

DEVELOPMENT APPLICATION ASSESSMENT REPORT

Application Number:	DA2020/0211
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Responsible Officer:	Adam Croft
Land to be developed (Address):	Lot 5 DP 8075, 82 - 84 Bower Street MANLY NSW 2095
Proposed Development:	Dual occupancy - Development Application seeking consent for the reconstruction of walls/structures that were to be retained and have been demolished, and for the use of walls/structures that were to be retained, but have been demolished and rebuilt
Zoning:	Manly LEP2013 - Land zoned E3 Environmental Management
Development Permissible:	No
Existing Use Rights:	Yes
Consent Authority:	Northern Beaches Council
Delegation Level:	NBLPP
Land and Environment Court Action:	No
Owner:	Trustees Roman Catholic Church Archdiocese Sydney 82-84 Bower Street Pty Ltd
Applicant:	Smith & Tzannes

Application Lodged:	05/03/2020
Integrated Development:	No
Designated Development:	No
State Reporting Category:	Residential - Alterations and additions
Notified:	08/06/2020 to 22/06/2020
Advertised:	Not Advertised
Submissions Received:	19
Clause 4.6 Variation:	4.3 Height of buildings: 31.7% 4.4 Floor space ratio: 55.1%
Recommendation:	Refusal

Estimated Cost of Works:	\$ 88,000.00
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EXECUTIVE SUMMARY

The original consent (DA0168/2017) relating to this development was approved under delegation on 14 November 2017.

The subject development application seeks consent for the reconstruction of the walls/structures that were to be retained and have been demolished, and for the use of walls/structures that were to be

retained, but have been demolished and since been rebuilt. There are no works proposed beyond the existing building on the site.

A Building Information Certificate Application (BC2020/0048) has also been submitted to Council seeking the regularization of the unauthorised reconstruction of walls and floors already carried out.

The use of the site as a dual occupancy is not permissible within the E3 zone and relies on existing use rights. An assessment of the development against the relevant legislation/case law regarding existing use rights is completed in the report and is found to be satisfactory.

Nineteen (19) submissions were received by way of objection in response to the notification/advertising of the application. The submissions generally relate to privacy, setbacks and whether the development should be classified as alterations and additions or a new build.

As the proposal has received more than ten submissions by way of objection, the application is referred to the Northern Beaches Local Planning Panel for determination.

Due to the extent of demolition and the resulting structures retained on the site, the development is fundamentally considered to be a new development rather than alterations and additions. Given this consideration and the subsequent assessment of the works/impacts as a new development, the proposal is not supported and is recommended for refusal.

PROPOSED DEVELOPMENT IN DETAIL

The site contained an existing dual occupancy development, with alterations and additions approved under DA0168/2017.

Following the commencement of works associated with this consent (and subsequent consents DA2019/0125 and DA2019/0126) a number of wall and floor structures that were proposed/approved to be retained were demolished and partially rebuilt.

This development applications seeks consent for the reconstruction of the walls/structures that have been demolished, and for the use of walls/structures that have been demolished and since been rebuilt without consent.

There is a concurrent Building Information Certificate (BC2020/0048) under assessment by Council in relation to the unauthorized reconstruction of those walls/structures that have since been rebuilt.

The extent of the demolition works to the existing dwellings and the extent of the structures remaining is such that the development as executed is now fundamentally considered to be for the construction of a new dual occupancy.

ASSESSMENT INTRODUCTION

The application has been assessed in accordance with the requirements of the Environmental Planning and Assessment Act 1979 and the associated Regulations. In this regard:

- An assessment report and recommendation has been prepared (the subject of this report) taking into account all relevant provisions of the Environmental Planning and Assessment Act 1979, and the associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon the subject site and adjoining, surrounding and nearby properties;
- Notification to adjoining and surrounding properties, advertisement (where required) and referral

to relevant internal and external bodies in accordance with the Act, Regulations and relevant Development Control Plan;

- A review and consideration of all submissions made by the public and community interest groups in relation to the application;
- A review and consideration of all documentation provided with the application (up to the time of determination);
- A review and consideration of all referral comments provided by the relevant Council Officers, State Government Authorities/Agencies and Federal Government Authorities/Agencies on the proposal.

SUMMARY OF ASSESSMENT ISSUES

Manly Local Environmental Plan 2013 - Zone E3 Environmental Management

Manly Local Environmental Plan 2013 - 4.6 Exceptions to development standards

Manly Local Environmental Plan 2013 - 6.2 Earthworks

Manly Local Environmental Plan 2013 - 6.5 Terrestrial biodiversity

Manly Local Environmental Plan 2013 - 6.8 Landslide risk

Manly Local Environmental Plan 2013 - 6.9 Foreshore scenic protection area

Manly Development Control Plan - 3.3.1 Landscaping Design

Manly Development Control Plan - 3.3.2 Preservation of Trees or Bushland Vegetation

Manly Development Control Plan - 3.4.1 Sunlight Access and Overshadowing

Manly Development Control Plan - 3.4.2 Privacy and Security

Manly Development Control Plan - 3.4.3 Maintenance of Views

Manly Development Control Plan - 4.1.2 Height of Buildings (Incorporating Wall Height, Number of Storeys & Roof Height)

Manly Development Control Plan - 4.1.4 Setbacks (front, side and rear) and Building Separation

