



## **128A ELANORA ROAD ELANORA HEIGHTS**

**STATEMENT OF ENVIRONMENTAL EFFECTS  
FOR THE CONSTRUCTION OF A NEW TWO STOREY DWELLING, SECONDARY DWELLING,  
ATTACHED DOUBLE GARAGE, DRIVEWAY AND ASSOCIATED LANDSCAPING**



Report prepared for  
**Action Plans**  
August 2020

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## **1. Introduction**

**1.1** This is a statement of environmental effects for the proposed construction of a new dwelling and secondary dwelling at 128A Elanora Road, Elanora Heights.

**1.2** The report describes how the application addresses and satisfies the objectives and standards of relevant State Environmental Planning Policies, the Pittwater Local Environmental Plan 2014, the Pittwater 21 Development Control Plan 2014 and the heads of consideration listed in Section 4.15 of the Environmental Planning and Assessment Act 1979 (as amended).

**1.3** This statement of environmental effects has been prepared with reference to the following:

- Site visit
- Survey prepared by DA Surveys
- Architectural drawings and BASIX Certificate prepared by Action Plans
- Arborist Report prepared by Hugh the Arborist
- Landscaping Plans prepared by Jamie King Landscape Architect
- Stormwater Management Plan prepared by Barrenjoey Consulting Engineers

**1.4** The proposed development is consistent with the objectives of all Council controls, considerate of neighbouring residents and will result in an accessible and improved amenity for the residents of the site. It is an appropriate development worthy of Council consent.

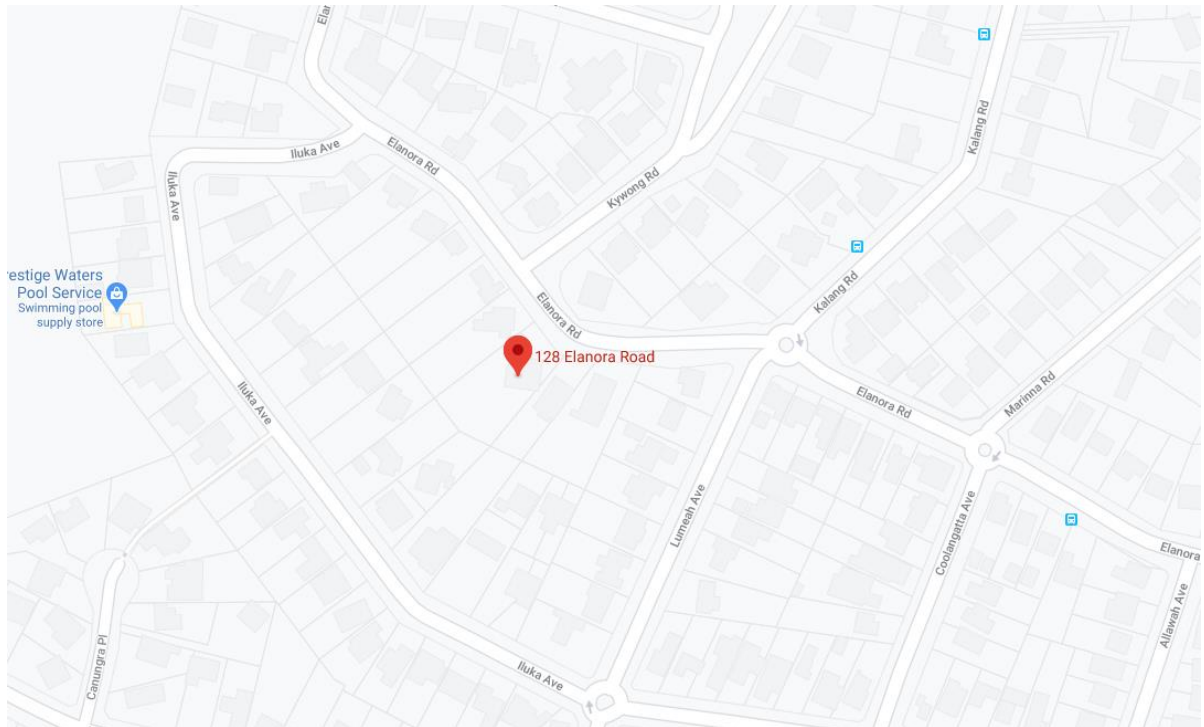


## 2. The site and its locality

- 2.1** The site is located on the to the south-western side of Elanora Road in Elanora Heights, approximately 130 metres south-west of the roundabout joining Elanora Road, Lumeah Avenue and Kalang Road. The site is legally described as Lot 2 DP 1237847.
- 2.2** The site is an irregular shaped battle-axe allotment with boundaries of 17.030 metres (south east – Elanora Road frontage), 27.430 metres (south west), splaying at the rear of the property with 12.550 metres (south-south east), 1.560 metres east, 22.250 metres (south east - rear) and 38.920 metres (south west). The site has an area of 706 m<sup>2</sup> and falls from the street front to the rear of the lot. No. 128a Elanora Heights gains access to Elanora Road through a Right of Carriageway over 128 Elanora Road.
- 2.3** The subject site is currently a vacant block. It is the result of a recent subdivision (DA2013/0345) into three separate properties. It is understood that the lots are not yet registered.
- 2.4** The property is surrounded by detached residential dwellings in all directions. The site is located in close proximity to Elanora shops, services and public transport linking to Pittwater Road.



