

31 May 2021

The General Manager  
Northern Beaches Council  
PO Box 82  
MANLY NSW 1655

Attn: Mr Kye Miles

Dear Mr Miles,

**REFERENCE: DEVELOPMENT APPLICATION NO. 2021/0369**  
**ADDRESS: 7 HILL STREET, QUEENSCLIFF**  
**PROPOSAL: ALTERATIONS AND ADDITIONS TO A DWELLING HOUSE**

On behalf of my client Mr Seth Bell, I have prepared the following response to address the planning concerns as outlined in your email correspondence dated 21 May 2021 and particular, the status of the existing semi-detached dwelling is a prohibited use within the R2 Low Density Residential Zone.

It is our opinion that the existing semi-detached dwelling appropriately benefits from existing use rights and as requested, we have provided the following submission to support the proposed alterations and additions. .

We note that the site is within the R2 Low Density Residential Zone under Warringah Local Environmental Plan 2011.

The existing semi-detached dwelling is defined in the Dictionary to the WLEP 2011 as:

***semi-detached dwelling*** means a dwelling that is on its own lot of land and is attached to only one other dwelling.

The proposal seeks to provide for additions and alterations to the existing semi-detached dwelling which is not a permissible use under the R2 Residential zone.

The proposal however is able to be considered by Council under the existing use rights regulated within Section 4.65 and Section 4.66 of the Environmental Planning and Assessment Act 1979 ("the EP & A Act") and Clauses 40-43 of the Environmental Planning and Assessment Regulation 2000 ("the Regulation").

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Under the provisions of Section 4.65 of the Environmental Planning and Assessment Act 1979, existing use means:-

- (a) The use of a building, work or land for a lawful purpose immediately before becoming into force of an Environmental Planning Instrument which would, but for division 4 of this part, have the effect of prohibiting that use, and;*
- (b) The use for building, work or land;*
  - (i) For which Development Consent was granted before the commencement of the provision of an Environmental Planning Instrument having the effect of prohibiting the use, and*
  - (ii) That has been carried out, within 1 year after the date on which that provision commenced in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the Development Consent would not lapse.*

### **Establishment of Existing Use Rights**

The investigation of the history of the development of the subject site notes that photographic information (See Figure 1 over) confirms that the subject building was in existence as early as 1943, with the general form and external appearance of the current building being representative of a semi-detached residential dwelling of the interwar era, with a more recent first floor addition to the semi-detached dwelling being evident.

These types of semi-detached dwelling building stock are not uncommon in this portion of Freshwater.

A review of the development approval history for the site notes:

- DA2008/1773 - Alterations and additions to an existing dwelling and construction of a swimming pool lodged 23 December 2008 and determined by refusal dated 4 June 2009.
- DA2009/0895 - Alterations and additions to the existing dwelling lodged 13 July 2009 and approved 1 October 2009
- DA2009/1520 - Alterations and additions to a dwelling including a carport lodged 13 November 2009 and approved 4 January 2010.

The appearance of the existing dwelling is considered to be generally consistent with the approved works detailed under DA2009/1520

The use of the subject site for a semi-detached dwelling became prohibited in December 2011 through the gazettal of the Warringah Local Environmental Plan 2011, which zoned the subject site as R2 Low Density Residential and which prohibits the use of the site for semi-detached dwellings.

This current use has continued, unabandoned, until the present day and in accordance with the provisions of Section 4.65 of the EPA Act, the current use is considered to meet the requirements to benefit from the existing rights provisions.

In my opinion, the fundamental use of the site as a semi-detached dwelling for residential purposes has not been relinquished or abandoned and the development is entitled to continue to rely on the establishment of "existing use rights" for the building.



**Fig 1: Extract of 1943 Aerial Mapping  
(Source: SIX Maps)**

The current proposal detailed under DA2021/0369 provides for alterations and additions to the dwelling including an excavation to provide for a basement level gym/storeroom.