Manly Development Control Plan - 4.1.7 First Floor and Roof Additions

Manly Development Control Plan - 4.4.2 Alterations and Additions

SITE DESCRIPTION

Property Description:	Lot 5 DP 8075 , 82 - 84 Bower Street MANLY NSW 2095
Detailed Site Description:	<p>The subject site consists of one (1) allotment (No. 82-84 Bower Street) located on the northern side of Bower Street.</p> <p>The site is irregular in shape with a frontage of 16.365m along Bower Street and a depth of 45.83m. The site has a surveyed area of 698.4m².</p> <p>The site is located within the E3 Environmental Management zone and accommodates an existing dual occupancy (attached).</p> <p>The site slopes 7.57m from front (south) to rear (north).</p> <p>The site planted vegetation generally within the front setback. No significant trees are located on the site.</p> <p>Detailed Description of Adjoining/Surrounding Development</p> <p>Adjoining and surrounding development is characterised by</p>

detached dwellings, dual occupancies and residential flat buildings.

Map:



SITE HISTORY

The land has been used for residential purposes for an extended period of time. A search of Council's records has revealed the following relevant history:

DA0034/2016 for Alterations and additions to an existing semi-detached dwelling including new upper level internal reconfiguration and new roof, reconstruction of the existing ground floor entry, partial demolition of rear of dwelling , new plunge pool, terrace, new double garage and landscaping - No 84 Bower Street, Manly only - Approved on 27 April 2016 by the former Manly Development Assessment Unit.

DA0168/2017 for Alterations and additions to the existing dual occupancy - Approved on 14 November 2017 under staff delegation.

Mod2018/0547 - Modification of Development Consent No. DA168/2017 granted for alterations and additions to the existing dual occupancy - Approved 10 January 2019 under staff delegation.

DA2019/0126 - Alterations and additions to a dual occupancy - Approved 10 July 2019 by the Development Determination Panel.

DA2019/0125 - Demolition works and construction of two garages - Approved 10 July 2019 by the Development Determination Panel.

EPA2019/0374 - A Stop Works Order was issued by Council when the unauthorised works were brought to the attention of the Building Control Team - Dated 21 November 2019 (revoked), and re-issued 19 December 2019.

BC2020/0048 - Reconstruction of existing walls and existing floors - Under Assessment.

It is noted that works associated with multiple previously approved development consents for the site are currently under construction.

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

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

Section 4.15 Matters for Consideration'	Comments
Section 4.15 (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on “Environmental Planning Instruments” in this report.
Section 4.15 (1) (a)(ii) – Provisions of any draft environmental planning instrument	Draft State Environmental Planning Policy (Remediation of Land) seeks to replace the existing SEPP No. 55 (Remediation of Land). Public consultation on the draft policy was completed on 13 April 2018. The subject site has been used for residential purposes for an extended period of time. The proposed development retains the residential use of the site, and is not considered a contamination risk.
Section 4.15 (1) (a)(iii) – Provisions of any development control plan	Manly Development Control Plan applies to this proposal.
Section 4.15 (1) (a)(iia) – Provisions of any planning agreement	None applicable.
Section 4.15 (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation 2000)	<p><u>Division 8A</u> of the EP&A Regulation 2000 requires the consent authority to consider "Prescribed conditions" of development consent. These matters have been addressed via a condition of consent.</p> <p><u>Clause 50(1A)</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer at lodgement of the development application. This clause is not relevant to this application.</p> <p><u>Clauses 54 and 109</u> of the EP&A Regulation 2000 allow Council to request additional information. No additional information was requested in this case.</p> <p><u>Clause 92</u> of the EP&A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This matter has been addressed via a condition of consent.</p> <p><u>Clauses 93 and/or 94</u> of the EP&A Regulation 2000 requires the consent authority to consider the upgrading of a building (including fire safety upgrade of development). This clause is not relevant to this application.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This matter has been addressed via a</p>

Section 4.15 Matters for Consideration'	Comments
	<p>condition of consent.</p> <p>Clause 98 of the EP&A Regulation 2000 requires the consent authority to consider the provisions of the Building Code of Australia (BCA). This matter has been addressed via a condition of consent.</p> <p>Clause 143A of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer prior to the issue of a Construction Certificate. This clause is not relevant to this application.</p>
<p>Section 4.15 (1) (b) – the likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality</p>	<p>(i) Environmental Impact The environmental impacts of the proposed development on the natural and built environment are addressed under the Manly Development Control Plan section in this report.</p> <p>(ii) Social Impact The proposed development will have a detrimental social impact in the locality considering the character of the proposal.</p> <p>(iii) Economic Impact The proposed development will have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.</p>
<p>Section 4.15 (1) (c) – the suitability of the site for the development</p>	<p>The site is considered unsuitable for the proposed development.</p>
<p>Section 4.15 (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs</p>	<p>See discussion on “Notification & Submissions Received” in this report.</p>
<p>Section 4.15 (1) (e) – the public interest</p>	<p>This assessment has found the proposal to be contrary to the relevant requirement(s) of the Manly LEP and DCP and will result in a development which will create an undesirable precedent such that it would undermine the desired future character of the area and be contrary to the expectations of the community. In this regard, the development, as proposed, is not considered to be in the public interest.</p>

EXISTING USE RIGHTS

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

Section 4.65 of the Act defines an existing use as:

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

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

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

This necessarily requires the following questions to be answered:

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

Comment:

The current use of the site/building as a dual occupancy (attached) was established prior to the coming into force of Manly Local Environmental Plan on 5 April 2013.

