Shaw Reynolds Lawyers

Level 29, Chifley Tower
2 Chifley Square
Sydney NSW 2000

ABN 77 159 046 036
TELEPHONE: (02) 8330 5837
WEB: shawreynolds.com.au

Our Ref: AK:JDK:220093

8 July 2022

Ray Brownlee
Chief Executive Officer
Northern Beaches Council

By email: ***council@northernbeaches.nsw.gov.au***

Attention: Megan Surtees, Planner

Dear Mr Brownlee,

Re: Development Application no. 2022/0798 at 11 Taylor Street, North Curl Curl NSW 2099 – Submission by way of Objection

1. By way of introduction, we act for Mr Haydon Bray and Mrs Kerry Bray, the owners and residents at 13 Pitt Road, North Curl Curl.

2. We refer to DA2022/0798 (the **DA**) for alterations and additions to a dwelling house including a swimming pool (the **Proposed Development**) at 11 Taylor Street, North Curl Curl (the **Site**).

3. Having reviewed the available material, we make this submission by way of an objection. We summarise our clients' objections and provide further details below.

Summary

4. The impact of the Proposed Development gives rise to matters which relevantly should result in the refusal of the proposal. Key legal issues of concern include:

    a. **non-compliance with the building height control** in the *Warringah Local Environmental Plan 2011* (the **LEP**). In particular, the Proposed Development seeks consent for approval a building height which:

        i. has not been calculated in accordance with accepted methods;

        ii. is in excess of the development standard for the Site; and

        iii. the supporting clause 4.6 variation is insufficient. The non-compliance results in unacceptable impacts on our clients, particularly in relation to view sharing.

    b. **view loss** - The Proposed Development will cause devasting view loss from the main living areas of the residence at 13 Pitt Road, North Curl Curl, including the kitchen, dining room, lounge room and outdoor entertaining areas.

    c. **amenity impacts** as a result of the height of the Proposed Development, which could be avoided by a well-considered design.

The calculation of "building height" from "ground level (existing)"

5. The LEP defines the following terms:

> ***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.*
>
> ***ground level (existing)*** *means the existing level of a site at any point.*

6. The Court has found that there are two ways of interpreting "*ground level (existing)*":

    a. measuring the building height from the lowest existing floor level (despite the existing floor level not being representative of the pre-developed site) (the **Usual Method**); or

    b. by extrapolating the pre-development existing ground level (the **Extrapolation Method,** as set out in *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 (***Bettar***)).

7. The appropriate calculation method depends upon the characteristics of the site. Based on the current position of the Court, we note the following:

    a. where possible, the Usual Method of measuring the lowest level on the existing site which is below the highest proposed point should be taken. The Extrapolation Method may be rejected where this usual method is possible.

    b. on sloped sites or where the building occupies the entirety of the site, it may be appropriate to adopt the Extrapolation Method to determine the existing ground level that is sympathetic to the topography of the site. This involves taking measurements adjacent and as near as possible to the required measurement points, and thereafter extrapolating the topography of the ground as if it were not excavated or developed on.

8. The Applicant appears to have applied some form of extrapolation method in calculating the 8.5m height plane shown on the architectural plans (see drawing no A08 rev 1). However, we note there has been no consideration of whether the Usual Method may be applied in this instance given the site has not been developed to the boundary and the current ground levels are reflective of the site's position within the topography of the headland.

9. Were it to be established that the Usual Method cannot be relied upon, then it would be open to the Applicant to apply the Extrapolation Method in *Bettar*. However, for the avoidance of doubt the Extrapolation Method applied on the architectural plans (at drawing no A08 rev 1) is not consistent with that envisaged by Commissioner O'Neill in *Bettar*. In *Bettar*, Commissioner O'Neill at [41] used *"the level of the footpath at the boundary"* and determined that this level *"bears a relationship to the context and the overall topography that includes the site"*.

