

**Statement of Environmental
Effects**

Alterations and additions to a residential
flat building

**Units 4 and 7, 1A Greycliffe Street
Queenscliff**

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Statement of Environmental Effects

Alterations and additions to a residential flat building

Units 4 and 7 Greycliffe Street, Queenscliff



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- Attachment 1** Existing use rights supporting documentation extracts
- Attachment 2** Clause 4.6 variation request – Height of buildings

1.0 INTRODUCTION

This document has been prepared as a component of a development application proposing alterations and additions to an existing residential flat building involving the amalgamation and reconfiguration of apartments 4 and 7 through the introduction of an internal staircase and the construction of an internally accessed retreat and bathroom predominantly within the existing pitched roof form at the southern end of the building.

This statement will demonstrate that the long-established flat building use on the site is an existing non-conforming use benefiting from existing use rights pursuant to Section 4.65 of the Environmental Planning and Assessment Act, 1979 (the Act).

The project Architect has responded to the client brief to provide a consolidated apartment outcome on the site which takes advantage of the sites superior locational attributes whilst providing high levels of amenity for future occupants. In this regard, the scheme has been developed through detailed site and contextual analysis to identify the constraints and opportunities associated with the development of the site including the height, proximity and orientation of adjoining residential development and available view lines across the site.

Particular attention has been given to ensuring that the upper-level additions are contained predominantly within the visual roof/ view plane established by the existing development to minimise impacts on available views from surrounding development. The proposal not only responds to its immediate built form context but importantly ensures that appropriate residential amenity is maintained to the immediately adjoining residential properties in terms of privacy, view sharing and solar access.

In preparation of the document consideration has been given to the following statutory planning regime:

- The Environmental Planning and Assessment Act, 1979 as amended (the Act).
- Warringah Local Environmental Plan 2011 (the LEP).
- Warringah Development Control Plan (the DCP).
- State Environmental Planning Policy (Housing) 2021.
- State Environmental Planning Policy (Resilience and Hazards) 2021

The application is accompanied by a boundary survey, architectural plans, shadow diagrams, stormwater management plans, geotechnical report, cost summary/ QS report, and BASIX Certificate.

The development benefits from existing use rights and responds appropriately to the intent of the development standards contained within WLEP as they reasonably relate to legitimate alterations and additions to an existing residential flat building on this particular site and the built form guidelines contained within Warringah Development Control Plan (WDCP) as they relate to development within the R2 Low Density Residential Zone.

The proposal succeeds when assessed against the relevant matters for consideration in relation to development benefiting from existing use rights as adopted by the Land and Environment Court in the matters of *Fodor Investments v Hornsby Shire Council* (2005) 141 LGERA 14 and *Stromness Pty Limited v Woollahra Municipal Council* [2006] NSWLEC 587. It is considered that the application, the subject of this document, succeeds on merit and is appropriate for the granting of consent.

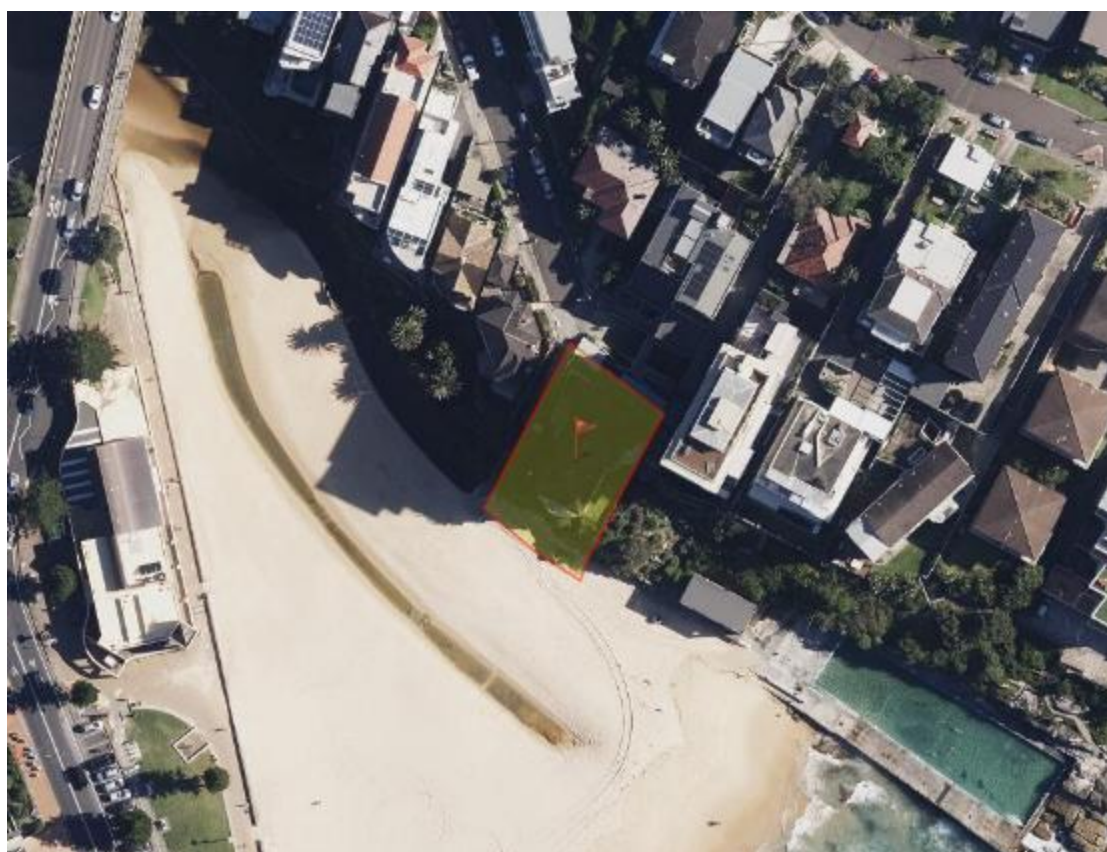
Whilst the proposal requires the consent authority to give favourable consideration to a variation to the building height development standard, strict compliance has been found to be unreasonable and unnecessary in this instance as the development is otherwise consistent with the objectives of the development standard and sufficient environmental planning grounds exist to support the variation as outlined in the attached Clause 4.6 variation request.

The proposal succeeds when assessed against the Heads of Consideration pursuant to section 4.15(1) of the Act. It is considered that the application, the subject of this document succeeds on merit and is worthy of the granting of development consent.

2.0 SITE DESCRIPTION AND LOCATION

The subject site is legally described as Lot B, DP 367566, No. 1A Greycliffe Street, Queenscliff. The property is irregular in shape having partial frontage to the end of Greycliffe Street and the adjacent public pathway of 34.03m, width of between 21.435m and 21.905m and an area of 713.9m². The site falls approximately 6m across its surface in a southerly direction and does not contain any significant trees or landscaping. The southern portion of the site drops off steeply towards the Queenscliff Beach and a separate Lot known as Lot 1, DP 1171295 which does not form part of this application.

