

## **STATEMENT OF ENVIRONMENTAL EFFECTS**

### **DEVELOPMENT APPLICATION FOR USE OF UNAUTHORISED WORKS PLUS PROPOSED DECK UNDER THE EXISTING STRUCTURE**

**34 ELANORA ROAD  
ELANORA HEIGHTS**

**NOVEMBER 2022**



# Planning report

Submission to  
**NORTHERN BEACHES COUNCIL**

**DEVELOPMENT APPLICATION FOR USE OF UNAUTHORISED  
WORKS PLUS PROPOSED DECK UNDER THE EXISTING  
STRUCTURE**

**34 ELANORA ROAD ELANORA HEIGHTS**

Prepared on behalf of  
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November 2022

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This statement has been prepared in consideration of the Expert Witness Code of Conduct in the Uniform Civil Procedure Rules and the provisions relating to expert evidence. The opinions in the statement represent the professional opinions of the authors, based on an assessment of the facts and circumstances as have been cited in the document.



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## **1.0 INTRODUCTION**

### **1.1 Status and Purpose of Document**

This Statement of environmental effects relates to an application made to Northern Beaches Council (the 'Council') in respect of the carrying out, without the prior consent of Council, of certain alterations and additions to an existing dwelling house on the land known as No 34 Elanora Road, Elanora Heights (the 'property'), such alterations and additions including extension of the roof, replaced exiting steel column, and enclosed existing open balcony (jointly and severally, the 'building work').

The building work was carried out on the eastern elevation of the premises.

As Council is aware, an application for a building information certificate (the 'BIC application' BC2022/0138) has also been made to Council in respect of the unlawful works.

The DA relates to, and seeks to approval to use and retain, the building work which was carried out by the owners of the property in the honest but quite mistaken belief that the work did not require any approval or consent. The DA also relates to a proposed deck (at ground level) under the existing new room.

This report has been prepared based on instructions provided directly by our clients [refer section 1.2 ('Our Clients'), below] and addresses the planning impacts of the building work and any environmental impact that has occurred and may occur as a result of the carrying out of the work.

## 1.2 Our Clients

Our clients' details are as follows:

Name	Address
Paul and Natalie Miller	34 Elanora Road Elanora Heights NSW 2108

## 2.0 PROPERTY LOCATION AND DESCRIPTION

### 2.1 Location and Description

The property, the area of which is approximately 905.6 square metres, is known as No 34 Elanora Road Elanora Heights and is legally described as Lot 88 in Deposited Plan 13152.

The property is situated on the southern side of Elanora Road, north of the Wakehurst Parkway.

**Annexure 1** provides a locality plan of the site.

**Annexures 2** and **3** respectively, provide cadastral detail and an aerial photograph of the property.

The immediate surrounding area comprises primarily low to medium density residential development in the form of one or two storey dwelling houses.

### 2.2 Building Work

The building work carried out on the property without the prior approval of Council comprises the carrying out of certain alterations and additions to the existing dwelling house on the property.

This Development application is seeking consent to 'use' the completed unauthorised works plus gain consent to a proposed deck at ground level.

**Annexure 4** provides a photographic palette including photos of the site and work.

A set of DA master plans has been prepared by 'Archaholics Designs' and these plans accompany the DA under separate cover.



Other documents also accompany the DA under separate cover, including the following:

- a survey plan showing detail and levels prepared by Byrne and Associates Surveyors;
- a geotechnical assessment report prepared by White Geotechnical Group;
- a bushfire assessment report prepared by Fire Protection Association Australia;
- a structural certificate prepared by Civil Structural Engineering Design Services Pty Ltd;
- a biodiversity assessment report prepared by Aquila Ecological Surveys; and
- this statement of environmental effects prepared by Turnbull Planning International Pty Limited.

### **3.0 STATUTORY PLANNING CONTROLS**

#### **3.1 Relevantly Applicable Legislation**

- *Environmental Planning and Assessment Act 1979* ('EPAA');
- *Environmental Planning and Assessment Regulation 2000* ('EPAR');
- *Pittwater Local Environmental Plan 2014* ('PLEP'); and
- *Pittwater 21 Development Control Plan 2014* ('PDCP').

#### **3.2 Pittwater Local Environmental Plan 2014**

Pittwater Local Environmental Plan 2014 (PLEP) is the relevantly applicable local environmental plan.

The aim of PLEP is, among other things, to promote economically, environmentally and socially sustainable development in the former Pittwater local government area (now part of the Northern Beaches local government area) and to ensure that development is consistent with the desired character of Pittwater's localities.



### 3.2.1 Zoning

The site is zoned C4 'Environmental Living' under the provisions of PLEP 2014.

**Annexure 5** provides a land zoning map extract from the t PLEP 2014.

A reference to an Environment Protection zone E1, E2, E3 or E4 within a Land Zoning Map should be taken to be a reference to a Conservation zone C1, C2, C3 or C4. For further information please see Standard Instrument (Local Environmental Plans) Amendment (Land Use Zones) Order 2021.

### 3.2.2 Zone Objectives

The objectives of the C4 Environmental Living zone are as follows:

#### **Objectives of 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.

In our opinion, the DA is consistent with the abovementioned zone objectives.

In particular, we submit that the building work, as carried out and the proposed ground level deck will maintain the low-density residential character of the property and won't cause any privacy or amenity impact to the adjoining properties.



### 3.2.3 Permissibility

The building work carried out on the property and the proposed ground level deck comprise development that is permissible with development consent. All of the works are ancillary to the carrying out of development for the purpose of a 'dwelling house', as relevantly defined in the Dictionary at the end of PLEP.

The definition of 'dwelling house' is as follows:

**dwelling house** means a building containing only one dwelling.

**dwelling houses** are a type of residential accommodation—see the definition of that term in this Dictionary.

In the absence of the prior consent of Council having been obtained in respect of the building work, only two mechanisms are legally available to *regularise* the state of affairs. The mechanisms are as follows:

- i. Seek and obtain a BIC in respect of the building work.
- ii. Apply for development consent for:
  - a. the prospective *use* [sic] of the building work for purposes associated with the use of the premises as a dwelling house; and
  - b. the completion of the building work associated with the proposed deck.

