
From: [REDACTED]
Sent: 22/02/2023 6:00:41 PM
To: Council Northernbeaches Mailbox
Cc: Simon Mahon
Subject: TRIMMED: DA 2023 /0072 100 HILLTOP ROAD, AVALON WRITTEN
SUBMISSION: LETTER OF OBJECTION SUBMISSION: TULLOCH
Attachments: 100 HILLTOP WS.pdf;

Kind regards,

Bill Tulloch BSc[Arch]BArch[Hons1]UNSW RIBA RAIA
[REDACTED]

SUBMISSION

a written submission by way of objection

Bill Tulloch BSc [Arch] BArch [Hons1] UNSW RIBA RAIA

prepared for

Dr Simon John Mahon and Ms Shannon Elizabeth Mahon 102 Hilltop Rd, Avalon 2107

22 February 2023

Northern Beaches Council
PO Box 82
Manly
NSW 1655

council@northernbeaches.nsw.gov.au

RE: DA 2023 /0072
100 HILLTOP ROAD, AVALON
WRITTEN SUBMISSION: LETTER OF OBJECTION
SUBMISSION: TULLOCH

Dear Sir,

This document is a written submission by way of objection lodged under Section 4.15 of the EPAA 1979 [the EPA Act].

I have been instructed by my clients to prepare an objection to this DA.

Unless the Applicant submits Amended Plans to resolve all of the adverse amenity impacts raised within this Submission, my clients ask Council to REFUSE this DA.

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A. EXECUTIVE SUMMARY

The design of the dwelling does not ensure that the existing high levels of amenity to my clients' property are retained.

The construction cost would exceed \$3m, considering that the proposed development consists of a three-level dwelling, over 15m high, with 450sqm of built form area [GFA, decks, elevated suspended entry and carport, etc], a lift, extensive external works, and all at BAL FZ construction standards that increase costs considerably. The applicant states a construction cost less than \$1m – this is not credible.

The proposal is considered to be inappropriate within the streetscape, as 15.3m high built form with minimal side setback is clearly on display to the street. Built form with near zero setback and over 8m high dominate the front setback, with minimal landscaping.

The subject site is zoned C4 Environmental Living under the LEP, and there is no reason, unique or otherwise why a fully compliant solution to LEP and DCP controls cannot be designed on the site.

The proposed development represents an overdevelopment of the site and an unbalanced range of amenity impacts that result in adverse impacts on my clients' property.

- Adverse View Loss Impacts
- Adverse Solar Loss Impacts
- Adverse Visual Privacy Impacts
- Adverse Visual Impacts
- Adverse Bushfire Risks

The proposed development fails to meet Council's planning controls, the objectives and the merit assessment provisions relating to:

- Building Height: Proposed 15.37m v Control 8.5m [81% non-compliance]
- Number of Storey: Proposed Three: Control Two [50% non-compliance]
- Side Setback South Dwelling: Proposed 1.2m v 2.5m Control [x 2.1 non-compliance]
- Southern Side Boundary Envelope – between 6.2m to 8.1m non-compliance
- Front Setback: Proposed 0.3m v Control 6.5m [6.3m non-compliance]
- Side Setback South Garage: Proposed 0.2m v 2.5m Control [2.3m non-compliance]
- Northern Side Boundary Envelope – between 2.5m to 5.6m non-compliance
- Tree canopy cover to be less than 15% at maturity to accord with Bushfire Report and NSWRFs: design does not comply;

- trees at maturity should not touch or overhang the building or Neighbours Buildings to accord with Bushfire Report and NSWRFs: design does not comply;
- tree canopies should be separated by 2 to 5 m to accord with Bushfire Report and NSWRFs: design does not comply;
- large discontinuities or gaps in the shrubs layer should be provided to slow down or break the progress of fire towards buildings, to accord with Bushfire Report and NSWRFs: design does not comply;
- shrubs should not be located under trees, to accord with Bushfire Report and NSWRFs: design does not comply;
- shrubs should not form more than 10% ground cover, to accord with Bushfire Report and NSWRFs: design does not comply;

The proposed development represents an unreasonably large new build dwelling house design, for which there are design alternatives to achieve a reasonable development outcome on the site without having such impacts.

The proposed development does not satisfy the objectives of the zone or contribute to a scale that is consistent with the desired character of the locality and the scale of surrounding development.

A compliant building design would reduce the amenity impacts identified.

My clients agree with Roseth SC in NSWLEC *Paflum v North Sydney Council*:

"People affected by a proposal have a legitimate expectation that the development on adjoining properties will comply with the planning regime."

The '*legitimate expectation*' that my clients had as a neighbour was for a development that would not result in very poor amenity outcomes caused directly from the non-compliance to building envelope controls.

My clients wish to emphasise the fact that my clients take no pleasure in objecting to their neighbour's DA.

The proposed DA has a deleterious impact on the amenity of their property caused by the DA being non-compliant to controls.

If the DA was fully or even substantially compliant to all development controls, they recognise that their rights with respect to any resulting amenity loss to their property would be more limited.

Council and NSWLEC Commissioners regularly concede that development standards and building envelopes provide for maximums and that there is no entitlement to achieve those maximums.

It does seem unreasonable that the Applicants wish to remove my client's amenity to improve their own, and is proposing non-compliant outcomes that would seriously adversely affect my clients' amenity.

The LEP does not include floor space ratio standards to control building bulk and scale in this residential area. Managing building bulk and scale relies on the application of controls relating to landscaped area, building height and building setbacks and building envelopes.

Council's development controls relating to managing building bulk and scale are designed to ensure that buildings are consistent with the height and scale of the desired character of the locality, are compatible with the height and scale of surrounding and nearby development, respond sensitively to the natural topography and allow for reasonable sharing of views and visual amenity.

Council's DCP with respect to the locality, requires that development respond to the natural environment and minimise the bulk and scale of buildings. The proposed development in its current form does not achieve this and provides inadequate pervious landscaped area at ground level.

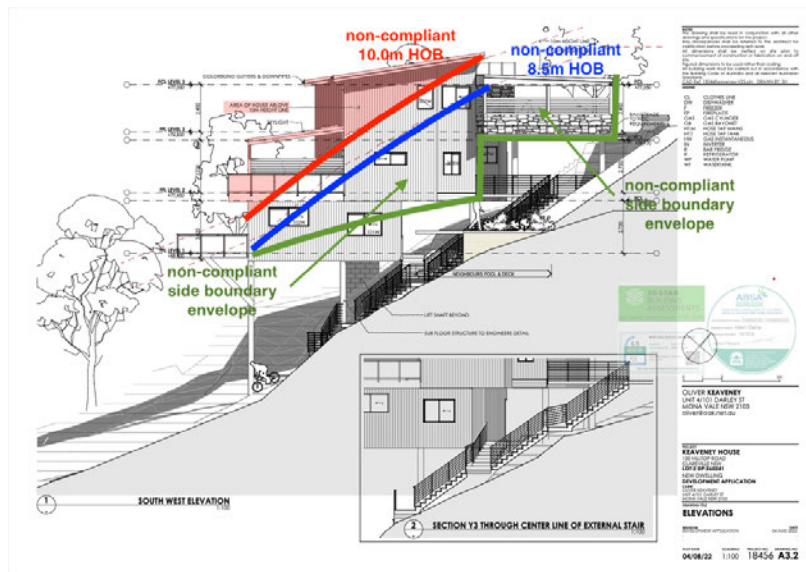
The proposal does not succeed when assessed against the Heads of Consideration pursuant to section 4.15 of the Environmental Planning and Assessment Act, 1979 as amended. It is considered that the application, does not succeed on merit and is not worthy of the granting of development consent.

The proposed development fails the fundamental principles of design excellence in terms of:

- Context and local character
- Built form, scale and public domain, urban design response
- Density
- Landscape integration
- Amenity impacts on neighbours

My clients ask Council to seek modifications to this DA as the proposed development does not comply with the planning regime, by non-compliance to development standards, and this non-compliance leads directly to my clients' amenity loss.

If any Amended Plan Submission is made by the Applicant, and re-notification is waived by Council, my clients ask Council to inform them immediately by email of those amended plans, so that my clients can inspect those drawings on the Council website.



B. FACTS

1. THE PROPOSAL

The development application seeks approval for is for a three level, four bedroom and home office dwelling with a carport and off street car parking for two cars at the front of the dwelling.

2. THE SITE

The site is legally identified as Lot 2 DP 260241.

3. THE LOCALITY

The existing character of the local area, including the immediate visual catchment (generally within 150 metres of the site) is of a well-established neighbourhood, made up of a heterogeneous mix of dwelling types within domestic landscaped settings.

My clients' property shares a common boundary with the subject site.

4. STATUTORY CONTROLS

The following Environmental Planning Instruments and Development Control Plans are relevant to the assessment of this application:

- Environmental Planning and Assessment Act 1979
- Environmental Planning and Assessment Regulation 2000

- SEPP (Building Sustainability Index: BASIX) 2004;
- SEPP (Resilience and Hazards) 2021;
- SEPP (Biodiversity and Conservation) 2021.

- Pittwater Local Environmental Plan 2014 [referred to as LEP in this Submission]
- Pittwater 21 Development Control Plan [referred to as DCP in this Submission]

C. CONTENTIONS THAT THE APPLICATION BE REFUSED

1. CONTRARY TO AIMS OF LEP

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy the aims under the LEP.

2. CONTRARY TO ZONE OBJECTIVES

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy the objectives of the zone of the LEP.

3. INCORRECT CONSIDERATIONS OF 'GROUND LEVEL EXISTING'

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to present *ground level (existing)* in accordance with the LEP, and the recent decisions on *ground level (existing)* at the NSWLEC.

The LEP states the following within the LEP Dictionary:

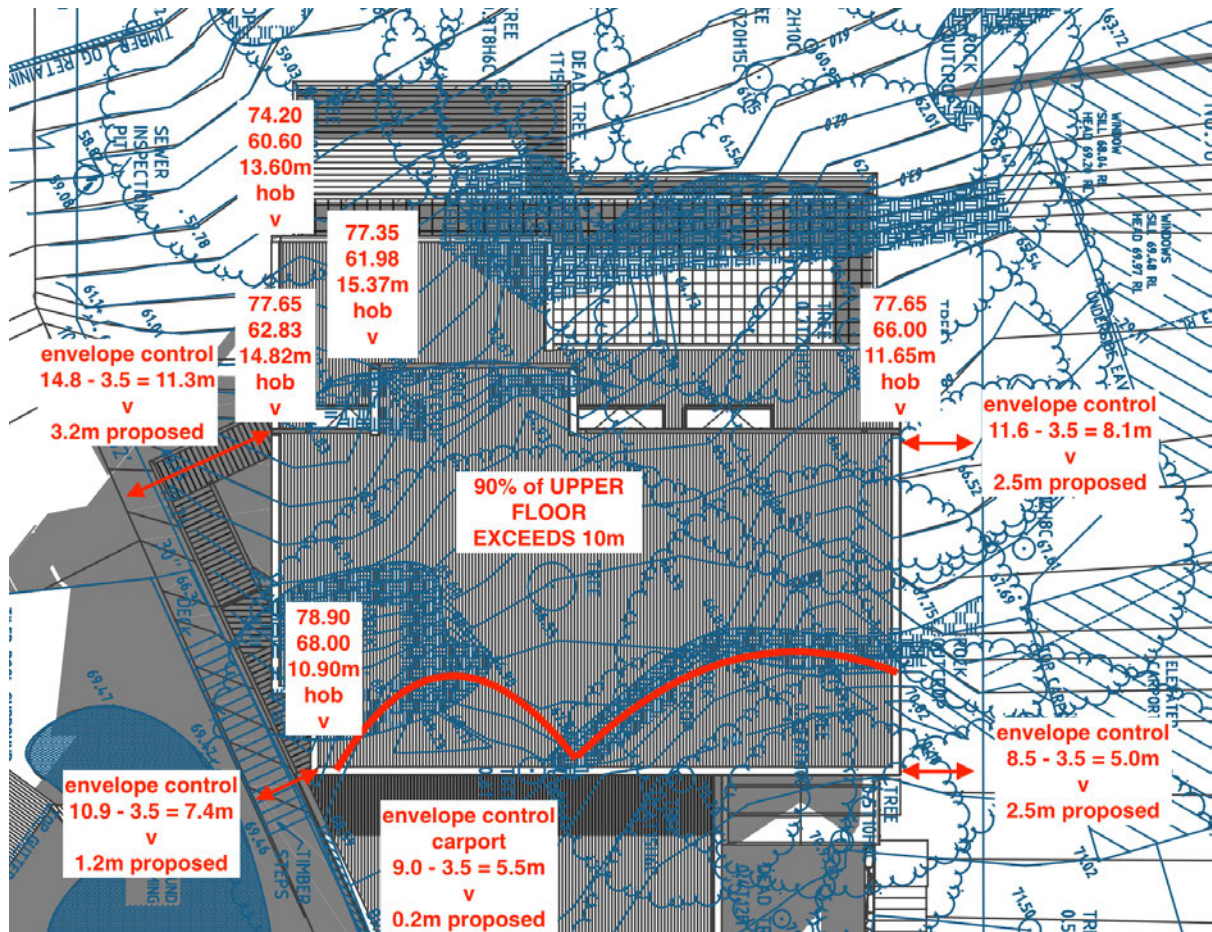
“ground level (existing) means the existing level of a site at any point.”

The DA drawings have not adequately transferred the spot levels from the Registered Surveyors drawing onto the DA Architectural drawings to allow assessment of heights.

My clients contend that *ground level (existing)* on the subject site has not been assessed correctly.

My clients bring to Council's attention the following issues.

Approximately 90% of the floor plate exceeds the 10m height provision.



Substantial non-compliance:

- Upper Projected Roof: 15.3m HOB, with substantial non-compliant side building envelope
- Upper Roof to Southern Boundary: 14.8m HOB, with substantial non-compliant side building envelope
- Lower Roof: 13.6m HOB, with substantial non-compliant side building envelope
- Carport: 9.0m HOB with 0.2m side setback, with substantial non-compliant side building envelope

4. EXCESSIVE BUILDING HEIGHT

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to comply with the building height development standard under the LEP.

- Upper Roof Projected Roof: 15.3m HOB, with substantial non-compliant side building envelope
- Upper Roof to Southern Boundary: 14.8m HOB, with substantial non-compliant side building envelope
- Lower Roof: 13.6m HOB, with substantial non-compliant side building envelope
- Carport: 9.0m HOB with 0.2m side setback, with substantial non-compliant side building envelope

The application benefits from Clause 2D of Clause 4.3 *Height of Buildings*, which permits a 10.0m height on the site, in lieu of the standard 8.5m.

As the Objectives of the clause are not met, the lesser building height of 8.5m is applicable.

The proposed development should be refused due to its excessive height and failure to comply with the *Height of Buildings* set out in the LEP which permits a maximum height of 8.5 metres.

The submitted written variation request under cl.4.6 of the LEP seeking to justify the contravention of the height of buildings development standard is not well-founded having regard to the requirements of cl.4.6(3) and 4.6(4)(a)(i) of LEP.

The proposal is inconsistent with the objectives of the Height of Buildings development standard pursuant to LEP.

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss
- The development does not minimise visual impact
- The development is not compatible with the desired future character of the locality in terms of building height and roof form.
- The development does not minimise the adverse effects of the bulk and scale of buildings

The adverse impacts of the proposed development, including on the amenity of neighbouring property and public property, are directly attributable to the exceedance of the height of buildings development standard.

The proposal is inconsistent with the LEP as there is a public benefit in maintaining the Height of Buildings development standard in this particular case.