The subject property is occupied by a three and four story residential flat building with pitched and tiled roof and garage accommodation accessed from the eastern end of Greycliffe Street. The aerial photograph at Figure 1 depicts the site and its immediate built form context.



Source: SIX Maps

Figure 1 – Aerial location/ context photograph

The established topographical and built form circumstances are depicted in the survey extract at Figure 2.

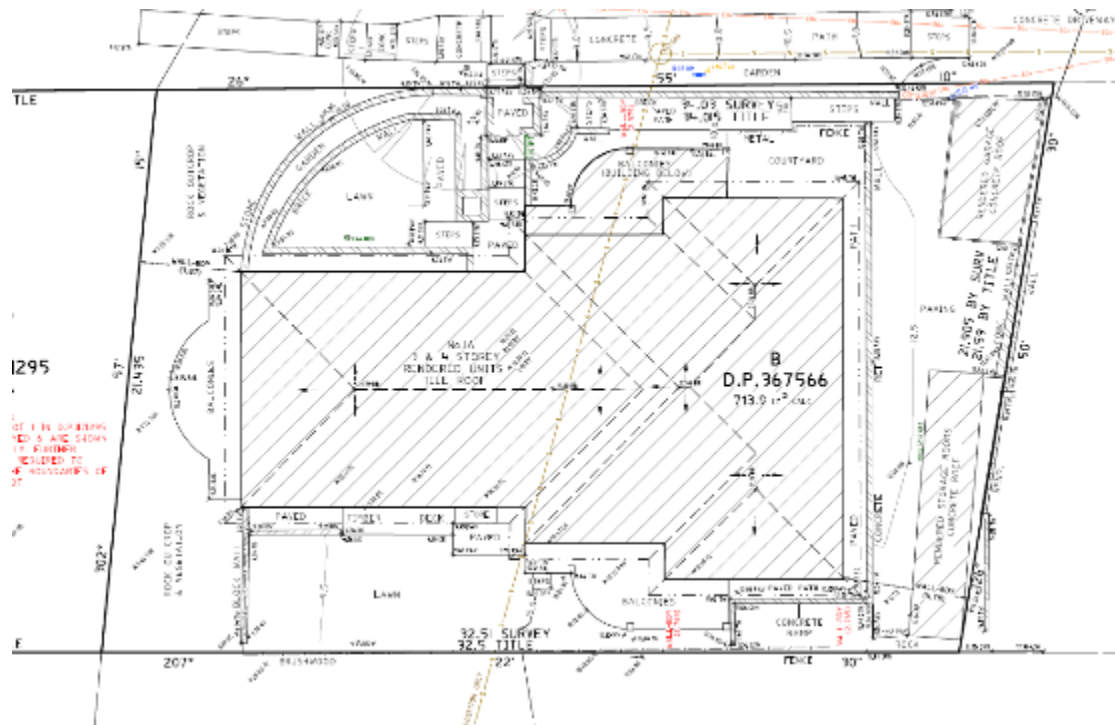


Figure 2 – Survey extract

The surrounding area has been developed for a mix of dwelling types of varying ages and styles. The site has good access to public transport, shops, services, schools and public open space. The following photographs depict the site and its immediate built form context.



Figure 3 - Subject property as viewed from Greycliffe Street.



Figure 4 - Subject property (red arrow) as viewed from Queenscliff Beach.



Figure 5 - Wider visual and built form context as viewed from Queenscliff Beach.



Figure 6 - View looking west down Greycliffe Street.

3.0 DEVELOPMENT PROPOSAL

The application proposes alterations and additions to an existing residential flat building involving the amalgamation and reconfiguration of apartments 4 and 7 through the introduction of an internal staircase and the construction of an internally accessed retreat and bathroom predominantly within the existing pitched roof form at the southern end of the building. New windows and doors are also proposed. The proposed works are depicted on the following plans prepared by Hobbs Jamieson Architecture:

DA01	BASIX CERTIFICATE
DA02	SITE ANALYSIS
DA03	DEMOLITION EXG UNIT 4 FLOOR PLAN (LEVEL 3)
DA04	DEMOLITION EXG UNIT 7 FLOOR PLAN (LEVEL 4)
DA05	DEMOLITION EXG ROOF PLAN (LEVEL 5)
DA06	PROPOSED SITE PLAN
DA07	PROPOSED LOWER FLOOR PLAN (LEVEL 3)
DA08	PROPOSED MIDDLE FLOOR PLAN (LEVEL 4)
DA09	PROPOSED UPPER FLOOR PLAN (LEVEL 5)
DA10	PROPOSED ROOF PLAN
DA11	PROPOSED SOUTH ELEVATION
DA12	PROPOSED NORTH ELEVATION
DA13	PROPOSED EAST ELEVATION
DA14	PROPOSED WEST ELEVATION
DA15	PROPOSED SECTION A-A
DA16	PROPOSED WINDOW SCHEDULE
DA17	PROPOSED EXTERNAL FINISHES
DA18	SHADOW DIAGRAMS

The application does not propose the removal of any trees or vegetation with the established landscape regime maintained.

The acceptability of the proposed development having regard to the geotechnical stability of the site and its immediate surrounds is addressed in the accompanying geotechnical report prepared by Crozier Geotechnical Consultants with all stormwater disposed of to the street drainage system in accordance with the stormwater management plans prepared by NB Consulting Engineers.

4.0 STATUTORY PLANNING FRAMEWORK

4.1 Environmental Planning and Assessment Act 1979 - Existing Use Rights and Relevant Matters for Consideration

The subject property is zoned R2 Low Density pursuant to WLEP. Residential flat buildings are prohibited in the zone the definition of this dwelling topology outlined below:

***residential flat building** means a building containing 3 or more dwellings, but does not include an attached dwelling, co-living housing or multi dwelling housing.*

The application proposes alterations and additions to the existing residential flat building containing nine (9) apartments with the building appropriately defined within WLEP as a residential flat building being a prohibited form of residential development in the zone.

