of the EPA Act provides for a separate and distinct process for obtaining consent through a CDC. Pursuant to s 4.2(5), "complying development" is defined as development that an environmental planning instrument specifies as being capable of being carried out if it meets specified predetermined development standards. Given that the process for assessment and approval of complying development is contained within a separate division of Part 4 of the Act, Div 4.5, the Council submits that this is separate to, and independent from, the process for development applications made under Part 4 Div 4.3. The Council submits that this is underscored by the heading to Div 4.3, which states "Development that needs consent (except complying development)" and by s 4.9(b), which makes it clear that Div 4.3 does not apply to complying development. The Council submits that whilst there is an explicit power to modify development the subject of a CDC by a further CDC, pursuant to s 4.30, there is no explicit power to modify the development by way of a development application. The Council submits that, therefore, consistent with the two options available pursuant to s 4.2(2) for obtaining consent for development that requires consent, an applicant seeking to carry out complying development has a choice between Div 4.3 and Div 4.5. The Council submits that if Div 4.5 is the chosen pathway, there is no power for the Council (and the Court on appeal) to later consider a development application under Div 4.3 to modify complying development approved under Div 4.5.

32 The Council submits that this is consistent with s 4.26(1), which makes it clear that complying development may only lawfully be carried out on land if a CDC is issued and the development is carried out in accordance with that CDC. The Council says that it would then be a breach of the EPA Act to carry out

development in accordance with what is sought in the proposed development, unless the CDC is also modified.

33 The Council says that this breach of the EPA Act cannot be resolved by the modification of a CDC through a condition of the development consent imposed pursuant to s 4.17(1)(b), as s 4.17(1)(b) applies only to a modification of a "consent granted under this Act" and does not extend to a CDC. The Council submits that if it was intended for s 4.17(1)(b) to extend to the modification of a CDC, it would have used the defined term "development consent", which includes a CDC unless expressly excluded (s 1.4 of the EPA Act). The Council submits that consent pursuant to the "issue of" a CDC pursuant to s 4.2(2)(b) is distinct from a consent "granted" under the Act, to which s 4.17(1)(b) refers.

34 Further, the Council submits that the power to modify a development consent pursuant to s 4.55 of the EPA Act does not extend to the modification of a CDC.

35 Finally, although there is authority that multiple consents can apply to the same parcel of land (see, for example, *Progress and Securities Pty Ltd v North Sydney Municipal Council* (1988) 66 LGRA 236), the Council says that these cases are distinguishable because they do not consider the statutory regime as it relates to the approval of complying development.

36 As such, the Council submits that the dwelling that results from the proposed development (i.e. the altered dwelling) could never be made lawful, and that to grant the development application would be to perpetuate a breach of ss 4.2 and 4.26 of the EPA Act.

The applicants' position on the jurisdictional issue

37 The applicants' position is that the true scheme of the EPA Act is for the threefold classification of development – development that does not need consent (s 4.1), development that needs consent (s 4.2) and development that is prohibited (s 4.3). Their position is that the proposed development is one that needs consent, is not complying development, and therefore development consent can be obtained pursuant to s 4.2(2)(a) and Div 4.3.

38 The applicants submit that Div 4.5 does nothing more than provide the process for seeking a grant of development consent by a complying development certificate. They point out that even if development consent can be obtained by CDC, the use of the word "may" in ss 4.26, 4.28 and 4.30 make it plain that the process under Div 4.5 is optional where it is available. However, given that the proposed development is not complying development, this course is not available to the applicants.

39 The applicants submit that previous authority establishes that development consent can be granted to change or alter parts of a development subject to a consent that is in force, but has not been implemented, and that multiple development consents can apply to the same land (see *Waverley Council v C M Hairis Architects* (2002) 100 LGERA 123; [2002] NSWLEC 180).

40 In support of its position, the applicants point out that the proposed development is clearly "development" within the meaning of the EPA Act as found in s 1.5(c), as it involves the erection of a building, where the erection of a building includes "the making of alterations to, or the enlargement or extension of, a building" pursuant to s 1.4(1) of the EPA Act. Further, the proposed development is for a permissible purpose. The applicants submit, therefore, that the absurdity of the Council's position is crystallised by the fact that, on the Council's submission, there is no way of obtaining consent for development that is permissible with development consent.