Council has on record evidence of the development consent, DA4026/91 for Proposed Alterations and Additions on the site. Condition A of this consent specifies a reduction to the number of units from three to two as part of the development, therefore granting approval for use of the site as a dual occupancy.

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

Comment:

The use of the building/land was lawfully approved by Council on 19 July 1991, prior to the coming into force of Manly Local Environmental Plan 2013 on 5 April 2013.

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

Comment:

The building/land has been approved for the purpose of a dual occupancy since 1991. As noted above, the Manly Local Environmental Plan 2013 rendered the use prohibited development, however, the continuance of existing use rights has been established by way of uninterrupted use of the building/land for the approved purpose.

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

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

Comment:

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

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

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

The following four principles adopted by the NSW Land and Environment Court in this case will have general application in dealing with development applications that rely on existing use rights:

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

While planning controls, such as height, floor space ratio and setbacks do not apply to sites with existing use rights; they have relevance to the assessment of applications on such sites. This is because the controls apply to surrounding sites and indicate the kind of development that can be expected if and when surrounding sites are redeveloped. The relationship of new development to its existing and likely future context is a matter to be considered in all planning assessments.

Comment:

The subject site is located within the E3 Environmental Management zone, which permits a limited range of development.

The proposed dual occupancy development, as approved under DA0168/2017 and subsequent approvals (DA2019/0125 and DA2019/0126), includes extensive non-compliances with the relevant numerical controls under the Manly Local Environmental Plan 2013 and Manly Development Control Plan 2013. These non-compliances include height of buildings, floor space ratio, wall heights, number of storeys, and front, side and rear setbacks.

It is acknowledged throughout this report that the existing development on the site contributed to the number and extent of these non-compliances, which were proposed/supported on the grounds that the development was for alterations and additions. As also discussed in this report, the works as undertaken are no longer considered to constitute alterations and additions, and are now assessed as a new development.

In this regard, the bulk and scale of the development may be consistent with what can be expected if surrounding sites are redeveloped through alterations and additions. However, the development does not reflect the expected/desired outcomes of new development under the applicable planning instruments.

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

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

space ratio, height or parking provision.

Comment:

There is no change of use proposed. As discussed above, the existing building elements that were to be retained made a significant contribution to the bulk of the approved development.

The existing building was not proposed/approved for demolition, but has since been demolished regardless. In this case, there is not considered to be any entitlement to build/rebuild the development to the bulk/scale resulting from the previously approved height, floor space ratio, setbacks, etc.

3. What are the impacts on adjoining land?

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

Comment:

The proposed development will not result in unreasonable view loss or overshadowing impacts, and incorporates privacy screening to the western elevation. However, the location of the existing lower ground and ground floor western walls provide minimal physical separation, resulting in excessive visual bulk and greater potential for privacy impacts despite any screening devices.

4. What is the internal amenity?

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

Comment:

The subject application does not alter the internal amenity of the development as previously approved.

Conclusion

Notwithstanding the above assessment against the relevant case law, the proposed development does not materially alter the built form of the development, so there is no measurable intensification of use of the existing building/land.

The use has been approved under a previous environmental planning instrument (Manly Local Environmental Plan 1988) and, therefore, is a lawful use. Subsequently, the use can be retained under the current environmental planning instrument (Manly Local Environmental Plan 2013).

BUSHFIRE PRONE LAND

The site is not classified as bush fire prone land.

NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited in accordance with the Environmental

Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the relevant Development Control Plan.

As a result of the public exhibition process council is in receipt of 19 submission/s from:

Name:	Address:
Mark Kelly	88 Bower Street MANLY NSW 2095
Charlie Lavender	Address Unknown
Ms Anne Gabrielle Crawford Dr Simon Buckingham	80 Bower Street MANLY NSW 2095
Christopher Philip Jones	5 Loquat Valley Road BAYVIEW NSW 2104
Elizabeth Anna Taylor	5 Bower Street MANLY NSW 2095
Mr Ross Boyd Lane	38 Stuart Street MANLY NSW 2095
Mr Angus Fingleton Gemmell	5 / 60 Bower Street MANLY NSW 2095
Vicki Pratt	8 Scarfe Street SMITHS LAKE NSW 2428
Mrs Vesela Matijevic	11 / 69 - 71 Oaks Avenue DEE WHY NSW 2099
Mr Stephan Goerner	87 Bower Street MANLY NSW 2095
Ms Lisa Kathleen Meadows	113 Bower Street MANLY NSW 2095
Ms Kathryn Cope	38 Mildred Avenue MANLY VALE NSW 2093
Mrs Ineses Indra Kingsmill	77 Gordon Street CLONTARF NSW 2093
Mr Stuart Plane	62 Bower Street MANLY NSW 2095
Dr Craig John Taylor	68 Bower Street MANLY NSW 2095
Mrs Tess Lavender	86 Bower Street MANLY NSW 2095
Ms Zena Hazel Hanna	51 Bower Street MANLY NSW 2095
Ms Merrilee Ann Linegar	2 / 92 Bower Street MANLY NSW 2095
Mr Mark Kehoe	12 Tutus Street BALGOWLAH HEIGHTS NSW 2093

The following issues were raised in the submissions and each have been addressed below:

- Classification of proposal as alterations and additions or a new development
- Consideration of the unauthorised works in isolation, rather than the context of the whole development
- Side boundary setbacks to eastern and western adjoining properties
- Privacy impacts

The matters raised within the submissions are addressed as follows:

- Classification of proposal as alterations and additions or a new development
Comment:
Given the proportion of structures/fabric that have been demolished to those that are retained, the development is no longer considered to be for alterations and additions. A detailed assessment of this matter is completed against the relevant matters set out in the planning principle relating to demolition (Coorey v Municipality of Hunters Hill).
- Consideration of the unauthorised works in isolation, rather than the context of the whole

development

Comment:

As the application is considered as a new development, the proposed walls/structures that are the subject of the application cannot be assessed in isolation. Rather, the LEP and DCP controls are applicable to the broader development and a greater level of compliance with these controls is expected/required. In this regard, the development is considered to exceed what would be achievable/supported for a new development in this area.

- Side boundary setbacks to eastern and western adjoining properties

Comment:

The proposed side boundary setbacks of the subject walls (previously existing walls) are significantly non-compliant with the numerical control for new structures, and provide insufficient physical separation to adjoining sites/dwellings.

- Privacy impacts

Comment:

The lack of adequate physical separation from the adjoining sites greatly increases the potential for privacy/overlooking impacts and reduces the effectiveness of mitigation measures.

REFERRALS

External Referral Body	Comments
Ausgrid: (SEPP Infra.)	The proposal was referred to Ausgrid who provided a response stating that the proposal is acceptable subject to compliance with the relevant Ausgrid Network Standards and SafeWork NSW Codes of Practice.

ENVIRONMENTAL PLANNING INSTRUMENTS (EPis)*

All, Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the merit assessment of this application.

In this regard, whilst all provisions of each Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the assessment, many provisions contained within the document are not relevant or are enacting, definitions and operational provisions which the proposal is considered to be acceptable against.

As such, an assessment is provided against the controls relevant to the merit consideration of the application hereunder.

State Environmental Planning Policies (SEPPs) and State Regional Environmental Plans (SREPs)

SEPP 55 - Remediation of Land

Clause 7 (1) (a) of SEPP 55 requires the Consent Authority to consider whether land is contaminated. Council records indicate that the subject site has been used for residential purposes for a significant period of time with no prior land uses. In this regard it is considered that the site poses no risk of contamination and therefore, no further consideration is required under Clause 7 (1) (b) and (c) of SEPP 55 and the land is considered to be suitable for the residential land use.

SEPP (Infrastructure) 2007

Ausgrid

Clause 45 of the SEPP requires the Consent Authority to consider any development application (or an application for modification of consent) for any development carried out:

- within or immediately adjacent to an easement for electricity purposes (whether or not the electricity infrastructure exists).
- immediately adjacent to an electricity substation.
- within 5.0m of an overhead power line.
- includes installation of a swimming pool any part of which is: within 30m of a structure supporting an overhead electricity transmission line and/or within 5.0m of an overhead electricity power line.

Comment:

The proposal was referred to Ausgrid who provided a response stating that the proposal is acceptable subject to compliance with the relevant Ausgrid Network Standards and SafeWork NSW Codes of Practice.

SEPP (Coastal Management) 2018

The site is subject to SEPP Coastal Management (2018). Accordingly, an assessment under the SEPP has been carried out as follows:

13 Development on land within the coastal environment area

- (1) *Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following:*
- (a) *the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,*
 - (b) *coastal environmental values and natural coastal processes,*
 - (c) *the water quality of the marine estate (within the meaning of the Marine Estate Management Act 2014), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,*
 - (d) *marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,*
 - (e) *existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,*
 - (f) *Aboriginal cultural heritage, practices and places,*
 - (g) *the use of the surf zone.*

Comment:

The proposed works are generally within the existing building footprint and will not unreasonably impact

the coastal environment area.

- (2) *Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:*
- (a) the development is designed, sited and will be managed to avoid an adverse impact referred to in subclause (1), or
 - (b) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or
 - (c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

Comment:

The proposal is consistent with this Clause.

14 Development on land within the coastal use area

- (1)
- (a) has considered whether the proposed development is likely to cause an adverse impact on the following:
 - (i) existing, safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,
 - (ii) overshadowing, wind funnelling and the loss of views from public places to foreshores,
 - (iii) the visual amenity and scenic qualities of the coast, including coastal headlands,
 - (iv) Aboriginal cultural heritage, practices and places,
 - (v) cultural and built environment heritage, and
 - (b) is satisfied that:
 - (i) the development is designed, sited and will be managed to avoid an adverse impact referred to in paragraph (a), or
 - (ii) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or
 - (iii) if that impact cannot be minimised—the development will be managed to mitigate that impact, and
 - (c) has taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.

Comment:

The proposal will not unreasonably impact the coastal use area given the nature and location of the works within the existing building footprint.

As such, it is considered that the application does comply with the requirements of the State Environmental Planning Policy (Coastal Management) 2018.

15 Development in coastal zone generally—development not to increase risk of coastal hazards

Development consent must not be granted to development on land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land.

Comment:

The proposal is unlikely to cause increased risk of coastal hazards on the site or surrounding land.

