Sent:	25/03/2020 8:04:41 PM
Subject:	Letter of Objection | Re: Building Information Certificate No. 2020/0048 and Development Application No. 2020/0211 [MCR-W.FID3783886]
Attachments:	Letter of Objection re Development Application No. 2020.0211 and Building Information Certificate Application No.2020.0048.pdf;

Dear Sirs and Madams

Please see **attached** our client's submission with respect to the following applications:

- Building Information Certificate No. BC2020/0048; and
- Development Application No. 2020/0211

Kind Regards

Elizabeth Ryan
Lawyer
T +61 2 8241 5638 | **M** +61 421 869 820
E eryan@mccullough.com.au

McCullough Robertson
Lawyers
Level 32 MLC Centre, 19 Martin Place, Sydney NSW 2000
Brisbane Sydney Melbourne Newcastle Canberra
www.mccullough.com.au

Partner Patrick Holland
Direct line 02 8241 5610
Email pholland@mccullough.com.au
Our reference PSH:174443-1

Lawyers | McCullough Robertson

25 March 2020

Louise Kerr
Director, Place and Planning
Northern Beaches Council
1 Belgrave Street
MANLY NSW 1655

Email louise.kerr@northernbeaches.nsw.gov.au;
nat.watson@northernbeaches.nsw.gov.au;
azmeena.kelly@northernbeaches.nsw.gov.au;
andrew.caponas@northernbeaches.nsw.gov.au;
adam.croft@northernbeaches.nsw.gov.au;
candy.bingham@northernbeaches.nsw.gov.au;
council@northernbeaches.nsw.gov.au

Dear Ms Kerr

Re: 82-84 Bower Street, Manly | Development Application No. 2020/0211 and Building Information Certification Application No. 2020/0048

1. We refer to the two abovementioned applications which were submitted to Council on 5 March 2020 in relation to the development of 82-84 Bower Street, Manly (**the Property**).

2. As you are aware, we act for Mr and Mrs Lavender (**our client**) who are the owners of 86 Bower Street, Manly, in relation to their concerns regarding significant breaches to the consent for Development Consent no.168/2017 (**the Consent**).

3. We note that separate to this submission, our client has also recently submitted separate objections to Council in relation to Development Application No. 2020/0211 **(DA Application)** and Building Information Certification Application No. 2020/0048 **(BIC Application).** Prior to these objections, our client also lodged an objection to the development application for the Consent when it was placed on public exhibition in 2017 [see **Annexure A**].

Background

4. We write to Council to express our client's strong objection to the approval of the DA Application and the BIC Application. In summary, these applications appear to be a continuation of the developer's attempt to strategically circumvent the proper development approval process in order to secure approval for complete demolition of the existing building and construction of a new dual occupancy under the guise of seeking approval for 'alterations and additions' to the previously existing dual occupancy.

5. Given that our client foreshadowed the events that are now playing out in their objection to Development Application No.168/2017 dated 21 August 2017 and the Consent was granted regardless, Council will no doubt appreciate that the lodgment of the DA Application and BIC Application, from our client's perspective, adds further insult to injury.

6. As you were advised in person during the meeting at our client's property on 10 January 2020 [see records of this meeting at **Annexure B** and **Annexure C**], it was clear to our client that the developer never had any intention of retaining those structures for which retrospective approval is now being sought to demolish. We refer to Part 6 of our client's letter of objection dated 21 August 2017 under the heading 'Alterations and Additions tantamount to demolition'. It was submitted on our client's behalf that it was "*both misleading and inappropriate, as a matter of planning principle to construe and environmentally assess the proposed development as being merely 'alterations and additions'*". Despite our client's objections, the Consent was granted. To our client's dismay, the development's impacts on our client's privacy were ignored. By way of reminder, the key aspects of the approved development which our client objects to are associated with:

    a. the height of the additional first floor storey, combined with the location and proximity of the rear deck (which lacks privacy screening) and which thereby permits a direct line of sight into our client's bathroom, bedroom, kitchen, living room and rear private open space areas; and

    b. the proximity of the wall along the western boundary of the Property at the ground floor and first floor levels, combined with the placement of windows and fixed louvre blades along the western boundary of the Property which are spaced too far apart, creating a further opportunity for significant overlooking into our client's property.

7. With the above concerns in mind, following the meeting held at our client's property on 10 January 2020, and in light of the Stop Works Orders issued by Council on 21 November 2019 and the amended Stop Works Order issued 19 December 2019, it was our client's expectation that a new development application for a dual occupancy development on the Property would be submitted by the developer. As the Consent was not complied with and was assessed and approved by Council under the (false) premise that the development would be for 'alterations and additions' to the existing dual occupancy, if Council was to proceed to approve the DA Application and issue a building information certificate with respect to the unauthorised works, this would set an extremely undesirable precedent for future developers to follow. This precedent encourages a piecemeal approach to securing approval for a larger development on a site over time, without the proposed development being subject to the same assessment process that it would otherwise have been if it were honestly and accurately described and presented to Council and the community.