The proposed portion of the building above the maximum height of 8.5m is not 'minor'. The building does not adequately step down the slope.

The DA seeks for a substantial non-compliance with the Council permissible height as provided for in the LEP. The proposal is supported by a clause 4.6 seeking to justify the breach of the height standard.

My clients submit that the proposal is excessive and an over development and that the clause 4.6 submissions do not satisfy the pre-requisites in clause 4.6 of the LEP.

In respect of the overall height control, I have considered the applicant's Clause 4.6 and I consider that, in this instance, they have not been able to establish an argument to support their assertion that it is unreasonable and unnecessary to comply with the control.

My clients submit that the submission fails on the basis of the assessment against the objectives of clause 4.3, as well as the environmental planning grounds set out. Additionally, I consider that the development does not comply with the land use objectives.

In respect of the proposed development, I submit that the built form, which also incorporates other substantial non-compliant breaches will have negative impacts the amenity of neighbours as well as have significant impacts in respect of visual intrusion. Additionally, there is nothing provided for in this development that seeks to minimise the adverse effects of bulk and scale of the building.

My clients have reviewed the responses to these objectives in the applicant's Clause 4.6 and do not consider they satisfy the objectives. My clients strongly refute their arguments.

In respect of the compatibility test, unsurprisingly the applicant completely ignores multiple considerations dealing with the understanding of the site in respect of its topography, how it is viewed from neighbouring properties as well as the lack of compatibility with its form and articulation.

My clients contend that the proposal fails to adequately demonstrate that compliance with each standard is unreasonable or unnecessary nor that there are sufficient environmental planning grounds to justify contravening each of the standards. Variation of the development standards is not in the public interest because the proposed development is not consistent with the objectives of each development standard nor the objectives of the zone. The proposed development has not sought adequate variations to development standards. The proposal is excessive in bulk and scale, and is inconsistent with the desired future character of the area resulting in adverse impacts on the streetscape. The proposal results in an unacceptable dominance of built form over landscape. The proposal fails to minimise the adverse effects of bulk and scale resulting in adverse amenity impacts.

The proposed development should be refused due to its excessive visual impact and impacts on the character of the locality, adjoining properties and the surrounding environment.

The form and massing of the proposal does not appropriately respond to the low-density character of the surrounding locality

The form and massing of development is also inconsistent with the provisions of the DCP which prescribe that new development should complement the predominant building form in the locality.

The proposal would not recognise or protect the natural or visual environment of the area, or maintain a dominance of landscape over built form. The proposal has not been designed to minimise the visual impact on the surrounding environment.

In *Veloshin*, [*Veloshin v Randwick Council* 2007], NSW LEC considered Height, Bulk & Scale. *Veloshin* suggest that Council should consider:

“Are the impacts consistent with impacts that may be reasonably expected under the controls? For non-complying proposals the question cannot be answered unless the difference between the impacts of a complying and a non-complying development is quantified.”

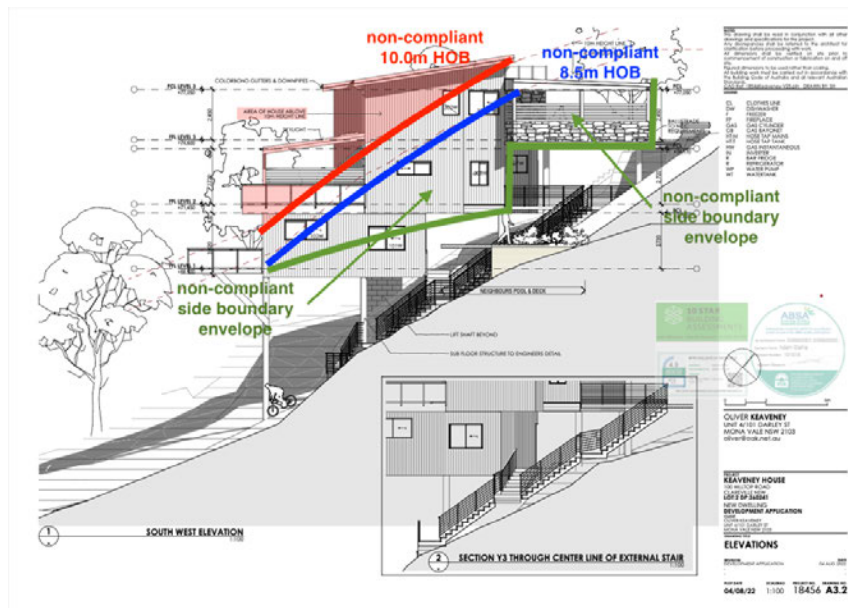
The impacts are not consistent with the impacts that would be reasonably expected under the controls.

In *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191, NSW LEC considered character:

“whether most observers would find the proposed development offensive, jarring or unsympathetic in a streetscape context, having regard to the built form characteristics of development within the site’s visual catchment”.

The non-compliant elements of the proposed development, particularly caused from non-compliant excessive heights would have most observers finding *‘the proposed development offensive, jarring or unsympathetic’*.

The planning controls are not limited to preventing offence and the like; and are concerned with establishing a certain physical and landscape character. In this instance I am not convinced that there are strong environmental planning grounds to justify a contravention of the scale proposed.



5. EXCESSIVE WALL HEIGHT & NUMBER OF STOREY

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to comply with the control.

The proposed development should be refused due to its excessive height and failure to comply with the Wall Height set out in the controls.

Wall Heights [WH:] assumes 300mm reduction to HOB

- Upper Roof Projected Roof: 15.0m WH, with substantial non-compliant side building envelope
- Upper Roof to Southern Boundary: 14.5m WH, with substantial non-compliant side building envelope
- Lower Roof: 13.3m WH, with substantial non-compliant side building envelope
- Carport: 8.7m WH with 0.2m side setback, with substantial non-compliant side building envelope

The proposed development is inconsistent with the objectives of the zone and the objectives that underpin the wall height.

This non-compliance, as well as the other non-compliances, arising from the proposed upper level indicates that the proposal cannot satisfactorily achieve the underlying objectives of this control, ultimately resulting in an unacceptable building bulk that creates a severe amenity impact.

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss

- The development does not minimise visual impact
- The development is not compatible with the desired future character of the locality in terms of building height and roof form.
- The development does not minimise the adverse effects of the bulk and scale of buildings

The adverse impacts of the proposed development, including on the amenity of neighbouring property and public property, are directly attributable to the exceedance of the wall height control.

The failure of the SEE to demonstrate the outcomes required by the wall height control means that the variation cannot be supported and, therefore, by necessity, the development application should be refused.

The proposal is inconsistent with the LEP and DCP as there is a public benefit in maintaining the Wall Height control in this particular case.

The proposed portion of the building above the maximum wall height is not 'minor'.

My clients contend that the proposal fails to adequately demonstrate that compliance with each standard or control is unreasonable or unnecessary nor that there are sufficient environmental planning grounds to justify contravening each of the standards. Variation of the development standards or control is not in the public interest because the proposed development is not consistent with the objectives of each development standard or control nor the objectives of the zone. The proposed development has not sought adequate variations to development standards or controls. The proposal is excessive in bulk and scale, and is inconsistent with the desired future character of the area resulting in adverse impacts on the streetscape. The proposal results in an unacceptable dominance of built form over landscape. The proposal fails to minimise the adverse effects of bulk and scale resulting in adverse amenity impacts.

The non-compliant elements of the proposed development, particularly caused from non-compliant excessive heights would have most observers finding *'the proposed development offensive, jarring or unsympathetic'*.

6. INADEQUATE CLAUSE 4.6 VARIATION REQUEST

Council cannot be satisfied that under clause 4.6 of the LEP seeking to justify a contravention of the development standard that the development will be in the public interest because the proposed development is inconsistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

There is nothing in the written request's consideration of the relationship between the proposal and the zone objectives which might provide sufficient environmental planning grounds for the breach.

The test is concerned with establishing sufficient environmental planning grounds to justify a contravention, something more than compliance or consistency with zone and development standard objectives must be sought.

The Applicant seeks to vary the height of buildings development standard.

The request relies upon the first way identified by Preston CJ in *Wehbe*. The first way in *Wehbe* is to establish that the objectives of the standard are achieved.

My clients contend that the variation has not responded to the objective of the maximum building height standard and given adequate reasoning why compliance is unreasonable or unnecessary.

In simple terms, I contend that:

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss
- The development does not minimise visual impact
- the impacts are not consistent with the impacts that may be reasonably expected under the controls;
- the proposal's height and bulk do not relate to the height and bulk desired under the relevant controls;
- the area has a predominant existing character and are the planning controls likely to maintain it;
- the proposal does not fit into the existing character of the area;
- the proposal is inconsistent with the bulk and character intended by the planning controls;
- the proposal looks inappropriate in its context

The objectives of the standard have not been met.

The bulk and scale of the proposed development is inappropriate for the site and locality.

Strict compliance with the maximum building height is reasonable and necessary in the circumstances of this case.

In summary, the proposal does not satisfy the requirements of clause 4.6 of LEP 2014.

The variation of the standard would not be in the public interest because it would set a precedent for development in the neighbourhood, such that successive exceedances would erode the views enjoyed from other similar properties.

The proposed development is inconsistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

7. UNACCEPTABLE BUILDING SEPARATION

The proposed development should be refused as it is significantly non-compliant with setback of the DCP.

- Side
- Front
- Side Boundary Envelope

The proposed development does not provide appropriate setbacks. This leads to inconsistency with the character of the area and unreasonable amenity impacts.

The proposed development results in an encroachment beyond the prescribed building envelope. This non-compliance is indicative of an unacceptable built form and contributes to the severe amenity loss.

The proposal will result in an unsatisfactory scale of built form that will be disproportionate and unsuitable to the dimensions of the site and neighbouring residential development.

The height and bulk of the development will result in unreasonable impacts upon the amenity of neighbouring properties with regard to visual dominance.

The excessive built form of the proposal results in a development where the building mass becomes visually dominant and imposing, particularly when viewed from the visual catchment of neighbouring properties

The cumulative effect of the non-compliances with setback and other development standard result in an over development of the site with the site being not suitable for the scale and bulk of the proposal.

8. BUILT FORM, BULK AND SCALE

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it will have unacceptable impacts upon the amenity of neighbours' property, specifically with regard to visual bulk impact.

The development has excessive bulk and scale and fails to comply with development standards set out LEP, resulting in a building which has unacceptable adverse impacts on neighbouring properties and the locality.

The non-compliant building envelope will lead to unacceptable visual bulk impact to neighbours.

The multiple non-compliances arising from the proposed upper floor levels indicates that the proposed development cannot achieve the underlying objectives of this control, resulting in an unacceptable building bulk when viewed from adjoining and nearby properties.

The development presents an inappropriate response to the site and an unsatisfactory response to the desired future character of the area.

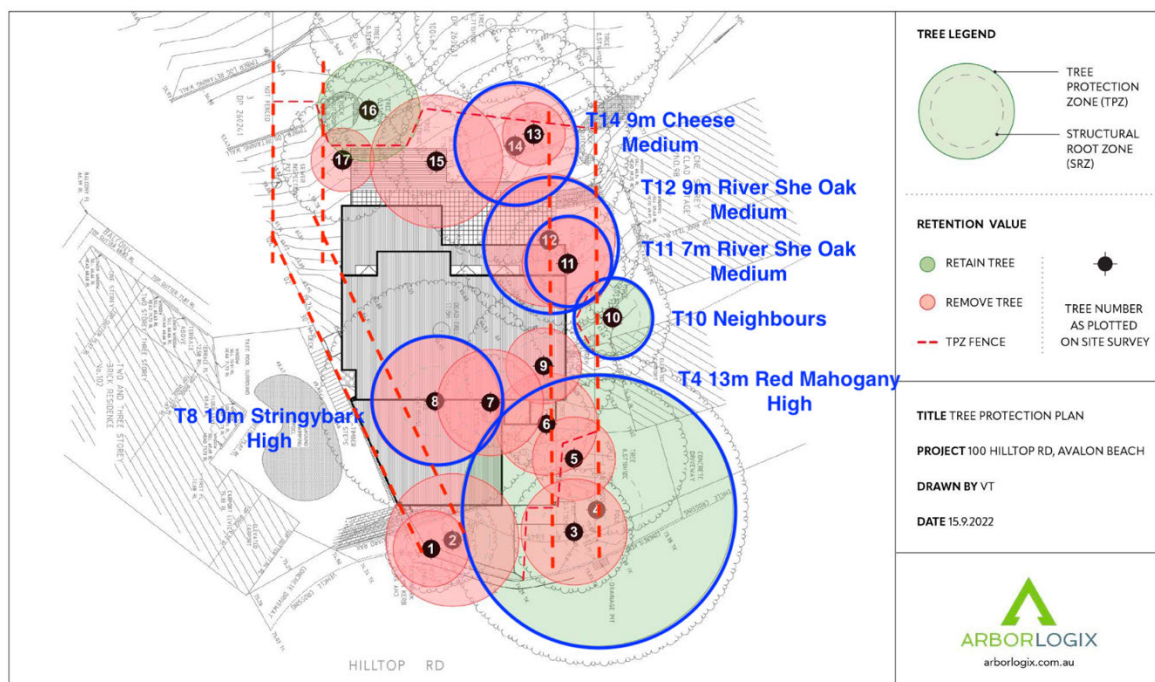
As detailed above, a redesign of the proposed development is strongly recommended to improve the amenity of adjoining properties.

9. EXCESSIVE REMOVAL OF NATIVE TREES

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to retain existing native trees.

There are at least 20 trees proposed to be removed on the subject site.

8.4. TREE PROTECTION AND REMOVALS PLAN



Council can easily assess that the proposed development has not adequately considered the positioning of the built form to protect the high value Tree 4, which the applicant confirms will be retained.

The Arborist states, in respect to Tree 4:

TPZ overlays show a major TPZ encroachment of 13% for the main building and carport and an additional 11.5% for the entrance slab (uncovered) and the external access stairs. This is a total TPZ encroachment of 24.5% and well within the SRZ (Structural Root Zone) which would not be possible.

I consider that the proposed development must be redesigned so as not to affect anything greater than 10% of the TPZ.

Council can easily assess that the proposed development has not adequately considered the positioning of the built form to retain Tree 8, Tree 11, Tree 12, and Tree 13, which the applicant confirms will be removed. These trees are all considered high or medium value by the Arborist. I consider that these trees must be retained; and the design modified to suit:

- Tree 8: 10m Stringybark
- Tree 11: 9m River She Oak
- Tree 12: 7m River She Oak
- Tree 14: 9m Cheese Tree

10. POOR STRATEGIC POSITIONING OF TREE CANOPY

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to strategically locate new tree canopy to avoid amenity loss.

The design and location of the proposed trees do not accord with NSWRFs normal recommendations in respect to BAL FZ sites.

I ask for a complete redesign of the Landscape Plan to achieve the following:

Asset Protection Zones

The intent of measures is to minimise the risk of bush fire attack and provide protection for emergency services personnel, residents and others assisting fire fighting activities. To achieve this, the following conditions shall apply:

From the commencement of building works and in perpetuity, the entire property must be managed as an inner protection area in accordance with the following requirements of Appendix 4 of Planning for Bush Fire Protection 2019:

- *tree canopy cover should be less than 15% at maturity;*
- *trees at maturity should not touch or overhang the building; [or Neighbours Buildings]*
- *lower limbs should be removed up to a height of 2 m above the ground;*
- *tree canopies should be separated by 2 to 5 m;*
- *preference should be given to smooth-barked and evergreen trees;*

- large discontinuities or gaps in the shrubs layer should be provided to slow down or break the progress of fire towards buildings;
- shrubs should not be located under trees;
- shrubs should not form more than 10% ground cover;
- clumps of shrubs should be separated from exposed windows and doors by a distance of at least twice the height of the vegetation;
- grass should be kept mown (as a guide, grass should be kept to no more than 100mm in height); and
- leaves and vegetation debris should be removed regularly.