41 Further, the applicants submit that the potential breach of s 4.26 of the EPA Act identified by the Council will not arise. The applicants explain that this is because the CDC will be implemented in accordance with the process set out in Div 4.5 and in compliance with s 4.26, and, following the issue of a final occupation certificate that process will be at an end. The dwelling approved by the CDC must be carried out in accordance with the CDC to provide the dwelling house to which the alterations and additions will be made. The applicants submit that, then, any consent to the proposed development will be carried out in accordance with Div 4.3. Consistent with the comments made by Talbot J in *Waverley Council v C M Hairis Architects*, this may be

"inconvenient, inappropriate or conceptually unsound but that does not make it incompetent" (at [26]).

42 In any event, the applicants submit that s 4.17(1)(b) extends to allow conditions to be imposed that require the modification of the CDC, in accordance with s 4.17(5) of the EPA Act and cl 97 of the EPA Regulation. Whilst it is accepted that s 4.17(1)(b) uses the term "consent granted under this Act" rather than the defined term "development consent", the applicants submit that this should be construed broadly. In particular, the applicants rely on the decision of Preston CJ in *Pasminco Cockle Creek Smelter Pty Ltd (subject to Deed of Company Arrangement) v Minister for Planning* [2018] NSWLEC 130, in which his Honour found at [40] that a "consent granted under this Act" is a "development consent granted under Part 4 of the EPA Act". The applicants therefore submit that the reference to "consent" should be construed to include a development consent, and, as there are no words within s 4.17(1)(b) or (5) that exclude a CDC, include a CDC (pursuant to the definition in s 1.4(1)). The applicants submit that the terms "issue" and "grant" are used interchangeably with respect to obtaining a CDC, and therefore cannot be used as a means by which to exclude a CDC from the reference to a consent in s 4.17(1)(b).

43 Finally, the applicants submit that there is no reason why the ability to make, consider and grant a modification application pursuant to s 4.55 would not extend to the modification of a CDC issued by a "consent authority".

There is power to grant development consent for the proposed development

44 I accept the position of the applicants that the scheme of the EPA Act allows development consent to be granted for the proposed development.

45 A development application, and a development consent, concern prospective development. As set out by Talbot J in *Windy Dropdown Pty Ltd v Warringah Council* (2000) 111 LGERA 299; [2000] NSWLEC 240, "Section 76A [now s 4.2] as well as s 78A [now s 4.12] clearly operate in the context of a prospective proposal."

46 The proposed development is for alterations and additions to a dwelling house. Contrary to the Council's position, it is not an application to modify the CDC.

Preston CJ explains this distinction in *Gordon & Valich Pty Ltd v City of Sydney Council* [2007] NSWLEC 780 at [17]:

> "even without a formal condition requiring modification, the grant of and the carrying out [of development] in accordance with another development consent may have such a consequence. In either case, this might be a consequence but it would not be the purpose of the development consent."

47 In the same way, the proposed development the subject of the development application would, if approved, have the consequence of modifying the dwelling approved through the CDC. However, that is not the purpose of the development application. Instead, the purpose of the development application is for the proposed development, the alterations and additions to the dwelling house.

48 In construing the regime of the EPA Act, I accept the applicants' submission that it provides for the threefold classification of development – development that does not need consent (s 4.1), development that needs consent (s 4.2) and development that is prohibited (s 4.3). The threefold classification was articulated by the Court of Appeal in *Chambers v Maclean Shire Council* (2003) 57 NSWLR 152; (2003) 126 LGERA 7; [2003] NSWCA 100 at [33], and Preston CJ describes it the same way in *Dean v Minister for Planning and Andros Australia Pty Limited* [2007] NSWLEC 779 at [16]:

> "This threefold classification divides development into development that may be carried out without the need for development consent, development that may not be carried out except with development consent and development that is prohibited. Environmental planning instruments identify particular forms of development according to this threefold classification."