To that extent, it is necessary to establish that the property benefits from existing use rights in accordance with section 4.65 of the Environmental Planning and Assessment Act 1979, as amended. Pursuant to the Act an "existing use" means:

- (a) *the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for this Division, have the effect of prohibiting that use, and*
- (b) *the use of a building, work or land:*
 - (i) *for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and*
 - (ii) *that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse.*

Clause 4.66 of the Act deals with the continuance of and limitations on existing use and indicates that:

- (1) *Except where expressly provided in this Act, nothing in this Act or an environmental planning instrument prevents the continuance of an existing use.*
- (2) *Nothing in subsection (1) authorises:*
 - (a) *any alteration or extension to or rebuilding of a building or work, or*
 - (b) *any increase in the area of the use made of a building, work or land from the area actually physically and lawfully used immediately before the coming into operation of the instrument therein mentioned, or*
 - (c) *without affecting paragraph (a) or (b), any enlargement or expansion or intensification of an existing use, or*
 - (d) *the continuance of the use therein mentioned in breach of any consent in force under this Act in relation to that use or any condition imposed or applicable to that consent or in breach of any condition referred to in section 4.17(1)(b), or*
 - (e) *the continuance of the use therein mentioned where that use is abandoned.*
- (3) *Without limiting the generality of subsection (2)(e), a use is to be presumed, unless the contrary is established, to be abandoned if it ceases to be actually so used for a continuous period of 12 months.*

Clause 41(1) of the Environmental Planning and Assessment Regulation 2000 (the Regs) states that:

- (1) *An existing use may, subject to this Division:*
 - (a) *be enlarged, expanded or intensified, or*
 - (b) *be altered or extended, or*
 - (c) *be rebuilt, or*
 - (d) *be changed to another use, but only if that other use is a use that may be carried out with or without development consent under the Act,*

In this regard, we note that Council undertook a review of the site's claims to existing use rights when assessing DA2017/0993. The following commentary is extracted from the assessment report for "Alterations and additions to a unit in a residential flat building" specifically Unit 7 which was subsequently approved on 24th November 2017:

The applicant has provided sufficient evidence to demonstrate that the use of the building and land commenced as a lawful purpose in 1949, prior to the coming into force of Warringah Local Environmental Plan 2011 on 9 December 2011....

There is no substantial evidence to prove that any (or all) of the existing nine units within the existing building had not been used or occupied for residential purposes for any period longer than 12 months, since the consent was issued in 1949...

Relevant extracts of the Council assessment report and development consent are at Attachment 1.

On the basis that development consent DA2017/0993 was granted by Northern Beaches Council for alterations and additions to the existing residential flat building it is evident that the property benefits from existing use rights pursuant to section 4.65 of the Act. We have also formed the considered opinion that such existing use rights have not been abandoned with the proposed development providing for legitimate alterations and additions to the existing residential flat building.

In these circumstances, it is also appropriate to apply the principle of regularity that was established in *Dosan Pty Limited v Rockdale City Council* [2001] NSWLEC 252: (2001) 117 LGERA 363 at 390. In this case Justice Lloyd summarised the principal as being "{when} ... an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act.

Commissioner Smithson in the judgement *Modog Pty Ltd v North Sydney Council* [2018] NSWLEC 1160 states the following [at 61]:

To paraphrase justice Lloyd in Dosan, the principal of regularity includes an act which can only be done legally by a public authority after the performance of some prior act, where proof of the latter (in this case the 2003 concurrence and consent) carries with it a presumption of the due performance of the prior act (i.e the lawful creation of an RFP on the site)

That is, Northern Beaches Council could only have approved development consent DA2017/0993 having found that the property benefits from existing use rights as a residential flat building.

With regards to the relevant matters for consideration in the assessment of the application, Clause 4.67 of the Act provides, through the applicable Regulations, for the carrying out of alterations or extensions to or the rebuilding of a building or work being used for an existing use. It also states that an environmental planning instrument may, in accordance with this Act, contain provisions extending, expanding or supplementing the incorporated provisions, but any provisions (other than incorporated provisions) in such an instrument that, but for this subsection, would derogate or have the effect of derogating from the incorporated provisions have no force or effect while the incorporated provisions remain in force.

In this regard, any provision of an environmental planning instrument, including an LEP or DCP must not derogate from the Regulations and to that extent no numerical controls strictly apply to the assessment of the proposed development.

Notwithstanding it is accepted that as identified in *Fodor Investments v Hornsby Shire Council* (Proceedings 10882 of 2004) that the Section 4.15(1) (formerly s79C) matters for consideration pursuant to the Act are still relevant so far as they do not serve to derogate from the Regulation with more recent case law establishing that a clause 4.6 variation request is still required for any variation to a development standard.

The Land and Environment Court of NSW has adopted planning principles relating to the assessment of applications where existing use rights have been established. These assessment criteria are detailed in *Fodor Investments v Hornsby Shire Council* [2005] NSWLEC 71 (*Fodor*) and further defined in *Stromness Pty Ltd v Woollahra Municipal Council* [2006] NSWLEC 587.

An assessment of the application against the planning principles is undertaken below:

1. *How do the bulk and scale (as expressed by height, floor space ratio and setbacks) of the proposal relate to what is permissible on surrounding sites?*
 - *While planning controls, such as height, floor space ratio and setbacks do not apply to sites with existing use rights; they have relevance to the assessment of applications on such sites.*

This is because the controls apply to surrounding sites and indicate the kind of development that can be expected if and when surrounding sites are redeveloped. The relationship of new development to its existing and likely future context is a matter to be considered in all planning assessment.

Response: We note that an 8.5 metre building height standard applies to development on surrounding sites with no FSR standard applicable to development within the R2 Low Density Residential zone. The form and massing of the development is instead determined through compliance with a minimum landscaped area control, which establishes an appropriate building footprint, setback controls and a building envelope control which collectively establish an envelope in which development should be located

In this regard, we note that the established building footprint is maintained with the upper-level additions increasing building height on the southern portion of the site from the existing ridge height of RL 21.8m AHD to a proposed ridge height of RL 22.66m AHD being the same height of the existing northern roof ridge. This represents an 860mm increase in building height.

The proposed works maintain front side and rear setbacks significantly greater than those currently established on the site ensuring that the upper-level additions are contained predominantly within the visual roof/ view plane established by the existing development to minimise impacts on available views from surrounding development.

The upper-level additions will not result in a building form which will be perceived as inappropriate or jarring having regards to its immediate built form context as depicted in Figures 3, 4 and 5. In forming this opinion, we note that surrounding development includes multi-level residential flat buildings which would appear to also benefit from existing use rights and which establish an existing built form and land-use character.

In this regard, we have formed the considered opinion that the height, form, massing and setbacks of the proposed development are complimentary and compatible with those applicable to what is permissible and also existing on surrounding sites. In forming such opinion, we note:

- The overall building height remains consistent with the height established by the existing building on the northern portion of the site with the upper-level additions designed and located to ensure that they are a recessive element as viewed from the street and adjoining properties.

- The front, side and rear boundary setbacks proposed are consistent with those prescribed for development on surrounding land and greater than those established by the existing residential flat building such that the alterations and additions will be perceived as recessive element contained predominantly within the established pitched roof. The breach of the building height standard will not give rise to any adverse streetscape or residential amenity consequences.
- The contextually appropriate nature of the proposed building heights and setbacks lead to a conclusion that the resultant floor space is acceptable particularly in circumstances where no FSR standard applies to development on surrounding land.
- Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the proposed development by virtue of its height, footprint and setbacks offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment.