My clients are concerned that new trees are positioned within the Tenacity Viewing Corridors to my clients' view.

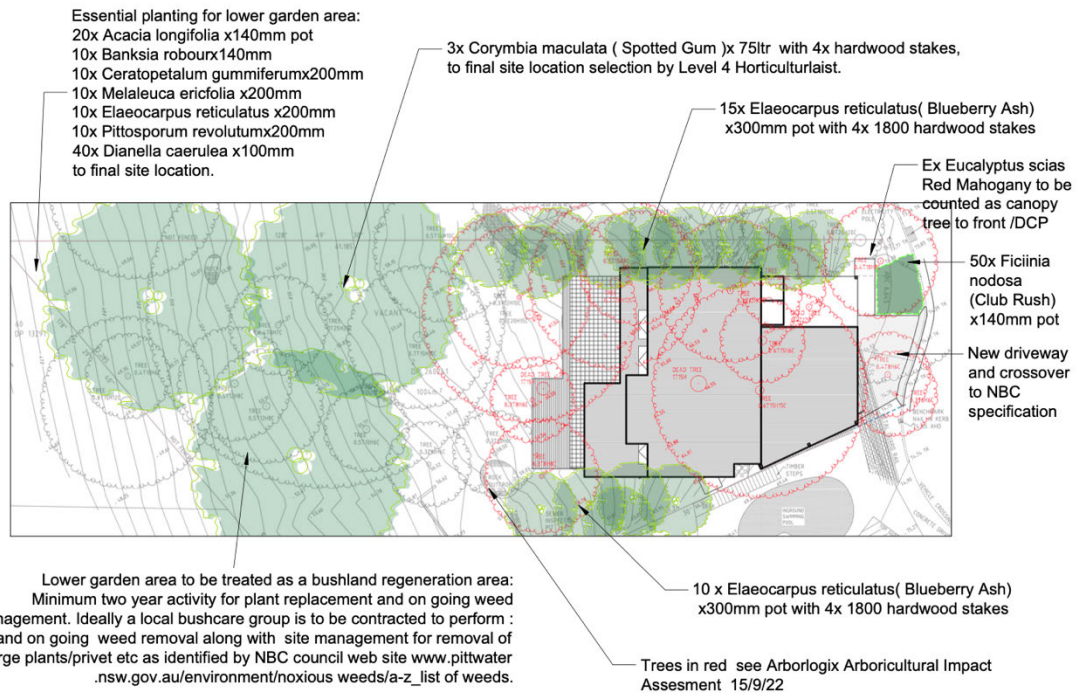
At the recent NSWLEC case, *Petesic v Northern Beaches Council [2022] NSWLEC*, decision dated 30 May 2022, view loss caused by excessive landscape was a key issue. Northern Beaches Council's SOFAC filed 16 September 2021, prepared by Louise Kerr, Director Planning and Place at NBC, in B2 Item 7, called for '*strategic positioning of canopy trees*' to avoid view loss. Proposed Trees were lowered and repositioned as a result. Commissioner Chilcott referred to the matter in 49[5].

At the recent NSWLEC case, *Zubani v Mosman Municipal Council [2022] NSWLEC 1381*, decision dated 19 July 2022, clearly identifies that under *Tenacity*, Council must be mindful to restrict landscape heights to ensure views are adequately protected. Commissioner Morris referred to the matter in 47 and 49.

At the recent NBLPP decision, DA 2022 0246 at 120 Prince Alfred Parade, Newport on 8 December 2022, the Panel agreed to delete trees higher than 8.5m in the viewing corridor as recommended by Council's assessment Report, and imposed the additional condition that the trees "*shall be maintained so that they do not exceed 8.5 metres in height measured from the ground at the base of the tree*"

The applicant is proposing three 20m+ high Spotted Gum into my client's water viewing corridors. These trees are required to be removed to avoid view loss, and to accord with bushfire controls in a BAL FZ zone.

I contend that if the existing trees are retained on the site as proposed, the BAL FZ control that "*tree canopy cover should be less than 15% at maturity*", is already exceeded, and therefore all new trees proposed should be deleted from the Landscape Plan.



Master Plan

Landscape plan
 100 Hill Top road Avalon

Issue: A client DRAFT
 Issue: B Council issue



Andrew Davies
 landscape designer



| Landscape DA Plan | | | |
|-------------------|-----------|-----------|-----------|
| Issue: A | Issue: B | Issue: C | Issue: D |
| Issue: E | Issue: F | Issue: G | Issue: H |
| Issue: I | Issue: J | Issue: K | Issue: L |
| Issue: M | Issue: N | Issue: O | Issue: P |
| Issue: Q | Issue: R | Issue: S | Issue: T |
| Issue: U | Issue: V | Issue: W | Issue: X |
| Issue: Y | Issue: Z | Issue: AA | Issue: AB |
| Issue: AC | Issue: AD | Issue: AE | Issue: AF |
| Issue: AG | Issue: AH | Issue: AI | Issue: AJ |
| Issue: AK | Issue: AL | Issue: AM | Issue: AN |
| Issue: AO | Issue: AP | Issue: AQ | Issue: AR |
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| Issue: AW | Issue: AX | Issue: AY | Issue: AZ |
| Issue: BA | Issue: BB | Issue: BC | Issue: BD |
| Issue: BE | Issue: BF | Issue: BG | Issue: BH |
| Issue: BI | Issue: BJ | Issue: BK | Issue: BL |
| Issue: BM | Issue: BN | Issue: BO | Issue: BP |
| Issue: BQ | Issue: BR | Issue: BS | Issue: BT |
| Issue: BU | Issue: BV | Issue: BW | Issue: BX |
| Issue: BY | Issue: BZ | Issue: CA | Issue: CB |
| Issue: CC | Issue: CD | Issue: CE | Issue: CF |
| Issue: CG | Issue: CH | Issue: CI | Issue: CJ |
| Issue: CK | Issue: CL | Issue: CM | Issue: CN |
| Issue: CO | Issue: CP | Issue: CQ | Issue: CR |
| Issue: CS | Issue: CT | Issue: CU | Issue: CV |
| Issue: CW | Issue: CX | Issue: CY | Issue: CZ |
| Issue: DA | Issue: DB | Issue: DC | Issue: DD |
| Issue: DE | Issue: DF | Issue: DG | Issue: DH |
| Issue: DI | Issue: DJ | Issue: DK | Issue: DL |
| Issue: DM | Issue: DN | Issue: DO | Issue: DP |
| Issue: DQ | Issue: DR | Issue: DS | Issue: DT |
| Issue: DU | Issue: DV | Issue: DW | Issue: DX |
| Issue: DY | Issue: DZ | Issue: EA | Issue: EB |
| Issue: EC | Issue: ED | Issue: EE | Issue: EF |
| Issue: EG | Issue: EH | Issue: EI | Issue: EJ |
| Issue: EK | Issue: EL | Issue: EM | Issue: EN |
| Issue: EO | Issue: EP | Issue: EQ | Issue: ER |
| Issue: ES | Issue: ET | Issue: EU | Issue: EV |
| Issue: EW | Issue: EX | Issue: EY | Issue: EZ |
| Issue: FA | Issue: FB | Issue: FC | Issue: FD |
| Issue: FE | Issue: FF | Issue: FG | Issue: FH |
| Issue: FI | Issue: FJ | Issue: FK | Issue: FL |
| Issue: FM | Issue: FN | Issue: FO | Issue: FP |
| Issue: FQ | Issue: FR | Issue: FS | Issue: FT |
| Issue: FU | Issue: FV | Issue: FW | Issue: FX |
| Issue: FY | Issue: FZ | Issue: GA | Issue: GB |
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| Issue: HA | Issue: HB | Issue: HC | Issue: HD |
| Issue: HE | Issue: HF | Issue: HG | Issue: HH |
| Issue: HI | Issue: HJ | Issue: HK | Issue: HL |
| Issue: HM | Issue: HN | Issue: HO | Issue: HP |
| Issue: HQ | Issue: HR | Issue: HS | Issue: HT |
| Issue: HU | Issue: HV | Issue: HW | Issue: HX |
| Issue: HY | Issue: HZ | Issue: IA | Issue: IB |
| Issue: IC | Issue: ID | Issue: IE | Issue: IF |
| Issue: IG | Issue: IH | Issue: II | Issue: IJ |
| Issue: IK | Issue: IL | Issue: IM | Issue: IN |
| Issue: IO | Issue: IP | Issue: IQ | Issue: IR |
| Issue: IS | Issue: IT | Issue: IU | Issue: IV |
| Issue: IW | Issue: IX | Issue: IY | Issue: IZ |
| Issue: JA | Issue: JB | Issue: JC | Issue: JD |
| Issue: JE | Issue: JF | Issue: JG | Issue: JH |
| Issue: JI | Issue: JJ | Issue: JK | Issue: JL |
| Issue: JM | Issue: JN | Issue: JO | Issue: JP |
| Issue: JQ | Issue: JR | Issue: JS | Issue: JT |
| Issue: JU | Issue: JV | Issue: JW | Issue: JX |
| Issue: JY | Issue: JZ | Issue: KA | Issue: KB |
| Issue: KC | Issue: KD | Issue: KE | Issue: KF |
| Issue: KG | Issue: KH | Issue: KI | Issue: KJ |
| Issue: KK | Issue: KL | Issue: KM | Issue: KN |
| Issue: KO | Issue: KP | Issue: KQ | Issue: KR |
| Issue: KS | Issue: KT | Issue: KU | Issue: KV |
| Issue: KW | Issue: KX | Issue: KY | Issue: KZ |
| Issue: LA | Issue: LB | Issue: LC | Issue: LD |
| Issue: LE | Issue: LF | Issue: LG | Issue: LH |
| Issue: LI | Issue: LJ | Issue: LK | Issue: LL |
| Issue: LM | Issue: LN | Issue: LO | Issue: LP |
| Issue: LQ | Issue: LR | Issue: LS | Issue: LT |
| Issue: LU | Issue: LV | Issue: LW | Issue: LX |
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| Issue: MG | Issue: MH | Issue: MI | Issue: MJ |
| Issue: MK | Issue: ML | Issue: MM | Issue: MN |
| Issue: MO | Issue: MP | Issue: MQ | Issue: MR |
| Issue: MS | Issue: MT | Issue: MU | Issue: MV |
| Issue: MW | Issue: MX | Issue: MY | Issue: MZ |
| Issue: NA | Issue: NB | Issue: NC | Issue: ND |
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| Issue: NI | Issue: NJ | Issue: NK | Issue: NL |
| Issue: NM | Issue: NN | Issue: NO | Issue: NP |
| Issue: NQ | Issue: NR | Issue: NS | Issue: NT |
| Issue: NU | Issue: NV | Issue: NW | Issue: NX |
| Issue: NY | Issue: NZ | Issue: OA | Issue: OB |
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| Issue: OG | Issue: OH | Issue: OI | Issue: OJ |
| Issue: OK | Issue: OL | Issue: OM | Issue: ON |
| Issue: OO | Issue: OP | Issue: OQ | Issue: OR |
| Issue: OS | Issue: OT | Issue: OU | Issue: OV |
| Issue: OW | Issue: OX | Issue: OY | Issue: OZ |
| Issue: PA | Issue: PB | Issue: PC | Issue: PD |
| Issue: PE | Issue: PF | Issue: PG | Issue: PH |
| Issue: PI | Issue: PJ | Issue: PK | Issue: PL |
| Issue: PM | Issue: PN | Issue: PO | Issue: PP |
| Issue: PQ | Issue: PR | Issue: PS | Issue: PT |
| Issue: PU | Issue: PV | Issue: PW | Issue: PX |
| Issue: PY | Issue: PZ | Issue: QA | Issue: QB |
| Issue: QC | Issue: QD | Issue: QE | Issue: QF |
| Issue: QG | Issue: QH | Issue: QI | Issue: QJ |
| Issue: QK | Issue: QL | Issue: QM | Issue: QN |
| Issue: QO | Issue: QP | Issue: QQ | Issue: QR |
| Issue: QS | Issue: QT | Issue: QU | Issue: QV |
| Issue: QW | Issue: QX | Issue: QY | Issue: QZ |
| Issue: RA | Issue: RB | Issue: RC | Issue: RD |
| Issue: RE | Issue: RF | Issue: RG | Issue: RH |
| Issue: RI | Issue: RJ | Issue: RK | Issue: RL |
| Issue: RM | Issue: RN | Issue: RO | Issue: RP |
| Issue: RQ | Issue: RR | Issue: RS | Issue: RT |
| Issue: RU | Issue: RV | Issue: RW | Issue: RX |
| Issue: RY | Issue: RZ | Issue: SA | Issue: SB |
| Issue: SC | Issue: SD | Issue: SE | Issue: SF |
| Issue: SG | Issue: SH | Issue: SI | Issue: SJ |
| Issue: SK | Issue: SL | Issue: SM | Issue: SN |
| Issue: SO | Issue: SP | Issue: SQ | Issue: SR |
| Issue: SS | Issue: ST | Issue: SU | Issue: SV |
| Issue: SW | Issue: SX | Issue: SY | Issue: SZ |
| Issue: TA | Issue: TB | Issue: TC | Issue: TD |
| Issue: TE | Issue: TF | Issue: TG | Issue: TH |
| Issue: TI | Issue: TJ | Issue: TK | Issue: TL |
| Issue: TM | Issue: TN | Issue: TO | Issue: TP |
| Issue: TQ | Issue: TR | Issue: TS | Issue: TT |
| Issue: TU | Issue: TV | Issue: TW | Issue: TX |
| Issue: TY | Issue: TZ | Issue: UA | Issue: UB |
| Issue: UC | Issue: UD | Issue: UE | Issue: UF |
| Issue: UG | Issue: UH | Issue: UI | Issue: UJ |
| Issue: UK | Issue: UL | Issue: UM | Issue: UN |
| Issue: UO | Issue: UP | Issue: UQ | Issue: UR |
| Issue: US | Issue: UT | Issue: UU | Issue: UV |
| Issue: UW | Issue: UX | Issue: UY | Issue: UZ |
| Issue: VA | Issue: VB | Issue: VC | Issue: VD |
| Issue: VE | Issue: VF | Issue: VG | Issue: VH |
| Issue: VI | Issue: VJ | Issue: VK | Issue: VL |
| Issue: VM | Issue: VN | Issue: VO | Issue: VP |
| Issue: VQ | Issue: VR | Issue: VS | Issue: VT |
| Issue: VU | Issue: VV | Issue: VW | Issue: VX |
| Issue: VY | Issue: VZ | Issue: WA | Issue: WB |
| Issue: WC | Issue: WD | Issue: WE | Issue: WF |
| Issue: WG | Issue: WH | Issue: WI | Issue: WJ |
| Issue: WK | Issue: WL | Issue: WM | Issue: WN |
| Issue: WO | Issue: WP | Issue: WQ | Issue: WR |
| Issue: WS | Issue: WT | Issue: WU | Issue: WV |
| Issue: WW | Issue: WX | Issue: WY | Issue: WZ |
| Issue: XA | Issue: XB | Issue: XC | Issue: XD |
| Issue: XE | Issue: XF | Issue: XG | Issue: XH |
| Issue: XI | Issue: XJ | Issue: XK | Issue: XL |
| Issue: XM | Issue: XN | Issue: XO | Issue: XP |
| Issue: XQ | Issue: XR | Issue: XS | Issue: XT |
| Issue: XU | Issue: XV | Issue: XW | Issue: XX |
| Issue: XY | Issue: XZ | Issue: YA | Issue: YB |
| Issue: YC | Issue: YD | Issue: YE | Issue: YF |
| Issue: YG | Issue: YH | Issue: YI | Issue: YJ |
| Issue: YK | Issue: YL | Issue: YM | Issue: YN |
| Issue: YO | Issue: YP | Issue: YQ | Issue: YR |
| Issue: YS | Issue: YT | Issue: YU | Issue: YV |
| Issue: YW | Issue: YX | Issue: YY | Issue: YZ |
| Issue: ZA | Issue: ZB | Issue: ZC | Issue: ZD |
| Issue: ZE | Issue: ZF | Issue: ZG | Issue: ZH |
| Issue: ZI | Issue: ZJ | Issue: ZK | Issue: ZL |
| Issue: ZM | Issue: ZN | Issue: ZO | Issue: ZP |
| Issue: ZQ | Issue: ZR | Issue: ZS | Issue: ZT |
| Issue: ZU | Issue: ZV | Issue: ZW | Issue: ZX |
| Issue: ZY | Issue: ZZ | | |