Manly Local Environmental Plan 2013

Is the development permissible?	No
After consideration of the merits of the proposal, is the development consistent with:	
aims of the LEP?	No
zone objectives of the LEP?	No

Principal Development Standards

Standard	Requirement	Proposed	% Variation	Complies
Height of Buildings:	8.5m	4.8m - 11.2m (No change)	31.7%	No (as approved)
Floor Space Ratio	0.45:1 314.28m ²	0.7:1 487.5m ²	55.1%	No (as approved)

It should be noted that the approved FSR for the alterations and additions proposed under the initial consent DA0168/2017 was 0.65:1. Since that time two subsequent development applications, DA2019/0125 and DA2019/0126, have increased the approved FSR for the site to 0.7:1.

Compliance Assessment

Clause	Compliance with Requirements
4.3 Height of buildings	No
4.4 Floor space ratio	No
4.6 Exceptions to development standards	No
6.2 Earthworks	Yes
6.4 Stormwater management	Yes
6.5 Terrestrial biodiversity	Yes
6.8 Landslide risk	Yes
6.9 Foreshore scenic protection area	Yes
6.12 Essential services	Yes

Detailed Assessment

Zone E3 Environmental Management

The proposed development relies on existing use rights. Discussion of this matter is contained within this report.

4.6 Exceptions to development standards

Description of non-compliance:

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Development standard:	Height of buildings
Requirement:	8.5m
Proposed:	11.2m
Percentage variation to requirement:	31.7%

Development standard:	Floor space ratio
Requirement:	0.45:1 (314.28m ²)
Proposed:	0.7:1 (487.5m)
Percentage variation to requirement:	55.1%

Given the extent of the demolition works to the existing building, the development as carried out at the site is considered to be fundamentally for the construction of a new dual occupancy, despite the previous approval being granted for alterations and additions.

As discussed elsewhere in this report, a greater level of compliance with the prescribed controls, particularly development standards, is expected/achievable for new developments. Further, the proposed setback non-compliances (previously existing setbacks) make a significant contribution to the non-compliant gross floor area outside of the allowable building footprint/envelope. This presents as significant additional bulk in closer proximity to the adjoining sites/dwellings.

Where previously the existing and approved variations were assessed in the context of a development for alterations and additions, they must now be considered in the context of a new development on the site, and take into account the subsequently approved developments that further increased the extent of the non-compliances.

To assist in this assessment, a recent search of Council's records for DA approvals including FSR variations was completed based the following criteria:

- New dwelling approvals under the current Manly LEP 2013
- Within the vicinity of the site on Bower Street within the E3 zone

This search revealed the following developments approved with a FSR non-compliance:

- 54 Bower Street - DA0103/2013 (0.526:1, 16.9%); later modified by DA0103/2013 Part 2, 2015 (0.57:1, 27%)
- 77 Bower Street - DA0269/2015 (0.63:1, 41%); later modified by MOD2018/0180 (0.68:1, 51.2%)

It is clear that variations to the FSR control for new dwellings are uncommon and the proposal would be inconsistent with the character of comparable development in the surrounding area.

Given the above, the proposed variations would result in a building of a bulk and scale that is not acceptable in the context of a new development, and the variations are not supported.

6.2 Earthworks

The proposal does not seek consent for any further earthworks on the site.

6.5 Terrestrial biodiversity

The subject site is within declared habitat for the endangered population of Long-nosed Bandicoot at North Head. The proposed development does not alter the design/built form from the previous approval and the relevant biodiversity conditions remain applicable to any works on the site. As such, the proposal was not referred to Council's Biodiversity team and is not considered likely to unreasonably impact the endangered bandicoot population or habitat.

6.8 Landslide risk

The proposal does not physically alter the works previously existing/approved on the site. Further, appropriate geotechnical assessment of the site has been undertaken.

6.9 Foreshore scenic protection area

The proposal includes the reconstruction/use of walls in existing/approved locations, and will not result in any material change to the appearance of the dwellings.

Manly Development Control Plan

Built Form Controls

Built Form Controls	Requirement		Proposed	Complies
4.1.2.1 Wall Height	West (No. 84): 8m		LG Lounge, Bed 3: 3.6/5.2m	Yes
			LG Bed 2, Ensuities: 3.1/3.4m	Yes
			GF Kitchen: 4.6/6m	Yes
	East (No. 82): 8m		GF Living: 4.3/5.5m	Yes
			GF Kitchen/Dining: 2.7/4.3m	Yes
4.1.4.2 Side Setbacks and Secondary Street Frontages	West (No. 84)	Lounge, Bed 3: 1.2/1.9m	0.8/0.9m	No
		Bed 2, Ensuities: 1.0.3/1.13m	1.1/1.2m	No
		Kitchen: 1.53/3m	1.1m	No
	East (No. 82)	Living: 1.4/1.83m	0.2/0.1m	No
		Kitchen, Dining: 0.9/1.43m	1.4/1.3m	No
4.1.4.4 Rear Setbacks	8m		5.2m	No

Note: As the development relies on existing use rights, the relevant Development Standards and Development controls do not strictly apply. However, in accordance with the principals outlined in *Fodor Investments v Hornsby Shire Council*, the controls are relevant to the extent that they indicate the kind of development that can be expected if and when surrounding sites are redeveloped. As such, an assessment against the residential control contained within the Manly LEP and DCP is undertaken in this report.

Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
3.1.1 Streetscape (Residential areas)	Yes	Yes
3.3.1 Landscaping Design	Yes	Yes
3.3.2 Preservation of Trees or Bushland Vegetation	Yes	Yes
3.4.1 Sunlight Access and Overshadowing	Yes	Yes
3.4.2 Privacy and Security	No	No
3.4.3 Maintenance of Views	Yes	Yes
3.7 Stormwater Management	Yes	Yes
4.1.2 Height of Buildings (Incorporating Wall Height, Number of Storeys & Roof Height)	Yes	Yes
4.1.4 Setbacks (front, side and rear) and Building Separation	No	No
4.1.7 First Floor and Roof Additions	No	No
4.1.8 Development on Sloping Sites	Yes	Yes
4.4.2 Alterations and Additions	No	No
4.4.5 Earthworks (Excavation and Filling)	Yes	Yes
5.4.1 Foreshore Scenic Protection Area	Yes	Yes
5.4.2 Threatened Species and Critical Habitat Lands	Yes	Yes

Detailed Assessment

3.3.1 Landscaping Design

The proposal includes the reconstruction/use of walls in existing/approved locations, and does not involve any changes to landscaping on the site.

3.3.2 Preservation of Trees or Bushland Vegetation

No removal of trees or vegetation is proposed.

3.4.1 Sunlight Access and Overshadowing

The proposal will not result in any unreasonable overshadowing impacts and maintains consistency with previous assessments of the development.

3.4.2 Privacy and Security

Merit consideration:

With regard to the consideration for a variation, the development is considered against the underlying Objectives of the Control as follows:

Objective 1) To minimise loss of privacy to adjacent and nearby development by:

- *appropriate design for privacy (both acoustical and visual) including screening between closely spaced buildings; and*
- *mitigating direct viewing between windows and/or outdoor living areas of adjacent buildings.*

Comment:

The wall/window locations as proposed for reconstruction are not appropriately designed for privacy. It is noted that a screening device is incorporated into the large ground floor western window. However, the proposed western side setback provides insufficient physical separation and the levels are such that the development has the potential to result in significant overlooking/direct viewing to the adjoining pool terrace and private open space area of No. 86 Bower Street.

Objective 2) To increase privacy without compromising access to light and air. To balance outlook and views from habitable rooms and private open space.

Comment:

The proximity of the development to adjoining properties does not provide increased privacy.

Objective 3) To encourage awareness of neighbourhood security.

Comment:

The proposal does not impact opportunities for passive surveillance.

Having regard to the above assessment, it is concluded that the proposed development is inconsistent with the relevant objectives of MLEP 2013 / MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is not supported, in this particular circumstance.

3.4.3 Maintenance of Views

The demolished walls at lower ground and ground floor levels are significantly below the building height control. The proposal will not result in any unreasonable view loss impacts and maintains consistency with previous assessments of the development.

4.1.2 Height of Buildings (Incorporating Wall Height, Number of Storeys & Roof Height)

Compliance with control

The walls that are the subject of this application maintain compliance with the wall height control.

4.1.4 Setbacks (front, side and rear) and Building Separation

Description of non-compliance

The development approved under DA0168/2017 included extensive existing and approved setback non-compliances. The existing eastern and western lower-ground and ground floor walls were non-compliant with the required side setback of 1/3 wall height. The approved development resulted in further side setback non-compliances to the proposed first floor addition (0.43m breach to the eastern side, 0.86m breach to the western side). No changes were proposed to the existing lower ground and ground floor walls and the proposed upper floor breaches were considered to be acceptable.

The maximum side setback breaches proposed as part of this application, which were existing walls as assessed/approved under DA0168/2017, are as follows:

- Eastern GF Living room wall - 5.5m high, setback of 0.1m is non-compliant with the requirement of 1.83m; and
- Western LG Bed 3/Lounge wall - 5.2m high, setback of 0.9m is non-compliant with the requirement of 1.9m.

Merit consideration:

The approved development was for alterations and additions to the existing dual occupancy and the majority of the non-compliances related to existing structures that were to be retained. Manly DCP Clause 4.1.7 First Floor and Roof Additions also allows for variations to setback provisions based on the existing ground floor wall locations. These considerations in relation to setback breaches facilitated greater floor plates and resulting gross floor area than what would have been otherwise achievable/supported through a new dwelling approval. As these walls were not previously assessed as existing structures, less consideration was given to their contribution to building bulk and any requirement for articulation of the elevations at lower ground and ground floor levels. In the current circumstance where the walls are no longer existing, a more acceptable outcome in relation to bulk and scale can be achieved by providing additional setbacks in relation to wall height, in accordance with the policy.

No objection was raised by Council to the existing and proposed setbacks under DA0168/2017, however, the 'existing' lower ground and ground floor walls have since been demolished or partially demolished. Those non-compliances, along with their contributions to the FSR, amenity and bulk impacts of the development, must now be considered in the context of new dwellings/structures. In this regard, a greater level of compliance with the relevant controls is generally expected/achievable for new dwellings or new constructions.

The outcome of the approved consent was a development that is entirely non-compliant with the prescribed side setback controls. This outcome was considered to be acceptable in the context of the works under the alterations and additions proposal where numerous breaches were existing and unchanged. However, as unauthorized works have since been undertaken to (partially) demolish the existing walls approved to be retained, the resulting non-compliances are no longer considered acceptable in the context of new works/structures.

With regard to the consideration for a variation, the development is considered against the underlying Objectives of the Control as follows:

Objective 1) To maintain and enhance the existing streetscape including the desired spatial proportions of the street, the street edge and the landscape character of the street.