10. With respect to the extrapolation applied on the architectural plans (at drawing no A08 rev 1):

    a. the gradient of ground level (existing) does not match the slope of the locality or the levels which may be extrapolated from the Survey Plan at boundaries of the Site and surrounding sites (particularly to the southern and western boundaries); and

b. the 8.5m height plane shown on the Architectural Plans (at drawing no A08 rev 1) does not follow the existing ground level marked on that same plan. There is a peak in the height plane at the eastern boundary which does not hold any bearing to the existing topography of the site or the locality and is not reflected by the line which appears to indicate "ground level (existing)".

11. In this regard, the height of the Proposed Development has not been calculated in accordance with either of the accepted methods. Given this, the impact of this is that the height of the development and the extent of the proposed non-compliance may be more significant than that which is referenced in the Statement of Environmental Effects (the **SEE**), Clause 4.6 Exception to Maximum Height of Buildings Development Standard (the **Clause 4.6 Variation Request**) and shown on the Architectural Plans.

12. We recommend that Council:

    a. obtain additional detailed plans showing an overlay of the 8.5m height limit; and

    b. clarify the method applied in the calculation of "ground level (existing)" with reference to the accepted methods of calculation, noting the Court's extensive consideration of this issue, including details as to why a particular method is applied in preference to another.

13. In the absence of the above, the Applicant has not provided sufficient information to allow for any meaningful assessment of the height of the Proposed Development. Notwithstanding this, we have considered deficiencies in the Clause 4.6 Variation Request and view analysis below.

Clause 4.6 Variation Request

1. In our view, there is significant public benefit in maintaining the development standard in the context of the DA.

2. The Clause 4.6 Variation Request which accompanies the DA:

    a. relies on the erroneous and unsubstantiated assumption that *"the proposal will not disrupt existing views from the surrounding properties"*. This is not correct, and we understand that the view loss will in fact be devastating.

    b. relies upon the SEE with respect to achieving the objectives of the development standard under clause 4.3(2) of the LEP. This SEE is inadequate as it does not undertake a detailed view loss assessment against *Tenacity Consulting v Warringah* [2004] NSWLEC 140.

    c. does not establish consistency with the objectives of height standard or the R2 Low Density Residential Zone. As such the Clause 4.6 Variation Request fails to establish that compliance with the standard is unreasonable or unnecessary or that 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.

    d. does not make out sufficient environmental planning grounds to justify the contravening the development standard.

3. In our view, the Clause 4.6 Variation Request is deficient and cannot be supported in the context of the proposed development and its subsequent impacts. The details and each of the justifications put forward in the Clause 4.6 Variation Request are set out below.

Unreasonable or unnecessary

4. The first matter for consideration in clause 4.6 of the LEP is helpfully summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (**Initial Action**) as follows:

> *The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.*

5. In seeking to establish that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, the Clause 4.6 Variation Request suggests that the objectives of the building height standard are satisfied notwithstanding the non-compliance. Each of the submissions put forward by the Applicant in support of such a claim are commented on the table below.

6. However, before considering such matters it is important to clarify that the requirement in clause 4.6(4)(a)(i) is that the consent authority be satisfied that the *written request* has adequately addressed the matters at clause 4.6(3). Statements or arguments in other documents forming part of the DA such as the SEE cannot be invoked or deferred to. Rather, the legislation provides that such matters must be established in the written statement and not in those other documents. Accordingly, where matters such as view analysis are referenced as having been considered in other documents, such matters are not able to be considered as having been adequately addressed by the written statement pursuant to clause 4.6(4)(a)(i).

Reasoning at section 3 of the Clause 4.6 Variation Request	**Comment**
The proposal presents as a two storey dwelling when viewed from the adjoining properties. The additions are located over the rear of the existing dwelling and will be predominantly obscured from the street as the site is a battle axe allotment. This is compatible with the existing locality and the desired future character. The proposal results in a ridge height of RL32.5 with the adjoining eastern property having a roof height of RL33.74 to the first floor ridge and RL32.34 to the ground floor ridge. The proposed height is appropriate for the scale of the surrounding locality. The proposal complies with objective (a).	The Clause 4.6 Variation Request does not provide evidence to support the assertions made. Namely the Clause 4.6 Variation Request does not: 1. demonstrate that the proposed development will present as a two-storey dwelling when viewed from adjoining properties. 2. provide evidence as to how the dwelling will sit in the local context. In relation to the latter, the Clause 4.6 Variation Request has not considered the following matters: 1. topography - in the locality the topography falls significantly to both the south and west meaning the property to the east sits substantially higher in the topography and a comparable ridge height would be inappropriate and inconsistent with the height plane of the headland. In this regard, there is no utility in