Plant Schedule

| Botanical Name | Common Name | Pot size mm | Dimensions WxH in metres | Qty. |
|---------------------------------|-------------------------|----------------|-----------------------------|------|
| <i>Acacia longifolia</i> | Wattle | 140 | 4x4 | 20 |
| <i>Banksia robour</i> | Swamp banksia | 140 | 4x5 | 10 |
| <i>Ceratopetalum gummiferum</i> | NSW Xmas bush/tree | 200 | 5x8 | 10 |
| <i>Corymbia maculata</i> | Spotted gum | 75ltr | 10x20plus | 3 |
| <i>Dianella caerulea</i> | Dianella | 100 | .3x.6 | 40 |
| <i>Elaeocarpus reticulatus</i> | Blueberry ash | 200 | 5x7 | 10 |
| <i>Elaeocarpus reticulatus</i> | Blueberry ash | 300 | 5x7 | 15 |
| <i>Ficinia nodosa</i> | Club rush | 140 | .4x.7 | 50 |
| <i>Melaleuca ericifolia</i> | Swamp paperbark | 200 | 4x4 | 10 |
| <i>Pittosporum revolutum</i> | Rough fruit pittosporum | 200 | 4x4 | 10 |
| | | | | |
| | | | | |

11. POOR GARAGE DESIGN

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as the design of the garage does not accord with the DCP provisions.

My clients are concerned that the proposed garage:

- Is built without adequate side setback to my clients' property;
- Is built within the front setback zone, taking away the opportunity for deep soil planting
- Is built without an adequate turning area to allow front in and front out access

My clients ask for these matters to be amended.

12. GEOTECHNICAL CONCERNS

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide minimal excavation, with excavation proposed too close the neighbours' property.

My clients are concerned that the excavation for foundations close to the existing 5m high concrete crib retaining wall, and close to my client's pool and dwelling, has not been adequately addressed.

These matters have not been addressed within the geotechnical hazards and risk analysis of the geotechnical report.

My clients have geotechnical concerns.

- Stability of the natural hillside slope; upslope of the proposed residence, beneath the proposed residence, downslope of the proposed residence and to all neighbour's land.
- Stability of the cliff adjacent to the site, and the existing concrete crib retaining wall
- Stability of existing retaining walls that will remain;
- Stability of proposed retaining walls to support the excavations for the proposed residence, and external landscaping walls.
- Incomplete consideration of landslip hazards
- Incomplete consideration of Natural Hillside Slope
- Incomplete consideration of the Cliff above the Site
- Incomplete consideration to create a Large-Scale Translational Slide
- Incomplete consideration of Existing Retaining Walls
- Incomplete consideration of Proposed Retaining Walls
- Incomplete consideration of partial excavation of large boulders
- Incomplete consideration and inadequate identification of 'floaters' across neighbour's boundary
- Incomplete consideration of Surface Erosion

- Incomplete consideration of potential Rock Fall
- Incomplete consideration of landslip of soils from excavation
- Incomplete consideration of a "floater" that extends from the subject site into my client's property where it passes under a timber staircase and connects to our concrete pool.
- Incomplete consideration of the existing brick boundary wall that acts as a compliant pool safety fence and this must be maintained.
- Incomplete consideration of the electricity and cable lines that cross in Council land adjacent the new driveway. The new crossover cannot be lowered in these areas.

My clients have concerns regarding the lack of extensive recommendations in respect to the following:

- Incomplete Conditions Recommended to Establish the Design Parameters
- Incomplete Conditions Recommended to the Detailed Design to be Undertaken for the Construction Certificate
- Incomplete Conditions Recommended During the Construction Period
- Incomplete Conditions Recommended for Ongoing Management of the Site/Structure(s)
- Incomplete Geotechnical Risk Management Forms

The Geotechnical report does not contain the full extent of conditions normally associated with this type of construction on a steep slope. Some of these matters are partially addressed but not all.

Excavation will occur for the large structural columns.

Typical conditions are as follows:

Conditions Recommended to Establish the Design Parameters

- all existing landscaping retaining walls within the site will be replaced as part of the development.
- a geotechnical investigation of the site should be carried out to confirm the subsurface conditions prior to the start of excavation. The investigation should be carried out following demolition to so access to the entire site for a drilling rig is possible.
- at least four boreholes be drilled, involving coring of the rock to assess its quality
- Cone Penetration Testing across the site to determine the soil profile and consistency;
- Boreholes for soil identification and collection of laboratory samples;
- Installation of groundwater monitoring wells with data loggers to measure groundwater levels before and during construction;
- Permeability testing in wells;
- Groundwater modelling to assess inflows and drawdown;
- Shoring wall analyses.
- Assess the groundwater level and fluctuations across the site and provide a detailed groundwater assessment to predict soil permeability, inflow rates,

drawdown and its effect in the short and long term for the site and surrounding properties;

- Excavations are expected to encounter sandstone bedrock and where such excavation is carried out using a hydraulic rock hammer continuous vibration monitoring must be carried out during rock hammer use. Vibration monitors should be set up on the adjoining houses. The ground vibration measured as peak particle velocity must not exceed 5mm/sec at the site boundaries, or 3mm/sec on older fragile properties. Lower PPV may be necessary due to the structural design of neighbouring properties
- Subject to inspection by a geotechnical engineer temporary batters for the proposed excavation should be no steeper than 1 Vertical (V) in 1 Horizontal (H) within the soil profile and extremely weathered rock and vertical in competent rock. All surcharge and footing loads must be kept well clear of the excavation perimeter.
- Where the required batters cannot be accommodated within the site geometry, or where not preferred, a retention system would be required and should be installed prior to excavation commencing.
- proposed new retaining walls should be designed using parameters set out by the geotechnical engineer, such as: For cantilever walls, adopt a triangular lateral earth pressure distribution and an 'active' earth pressure coefficient, K_a , of 0.3, for the retained height, assuming a horizontal backfill surface. A bulk unit weight of 20kN/cubm should be adopted for the soil profile. Any surcharge affecting the walls (e.g. traffic loading, live loading, compaction stresses, etc) should be allowed in the design. Propped or anchored retaining walls may be designed based on a trapezoidal lateral pressure distribution of $6H$ kPa, where H is the retained height in metres, assuming no structures are located within $2H$ of the wall. The retaining walls should be provided with complete and permanent drainage of the ground behind the walls. The subsoil drains should incorporate a non-woven geotextile fabric (e.g. Bidim A34), to act as a filter against subsoil erosion. For soldier pile walls strip drains should be placed behind the shotcrete panels. Toe resistance of the wall may be achieved by keying the footing into bedrock. An allowable lateral stress of 200kPa may be adopted for design.
- No rock anchors beyond the subject site boundary
- All proposed footings must be founded in sandstone bedrock. The footings should be designed for an allowable bearing pressure of 600kPa, subject to inspection by a geotechnical engineer prior to pouring.
- The surface water discharging from the new roof and paved areas must be diverted to outlets for controlled discharge to the existing stormwater system which appears to drain to the north. Any stormwater discharge must be spread across the slope and not discharged in a concentrated manner.
- The guidelines for Hillside Construction should also be adopted.

Conditions Recommended to the Detailed Design to be Undertaken for the Construction Certificate

- All structural design drawings must be reviewed by the geotechnical engineer who should endorse that the recommendations contained in this report have been adopted in principle. As the construction certificate will need to be obtained prior to demolition, the structural drawings prepared for the construction certificate application will require review following completion of

the geotechnical investigation and must be marked as such. The need for the geotechnical investigation following demolition must be clearly stated on the construction certificate structural drawings.

- All hydraulic design drawings must be reviewed by the geotechnical engineer who should endorse that the recommendations contained in this report have been adopted in principle.
- All landscape design drawings must be reviewed by the geotechnical engineer who should endorse that the recommendations contained in this report have been adopted in principle.
- Dilapidation surveys must be carried out on the neighbouring buildings and structures. A copy of the dilapidation report must be provided to the neighbours and Council or the Principle Certifying Authority.
- An excavation/retention methodology must be prepared prior to bulk excavation commencing. The methodology must include but not be limited to proposed excavation techniques, the proposed excavation equipment, excavation sequencing, geotechnical inspection intervals or hold points, vibration monitoring procedures, monitor locations, monitor types, contingency plans in case of exceedances.
- The excavation/retention methodology must be reviewed and approved by the geotechnical engineer.
- A Geotechnical Monitoring Plan is to be prepared which will detect any settlement associated with temporary and permanent works and structures; Will detect vibration in accordance with AS 2187 .2-1993 Appendix J including acceptable velocity of vibration (peak particle velocity); Will detect groundwater changes calibrated against natural groundwater variations; Details the location and type of monitoring systems to be utilised; Details the pre-set acceptable limits for peak particle velocity and ground water fluctuations; Details recommended hold points to allow for the inspection and certification of geotechnical and hydro-geological measures by the professional engineer; and Details a contingency plan.
- A geotechnical investigation meeting the requirements of TfNSW Technical Direction Geotechnology GTD 2020/001 | Version No. 01 – 2 July 2020 *Excavation adjacent to Transport for NSW Infrastructure*. This investigation will relate to the proximity of the excavation to the road
- Geotechnical assessment meeting the requirements of Sydney Water, *Technical guidelines, Building over and adjacent to pipe assets*, August 2021. This assessment will relate to the proximity of the excavation to the existing sewer main.
- A minimum of four cored boreholes extending to at least 3 m below the proposed bulk excavation level. A monitoring well is to be installed in at least one borehole the presence or otherwise of a groundwater level within the proposed depth of excavation established prior to design.
- Rock grinders are to be used for excavation. Hydraulic rock hammering is not to be used for excavation as it has the potential to provoke rock instability of the existing cliff face.
- Vibration monitoring limits are to be set at maximum Peak Particle Velocity of 5 mm/sec on neighbouring properties, or 2mm/sec to heritage, historical, structures in sensitive and fragile conditions or older fragile dwellings.
- Monitoring is to be carried out during demolition and excavation using a vibration monitoring instrument [Vibra] and alarm Levels [being the appropriate PPV] selected in accordance with the type of structures present

within the zone of influence of the proposed excavation. If vibrations in adjacent structures exceed the above values or appear excessive during construction, excavations should cease, and the project Geotechnical Engineer should be contacted immediately for appropriate review.

Conditions Recommended During the Construction Period

- The recommendations provided below must be reviewed and amplified following completion of the geotechnical investigation. The recommendations given below assume that good quality rock will be encountered at relatively shallow depths.
- The structural drawings must be updated following completion of the geotechnical investigation and subsequently reviewed by the geotechnical engineer to confirm that the geotechnical recommendations have been adopted.
- The approved excavation/retention methodology must be followed.
- Bulk excavations must be progressively inspected by the geotechnical engineer as excavation proceeds. We recommend inspections at 1.5m vertical depth intervals and on completion.
- The geotechnical engineer must inspect all footing excavations prior to placing reinforcement or pouring the concrete.
- Proposed material to be used for backfilling behind retaining walls must be approved by the geotechnical engineer prior to placement.
- Compaction density of the backfill material must be checked by a NATA registered laboratory to at least Level 2 in accordance with, and to the frequency outlined in, AS3798, and the results submitted to the geotechnical engineer.
- If they are to be retained, the existing stormwater system, sewer and water mains must be checked for leaks by using static head and pressure tests under the direction of the hydraulic engineer or architect, and repaired if found to be leaking.
- The geotechnical engineer must inspect all subsurface drains prior to backfilling.
- An 'as-built' drawing of all buried services at the site must be prepared (including all pipe diameters, pipe depths, pipe types, inlet pits, inspection pits, etc).
- All rock anchors must be proof-tested to 1.3 times the working load. In addition, the anchors must be subjected to lift-off testing no sooner than 24 hours after locking off at the working load. The proof-testing and lift-off tests must be witnessed by the geotechnical engineer. The anchor contractor must provide the geotechnical engineer with all field records including anchor installation and testing records. No rock anchors under neighbours property.
- The geotechnical engineer must confirm that the proposed alterations and additions have been completed in accordance with the geotechnical reports.

Conditions Recommended for Ongoing Management of the Site/Structure(s)

The following recommendations have been included so that the current and future owners of the subject property are aware of their responsibilities:

- All existing and proposed surface (including roof) and subsurface drains must be subject to ongoing and regular maintenance by the property owners. In addition, such maintenance must also be carried out by a plumber at no more than ten yearly intervals; including provision of a written report confirming scope of work completed (with reference to the 'as-built' drawing) and identifying any required remedial measures.
- The existing retaining walls on the western and eastern boundaries that are to remain must be inspected by a structural engineer at no more than ten yearly intervals; including the provision of a written report confirming scope of work completed and identifying any required remedial measures
- No cut or fill in excess of 0.5m (e.g. for landscaping, buried pipes, retaining walls, etc), is to be carried out on site without prior consent from Council.
- Where the structural engineer has indicated a design life of less than 100 years then the structure and/or structural elements must be inspected by a structural engineer at the end of their design life; including a written report confirming scope of work completed and identifying the required remedial measures to extend the design life over the remaining 100 year period.

Other Conditions:

- It is possible that the subsurface soil, rock or groundwater conditions encountered during construction may be found to be different (or may be interpreted to be different) from those inferred from the surface observations
- Surface run-off patterns during heavy rainfall may present poor outcomes

Concern is raised that the Geotechnical report has not fully addressed these matters

- Comprehensive site mapping conducted - inadequate
- Mapping details presented on contoured site plan with geomorphic mapping
- Subsurface investigation required
- Geotechnical model developed and reported as an inferred subsurface type-section
- Geotechnical hazards identified
- Geotechnical hazards described and reported
- Risk assessment conducted in accordance with the Geotechnical Risk Management Policy; Consequence analysis & Frequency analysis
- Risk calculation
- Risk assessment for property conducted in accordance with the Geotechnical Risk Management Policy
- Risk assessment for loss of life conducted in accordance with the Geotechnical Risk Management Policy
- Assessed risks have been compared to "Acceptable Risk Management" criteria as defined in the Geotechnical Risk Management Policy
- Opinion has been provided that the design can achieve the "Acceptable Risk Management" criteria provided that the specified conditions and recommendations presented in the Report are achieved recommendations presented in the Report are adopted.
- Design Life Adopted:100 years
- Geotechnical Conditions to be applied to all four phases as described in the Geotechnical Risk Management Policy

- o Additional action to remove risk where reasonable and practical have been identified and included in the report.