8. While Development Application No. 2020/0211 seeks approval for the construction of only those new walls and structural components which were to be retained in accordance with the Consent, given that these structural components are an integral part of the development of the site as a whole, it is inappropriate for Development Application No. 2020/0211 to be considered and commented on in isolation.

9. Although the developer seeks to rely on the Consent to justify why approval for the DA Application ought to be granted, it is important to remember that the Consent was assessed and granted on the basis that what was proposed was "alterations and additions" to an existing building. What is now before Council is a development application that seeks to undermine that foundation and legitimise works that may not have otherwise been assessed and approved by Council if they had not already existed and were to be retained.

Application for Building Information Certificate No. 2020/0048

10. We refer to the BIC Application which relates to the unauthorised construction of walls and floors on the Property (**unauthorised works**).

11. For the following reasons our client submits that, in the circumstances, it would be completely inappropriate for Council to issue a building information certificate in respect of the unauthorised works.

12. Firstly, pursuant to section 6.25 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) it is critical to note that a building information certificate:

> "…is to be **issued by Council only if it appears that** [our emphasis]:
>
> *a) there is no matter discernible by the exercise of reasonable care and skill that would entitle the council, under the EP& Act or the Local Government Act 1993 -*
>
> *i. to order the building to be repaired, demolished, altered, added to or rebuilt, or*
>
> *ii. to take proceedings for an order or injunction requiring the building to be demolished, altered, added to or rebuilt, or*
>
> *iii. to take proceedings in relation to any encroachment by the building onto land vested in or under the control of the council, or*
>
> *b) there is such a matter but, in the circumstances, the council does not propose to make any such order or take any such proceedings."*

13. In accordance with section 6.25(3) of the EP&A Act, the issuing of the building information certificate would prevent Council:

> *(a) from making an order (or taking proceedings for the making of an order or injunction) under the EP& A or the Local Government Act 1993 requiring the building to be repaired, demolished, altered, added to or rebuilt in relation to matters existing or occurring before the date of issue of the certificate.*

14. Noting that Council has already issued a Stop Works Order pursuant to section 9.34 of the EP&A Act, we note that a 'Demolish Works Order' may also be issued by Council. Further, Council is also able to issue a penalty notice in respect of the unauthorised works pursuant to section 9.58 of the EP&A Act. With this in mind, it is clear that there certainly *are* matters discernible by the exercise of reasonable care and skill that would entitle the Council, under the EP&A Act to take action in accordance with section 6.25(1)(a) of the EP&A Act. As such, it would be inappropriate for a building information certificate to be issued by Council in these circumstances.

15. It is not in dispute that the works which are the subject of the BIC Application have either already been carried out unlawfully, or are proposed to be carried out without development consent but are yet to be undertaken. In this sense, the BIC application not only seeks retrospective approval for existing unauthorised works, but it also seeks to operate so as to enable the developer to proceed with works which have not yet been undertaken, without Council being able to take any action in respect of these works. Setting aside the fact that the DA Application has been lodged simultaneously with the BIC Application so that approval for those unauthorised works that are yet to be undertaken can be obtained, it is curious that works yet to be carried out have been included in the BIC Application. If the developer genuinely intended to no longer undertake works without development consent, why are works that have not yet been carried out included in the BIC Application?

Development Application No. 2020/0211

16. While it is accepted that multiple consents may in certain cases apply to a property, we refer to the Land and Environment Court's decision in *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 4)* [2019] NSWLEC 58, which details the key principles that apply where multiple development consents are permitted to operate on the same site. In this case, the Court made it clear that if multiple consents apply to a site, the conditions of each consent will still apply if development has been carried out pursuant to the consent. The Court notes at paragraph 76(g) of its judgment that:

"…if a holder of a planning approval acts upon the consent by carrying out the development the subject of the approval, the holder must comply with the approval and any conditions to which it is subject. Thus:

(g) "… once commenced there is no obligation to fully implement the consent provided that in undertaking part of the development authorised by the consent there has been no breach of any relevant condition of the consent."

17. With this in mind, where a condition of the Consent required certain walls and structural elements to be retained, any granting of consent for the DA Application will not make good again the developer's non-compliance with the Consent. Until the Consent is modified in accordance with section 4.55 of the EP&A Act so as to permit the demolition of these walls and structural elements, the developer remains in breach of the Consent. In summary, the developer cannot cure its non-compliance with a condition of the Consent on the basis that the works are permitted under another consent that applies to the same property.