**Figure 1. Aerial image of the subject site**



**Figure 2. The site within the locality**



**Figure 3. Aerial image of the site within the locality**



### 3. Site Photos



Figure 4: ROW entry to the site



Figure 5: Tree and rock outcrop to be incorporated into the developments design.





**Figure 6: Rear of the property looking up to property frontage.**



**Figure 7: Existing rock outcrop to remain, looking east**





**Figure 8: The rear yard, looking north west**



## 4. Proposed Development

- 4.1** The proposed development is for the construction of a new two storey dwelling incorporating a secondary dwelling on the lower ground floor. A double garage is provided at the front of the site and the development has been designed to retain the natural slope of the site and provide ramp access where feasible.
- 4.2** The development remains consistent with the streetscape and the locality, is consistent with Council controls and ensures privacy and solar access are maintained for surrounding properties and the subject site.
- 4.3** The proposed development will consist of the following:

### **Lower Ground Floor**

- Self-contained two-bedroom granny flat, which will have access to its own deck proposed on the lower ground floor.
- Duncan's 'Mancave' with deck
- Home theatre with storage and bar
- Internal stairs for access to ground floor from the home theatre
- Sub-floor space
- Access to the backyard via stairs

### **Ground Floor**

- Open plan dining, kitchen and living space
- Rear deck
- 4 bedrooms;
  - 1x Master room with ensuite and walk in wardrobe
  - 1x bedroom with ensuite
  - 2x bedrooms with built in wardrobes
- Laundry
- Bathroom
- Front Porch and entry
- Double garage at the front of the site

### **External Works**

- Proposed pond, access pathway, and associated landscaping

## **5. Statutory Framework**

### **5.1 State Environmental Planning Policies**

#### **State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004**

Schedule 1 of the Environmental Planning and Assessment Regulation (2000) sets out the requirement for a BASIX certificate to accompany any BASIX affected building, being any building that contains one or more dwellings, but does not include a hotel or motel. SEPP BASIX applies to the proposal and a compliant BASIX certificate is provided with this application for each dwelling.

#### **State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017**

State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 replaces the repealed provisions of clause 5.9 of the standard instrument LEP relating to the preservation of trees and vegetation.

The aims of this Policy are to protect the biodiversity values of trees and other vegetation, and to preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.

The development remains consistent with the provisions of the SEPP as it is located within the already disturbed site area and proposes the removal of 2 trees to be replaced with a major canopy tree, as is detailed and supported in the report under separate cover by consultant arborist.



## 5.2 Pittwater Local Environmental Plan 2014

The relevant clauses of the Pittwater Local Environmental Plan 2014 are addressed below.

### Zoning

The site is zoned E4 Environmental Living, pursuant to the provisions of the Pittwater Local Environmental Plan 2014.



**Figure 9: Extract from Pittwater LEP 2014 Zoning Map**

The proposed development is for the construction of a dwelling and secondary dwelling on a vacant block and is permissible with development consent in the E4 zone.

### Minimum Lot Size

The site is mapped with a minimum subdivision lot size of 550m<sup>2</sup>. The subject site comprises an area of 701.8m<sup>2</sup> with no subdivision proposed.

## Height of Buildings

The LEP restricts the height of any development on the subject site to 8.5 metres. The proposed development has a building height which primarily complies or is lesser than the 8.5 metres. However, a small portion sits at 9.350 metres exceeding the 8.5 metre limit by 0.85 metres or 10%.

This limited increase in height occurs at the rear of the proposed development with the land at the rear being at a steeper slope and is only for the very rear gable portion of the roof form. The majority of the building is compliant within the 8.5 metre height restriction of the Pittwater DCP and the sight breach is believed to not be detrimental to any neighbouring properties, with the small portion having a negligible impact on solar access.

This is further addressed in Appendix A within the Clause 4.6 variation.