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

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

Response: No change of use is proposed.

3. *What are the impacts on adjoining land?*

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

Response: Potential impacts are summarised as follows:

Overshadowing

The accompanying shadow diagrams demonstrate that the alterations and additions will not result in any additional shadowing impact to any surrounding residential property with the additional shadowing impact to Queenscliff Beach considered to be minor and acceptable.

Visual privacy

The development has been carefully designed to limit side boundary facing fenestration with primary living and bedroom windows and doors orientated to the south where possible to prevent direct and immediate overlooking opportunities into adjoining properties. In this regard, we have formed the considered opinion that the development provides for the retention of an appropriate level of visual privacy consistent with that reasonably anticipated given the medium density nature of surrounding development and the dominant orientation of living areas to the south take advantage of available views.

View loss

Having inspected the site and its immediate surrounds to identify existing view corridors we have formed the opinion that the proposed development will not give rise to any unacceptable view impacts from surrounding properties in particular the properties to the north of the subject site which obtain views over the properties located on the low side of Queenscliff Road towards Manly Beach.

In this regard, the upper-level additions are contained predominantly within the visual roof/ view plane established by the existing development to minimise impacts on available views from surrounding development is depicted in the elevation extract over page.

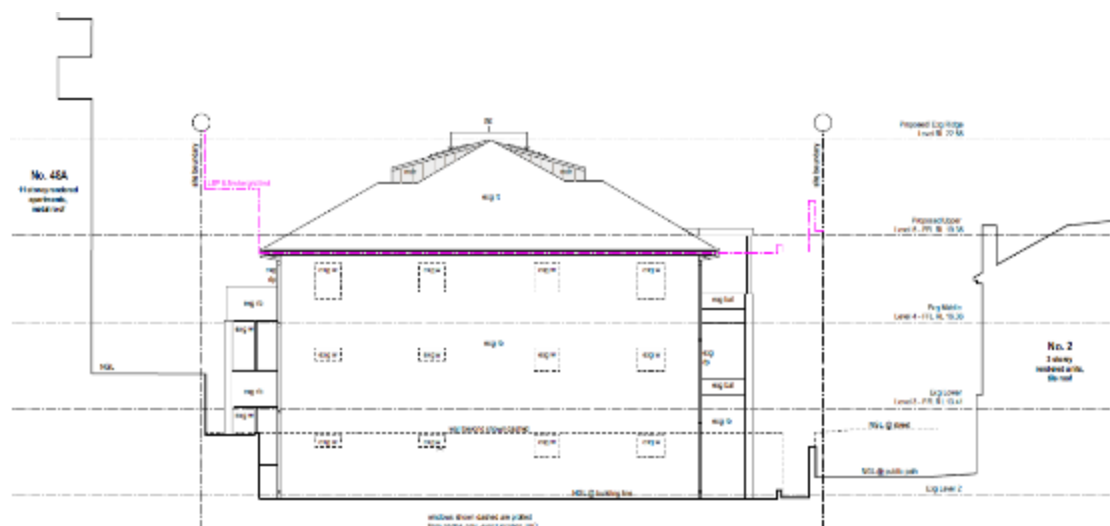


Figure 7 – Plan extract northern elevation showing minor intrusion into view plane.

Visual impacts

The documentation prepared in support of this application demonstrates that the height, form, massing and setbacks of the proposal will not give rise to any unacceptable or jarring visual impacts having regard to the height, form, massing and setbacks established by surrounding development and development generally with the site's visual catchment.

4. What is the internal amenity?

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

Response: The development affords exceptional levels of internal amenity to the consolidated apartment in relation to views, solar access and privacy.

Given these circumstances, we have formed the considered opinion that the proposed development succeeds when assessed against the relevant matters for consideration in relation to development benefiting from existing use rights as adopted by the Land and Environment Court in the matters of Fodor Investments v Hornsby Shire Council (2005) 141 LGERA 14 and Stromness Pty Limited v Woollahra Municipal Council [2006] NSWLEC 587. It is considered that the application, the subject of this document, succeeds on merit and is appropriate for the granting of consent.

4.2 Warringah Local Environmental Plan 2011

4.2.1 Zone and Zone Objectives

The subject property is zoned R2 Low Density Residential pursuant to the provisions of WLEP with residential flat buildings prohibited in the zone.

This statement demonstrates that the long-established residential flat building use on the site is an existing non-conforming use benefiting from existing use rights pursuant to Section 4.65 of the Environmental Planning and Assessment Act, 1979 (the Act).

Accordingly, the developments consistency with the zone objectives is not a relevant matter for consideration in relation to this particular application with there being no statutory zoning or zone objective impediment to the granting of approval to the proposed development.

4.2.2 Height of Buildings

Pursuant to clause 4.3 WLEP the height of any building on the land shall not exceed 8.5 metres above existing ground level. The stated objectives of this clause are as follows:

- (a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

- (d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

The dictionary to the LEP defines building height to mean:

building height (or **height of building**) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

It has been determined that the upper-level additions increase building height on the southern portion of the site from the existing ridge height of RL 21.8m AHD to a proposed ridge height of RL 22.66m AHD being the same height of the existing northern roof ridge. This represents an 860mm increase in building height.

The southern end of the proposed additions has a maximum building height measured above ground level (existing), being the slab level of Unit 1, of 15.25m representing a non-compliance of 6.75m or 79.4%. This is depicted in the plan extract below.

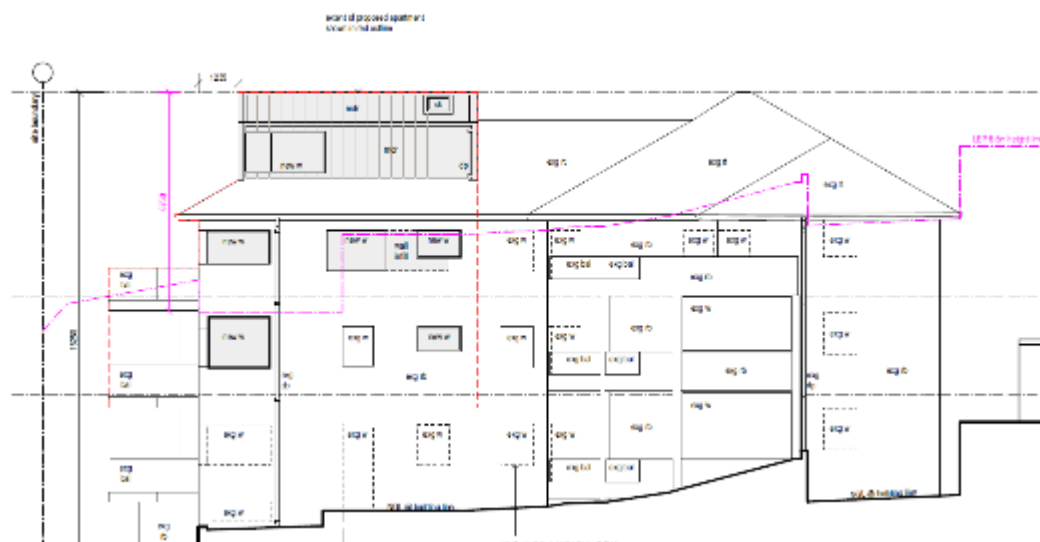


Figure 8 – Plan extract depicting the existing and proposed building height breaching elements.