This proposal for a *Alterations and additions to a dwelling house* on the subject site relies upon the provisions of existing use rights regulated under Section 4.65 and Section 4.66 of the Environmental Planning and Assessment Act 1979 ("the EP& A Act") and clauses 40-43 of the Environmental Planning and Assessment Regulation 2000 ("the Regulation").

The relevant provisions relating to the application of Environmental Planning Instruments to developments relying upon existing use rights are as follows:-

***Section 4.65 of EP & A Act -***

- (1) *Except where expressly provided in this Act, nothing in this Act or an environmental planning instrument prevents the continuance of an existing use.*
- (2) *Nothing in subsection (1) authorises:*
  - (a) *any alteration or extension to or rebuilding of a building or work, or*
  - (b) *any increase in the area of the use made of a building, work or land from the area actually physically and lawfully used immediately before the coming into operation of the instrument therein mentioned, or*

- (c) *without affecting paragraph (a) or (b), any enlargement or expansion or intensification of an existing use, or*
- (d) *the continuance of the use therein mentioned in breach of any consent in force under this Act in relation to that use or any condition imposed or applicable to that consent or in breach of any condition referred to in section 4.17 (1) (b), or*
- (e) *the continuance of the use therein mentioned where that use is abandoned.*
- (3) *Without limiting the generality of subsection (2) (e), a use is to be presumed, unless the contrary is established, to be abandoned if it ceases to be actually so used for a continuous period of 12 months.*

The EP & A Act under Section 4.66 states that if provisions of an environmental planning instrument will derogate from the existing use rights provisions, then these provisions do not have any force or effect whilst the existing use rights remain.

#### **4.67 Regulations respecting existing use**

*(cf previous s 108)*

- (1) *The regulations may make provision for or with respect to existing use and, in particular, for or with respect to:*
  - (a) *the carrying out of alterations or extensions to or the rebuilding of a building or work being used for an existing use, and*
  - (b) *the change of an existing use to another use, and*
  - (c) *the enlargement or expansion or intensification of an existing use.*
  - (d) *(Repealed)*
- (2) *The provisions (in this section referred to as the incorporated provisions) of any regulations in force for the purposes of subsection (1) are taken to be incorporated in every environmental planning instrument.*
- (3) *An environmental planning instrument may, in accordance with this Act, contain provisions extending, expanding or supplementing the incorporated provisions, but any provisions (other than incorporated provisions) in such an instrument that, but for this subsection, would derogate or have the effect of derogating from the incorporated provisions have no force or effect while the incorporated provisions remain in force.*
- (4) *Any right or authority granted by the incorporated provisions or any provisions of an environmental planning instrument extending, expanding or supplementing the incorporated provisions do not apply to or in respect of an existing use which commenced pursuant to a consent of the Minister under section 4.33 to a development application for consent to carry out prohibited development.*

The existing semi-detached dwelling building is believed to have been erected over seventy seven years ago and has been continuously used for residential purposes. Council has subsequently issued Development Consent for further additions and alterations to the building, under the previous instrument – Warringah Local Environmental Plan 2000.

The proposal seeks consent for the carrying out of additions and alterations to the existing semi-detached dwelling which is consistent with Section 4.67 of the Act.

The following clauses of the Environmental Planning & Assessment Regulations is applicable to the proposed works to the existing residential building.

Clause 41(1) states that:

- 41 (1)** *An existing use may, subject to this division:*
- (a) be enlarged, expanded or intensified, or*
  - (b) be altered or extended, or*
  - (c) be rebuilt, or*
  - (d) be changed to another use, including a use that would otherwise be prohibited under the Act.*

Clause 42 notes that Development Consent is required for the enlargement, expansion or extension of an existing use.