18. Although the DA Application seeks to exclude all those elements approved under the Consent from the current application, this assumes that consent for the DA Application is inevitable and that compliance with the Consent has not been irreparably undermined by the unauthorised works undertaken. While in some cases a modification application might be legitimately submitted by an Applicant for unauthorised works in an effort to preserve a consent, in our view any modification application for the Consent submitted in respect of the unauthorised works would be unable to overcome the substantially the same test. This is because the nature of the Consent was for alterations and additions to an existing development, whereas the modification application would be effectively seeking approval for the demolition of existing development and construction of a brand new dual occupancy development.

19. In light of our opinion in relation to the above, it follows that the way forward for the developer is to submit a new development application for the entirety of the works proposed on the Property, not just those works which have been undertaken without development consent.

20. It is distressing to our client that Council and the community has been asked to consider and provide comment on only those structural works which have not been approved by the Consent, to the exclusion of all those works which are directly connected to these, but are tied to the Consent. By way of example, the close proximity and overbearing nature of the basement and ground floor wall along the western boundary which has almost been entirely reconstructed without approval is directly connected to the inappropriate siting of the fixed louvre blades along this wall and lack of privacy screening on the rear deck which will enable residents of the Property to see directly into our client's living rooms, bedroom and bathroom areas. Despite the relationship which exists between the unauthorised works which are the subject of the DA Application and the works approved under the Consent, the DA Application seeks that these be considered and assessed as though they are completely unrelated.

21. We note that the adequacy of the DA Application is also lacking. We refer to page 57 of the Statement of Environmental Effects (**SEE**) submitted with Development Application No. 2020/0211, where it is stated that the proposal meets the 'relevant objectives' of the Manly Development Control Plan 2013 (**MDCP**) with respect to its front, side and rear setbacks. The 'relevant' objectives referred to in the SEE are as follows:

    - *Objective 1) To maintain and enhance the existing streetscape.*
    - *Objective 2) To ensure and enhance local amenity by:*
        - *providing privacy*
        - *providing equitable access to light, sunshine and air movement*

- *facilitating view sharing and maintaining adequate space between buildings to limit impacts on views and vistas from private and public spaces*
- *Facilitating safe and adequate traffic conditions including levels of visibility around corner lots at the street intersection*

- *Objective 3) To allow adequate sunlight to penetrate both the private open spaces within the development site and private open spaces and windows to the living spaces of adjacent residential development*.

22. The SEE disregards the MDCP controls under Part 4.1.4.2 which relate specifically to side setbacks, including control (a) which provides that:

    a) *Setbacks between any part of a building and the side boundary must not be less than one third of the height of the adjacent external wall of the proposed building.*

23. There is no explanation which seeks to justify why having such a limited setback along the western boundary is acceptable beyond the SEE simply relying on the Consent and stating that "*approved setbacks to both side boundaries remain unaltered by the proposal*."

24. Noting that the unauthorised construction of the wall on the western boundary is subject to the DA Application and our client's objections to the proximity of this wall to the boundary and their property, our client trusts that Council will ensure that this wall is not authorised to remain in its present location.

25. While Council may have approved the previously existing wall in this location when it granted the Consent, there is now a fresh opportunity for Council to respond to our client's concerns as detailed in this letter, the letter of objection dated 21 August 2017, and the letters of objection dated 24 March 2020 submitted in respect of the DA Application and BIC Application.

Conclusion

26. Given the legal and public interest related impediments to any approval of the DA Application and BIC Application noted above, and in the interests of preserving the integrity of the planning system, Council is urged to determine not to issue a building information certificate in respect of the unauthorised works and to refuse DA Application.

27. In the event that Council is minded to issue a building information certificate and/or determine to approve the DA Application, given the significant impacts that will be experienced by our client as a consequence of this, we are instructed to request that our client be notified of this at least 2 weeks prior to this happening.

28. We reserve our client's rights with respect to the matters referred to in this letter. We also request the opportunity to meet with you and our client to discuss both applications.

29. If you have any queries in relation to this letter, please do not hesitate to contact me on (02) 8241 5610.

Yours sincerely

Patrick Holland
Partner

Annexures

A – Letter of objection to Development Application No. 168/2017, dated 21 August 2017

B – Letter from McCullough Robertson Lawyers to Council, dated 10 January 2020

C - Letter from Council letter to McCullough Robertson Lawyers, dated 23 January 2020

TOWN PLANNERS
Suite 2301, Quattro Building 2
Level 3, 4 Daydream Street
WARRIEWOOD NSW 2102
P > 02 9979 4922
F > 02 9979 4811
E > info@turnbullplanning.com.au
W > www.turnbullplanning.com.au
ABN 12 061 186 409

21 August 2017

Chief Executive Officer
Northern Beaches Council
1 Belgrave Street
MANLY NSW 1655

Dear Chief Executive Officer,

DEVELOPMENT APPLICATION NO DA168/07
PROPERTY: 82-84 BOWER STREET MANLY
PROPOSED ALTERATIONS AND ADDITIONS TO THE EXISTING DWELLINGS

We are consultant town planners and act on behalf of Tess and Wil Lavender, who reside at No 86 Bower Street, Manly ('our clients' property').

