

Ref: 012/2018

26 September 2019

The Chief Executive Officer  
Northern Beaches Council  
1 Park Street  
MONA VALE NSW 2013

Attention: Georgia Quinn / Rodney Piggott / Peter Robinson

**By e-mail**

Dear Sir

**NOTICE OF PROPOSED DEVELOPMENT  
DA2019/0359: ALTERATIONS AND ADDITIONS TO A JETTY**

**Introduction**

1. As the Council is aware, I act for Mr Clive and Mrs Marilyn Steirn of 147 Riverview Road, Avalon in relation to the above application by Mr Mark Bennett.
2. As such you would be aware Mr and Mrs Steirn reside next door to the applicant and are *directly* affected by the proposed development by Mr Bennett in seeking to extend his jetty. Accordingly, in conformity with the Council's protocol on 14 May 2019, the Council notified my clients of their right to identify issues of concern in relation to the DA2019/0359.
3. I also note recent correspondence between my clients and Ms Georgia Quinn and the letter by Mr Peter Robinson, Executive Manager, Development Assessment dated 19 September 2019.
4. I note that on 23 August 2019, the Council issued my clients with Building Certificate BC0041/17 in relation to alterations and additions to their jetty.
5. Accordingly, set out below I make the following submissions on behalf of my clients. In doing so, I will adopt as relevant headings, the issues contained in the letter by Ms Quinn to my clients dated 14 May 2019.

### **“Issues of Concern”**

6. My clients are concerned in relation to the following issues concerning navigational safety hazards identified by the RMS Safety Officer, Mr Steve Nugent in his report of 25 July 2017 (see **Annexure A**).

### **Navigational Safety Hazard Identified by RMS Report**

7. As a result of a GIPA application on behalf of my clients to RMS, e-mail documents were received disclosing e-mail correspondence between RMS officers and the applicant, Mr Bennett. The contents of an e-mail report by Mr Nugent to Mr Bennett of 25 July 2017 raises “*Issues of Concern*” involving navigational safety hazards contained in the document.

### **“Reasons for Concern”**

8. On 25 July 2017, Mr Nugent in response to a request by Mr Bennett identified the following navigational safety hazard in relation to the application by Mr Bennett (see Annexure A):

*“A vessel trying to berth at the new No 149 facilities would have significant difficulty approaching the pontoon from the south or west, to try and access its pontoon, if a vessel was already secured at the pontoon of No 147. **The No. 149 berthing area would be completely obstructed and unusable in that situation.** (emphasis added).*

*Accordingly, the existing projections of No 147 have a navigational impact upon the new facilities of No. 149, which becomes significant if a large vessel is secured to the pontoon of 147. The No 147 facility, as it exists, **restricts manoeuvrability and the safe operation of vessels for the neighbour at No 149.**” (emphasis added).*

9. On 18 April 2018, Mr Andy Robertson, the Acting Manager Operations, RMS, in his second dot point set out in the letter to the applicant, again noted the navigational hazard issue identified by Mr Nugent in his previous e-mail report of 25 July 2017 in relation to my clients’ jetty being “*over its division of water*” (see Mr Robertson’s letter at **Annexure B**).

### **The Simultaneous Effect on my Client’s Property at No. 147 Riverview Road**

10. Accordingly, my clients’ concerns are based on the navigational hazard issues raised and identified by the Safety Officer for RMS with which I respectfully agree. Logically and simultaneously, it would follow that just as “*A vessel trying to berth at the new No 149 facilities **would have significant difficulty** approaching the pontoon from the south or west, to try and access its pontoon, if a vessel was already secured at the pontoon of No 147*”, the same “**significant difficulty**” would be encountered by a vessel approaching my clients’ pontoon at No. 147 from the north or west if a vessel was already secured at the pontoon of No 149. It follows that the No. 147 facility (my clients’ pontoon) “**would (also) be completely obstructed and unusable in**

***that situation***” for the same reasons identified by Mr Nugent (emphasis added).

11. Further, for the same reason advanced by Mr Nugent. I submit that the *proposed* projections for No. 149 would have a navigational impact upon the *existing* facilities of No. 147, which would become significant if a large vessel is secured to the pontoon of No. 149. Again, for the same reason, the No. 149 facility, as is proposed, **would restrict manoeuvrability and the safe operation of vessels** for the neighbour (my clients) at No. 147 (emphasis added).
12. It follows that if consent is granted, the jetty extension will create a navigational hazard which will have the same negative impact on my clients’ safe use of their own facilities. Accordingly, my clients object to the application as presently proposed.

### **Material Omissions by the Applicant**

13. On 10 April 2019 the applicant in the updated Statement of Environmental Effects to the Council dated 10 April 2019 (‘the SEE’) cites the *favourable* opinion of the Acting Manager, Mr Robertson, RMS referred to above. However, the applicant, whilst referring to the approval by RMS, failed to disclose the significant qualification to the approval concerning the safety issues identified by Mr Robertson.
14. Further, the applicant also fails in the SEE to disclose *any* reference to the navigational safety issues identified by RMS and which were reported to the applicant by Mr Nugent in his e-mail report referred to above. In this regard, the applicant stated in the SEE that:  
  

***“The jetty extension does not encroach on navigation channels. Refer Maritime’s letter of approval. The structures blend with the natural environment and are not detrimental to the areas visual quality.”***  
(emphasis added)
15. My clients are concerned (as would be the Council) with the applicant’s failure to disclose the significant safety issue identified by RMS and which was known to the applicant prior to lodgment of the SEE to the Council. On any fair reading of the extract referred to, Mr Bennett contends the opposite to the true position.
16. I also note the reference by Mr Peter Robinson of the Council in his recent letter dated 19 September 2019 that the Council was unable to obtain any information from the RMS in regards to the navigational safety issue identified above. This was despite the specific request by the Council to RMS to make available relevant information. However, if RMS had complied with the request, the Council would have been fully informed in relation to the report concerning the navigational safety issues identified therein by Mr Nugent. It is trite to say that if my clients had not made a GIPA application to RMS, the material omission identified would not have become known to the Council.

