



4 March 2019

Our Ref: CHS:AK:180132

Roger Bain  
c/o Stephen Lesiuk  
1118 Barrenjoey Rd  
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By email: [rkb.1@bigpond.com](mailto:rkb.1@bigpond.com) ; [stephenlesiuk@mac.com](mailto:stephenlesiuk@mac.com)

Dear Mr Bain,

**Re: advice with respect to approval options for development of 6 Mitchell Road, Palm Beach.**

**Summary**

1. We refer to our recent discussions and correspondence with you and your Architect regarding the proposed construction of a viewing platform, driveway and garage (**Proposed Development**) as part of a development application for a dwelling house at 6 Mitchell Road, Palm Beach (lot 1 DP1086858) (the **Property**).
2. You have asked us to provide advice with respect to the most appropriate approval pathway for the Proposed Development.
3. Our advice to you is there are three avenues available to carry out the Proposed Development. They are:
  - a. completing the Proposed Development without further development approvals because it is permitted in the zone (the **Permitted Development Option**);
  - b. seeking approval by way of a development application for the garage as an ancillary use to the viewing platform (the **Ancillary Use Option**); or
  - c. seeking to have the land rezoned, or seeking to have the permissible uses on the land modified to include dwelling houses (the **Rezoning Option**).
4. The simplest option is the Permitted Development Option. However, in light of the proposed development application for the Property, the Ancillary Use Option can easily be incorporated into such an application. We explain in more detail below.

## Background

5. We understand the following:

- a. The **Property** (being on lot 1 DP1086858) is adjacent to a site known as the Bible Garden at 6A Mitchell Road, Palm Beach (lot 2 DP1086858) (**Bible Garden**).
- b. The Property and the Bible Garden were previously on the same lot (lot 2 DP 213975) (the **Original Lot**).
- c. In March 2001 Pittwater Council received a draft proposal for the subdivision of the Original Lot.
- d. Between March 2001 and February 2004 Pittwater Council received and commented on a range of documents, including concept sketches of the proposed dwelling house on the Property.
- e. On 9 February 2004, a contract was entered into between Pittwater Council and the trustees of the Bible Garden Memorial Trust in their capacity as owners of 6 Mitchell Road, Palm Beach (the **Heads of Agreement Contract**). The Heads of Agreement Contract enabled investigation of subdivision of the Original Lot to enable residential development on the Property and to allow the Bible Garden to continue in perpetuity. The Heads of Agreement Contract acknowledged that the boundary between the Property and the Bible Garden was chosen to provide space for the "eventual two car garage" on the Property, and that any approved subdivision would have to enable the construction of the two-car garage as shown on the concept plans.
- f. In 2005 the Bible Garden was rezoned as "6(a) Existing Recreation" under the *Pittwater Local Environmental Plan 1993* (**PLEP 1993**) in accordance with the Heads of Agreement Contract. This zoning permitted development if such development was set out in a Plan of Management.
- g. In February 2006 the Original Lot was subdivided and the Bible Garden was vested in Pittwater Council. Relevantly, the plan of subdivision shows building envelopes, including for the garage and entry below the Bible Garden and within the Property.
- h. In December 2006 a Plan of Management was prepared for issues relating to the Bible Garden and to detail acceptable usage of the garden (**Plan of Management**). Relevantly:
  - i. the zoning of the Bible Garden was identified as "6(a) Existing Recreation" under the Pittwater LEP;
  - ii. table 3 of the Plan of Management identified permissible uses for the Bible Garden; and
  - iii. figure 5 of the Plan of Management showed the zoning of the Property (including the area of part of the Property immediately adjacent to the Bible Garden) as "Residential A" and the zoning of the Bible Garden.