Comment:

Sightlines to the development from the street frontage are largely obscured by the approved double garage structures at the front of the site.

Objective 2) To ensure and enhance local amenity by:

- *providing privacy;*
- *providing equitable access to light, sunshine and air movement; and*
- *facilitating view sharing and maintaining adequate space between buildings to limit impacts on views and vistas from private and public spaces.*
- *defining and adding character to the streetscape including the provision of adequate space between buildings to create a rhythm or pattern of spaces; and*

- *facilitating safe and adequate traffic conditions including levels of visibility around corner lots at the street intersection.*

Comment:

The lack of adequate physical separation from the adjoining properties will unreasonably impact local amenity, particularly in relation to building bulk and the greater potential for privacy impacts.

Objective 3) To promote flexibility in the siting of buildings.

Comment:

Flexibility was allowed in the context of the approved development for alterations and additions. However, as discussed above, the previous setback non-compliances are not considered to be appropriate in the circumstance where substantial demolition works have been undertaken.

Objective 4) To enhance and maintain natural features by:

- *accommodating planting, including deep soil zones, vegetation consolidated across sites, native vegetation and native trees;*
- *ensuring the nature of development does not unduly detract from the context of the site and particularly in relation to the nature of any adjoining Open Space lands and National Parks; and*
- *ensuring the provisions of State Environmental Planning Policy No 19 - Urban Bushland are satisfied.*

Comment:

The proposed non-compliances do not impact landscaping on the site.

Objective 5) To assist in appropriate bush fire asset protection zones.

Comment:

N/A

Having regard to the above assessment, it is concluded that the proposed development is inconsistent with the relevant objectives of MLEP 2013 / MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is not supported, in this particular circumstance.

4.1.7 First Floor and Roof Additions

This control provides for variations to the setback requirements where additions follow the line of an existing ground floor wall.

The assessment of setback non-compliances in relation to DADA0168/2017 notes that the existing side and rear setbacks at the lower ground and ground floor levels were to be retained. As such, no consideration of the (existing) setback breaches was undertaken through that assessment.

However, the existing western lower ground floor wall has since been demolished and therefore a variation in accordance with this control can no longer apply to the ground floor wall above. An

assessment of the merits of the proposed setback breaches is completed under Clause 4.1.4 Setbacks.

4.4.2 Alterations and Additions

The works undertaken on the site have resulted in the demolition of the majority of the existing dual occupancy building. As such, the proposed development is considered to be a new building for the purposes of Clause 4.4.2.

Furthermore, an assessment has been made against the planning principle relating to demolition (Coorey v Municipality of Hunters Hill [2013] NSWLEC 1187) to establish whether the development as undertaken is classified as alterations and additions or new development. An assessment of the qualitative and quantitative issues set by the planning principle is as follows:

Qualitative issues

- *How is the appearance of the existing building to be changed when viewed from public places?*

Comment: The works that are the subject of this application are generally located at the lower ground and ground floor levels towards the rear of the site and do not alter the appearance of the building from the Bower Street frontage of Marine Parade at the rear.

- *To what extent, if any, will existing landscaping be removed and how will that affect the setting of the building when viewed from public places?*

Comment: The proposal retains the existing building footprint and will not impact existing landscaping.

- *To what extent, if any, will the proposal impact on a heritage item, the curtilage of a heritage item or a heritage conservation area?*

Comment: The proposal will not impact any nearby heritage items.

- *What additional structures, if any, in the curtilage of the existing building will be demolished or altered if the proposal is approved?*

Comment: The application relates to structures that have previously been demolished, that were to be retained under DA0168/2017. These structures include the eastern ground floor wall, western lower ground and ground floor walls, as well a substantial proportion of the party wall and the lower ground and ground level floor structures.

- *What is the extent, if any, of any proposed change to the use of the building?*

Comment: The proposal does not involve any change of use of the building.

- *To what extent, if any, will the proposed development result in any change to the streetscape in which the building is located?*

Comment: The proposed works will not change the presentation of the building within the streetscape.

- *To what extent, if any, are the existing access arrangements for the building proposed to be altered?*

Comment: The proposal will not alter the approved access.

- *To what extent, if any, will the outlook from within the existing building be altered as a consequence the proposed development?*

Comment: The proposal is for the reconstruction of existing building fabric and will not significantly alter the outlook from within the building.

- *Is the proposed demolition so extensive to cause that which remains to lose the characteristics of the form of the existing structure?*

Comment: The extent of demolition work to the existing dwellings are such that the remaining structure is not considered sufficient to constitute alterations and additions.

Quantitative issues

- *To what extent is the site coverage proposed to be changed?*

Comment: The proposal retains the building footprint as approved under previous consents on the site.

- *To what extent are any existing non-compliances with numerical controls either increased or diminished by the proposal?*

Comment: The proposal includes further setback non-compliances to the eastern ground floor wall and western lower ground and ground floor walls. Under the original approval, DA0168/2017, these walls were proposed to be retained as existing.

- *To what extent is the building envelope proposed to be changed?*

Comment: The resulting building envelope remains unchanged.

- *To what extent are boundary setbacks proposed to be changed?*

Comment: Boundary setbacks that were previously approved to be retained have since been demolished, and now result in further setback non-compliances in this application.

- *To what extent will the present numerical degree of landscaping on the site be changed?*

Comment: The landscaping calculation on the site remains unchanged.

