



12th July 2021

The General Manager
Northern Beaches Council
council@northernbeaches.nsw.gov.au

Attn: Gareth David

Dear Gareth,

Development Application No: DA2021/0317 for Construction of a dwelling house at 141 Riverview Road AVALON BEACH.

We refer to our recent discussions with Council on 7th July 2021 regarding the above development application. In response to those discussions, further revisions to the plans and supporting documentation has been made to address the matters raised at the meeting. Please find attached further revised drawings dated 12/07/2021 that we seek to have substituted as part of the development application (DA2021/0317).

In summary, the amendments include the following:

Northern side envelope and setback

- The northern elevation of the proposed dwelling house has been modified by a reduction in the upper and ground storey floor plan. This has resulted in the proposed building being generally compliant with the building envelope on the northern side. Minor encroachments relate to the eaves of the upper storey bedroom that project beyond the envelope.
- A slight increase to the roof area protruding above the 8.5m height development standard however compliant with the maximum 10 metre height standard. We submit that the proposed dwelling house complies fully with the 'Height of Building' standard permitted under clause 4.3(2D) of the Pittwater Local Environmental Plan 2014 (LEP 2014). The revised plans represent a *minor* portion of the total roof area (4.68% of the total roof area) at a height greater than 8.5m but less than the 10m maximum building height standard permitted. Accordingly, there is no requirement in the (revised) plans to seek a variation request pursuant to clause 4.6 of the LEP 2014 as the proposal does not seek to vary the height of building development standard.
- Increased setback from the north side boundary
- A further increase to the landscape area by 10m².

Landscape Area

Due to the above revision, the landscaped area is now increased to 56.5% of the site area (previously 55%). The landscaped area calculation includes the under-croft areas beneath the front walkway and carport which are elevated above the ground. This is consistent with Pittwater DCP C1.1, where it specifies that the following soil depths are required to be counted as landscaping:

- 300mm for lawn
- 600mm for shrubs
- 1metre for trees

Note that the under-croft areas beneath the dwelling house are not included as those areas are enclosed within wall structures.

Carport consistency with approved DA

As previously advised, there are no modifications proposed to the approved carport design. The carport will be built in accordance with the terms and conditions of development consent DA2019/1149. The plans have been modified to reflect the finished RL's and design of the approved stamped plans under DA2019/1149.

External colours

The lightweight wall colour "white" (as per the initial submission) has been replaced with "Mid Grey", consistent with the Pittwater DCP D1.5. Streetscape and rear distant view showing the proposed colours are indicated on page 20 of the revised plans.

Arborist Report updates

As discussed, the number of trees proposed to be removed based on the design revisions are consistent with the recommendations of the Arborist report. However as requested, the Arborist report will be updated to reflect the reduction in proposed tree removal on the site. The updated Arborist report is currently being prepared and will be submitted to Council under separate cover.

BDAR Report updates

As requested, the BDAR report will be updated to align with the revised dwelling footprint. The updated BDAR report is currently being prepared and will be submitted to Council under separate cover.

Consistency with character of the locality

Figure 1 below provides a visual assessment of the proposed dwelling house as viewed from Riverview Road. It is the qualified opinion of the author that the visual impact of the development upon the streetscape is negligible due to the natural topography and the adopted design. In fact, the view of the proposed development from Riverview Road will be dominated by the retained tree canopy, and an almost uninterrupted view of the Pittwater and the hill scape on the western horizon.

Figure 1 – Perspective from Riverview Road

Council has raised concerns that the proposed dwelling house includes minor variations to the setback, landscaped area and building envelope provisions of the Pittwater DCP and consequently results in a 'built form' that is not in keeping with the character of development in the locality. On the issue of strict application of the provisions of the Pittwater DCP, we have previously expressed a position regarding amendments made to the Environmental Planning and Assessment Act 1979 (the Act), which largely changed the key purpose of development control plans (DCP), that came into effect on 1 March 2013. The principal purpose of a DCP is to provide '*guidance*' and the provisions of a DCP are expressly said not to be '*statutory requirements*'.