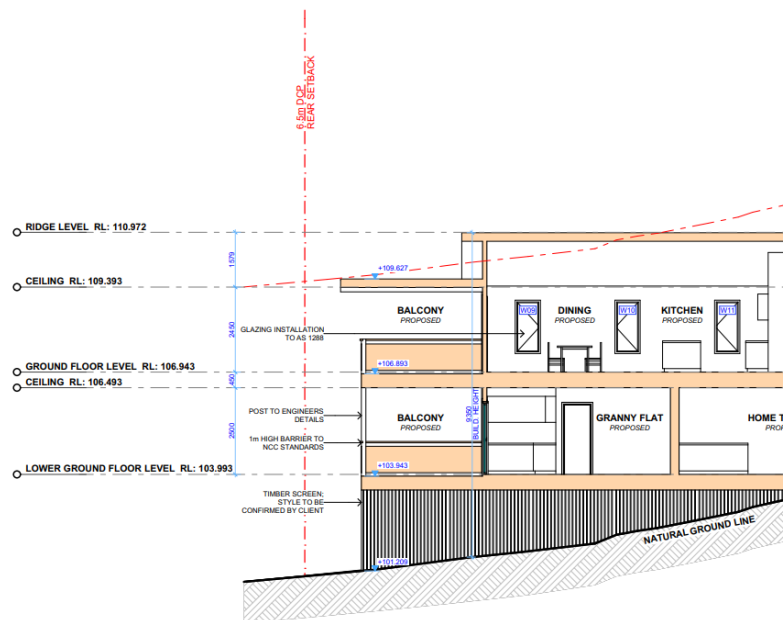


Figure 10: Extract from Plan showing extent of height breach

## Heritage Conservation

The site is not a heritage item, located within a heritage conservation area or located in proximity to a heritage item.

## Acid Sulfate soils

The site has been identified on Council's zoning map as being Class 5 acid sulfate soils. The works are not anticipated to result in the disturbance of any acid sulfate soils and no further information is required in this instance.



## **Earthworks**

Minimal and compliant earthworks are proposed to prepare the site for construction of the new dwelling. All works will be undertaken in accordance with engineering specifications, Councils controls and any consent conditions.

## **Essential services**

Essential services to the site will be provided to the dwelling, as necessary. These matters were all addressed as part of the original subdivision consent.

### **5.3 Pittwater 21 Development Control Plan 2014**

The relevant sections of the DCP are addressed below.

#### **Objectives**

The proposed development is entirely consistent with the ecologically sustainable, environmental, social and economic objectives as specified in the DCP. The proposal is appropriate to the site and the locality and has been designed with fulfilment of these objectives as essential criteria.

#### **Section A4 Localities**

The site is located within the Elanora Heights Locality.

The desired character statement for Elanora Heights is:

*The Elanora Heights locality will remain primarily a low-density residential area with dwelling houses a maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape. Secondary dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations. Any dual occupancies will be located only on the plateau on land that has less tree canopy coverage, species and habitat diversity and fewer other constraints to development. Land in the vicinity of Caladenia Close and Dendrobium Crescent to the west will remain a low-density rural residential area due to the constraints and characteristics of the land, including steepness of slope, species and habitat diversity, and lack of infrastructure. Any medium density housing will be located within and around commercial centres, public transport and community facilities. Retail, community, and recreational facilities will serve the community.*

*Future development is to be located so as to be supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.*

*Future development will maintain a building height limit below the tree canopy, and minimise bulk and scale. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape and minimise site disturbance. Development on non-urban zoned land shall maintain generous spatial separation of the built form and low site coverage on large lots. Development will be designed to be safe from hazards including landslip and bushfire.*

*A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, and to enhance wildlife corridors.*

*Heritage items and conservation areas indicative of the Guringai Aboriginal people and of early settlement in the locality will be conserved.*

*Vehicular, pedestrian and cycle access within and through the locality will be maintained and upgraded. The design and construction of roads will manage local traffic needs, minimise harm to people and fauna, and facilitate co-location of services and utilities.*

The proposed development has been designed taking into consideration the desired character of the location. The scale of the proposal is well designed to ensure retention of the character sought by Council and provides an architecturally pleasing dwelling, whilst being mindful of the natural environment.

## **Section B General Controls**

### **Heritage Conservation**

The site is not located in a heritage conservation area or immediately adjacent to any heritage items.

### **Aboriginal heritage Significance**

The site is not known or anticipated to be home to any aboriginal relics. Should any objects be discovered during construction, appropriate measures will be taken according to NSW Office of Environment and Heritage.

### **Landslip Hazard**

The site is not located in a geotechnical hazard zone.

### **Bushfire Hazard**

The site is not mapped as Bushfire Prone Land.

### **Flood Hazard**

The site is not mapped as being in a Flood Hazard Zone.



## **The Natural Environment**

The proposal will impact on the natural environment in the immediate locality, with the alteration of the site and cutting of three trees at the rear of the site. The likelihood of the site to impact external properties is minimal with the significant tree on site to be retained and the design of the dwelling working around its protection zone, to ensure its survival.