49 The proposed development, for alterations and additions to a dwelling house, falls within the definition of "development" and is for a purpose that is permissible with development consent in the zone. It is therefore development that may not be carried out except with development consent. Section 4.2(2) then provides that development consent can be obtained as follows:

> (2) For the purposes of subsection (1), development consent may be obtained—
>
> > (a) by the making of a determination by a consent authority to grant development consent, or
> >
> > (b) in the case of complying development, by the issue of a complying development certificate.

50 The parties agree that the proposed development is not complying development. As such, s 4.2(2)(b) is not available to the applicants and, therefore, development consent can be obtained pursuant to s 4.2(2)(a) and Div 4.3, which requires the making of a development application (see s 4.12). Section 4.9(b) does not present any obstacle to applying for development consent pursuant to s 4.2(2)(a) and Div 4.3, as it is agreed that the proposed development is not complying development.

51 As a development application and consent is for prospective works, the fact that other works are required to take place prior to the proposed development is not an impediment to the making of an application and the granting of consent for the proposed development. This is consistent with the comments by Preston CJ in *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [3]-[4]. This means that the carrying out of the proposed development is dependent on the carrying out of the development approved by the CDC. The CDC and the development consent, if granted, would need to be "read together in order to understand the altered [building] that has been approved", in the words of Preston CJ (at [4]).

52 In that respect, I consider that the case authority with respect to multiple development consents concerning the same development also apply to CDCs, such that any number of Div 4.3 development consents and Div 4.5 CDCs can operate with respect to the same parcel of land. Contrary to the submission of the Council, such an outcome does not lead to a breach of ss 4.2 and 4.26 of the EPA Act. Section 4.26 is permissive, allowing development to be carried out in accordance with a CDC. Section 4.2(1) makes it clear that, with respect to development requiring consent, consent must be obtained and be in force (subs (1)(a)), the development must be carried out in accordance with the consent (subs (1)(b)), and that consent can be obtained either through the granting of development consent (subs (2)(a)) or by the issue of a CDC (subs (2)(b)). A breach of s 4.2 would therefore only occur if the development that is carried out cannot be supported by either the Div 4.3 development consent or the CDC. As such, the work carried out pursuant to the CDC would be required to be carried out in a manner consistent with s 4.26, and the work carried out pursuant to a Div 4.3 development consent would be carried out in a manner

consistent with the consent and its conditions. Consistent with the words of Talbot J in *Waverley Council v C M Hairis Architects* (at [29]):

> "Whether there are anomalies in that approach that cannot be resolved remains to be determined by the consideration and determination of the new development application on its merits. It is, however, not so far as the Court can see, contrary to any principle established by the regime provided in the EP&A Act or otherwise. It may be complicated, inept, inconvenient, inappropriate or conceptually unsound but that does not make it incompetent."

53 In order to avoid the complication referred to by Talbot J, I accept the submission of the applicants that an appropriate course would be for the imposition of a deferred commencement condition that requires the issue of an occupation certificate for the CDC works prior to the commencement of the development consent.

54 Finally, a question remains as to whether the power in s 4.17(1)(b) to impose a condition requiring the modification of "a consent granted under this Act" extends to a consent granted through the issue of a CDC. Given that I below determine that consent cannot be granted on the basis of the written request made in accordance with cl 4.6, I need not resolve this question. However, I note that the applicants' interpretation of s 4.17(1)(b) is consistent with the decision of Preston CJ in *Pasminco Cockle Creek Smelter v Minister for Planning*. It also finds support in cl 97(1) of the EPA Regulations, which sets out the requirements for a "notice of modification or surrender of a ***development consent***… as referred to in section 4.17(5)…" (emphasis added). Section 11 of the *Interpretation Act 1987* makes it clear that words and expressions in an instrument have the same meanings as they have in the Act under which the instrument is made. Accordingly, the use of the term "development consent" in cl 97(1) of the EPA Regulations combined with the words "as referred to in section 4.17(5)" is consistent with a broad interpretation of the word "consent" in s 4.17(1)(b) and (5), so as to include consents granted under Pt 4 of the EPA Act, including the defined term "development consent".