Reasoning at section 3 of the Clause 4.6 Variation Request	Comment
	comparing the ridge height RL of the proposed development with that of the site's eastern neighbour. 2. elevated position of the Proposed Development - the elevated position of the Proposed Development on a highly visible headland with views toward the site from numerous prominent public vantage points. 3. locality - that the locality and surrounding properties are characterised by dwellings on large lots containing significant soft landscaping and the existing site already presents a vastly more imposing built form than that which is observed at surrounding sites. Given these matters, the Clause 4.6 Variation Request does not establish consistency with objective (a).
Shadow diagrams have been prepared and submitted with the application. The proposed additions do not result in any significant overshadowing. The proposed additions provide for an appropriate visual outcome. The proposal will not disrupt existing views from the surrounding properties. A View Analysis has been prepared and included in the Statement of Environmental Effects. The proposal achieves objective (b).	The shadow diagrams prepared to accompany the application do not show the extent of existing shadows, additional shadows or shadows derived from the exceedance of the height limit. As such the shadow diagrams do not provide information sufficient to establish consistency with objective (b). Similarly, the Clause 4.6 Variation Request states that *"the proposed additions provide for an appropriate visual outcome*", but does not provide any evidence or justification for such a statement. The assumption that there the proposal will not disrupt existing views from surrounding properties is incorrect. No detailed view analysis has been carried out to support these statements. We note that a high-level desktop consideration of views in the SEE has been provided, however the assumptions within that analysis are incorrect. Given these matters, the Clause 4.6 Variation Request does not establish consistency with objective (b).
The proposed additions will not be prominent when viewed from the coast or bushland areas. The proposal complies with objective (c)	There is no evidence provided to support this statement, such as photomontages from public vantage points. Our clients remain concerned that the Proposed Development will present as an overdevelopment when viewed in the context of surrounding built form and this would further be exacerbated by the proposed exceedance of the height limit. The Clause 4.6 Variation Request does not establish consistency with objective (c).

Reasoning at section 3 of the Clause 4.6 Variation Request	Comment
The site is a battle axe allotment and the development will be predominantly obscured from the public view. Notwithstanding, the proposal provides a height that is comparable with the surrounding development. The proposal complies with objective (d).	There is no evidence to suggest that the development will be obscured from public view. The Clause 4.6 Variation Request does not consider that the site is located on a headland which is highly visible from the public domain. The proposed development is not consistent with the height of surrounding development. The Clause 4.6 Variation Request provides a numerical comparison only to the adjoining site located up the hill at 12 Taylor Street (a site which is highly visible from surrounding public areas due to its height). The topography of the locality slopes significantly to both the south and west so it is not logical to point to consistency with ridge lines on a site that it up the hill from the subject Site as support for a non-compliant height at the subject Site.

7. In our view, the Clause 4.6 Variation Request cannot be said to have established the first opinion of satisfaction, in clause 4.6(4)(a)(i).

Sufficient environmental planning grounds

8. The second opinion of satisfaction under clause 4.6 is that the written request seeks to justify the contravention by demonstrating that that there are sufficient environmental planning grounds to justify contravening the development standard (per clause 4.6(3)(b)). As above, there is a subsequent requirement that the consent authority be satisfied that the written request has adequately addressed this matter (per clause 4.6(4)(a)(i)). The relevant state of satisfaction was addressed by Justice Payne in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, stating that *"[p]roperly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3)"*. With these comments it is no longer enough for a consent authority to be satisfied only that the written request has addressed the matters in clause 4.6(3), the consent authority must itself be satisfied of those matters. This provides the consent authority greater scope to refuse a development application that is accompanied by a written request made pursuant to clause 4.6.