In some cases, a BIC will suffice in respect of unapproved building work. In other cases, both a BIC and development consent will be needed, with the issue of a BIC being a prerequisite to a grant of development consent.

We are of the opinion the best course of action is to seek a BIC in respect of the building work (which we have done BC 2022/0138) and apply for development consent for, firstly, the prospective *use* [sic] of the building work for



purposes associated with the use of the premises as a dwelling house and, secondly, to erect a deck at the ground level.

#### 3.2.4 Height of Buildings

Clause 4.3 of PLEP controls the height of buildings.

The objectives of clause 4.3 are as follows (refer clause 4.3(1), PLEP):

- To ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality.
- To ensure that buildings are compatible with the height and scale of surrounding and nearby development.
- To minimise any overshadowing of neighbouring properties.
- To allow for the reasonable sharing of views.
- To encourage buildings that are designed to respond sensitively to the natural topography.
- To minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

By virtue of PLEP Height of Buildings Map (tile HOB 015), the maximum permissible height of a building on the property is 8.5 metres.

The building work included enclosing the existing open balcony at the first level floor, and extension of the roof to the eastern side and does not increase the existing building height so that it breaches the 8.5m height control (see Sections 01 and 02). The proposed new deck at ground level also does not affect the existing building height.

In addition, the building work does not significantly increase the building bulk and scale from that which was previously approved. There will be no overshadowing impacts to neighbouring properties. Views and vistas will be preserved from neighbouring properties.



In our opinion, the building works the subject of the DA is consistent with the objectives of clause 4.3 of PLEP.

A Height of Buildings Map extract from PLEP is provided at **Annexure 6**.

### 3.2.5 Acid Sulfate Soils

The property is identified as being within 'Class 3' and 'Class 5' on the Acid Sulphate Soils Map. Clause 7.1 of PLEP relates to development on acid sulphate soils. The objective of the clause is to ensure that a development does not disturb, expose or drain acid sulphate soils and cause environmental damage.

The building work has involved the carrying out of very minor earthworks (for footings, etc). However, the works do not involve the disturbance of more than one tonne of soil. Thus, a specialist report is not required.

In addition, it is unlikely that the building work carried out has impacted upon the water table. Accordingly, an acid sulphate soils management plan (refer clause 7.1 (6), PLEP) has not been prepared in the present circumstances.

An Acid Sulphate Soils Map extract from PLEP is provided at **Annexure 7**.

### 3.2.6 Geotechnical Hazard

The site is identified as '*Geotechnical Hazard H1*' on the Geotechnical Hazard Map under the PLEP.

The objectives of this clause are to ensure that development on land susceptible to geotechnical hazards—

- (a) matches the underlying geotechnical conditions of the land, and
- (b) is restricted on unsuitable land, and
- (c) does not endanger life or property.



In our opinion, the building work is complying these objectives. A geotechnical assessment report addresses the relevant issues and for more details please refer to the geotechnical assessment report prepared by White Geotechnical, which accompanies this application.

Regarding structural issues, please refer to the structural certificate prepared by Civil Structural Engineering Design Services Pty Ltd.

A Geotechnical Hazard Map extract is provided at **Annexure 8**.

### 3.2.7 Biodiversity

The site is within a biodiversity area (refer Biodiversity Map).

Accordingly, clause 7.6 ('Biodiversity') of PLEP applies to the development proposal.

in our opinion, it is most unlikely that the building work carried out caused any significant adverse impact on existing flora and fauna nor disturbed the biodiversity structure, function and composition of the property. For more details please refer to the Biodiversity Assessment Report which accompanies this application.

A Biodiversity Map extract is provided at **Annexure 9**.

### 3.2.8 Miscellaneous

The site is not a heritage item or in a heritage conservation area.

The site is not subject to a Foreshore Building Line, is not a Coastal Risk nor subject to Flooding Hazard.

The site is within a 'Vegetation Buffer Zone' under the bushfire prone land map (refer to Bushfire Prone Land Map).



A bushfire assessment report addresses the relevant issues. For more details please refer to the report prepared by Wayne Tucker, which accompanies this application.

A Bushfire Prone Land Map extract is provided at **Annexure 10**.

### 3.3 Pittwater Development Control Plan 2014

*Pittwater 21 Development Control Plan 2014* (PDCP) applies to all land to which PLEP applies and provides more detailed provisions than PLEP for development in so much of the Northern Beaches local government area as previously comprised the former local government area of Pittwater.

PDCP applies to development on the property.

The purpose of PDCP is to provide best practice standards for developments.

At the outset, it must be stressed that development control plans contain **guideline** controls at best: see *Zhang v Canterbury City Council* (1999) 105 LGERA 18. This is enshrined in sections 3.42 and 4.15(3A) of the *Environmental Planning and Assessment Act 1979* (NSW), which are as follows:

#### **3.42 Purpose and status of development control plans**

(cf previous s 74BA)

(1) The principal purpose of a development control plan is **to provide guidance** on the following matters to the persons proposing to carry out development to which this Part applies and to the consent authority for any such development:

- (a) giving effect to the aims of any environmental planning instrument that applies to the development,
- (b) facilitating development that is permissible under any such instrument,
- (c) achieving the objectives of land zones under any such instrument.



***The provisions of a development control plan made for that purpose are not statutory requirements.***

(2) The other purpose of a development control plan is to make provisions of the kind referred to in section 3.43 (1) (b)–(e).

(3) Subsection (1) does not affect any requirement under Division 4.5 in relation to complying development. *[Our emphasis]*

#### **4.15 Evaluation**

(cf previous s 79C)

... ..

(3A) **Development control plans** If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority:

(a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and

(b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be ***flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development***, and

(c) may consider those provisions only in connection with the assessment of that development application.