Where the proposed development does not comply with the provisions of a DCP, a consent authority will be obliged to 'be flexible in applying those provisions' and to 'allow reasonable alternative solutions' that achieve the objectives of those standards. This means that a consent authority cannot apply a DCP rigidly and is required by the Act to allow reasonable alternative solutions that still achieve the desired character for the relevant local government area.

The locality is characterised by a variety of built form. Several buildings including garages are constructed at or near the frontages to Riverview Road particularly on the lower side of the road. The setback and design of the proposed dwelling will result in a built form that is far less obtrusive on the streetscape to other developments in the immediate locality. The minor variations detailed above are inconsequential regarding the resultant built form. As such, the proposed dwelling house is in no way 'out of character' with the character of the locality.

The issue of desired future character and what this means for a development application was considered in detail by the Land and Environment Court of NSW in recent decisions made in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 and *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 (SJD).

Chief Justice Preston explicitly found that, in determining the desired future character, matters other than the development standard needed to be considered. His Honour noted that other provisions of the local environmental plan and other approved development that contravenes the development standard are both relevant to determining desired future character. His Honour disagreed with all of Council's grounds of appeal in relation to desired future character. Importantly, His Honour noted that Councils cannot define the future character that is referred to in a LEP by doing so in a DCP unless the LEP expressly refers to the DCP in the definition. Therefore, it is open to a developer to identify the desired future character considering a range of factors, including other approved development.

More recently, in May 2021, in the matter of *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021], Commissioner O'Neill was required to determine an appeal particularly on the issue of whether a proposed development was compatible with the desired future character of the area in terms of building height and roof form and will produce a cohesive streetscape.

In upholding the appeal, Commissioner O'Neill held at [57]:

"The desired future character of the locality can be evaluated by reference to matters other than the development standards that determine the building envelope for the site, including the existing development that forms the built context of the site (Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115 (SJD DB2) at [54]). The desired future character of an area is not determined and fixed by the applicable development standards for height and FSR, because they do not, alone, fix the realised building envelope for a site. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality (SJD DB2 at [62]-[63]). Development standards that determine building envelopes can only contribute to shaping the character of the locality (SJD DB2 at [53]-[54] and [59]-[60])."

In council's consideration of DA2021/0317 the matters reached by the court in the above decisions ought to be given weight. Clearly, the desired future character has not been defined in the LEP 2014 itself.

Recent case law shows that 'desired future character' is determined by a range of factors including the LEP and the approved buildings of neighbouring a development. The proposed development complies with the relevant development standards contained in the LEP 2014. Further, provisions contained within the DCP cannot be used as a carte blanche for claiming that a development is

inconsistent with the desired future character of the neighbourhood. Council should consider the surrounding site context to consider desired future character and can assume that not all future development will comply with development standards and/or DCP provisions. The proposed development in our respectful opinion will result in a built form that is in keeping with the character of the locality. We note that the Department of Planning, Industry and Environment has developed a draft local character clause which is proposed to be included in the Standard Instrument Local Environmental Plan. The clause will allow councils to adopt a map overlay which identifies the boundaries of a local character area and requires councils to consider local character statements when addressing development applications. The local character statement will address future desired character. This standard clause was on exhibition from late 2020 until January 2021 but is not yet in force.

In the absence of the adoption of the character clause under the provisions of the LEP 2014, the principles applied in the above decisions of the Court are relevant in the determination of 'character'.

Please do not hesitate to contact the undersigned on **0432 678 268** should you require any further assistance in this matter.

Yours faithfully,

Peter Fryar

BTP(UNSW), CERT T&CP(Ord4), MPIA

A handwritten signature in black ink, appearing to read 'Peter Fryar', with a large, stylized loop at the bottom.

Director,

KEY URBAN PLANNING

Attachments:

File 210709-DA Design Development-Issue09, dated 09/07/21