



# TOMASY PLANNING

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1 August 2023

Mr Scott Phillips  
Chief Executive Officer  
Northern Beaches Council  
725 Pittwater Road  
DEE WHY NSW 2099  
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**Att:** Nemani Robertson  
[Nemani.robertson@northernbeaches.nsw.gov.au](mailto:Nemani.robertson@northernbeaches.nsw.gov.au)

Dear Mr Phillips

**Re: Letter of Objection to Planning Proposal (PP2022/3209) to amend Pittwater  
Local Environment Plan 2014  
Property: 6 Mitchell Road, Palm Beach (Lot 1 in DP 1086858)**

Congratulations on your appointment to the position of CEO, Northern Beaches Council.

Reference is made to correspondence received from Council's Nemani Robertson, Planner, who has been dealing with the Planning Proposal since the time Council received the request from The Planning Hub for the rezoning of part of land known as 6 Mitchell Road, Palm Beach. Reference is also made to recent correspondence from Mr Robertson confirming an extension of time of the date for submission being granted up until 4 August 2023.

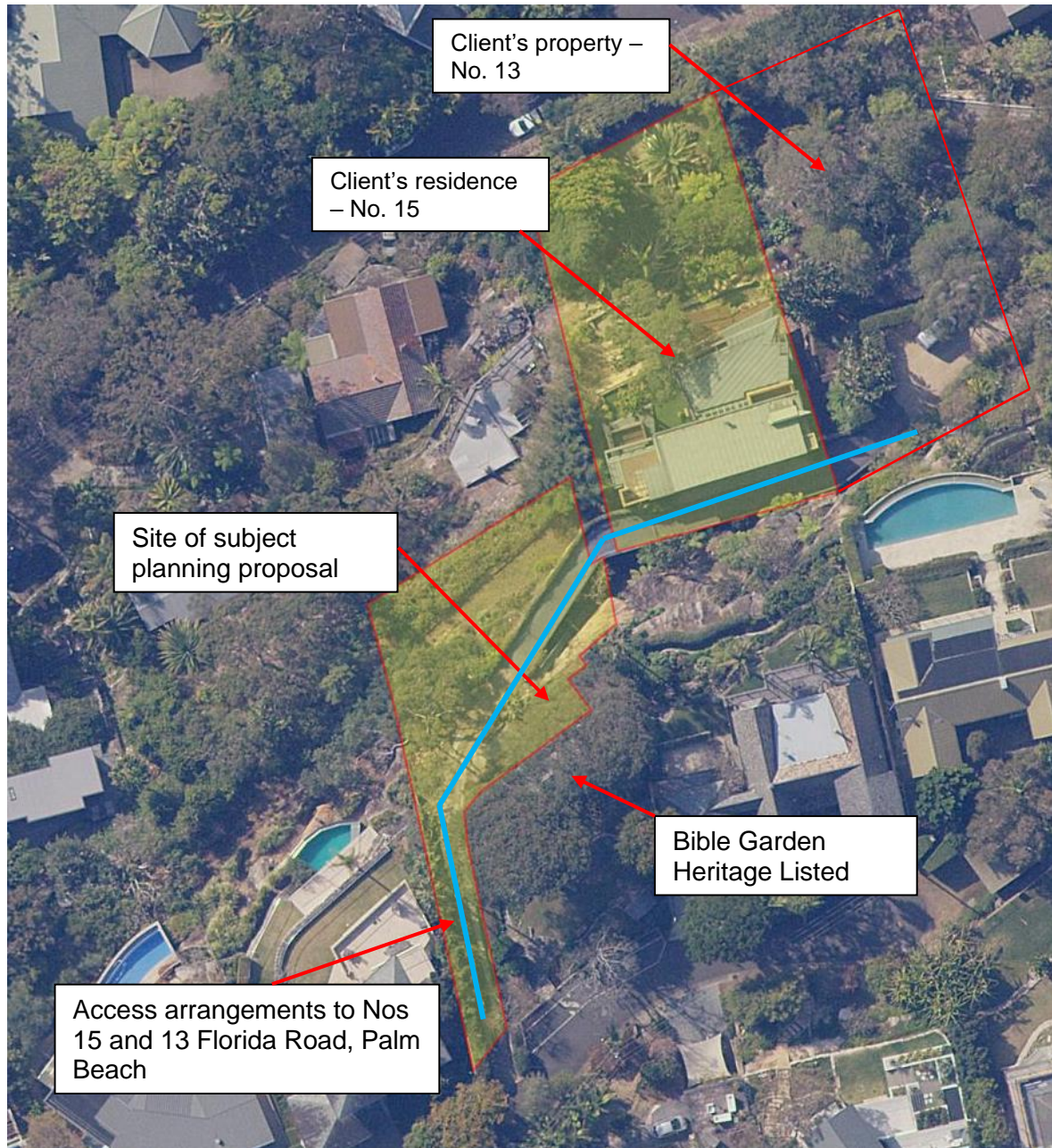
Tomasy Planning has once again been engaged by Jason and Jodie Smith, the owners of Nos 15 and 13 Florida Road, Palm Beach, to lodge a formal objection in respect to the above Planning Proposal.