The Applicant has not provided adequate protection to my clients' property from excessive excavation and potential land slip and damage to my clients' property, including intrusive geotechnical investigations, incomplete geotechnical recommendations, incomplete geotechnical monitor plan, excessive vibration limits, lack of full-time monitoring of the vibration, incomplete dilapidation report recommendations, incomplete attenuation methods of excavation, exclusion of excavation in the setback zone, exclusion of anchors under my clients' property, and incomplete consideration of battering in the setback zone.

My clients ask for the Geotechnical Report to be updated to include all these matters, and the recommendations of the risk assessment required to manage the hazards as identified in the Geotechnical Report.

13. STORMWATER CONCERNS

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide adequate stormwater control outcomes.

My clients ask Council to consider the stormwater design and the OSD.

My clients ask Council to ensure that there are six stormwater pits to collect surface and sub surface stormwater along the perimeter of the subject site.

14. BUSHFIRE CONCERNS

I ask Council to seek advice regarding bush fire protection for the Development Application in accordance with section 4.14 of the *Environmental Planning and Assessment Act 1979*.

My Client's concerns are the additional bushfire risks to their own property that would be caused by an under assessment of the proposal and inappropriate conditions of consent.

The proposed development has not been designed to accord with:

- o Landscape within the Asset Protection Zone
- o Tree canopy cover to be less than 15% at maturity to accord with Bushfire Report and NSWRFs: design does not comply;
- o trees at maturity should not touch or overhang the building or Neighbours Buildings to accord with Bushfire Report and NSWRFs: design does not comply;
- o tree canopies should be separated by 2 to 5 m to accord with Bushfire Report and NSWRFs: design does not comply;

- large discontinuities or gaps in the shrubs layer should be provided to slow down or break the progress of fire towards buildings, to accord with Bushfire Report and NSW RFS: design does not comply;
- shrubs should not be located under trees, to accord with Bushfire Report and NSW RFS: design does not comply;
- shrubs should not form more than 10% ground cover, to accord with Bushfire Report and NSW RFS: design does not comply;
- Wall Construction to BAL FZ
- BAL FZ Bushfire Shutters on Windows & Doors not shown
- Roof Construction to BAL FZ
- Skylights not shown to accord with BAL FZ

I consider that the New South Wales Rural Fire Service (NSW RFS) may provide the following recommended conditions:

Asset Protection Zones

The intent of measures is to minimise the risk of bush fire attack and provide protection for emergency services personnel, residents and others assisting fire fighting activities. To achieve this, the following conditions shall apply:

From the commencement of building works and in perpetuity, the entire property must be managed as an inner protection area in accordance with the following requirements of Appendix 4 of Planning for Bush Fire Protection 2019:

- *tree canopy cover should be less than 15% at maturity;*
- *trees at maturity should not touch or overhang the building;*
- *lower limbs should be removed up to a height of 2 m above the ground;*
- *tree canopies should be separated by 2 to 5 m;*
- *preference should be given to smooth-barked and evergreen trees;*
- *large discontinuities or gaps in the shrubs layer should be provided to slow down or break the progress of fire towards buildings;*
- *shrubs should not be located under trees;*
- *shrubs should not form more than 10% ground cover;*
- *clumps of shrubs should be separated from exposed windows and doors by a distance of at least twice the height of the vegetation;*
- *grass should be kept mown (as a guide, grass should be kept to no more than 100mm in height); and*
- *leaves and vegetation debris should be removed regularly.*

Construction Standards

The intent of measures is that buildings are designed and constructed to withstand the potential impacts of bush fire attack. To achieve this, the following conditions shall apply:

New construction must comply with Section 3 (excluding section 3.5) and Section 9 (BAL FZ) of Australian Standard AS3959-2018 Construction of buildings in bushfire-prone areas or the relevant requirements of the NASH Standard - Steel Framed

Construction in Bushfire Areas (incorporating amendment A - 2015). New construction must also comply with the construction requirements in Section 7.5 of Planning for Bush Fire Protection 2019.

The existing building must be upgraded to improve ember protection by enclosing all openings (excluding roof tile spaces) or covering openings with a non-corrosive metal screen mesh with a maximum aperture of 2mm. Where applicable, this includes any sub floor areas, openable windows, vents, weepholes and eaves. External doors are to be fitted with draft excluders.

Water and Utility Services

The intent of measures is to minimise the risk of bush fire attack and provide protection for emergency services personnel, residents and others assisting fire fighting activities. To achieve this, the following conditions shall apply:

The provision of water must comply with the following in accordance with Table 7.4a of Planning for Bush Fire Protection 2019:

- a 5,000 litre static water supply, tank, pool, dam or the like, must be provided on-site,
- an outlet for firefighting purposes is located within the IPA or non-hazard side and away from the structure
- 65mm Storz connection with a ball valve is fitted to the outlet,
- the ball valve, pipes and tank penetration are adequate for the full 50mm inner diameter water flow through the Storz fitting and are constructed of a metal material,
- underground tanks have an access hole of 200mm to allow tankers to refill, direct from the tank,
- a hardened ground surface for truck access is supplied within 4m of the water outlet or access hole,
- above-ground tanks are manufactured from concrete or metal,
- raised tanks have their stands constructed from non-combustible material or bush fire-resisting timber.

The bush fire-resisting timbers are Silvertop Ash, Blackbutt, Red or River Gum, Spotted Gum, Red

Ironbark, Kwila (Merbau) or Turpentine,

- unobstructed access can be provided at all times,
- underground tanks are clearly marked,
- tanks on the hazard side of a building are provided with adequate shielding for the protection of firefighters,
- all exposed water pipes external to the building are metal, including any fittings,
- where pumps are provided, they are a minimum 5hp or 3kW petrol or diesel-powered pump, and are shielded against bush fire attack,
- any hose and reel for firefighting connected to the pump must be 19mm internal diameter,
- fire hose reels are constructed in accordance with AS/NZS 1221:1997, and installed in accordance with

the relevant clauses of AS 2441:2005,

- A Static Water Supply (SWS) sign must be obtained from the local NSW Rural Fire Service (RFS) and

positioned for ease of identification by RFS personnel and other users of the SWS. In this regard:

- Markers must be fixed in a suitable location to be highly visible, and
- Markers should be positioned adjacent to the most appropriate access for the water supply.
- where practicable, electrical transmission lines are underground,
- where overhead, electrical transmission lines are proposed as follows:
 - lines are installed with short pole spacing (30m), unless crossing gullies, gorges or riparian areas, and
 - no part of a tree is closer to a power line than the distance set out in accordance with the

specifications in ISSC3 Guideline for Managing Vegetation Near Power Lines.

- reticulated or bottled gas is installed and maintained in accordance with AS/NZS 1596:2014 and the requirements of relevant authorities, and metal piping is used,
- all fixed gas cylinders are kept clear of all flammable materials to a distance of 10m and shielded on the hazard side,
- connections to and from gas cylinders are metal,
- polymer-sheathed flexible gas supply lines are not used, and
- above-ground gas service pipes are metal, including and up to any outlets.

Landscaping Assessment

The intent of measure is to minimise the risk of bush fire attack and provide protection for emergency services personnel, residents and others assisting firefighting activities. To achieve this, the following conditions shall apply:

Landscaping within the required asset protection zone must comply with Appendix 4 of Planning for Bush Fire Protection 2019. In this regard, the following principles are to be incorporated:

- A minimum 1 metre wide area (or to the property boundary where the setbacks are less than 1 metre), suitable for pedestrian traffic, must be provided around the immediate curtilage of the building;
- Planting is limited in the immediate vicinity of the building;
- Planting does not provide a continuous canopy to the building (i.e. trees or shrubs are isolated or located in small clusters);
- Landscape species are chosen to ensure tree canopy cover is less than 15% (IPA), and less than 30% (OPA) at maturity and trees do not touch or overhang buildings;
- Avoid species with rough fibrous bark, or which retain/shed bark in long strips or retain dead material in their canopies;
- Use smooth bark species of trees species which generally do not carry a fire up the bark into the crown;
- Avoid planting of deciduous species that may increase fuel at surface/ ground level (i.e. leaf litter);
- Avoid climbing species to walls and pergolas;

- Locate combustible materials such as woodchips/mulch, flammable fuel stores away from the building;
- Locate combustible structures such as garden sheds, pergolas and materials such as timber garden furniture away from the building; and
- Low flammability vegetation species are used.

General Advice

- The NSW RFS recognises that the site is constrained and that the proposed development falls within the Flame Zone. Flame Zone development is high risk development; consequently, in situations such as this, the NSW RFS seeks to improve the overall fire safety of the existing development. This requires greater emphasis on construction standards, landscaping, siting, and vegetation management practices to ensure improved levels of protection are afforded to the development, its occupants and fire fighters. The NSW RFS has undertaken a merit based assessment of the proposal and provides the above advice in accordance with Planning for Bush Fire Protection 2019.
- The property is located such that access/egress presents an ongoing bush fire risk. As such, a Bush Fire Survival Plan is to be prepared by the residents of the dwelling. Information to assist in the preparation of a Bush Fire Survival Plan can be found at www.rfs.nsw.gov.au.

15. POOR STREETSCAPE OUTCOMES

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide adequate streetscape outcome, presenting non-compliant envelope controls that are visible from the street.

The proposal is excessive in scale, has adverse impacts on the visual amenity of the environment, does not positively contribute to the streetscape in terms of an adequately landscaped setting. The proposal is visually dominant, and is incompatible with the desired future townscape area character.

16. IMPACTS UPON ADJOINING PROPERTIES: VIEW LOSS

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to achieve an appropriate view sharing outcome to neighbours.

I attach photographs from my Clients Property in the appendix.

The development results in a loss of private views enjoyed by the neighbouring properties.

The development does not satisfy the objectives and planning controls of the DCP in respect to view loss.

The development exceeds the maximum quantum of development for the site by contravening development standards and planning controls.

The reduction of private views enjoyed by the neighbouring properties is attributed to the breaches of statutory development standards and planning controls that regulate the building envelope.

The proposed scale and design are not considered to take into account site or area planning to protect available water views. The proposed height, design and roof form are not considered to promote or maximise the opportunity of achieving the 'reasonable sharing of views' and some view access to be maintained for neighbours. It is considered that design options do exist, in terms of 'innovative design solutions' to improve the urban environment, including maintaining view access in the area and tapering built form with the sloping topography. The application does not detail whether or which 'skilful' design options have been considered in accordance with the Planning Principle established by the Land and Environment Court in *Tenacity Consulting v Warringah Council* (2004) NSWLEC 140. The principle seeks to achieve a development whilst allowing reasonable view access. The available information does not provide current height poles or a view montage to clearly quantify the views blocked or protected by the current design. At a reduced height, with a lower roof form, the building could potentially allow some view across. It is considered reasonable to request a revised design in order to protect the public interest.

Height poles are to be erected and are to be certified by a registered surveyor.

View impact photographs are to be taken from my client's property and public places.

View impact photomontages prepared in accordance with the Land and Environment Court policy on the use of photomontages are to be prepared from the view impact photographs.

I consider that my clients' view loss is greater than moderate.

For proposed developments where there is the potential for view loss from nearby or adjoining properties, consideration must be given to the view sharing principles detailed in the judgement handed down by the NSW Land and Environment Court under *Tenacity Consulting v Warringah Council*.

In relation to principle four of this judgement (being the 'assessment of the reasonableness of the proposal that is causing the impact'), it is considered that a development which complies with all planning controls would be deemed more reasonable than one that is non-compliant. The proposal, as it currently stands, presents numerous non-compliances to the planning controls listed under the LEP and DCP. This brings into question as to whether a more 'skilful' (or sensitive) design would achieve an improved and acceptable outcome, and as such allowing for an acceptable level of view sharing.

In this instance, it must be strongly recommended that the proposed upper floor is redesigned to respond to, and address, principle four of *Tenacity Consulting v Warringah Council*, which would provide the Applicant with a similar amenity while also reducing the view impact to an acceptable level on adjoining properties. An alternative design outcome could be achieved involving a reduction to the built form to below the 8.5m HOB standard at all levels, and full compliance with side setback and side boundary envelope controls, resulting in 2.5m and 5.0m side setbacks.

In this instance, alternative design outcomes are encouraged to appropriately and satisfactorily address the four-part assessment of *Tenacity Consulting v Warringah Council*.

The proposed development when considered against the DCP and the NSW Land and Environment Court Planning Principle in *Tenacity Consulting Pty Ltd v Warringah Council (2004) NSWLEC* will result in an unacceptable view impact and will not achieve appropriate view sharing.

The proposed development will result in unacceptable additional view impacts. The view impact is greater than moderate when considered against the *Tenacity* planning principle. The view impact could reasonably be avoided by a more considered design that retains the amenity of the proposal, whilst limiting the impact upon the neighbouring property.

The built form proposed blocks scenic, iconic or highly valued items or whole views as defined in *Tenacity* terms.

The proposed development will unreasonably obstruct views enjoyed by my clients' property from highly used rooms and from entertainment balconies, resulting in inconsistency with the requirements and objectives of the DCP.

The proposed development has not considered the strategic placement of canopy trees to avoid further view loss impacts upon existing view corridors.

The Applicant has not provided an adequate View Impact Analysis which details the extent to which existing water views from my clients' property, and other impacted dwellings, are obstructed under the current proposal. The existing documentation accompanying the application is insufficient to undertake a detailed analysis of the proposal against the relevant DCP and NSWLEC guidelines.

The proposal may also cause potential view loss of the water views from the public road, and may cause potential view loss from other neighbours who have not been notified of this DA.

The SEE has not considered the loss of street view loss from the public domain. The impact on public domain views has not been assessed by the applicant. I refer to *Rose Bay Marina Pty Limited v Woollahra Municipal Council 2013 NSWLEC 1046*. My clients contend that the public domain street view will be completely lost.

I bring to Council's attention a number of recent decisions on view loss grounds:

- FURLONG V NORTHERN BEACHES COUNCIL [2022] NSWLEC 1208 [NSWLEC Dismissal of Appeal]
- DER SARKISSIAN V NORTHERN BEACHES COUNCIL [2021] NSWLEC 1041 [NSWLEC Dismissal of Appeal]
- WENLI WANG V NORTH SYDNEY COUNCIL [2018] NSWLEC 122
- REBEL MH NEUTRAL BAY PTY LTD V NORTH SYDNEY COUNCIL [2018] NSWLEC 191
- AHEARNE V MOSMAN MUNICIPAL COUNCIL [2023] NSWLEC 1013

I contend that the composite consideration from these NSWLEC decisions, gives clear consideration that where view loss occurs across a side boundary caused by non-compliant development, and the view loss is moderate or higher, then the DA is unreasonable.

Other decisions suggest that even when a compliant development causes view loss, and the view is across a side boundary, and when there is an alternative option open to avoid that view loss, and that alternative has not been taken, then the DA is unreasonable.

FURLONG V NORTHERN BEACHES COUNCIL [2022] NSWLEC 1208

I refer to a dismissal of a Class 1 Appeal by NSWLEC Commissioner Dr Peter Walsh on a nearby site in Dee Why on view loss grounds. I refer to Furlong v Northern Beaches Council [2022] NSWLEC 1208. [NBC DA 2021/0571, 55 Wheeler Parade Dee Why]

I raise the dismissal by NSWLEC of the Applicant's appeal. The case in question had many similarities to this DA.

NBC DDP refused this DA on 24 November 2021, with Panel members Rod Piggott, Rebecca Englund, Tony Collier and Liza Cordoba, following a Refusal Recommendation of NBC Development Assessment Manager, by the NBC Responsible Officer Jordan Davies, a very senior NBC Planning Officer, that Council as the consent authority refuses Development Consent to DA2021/0517 for Alterations and additions to a dwelling house on land at Lot B DP 338618, 55 Wheeler Parade Dee Why subject to the conditions that were outlined in the Assessment Report.