17. It will also be noted that the report by Mr Nugent was *initiated* by the applicant's request to RMS of 24 July 2017 thereby putting the applicant on notice of the safety issues (see Annexure A).

### **Consequence of RMS failing to disclose relevant material to the Council**

18. It follows from the above that if the Council had been fully informed by RMS, the assertions by Mr Peter Robinson that Mr Andy Robertson's letter indicating that the proposed jetty extension does not present any navigational concerns would not have been made, given the report by RMS (see Annexure B). Because of the safety issues now identified, as will be demonstrated below, the application does *not* satisfy the relevant requirements pursuant to the relevant statutory provisions.
19. It remains unexplained at this stage as to the reasons why RMS did not make available the report by its Mr Nugent, which by omission appears to have misled the Council. No doubt the Council will make the relevant inquiry of RMS in this regard given that the Council is the consent authority in relation to this application and therefore needs to be fully informed in order to fulfill its statutory obligations.

### **Relevant statutory provisions**

20. The application by Mr Bennett is subject to the Pittwater Local Environmental Plan 2014 ("the LEP"). Clause 2.3(2) of the LEP states:

*"The consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone."*

21. In relation to the present application, the objective of Zone W1 Natural Waterways of the LEP provides that:
- *To protect the ecological and scenic values of natural waterways.*
  - *To prevent development that would have an adverse effect on the natural values of waterways in this zone.*
  - *To provide for sustainable fishing industries and recreational fishing.*
  - *To ensure development does not adversely impact on the natural environment **or obstruct the navigation of the waterway** (added emphasis).*
22. See also *Gray & anor v Pittwater Council* [2016] NSWLEC 1176 (at **Annexure C**) where the Court dealt with the relevant statutory framework in relation to an appeal by the land owner against Pittwater Council's decision not to provide a building certificate. Whilst the present application by Mr Bennett is in relation to a DA, the application of the principles governing both are the same and therefore instructive.
23. It should also be noted that the expert evidence in the matter on behalf of Pittwater Council was provided by Mr Steve Nugent, RMS Boating Safety

Officer, the same officer in the present application. Mr Nugent's evidence was accepted by the Court [at para. 57].

### **The Council as Consent Authority**

24. It will be noted that, by the use of the word, "*must*" makes it clear the legislation is in mandatory terms and therefore it is not open to any discretion where objectives for development are breached.
25. No doubt the Council will obtain its own legal advice, however, it suffices to state that the Council has a statutory duty to ensure as the consent authority, that it does not ratify or otherwise authorise the construction of the jetty extension in circumstances where it has been put on notice of a potential safety issue by RMS. To do so would mean that the Council's decision is contrary to, and in breach of, the statutory provisions.
26. It is trite to say my clients are *directly* affected in terms of their safe use and quiet enjoyment of their waterfront facilities which would be severely affected by the navigational safety hazards identified by RMS *vis a viz* my clients' own use of their jetty. Accordingly, I submit that development consent for the jetty extension *in its present form* cannot be given by the Council without the applicant dealing with the safety hazard. To do so would mean that the Council was acting contrary to the relevant statutory provisions which is one of the fundamental *objectives for development* as set out above.
27. It follows from the above that the Council as the consent authority *must* satisfy itself to ensure that the navigation hazards identified by the Safety Officer for the RMS are eliminated before determining the application. Unless and until the safety issue is properly dealt with, my clients' objections to the application being approved by the Council based on the safety issues identified by RMS remain.
28. Accordingly, my clients oppose the application for the reasons stated.

### **Summary**

29. A precis of the above establishes:
  - (a) That RMS as the responsible authority has identified navigational safety hazards in relation to the use of the applicant's *proposed* jetty extensions at No. 149 Riverview Road.
  - (b) That, by logical extension, the *same* navigational safety hazards identified by RMS are relevant and applicable to my clients' *existing* jetty at No. 147 Riverview Road as identified by RMS for the reasons given.
  - (c) That the navigational safety hazards identified *obstruct the navigation of the waterway* in breach of clause 2.3(2) of the LEP.

- (d) That the Council as the consent authority and as a matter of law *must* refuse the application in its present form.

**Outstanding GIPA Application to RMS and Information request to Council**

30. In order to respond to the Council on an informed basis I note that my clients' have requested further relevant material from both the Council and the RMS which has not been forthcoming.
31. Previous correspondence by my clients has been posted on the Council website in relation to the GIPA application in relation to the undisclosed material, some of which remains outstanding (see below).
32. As at this date, I have not received *all* of the material sought from the RMS and I am still awaiting copies of Mr Bennett's submissions in relation to both his own application and my clients' application for a building certificate in relation to their own jetty extension.
33. Having regard to the outstanding applications for documents, my clients reserve the right to make further submissions if necessary.
34. Please do not hesitate to contact me if you require any further information,

Yours faithfully



**Grant Christmas**  
Solicitor / Principal

Law Society of NSW: Accredited Specialist (Local Government & Planning)