As Council is no doubt aware, our clients share a common boundary with No 6 Mitchell Road and have a lawful right of carriageway over No 6 Mitchell Road to access their properties at Nos 15 and 13 Florida Road, Palm Beach. So that Council, and in particular, you, as the newly-appointed CEO, can appreciate the location and relationship between our client's land, Council's land (Bible Garden – Heritage item), and the land the subject of the Planning Proposal, the photograph over the page clearly delineates the relationship between the properties.

Our clients have submitted comprehensive objections to the original development application (as amended) DA2020/15906 for the erection of a dwelling house at No 6 Mitchell Road, which includes part of the dwelling that was to be located within the RE1 Public Recreation Zoned land. The objections lodged by our client were supported by comprehensive advice from Paul Vergotis, Partner, Piper Alderman and Accredited Lawyer in Planning and Environmental Matters, together with advice from Dr Steven Berveling, Barrister, who is highly respected in Planning and Environmental Law. Our clients' lawyers have also submitted comprehensive advice relating to the Planning Proposal submitted by The Planning Hub seeking to have that part of the land that adjoins Council's Bible Garden amended to permit a dwelling house to be erected on the land currently zoned RE1 Public

Recreation. This advice, like most of the submissions that have been made to Council since the original DA in 2021, have been summarily dismissed by the planning officer in the reports that have been submitted to Council and to the NSW Department of Planning.

It is important for Council and, in particular, you as the new CEO, to understand that No 6 Mitchell Road is a privately owned property which is adjacent to No 6A Mitchell Road, which is known as the Bible Garden' and is owned by Council. The Bible Garden is a listed Heritage site under Pittwater Local Environment Plan 2014. The Council's land is zoned as RE1 Public Recreation, the same as the land to which the current Planning Proposal relates.



Client's subject property in relation to 6 Mitchell Road, Palm Beach

Source: <https://maps.six.nsw.gov.au/>

One of the principal grounds of objection by our clients is the perceived conflict of interest that Northern Beaches Council and its officers have in dealing with this application.

This component of the objection is based upon the following:

- In respect of the original Development Application, being DA2020/1596), the applicant submitted amended plans which were the subject of a review by our clients' lawyers. Our clients' lawyers confirmed that the applicant's amended plans intended to carry out works on the Council-owned property (Bible Garden). The applicant proposed a rooftop terrace which linked it with the Council-owned land, being the Bible Garden. The applicant also proposed new balustrades adjacent to the viewing platform of the Bible Garden. Lawyers representing our clients pointed out the DA therefore embraced two parcels of land, one being Council's property and the other being the land the subject of this current Planning Proposal.

Our clients' lawyers also pointed out that the amended plans involved development that relates to Lot 1 (applicant's land) and Lot 2 in DP108658 (Council land, the Bible Garden) and, accordingly, required the consent of all owners (one being Northern Beaches Council). Our clients' lawyers also advised in terms of the following: *"17) consent from the owner of Lot 2 DP 108658 has not been obtained. The letter dated 28 April from Dr Stuart Springs to the Architect does not consent to the lodgement of the DA in accordance with the Amended Plans."* Following advice from the clients' lawyers, Council was forced to admit that formal consent from Northern Beaches Council had not been obtained.

It is blatantly obvious that Council and its representative, being Dr Stuart Springs, on behalf of the Trustees of the Bible Garden (Council land), had been supporting the proposal to permit a dwelling to be erected on that part of the land zoned RE1 Public Recreation since 2021. This is a fact that Council cannot deny and verifies our clients' claim that Council does have a conflict of interest in now promoting the Planning Proposal.