## **Water management**

The site can be connected to the reticulated sewer system.

Stormwater from the proposed development will be connected to the existing drainage easement, located on the south western boundary of the lot. A hydraulic engineers plan detailing works is provided with the application including water tanks to provide OSD and connection to the existing easement.

## **Access and parking**

The site benefits from access over a right of way. A double car garage is proposed at the front of our lot with immediate access to the driveway, which is less than 30 metres in length. Location of the parking structure has been determined with advice from an arborist to ensure the large tree on site is unaffected.

The DCP requires 2 car parking spaces for a dwelling containing 2 or more bedrooms.

A compliant 2 car garage is proposed, and additional parking is easily available on street parking on the public road reserve.

## **Site works and management**

All Council controls and conditions of consent will be complied with in the construction works. Appropriate devices will be used during the construction process to ensure no issues arise in regard to erosion and sedimentation.

## **Part C Design Criteria for Residential**

### **Landscaping**

Appropriate landscaping and vegetation will be retained on the site in accordance with Council's DCP. The large Morton Bay Fig on the site has been a key feature in the design to ensure it can be retained as a feature of the site. The site is a battle axe and accordingly does not present to the street frontage. Ample landscaped area is

retained, and the development will achieve the outcomes desired by the DCP for landscaping with the site maintaining a suitable area of soft green space and appropriate native species.

We note that the area within the immediate frontage of the dwelling incorporates a landscaped entrance including a pond and provides a very inviting and “green” entry space.

### **Safety and Security**

The proposed development will maintain suitable safety and security for the site. The new dwelling will provide ongoing casual surveillance to the site’s entry point from the common access driveway.

### **View Sharing**

A site visit has been undertaken and it is considered that no views will be impacted as a result of the proposed development.

### **Solar Access**

The DCP requires 3 hours of solar access are maintained for the windows of principal living areas, solar collectors and private open space of the site and adjoining properties on 21 June.

We note that the southern neighbour, 128b Elanora Road has recently been approved. The location of this dwelling, which has a living room at the rear of the site, is shown on the shadow diagrams.

Post development shadow diagrams are provided in the attached plan set, illustrating that the proposed development will result in the following:

9am: Some shadowing to the side boundary of No 128B Elanora Road and no impact on the dwelling (approved).

12pm: A minor shadowing to occur to the northern side of No 128B Elanora Road and minor shadowing within the side boundary of the subject site.

3pm: Shadowing over the central roof and northern elevation of No 128B Elanora Road and shadowing to the front yard.

It is concluded the proposal will result in appropriate and considerate shadowing to No 128B Elanora Road, and both lots will maintain the minimum 3 hours solar access on the winter solstice.

**Visual Privacy**

The proposed development will have minimal impact for neighbour's visual privacy having been designed to look over the tree top areas and direct its view to the west.

The lower ground floor will have no impact for properties to the rear as it has generous setbacks and topographical differences, with the adjoining properties sitting higher up and beyond boundary fencing and landscaping.

The ground level deck is more elevated and has been designed with windows not looking into neighbours, elevated sills where required and with the combination of fencing and landscaping ensuring privacy for all dwellings.

There will be no visual privacy issues between the dwellings due to the appropriate setbacks from the boundary lines and associated landscaping.

**Acoustic Privacy**

The development is appropriate and will not result in noise levels inappropriate to a residential area.

**Private Open Space**

The DCP requires a minimum private open space requirement of 80sqm. The development proposed a compliant private open space area in the rear yard.

**Waste and Recycling Facilities**

Appropriate waste management will be undertaken during the demolition and construction process. Where applicable all materials will be recycled where possible which is detailed in the accompanying Waste Management Plan.

The dwelling will have a bin storage area behind the building line, with waste to be collected by Councils regular service.

**Eaves**

A minimum 450mm eaves are incorporated on all elevations in accordance with this clause.

**Part D – Elanora Heights Locality**

The site is located in the Elanora Heights Locality and is consistent with the desired character, built form and natural environment criteria as specified in the DCP. The proposed alterations and additions are appropriate within residential and natural setting.



### Character

The proposed development is an appropriate architectural design for the locality. Materials and colours complement the area and are consistent with the site, while sitting comfortably in the locality.

### Scenic Protection

The site is not visible from Elanora Road or any public place. However, the new dwelling will be consistent with this clause, in that there will be no negative visual impacts as a result of the development from any viewpoint.

### Building colours, materials and construction

The proposed materials include weatherboard cladding and metal sheet roofing, in colours which will complement the existing dwellings and the residential environment.