- i. In 27 June 2014 the PLEP 1993 was repealed and replaced with the *Pittwater Local Environmental Plan 2014* (PLEP 2014). Under the PLEP 2014 (and as it stands today):
  - i. The Property was predominately zoned E4 Environmental Living with a small portion immediately adjacent to the Bible Garden zoned RE1 Public Recreation. The Bible Garden was zoned RE1 Public Recreation.
  - ii. The RE1 Public Recreation zone no longer specified that development was permissible if it is in a Plan of Management. This situation continues today.
- j. On 8 January 2019 a meeting occurred with Northern Beaches Council to discuss the dwelling house and the Proposed Development. At that meeting, council officers provided an opinion that evidence would be required to support a development application if it sought to rely on existing use rights on the site with respect to the Proposed Development.

## Legislation

6. The existing zoning for the site is E4 Environmental Living and RE1 Public Recreation under the PLEP 2014. Part 2 of the PLEP 2014 relevantly states (with *emphasis* added):

### **Zone RE1 Public Recreation**

#### *1 Objectives of zone*

- *To enable land to be used for public open space or recreational purposes.*
- *To provide a range of recreational settings and activities and compatible land uses.*
- *To protect and enhance the natural environment for recreational purposes.*
- *To allow development that does not substantially diminish public use of, or access to, public open space resources.*
- *To provide passive and active public open space resources, and ancillary development, to meet the needs of the community.*

#### *2 Permitted without consent*

*Building identification signs; Environmental protection works; Horticulture; Markets; Roads*

#### *3 Permitted with consent*

*Child care centres; Community facilities; Environmental facilities; Information and education facilities; Kiosks; Public administration buildings; Recreation areas; Recreation facilities (indoor); Recreation facilities (outdoor); Respite day care centres; Restaurants or cafes; Signage; Take away food and drink premises; Water recreation structures*

#### *4 Prohibited*

*Any development not specified in item 2 or 3*

...

## **Zone E4 Environmental Living**

### 1 Objectives of zone

- To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.
- To ensure that residential development does not have an adverse effect on those values.
- To provide for residential development of a low density and scale integrated with the landform and landscape.
- To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.

### 2 Permitted without consent

*Home businesses; Home occupations*

### 3 Permitted with consent

*Bed and breakfast accommodation; Boat sheds; Building identification signs; Business identification signs; Child care centres; Community facilities; Dwelling houses; Environmental protection works; Group homes; Health consulting rooms; Home-based child care; Home industries; Jetties; Places of public worship; Respite day care centres; Roads; Secondary dwellings; Water recreation structures*

### 4 Prohibited

*Industries; Service stations; Warehouse or distribution centres; Any other development not specified in item 2 or 3*

...

7. Dwelling houses are permissible on the area of land zoned E4 Environmental Living, however it is not permissible to construct a dwelling house on land zoned RE1 Public Recreation.
8. It is permissible with consent to construct a "recreation area" in the RE1 Public Recreation zone. It is also permissible to construct a "road" without consent in the zone. The PLEP 2014 relevantly states:

**recreation area** means a place used for outdoor recreation that is normally open to the public, and includes:

- (a) a children's playground, or
- (b) an area used for community sporting activities, or
- (c) a public park, reserve or garden or the like,

and any ancillary buildings, but does not include a recreation facility (indoor), recreation facility (major) or recreation facility (outdoor)

**road** means a public road or a private road within the meaning of the Roads Act 1993, and includes a classified road.

9. The Roads Act 1993 states:

**private road** means any road that is not a public road.

...

**public road** means:

(a) any road that is opened or dedicated as a public road, whether under this or any other Act or law, and

(b) any road that is declared to be a public road for the purposes of this Act.

...

**road** includes:

(a) the airspace above the surface of the road, and

(b) the soil beneath the surface of the road, and

(c) any bridge, tunnel, causeway, road-ferry, ford or other work or structure forming part of the road.

...