- Following Council's refusal of the DA on 20 August 2021, the applicant met with Council and proceeded to lodge a Planning Proposal to permit the erection of a dwelling house on that part of the land zoned RE1 Public Recreation.
- On 12 September 2022, The Planning Hub submitted a Planning Proposal Application for No 6 Mitchell Road, Palm Beach. The application seeks to amend the Pittwater Local Environmental Plan 2014 (PLEP2014) to include an additional permitted use (dwelling house) on that portion of the site zoned RE1 Public Recreation. The application was placed on exhibition and six submissions were received.
- On October 2022, following receipt of submissions to the Planning Proposal prepared by the Planning Hub, the Council staff prepared a Planning Proposal and became the proponents for the rezoning to permit a dwelling house on that portion of the site zoned RE1 Public Recreation.
- On 14 December 2022, the Northern Beaches Local Planning Panel considered the Planning Proposal and supporting documentation and recommended that Council support the proposal.
- On 28 February 2023, Council considered the officer's report from the Director of Planning and Place recommending that the Planning Proposal be submitted to the Department of Planning and Environment for a Gateway Determination.
- The Department of Planning on 30 May 2023 granted the Gateway Determination and determined that Council may *'exercise local plan making authority functions in relation to the Planning Proposal'*.

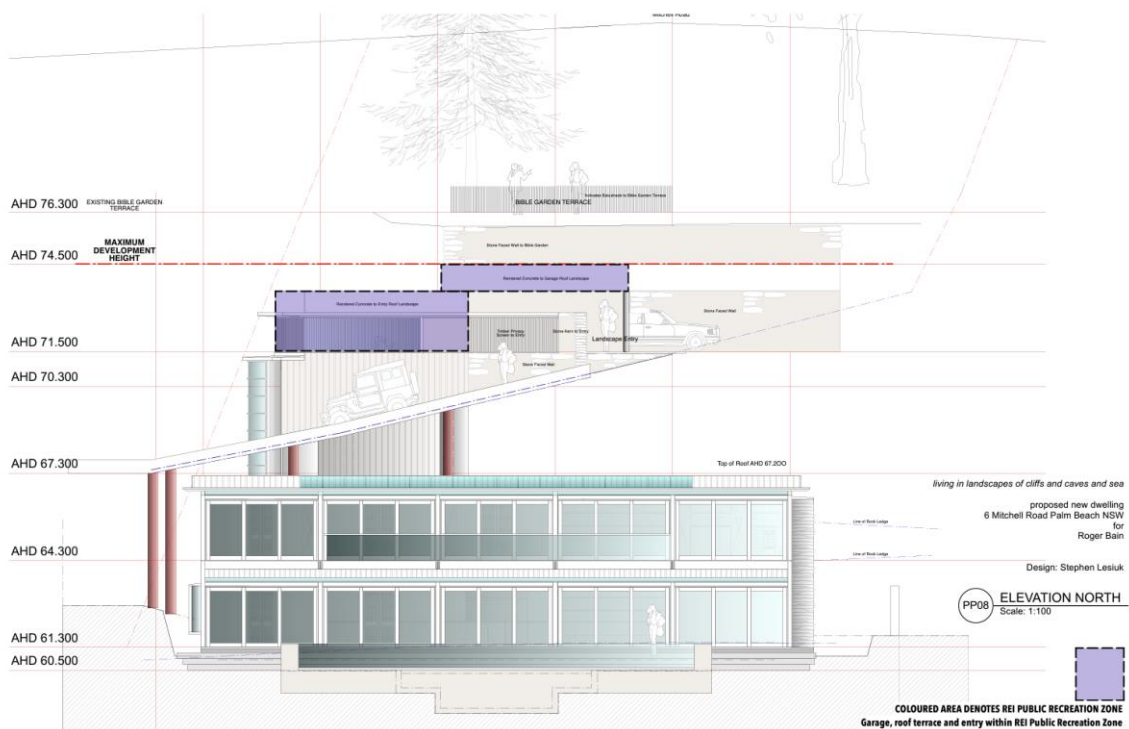


In our opinion, our clients' opinion and based upon other advice, it is evident that Council, who owns the adjoining land to the subject Planning Proposal have been the authors of the Planning Proposal, the authors of the reports prepared by Council Officers, the authors of the submission they made to the NSW Department of Planning and have become the Determining Authority for the making of the local plan.

At no stage has there been any independent advice sought by Council regarding the conflict of interest between Council and the owners of No 6 Mitchell Road in regard to the rezoning of land which adjoins Council's Heritage site. The land the subject of this Planning Proposal, has been zoned for Public Recreation purposes since 2014. Council Officers have not, in any of their reports, advised Council why the land, the subject of this Planning Proposal, was zoned for Public Recreation purposes.