In this subsection, ***standards*** include performance criteria. *[Our emphasis]*

Thus, any and all purported ‘requirements’ or ‘controls’ in PDCP are only **guidelines**. They are *not* statutory requirements. In addition, they are not ‘development standards’ within the meaning of the EPAA.

Now, having said that, the controls contained in PDCP, to the extent to which they are relevantly applicable to



the building work the subject of the DA, will now be considered and discussed.

### 3.3.1 Locality

The property is located in the Elanora Heights locality.

The building work carried out and proposed deck are consistent with the desired low-density residential nature of the area, do not increase the height of the existing premises, and do not significantly increase the building bulk and scale from that which was previously approved. The changes are modest. There will be no incidental overshadowing impacts to neighbouring properties. Views and vistas will be preserved from neighbouring properties. In addition, the natural environment has been preserved.

### 3.3.2 Hazard Controls

The property is not identified under the Estuarine Hazard Map and Flood Prone Land Area Map under the PDCP.

The building work the subject of the DA is within a bushfire prone area and landslip hazard area.

For additional information please refer to the Geotechnical Assessment Report and Bushfire Assessment Report which accompany this application.

### 3.3.3 General

In our opinion, the existing building work the subject of the DA and the proposed ground level deck, achieve such of the key objectives of PDCP as are of relevance to the nature and scope of the work carried out and to be carried out.

The DA relates solely to the use of the unapproved (and as yet uncompleted) extension of the existing dwelling house and the proposed deck.



The building work carried out does not affect the reasonable sharing of views by the neighbours and does not impact upon the visual or acoustic privacy of the neighbours.

As a consequence of the minor impacts of the building work on the amenity of the neighbourhood, we are of the opinion that a more detailed assessment relating to PDCP is unnecessary and therefore has not been undertaken.

#### 3.3.4 Building Colours and Materials

The unauthorised building works include extension of the roof, replacing an existing steel column, and enclosing the existing open balcony. All of these works are matched to the existing dwelling house colours and materials. The colours accord with the preferences referred to in the PDCP.

#### 3.3.5 Building Line

Per the D5.5 and 5.6 of PDCP, for land zoned C4, the side setback control is 2.5 metres to at least one side; 1.0 metre for other side and the front setback control is 6.5 metres, with the rear setback control also being 6.5 metres. The building footprint is not altered in this case and setbacks are not affected.

#### 3.3.6 Landscaped Area

The site is listed as Area 1 under the Landscaped Area Map, with total landscaped area of 60% of the total site area. The development complies with this control.

The proposed ground level deck won't alter the existing landscaped area.





## 4.0 MERIT CONSIDERATIONS

### 4.1 Building Work Permissible with Consent

Under PLEP (in particular, pursuant to the land use table in Part 2 of the plan in relation to the R2 Low Density Residential zone), the building work carried out to and at the property is permissible with the development consent of the consent authority, being work that is ancillary to the carrying out of development for the purpose of a 'dwelling house' as relevantly defined in the Dictionary at the end of PLEP.

Even though consent cannot be given to the *ex post facto* **erection** of a building or carrying out of building work, once the building has been erected or the building work has been carried out, consent can still issue with respect to:

- the *prospective use* of any such building or building work; and
- the carrying out of **alterations, additions or extensions** to any or all of the building work,

notwithstanding that the prior consent of Council had not been obtained in respect of the unapproved work.

### 4.2 Structural Integrity

The consent authority needs to be satisfied that the building as built, or building work as carried out, as the case may be is structurally sound: see *Chami v Lane Cove Council* [2015] NSWLEC 1003 at [178] per Moore SC (now Moore J).

The issue of structural soundness of the building or building work, is demonstrably also a relevant planning issue in the context of any development application for the use of the building or building work. For more details, please refer to the structural certificate prepared by Civil Structural Engineering Design Services Pty Ltd.

### 4.3 Environmental Risk

In our opinion, the continued existence and completion of the building work the subject of the DA will cause



negligible impact in terms of the way the building relates to the environment in terms of privacy and visual affect.

#### 4.4 Amenity Impacts

The retention of the unapproved building work will cause no appreciable loss of amenity for the owners/occupiers of the adjoining properties (in particular, No 30 Elanora Road, Elanora Heights).

The building work carried out and the proposed deck will cause virtually no impact on, nor cause any disturbance to, other properties in the vicinity of the property.

### 5.0 CONCLUSION

The unapproved building work has minimal impact on the existing environment and the retention of the works are reasonably necessary (that is, appropriate) to provide amenity to the occupiers of the property.

We respectfully submit that in circumstances where:

- there is no doubt about the permissibility, with consent, of the building work the subject of the DA;
- there is no doubt about the structural integrity of the building work the subject of the application;
- the building work is most unlikely to have materially disturbed, exposed or drained acid sulphate soils, thereby causing environmental damage;
- it is most unlikely that the building work carried out caused any significant adverse impact on existing flora and fauna nor disturbed the biodiversity structure, function and composition of the property;
- the continued retention of the unapproved building work will not cause any appreciable loss of amenity for the owners/occupiers of adjoining properties; and
- it is more probable than not that development consent:



- would have been granted by a consent authority to the building work had such consent been sought before the work was carried out (refer the 'notional [or hypothetical] development application' concept: see *Taipan Holdings Pty Ltd v Sutherland SC* [1999] NSWLEC 276); and
- would and should be granted by a reasonable consent authority (whether a local council or the Court on appeal) properly acting within the four corners of its jurisdiction based on the merits of the development application that is separately being submitted to Council in respect of the building work,