The assessment of DA 2020/0517 involved a consideration of a view loss arising from a proposed development that presented a generally compliant envelope to LEP and DCP controls.

The DDP agreed with the recommendation and refused this DA.

The Assessment Report found that:

"A view assessment is undertaken later in this assessment report and the proposal is found to result in an unsatisfactory view sharing outcome and the application is recommended for refusal for this reason"

The Assessment Report found that in respect to a compliant envelope:

" the question to be answered is whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact upon views of neighbours."

The Assessment Report within the Tenacity Assessment concluded:

"the view impact looking south-east is considered both severe and devastating from the respective rooms given the significant proportion of the views which are impacted. The aspect looking south and south- east are considered whole, prominent coastal views which are certainly worthy of consideration and at least partial protection. The proposal to remove the vast majority of these views is considered overall to be a severe view impact."

The DA was recommended for refusal, and DDP refused the DA in full support of the NBC Responsible Officer Assessment Report.

The severity of the view loss that was considered unacceptable by the DDP was clearly stated by the DDP. This level of view loss was considered as 'severe' by the assessing officers and the DDP.

The Applicant appealed this decision.

On 22 April 2022, the appeal on Furlong v Northern Beaches Council [2022] NSWLEC 1208, was dismissed by the NSWLEC Commissioner Dr Peter Walsh. The decision summarised the issues:

60 Council took me to the findings of Robson J in Wenli Wang v North Sydney Council [2018] NSWLEC 122 ('Wenli Wang').

I reproduce pars [70]-[71] below:

"70 Applying the fourth step of Tenacity, I repeat that the proposed development complies with the development standards in the LEP and is therefore more reasonable than a development which would have breached them. However, I do also note that there is evidence in the form of the Colville plan that a similar amount of floor space could be provided by a design which reduces the effect on the view from the surrounding properties.

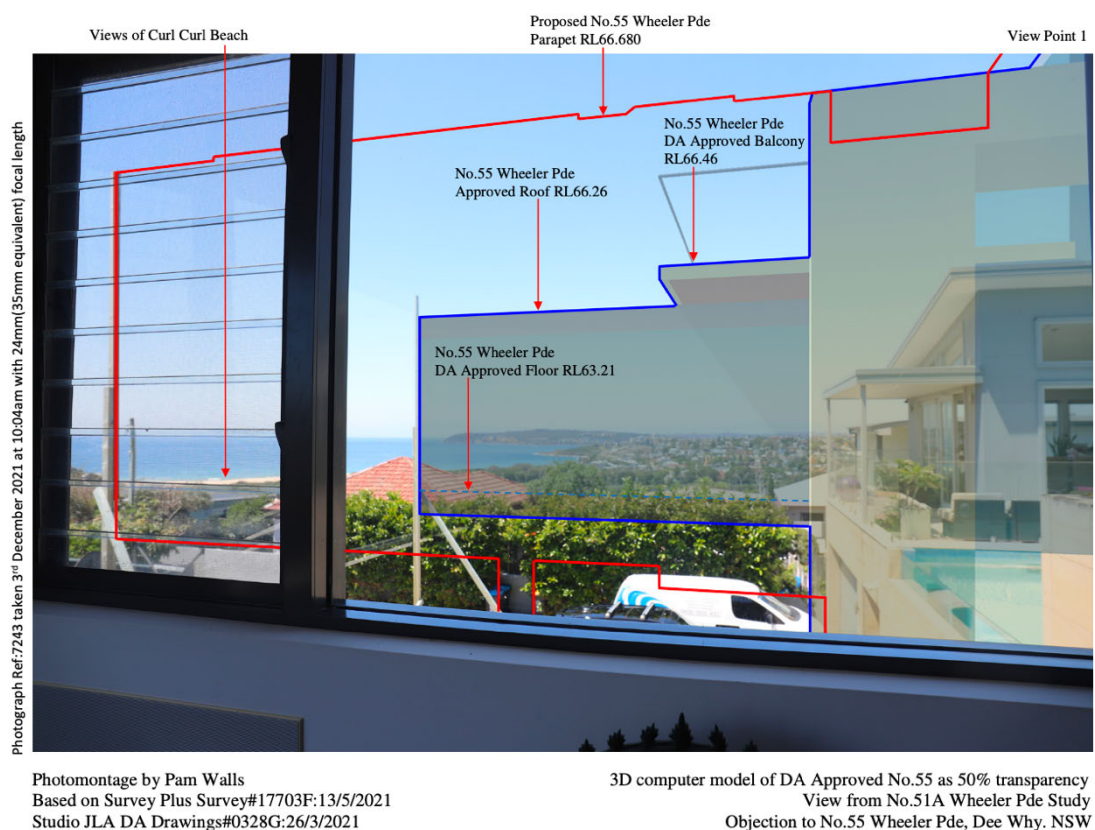
71 I consider there is force in the submission of Council that the applicant has taken a circular approach to the fourth step of Tenacity which presupposes a right to the level of amenity achieved by the proposed development. Whilst it is true that a redevelopment similar to that provided in the Colville plan would not provide the same amenity as the proposed development, it would provide a very high level of amenity and enjoy impressive views."

61 In the matter before me, I am more inclined to the kind of conclusion expressed at [71] in Wenli Wang. While the proposed development, accommodating the alternative designs suggested by Council (either shifting the master bedroom westwards some 3.5m or sliding the master bedroom to the south to bring about the same view availability effect – see [43]), may not provide the same amenity outcomes as would be the case without such changes, the proposal would still enjoy a very high level of amenity, including in regard to the panoramic views available to

the south, especially from living areas. The master bedroom would still enjoy superior views.

62 The proposal would bring about a severe view loss impact on 51A Wheeler Parade when there are reasonable design alternatives which would moderate this impact significantly. The proposal does not pay sufficient regard to cl D7 of WDCP which requires view sharing. The proposal before the Court does warrant the grant of consent in the circumstances.

The key issues in this case considered that the proposal would bring about a greater than moderate view loss impact, across a side boundary, on a Study/Bedroom when there was a reasonable design alternative which would moderate this impact significantly. The proposal did not pay sufficient regard to cl D7 of WDCP which requires view sharing.



The NSWLEC Furlong View Loss

DER SARKISSIAN V NORTHERN BEACHES COUNCIL [2021] NSWLEC 1041

My clients refer to a dismissal of a Class 1 Appeal by NSWLEC Commissioner Dr Peter Walsh on a nearby site in Curl Curl on view loss grounds. My clients refer to Der Sarkissian v Northern Beaches Council [2021] NSWLEC 1041. [NBC DA 2019/0380, 72 Carrington Parade, Curl Curl]

I raise the dismissal by NSWLEC of the Applicant's appeal. The case in question had many similarities to this DA.

- The main view loss concern was to a neighbour immediately behind 72 Carrington Parade, Curl Curl. My clients are in a similar position immediately behind the subject site.
- The view loss involved side setback controls.
- The view loss at Curl Curl was severe – my clients' loss would be also be greater than moderate: my clients would have significant loss of land/water interface from my clients' living spaces

The key matters within the Commissioner's Conclusion:

- the determinative issue in this case is view loss
- the proposal would significantly change the amenity enjoyed for the worse.
- both policy controls and view sharing principles suggest the proposal goes too far.
- proposal attempts to achieves too much on a constrained site.
- a reasonable development at the upper level in regard to view sharing and setback policy,
- with good design, there is scope for this to occur while also providing for reasonable floor space on this level.

It is clear that the view loss, on this DA, occurs through a poor consideration on wall height, building height and side boundary envelope controls.

My commentary on this DA is very similar to Commissioner Walsh in *Der Sarkissian v Northern Beaches Council* [2021] NSWLEC 1041

- the determining issue in this case is view loss – in my clients' case a water and water/land interface view loss
- the proposal would significantly change the amenity enjoyed for the worse.
- policy controls of building height, wall height, side boundary envelope non-compliances and view sharing principles suggest the proposal goes too far.
- proposal attempts to achieves too much on a constrained site.
- a reasonable development at the upper level in regard to view sharing building height, wall height, side boundary envelope policy, would share the view
- with good design, there is scope for view sharing to occur while also providing for reasonable floor space on all levels

My clients contend that there is no reasonable sharing of views amongst dwellings.

The new development is not designed to achieve a reasonable sharing of views available from surrounding and nearby properties.

The proposal has not demonstrated that view sharing is achieved through the application of the Land and Environment Court's planning principles for view sharing.

WENLI WANG V NORTH SYDNEY COUNCIL [2018] NSWLEC 122

This decision, and referenced in FURLONG, gives consideration to the assessment of a complaint development.

In this particular case, Council is assessing a substantially non-compliant development, however view loss over a side boundary again is a key matter,

REBEL MH NEUTRAL BAY PTY LTD V NORTH SYDNEY COUNCIL [2018] NSWLEC 191

As noted by his Honour, Justice Moore of the Court in Rebel MH Neutral Bay Pty Ltd v North Sydney Council [2018] NSWLEC 191 (Rebel),

“the concept of sharing of views does not mean, for the reasons earlier explained, the creation of expansive and attractive views for a new development at the expense of removal of portion of a pleasant outlook from an existing development. This cannot be regarded as “sharing” for the purposes of justifying the permitting of a non-compliant development when the impact of a compliant development would significantly moderate the impact on a potentially affected view”.

This is a key consideration, and one that parallels the forementioned NSWLEC decisions.

AHEARNE V MOSMAN MUNICIPAL COUNCIL [2023] NSWLEC 1013

As noted by Commissioner Espinosa of the Court in Ahearne v Mosman Municipal Council [2023] NSWLEC 1013 that the view sharing objectives and controls were minimised through the appropriate distribution of floor space and landscaping.

The importance of this decision reinforces the issues of landscaping in view loss assessment, and the consideration that the composite outcome of appropriate distribution of floor space and landscaping is relevant to view sharing principles.

NBC RECENT REFUSALS ON VIEW LOSS

I raise refusals by NBC DDP and NBLPP in 2022, on view loss grounds:

- NBLPP REFUSAL: DA 2021/1408 16 ADDISON ROAD MANLY
- NBC DDP REFUSAL: DA 2021/1734; 21 HEADLAND ROAD NORTH CURL CURL.
- NBLPP REFUSAL: DA 2022/0625 27 KARLOO PARADE NEWPORT
- NBLPP REFUSAL: DA 2022/1158 13 ILUKA ROAD, PALM BEACH

NBLPP REFUSAL: DA2021/1408 16 ADDISON ROAD MANLY

On 16 March 2022, NBLPP refused DA2021/1408 at 16 Addison Road Manly, accepting the Assessment Report of NBC Officer Maxwell Duncan. NBLPP Members were Crofts, Sainsbury, Krason and Cotton. The DA was refused as the proposed development was inconsistent with the provisions of Clause 3.4.3 Maintenance of Views of the Manly Development Control Plan.

The view loss was across side boundaries.

Comment to Principle 4:

The proposed development complies with the Building Height and Floor Space Ratio development standards under the Manly LEP. The subject development does not comply with the controls of the MDCP 2013 and, in the circumstance, it is found that the view loss for the neighbouring property is unacceptable and warrants the refusal of the application. The demonstrated non-compliances, being side setbacks and wall height give rise to unreasonable view impacts. It is acknowledged that the context and siting of the existing dwelling on the subject site, makes views for adjoining properties extremely vulnerable to any form of new development. However, it is concluded that the extent of the breaches of the planning controls is excessive and a more skilful and compliant design would vastly improve the outcome. The question of a more skilful design has been considered in that a close analysis of the plans identifies the opportunity to retain areas of view lines from all affected properties. The views assessment determined that there is the opportunity to significantly lessen the impact on views. While it acknowledged that that full compliance would be unreasonable given the constraints of the site, a greater level of compliance with both the wall height and side setback control would allow for view corridors to be maintained. In this regard, the development potential would not be significantly compromised. Therefore, the proposed dwelling house in particular the first-floor setback and wall height non-compliance is considered unreasonable in the circumstances of this application in that the application does not demonstrate a reasonable sharing of views.

In general terms, NBLPP assessed that the proposed development was unreasonable, in that the minor non-compliance to the side setbacks and wall height contributed to the view loss, and therefore was unreasonable. Although the proposed development complied with HOB and FSR, NBLPP considered that a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact.

NBC DDP REFUSAL: DA 2021/1734; 21 HEADLAND ROAD NORTH CURL CURL.

On 14 September 2022, NBC DDP refused DA 2021 1734 at 21 Headland Road North Curl Curl. Officer Richter [Independent Planning Consultant] recommended refusal on view loss grounds. The Panel Members were Adam Richardson, Anne-Maree Newbery and Neil Cocks.

The proposed development was compliant to HOB at 8.16m, with a modest non-compliance to Side Boundary Envelope.

The view loss was a modest triangular ocean south towards Manly, across a front and rear boundary.

The view loss however was devastating – a complete loss.

The DDP Refusal noted the following:

'The proposed scale and design are not considered to take into account site or area planning to protect available water views. The proposed height, design and roof form are not considered to promote or maximise the opportunity of achieving the 'reasonable sharing of views' and some view access to be maintained for the first floor areas of No. 20 Headland Road. It is considered that design options may exist, in terms of 'innovative design solutions' to improve the urban environment (including maintaining view access in the area and tapering built form with the sloping topography). The application does not detail whether or which 'skilful' design options have been considered in accordance with the Planning Principle established by the Land and Environment Court in Tenacity Consulting v Warringah Council (2004) NSWLEC 140. The principle seeks to achieve a development whilst allowing reasonable view access. The available information does not provide current height poles or a view montage to clearly quantify the views blocked or protected by the current design. At a reduced height, with a flatter roof form, the building could potentially allow some view across. It is considered reasonable to request a revised design in order to protect the public interest.'

In general terms, NBC DDP assessed that the proposed development was unreasonable, in that the minor non-compliance to side boundary envelope and minor non-compliance to wall height contributed to the view loss, and therefore was unreasonable. Although the proposed development complied with HOB, NBC DDP considered that a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact.

NBLPP REFUSAL: DA2022/0625 27 KARLOO PARADE NEWPORT

On 7 December 2022, NBLPP refused DA 2022/1158 on view loss grounds, across a side boundary. A recommendation for refusal on view loss grounds was presented by NBC Officer, Steven Findlay. NBLPP Members were Biscoe, Esposito, Brown and Simmons.

The view loss was severe.

The view in question was a partial view, across a side boundary to the headland view in Newport.

The loss was predominantly caused by a non-compliant HOB, Landscape Area, Side Boundary Envelope, and Setback controls.

The assessment read:

The view impacts are almost entirely caused by non-compliances which, independently when measured against the respective Outcomes in the P21DCP and PLEP. In response to Principle 4 - the design of the building is unreasonable and it is a non-compliance that is causing the view impacts. The site has ample opportunity to accommodate an alternate, more skilful design, which retains more views. The development is therefore inconsistent with the View Sharing Planning Principle of Tenacity Consulting Pty Ltd Vs Warringah Council (2004) NSWLEC 140.

In general terms, NBLPP assessed that the proposed development was unreasonable, in that the loss was predominantly caused by a non-compliant HOB, Landscape Area, Side Boundary Envelope, and Setback controls.

NBLPP REFUSAL: DA 2022/1158 13 ILUKA ROAD, PALM BEACH

On 14 December 2022, NBLPP refused DA 2022/1158 on view loss grounds, across a side boundary. A recommendation for refusal on view loss grounds was presented by NBC Officer Peter Robinson. NBLPP Members were Biscoe, Krason, Hussey and Bush.