### Front Building Line

The DCP requires a front building line setback of 6.5 metres on the site. The site is a battle-axe lot and accordingly no front setback exists.

The garage is provided at the front of the battle-axe with immediate access to the driveway. This is appropriate with a 29 metre setback to the street front.

### Side and Rear setbacks

Side setbacks of 2.5 metres and 1 metre side setback are required.

The dwelling proposes generous side setbacks which are primarily compliant, with the exception of 2 small access deck/ ramp areas.

	Proposed Side setback
Lower Ground (north)	3.146 2.159 (access deck)
Lower Ground (south)	2.003m 1m (access deck)
Ground (north)	3.46m
Ground (south)	2m
Garage (north)	0.5m
Garage (South)	10.2m

The rear setback of 6.5 metres is compliant.

### Building envelope

A building envelope of 45° measured at a height of 3.5 metres applies to the site. The proposed dwelling breaches the building envelope control, however this is only at the

rear of the property and is due to the slope and of very minimal impact due to the generous setbacks.

#### **Landscaped Area – General**

The subject site requires a minimum landscaped area of 60%, which equates to 421.08m<sup>2</sup> for the site area of 701.8m<sup>2</sup>. The site proposes a landscaped area of 56.6% or 397.54, including the 6% impervious area permitted, which is minimally less than the DCP standard.

We note that the neighbouring site to the east, 128B Elanora Road recently approved, has a landscaped area with a similar minimal variation proposed. This development is easily consistent with neighbours and allows for ample landscaped space, plus the benefit of generous decking and usable above ground outdoor spaces. This is highly valuable on the sloping site and also allows for the outdoors to be enjoyed whilst viewing the outlook provided at the top of the site.

#### **Fences – General**

No fencing is proposed.

#### **Construction of Retaining walls, terracing and undercroft areas**

The development includes a visually pleasing timber screen to cover to the undercroft area or the sub-floor area.

Timber retaining walls are also proposed to provide a level space in the rear yard.

## 6. Numerical Control Table

The following table provides a summary of the development proposal, in accordance with the relevant numerical planning controls contained in the Pittwater LEP 2014 and the Pittwater DCP 2011.

	Standard	Proposed	Compliance
<b>Pittwater LEP 2014</b>			
Lot Size	550m <sup>2</sup>	701.8m <sup>2</sup>	Yes
Building Height	8.5 metres	9.350 metres 10% variation	Clause 4.6 provided
Floor Space Ratio	Not identified	-	-
<b>Pittwater DCP 2014</b>			
Side Boundary Envelope	3.5 metres / 45 degrees	3.5 metres / 45 degrees	Compliant with objectives
Front setback	N/A	-	-
Side Boundary Setbacks	2.5 metres on one side and 1 metre on the other	Lower Ground (north) 3.146 2.159 (access deck) Lower Ground (south) 2.003m 1m (access deck) Ground (north) 3.46m Ground (south) 2m Garage (north) 0.5m Garage (South) 10.2m	Yes
Rear Boundary Setbacks	6.5 metres	11.632m	Yes
Parking	2 spaces	2 space	Yes
Landscaped Open Space and Bushland Setting	60% of lot area (421.08m <sup>2</sup> )	56.6% (397.54m <sup>2</sup> )	Compliant with objectives
Private Open Space	80m <sup>2</sup>	80.98m <sup>2</sup>	Yes
Solar Access	3 hours sunlight to 50% of POS of both subject site and adjoining properties between 9am and 3pm on June 21.	3 hours +	Yes



## 7. Section 4.15 Considerations

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15 of the Environmental Planning and Assessment Act 1979 (as amended). Guidelines to help identify the issues to be considered have been prepared by the former Department of Urban Affairs and Planning. The relevant issues are:

### **The provision of any planning instrument, draft environmental planning instrument, development control plan or regulations**

This report clearly and comprehensively addresses the statutory regime applicable to the application and demonstrates that the proposed land use is complimentary and compatible with adjoining development. The proposal achieves the aims of the Pittwater LEP and DCP.

The development is permissible in the E4 zone.

### **The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality**

#### 7.1 *Context and Setting*

*What is the relationship to the region and local context in terms of:*

- *the scenic qualities and features of the landscape?*
- *the character and amenity of the locality and streetscape?*
- *the scale, bulk, height, mass, form, character, density and design of development in the locality?*
- *the previous and existing land uses and activities in the locality?*

These matters have been discussed in detail in the body of the statement, appendices and attached specialist reports.

*What are the potential impacts on adjacent properties in terms of:*

- *relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)?*
- *visual and acoustic privacy?*
- *views and vistas?*
- *edge conditions such as boundary treatments and fencing?*

The proposed alterations and additions have been designed to complement the site and its surrounds. The proposal is appropriate and will have negligible impact on adjacent properties.