Clause 4.6 of WLEP provides a mechanism by which a development standard can be varied with a clause 4.6 variation request attached at Attachment 2.

We consider the clause 4.6 variation to be well founded as it has been demonstrated that the proposal is consistent with the objectives of the standard and therefore strict compliance is both unreasonable and unnecessary under the circumstances. Further, the clause 4.6 variation request demonstrates that there are sufficient environmental planning grounds to justify the variation sought including the general maintenance of the established building heights on the site and the complimentary and compatible nature of the works proposed which do not give rise to any adverse streetscape or residential amenity consequences.

4.2.2 Earthworks

Pursuant to the clause 6.2 WLEP 2011 provisions we have formed the considered opinion that as the proposal does not involve any earthworks that these provisions are satisfied.

4.2.3 Development on sloping land

Pursuant to Clause 6.4 WLEP 2011 the application is accompanied by a Geotechnical Assessment report prepared by Crozier Geotechnical Consultants in accordance with Council's geotechnical risk management reporting requirements.

The report addresses the extent of site disturbance and confirms that subject to standard engineering considerations, design and construction that the level of site disturbance is acceptable. No objection is raised to a condition requiring compliance with the findings/ recommendations of such report.

4.3 Warringah Development Control Plan

The following built form controls apply to the subject development with the accompanying assessment prepared to facilitate a comparative analysis against the intent of the controls noting that the DCP provisions cannot derogate from the existing use rights afforded to the existing development by section 4.67 of the Act.

4.3.1 Wall Height (B1)

Pursuant to these provisions, walls are not to exceed 7.2 metres from ground level (existing) to the underside of the ceiling on the uppermost floor of the building.

The proposed upper-level additions have wall heights exceeding 7.2m control notwithstanding that they maintain setbacks well in excess of the side boundary facing walls established by the existing building. Having regard to the objectives associated with the control we provide the following analysis:

- *To minimise the visual impact of development when viewed from adjoining properties, streets, waterways and land zoned for public recreation purposes.*

Response: The visual impact associated with the non-compliant wall height portion of the building has been minimised by providing increased setbacks at the uppermost level of the building to the side boundaries.

In this regard, notwithstanding the non-compliant wall height elements, the development has been designed to minimise the visual impact of development when viewed from adjoining properties and the adjacent public domain.

This objective is satisfied notwithstanding the non-compliant wall height elements proposed.

- *To ensure development is generally beneath the existing tree canopy level.*

Response: Given the general absence of tree canopy within proximity of the site and the complimentary and compatible overall building height proposed this objective is not defeated by the proposed wall heights.

- *To provide a reasonable sharing of views to and from public and private properties.*

Response: Having inspected the site and its immediate surrounds we are satisfied that the proposal will maintain a reasonable sharing of views to and from public and private properties notwithstanding the non-compliant wall height elements proposed.

This objective is satisfied notwithstanding the non-compliant wall height elements proposed.

- *To minimise the impact of development on adjoining or nearby properties.*

Response: The proposed wall height breaching elements will not give rise to any adverse shadowing impact, privacy impacts or view loss impacts and to that extent the impact of development on adjoining or nearby properties has been minimised notwithstanding the wall height breaching elements.

This objective is satisfied notwithstanding the non-compliant wall height elements proposed.

- *To ensure that development responds to site topography and to discourage excavation of the natural landform.*

Response: The proposed works do not require any additional site excavation or changes to the natural landform. The breaching wall height elements do not compromise the development's ability to satisfy this objective.

- *To provide sufficient scope for innovative roof pitch and variation in roof design.*

Response: The wall height non-compliant elements support a characteristically pitched roof form. This objective is achieved notwithstanding the wall height non-compliance.

Accordingly, the consent authority can be satisfied that the proposal satisfies the objectives of the wall height standard notwithstanding the non-compliant elements proposed.

Such variation succeeds pursuant to section 4.15 of the Act which requires Council to be flexible in applying such provisions and allow reasonable alternative solutions that achieve the objects of DCP standards for dealing with that aspect of the development.

4.3.2 Side Boundary Envelope (B3)

Pursuant to these provisions buildings must be sited within a building envelope determined by projecting planes at 45 degrees from a height above ground level (existing) at the side boundaries of 5 metres. The objectives of the standard are as follows:

- *To ensure that development does not become visually dominant by virtue of its height and bulk.*
- *To ensure adequate light, solar access and privacy by providing spatial separation between buildings.*
- *To ensure that development responds to the topography of the site.*

It has been determined that the proposed upper-level additions breach the side boundary envelope control.

Having regard to the objectives of the control it can be demonstrated that the development will not be visually dominant by virtue of its height and bulk and will maintain appropriate levels of light, solar access and privacy between buildings. Strict compliance would prevent the reasonable development of the site noting that it benefits from existing use rights in relation to a residential flat development.

Under such circumstances it is considered that strict compliance is both unreasonable and unnecessary given the ability of that development to satisfy the objectives of the control. Such variation succeeds pursuant to section 4.15 of the Act which requires Council to be flexible in applying such provisions and allow reasonable alternative solutions that achieve the objects of DCP standards for dealing with that aspect of the development.

4.3.3 Side Boundary Setbacks (B5)

Pursuant to these provisions, development is to maintain a 900mm minimum setback from side boundaries. Side boundary setback areas are to be landscaped and free of any above or below ground structures, car parking or site facilities other than driveways and fences.

The objectives of the standard are:

- *To provide opportunities for deep soil landscape areas.*
- *To ensure that development does not become visually dominant.*
- *To ensure that the scale and bulk of buildings is minimised.*

- *To provide adequate separation between buildings to ensure a reasonable level of privacy, amenity and solar access is maintained.*
- *To provide reasonable sharing of views to and from public and private properties.*

The architectural plans demonstrate that side boundary setbacks well in excess of the minimum required by the DCP are provided to both side boundaries. The proposed upper-level setbacks are contextually responsive and provide for the maintenance of appropriate spatial separation between adjoining development in strict accordance with the side boundary setback control.

4.3.4 Front Boundary Setbacks (B7)

In accordance with this control a minimum front setback of 6.5 metres applies.

No change to the existing front setbacks.