The view in question was a partial view, across a side and secondary street boundary, across a reserve to the water view in Pittwater. The Assessment Report considered that 50% of the water view would be lost, and considered it a moderate loss. The loss was predominantly caused by a non-compliant secondary front building line. Although the proposed development was compliant to HOB, and most other envelope controls, it was the non-compliant secondary front building line that caused the moderate view loss that was considered unreasonable.

In general terms, NBLPP assessed that the proposed development was unreasonable, in that the minor non-compliance to the secondary front building line contributed to the view loss, and therefore was unreasonable. Although the proposed development complied with HOB, NBLPP considered that a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact.

TENACITY CONSULTING V WARRINGAH COUNCIL 2004

In Tenacity, [Tenacity Consulting v Warringah Council 2004], NSW LEC considered Views. Tenacity suggest that Council should consider:

"A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable."

The development breaches multiple planning controls and is unreasonable.

My clients contend that the impact on views arises as a result of non-compliance with one or more planning controls, and the view loss from the highly used rooms and decks is considered unreasonable.

APPLICATION OF TENACITY PLANNING PRINCIPLE

I have been unable to consider the impact of the proposal on the outward private domain views from my clients' property.

Height poles and montage view loss analysis has yet to be provided by the Applicant.

An assessment in relation to the planning principle of Roseth SC of the Land and Environment Court of New South Wales in *Tenacity Consulting v Warringah* [2004] NSWLEC 140 - Principles of view sharing: the impact on neighbours (Tenacity) is made, on a provisional basis ahead of height poles being erected by the Applicant.

The steps in Tenacity are sequential and conditional in some cases, meaning that proceeding to further steps may not be required if the conditions for satisfying the preceding threshold is not met.

STEP 1 VIEWS TO BE AFFECTED

The first step quoted from the judgement in Tenacity is as follows:

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

An arc of view is available when standing at a central location in the highly used zones including entertainment decks, highly used rooms, and private open spaces on my clients' property.

The composition of the arc is constrained over the subject site boundaries, by built forms and landscape. The central part of the composition includes the subject site. Views include scenic and valued features as defined in Tenacity. The proposed development will take away views for its own benefit. The view is from my clients' highly used rooms towards the view. The extent of view loss exceeds moderate and the features lost are considered to be valued as identified in Step 1 of Tenacity.

STEP 2: FROM WHERE ARE VIEWS AVAILABLE

This step considers from where the affected views are available in relation to the orientation of the building to its land and to the view in question. The second step, quoted, is as follows:

The second step is to consider from what part of the property the views are

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

The views in all cases are available across the boundary of the subject site, from standing and seated positions. An arc of view is available when standing at highly used zones on my clients' property.

In this respect, I make two points: My clients have no readily obtainable mechanism to reinstate the impacted views from my clients' high used zones if the development as proposed proceeds; and all of the properties in the locality rely on views over adjacent buildings for their outlook, aspect and views.

STEP 3: EXTENT OF IMPACT

The next step in the principle is to assess the extent of impact and the locations from which the view loss occurs.

Step 3 as quoted is:

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

As I rate the extent of view loss is above moderate in my opinion the threshold to proceed to Step 4 of Tenacity is met.

STEP 4: REASONABLENESS

The planning principle states that consideration should be given to the causes of the visual impact and whether they are reasonable in the circumstances.

Step 4 is quoted below:

The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the

impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

NSWLEC Commissioner Walsh in Balestriere v Council of the City of Ryde [2021] NSWLEC 1600 in relation to the Fourth Step:

There are three different points to the fourth Tenacity step, concerned with assessing the reasonableness of the impact, which I summarise as follows:

Point 1 - Compliance, or otherwise, with planning controls.

Point 2 - If there is a non-compliance, then even a moderate impact may be considered unreasonable.

Point 3 - For complying proposals: (a) "whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact", and (b) "if the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable".

In respect to Point 3, NSWLEC Commissioner Walsh in Furlong v Northern Beaches Council [2022] NSWLEC 1208 referenced Wenli Wang v North Sydney Council [2018] NSWLEC 122, in considering that if a more skilful design could be achieved arriving at an outcome that achieved 'a very high level of amenity and enjoy impressive views', then a proposed development has gone too far, and must be refused.

As the proposed development does not comply with outcomes and controls, that are the most relevant to visual impacts, greater weight would be attributed to the effects caused.

In my opinion the extent of view loss considered to be the greater than moderate, in relation to the views from my clients' highly used zones of my clients' dwelling. The view is from a location from which it would be reasonable to expect that the existing view, particularly of the view that could be retained especially in the context of a development that does not comply with outcomes and controls. The private domain visual catchment is an arc from which views will be affected as a result of the construction of the proposed development. The proposed development will create view loss in relation to my clients' property. The views most affected are from my clients' highly used zones and include very high scenic and highly valued features as defined in Tenacity. Having applied the tests in the Tenacity planning principle I conclude that my clients would be exposed to a loss greater than moderate from the highly used rooms. The non-compliance with planning outcomes and controls of the proposed development will contribute to this loss. Having considered the visual effects of the proposed development envelope, the extent of view loss caused would be unreasonable and unacceptable.

The proposed development cannot be supported on visual impacts grounds. The proposal incorporates a significant departure from controls, which helps contain building envelope. Additionally, the siting of the proposed development and its distribution of bulk does not assist in achieving view sharing objectives. Where the diminishing of private views can be attributed to a non-compliance with one or

more planning controls, even a moderate impact may be considered unreasonable. My assessment finds that view sharing objectives have not been satisfied.

The above non-compliance will give rise to unreasonable amenity impacts upon the adjoining properties. In this instance, the proposal is not considered to achieve compliance with this control.

There are architectural solutions that maintains my clients' view. I identify the precise amendments necessary to overcome this loss.

As noted by his Honour, Justice Moore of the Court in *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191 (*Rebel*),

"the concept of sharing of views does not mean, for the reasons earlier explained, the creation of expansive and attractive views for a new development at the expense of removal of portion of a pleasant outlook from an existing development. This cannot be regarded as "sharing" for the purposes of justifying the permitting of a non-compliant development when the impact of a compliant development would significantly moderate the impact on a potentially affected view".

The same unreasonable scenario in *Rebel* applies to the current DA. The proposed breaching dwelling will take away views from my clients' property (and possibly other adjoining properties) to the considerable benefit of the future occupants of the proposed dwelling. This scenario is not consistent with the principle of View Sharing enunciated by his Honour, Justice Moore in *Rebel*. The adverse View Loss from my clients' property is one of the negative environmental consequences of the proposed development. The proposed development cannot be supported on visual impacts grounds.

These issues warrant refusal of the DA.

My clients ask Council to request that the Applicant position 'Height Poles/Templates' to define the non-compliant building envelope, and to have these poles properly measured by the Applicant's Registered Surveyor. The Height Poles will need to define: All Roof Forms, and all items on the roof, Extent of all Decks, Extent of Privacy Screens. Height Poles required for all trees. The Applicant will have to identify what heights and dimensions are proposed as many are missing from the submitted DA drawings.

In conclusion, as the dwelling proposed will impact views from my clients' property, the erection of height poles is required to allow an accurate assessment of view impact. The height poles should provide a delineation to identify any elements of the proposed built form that breaches the envelope controls of height and setbacks.

My clients contend that the proposed development when considered against the DCP and the NSW Land and Environment Court Planning Principle in *Tenacity Consulting Pty Ltd v Warringah Council* (2004) NSWLEC will result in an unacceptable view impact and will not achieve appropriate view sharing.

My clients contend that the proposal is contrary to Section 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979* in that it does not satisfy the view sharing controls of the DCP.

17. IMPACTS UPON ADJOINING PROPERTIES: OVERSHADOWING

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it will have unacceptable impacts upon the amenity of neighbours' property, specifically with regard to overshadowing.

The Applicant has not provided adequate Solar Access Diagrams, at one hourly intervals, in plan and elevation of my clients' property, to assess the loss of solar access at mid-winter, to accord with DCP controls and NSWLEC planning principles

My clients believe that further assessment of the shadow impacts through the production of elevational shadow diagrams or a "View from the Sun" assessment are critical in order to understand the potential future impacts and necessary for Council's reasonable assessment.

The proposed development should be refused as it will have unacceptable impacts upon the amenity of adjoining properties, specifically with regard to overshadowing.

The proposed development will result in unreasonable overshadowing of the windows of my clients' property and the private open space of my clients' property, resulting in non-compliance with the provisions of DCP.

A variation to the DCP is not supported as the objectives of the clause are not achieved.

In *The Benevolent Society v Waverley Council* [2010] NSWLEC 1082 the LEC consolidated and revised planning principle on solar access is now in the following terms:

"Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines. The poor quality of a proposal's design may be demonstrated by a more sensitive design that achieves the same amenity without substantial additional cost, while reducing the impact on neighbours."

My clients contend that the overshadowing arises out of poor design. The design does not respect envelope controls, and must be considered 'poor design'.

The Applicant has not submitted hourly solar diagrams to fully assess the solar loss. My clients ask Council to obtain these diagrams.

The loss of sunlight is directly attributable to the non-compliant envelope.

The planning principle *The Benevolent Society v Waverley Council* [2010] NSWLEC 1082 is used to assess overshadowing for development application. An assessment against the planning principle is provided as follows:

- *The ease with which sunlight access can be protected is inversely proportional to the density of development. At low densities, there is a reasonable expectation that a dwelling and some of its open space will retain its existing sunlight. (However, even at low densities there are sites and buildings that are highly vulnerable to being overshadowed.) At higher densities sunlight is harder to protect and the claim to retain it is not as strong.*

The density of the area is highly controlled. Building envelope controls have been exceeded.

- *The amount of sunlight lost should be taken into account, as well as the amount of sunlight retained.*

The solar diagrams are not complete, but what has been provided shows that the proposed development will overshadow the adjoining dwellings. The amount of sunlight that will be lost will only be able to be fully considered once solar elevational drawings are submitted. What has been submitted gives the very clear indication that the outcome is not in accordance with controls

- *Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines. The poor quality of a proposal's design may be demonstrated by a more sensitive design that achieves the same amenity without substantial additional cost, while reducing the impact on neighbours.*

The proposed development has been designed without considering the amenity of the neighbouring properties. It is considered that a more skilful design, with a compliant envelope control, could have been adopted that would have reduced the impact on the neighbouring properties. What has been submitted gives the very clear indication that the outcome is not in accordance with controls

- *To be assessed as being in sunlight, the sun should strike a vertical surface at a horizontal angle of 22.5o or more. (This is because sunlight at extremely oblique angles has little effect.) For a window, door or glass wall to be assessed as being in sunlight, half of its area should be in sunlight. For private open space to be assessed as being in sunlight, either half its area or a useable strip adjoining the living area should be in sunlight, depending on the size of the space. The amount of sunlight on private open space should be measured at ground level.*

This can only be fully assessed once elevational solar drawings at hourly intervals are submitted. What has been submitted gives the very clear indication that the outcome is not in accordance with controls

- *Overshadowing by fences, roof overhangs and changes in level should be taken into consideration. Overshadowing by vegetation should be ignored, except that vegetation may be taken into account in a qualitative way, in particular dense hedges that appear like a solid fence.*

There is no major overshadowing as a result of vegetation

- *In areas undergoing change, the impact on what is likely to be built on adjoining sites should be considered as well as the existing development.*

The area is not currently undergoing change, the LEP and DCP controls have not altered for many years.

The assessment of the development against the planning principal results in the development not complying with the solar access controls and therefore amended plans should be requested to reduce the overshadowing impact on the adjoining neighbour. It is suggested that a more skilful design of the development, with a compliant envelope control, would result in less impact in regard to solar access. It is requested that Council seek amended plans for the development to reduce the impact of the development, and these matters are addressed elsewhere in this Written Submission.

My clients object to solar loss to my clients' private open space, and to my clients' windows that fails to allow mid-winter solar access into highly used room by non-compliant development controls.

18. IMPACTS UPON ADJOINING PROPERTIES: PRIVACY

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it will have unacceptable impacts upon the amenity of neighbours' property, specifically with regard to visual privacy.

The proposed development should be refused as it will have unacceptable impacts upon the amenity of my clients' property, specifically with regard to visual privacy.

The proposed development will result in unacceptable overlooking of the adjoining dwelling and associated private open space, resulting in inconsistency with the provisions of the DCP and the objectives of the DCP.

The Applicant has not provided an adequate Privacy Impact Analysis which details the extent to which privacy at my clients' property will be adversely impacted by the proposal.

An assessment of the privacy impact against the planning principle *Meriton v Sydney City Council* [2004] NSWLEC 313 follows:

Principle 1: The ease with which privacy can be protected is inversely proportional to the density of development. At low-densities there is a reasonable expectation that a dwelling and some of its private open space will remain private. At high-densities it is more difficult to protect privacy.

Response: The development is located in a low-density area.

Principle 2: Privacy can be achieved by separation. The required distance depends upon density and whether windows are at the same level and directly facing each

other. Privacy is hardest to achieve in developments that face each other at the same level. Even in high-density development it is unacceptable to have windows at the same level close to each other. Conversely, in a low-density area, the objective should be to achieve separation between windows that exceed the numerical standards above. (Objectives are, of course, not always achievable.)

Response: The proposed development results in a privacy impact with the proposed windows facing neighbours without sufficient screening devices being provided, considering the proposed windows are directly opposite my clients' windows and balconies.

Principle 3: The use of a space determines the importance of its privacy. Within a dwelling, the privacy of living areas, including kitchens, is more important than that of bedrooms. Conversely, overlooking from a living area is more objectionable than overlooking from a bedroom where people tend to spend less waking time.

Response: The windows in question are windows of the main circulation zones and living areas, it is considered that the living areas will result in an unacceptable privacy breach. The proposed windows and decks facing the rear private open spaces for the neighbouring dwelling and will result in an unacceptable level of privacy impact.

Principle 4: Overlooking of neighbours that arises out of poor design is not acceptable. A poor design is demonstrated where an alternative design, that provides the same amenity to the applicant at no additional cost, has a reduced impact on privacy.

Response: The proposed development is a new development and the proposed windows have been designed without any consideration to the privacy of the neighbouring property.

Principle 5: Where the whole or most of a private open space cannot be protected from overlooking, the part adjoining the living area of a dwelling should be given the highest level of protection.

Response: It is considered that the private open space of the neighbouring dwellings could be better protected. My clients ask Council to consider the most appropriate privacy screening measures to be imposed on windows and decks facing my clients' property, including landscaping

Principle 6: Apart from adequate separation, the most effective way to protect privacy is by the skewed arrangement of windows and the use of devices such as fixed louvres, high and/or deep sills and planter boxes. The use of obscure glass and privacy screens, while sometimes being the only solution, is less desirable.

Response: As mentioned above, the use of privacy devices would reduce the impact of the dwelling.

Principle 7: Landscaping should not be relied on as the sole protection against overlooking. While existing dense vegetation within a development is valuable, planting proposed in a landscaping plan should be given little weight.

Response: Additional landscaping may assist in addition to privacy devices.

Principle 8: In areas undergoing change, the impact on what is likely to be built on adjoining sites, as well as the existing development, should be considered.

Response: The area is not undergoing change that would warrant privacy impact such as the one presented.

Comment: As the development is considered to result in an unacceptable privacy impact due to the design, it is requested that the proposed development be redesigned to reduce amenity impact on the neighbouring properties.

In the context of the above principles, the application can be considered to violate the reasonable expectation that the habitable rooms and private open space at my clients' property will remain private. It is therefore reasonably anticipated that the application does not comply with the DCP.

The above non-compliance will give rise to unreasonable amenity impacts upon the adjoining properties. In this instance, the proposal is not considered to achieve compliance with this control.