The breach of the FSR development standard

55 As set out above, the proposed development results in an altered dwelling with a FSR (on the Council's calculations) of 0.563:1, which represents a variation

of 40% or an additional area of 84.76m2 above the development standard of 0.4:1. Of that additional area above the development standard, 59.46m2 is the floor area added by the proposed development. As such, 30% (or 25m2) of the floor area that exceeds the development standard is already approved by the CDC. Additionally, the sketch plans tendered by the applicants (Ex C) show an intention by the applicants, by the making of a separate application to modify the CDC, to reduce the floor area of the CDC approved dwelling by 10m2.

56 All of the additional floor area added by the proposed development is at the lower ground level, where the additional bedrooms and bathroom are proposed. The alterations to the terraces, cabana and bin storage areas, for which consent is also sought, do not add "gross floor area" to the dwelling within the meaning of the defined term in the MLEP 2013, and therefore do not add to the proposed FSR of the altered dwelling.

57 Nevertheless, pursuant to cl 4.6 of the MLEP 2013, consent cannot be granted to a proposed development that breaches a development standard unless the Court, in exercising the functions of the consent authority, is satisfied of the matters in cl 4.6(4). Consistent with the decision of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 ("*Initial Action*"), this requires satisfaction that:

- The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)),
- The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)),
- The proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)), and
- The proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)).

58 In *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, the Court of Appeal made it clear that the Court, in exercising the functions of the consent authority, must "in fact" be satisfied of the above matters. However, as I stated in *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583 at [33]:

> "The state of satisfaction that compliance is "unreasonable or unnecessary" and that there are "sufficient environmental planning grounds" to justify the contravention (the first two dot points above) must be reached only by reference to the cl 4.6 request. Whilst the evidence in the proceedings can assist in understanding the request and in considering the adequacy of the request, it cannot supplement what is in the request. On the other hand, the state of satisfaction that the proposed development is in the public interest (the last two dot points above) can be reached by considering the evidence before the Court, without being limited to what is contained in the cl 4.6 request."

59 The objectives of the FSR development standard are as follows:

> (a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,
>
> (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,
>
> (c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,
>
> (d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,
>
> (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.

The written request

60 The written request, made pursuant to cl 4.6(3), was amended a number of times, and the final request is dated 21 June 2020.

61 In addressing that compliance with the FSR standard is unreasonable and unnecessary, the request refers to the five different ways in which this can be established as set out in Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 ("Wehbe"), and recognised by the Chief Judge in Initial Action at [16]-[22]. In particular, the request relies on the first way, that compliance is unreasonable or unnecessary because the objectives of the FSR development standard are achieved notwithstanding non-compliance with the standard. The request also states that it relies on the second and fourth way, but nothing in the request pertains to the second and fourth way.

62 The request advances a number of reasons as to why the objectives of the FSR development standard are achieved notwithstanding non-compliance with the standard, which can be summarised as follows:

- The perception of the bulk and scale will not change as a result of the proposed development, and the dwelling will continue to present as a two-storey dwelling.
- The additional floor area added by the proposed dwelling is below ground level and not visible to adjoining neighbours or from the public domain.
- The dwelling that is approved, as altered by the proposed development, is of similar scale to other dwellings in the locality and in the streetscape.
- The undercroft area, in which the lower ground floor additions are proposed, has been approved by the CDC.
- The bedrooms and bathrooms to be added by the proposed development do not have any adverse impacts on adjoining properties, and the proposed development does not increase the shadows or create any view impact.
- The dwelling is well below the height development standard and complies with the setback requirements.
- The dwelling that is approved has been designed to minimise impacts.

63 The written request describes the dwelling at 9 Adelaide Street, adjacent to the site, as appearing as a three-storey dwelling which has approval to increase the FSR to 0.61:1, which is similar to the dwelling once altered by the proposed development. Similarly, it states that the dwelling at 13-15 Adelaide Street, also adjacent to the site, is assumed to have a FSR not dissimilar to numbers 9 and 11 Adelaide Street.