One does not have to be highly intelligent to understand that one of the principal reasons would have been to protect the landscape integrity and scenic qualities of the cliff face of the Bible Garden. If this Planning Proposal were to be approved by Council, it would be the subject of residential development that abuts the cliff face and involves extensive excavation to achieve the provision for a double garage to accommodate the parking of vehicles for a future dwelling on the other part of No 6 that is not zoned for Public Recreation purposes.

It is common practice throughout Local Government, where Council are the owners of land (in this case, zoned for Public Recreation purposes) and have been party to discussions to include part of Council's land (which is Heritage listed) that the Council land be linked with the development of No 6 Mitchell Road (DA2020/1596) by way of a series of stairs via a viewing platform. Council now are the proponents to rezone the same land that adjoins the Bible Garden which is Heritage listed and support in the strongest manner the proposal to erect a dwelling house on land currently zoned for Public Recreation purposes. Council should divorce themselves from the Planning Proposal and have the matter referred to an independent planning practice for appraisal and advice. It is blatantly obvious that Council have avoided this course of action as they do have a conflict of interest. One of the plans that supports the Planning Proposal demonstrates that if this re-zoning eventuates by the stroke of a pen by Council's officers, it is inevitable there will be a significant adverse impact on the scenic landscape qualities of the adjoining Bible Garden when viewed from numerous public places.



It is also relevant for you and the Director of Planning and Place to note that in all the reports relating to the Planning Proposal, the Officer's reports state that "the primary reason for refusal of the Development Application in August 2021 was that the residential development proposed to be built on that portion of the site zoned RE1 Public Recreation is prohibited under the zone." What the author of the document, and other documents that have been submitted to Council, failed to advise Council, was that the application was refused on seven grounds and only one of the grounds of refusal related to the current zoning of the land being RE1 Public Recreation.

Council officers have a duty of care to report in a fair, unbiased and accurate way when dealing with development applications and planning proposals. It would appear that when you are dealing with a planning proposal and Council is a proponent of the proposal that you can prepare a report with a level of bias to achieve an objective of an approval.

The Notice of Determination for the original DA included the following six grounds of refusal which have never been listed in any of the reports prepared by Council as they relate to the Planning Proposal. An excerpt of the reasons for refusal from the Notice of Determination of DA 2020/1596 dated 18 August 2021 is below:

*"REASONS FOR REFUSAL*

- 1. The double garage, lift and entry are located on land zone RE1 (Public Recreation), these elements are integral to the dwelling and this form of development is prohibited in the RE1 zone in Pittwater LEP 2014.*
- 2. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the Clause 1.2 Aims of the Plan of the Pittwater Local Environmental Plan 2014.*
- 3. The proposal is inconsistent with Section 4.15(1)(b) of the EP&A Act as:*
  - (a) Insufficient information has been submitted to ensure:*
    - (i) That the earthworks will not result in unreasonable geotechnical impacts on the natural and built environment.*
    - (ii) To confirm that the development will not have unreasonable impacts on access to private dwellings.*
  - (b) Owners consent has not been obtained for the work on Deposited Plan 1086858, Lot 2 above AHD 74.5.*
  - (c) The proposal is inconsistent with Section 4.15 (1)(c) of the EP&A Act as part of the site is zoned as RE1 (Public Recreation) and a private residential dwelling is not suitable for the site.*
  - (d) The proposal is inconsistent with Section 4.15(1)(e) of the EP& A Act as it is not in the public interest.*
- 4. The proposal exceeds the 10m maximum height development standard and a Clause 4.6 variation has not been submitted.*
- 5. The proposal is inconsistent with Clause 6.2 of the Pittwater LEP, and Clause B8.1 (Construction and Demolition – Excavation) of the Pittwater DCP as insufficient information has been submitted to ensure that the earthworks will not have a detrimental impact on the amenity of adjoining properties.*
- 6. The proposal is inconsistent with Clause 7.7 of the Pittwater LEP and Clause B3.1 (Landslip Hazards) of the Pittwater DCP as insufficient information has been submitted to ensure that the development has been designed, sited and managed to avoid any geotechnical risk or impact on surrounding development.*
- 7. The proposal is inconsistent with Clause B6.7 (Transport and Traffic Management) and B8.6 (construction and Demolition – Traffic Management Plan) of the Pittwater DCP as insufficient information has been submitted to ensure the development will*

*have minimal disturbance to the residential community in terms of available safe access from the shared right of carriageway to dwellings, especially during construction.”*

Further grounds of objection to Council’s Planning Proposal for the rezoning of land adjacent to Council’s heritage listed Bible Garden:

- We have real and genuine concerns about the process that has been followed by Council in dealing with the subject proposal and the relationship between the owners of the land and Council’s trustees of the Bible Garden and these concerns have been addressed in the earlier part of this objection.
- We find it difficult to comprehend how a spot rezoning has been dealt with, with such expediency when Council is in the course of preparing a comprehensive LEP for the entire LGA. Why has this proposal been singled out and dealt with as a ‘spot rezoning’ as opposed to many others who are affected by current zonings and are forced to deal with their matters over many months/years when the new LEP is exhibited.
- The NSW Government, through the Department of Planning, issued a document titled “A New Approach to Rezoning” as a discussion paper in December 2021. This document states that one of the major delays in processing Planning Proposals is having to deal with spot rezonings which have caused “major inefficiencies under the current system”. A review of Council’s electronic records, including the NSW Department of Planning’s records, has revealed that Northern Beaches Council has only supported rezonings where they have involved major developments and NOT spot rezonings. It is reasonable to ask the question, WHY has Council singled this Planning Proposal out for such urgent and special treatment. There is no community benefit to the proposal; the only one who benefits is the owner of the land.
- The Department of Planning’s discussion paper states that “Planning proposals should be clear and transparent in the manner in which they are dealt with”. In this regard Tomasy Planning, on behalf of the client, has sought an extension of time to the submission period for the Planning Proposal on two separate occasions. Firstly, the Planning Proposal was placed on exhibition for a very limited period and a request was made for an additional 14 days to enable legal advice to be sought; however, only seven days were granted. The reason being, as advised by Council, was that “this planning proposal must be submitted to the planning panel in December 2022”. Again, one must ask the question, WHY has Council granted such urgency in dealing with a spot rezoning when the owner of the land only purchased the property some two years ago with the full knowledge that part of the land was zoned for public recreation purposes. Perhaps the only person who can answer these questions is the NSW Ombudsman.
- The proposal does not fall within the parameters of being of State or Regional significance, or development proposed around a town centre. Any spot rezoning should be dealt with by way of a strategic planning basis, that is, as part of a comprehensive review of the LEP that this Council is currently finalising. Again, this raises the same question, WHY is Council and its officers deeming this matter be of such importance to warrant a spot rezoning. It is noted in the letter from the Department of Planning and Environment of 30 May 2023, to Council’s acting CEO, that that the Director of North District (Gateway Determination) noted that the inconsistency of the Planning Proposal with applicable directions of the Minister under Section 919 of the *EP&A Act*, *1.4 Site Specific provisions* and *5.2 Reserving Land for Public Purposes* is justified in terms of the direction as submitted by Council’s Planning staff that the inconsistency is justified. Once again, notwithstanding the inconsistency of the Planning Proposal with the Ministerial directions for spot rezonings, Council has prepared a case justifying the inconsistency to allow the rezoning to take place.

- At the time the Planning Proposal by Council was placed on exhibition in late 2022, six submissions were received, and Council's listing of these submissions was by way of an annexure to their report on a half-page document with font size that was almost impossible to read. All responses by Council dismissed the matters raised by members of the community or their respective advisors. How can Council claim that they have dealt with their own proposal in an open and transparent way? It is respectfully submitted that all Council reporting has been prepared with a level of bias promoting their own Planning Proposal in favour of one individual land owner where the land has been zoned for Public Recreation since 2014. It is indeed very difficult to comprehend how this individual parcel of land can warrant such expediency and Council officers' time and attention in having it rezoned to permit a dwelling house.
- This action has been taken at a time when Council is in the course of finalising their comprehensive LEP and one land owner with the support of Council can take a different path of action which has no benefit to the community and could result in a development which will leave a permanent scar on the escarpment of the Heritage item, being the Bible Garden, which is owned and managed by Council.

It is respectfully requested that you, as the newly appointed CEO, take the time to review the matters that we have raised, together with some of the legal opinions that have been submitted by reputable lawyers and a very highly respected barrister to ensure that Council does not have a conflict of interest in attempting to rezone land from Public Recreation to permit a dwelling house on property that has a common boundary with a heritage listed item owned and operated by Council.

Our clients have also referred this matter to the Local Member for Pittwater, the Hon Rory Amon, to seek his support to have the rezoning refused. We have also recommended to our clients that they seek the assistance of the NSW Ombudsman as we firmly believe Council does have a conflict of interest in dealing with this matter.

We would welcome the opportunity of discussing this application with you.

Yours sincerely



**Denis Smith**  
**Principal**

**cc: Hon Rory Amon, Member for Pittwater**

**Mr Brendan Metcalfe, Director, North District, Department of Planning and Environment**