4.3.5 Rear Boundary Setbacks (B9)

A minimum rear building setback of 6 metres applies to development on the site.

No change to the established rear setback although the upper-level is recessive relative to the levels below.

4.3.6 Parking Facilities (C3)

The application proposes no change to the long-established off-street parking circumstance notwithstanding that the application provides for the consolidation of two apartments into one representing a reduction in residential density on the site.

4.3.7 Stormwater, Erosion and Sediment Control (C4) & (C5) (C7)

It is anticipated that Council will impose appropriate conditions in relation to erosion and sedimentation control during the demolition works. All stormwater will be disposed of to the street drainage system as detailed on the stormwater management plan prepared by NB Consulting Engineers.

4.3.8 Landscaped Open Space (D1)

Pursuant to these provisions a minimum 40% landscaped open space is to be provided.

The application does not propose any changes to the long established landscaped open space circumstance on the site.

4.3.9 Private Open Space (D2)

The apartment is provided with ADG compliant private open space.

4.3.10 Access to Sunlight (D6)

Pursuant to these provisions development is not to unreasonably reduce sunlight to surrounding properties. In the case of housing:

- Sunlight, to at least 50% of the principle private open spaces, is not to be reduced to less than 2 hours between 9am and 3pm on June 21, and
- Where overshadowing by existing structures and fences is greater than this, sunlight is not to be further reduced by development by more than 20%.

The accompanying shadow diagrams demonstrate that the alterations and additions will not result in any additional shadowing impact to any surrounding residential property with the additional shadowing impact to Queenscliff Beach considered to be minor and acceptable.

4.3.11 Views (D7)

Having inspected the site and its immediate surrounds to identify existing view corridors we have formed the opinion that the proposed development will not give rise to any unacceptable view impacts from surrounding properties in particular the properties to the north of the subject site which obtain views over the properties located on the low side of Queenscliff Road towards Manly Beach.

4.3.12 Privacy (D8)

The development has been carefully designed to limit side boundary facing fenestration with primary living and bedroom windows and doors orientated to the front of the property to prevent direct and immediate overlooking opportunities into adjoining properties beyond that which currently exists on site.

In this regard, we have formed the considered opinion that the development provides for the retention of an appropriate level of visual privacy consistent with that reasonably anticipated given the established medium density residential context in which the site is located.

4.3.13 Building Bulk (D9)

For the reasons outlined in this report we are satisfied that the upper-level additions will not contribute to building bulk to the extent that the overall development will be perceived as inappropriate or jarring having regards to the built form characteristics established by surrounding development.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the proposed development by virtue of its height, footprint and setbacks offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment.

4.3.14 Glare and Reflection (D10)

The colours and materials proposed will not give rise to any unacceptable glare will reflection in strict accordance with the control.

4.3.15 Landslip Risk (E10)

Pursuant to Clause 6.4 WLEP 2011 the application is accompanied by a Geotechnical Assessment report prepared by Crozier Geotechnical Consultants in accordance with Council's geotechnical risk management reporting requirements.

4.4 State Environmental Planning Policy (Housing) 2021 - Design of Residential Apartment Development

Chapter 4 of this SEPP does not apply in this instance as the proposal is not considered to be a substantial redevelopment or refurbishment of the existing building. It relates to relatively minor alterations and additions to the existing building.

4.5 State Environmental Planning Policy (Resilience and Hazards) 2021

The site is identified as being within the Coastal Environmental Area Map and Coastal Use Area Map:

Clause 2.10 of the SEPP, coastal environmental area, states the following:

- (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.*

The site is situated on the escarpment overlooking Queenscliff and Manly Beaches. The proposed development will have no impact on the natural coastal processes and environment, marine flora and fauna, public access to the beach and is not within the surf zone.

Clause 2.11 of the SEPP, Coastal Use Area, states the following:

- (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 platform for members of the public, including persons with a disability,*
 - (ii) *overshadowing, wind funnelling and the loss of views from public places to foreshores,*
 - (iii) *the visual amenity and scenic qualities of the coast, including coastal headlands,*
 - (iv) *Aboriginal cultural heritage, practices and places,*
 - (v) *cultural and built environment heritage, and*
 - (b) *is satisfied that:*
 - (i) *the development is designed, sited and will be managed to avoid an adverse impact referred to in paragraph (a), or*

- (ii) *if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or*
 - (iii) *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.*

The proposed works are commensurate with surrounding development and will not give rise to any adverse visual impacts when viewed from the water. The proposed does not compromise foreshore access or unreasonably contribute to amenity impacts in terms of overshadowing and visual bulk. The proposal performs acceptably when assessed against these considerations.

Clause 2.12 of the SEPP states:

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.

The consent authority can be satisfied that proposed works will not risk coastal hazards on the site or in the local area.

4.6 State Environmental Planning Policy (Sustainable Buildings) 2022

This SEPP applies to the development and aims to encourage sustainable residential development.

A BASIX Assessment accompanies the development application and demonstrates that the proposal achieves compliance with the BASIX water, energy and thermal efficiency targets.

4.7 Matters for Consideration Pursuant to Section 4.15(1) of the Environmental Planning and Assessment Act 1979 as amended

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15 of the Environmental Planning and Assessment Act 1979 (as amended). Guidelines (*in italic*) to help identify the issues to be considered have been prepared by the Department of Urban Affairs and Planning. The relevant issues are:

4.7.1 The provision of any planning instrument, draft environmental planning instrument, development control plan or regulations.

The development benefits from existing use rights and responds appropriately to the intent of the development standards contained within WLEP as they reasonably relate to development on this particular site and the built form guidelines contained within Warringah Development Control Plan (WDCP) as they relate to development within the R2 Low Density Residential Zone.

The proposal succeeds when assessed against the relevant matters for consideration in relation to development benefiting from existing use rights as adopted by the Land and Environment Court in the matters of Fodor Investments v Hornsby Shire Council (2005) 141 LGERA 14 and Stromness Pty Limited v Woollahra Municipal Council [2006] NSWLEC 587. It is considered that the application, the subject of this document, succeeds on merit and is appropriate for the granting of consent.

4.7.2 The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

Context and Setting

- i) *What is the relationship to the region and local context on terms of:*
- *the scenic qualities and features of the landscape?*
 - *the character and amenity of the locality and streetscape?*
 - *the scale, bulk, height, mass, form, character, density and design of development in the locality?*

- *the previous and existing land uses and activities in the locality?*

These matters have been discussed in detail in the body of the report with the proposed development being entirely appropriate to its context and setting.

- ii) *What are the potential impacts on adjacent properties in terms of:*

- *relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)?*
- *visual and acoustic privacy?*
- *views and vistas?*
- *edge conditions such as boundary treatments and fencing?*

These matters have been discussed in detail earlier in this report. The proposed development will not give rise to any adverse residential amenity impacts in regards to views, privacy or solar access.