64 The written request also proffers a number of matters that it describes as environmental planning grounds that justify the contravention of the FSR development standard. They can be summarised as follows:

- The alterations and additions are within the footprint of the approved dwelling.
- The undercroft area, in which the lower ground floor additions are proposed, is created by the relatively steep slope of the land, and creates “an opportunity to provide the additional accommodation… in an area which otherwise might not be used.”
- The overall floor area, dwelling height and three-storey dwelling is not inconsistent with the dwellings in the locality, which have comparable FSRs and height.
- The proposed development and the variation to the development standard does not cause any adverse environmental impacts, including “in terms of amenity to adjoining property owners such as overshadowing, privacy or loss of views”.

- The variation to the development standard does not reduce the amenity of other dwellings, but “results in significantly enhanced amenity for the approved dwelling house”.
- A better planning outcome is achieved by utilising the undercroft area, rather than leaving it an undeveloped state, which will delete “blind or dark alcoves within the building framework”, protect water quality and reduce stormwater discharge, and minimise “potential rising damp, possible haven for vermin”.
- The proposed development achieves the objects in s 1.3 of the EPA Act, in that the infill of the undercroft area facilitates sustainable development, promotes orderly and economic use and development of land, does not adversely impact on conservation of native animals and plants, provides a good design, and ensures the protection of the health and safety of its future occupants.
- The proposed development provides a building with sufficient floor area for future occupants “whilst maintaining the height and envelope of the approved dwelling, to minimise the impacts of bulk and scale and maintain views over the building.”

65 The request also outlines the manner in which the proposed development is consistent with the objectives of the standard and of the zone.

The parties’ submissions

66 The Council submits that the request is inadequate as it focuses on the new floor space added by the proposed development, and does not justify the entire contravention of the FSR development standard, as required by the words of cl 4.6(3). Mr Lazarus SC, counsel for the Council, pointed to a number of places in the written request where this is apparent. Further, the Council relies on Mr Hill’s evidence in cross-examination, in which he conceded that he did not consider a compliant development in the written request and did not make a comparison between the proposed development and a compliant development. The Council submits that the request never addresses itself with the proper enquiry required by cl 4.6, but instead addresses the difference between the proposed development and what has already been approved through the CDC. As such, the Council submits that the request does not address what is required by cl 4.6(3).

67 The applicants instead submit that the contravention of the FSR development standard is easily understood as the whole development contravenes the development standard, and the comparison between the proposed development and a compliant development is of no utility because a

development that complies would not exist, given the FSR of the dwelling approved by the CDC. The applicants submit that there is nothing about the proposed development, or the dwelling as altered, that would make it contrary to the objectives of the standard. Further, the applicants submit that the proposed development provides a benefit by using an undercroft, and that the reasons set out in the request establish sufficient environmental planning grounds to justify the breach of the FSR development standard.

The request does not establish sufficient environmental planning grounds

68 I am not satisfied that the written request adequately addresses that there are sufficient environmental planning grounds to justify contravening the FSR development standard. Each of the matters advanced by the request as forming environmental planning grounds are either benefits of the proposed development, or describe aspects of the proposed development. Contrary to the submission of the Council, each of the benefits described by the written request are benefits of both the proposed development, and the benefits of breaching the development standard. However, the benefits need to constitute "environmental planning grounds", and, consistent with the submissions of the Council, they must be sufficient "to justify contravening the development standard". For the following reasons I do not consider that the benefits and description of the development in the written request, which are advanced as environmental planning grounds, do so.

69 Firstly, many of the described benefits and descriptions of the development in the written request, which are set out as reasons that justify the breach of the development standard, do not constitute "environmental planning grounds". Whilst the phrase "environmental planning" is not a defined term, Preston CJ considered in *Initial Action* (at [23]) that it "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." Whilst the written request seeks to connect some of the benefits of the proposed development with the objects in s 1.3 of the EPA Act, I am not satisfied that the connection is adequately made out for all of those benefits to form environmental planning grounds. Specifically, I am not satisfied that the filling of an already approved void or undercroft with additional floor space, and maintaining the existing bulk and scale and street presentation of

the dwelling, is an environmental planning ground. Instead, it is a description of the proposed development. Similarly, the benefit of “enhanced amenity” by additional floor space to accommodate the needs of the residents, which is the meeting of a private interest, is not an environmental planning ground and does not advance the aims of the EPA Act.