19. PRECEDENT

The Development Application should be refused because approval of the proposal will create an undesirable precedent for similar inappropriate development in the area.

20. PUBLIC INTEREST

The proposal is contrary to the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*. The proposed development is not in the public interest as the development is inconsistent with the scale and intensity of development that the community can reasonably expect to be provided on this site by nature of the applicable controls. The development does not represent orderly development of appropriate bulk, scale or amenity impact in the locality and approval of such a development would be prejudicial to local present and future amenity as well as desired future character and therefore is not in the public interest.

D. CONTENTIONS THAT RELATE TO INSUFFICIENT INFORMATION

View Impact Analysis

The Applicant has not provided an adequate View Impact Analysis which details the extent to which existing water views from my clients' property are obstructed under the current proposal, from the proposed built form and the proposed trees, to accord with DCP controls and NSWLEC planning principles

My clients ask Council that after amended plans are submitted to reduce the building envelope below building height, wall height, and all envelope controls, to request that the Applicant position 'Height Poles/Templates' to define the non-compliant building envelope, and to have these poles properly measured by the Applicant's Registered Surveyor. The Height Poles will need to define: All Roof Forms, and all items on the roof, Extent of all Decks, Extent of Privacy Screens. Height Poles required for all trees. The Applicant will have to identify what heights and dimensions are proposed as many are missing from the submitted DA drawings.

Privacy Impact Analysis

The Applicant has not provided an adequate Privacy Impact Analysis, to accord with DCP controls and NSWLEC planning principles.

Solar Access Diagrams

The Applicant has not provided adequate Solar Access Diagrams, at one hourly intervals, in plan and elevation of my clients' property, to assess the loss of solar access at mid-winter, to accord with DCP controls and NSWLEC planning principles

My clients believe that further assessment of the shadow impacts through the production of elevational shadow diagrams or a "View from the Sun" assessment are critical in order to understand the potential future impacts and necessary for Council's reasonable assessment.

Visual Bulk Analysis

The Applicant has not provided adequate montages from my clients' property to assess the visual bulk assessment from the proposed non-compliant envelope.

Geotechnical

The Applicant has not provided adequate protection to my clients' property from excessive excavation and potential land slip and damage to my clients' property, including excessive vibration limits, lack of full-time monitoring of the vibration, incomplete dilapidation report recommendations, incomplete attenuation methods of excavation, exclusion of excavation in the setback zone, exclusion of anchors under my clients' property, and incomplete consideration of battering in the setback zone. The geotechnical requirements referred to earlier must be added to the Geotechnical Report. My clients ask for the Geotechnical Report to be updated to include these matters, and the recommendations of the risk assessment required to manage the hazards as identified in the Geotechnical Report are to be incorporated into the construction plans. Details demonstrating compliance are to be submitted to the Principal Certifying Authority prior to the issue of the Construction Certificate.

E. REQUEST FOR AMENDED PLANS TO BE SUBMITTED TO BETTER ADDRESS IMPACTS UPON ADJOINING PROPERTIES

A compliant building design would reduce the amenity impacts identified.

Prepare and submit further supporting information and amendments to the assessing officer directly addressing the issues.

Reduce the proposed development as follow:

1. REDUCTION OF BUILT FORM

- Reduce the Building Height to 8.5m, with north-western sun control devices and privacy screens facing side boundaries not to breach the 10m height control zone
- Increase Side Setback to DCP controls, with a minimum of 2.5m side setback to the SW elevation,
- Increase Side Boundary Envelope or Inclined Plane to DCP controls, with a minimum of 5.0m side setback to the SW elevation to zones reaching 8.5m height zones, including the upper levels of the dwelling and the carport,
- Delete all built form within Side Boundary Envelope or Inclined Plane zone
- Crossover to be have SW side boundary setback
- Increase Front Setback to DCP controls
- Solar panels to lie flat of the roof and not to exceed maximum roof height
- Position six stormwater grated surface inlet pits along the boundary to collect surface and sub surface stormwater

2. PRIVACY DEVICES

- Privacy Windows: New Windows to have 1.65 high sills, measured from the internal FFL, or the window is to be fixed and non-opening and fitted with obscured glazing to 1.65m height above internal FFL
- Privacy Windows: Privacy Screens to be shall be of fixed panels or battens or louver style construction (with a maximum spacing of 20mm), in materials that complement the design of the approved development
- Privacy Decks: 1.65m privacy screens to all decks facing my clients' property, measured from the internal FFL of the deck, shall be of fixed panels or battens or louver style construction (with a maximum spacing of 20mm), in materials that complement the design of the approved development.
- The proposed communal open space should be deleted as it would not be successful given its location away from the communal lobby and its inaccessibility.
- In order to mitigate visual privacy impacts upon the adjacent side properties, the following measures shall be implemented:
 - The provision of 1.65m high privacy screening
 - The increase to the height of the proposed translucent glazing to 1.65m above first floor level.

3. LANDSCAPING

Delete all new proposed trees as the tree canopy cover should be less than 15% at maturity to accord with NSWRFs BAL FZ Controls.

Delete new scrubs under trees, and reduce to 10% of the ground cover.

- *From the commencement of building works and in perpetuity, the entire property must be managed as an **inner protection area** in accordance with the following requirements of Appendix 4 of Planning for Bush Fire Protection 2019:*
- *tree canopy cover should be less than 15% at maturity;*
- *trees at maturity should not touch or overhang the building; [or Neighbours Buildings]*
- *lower limbs should be removed up to a height of 2 m above the ground;*
- *tree canopies should be separated by 2 to 5 m;*
- *preference should be given to smooth-barked and evergreen trees;*
- *large discontinuities or gaps in the shrubs layer should be provided to slow down or break the progress of fire towards buildings;*
- *shrubs should not be located under trees;*
- *shrubs should not form more than 10% ground cover;*
- *clumps of shrubs should be separated from exposed windows and doors by a distance of at least twice the height of the vegetation;*
- *grass should be kept mown (as a guide, grass should be kept to no more than 100mm in height); and*
- *leaves and vegetation debris should be removed regularly.*

- To maintain view sharing, all proposed trees and plants over 6m in height shall be deleted in the landscape plan, or relocated out of the neighbours viewing corridor. Tree canopy planting must be located at least 3m from buildings and 5m from common boundaries, to avoid excessive canopy protruding over neighbours property. An amended Landscape Plan prepared by a qualified landscape designer to a scale of 1:100 and conditions of this Consent shall be submitted to Council's satisfaction with the Construction Certificate. The plan shall show: a north point; existing and proposed finished ground levels; the location of all existing and proposed landscape features; proposed streetscape works adjacent to the property boundary; existing trees to be retained, removed or transplanted (including species and dimensions); and tree protection zones for trees (on or near the property) that are to be retained and are liable to impacts from the proposed development. Predominantly locally indigenous plant species shall be specified in the Plant Schedule. All plantings shall be of local species not to exceed 8m in height. Details must be submitted with the Construction Certificate application, and shall be to the satisfaction of the Principal Certifying Authority (PCA), to maintain view sharing. Tree planting shall be located to minimise impacts on view loss.
- Landscaping: increase garden width between the proposed carport wall and the side boundary of the adjoining property to adequately support planting and at least 5000mm is considered necessary to support columnar shrub screen planting,
- Landscaping: A continuous landscape strip, of a minimum 2500mm width and a minimum soil depth of 1000mm, is to be provided along the SW boundary to enable suitable screen planting.

4. OTHER MATTERS/CONDITIONS OF ANY CONSENT

- Dilapidation reports, including photographic surveys, of the adjoining properties must be provided to the Principal Certifying Authority prior to any works commencing on the site (including demolition or excavation). The reports must detail the physical condition of those properties listed below, both internally and externally, including walls, ceilings, roof, structural members and other similar items. The dilapidation report is to be prepared by a suitably qualified person. A copy of the report must be provided to Council, the Principal Certifying Authority and the owners of the affected properties prior to any works commencing. Post-Construction Dilapidation Reports, including photos of any damage evident at the time of inspection, must be submitted after the completion of works. The report must: compare the post-construction report with the pre-construction report, clearly identify any recent damage and whether or not it is likely to be the result of the development works, should any damage have occurred, suggested remediation methods.
- The Applicant must provide a certificate to ensure the recommendations of the risk assessment required to manage the hazards as identified in the Geotechnical Report are to be incorporated into the construction plans. The certificate shall be prepared by a qualified geotechnical engineer.
- The external finish to the roof shall have a medium to dark range (BCA classification M and D) in order to minimise solar reflections to neighbouring properties. Any roof with a metallic steel finish is not permitted.

- The Applicant is to provide a certification of drainage plans detailing the provision of on-site stormwater detention in accordance with Council's Water Management for Development Policy. Detailed drainage plans are to be prepared by a suitably qualified Civil Engineer, who has membership to the Institution of Engineers Australia, National Professional Engineers Register (NPER) and registered in the General Area of Practice for civil engineering.
- Excavation work is to ensure the stability of the soil material of adjoining properties, the protection of adjoining buildings, services, structures and / or public infrastructure from damage using shoring, retaining walls and support where required. All retaining walls are to be structurally adequate for the intended purpose, designed and certified by a Structural Engineer.
- The development is required to be carried out in accordance with all relevant Australian Standards.
- A survey certificate prepared by a Registered Surveyor at the following stages of construction: (a) Commencement of perimeter walls columns and or other structural elements to ensure the wall or structure, to boundary setbacks are in accordance with the approved details. (b) At the lowest level slab, and at ground level to ensure the finished floor levels are in accordance with the approved levels, prior to concrete slab being poured/flooring being laid. (c) At completion of the roof frame confirming the finished roof/ridge height is in accordance with levels indicated on the approved plans.
- All plant and equipment (including but not limited to except for the rooftop air conditioning equipment) is to be located within the basement of the building and is not to be located on balconies or the roof. Plans and specifications complying with this condition must be submitted to the Certifying Authority for Approval prior to the issue of any Construction Certificate. The Certifying Authority must ensure that the building plans and specifications submitted, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.
Reason: Minimise impact on surrounding properties, improved visual appearance and amenity for locality
- In order to minimise atmospheric air pollution, the proposed fire place is to burn non- solid fuel only.

F. REASONS FOR REFUSAL

My clients ask Council to refuse the DA as the proposal is contrary to the Environmental Planning and Assessment Act:

1. Council is not satisfied that under clause 4.6 of the LEP seeking to justify a contravention of the development standard that the development will be in the public interest because it is inconsistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

2. The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy objectives and planning controls of LEP:
 - Aims of Plan
 - Zone Objectives
 - Height of Buildings
 - Exceptions to Development Standards
 - Earthworks
3. The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy objectives and planning controls of DCP:
 - Excessive Wall Height & Number of Storey
 - Unacceptable Building Separation
 - Excessive Removal of Native Trees
 - Poor Strategic Positioning of Tree Canopy
 - Poor Garage Design
 - Geotechnical Concerns
 - Bushfire
 - Stormwater Concerns
 - Poor Streetscape Outcomes
 - Impacts Upon Adjoining Properties: View Loss
 - Impacts Upon Adjoining Properties: Overshadowing
 - Impacts Upon Adjoining Properties: Privacy
 - Impacts Upon Adjoining Properties: Visual Bulk
4. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that the plans and documentation are misleading as they do not clearly portray the true extent of works proposed. The plans include inaccuracies and inconsistencies and insufficient information has been provided in order to enable a detailed assessment.
5. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that the proposal would not satisfy the matters for consideration under Biodiversity & Conservation SEPP 2021 and Resilience & Hazards SEPP 2021
6. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that it will have an adverse impact through its bulk, scale and siting on the built environment, and through lack of landscape provision, and adverse impact on the natural environment. The proposed development will have a detrimental impact on the visual amenity of the adjoining properties by virtue of the excessive building bulk, scale and mass of the upper floor and its associated non-compliant envelope.
7. The site is not suitable for the proposal pursuant to Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979* in that this area of the site is unsuitable for a development of such excessive bulk and scale.
8. The proposals are unsuitably located on the site pursuant to Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979*.

9. The proposal does not satisfy Section 4.15(1)(d) of the Environmental Planning and Assessment Act 1979 in that the proposal does not adequately address the amenity of neighbours
10. The proposal is contrary to the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*. The proposed development is not in the public interest as the development is inconsistent with the scale and intensity of development that the community can reasonably expect to be provided on this site by nature of the applicable controls. The development does not represent orderly development of appropriate bulk, scale or amenity impact in the locality and approval of such a development would be prejudicial to local present and future amenity as well as desired future character and therefore is not in the public interest. The proposed development will have a detrimental impact on the amenity of adjoining residential properties, and for this reason is contrary to the public interest.

G. CONCLUSION

The proposed dwelling is not consistent with the intent of the LEP standards and DCP controls as they are reasonably applied to the proposal.

The variations to LEP standards and DCP controls are considered unreasonable in this instance. The cumulative effect on these non-compliances cause considerable amenity loss to my clients' property.

The development will not sit well within the streetscape with non-compliance to LEP standards and DCP controls causing considerable concern. In this regard, the proposal is considered excessive in bulk and scale and would be consider jarring when viewed from the public domain.

Commissioner Moore revised the NSWLEC planning principle for assessing impacts on neighbouring properties within *Davies v Penrith City Council* [2013] NSWLEC 1141

"The following questions are relevant to the assessment of impacts on neighbouring properties:

How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?

How reasonable is the proposal causing the impact?

How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?

Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?

Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?"

My clients contend that the proposed development severely impacts my clients' property, and in terms of amenity, there is excessive sunlight, view or privacy loss. The loss is unreasonable. My clients' property is not vulnerable to the loss that is presented. The loss arises out of poor design, either through non-compliance to envelope controls or poorly located built form.

It is considered that the proposal is inappropriate on merit and unless amended plans are submitted, this DA must be refused for the following reasons:

- The application has not adequately considered and does not satisfy the various relevant planning controls applicable to the site and the proposed development.
- The proposed dwelling is incompatible with the existing streetscape and development in the local area generally.
- The proposed dwelling will have an unsatisfactory impact on the environmental quality of the land and the amenity of surrounding properties.
- The site is assessed as unsuitable for the proposal, having regard to the relevant land use and planning requirements.

It is considered that the public interest is not served.

The proposed development does not follow the outcomes and controls contained within the adopted legislative framework.

Having given due consideration to the matters pursuant to Section 4.15 of the Environmental Planning and Assessment Act, 1979 as amended, it is considered that there are multiple matters which would prevent Council from granting consent to this proposal in this instance.

The proposed development represents an overdevelopment of the site and an unbalanced range of amenity impacts all of which would result in adverse impacts on my clients' property. Primarily,

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss
- The development does not minimise visual impact

Unless the Applicant submits Amended Plans to resolve all of the adverse amenity impacts raised within this Submission, my clients' ask Council to REFUSE this DA.

We ask that if Council in their assessment of this application reveals unsupported issues, which prevent Council from supporting the proposal in its current form, and writes to the applicant describing these matters, we ask for that letter to be forwarded to us.

My clients trust that Council will support my clients' submission and direct the proponent to modify the DA plans, as outlined above. My clients ask Council Officers to inspect the development site from my clients' property so that Council can fully assess the DA.

Yours faithfully,

Bill Tulloch

Bill Tulloch BSc [Arch] BArch [Hons1] UNSW RIBA RAIA
PO Box 440 Mona Vale
NSW 1660

Appendix: Photographs from my Clients Property

Photographs from my Clients Property



The existing pool



View from Level 2 Lounge



View from front of Pool Deck



View from rear of Pool Deck



View from Level 1 Lounge



View from Dining Room Level 2



View from Kitchen Level 2



View from Master Bedroom Level 3



View from Bedroom Level 3