## **7.2 Access, transport and traffic**

*Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:*

- *travel demand?*
- *dependency on motor vehicles?*
- *traffic generation and the capacity of the local and arterial road network?*
- *public transport availability and use (including freight rail where relevant)?*
- *conflicts within and between transport modes?*
- *traffic management schemes?*
- *vehicular parking spaces?*

No conflict or issues will arise as a result of the proposed development.

## **7.3 Public domain**

There will be no impact.

## **7.4 Utilities**

The site will be service with utilities as required.

## **7.5 Flora and fauna**

There will be no impact.

## **7.6 Waste**

There will be no impact.

## **7.7 Natural hazards**

The site is not mapped as being in a natural hazard zone. There will be no impact.

## **7.8 Economic impact in the locality**

There will be no impact, other than the possibility of a small amount of employment during construction.

## **7.9 Site design and internal design**

*Is the development design sensitive to environmental conditions and site attributes including:*

- *size, shape and design of allotments?*
- *the proportion of site covered by buildings?*
- *the position of buildings?*
- *the size (bulk, height, mass), form, appearance and design of buildings?*
- *the amount, location, design, use and management of private and communal open space?*
- *landscaping?*

The proposed development is appropriate to the site with regards to all of the above factors. The development fits well within the context of the surrounding environment and is complimentary to the residential surrounds.

*How would the development affect the health and safety of the occupants in terms of:*

- *lighting, ventilation and insulation?*
- *building fire risk – prevention and suppression?*
- *building materials and finishes?*
- *a common wall structure and design?*
- *access and facilities for the disabled?*
- *likely compliance with the Building Code of Australia?*

The proposed development will comply with the provisions of the Building Code of Australia and all relevant Council controls.

## **7.10 Construction**

*What would be the impacts of construction activities in terms of:*

- *the environmental planning issues listed above?*
- *site safety?*

Site safety measures and procedures compliant with relevant legislation will ensure that no site safety or environmental impacts will arise during construction.

### **The suitability of the site for the development**

*Does the proposal fit in the locality?*

- *are the constraints posed by adjacent developments prohibitive?*
- *would development lead to unmanageable transport demands and are there adequate transport facilities in the area?*



- *are utilities and services available to the site adequate for the development?*

The adjacent development does not impose any unusual development constraints.

**Are the site attributes conducive to development?**

The site is appropriate for the proposed development.

**Any submissions received in accordance with this Act or the regulations**

It is envisaged that the consent authority will consider any submissions made in relation to the proposed development.

**The public interest**

It is considered that the proposal is in the public interest as it allows for appropriate use of the residential site.

Section 4.15(1) of the Environmental Planning and Assessment Act has been considered and the development is considered to fully comply with all relevant elements of this section of the Environmental Planning and Assessment Act 1979.

## **8. Conclusions**

- 8.1** The proposed development for the construction of a two-storey dwelling with double garage at 128A Elanora Road, Elanora Heights is appropriate considering all State and Council controls.
  
- 8.2** When assessed under the relevant heads of consideration of s4.15 of the Environmental Planning and Assessment Act, the proposed development is meritorious and should be granted consent.
  
- 8.3** Considering all the issues, the development is considered worthy of Council's consent.

## **Appendix One - Clause 4.6 *Exceptions to Development Standards***

Clause 4.6 of the Pittwater Local Environmental Plan 2014 (PLEP 2014) permits departures from development standards in certain circumstances. In this case, it is necessary to consider if compliance with the development standard is consistent with the aims of the policy and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in section 1.3 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* being:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*



The aims and objectives of Pittwater LEP 2014 Clause 4.6 are as follows:

*(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*

*(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Under Clause 4.6(3) and (4) of the PLEP 2014, consent for a development that contravenes a development standard must not be granted unless the consent authority is satisfied that:

*(3)(a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

*(3)(b) there are sufficient environmental planning grounds to justify contravening the development standard.*

*(4)(a)(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out,*

These matters, along with case law judgements from the NSW Land and Environment Court, are addressed below.

It is of interest that the consent authority specifies a number of development standards that cannot be varied under Clause 4.6, listed in Clause 4.6(8). Clause 4.3 - Height of buildings is not one of the standards excluded, it must therefore be assumed that the standard for height of buildings, is one of the development standards that can have an appropriate degree of flexibility applied under clause 4.6.