70 Secondly, with respect to the benefits of the proposed development in the request that I do accept could form environmental planning grounds, they do not justify the contravention of the FSR development standard. In the words of Preston CJ in *Initial Action*, “The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole” (at [24]). That is, the benefits, if they form environmental planning grounds, must be tethered in some way to the breach of the FSR development standard. The environmental planning grounds that are advanced must justify, or inform, the breach of the FSR development standard. I am not satisfied that the request adequately addresses this. The benefits that could constitute environmental planning grounds include deleting “blind or dark alcoves within the building framework”, protecting water quality and reduce stormwater discharge, and minimising “potential rising damp, possible haven for vermin”. Such grounds promote the proper construction and maintenance of buildings, consistent with the objects of the EPA Act. Nevertheless, these benefits, as described by the request, seek to avoid problems that are not established by any evidence, and I consider that the avoidance of such problems relate to remedying deficiencies in or aspects of design, and do not justify a breach in the FSR development standard. The request does not outline why the additional floor space is required to avoid those problems. Further, the absence of any amenity impacts of the additional floor space added by the proposed development on adjoining properties could constitute an environmental planning ground, as it promotes good design and amenity in accordance with the objects of the EPA Act. However, the lack of amenity impacts is a product of the nature of the application (to insert floor space in an undercroft) and does not justify the additional floor space that contravenes the development standard that is added by the proposed development.

71 The request also outlines that the proposed development facilitates ecologically sustainable development by the provision of natural daylight and cross-ventilation, and does not adversely impact on the conservation of threatened species. This may be true, but it does not inform, or justify, the breach of the FSR development standard. Similarly, the FSR of adjoining sites does not, of itself, constitute an environmental planning ground that entitles the same FSR to be achieved on the site of the proposed development or that justifies the breach of the FSR development standard. This is distinct from cases such as *Gejo Pty Ltd v Canterbury-Bankstown Council* [2017] NSWLEC 1712 and *Abrams v Council of the City of Sydney*, where the contravention of the development standard enabled the development to achieve consistency in the streetscape with other sites that breached the relevant development standard (in the case of *Gejo Pty Ltd v Canterbury-Bankstown Council*) or to achieve an appropriate presentation to the streetscape in the context of the adjacent sites (in the case of *Abrams v Council of the City of Sydney*). In the proposed development, the streetscape presentation will remain unchanged and accordingly, the contravention of the FSR development standard is not justified by any such outcome.

72 As such, I am not satisfied that any of the benefits outlined in the request (including those that I consider do not form environmental planning grounds) justify, or inform, the additional floor space and therefore the contravention of the FSR development standard. Nor are there any other grounds that are set out that justify the contravention of the standard. This alone, even aside from the first point above and the third point below, is sufficient to prevent me from reaching the state of satisfaction required by cl 4.6(4)(a)(i), and therefore prevents development consent from being granted to the proposed development.

73 Thirdly, separately and additionally to the second point above, I am not satisfied that the request adequately addresses how the environmental planning grounds are “sufficient” to justify the contravention of the standard. That is, I consider that the environmental planning grounds advanced are not qualitatively or quantitatively sufficient to justify the actual contravention, which is a variation of 40% or an additional area of 84.76m2 above the development

standard of 0.4:1, and includes the entire floor space added by the proposed development. Although part of that contravention is informed, or justified, by the floor area approved by the CDC, the remaining contravention of 59.46m2 is not sufficiently justified by the environmental planning grounds put forward in the request and considered above. This alone is also sufficient to prevent me from reaching the state of satisfaction required by cl 4.6(4)(a)(i).

Outcome of the appeal

74 Having not reached the state of satisfaction required by cl 4.6(4)(a)(i), cl 4.6(4) of the MLEP 2013 makes it clear that development consent must not be granted for the proposed development. Accordingly, there is no power to grant development consent and the development application must be refused.

75 The Court orders that:

(1) The appeal is dismissed.

(2) The development application for alterations and additions to a dwelling at 11 Adelaide Street, Balgowlah Heights (DA2019/1303) is refused.

(3) The exhibits are returned, except for Exhibit A.

……

J Gray

Commissioner of the Court

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