1.0 BACKGROUND AND INTRODUCTION

Our clients' property, which was once owned by the former NSW Premier Sir Robert Askin, is the site of an iconic oceanfront residence forged into the cliffs of Fairy Bower. The property is right next door to the property known as Nos 82-84 Bower Street (the 'subject property'), looks north-east across a marine sanctuary, and has magnificent beach and coastal views.

Council is currently considering Development Application No DA168/17 (the 'Development Application') in respect of the subject property which seeks development consent for alterations and additions to the existing dwellings situated on the land (the 'proposed development').

This submission constitutes an objection to the Development Application as lodged.

2.0 SITE LOCATION AND DESCRIPTION

The subject property is located on the northern side of Bower Street and has a north easterly aspect towards the Pacific Ocean (Cabbage Tree Bay) and Manly Beach.

The subject property is a long rectangular shaped parcel of land with a dual street frontage, facing Bower Street which lies to the south and Marine Parade (pedestrian access only) to the north.

Situated on the subject property is a pair of semi-detached dwellings. In 2016 Council granted development consent for alterations and additions to the semi-detached dwelling on No 82 Bower Street (refer Development Application No 34/2016), including new upper level internal reconfiguration and new roof, reconstruction of the existing ground floor entry, partial demolition of the rear of the dwelling, new plunge pool, terrace, new double garage and landscaping.

The locality in which the subject property is situated can best be described as a dormitory area, with a somewhat green leafy character. Manly is a diverse residential neighbourhood where smaller shops and community facilities cater for local residents as well as tourists. The precinct contains dramatic topography, with attractive tree lined streetscapes and these elements combined with the eclectic scale and style of the predominantly well-presented dwellings, contribute to the high aesthetic quality of the neighbourhood. Many properties on the northern side of Bower Street have 'dual access', with vehicle access provided from Bower Street and pedestrian access provided from Marine Parade.

The residential allotment pattern and orientation in the immediate vicinity comprises long lots of sloping land running in a south-north direction giving rise to significant potential for environmental impacts as between neighbours.

3.0 THE DEVELOPMENT PROPOSAL

The Development Application proposes alterations and additions to the existing dwellings on the subject property. In general terms, the development proposal involves the demolition of existing salient elements on the northern facade, a new terrace and plunge pool on No 82 Bower Street, internal reconfiguration and enlargement of floor areas, the installation of lifts to both dwellings, a new garage structure on No 82 Bower Street, and landscaping and privacy screens.

4.0 NATURE OF SUBMISSION

Having considered the subject property and its surrounds and the details of the Development Application currently before Council, it is our view that the proposal, in its present form, does not warrant support and we are of the view that amendments should be made prior to Council determining the application. As mentioned above, this submission constitutes an objection to the Development Application as lodged.

This submission details the various ways the proposal lacks finesse and reasonable consideration for the amenity of surrounding properties, particularly our client's property.

The objection is based on various grounds detailed in the following paragraphs.

5.0 STATUTORY AND MDCP PROVISIONS

The relevantly applicable local statutory environmental planning instrument is *Manly Local Environmental Plan 2013* ('MLEP'). The subject property is zoned E3 Environmental Management under MLEP.

The erection of a dwelling house is permissible with development consent in the subject zone, subject to the discretion of Council and based on a merit-based assessment having regard to the matters for consideration set out in section 79C of the *Environmental Planning and Assessment Act 1979* (NSW) (the 'EPA Act'), the relevantly applicable development controls and zone objectives.

By virtue of MLEP, the maximum permissible height of a building that may be erected on the subject property is 8.5m and the maximum permissible floor space ratio (FSR) of any such building is 0.45:1.

The proposal results in non-compliances with **both** statutory development standards and the provided Clause 4.6 Variation Request does not include adequate justification for such significant departures from the standards.

The E3 zone under MLEP is a zone in which any development must respond sensitively to environmental constraints including as regards ecological and aesthetic issues. Such is not the case in relation to the current proposal as is shown in the paragraphs following. Our opinion is assertion is exemplified by the fact that the proposal is not consistent with relevant E3 zone objectives as regards permitting only 'low impact residential uses'…. 'to ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses'.

In this case, the proposed built form is of a scale that is incompatible with dwellings in the locality. The proposal seeks to provide built elements outside of the relevant planning controls (see below) and will not provide an appropriate or indeed desirable planning outcome.

The proposed development will, by incorporating the additional floor space, height and reduction in planting cause unsatisfactory building bulk for a significant portion of the site abutting both the eastern and western

boundaries. This would render the development inconsistent with the zone objectives and therefore inappropriate at this most fundamental level.