9. In *Initial Action*, Chief Judge Preston provided the following guidance with respect to the relevant considerations under clause 4.6(3)(b) and how these should be correctly applied in a written request:

> *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
>
> *The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning*

grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

10. In relation to the environmental planning grounds put forward by the Clause 4.6 Variation Request, we note the following:

    a. **topography**: the primary justification is that the site is constrained by its topography. The Clause 4.6 Variation Request does not suggest that the site is unique in any way, only that it is sloped, and the steepness of the slope justifies contravening the standard. In our view, it is not sufficient for an applicant to suggest they are entitled to contravene a development standard simply because a site is sloped. Such an approach was criticised by Justice Moore in *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191 on grounds that were subsequently applied by the Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130. Further, if Council were minded to accept that the site's topography as an environmental planning ground which warrants the contravening the development standard in this instance, that may undermine the development standard itself in the locality where sites are inevitably "sloped". This is particularly the Clause 4.6 Variation Request does not suggest the site is unique, or consider whether a more skilful architectural design could achieve a compliant design with some regard for the impacts of the noncompliance.

    b. **amenity**: the Applicant points to an alleged absence of amenity impacts as an environmental planning ground to support the contravention of the standard. In this regard we note:

        i. the Clause 4.6 Variation Request incorrectly states that there are *"no unreasonable impacts upon the amenity of adjoining properties"*. The contravention of the development standard will result in direct and devastating view loss to multiple surrounding properties. This view loss is addressed further in a letter of objection prepared by Mr Jeremy Swan from the Planning Hub on behalf of our clients. In any event, we note that the comments made about views in the Clause 4.6 Variation Request are made in the absence of any meaningful view analysis and such statements are unsubstantiated on the face of the Clause 4.6 Variation Request and within the DA documentation.

        ii. no information has been provided in the Clause 4.6 Variation Request (or the DA) that could support statements made with respect to the absence of overshadowing impacts. The shadow diagrams do not show the extent of overshadowing derived from the contravention.

    In our view, the contravention will give rise to significant amenity impacts. In any event the Land and Environment Court has, on a number of occasions, cautioned against environmental planning ground which rely solely on the absence of impacts in seeking to justify a contravention of a development standard (see *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Gergely & Pinter v Woollahra Municipal Council* (1984) 52 LGRA 400 at 411-412; *Hooker Corporation Pty Ltd v Hornsby Shire Council* (1986) 130 LGERA 438 at 441; *Winten Property*

Group Ltd v North Sydney Council (2001) 130 LGERA 79 at 89; and *Memel Holdings Pty Ltd v Pittwater Council* [2001] NSWLEC 240 (17 October 2001) at [102]).

c. **streetscape**: the Clause 4.6 Variation Request also suggests that the area of noncompliance is not prominent in the streetscape. This suggestion ignores the numerous public vantage points with views toward the subject site given its elevated position on the headland and the proposed addition of a third storey. There has been no analysis of the visual impact through the use of photomontages or plans showing the proposed design in context as viewed from the public domain (which is beyond the street frontage).

d. **design**: the Clause 4.6 Variation Request also asserts that the *"the proposal will provide for the good design and amenity of the built environment"*. A "*good design*" would generally be accepted as one which balances or enhances the residential amenity of the site in a way that minimises impacts on surrounding properties and complies with the relevant development standards, in circumstances where there is no site-specific environmental planning justification for contravening the standard. The Clause 4.6 Variation Request does not seek to justify why the proposed development is considered to be a *"good design"*.

11. For the reasons set out above, Clause 4.6 Variation Request has not established that there are sufficient environmental planning grounds to justify contravening the development standard.

<u>Public interest</u>

12. The final matter of satisfaction that will be considered in this submission, requires that the consent authority must be satisfied *"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"*.

13. It has been established above that the proposed development is not consistent with the objectives of the building height standard.