Access, transport and traffic

Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:

- *travel demand?*
- *dependency on motor vehicles?*
- *traffic generation and the capacity of the local and arterial road network?*
- *public transport availability and use (including freight rail where relevant)?*
- *conflicts within and between transport modes?*
- *traffic management schemes?*
- *vehicular parking spaces?*

No change.

Public domain

The proposed development will have no adverse impact on the public domain.

Utilities

Existing utility services will adequately service the development.

Flora and fauna

No change.

Waste collection

No change.

Natural hazards

The development application submission addresses the applicable considerations for this particular site have regard to potential landslip Hazard.

Economic impact in the locality

The proposed development will not have any significant impact on economic factors within the area notwithstanding that it will generate additional employment opportunities through the construction period of the proposed development.

Site design and internal design

i) *Is the development design sensitive to environmental conditions and site attributes including:*

- *size, shape and design of allotments?*
- *the proportion of site covered by buildings?*
- *the position of buildings?*
- *the size (bulk, height, mass), form, appearance and design of buildings?*
- *the amount, location, design, use and management of private and communal open space?*
- *landscaping?*

These matters have been discussed in detail earlier in this report. The potential impacts are considered to be minimal and within the scope of the built form controls.

ii) *How would the development affect the health and safety of the occupants in terms of:*

- *lighting, ventilation and insulation?*
- *building fire risk – prevention and suppression/*
- *building materials and finishes?*

- *a common wall structure and design?*
- *access and facilities for the disabled?*
- *likely compliance with the Building Code of Australia?*

The proposed development can comply with the provisions of the Building Code of Australia.

Construction

i) *What would be the impacts of construction activities in terms of:*

- *the environmental planning issues listed above?*
- *site safety?*

Normal site safety measures and procedures will ensure that no site safety or environmental impacts will arise during construction.

4.7.3 The suitability of the site for the development.

Does the proposal fit in the locality?

- *are the constraints posed by adjacent developments prohibitive?*
- *would development lead to unmanageable transport demands and are there adequate transport facilities in the area?*
- *are utilities and services available to the site adequate for the development?*

The adjacent development does not impose any unusual or impossible development constraints. The site is well located with regards to public transport and utility services. The development will not cause excessive or unmanageable levels of transport demand.

Are the site attributes conducive to development?

The proposed dwelling appropriately responds to the constraints and opportunities associated with this particular site.

4.7.4 Any submissions received in accordance with this Act or the regulations.

It is envisaged that Council will appropriately consider any submissions received.

4.7.5 The public interest.

It is considered that the public interest is best served in providing certainty in the planning process through encouraging development of good design that satisfies the outcomes contained within the adopted legislative framework.

The development is compatible with the form and character established by development within the sites visual catchment. For these reasons the development is considered to be in the public interest.

5.0 CONCLUSION

This statement will demonstrate that the long-established flat building use on the site is an existing non-conforming use benefiting from existing use rights pursuant to Section 4.65 of the Environmental Planning and Assessment Act, 1979 (the Act).

The project Architect has responded to the client brief to provide a consolidated apartment outcome on the site which takes advantage of the sites superior locational attributes whilst providing high levels of amenity for future occupants. In this regard, the scheme has been developed through detailed site and contextual analysis to identify the constraints and opportunities associated with the development of the site including the height, proximity and orientation of adjoining residential development and available view lines across the site.

Particular attention has been given to ensuring that the upper-level additions are contained predominantly within the visual roof/ view plane established by the existing development to minimise impacts on available views from surrounding development. The proposal not only responds to its immediate built form context but importantly ensures that appropriate residential amenity is maintained to the immediately adjoining residential properties in terms of privacy, view sharing and solar access.

The development benefits from existing use rights and responds appropriately to the intent of the development standards contained within WLEP as they reasonably relate to legitimate alterations and additions to an existing residential flat building on this particular site and the built form guidelines contained within Warringah Development Control Plan (WDCP) as they relate to development within the R2 Low Density Residential Zone.

The proposal succeeds when assessed against the relevant matters for consideration in relation to development benefiting from existing use rights as adopted by the Land and Environment Court in the matters of *Fodor Investments v Hornsby Shire Council* (2005) 141 LGERA 14 and *Stromness Pty Limited v Woollahra Municipal Council* [2006] NSWLEC 587.

Whilst the proposal requires the consent authority to give favourable consideration to a variation to the building height development standard, strict compliance has been found to be unreasonable and unnecessary in this instance as the development is otherwise consistent with the objectives of the development standard and sufficient environmental planning grounds exist to support the variation as outlined in the attached Clause 4.6 variation request.

It is considered that the application, the subject of this document, succeeds on merit and is appropriate for the granting of consent.

The proposal succeeds when assessed against the Heads of Consideration pursuant to section 4.15(1) of the Act. It is considered that the application, the subject of this document succeeds on merit and is worthy of the granting of development consent.



Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

Attachment 1

Existing use rights supporting documentation extracts



24 November 2017



Bianca Alice Bailey
7 / 1 A Greycliffe Street
QUEENSCLIFF NSW 2096

Dear Sir/Madam

Application Number: DA2017/0993
Address: Lot B DP 367566 , 7 / 1 A Greycliffe Street, QUEENSCLIFF NSW 2096
Proposed Development: Alterations and Additions to a unit in a residential flat building

Please find attached the Notice of Determination for the above mentioned Application.

Please be advised that a copy of the Assessment Report associated with the application is available on Council's eServices website at www.warringah.nsw.gov.au

Please read your Notice of Determination carefully and the assessment report in the first instance.

If you have any further questions regarding this matter please contact the undersigned on (02) 9942 2111 or via email quoting the application number, address and description of works to council@warringah.nsw.gov.au

Regards,

A handwritten signature in dark ink, appearing to read "NE" with a stylized flourish.

Nick England
Planner



NOTICE OF DETERMINATION

Application Number:	DA2017/0993
Determination Type:	Development Application

APPLICATION DETAILS

Applicant:	Bianca Alice Bailey
Land to be developed (Address):	Lot B DP 367566 , 7 / 1 A Greycliffe Street QUEENSCLIFF NSW 2096
Proposed Development:	Alterations and Additions to a unit in a residential flat building

DETERMINATION - APPROVED

Made on (Date)	24/11/2017
Consent to operate from (Date):	24/11/2017
Consent to lapse on (Date):	24/11/2022

Detail of Conditions

The conditions, which have been applied to the consent, aim to ensure that the Environmental Impacts of Development are minimised and the Health and Safety of the community is maintained in accordance with the relevant standards and the Building Code of Australia.

Note:

If the works are to be certified by a Private Certifying Authority, then it is the certifier's responsibility to ensure all outstanding fees and bonds have been paid to Council prior to the issue of the Construction Certificate or as otherwise specified by Consent conditions.