The proposed development will result in numerous non-compliances with the relevantly applicable planning controls. Details of the non-compliances are set out and detailed in the section below.

The subject property is within a Foreshore Scenic Protection Area. That fact, in and of itself, raises additional concerns in terms of the nature and scale of the proposed purported 'alterations and additions', by reason of the fact that, for all intents and purposes, the so-called alterations and additions are tantamount to a *demolition* of the existing structure and its *replacement* by a new building which, we respectfully submit, needs to be environmentally assessed as such. That matter is discussed in greater detail below.

The proposed development includes non-compliances with the MLEP and the subordinate controls. Details of those non-compliances are set out and discussed below.

Scenic quality and architectural character

The MDCP states that development should 'compliment the predominant building form, distinct building character … and architectural style in the locality'. Whilst the development in this area has no one clear style or character, most dwellings on the southern side of Bower Street are two storeys in height, have a pitched roof form, and are well setback from the street frontage. The same cannot be said for the subject application which proposes a level roof, an increased built upon area, non-compliances with FSR and height controls as well as built elements encroaching into the front setback area (Marine Parade).

In our opinion, the proposed development would not only exacerbate the lack of 'architectural fit' that the building presently enjoys, but would lengthen and add bulk to the building, resulting in an increase in the oppressive nature of the eastern and western facades towards the north of the property.

The statement of environmental effects lodged as part of the Development Application package states that 'the proposed alterations and additions are of a contemporary appearance, with an emphasis on horizontal elements, matching the evolving architectural character and language of the adjacent attached dwelling'. We disagree with this assertion. The adjoining built form is integrated into the land form with hipped roofing elements and terraced areas to soften the built form impact as regards this highly environmentally sensitive location.

Height of buildings

The development proposal does not comply with a fundamental development standard of MLEP, this being floor space ratio.

Clause 4.1.2.2 of the MDCP provides that a maximum of two storeys is permitted in terms of development on this site. The subject proposal is for a three storey dwelling house. There is a variation in the DCP to allow for an 'understorey'. The MDCP also provides that a 'storey' must satisfy the meaning of 'basements' in the MLEP (Clause 4.1.2.2(c)(ii)). The MLEP defines a basement as 'the space of a building where the floor level for that space is predominantly below ground level (existing) and where the floor level of the storey immediately above is less than 1 metre above ground level (existing)'.

The 'lower ground level' of the development proposal does not fall within the definition of 'basement' within the meaning of MLEP. Furthermore, there are no significant physical constraints in respect of this site to warrant an exception to the provision.

The height of buildings control works in conjunction with the MLEP provisions to minimise bulk and scale of buildings and consequent overshadowing and privacy impacts. Any non-compliance with this control has a direct impact on the neighbouring residence to the west of the property resulting in a feeling of oppression when viewed from these dwellings. Another consequence is that aural and visual privacy impacts will occur as discussed in detail below.

In terms of height, the excessive box-like design of the building would tower over our clients' property and dominate the scenic character of the sensitive locality.

Floor space ratio

The development proposal also does not comply with another fundamental development standard of MLEP, being floor space ratio. The cumulative impact of the non-compliances with the height of buildings control and the floor space ratio control would result in excessive bulk and scale of the two dwellings.

Insofar as the proposed FSR for the dwellings is concerned, the submitted clause 4.6 MLEP variation request states that the proposed FSR is to be 0.55:1 whereas the submitted plans clearly indicate that the proposed FSR is 0.66:1. We question the legal ability of Council to consider the clause 4.6 variation request when an incorrect FSR appears to have been stated.

Despite this error, the Development Application goes on to state that the proposal will include architecture which will match the evolving architectural character of the adjoining dwellings. This is a misleading statement and is incorrect. The proposal will result in a significantly large and bulky building set forward from our clients' dwelling house. The proposed development will result in the creation of a building that will dominate the natural environment and will not contribute in a positive manner to the character and built form of the neighbourhood as has been asserted to be the case in the clause 4.6 variation request.

6.0 'ALTERATIONS AND ADDITIONS' TANTAMOUNT TO DEMOLITION

The Development Application purports to describe the development proposal as 'alterations and additions'. With respect, such a description of the proposed development is altogether misleading and quite inappropriate in light of the planning principle reformulated and promulgated in *Coorey v Municipality of Hunters Hill* [2013] NSWLEC 1187. In *Coorey* Senior Commissioner Moore and Acting Commissioner Sullivan replaced the planning principle in *Edgar Allen Planning Pty Limited v Woollahra Municipal Council* [2006] NSWLEC 790; (2006) 150 LGERA 1 with a new principle for determining if a development application should be described as being for additions and alterations rather than a new development.