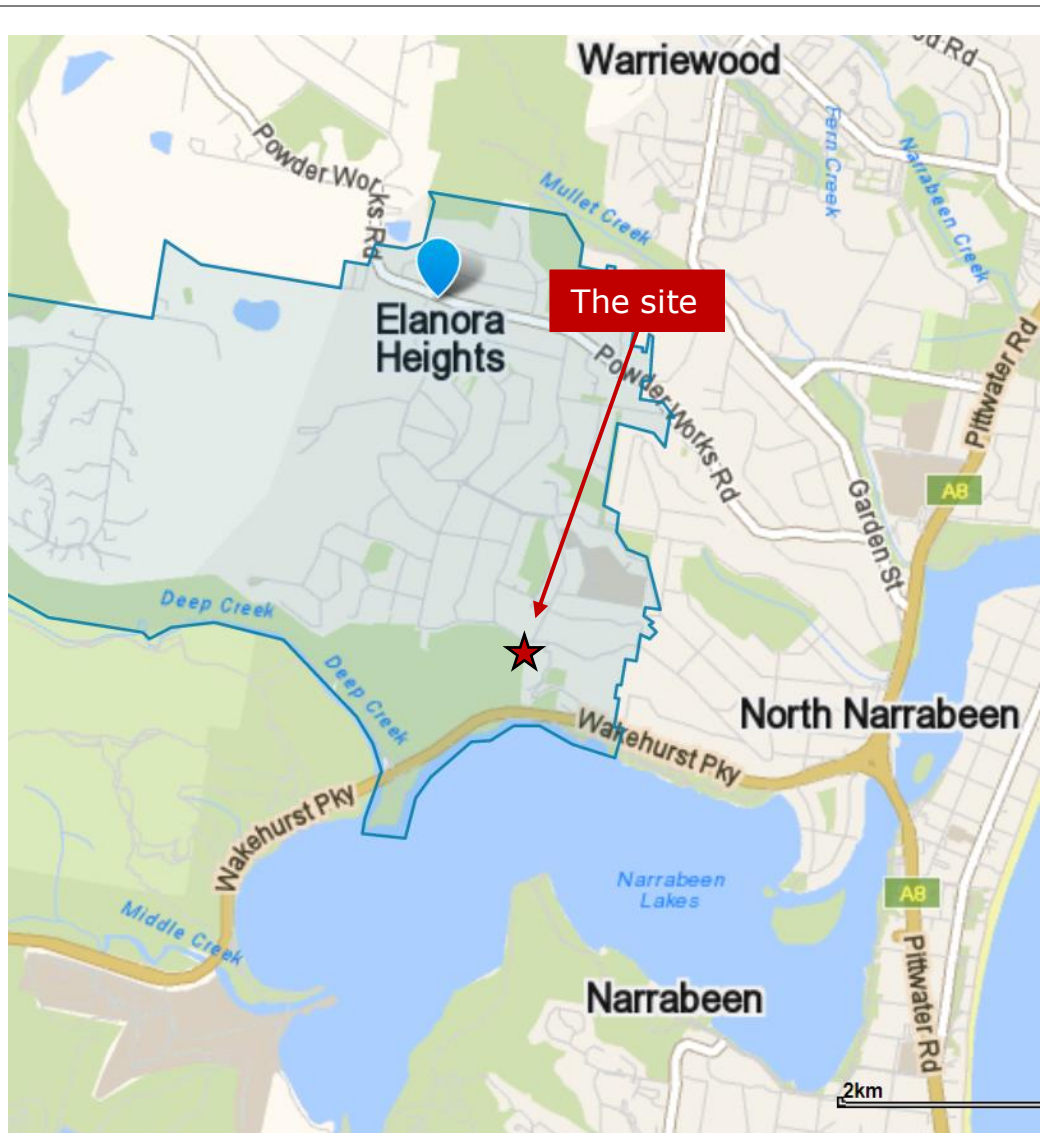
The owners of the property carried out the building work in the honest but quite mistaken belief that the work did not require any approval or consent. There was absolutely no intention on their part to contravene the law or circumvent the requirements of Council.

We have considered the relevant matters in section 4.15 of the EPAA and those identified in the various judicial authorities discussed and otherwise referred to in this report and are of the opinion that a grant of development consent in respect of the prospective use of the built alteration of the existing dwelling house and to build the deck is both lawful and appropriate in all the circumstances having due regard to the nature of the work and the various merit considerations discussed in this report.