DEVELOPMENT APPLICATION ASSESSMENT REPORT

Application Number:	DA2017/0993
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Responsible Officer:	Nick England
Land to be developed (Address):	Lot B DP 367566, 7 / 1 A Greycliffe Street QUEENSCLIFF NSW 2096
Proposed Development:	Alterations and Additions to a unit in a residential flat building
Zoning:	LEP - Land zoned R2 Low Density Residential
Development Permissible:	Yes
Existing Use Rights:	Yes
Consent Authority:	Northern Beaches Council
Land and Environment Court Action:	No
Owner:	Bianca Alice Bailey
Applicant:	Bianca Alice Bailey

Application lodged:	06/10/2017
Integrated Development:	No
Concurrence Required:	No
State Reporting Category:	Residential - Alterations and additions
Notified:	17/10/2017 to 02/11/2017
Advertised:	Not Advertised, in accordance with A.7 of WDCP
Submissions Received:	0
Recommendation:	Approval

Estimated Cost of Works:	\$ 27,390.00
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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

Warringah Local Environmental Plan 2011 - 4.3 Height of buildings

Warringah Local Environmental Plan 2011 - 4.3 Height of buildings

SITE DESCRIPTION

Property Description:	Lot B DP 367566 , 7 / 1 A Greycliffe Street QUEENSLIFF NSW 2096
Detailed Site Description:	<p>The subject site consists of one (1) allotment located on the southern side of Greycliffe Street.</p> <p>The site is regular in shape with a surveyed area of 760m².</p> <p>The site is located within the R2 Low Density Residential zone and accommodates a three storey residential flat building, consisting of 9 units.</p> <p>The site has a southerly aspect and is located on a significant slope adjoining Queenscliff lagoon and beach.</p> <p>Adjoining and surrounding development is characterized predominantly by residential flat buildings interspersed by dwelling houses.</p>

Map:



SITE HISTORY

Site history of most relevance to the proposal includes the following:

972/49: Consent for "BK FLTS" (brick flats) dated 1949.

DA2011/0212: Development consent for "Alterations and additions to a residential flat building" dated 4 April 2011. This consent related to another unit within the building (No.8).

PROPOSED DEVELOPMENT IN DETAIL

The application seeks to make alterations and additions to Unit 7 of the existing residential flat building on the land, consisting of the following:

- internal alterations to reconfigure the floor plan;
- create one (1) new window on the east elevation;
- infill one (1) existing window; and
- new door to existing opening to balcony on south elevation.

In consideration of the application a review of (but not limited) documents as provided by the applicant in support of the application was taken into account detail provided within Attachment C.

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

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

Section 79C 'Matters for Consideration'	Comments



Section 79C 'Matters for Consideration'	Comments
Section 79C (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on "Environmental Planning Instruments" in this report.
Section 79C (1) (a)(ii) – Provisions of any draft environmental planning instrument	None applicable.
Section 79C (1) (a)(iii) – Provisions of any development control plan	Warringah Development Control Plan 2011 applies to this proposal.
Section 79C (1) (a)(iia) – Provisions of any planning agreement	None applicable.
Section 79C (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation 2000)	<p><u>Division 8A</u> of the EP&A Regulation 2000 requires the consent authority to consider "Prescribed conditions" of development consent. These matters have been addressed via a condition of consent.</p> <p><u>Clause 50(1A)</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer at lodgement of the development application. This clause is not relevant to this application.</p> <p><u>Clauses 54 and 109</u> of the EP&A Regulation 2000, permits Council to request additional information and therefore consider the number of days taken in this assessment in light of this clause within the Regulations. However, no additional information was requested.</p> <p><u>Clause 92</u> of the EP&A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This matter has been addressed via a condition of consent.</p> <p><u>Clauses 93 and/or 94</u> of the EP&A Regulation 2000 requires the consent authority to consider the upgrading of a building (including fire safety upgrade of development). This matter has been considered by Council's Building Assessment Officers.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This matter has been addressed via a condition of consent.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider the provisions of the Building Code of Australia (BCA). This matter has been addressed via a condition of consent.</p> <p><u>Clause 143A</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the</p>



Section 79C 'Matters for Consideration'	Comments
	building designer prior to the issue of a Construction Certificate. This clause is not relevant to this application.
Section 79C (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	(i) The environmental impacts of the proposed development on the natural and built environment are addressed under the Warringah Development Control Plan section in this report. (ii) The proposed development will not have a detrimental social impact in the locality considering the character of the proposal. (iii) The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.
Section 79C (1) (c) – the suitability of the site for the development	The site is considered suitable for the proposed development.
Section 79C (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs	See discussion on "Public Exhibition" in this report.
Section 79C (1) (e) – the public interest	No matters have arisen in this assessment that would justify the refusal of the application in the public interest.

EXISTING USE RIGHTS

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

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

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

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

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

This necessarily requires the following questions to be answered.

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

Comment:

The applicant has provided sufficient evidence to demonstrate that the use of the building and land commenced as a lawful purpose in 1949, prior to the coming into force of Warringah Local



Environmental Plan 2011 on 9 December 2011.

2. Was the use of the building granted development consent before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use?

Comment:

The use of the building / land was likely to have been lawfully approved by Council in 1949. No specific date of consent is available on Council's records, however the state of the existing building and subsequent consents issued on the land make it a reasonable assume that this consent was issued prior to the coming into force of Warringah Local Environmental Plan 2011 on 9 December 2011.

3. Has the use of the building been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse?

Comment:

There is no substantial evidence to prove that any (or all) of the existing 9 units within the existing building have not been used or occupied for residential purposes for any period longer than 12 months, since the consent was issued in 1949. The application therefore meets this test.

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

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

Comment:

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

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

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

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

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

While planning controls, such as height, floor space ratio and setbacks do not apply to sites with existing use rights; they have relevance to the assessment of applications on such sites. This is because the controls apply to surrounding sites and indicate the kind of development that can be



expected if and when surrounding sites are redeveloped. The relationship of new development to its existing and likely future context is a matter to be considered in all planning assessments.

Comment: The proposed works make no modification to the existing bulk and scale. The application hence satisfies this principle.

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

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

Comment: The proposed works make no modification to the existing bulk and scale. The application hence satisfies this principle.

3. What are the impacts on adjoining land?

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

Comment: The proposed works will not have an adverse impact on the amenity of any adjoining property. The application hence satisfies this principle.

4. What is the internal amenity?

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

Comment: Not relevant to the proposed development.

Conclusion

The use has been approved under a previous EPI (this was likely to have been the Local Government Act 1919, as the County of Cumberland Planning Scheme did not operate until 1951 and the consent predates this EPI) and therefore, is a lawful use. Subsequently, the use can be retained under the current EPI (WLEP 2011).

Attachment 2

Clause 4.6 variation request – Height of buildings

Circulated separately