- *To what extent will the existing floor space ratio be altered?*

Comment: The previously approved FSR remains unchanged.

- *To what extent will there be changes in the roof form?*

Comment: No change to the roof form is proposed.

- *To what extent will there be alterations to car parking/garaging on the site and/or within the building?*

Comment: There will be no alteration to car parking/garaging on the site.

- *To what extent is the existing landform proposed to be changed by cut and/or fill to give effect to the proposed development?*

Comment: The existing landform is unchanged by this application.

- *What relationship does the proportion of the retained building bear to the proposed new development?*

Comment: The proportion of the building retained on the site bears minimal relationship/resemblance to the proposed new development under this application or that approved under DA0168/2017. The consideration of this planning principle completed in the assessment of DA0168/2017 included the following comment:

"The majority of the existing structure is retained, with some internal walls being demolished a

Since this approval, the majority of the external walls have been demolished, as well as a significant proportion of the existing lower ground and ground level floor structures. The structures that have been retained are generally limited to the central section of the party wall, the eastern side lower ground floor external wall, and minor internal walls/elements at the basement and lower ground floor levels.

The below photographs of the site reflect the extent of the retained structures:

- Photos 1 & 2 show the eastern and western ground floor walls completely demolished, as well as the front portion of the party wall.
- Photos 4 & 6 show that the western lower ground floor wall has also been completely demolished.
- The ground level floor structure visible in Photos 1 & 2 was also partially demolished, and is shown partially rebuilt in Photo 4.



Photos 1 & 2. View from front property boundary indicating extent of demolition at Nos. 82 (right) and 84 (left) Bower Street.



Photo 3 (left) View prior to demolition from No. 86 Bower Street first floor showing the location of the existing western wall of No. 84, and Photo 4 (right) indicating subsequent extent of demolition at the western side of the building.



Photo 5 (left) View prior to demolition from No. 86 Bower Street rear terrace showing the location of the existing western wall of No. 84, and Photo 6 (right) indicating subsequent extent of demolition at the western side of the building.

Conclusion:

The above consideration of the proposal shows that there is a significant departure from the existing position in relation to the proportion of the building fabric retained and demolished. As such, the proposal no longer constitutes alterations and additions as previously assessed, but rather is now considered to be for a new building.

THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES

The proposal will not significantly effect threatened species, populations or ecological communities, or their habitats.

CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN

The proposal is consistent with the principles of Crime Prevention Through Environmental Design.

CONCLUSION

The site has been inspected and the application assessed having regard to all documentation submitted by the applicant and the provisions of:

- Environmental Planning and Assessment Act 1979;
- Environmental Planning and Assessment Regulation 2000;
- All relevant and draft Environmental Planning Instruments;
- Manly Local Environment Plan;
- Manly Development Control Plan; and
- Codes and Policies of Council.

This assessment has taken into consideration the submitted plans, Statement of Environmental Effects, all other documentation supporting the application and public submissions, in this regard the application is not considered to be acceptable and is recommended for refusal.

In consideration of the proposal and the merit consideration of the development, the proposal is considered to be:

- Inconsistent with the objectives of the DCP
- Inconsistent with the zone objectives of the LEP
- Inconsistent with the aims of the LEP
- Consistent with the objectives of the relevant EPIs
- Inconsistent with the objects of the Environmental Planning and Assessment Act 1979

Notwithstanding the previously approved variation to the height of buildings and floor space ratio development standards, the proposed development does not seek any further variation. As no variation is proposed as part of this application, Clause 4.6 does not apply and the applicant is not required to make a written request.

This application seeks consent for the reconstruction/use of walls and other structures that were to be retained but have since been demolished.

The proportion of existing structures that have been retained on the site is not sufficient to assess the proposal as alterations and additions, and the development is now considered to be a new building.

The subsequent assessment of the works as a new development concludes that the proposal is unacceptable due to the extent of non-compliance with the relevant LEP/DCP controls and the associated impacts.

It is considered that the proposed development does not satisfy the appropriate controls and that all processes and assessments have been satisfactorily addressed.

RECOMMENDATION

THAT the Northern Beaches Local Planning Panel, on behalf of Northern Beaches Council , as the consent authority REFUSE Development Consent to Development Application No DA2020/0211 for the Dual occupancy - Development Application seeking consent for the reconstruction of walls/structures that were to be retained and have been demolished, and for the use of walls/structures that were to be retained, but have been demolished and rebuilt on land at Lot 5 DP 8075,82 - 84 Bower Street, MANLY, for the reasons outlined as follows:

1. 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 Manly Local Environmental Plan 2013.
2. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause Zone E3 Environmental Management of the Manly Local Environmental Plan 2013. Specifically, the development is not considered to have suitable regard for the impact to surrounding properties/land uses as a new development within the E3 zone.
3. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.6 Exceptions to Development Standards of the Manly Local Environmental Plan 2013. Specifically, the extent of the variations to the height of buildings and floor space ratio development standards are unacceptable for a new development in the context of the surrounding area.
4. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 3.4.2 Privacy and Security of the Manly Development Control Plan.
5. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.1.4 Setbacks (front, side and rear) and Building Separation of the Manly Development Control Plan. Specifically, the side setback non-compliances provide insufficient physical separation, resulting in a development that is out of character with comparable new constructions in the surrounding area and significantly increasing the potential for amenity/privacy impacts to adjoining properties.