The planning principle in *Edgar Allen Planning* is a prescriptive one and is in the following terms:

> 'A Development Application to alter and add to a building will be taken to be that relating to a new building where more than half of the existing external fabric of the building is demolished. The area of the existing external fabric is taken to be the surface area of all the existing external walls, the roof measuring plan and the area of the last habitable floor'.

The principle is often important when looking to the applicability of planning controls, particularly those in DCPs. An oft-quoted example is where some walls are left due to their existing position being in breach of the increased side, front or rear setback controls for a new dwelling but that would not apply if the proposal was for alterations and additions. In these circumstances the existing quantitative principle would classify the development as a new building.

In *Coorey* Moore SC and Sullivan AC described (at [45]-[47]) planning principles as follows:

> 45 The Land and Environment Court's website describes planning principles as being statements of 'a desirable outcome from a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making, a

> planning decision'. The first planning principle was published in 2003 and there have been over 40 principles published since that time.
>
> 46 Planning principles fall into two distinct classes. The first class, being the majority of the planning principles published to date, are those that are process related (in that they set out what matters are appropriate to be considered in undertaking an assessment of and reaching a decision about a particular planning concern). The minority of the planning principles are those that are prescriptive (in that they attempt to define what should be the outcome of a reasoning process concerning a particular planning concern).
>
> 47 In recent years, the Commissioners of the Court (who collegially develop planning principles) have ceased to adopt any further prescriptive planning principles.

However, as the Court pointed out in *Coorey*, the quantitative purely mathematical approach promulgated in *Edgar Allan Planning* 'ignores the fact that the nature of the analysis required depends on the reason why the enquiry is being made' (at [53]). Moore SC and Sullivan AC went on to say (at [54]-[55]):

> 54 Whether something should be regarded as alterations or additions to a heritage item engages different considerations when compared to an enquiry, for example, as to whether particular controls defining a building envelope may be engaged or not by a development proposal. The purely mathematically derived approach in *Edgar Allan Planning* fails to engage with the fundamental preliminary question as to the purpose for which the enquiry is being made.
>
> 55 As a consequence, it is no longer appropriate to set a prescriptive basis for determining whether approval is being sought for additions and/or alterations or if it is an application for an entirely new development. As with solar amenity, strict mathematical formulae are not an appropriate basis for such an assessment. As a further consequence, the planning principle published in *Edgar Allan Planning* should be set aside and the planning principle set out below should be adopted in its place.

The planning principle articulated by the Court in *Coorey* is in the following terms:

> 56 The first question to be considered is 'what is the purpose for determining whether this application should be characterised as being for additions and/or alterations to an existing structure rather than an application for a new structure?' The answer to this fundamental question will frame the approach to be undertaken to the analytic framework set out below.
>
> 57 In determining whether an application is appropriate to be regarded as for additions and/or alterations or not, it is appropriate to follow, by broad analogy, the process discussed by Bignold J in *Moto Projects (No 2) Pty*

Limited v North Sydney Council [1999] NSWLEC 280; (1999) 106 LGERA 298 -- namely undertaking both a qualitative and a quantitative analysis of what is proposed compared to what is currently in existence.

58 In this consideration, regard should be had to such of the matters in the following lists of matters as are relevant to the enquiry:

59 Qualitative issues

- How is the appearance of the existing building to be changed when viewed from public places?
- To what extent, if any, will existing landscaping be removed and how will that affect the setting of the building when viewed from public places?
- To what extent, if any, will the proposal impact on a heritage item, the curtilage of a heritage item or a heritage conservation area?
- What additional structures, if any, in the curtilage of the existing building will be demolished or altered if the proposal is approved?
- What is the extent, if any, of any proposed change to the use of the building?
- To what extent, if any, will the proposed development result in any change to the streetscape in which the building is located?
- To what extent, if any, are the existing access arrangements for the building proposed to be altered?
- To what extent, if any, will the outlook from within the existing building be altered as a consequence the proposed development?
- Is the proposed demolition so extensive to cause that which remains to lose the characteristics of the form of the existing structure?

60 Quantitative issues

- To what extent is the site coverage proposed to be changed?
- To what extent are any existing non-compliances with numerical controls either increased or diminished by the proposal?
- To what extent is the building envelope proposed to be changed?
- To what extent are boundary setbacks proposed to be changed?
- To what extent will the present numerical degree of landscaping on the site be changed?
- To what extent will the existing floor space ratio be altered?
- To what extent will there be changes in the roof form?
- To what extent will there be alterations to car parking/garaging on the site and/or within the building?
- To what extent is the existing landform proposed to be changed by cut and/or fill to give effect to the proposed development?
- What relationship does the proportion of the retained building bear to the proposed new development?

61 ***Obviously, the greater the overall extent of departure from the existing position, the greater the likelihood the proposal should be characterised as being for a new building***.