## **1. Environmental Planning Instrument Details (Pittwater LEP 2014)**

### **1.1 What is the name of the environmental planning instrument that applies to the land?**

Pittwater Local Environmental Plan 2014 (PLEP 2014)

### **1.2 What is the zoning of the land?**

E4 – Environmental Living

### **1.3 What are the objectives of the zone?**

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

#### **1.4 What is the development standard being varied?**

Cl 4.3 of the Pittwater Local Environmental Plan 2014, Height of Buildings

#### **1.5 Under what clause is the development standard listed in the environmental planning instrument?**

Cl 4.3 of the Pittwater Local Environmental Plan 2014

#### **1.6 What are the objectives of the development standard?**

- (1) The objectives of this clause are as follows:*
- (a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*
  - (b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
  - (c) to minimise any overshadowing of neighbouring properties,*
  - (d) to allow for the reasonable sharing of views,*
  - (e) to encourage buildings that are designed to respond sensitively to the natural topography,*
  - (f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

#### **1.7 What is the numeric value of the development standard in the environmental planning instrument?**

The numeric value of the height of buildings development standard applicable to the subject site is a maximum of 8.5m.

### 1.8 What is proposed numeric value of the development standard in your development application?

The numeric value of the development standard in this development application is a maximum of 9.350m.

This is for a very limited portion of the roofline at the rear of the development.

**building height** (or **height of building**) means:

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or
- (b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

### 1.9 What is the percentage variation (between your proposal and the environmental planning instrument)?

The percentage variation sought is 10%

## 2. NSW Land and Environment Court Case Law

Several key Land and Environment Court (NSW LEC) judgements have refined the manner in which variations to development standards are required to be approached. The key findings and direction of each of these matters are outlined in the following discussion.

### 2.1 *Wehbe v Pittwater* [2007] NSW LEC 827

The decision of Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827, (expanded on the findings in *Winten v North Sydney Council*), identified 5 ways in which the applicant might establish that compliance with a development standard is unreasonable or unnecessary. It was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary.

The five ways outlined in *Wehbe* include:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).*

4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Way).*

5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Way).*

In the Micaul decision Preston CJ confirmed that the requirements mandated by SEPP 1 (as discussed in Wehbe) are only relevant in demonstrating that compliance with a development standard is unreasonable or unnecessary for the purpose of Clause 4.6(3)(a).

## **2.2 Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC**

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

1. Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
2. That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
3. That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs;
4. All three elements of clause 4.6 have to be met and it is best to have different reasons for each, but it is not essential.

## **3 Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7**

In *Randwick City Council v Micaul Holdings*, the Court allowed a departure from development standards, provided the processes required by clause 4.6 are followed, a consent authority has a broad discretion as to whether to allow a departure from development standards under clause 4.6, even where the variation is not justified for site or development specific reasons.

Preston CJ noted that *the Commissioner did not have to be satisfied directly that compliance with each development standard was unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's*

*written request had adequately addressed the matter in clause 4.6(3)(a) that compliance with each development standard was unreasonable or unnecessary.*

#### **4 Zhang v City of Ryde**

Commissioner Brown reiterated that clause 4.6 imposes three preconditions which must be satisfied before the application could be approved:

- 1. The consent authority must be satisfied that the proposed development will be consistent with the objectives of the zone;*
2. The consent authority must be satisfied that the proposed development will be consistent with the objects of the standard which is not met; and
3. The consent authority must be satisfied that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances and there are sufficient environmental planning grounds to justify contravening the development standard.

It is only if all of these conditions are met that consent can be granted to the application, subject to an assessment of the merits of the application.

The Commissioner applied the now familiar approach to determining consistency with zone objectives by considering whether the development was antipathetic to the objectives.

In contrast to Four2Five Pty Ltd, the reasons relied on to justify the departure from the standards in this case were not necessarily site specific.

#### **3. Consideration**

The following section addresses the provisions of clause 4.6 of the WLEP 2011 together with principles established in the NSW Land and Environment Court Case Law outlined above.

**Clause 4.6(3)(A) - Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)?**

In order to demonstrate that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, the Five (5) Part Test established in *Winten v North Sydney Council* and expanded by Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827 is considered: b



The five ways outlined in *Wehbe* include:

### 3.1 Five (5) Part Test - *Wehbe v Pittwater*

#### 1. ***The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).***

The objectives of the standard are:

*(a) to ensure that any [building](#), by virtue of its height and scale, is consistent with the desired character of the locality,*

The proposed development will present with a dwelling of compatible scale to neighbouring development. It is a compatible and aesthetically pleasing development which will be completed by its surrounding environment. The desired character of the locality is encouraged and preserved by the dwelling design and the minimal variation to the height is negligible and not discernible.

*(b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

The proposed development will present with a dwelling of compatible scale to neighbouring development. It is a compatible and aesthetically pleasing development which will be completed by its surrounding environment. The height noncompliance results only from the natural slope towards the rear of the property. The height is compliant and well under the height limit for the vast majority of the building length and is only at breach at the back of the property, which is not visible from the streetscape and well setback from neighbours.