14. In relation to the objectives of the zone, we note the objectives of the R2 – Low Density Residential Zone are as follows:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

15. The Clause 4.6 Variation Request states that objective 2 and 3 are not relevant and briefly describes compliance with objective 1. In our view, objective 3 is relevant and the proposed development fails to ensure that "*low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah*".

16. The proposed development represents an overdevelopment of the site which, by extending beyond the height plane, will unreasonably alter the built form of headland, upon which buildings currently follow the natural topography of the land. The Proposed Development does not observe this and the DA does not address this matter. Accordingly, the DA has not demonstrated harmony with the natural environment of Warringah.

17. Overall, the proposed development is not consistent with the objectives of the particular standard and the objectives for development within the zone and is not in the public interest.

View loss

18. View loss resulting from the proposed development and the consideration of this view loss against the planning principle set out by Roseth SC in *Tenacity Consulting v Waringah* [2004] NSWLEC 140 (***Tenacity***) is considered in the submission prepared by Mr Jeremy Swan from the Planning Hub.

19. In support of Mr Jeremy Swan's submission, we note that the development application is not accompanied by any meaningful view analysis. The view analysis undertaken by applicant is insufficient given the following issues:

    a. **it contains statements that cannot be supported**: the Applicant submits that the Proposed Development will not obscure any views from our clients' site or those of their neighbours. This is not correct.

    b. **it lacks evidence**: the Applicant has not provided photos, photomontages, or plans to substantiate claims regarding the absence of view loss. We understand that our clients have provided photos and plans to Council in a previous submission which demonstrate the extent of view impacts. This analysis demonstrates that the Proposed Development does not attempt to 'view share', and instead causes devastating view loss for our clients.

    c. **it is inconsistent with *Tenacity***: the view analysis is not consistent with the *Tenacity* planning principle and, if accepted, will lead the assessing officer to be misled and to incorrectly conclude that the view impacts on 13 Pitt Road, North Curl Curl are not as devastating as they will be. At a minimum, our clients press that Council require a view analysis from the Applicant, and to verify the findings by inspecting the affected sites once height poles are erected. Our clients are agreeable to Council attending their home for a site inspection at a convenient time.

14. Furthermore, there are numerous non-compliances with the Council's controls that contribute to the view loss:

    a. non-compliance with the wall height control in chapter B1 of the Warringah Development Control Plan (the **DCP**) (the SEE states that this control is addressed in the Clause 4.6 Variation Request, however, no such consideration or justification is provided).

    b. non-compliance with the side boundary envelope controls at chapter B3 of the DCP.

    c. non-compliance with the rear boundary setback controls at chapter B9 of the DCP.

    d. non-compliance with the landscaping controls in chapter D1 of the DCP.

    e. non-compliance with the view sharing controls in chapter D7 of the DCP.

15. Such non-compliances cannot be supported on the merits given the amenity impacts on our clients. The confluence of these non-compliances indicate that the Proposed Development is an overdevelopment of the Site. While we acknowledge that the non-compliance regarding landscaping is not altered by the Proposed Development, we note that increasing the scale of the built form at the Site with no consequential improvement for landscaping is contrary to the objectives of the chapter D1 of the DCP and the objectives of the R2 zone.

16. Given the above, it is considered that the overall view loss impacts from the proposed development are devastating and unreasonable.

Next steps

17. We kindly request that the matters raised in this submission be considered by Council's Assessing Officer and that the Assessing Officer contact the writer to discuss Council's position.

18. In the event that additional information is requested from the Applicant, we respectfully request that we are notified and our clients are provided the opportunity to make further submissions.

19. Should the DA be referred to a panel or Council meeting we respectfully request that:

    a. a copy of this submission, and all other submissions made by or on behalf of our clients, are provided to the relevant decision makers; and

    b. we are notified and provided the opportunity to make verbal submissions.

20. Please contact the writer if you have any questions about this letter, or require further information.

Yours faithfully,

Per Alyce Kliese
Partner
for **SHAW REYNOLDS LAWYERS**

James Kingston
Associate Solicitor

[redacted]

[redacted]