Clause 42 of the Regulation states:-

- 42 (1)** *Development Consent is required for any enlargement, expansion or intensification of an existing use.*
- (2)** *The enlargement, expansion or intensification:*
- (a) must be for the existing use and for no other use and*
  - (b) must be carried out only on the land on which the existing use was carried out immediately before the relevant date.*

Clause 43 of the Regulation states:-

- 43 (1)** *Development consent is required for any alteration or extension of a building or work used for an existing use.*
- (2)** *The alterations or extension*
- (a) must be for the existing use of the building or work and for no other use and*
  - (b) must be erected or carried out only on the land on which the building or work was erected or carried out or immediately before the relevant date.*

Clause 44 of the Regulation states:-

- 44 (1)** *Development consent is required for any rebuilding of a building or work used for an existing use.*
- (2)** *The rebuilding:*
- (a) must be for the existing use of the building or work and for no other use, and*
  - (b) must be carried out only on the land on which the building or work was erected or carried out immediately before the relevant date.*

The utilisation of the existing use rights provisions of the Act are necessary in this instance due to the non-compliance of the existing semi-detached dwelling with the R2 Low Density zone, which prohibits semi-detached dwellings.

The proposed development is in my opinion consistent with the existing use provisions as contained within the Act and therefore worthy of a favourable merit based assessment.

More recently Commissioner Roseth provided guidance for the assessment of existing use rights through a four step process under a Planning Principle in *Fodor Investments v Hornsby Shire Council [2001] NSWLEC 71*.

An assessment of the proposal under the Planning Principle is provided below:

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

The subject site is zoned R2 Low Density Residential, which permits uses such as dwelling houses, which together with a number of existing residential flat buildings form the local character of the immediate vicinity.

Whilst the R2 Low Density Residential zone does not permit semi-detached dwellings, it does not accurately reflect the existing and past residential use of the land.

The Warringah LEP 2011 and the supporting Warringah Development Control Plan contain provisions restricting bulk and scale for buildings in this locality, by restricting the overall height of a building to a maximum of 8.5m. The new works will observe Council's maximum height control, with no change to the existing overall height or current side setbacks.

The proposed new works to the existing semi-detached dwelling will see the existing height and general form will of the existing development maintained, which itself is compatible with the overall height and general bulk and scale of the surrounding single dwelling development.

***All What is the relevance of the building in which the existing takes place?***

Commissioner Roseth provided in his judgement:

*'Where the change of use is proposed within an existing building, the bulk and scale of that building are likely to be deemed acceptable, even if the building is out of scale with its surroundings, because it already exists.'*

It is noted that the proposal seeks to carry out building alterations including the addition of a new excavated basement level to provide for a gym/storage level.

The surrounding properties include a mix of duplex development and similar 1-2 storey residential buildings and in this regard, the proposal is consistent with the housing density of the immediate area.

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

The proposal seeks to provide for additions and alterations to the existing semi-detached dwelling, which are residential in their scale and form. The height and general form of the building will be compatible with the surrounding properties and will not unreasonably affect the views and outlook for the surrounding properties.

The proposed new excavated basement level will not introduce unreasonable or adverse impacts for the privacy enjoyed by the surrounding properties.

***What is the internal amenity?***

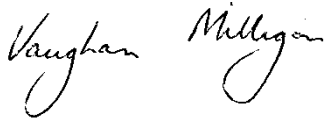
The proposal will see enhanced internal amenity for the existing dwelling, with the current solar access and natural light to be maintained.

It is therefore considered that the proposal as assessed under the Planning Principles for Existing Use Rights is acceptable and should be supported by Council.

We remain available to discuss any aspect of our submission and we would be pleased to discuss any further concerns with you during your assessment.

Should you require anything further, please not hesitate to contact me on 0412 448 088.

Yours faithfully,

A handwritten signature in black ink, reading "Vaughan Milligan". The signature is written in a cursive style, with the first name "Vaughan" and the last name "Milligan" clearly distinguishable.

**VAUGHAN MILLIGAN**  
Town Planner