The orientation of the land and the fall of the site aid in ensuring that the impacts are further reduced for neighbours with the overall development proposal being a positive addition to the site when viewed from any location.

*(c) to minimise any overshadowing of neighbouring properties,*

The variation is minimal in area and occurs where the property falls away at the rear. The impacts of the height of the proposal will not be to the detriment of neighbours with compliant solar access retained and the rear yard and windows of the neighbouring dwelling achieving close to full sun.

*(d) to allow for the reasonable sharing of views,*

No significant views are apparent and there is no loss for neighbours.

*(e) to encourage buildings that are designed to respond sensitively to the natural topography,*

The dwelling has been designed to allow for the existing topography to be retained, with no significant cutting or filling as a result of the proposal.

*(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

The proposed development will result in significant improvement to the dwellings contribution to the character of the area. Colours and materials have been chosen to complement the scenic coastal/ bushland location and there will be no adverse impacts as a result of the small breach in height.

***The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).***

This exception to development standards request does not rely on this reason.

***2. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).***

This exception to development standards request does not rely on this reason.

***3. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Way).***

This exception to development standards request does not rely on this reason.

***4. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Way).***

This exception to development standards request does not rely on this reason.

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the height of buildings control pursuant to the First Way outlined in Wehbe.

Thus, it is considered that compliance with Clause 4.6(3)(a) is satisfied.

### **3.2 Clause 4.6(3)(B) – Are there sufficient environmental planning grounds to justify contravening the development standard?**

There are sufficient grounds to permit the variation of the development standard. In particular:

- The area of variation will not be visible from the street frontage as it is well setback and at the termination of a battle-axe lot
- The area of variation will be of negligible impact to neighbours being limited in length and resulting only to allow for the raked ceilings and gable roof form.
- The architectural merit of the design is high, and it would be of vast benefit the site, neighbours and locality to allow for this contemporary and thoughtful design.
- There are no discernible solar access impacts with the neighbour's rear living area windows and yard retaining compliant sunlight
- There are no view loss impacts with the area of the height variation the same RL as the remainder of the dwelling, which is easily compliant in height moving up the site.

### **3.3 Clause 4.6(4)(A)(ii) – Will the proposed development be in the public interest because it is consistent with the objectives of the particular standard and objectives for development within the zone which the development is proposed to be carried out.**

The proposed development is consistent with the objectives of the standard (see CI 4.6(3)(A). An assessment of consistency with the objectives of the Zone is provided below:

#### **Zone – E4 Environmental Living**

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

Consistent. The proposal is for a residential dwelling which is well suited and designed to retain site features.

- *To ensure that residential development does not have an adverse effect on those values.*

The minimal height breach does not detract for the thoughtful design, which respects the E4 zone and retains the environmental values of the site.

- *To provide for residential development of a low density and scale integrated with the landform and landscape.*

- *To encourage development that retains and enhance riparian and foreshore vegetation and wildlife corridors*

The proposal adequately retains the natural environment of the site with the dwelling proposed in a primarily cleared location.

The proposed development is not contrary to the public interest, because it is consistent with the objectives of the standard (see Cl 4.6(3)(A)) and objectives for development within the zone.

**Clause 4.6(5)(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning,**

The non-compliance will not raise any matter of State or Regional Significance.

**Clause 4.6(5)(b) the public benefit of maintaining the development standard,**

The proposed development is not contrary to the public interest, accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

**Clause 4.6(5)(c) any other matters required to be taken into consideration by the Secretary before granting concurrence**

**How would strict compliance hinder the attainment of the objects specified in Section 1.3 of the Act.**

Strict compliance with the standard would hinder the attainment of the objects specified in section 1.3 of the Act

*(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*

*(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*

*(c) to promote the orderly and economic use and development of land,*

*(d) to promote the delivery and maintenance of affordable housing,*

*(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*

*(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*

*(g) to promote good design and amenity of the built environment,*

*(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*

*(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*

*(j) to provide increased opportunity for community participation in environmental planning and assessment.*

Strict compliance with the 8.5 metres height development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, protecting the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats and promoting good design and amenity of the built environment.*

The proposed development is for a two-storey residential dwelling with secondary dwelling, on land zoned E4 – Environmental Living.

- The area of variation will not be visible from the street frontage as it is well setback and at the termination of a battle-axe lot
- The area of variation will be of negligible impact to neighbours being limited in length and resulting only to allow for the raked ceilings and gable roof form.
- The architectural merit of the design is high and it would be of vast benefit the site, neighbours and locality to allow for this contemporary and thoughtful design.
- There are no discernible solar access impacts with the neighbour's rear living area windows and yard retaining compliant sunlight
- There are no view loss impacts with the area of the height variation the same RL as the remainder of the dwelling, which is easily compliant in height moving up the site.