# ANNEXURE 1

## LOCALITY PLAN (EXTRACT FROM SIX MAPS)



## LOCALITY PLAN

EXTRACT FROM SIX MAPS

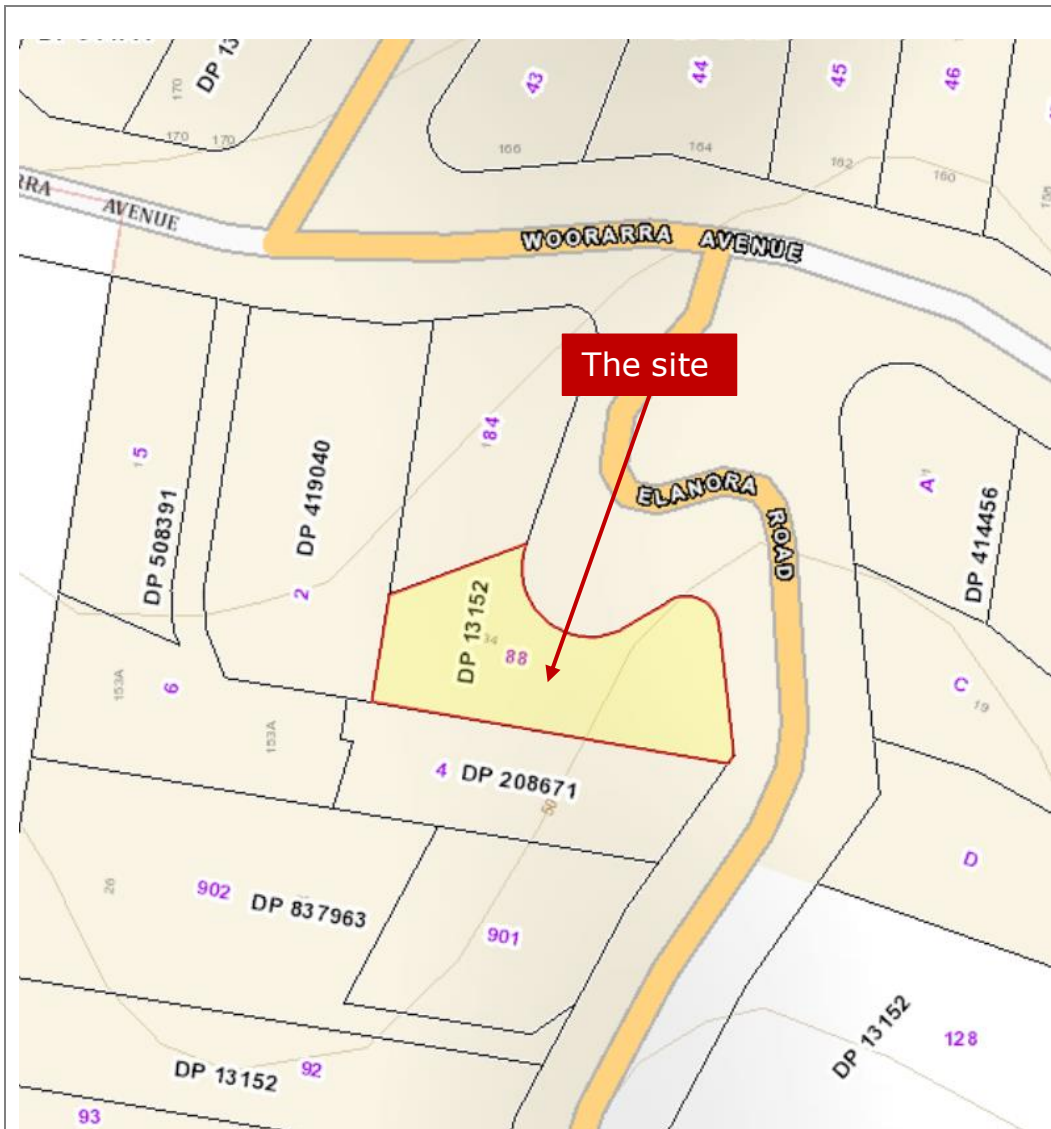


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	DRAWN: TG	34 Elanora Road Elanora Heights



## ANNEXURE 2

CADASTRAL DETAIL (EXTRACT FROM SIX MAPS)



## CADASTRAL DETAIL

EXTRACT FROM SIX MAPS



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	<p>DRAWN: TG</p>	<p>34 Elanora Road Elanora Heights</p>



## ANNEXURE 3

AERIAL PHOTOGRAPH (EXTRACT FROM SIX MAPS)





## AERIAL PHOTOGRAPH

EXTRACT FROM SIX MAPS



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	<p>DRAWN: TG</p>	<p>34 Elanora Road Elanora Heights</p>