### **The Permissible Development Option**

10. Roads are permitted without development consent under the PLEP 2014 in the RE1 Public Recreation zone. This means that no development application or development consent is required for a road to be constructed and used in the part of the site zoned RE1 Public Recreation.
11. Roads include "*any other work or structure forming part of the road*". This means that if other works or structures form part of the road, they can also be constructed and used without development consent.
12. In this instance, a viewing platform will be situated above a private road providing access to a residential dwelling. Any other structures required to facilitate the use of the road would be considered ancillary to the permissible use of the private road. This includes any supporting structure for the viewing platform (i.e. the garage), or an elevator to the residential dwelling to allow for the private road to be used as intended.
13. In *Argyropoulos v Canterbury Municipal Council* (1988) 66 LGRA 202 the Court held that the permissible use of a "road" remained permissible in a residential area although its sole purpose was to serve a prohibited industrial use on adjoining industrial land. Similarly in this instance a road is permitted without consent and is allowable despite its sole purpose being to serve a prohibited residential use on the Property.
14. This approach will ensure that the obligations under the Heads of Agreement Contract are satisfied and that both the viewing platform and garage are delivered in accordance with the Plan of Management without the need for further additional assessment or development consent.

## **The Ancillary Use Option**

15. In *Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157 the Court found that where part of premises are used for a prohibited purpose, which is serving a dominant purpose, it is legitimate to disregard the prohibited purpose and to treat the dominant purpose as that for which the whole premises are being used.
16. In this instance a garage is proposed on the Property in the area zoned RE1 Public Recreation. The garage has as its roof a garden viewing platform. The garage is ancillary to a dwelling house which is also proposed on the Property in the E4 Environmental Living zone. A dwelling house is permissible in the E4 Environmental Living zone, however it is prohibited in the RE1 Public Recreation zone. The garage's ancillary purpose is to serve the dwelling house.
17. Looking at the situation from another perspective, the garage, is also ancillary to the proposed garden viewing platform. The garden viewing platform abuts the Bible Garden with the purpose of effectively extending the Bible Garden into so much of the Property as exists above the garage. Whilst the garden viewing platform can be categorised as a recreational area and sits comfortably within the RE1 Public Recreation zone, provided consent is granted, its understorey, being the supporting structure facilitating the use of a garage, would be ancillary to the recreational area which it supports. In any instance, recreational areas include any "*ancillary buildings*" and the supporting structure would be a necessary component of the recreation area.
18. An ancillary prohibited use can be disregarded if it is subservient to a permissible use. In this regard the garage is subservient to the use of the viewing platform which is a permissible use i.e. "recreational area" under the PLEP 2014.
19. Accordingly the garage is permissible as an ancillary use given that the viewing platform is supported by the garage.
20. Such an interpretation supports the outcome that was contemplated in the Heads of Agreement Contract. This approach will ensure that the obligations under the Heads of Agreement Contract are satisfied and that both the viewing platform and garage are delivered in accordance with the Plan of Management.

## **The Rezoning Option**

21. In the instance where Northern Beaches Council is adverse to the above options, the approach would be to have the zoning of the Property changed. This could be done by submitting a planning proposal to Northern Beaches Council requesting that the PLEP 2014 be amended to allow the Proposed Development to be carried out.
22. We note that the planning proposal process can take in excess of 12 months and involves a range of requirements with respect to consultation with the community and with the Department of Planning. These processes may cause delays in obtaining a development consent in an acceptable timeframe.

## **Other options**

23. We have considered whether existing use rights can be utilised to seek approval. In our opinion this option is unavailable in this instance due to the nature of the existing development on the Property.

## **Next steps**

24. We recommend that a meeting be arranged with yourself, the relevant council officers and Shaw Reynolds Lawyers to discuss the options above and the ability for Northern Beaches Council to allow the development to occur. Once the council officers are in agreement on the path forward it will be possible to proceed on that basis.

25. Please contact the writer if you have any questions about this letter, or require further information.

Yours faithfully

Christopher Shaw  
Principal  
for **SHAW REYNOLDS LAWYERS**

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