62 It is not intended that the above lists should be regarded as exhaustive. Other matters may well arise for consideration in the facts and circumstances of a particular application or the reason why the analysis is being undertaken.

> However, having considered all of the listed matters (together with any other additional matters that may be relevant in the particular circumstances of the application), an evaluation can then be made as to whether or not a proposal would correctly be characterised as additions and/or alterations to an existing structure or whether the proposal should be characterised as an application for an entirely new structure. *[Emphasis added]*

The change in planning principle from that articulated in *Edgar Allan Planning* to that in *Coorey* is a change 'from a mathematically structured prescriptive planning principle to one that is based on an inquisitive process' (*Coorey* at [63]). Now, *Coorey* involved alterations and additions to a heritage item which the learned Commissioners considered would have different considerations when compared to an enquiry as to whether particular controls as defining a building envelope may be engaged or not by a development proposal. The proposal did not meet the mathematical approach of *Edgar Allen Planning* to be described as alterations and additions to an existing dwelling, as the proposal was ultimately held to be.

In the case of the proposal the subject of the Development Application no heritage item is involved. However, the subject property as well as our client's property are located in a Foreshore Scenic Protection Area, and when regard is had to the resultant loss of privacy that would inevitably ensue for our clients in the event that the development proposal in its current form were to be approved, as well as the combined quantitative and qualitative changes to the built form of the existing dwelling on the subject property, we submit that it is both misleading and inappropriate, as a matter of planning principle, to construe and environmentally assess the proposed development as being merely 'alterations and additions'.

Applying the planning principle articulated by the Court in *Coorey*, in which the learned Commissioners concluded that 'obviously, the greater the overall extent of departure from the existing position, the greater the likelihood the proposal should be characterised as being for a new building' (*Coorey* at [61]), the true nature of the proposed development is, in fact, not 'alterations and additions' but 'a proposal for an entirely new structure' (*Coorey* at [70]) which needs to be appropriately assessed as such having regard to those controls in the MLEP and MDCP that are relevantly applicable to the erection of new buildings.

Even the statement of environmental effects ('SEE') prepared by Mr Lance Doyle on behalf of the applicant and submitted as part of the development application package tacitly, if not actually expressly, acknowledges that the purported and so-called 'alterations and additions' are really an application for a new building (refer pp 3, 8, 15, 19 and 61 of the SEE). However, the SEE also states, quite prominently:

The Proposal involves **a number of alterations and additions** to a pair of existing residential dwellings generally as follows -

- **Demolition of existing salient elements fronting Marine Parade.**
- Provision of terrace and plunge pool to No.82.
- **Enlargement of ground floor and level 1 by removal of internal walls and some minor enlargement**.
- Personnel lifts to both dwellings.
- **Construction of new bedrooms with ensuites and walk in robes within replacement roof level.**
- **Construction of new garage structure to No.82.**
- **New finishes to the existing western wall.**
- **Provision of all new glazing to the western elevation of levels two and three.**
- Landscaping and privacy screens to external areas. *[Emphasis added above]*

Thus, the development proposal involves, among other things, the demolition of the existing building elements fronting Marine Parade, the removal of internal walls, and the construction of additional habitable rooms—in other words, for all intents and purposes, demolition and rebuilding. In our estimate, approximately 70-75 per cent of the existing building is proposed to be rebuilt, 'based on an inquisitive process' (*Coorey* at [63]) and analysis of the architectural drawings lodged as part of the development application package.

In short, based on any objective but principled assessment of the proposed development, the true nature of the proposed development is, in fact, not 'alterations and additions' but 'a proposal for an entirely new structure' (*Coorey* at [70]) and therefore 'should be characterised as being for a new building' (*Coorey* at [61]).

7.0 PRIVACY

The proximity to our clients' property and overall height of certain aspects of the proposed development will create an unacceptable privacy impact (see **Annexure 1**).

In the event that Council were to consent to the proposed development in its current form there would be a severe impact on the amenity on our clients' property and the use and enjoyment of that property by our clients. At present, no screening from the deck to the pool located on our clients' property is proposed.

The proposed development is contrary to the well-established general planning principle relating to privacy set out in *Meriton v Sydney City Council* [2004] NSWLEC 313. In that decision Roseth SC stated (at [45]-[46]):

> 'When visual privacy is referred to in the context of residential design, it means the freedom of one dwelling and its private open space from being overlooked by another dwelling and its private open space. …
>
> '… Overlooking of neighbours that arises out of poor design is not acceptable. A poor design is demonstrated where an alternative design that provides the same amenity to the applicant at no additional cost, has a reduced impact on privacy.
>
> '… Landscaping should not be relied on as the sole protection against overlooking. While existing dense vegetation within a development is valuable, planting proposed in a landscaping plan should be given little weight. …'

It is clear from *Meriton v Sydney City Council* and subsequent cases in which the planning principle has been fairly consistently applied that separation rather than landscaping is the main safeguard in the protection of privacy.