## ANNEXURE 4

### PHOTOGRAPHIC PALETTE



**Photograph 1** – Street frontage



**Photograph 2** – Location of the proposed new deck



## ANNEXURE 5

### LAND ZONING MAP (EXTRACT FROM PLEP)



## LAND ZONING MAP

EXTRACT FROM PLEP 2014



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Annexure 5

DRAWN: TG

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## ANNEXURE 6

### HEIGHT OF BUILDINGS MAP (EXTRACT FROM PLEP)



## HEIGHT OF BUILDINGS MAP

EXTRACT FROM PLEP 2014



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Annexure 6

DRAWN: TG

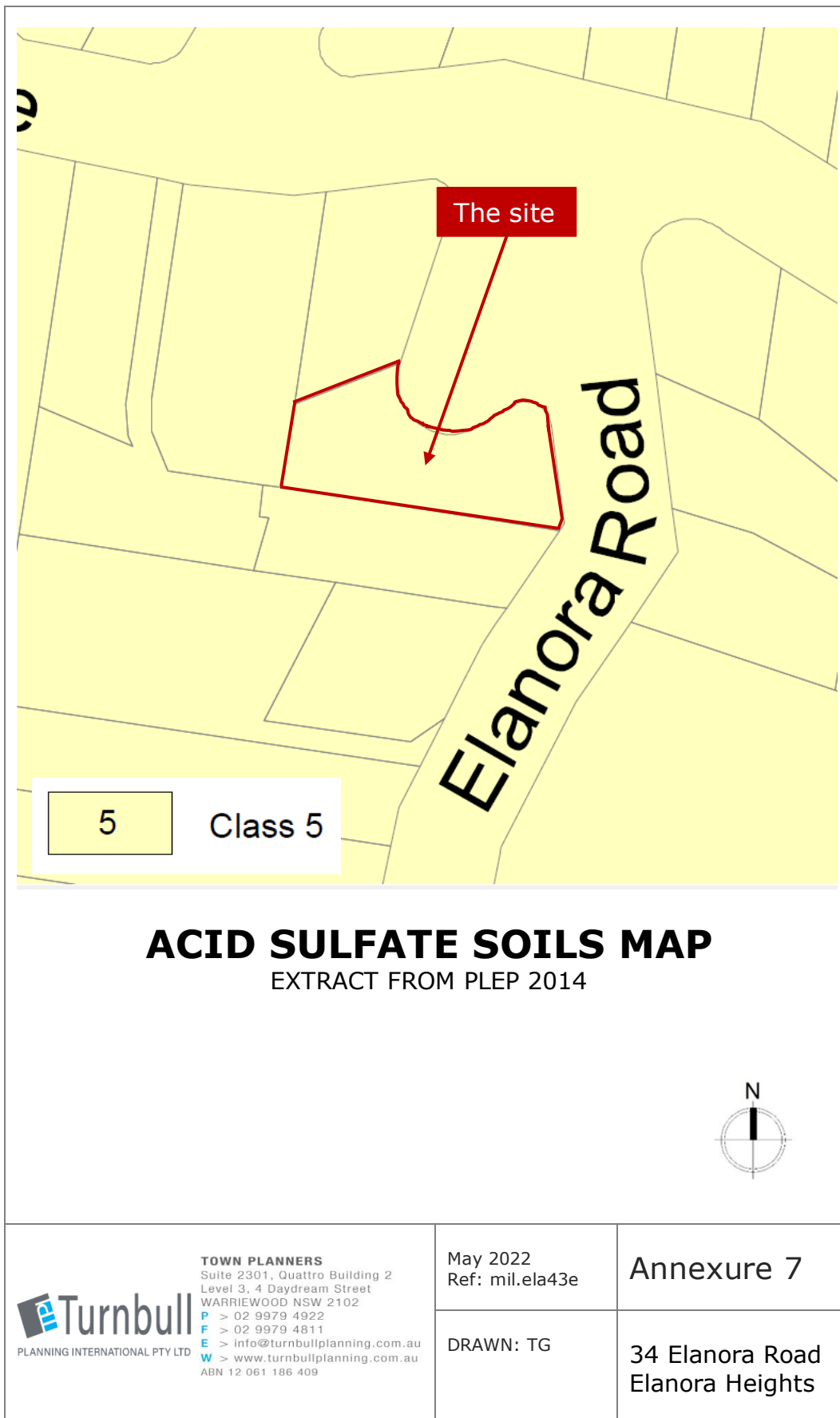
34 Elanora Road  
Elanora Heights



## ANNEXURE 7

### ACID SULFATE SOILS MAP (EXTRACT FROM PLEP)

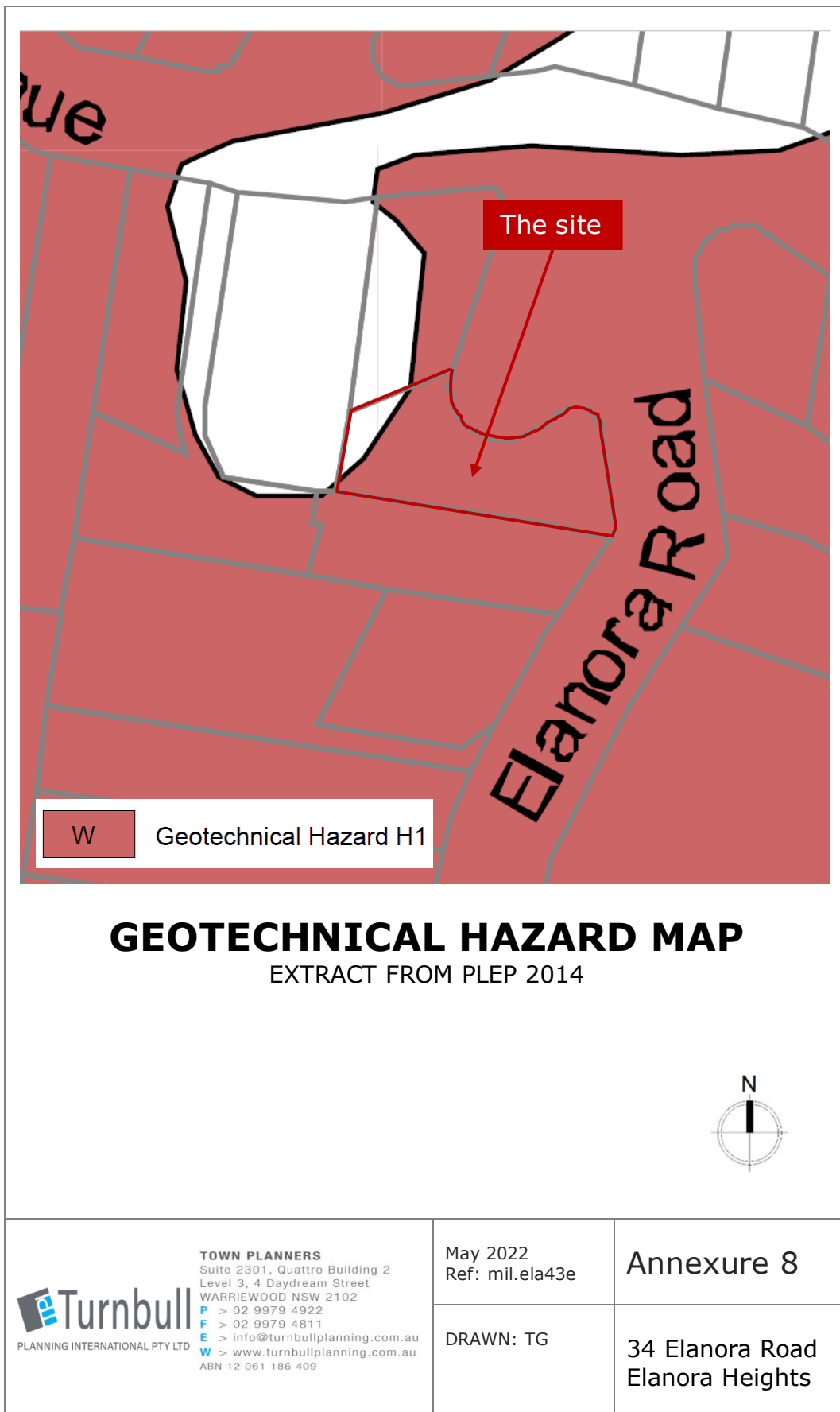






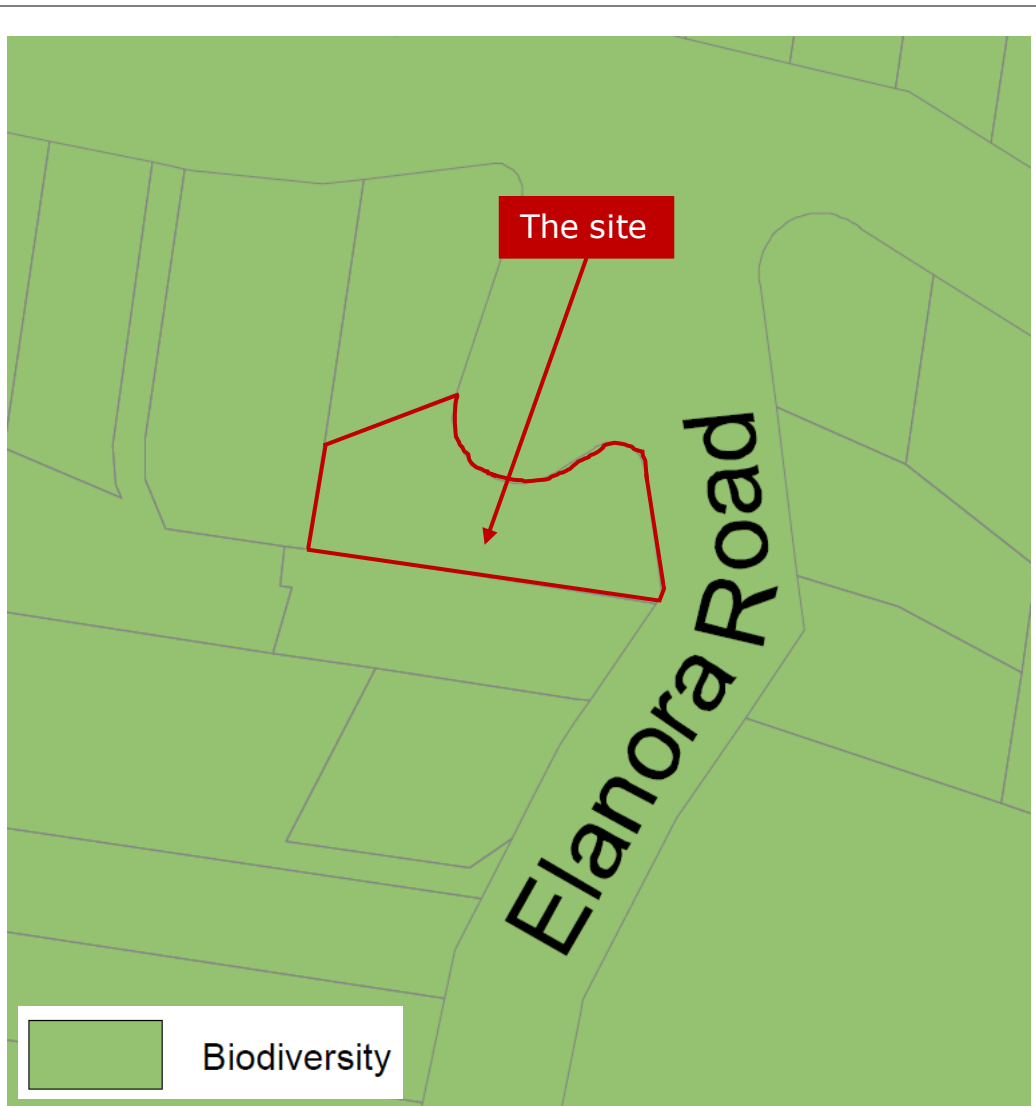
## ANNEXURE 8

### GEOTECHNICAL HAZARD MAP (EXTRACT FROM PLEP)



## ANNEXURE 9

### BIODIVERSITY MAP (EXTRACT FROM PLEP)



## BIODIVERSITY MAP

EXTRACT FROM PLEP 2014



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 Ref: mil.ela43e

Annexure 9

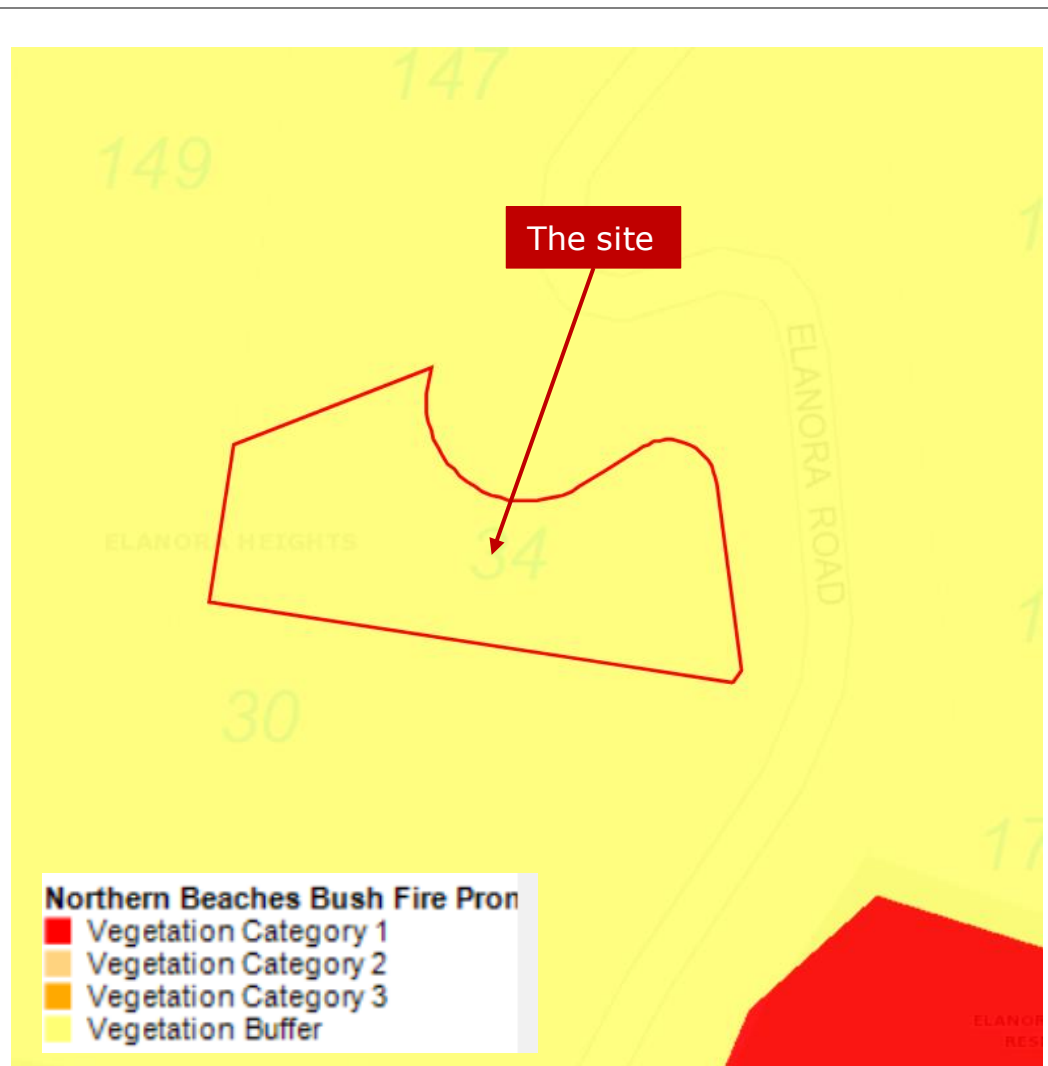
DRAWN: TG

34 Elanora Road  
 Elanora Heights



## ANNEXURE 10

BUSHFIRE PRONE LAND MAP (EXTRACT FROM NBC BUSH  
FIRE PRONE LAND MAP 2020)



## BUSHFIRE PRONE LAND MAP

EXTRACT FROM NBC BUSH FIRE PRONE LAND MAP 2020



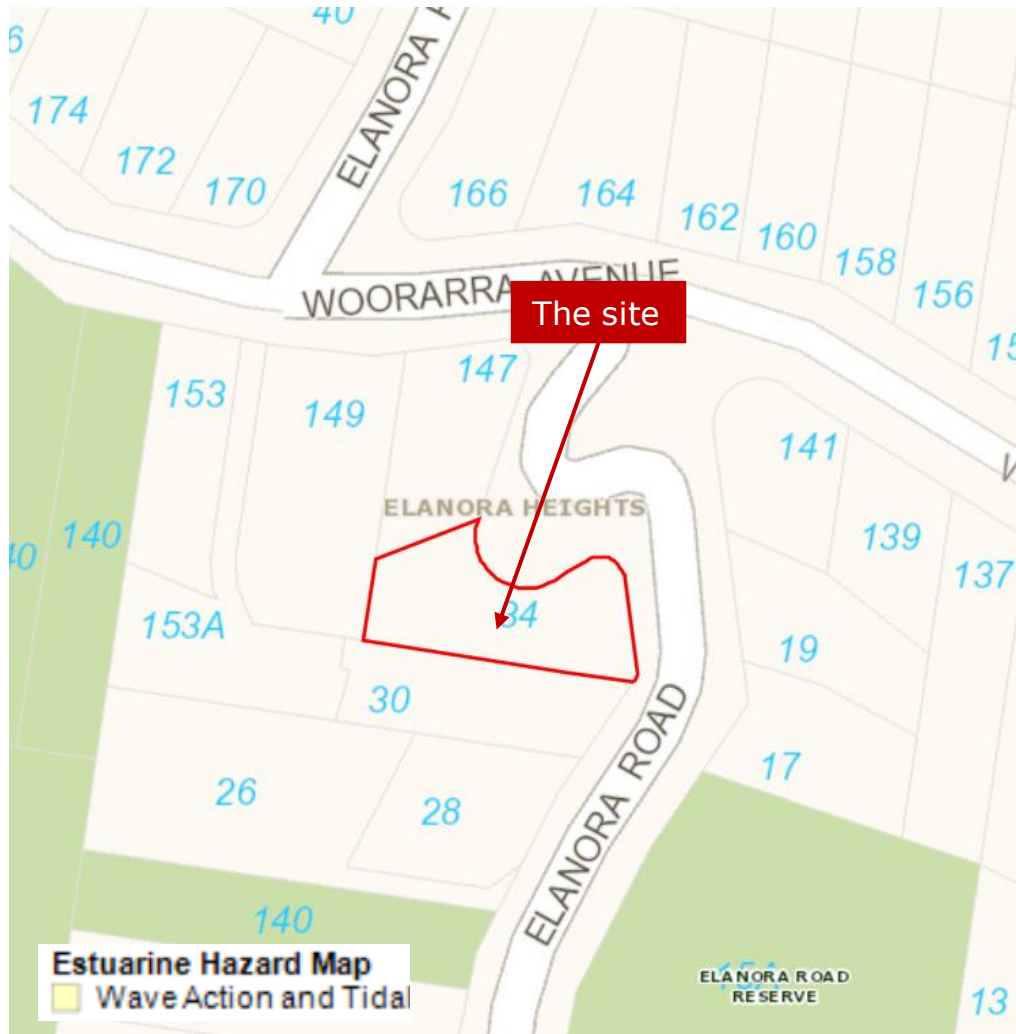
 <p><b>TOWN PLANNERS</b> Suite 2301, Quattro Building 2 Level 3, 4 Daydream Street WARRIEWOOD NSW 2102 P &gt; 02 9979 4922 F &gt; 02 9979 4811 E &gt; info@turnbullplanning.com.au W &gt; www.turnbullplanning.com.au ABN 12 061 186 409</p>	May 2022 Ref: mil.ela43e	Annexure 10
	DRAWN: TG	34 Elanora Road Elanora Heights



## ANNEXURE 11

ESTUARINE HAZARD MAP (EXTRACT FROM PDCP 2014)





## ESTUARINE HAZARD MAP

EXTRACT FROM PDCP 2014



 <p><b>TOWN PLANNERS</b>          Suite 2301, Quattro Building 2          Level 3, 4 Daydream Street          WARRIEWOOD NSW 2102  <b>P</b> &gt; 02 9979 4922  <b>F</b> &gt; 02 9979 4811  <b>E</b> &gt; info@turnbullplanning.com.au  <b>W</b> &gt; www.turnbullplanning.com.au          ABN 12 061 186 409</p>	May 2022 Ref: mil.ela43e	<b>Annexure 11</b>
	DRAWN: TG	<b>34 Elanora Road          Elanora Heights</b>



## ANNEXURE 12

LANDSCAPED AREA MAP (EXTRACT FROM PDCP 2014)