In *Davis v Penrith City Cou*ncil [2013] NSWLEC 1141 Moore SC confirmed, at [121], the following as the criteria for assessing impact on neighbouring properties:

> How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?
>
> How reasonable is the proposal causing the impact?
>
> How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?
>
> Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?
>
> Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?

As Dickson C pointed out in *Rose & Sanchez v Woollahra Municipal Council* [2016] NSWLEC 1348 (19 August 2016) at [78]:

> In applying these criteria *Meriton v Sydney City Council* [2004] NSWLEC 313 at [45] clarifies the scope of visual privacy in the context of residential

> design as: the freedom of one dwelling and its private open space from being overlooked by another dwelling and its private open space.

That is the heart of the matter – the freedom of one dwelling and its private open space from being overlooked by another dwelling and its private open space.

In this case, there is no doubt that the impacts arise primarily from the absence of any proposed screening devices at the rear of the subject property, where views and the loss of amenity and visual privacy are of paramount importance. In *Vescio v Manly Council* [2012] NSWLEC 1098 (24 April 2012) the Court, in assessing the impacts on visual privacy, had regard to the fact that, in addition to the height difference, outlook, and angle of view from bedroom windows, any overlooking would be from a bedroom where people tended to spend less waking time, which was a factor to be considered in assessing impacts on visual privacy. Accordingly, the learned Commissioners (Pearson C and O'Neill C) did not consider that the impacts on privacy were such as to require the deletion of those windows, or any screening.

However, in the case of the present development proposal, the impacts upon visual privacy and overlooking occur, as mentioned, at the rear of the subject property, where views and the loss of amenity and visual privacy are of paramount importance. The swimming pool area together with its curtilage, given its prime location, is a major entertaining and recreational area for our clients. The use and enjoyment of that area is greatly diminished, and the loss of visual privacy acutely felt, when protective and ameliorative measures are not taken to minimise or prevent loss of privacy and overlooking. (As respects the assessment of the latter – namely, overlooking – Council's attention is drawn to the Court's decision in *Super Studio v Waverley Council* [2004] NSWLEC 91.)

In light of the fact that both the subject property and our clients' property are located within the Foreshore Scenic Protection Area, we submit that our clients have a reasonable expectation that their dwelling house and some of its open space area – relevantly, the swimming pool area and its curtilage – will and should remain private, and that landscaping should not be relied on to protect against overlooking. Accordingly, some sort of privacy screen or privacy louvres are legitimately required to afford privacy and avoid overlooking.

It is strongly submitted that, in the event that consent were to be granted to the Development Application in its present form, conditions should be imposed requiring the installation of appropriate screening devices, given the adverse impacts on privacy that would otherwise ensue. However, our clients' strong preference and submission is that the Development

Application and plans, in their current form, should be amended to make provision for the installation of appropriate screening devices so as to ensure that there will be no loss of amenity by reason of loss of privacy. Accordingly, we respectfully submit that the following amendments be made to the plans accompanying the Development Application:

> Privacy louvres are to be fixed to all glazing the full length of the existing glass balustrade alongside the boundary of the subject property and our clients' property.

8.0 CONCLUSION

In assessing the impact of a development proposal upon a neighbouring property, what was said by Roseth SC in *Pafburn v North Sydney Council* [2005] NSWLEC 444 (16 August 2005), at [19]-[24], is, in our respectful submission, extremely helpful:

> 19 Several judgments of this Court have dealt with the principles to be applied to the assessment of impacts on neighbouring properties. *Tenacity Consulting v Warringah* [2004] NSWLEC 140 dealt with the assessment of views loss; *Parsonage v Ku-ring-gai Council* [2004] NSWLEC 347 dealt with the assessment of overshadowing; while *Meriton v Sydney City Council* [2004] NSWLEC 313 and *Super Studio v Waverley Council* [2004] NSWLEC 91 dealt with the assessment of overlooking.
>
> 20 Five common themes run through the above principles. **The first theme** is that change in impact may be as important as the magnitude of impact. …
>
> 21 **The second theme** is that in assessing an impact, one should balance the magnitude of the impact with the necessity and reasonableness of the proposal that creates it. …
>
> 22 **The third theme** is that in assessing an impact one should take into consideration the vulnerability of the property receiving the impact. …
>
> 23 **The fourth theme** is that the skill with which a proposal has been designed is relevant to the assessments of its impacts. Even a small impact should be avoided if a more skilful design can reduce or eliminate it.
>
> 24 **The fifth theme** is that an impact that arises from a proposal that fails to comply with planning controls is much harder to justify than one that arises from a complying proposal. People affected by a proposal have a legitimate expectation that the development on adjoining properties will comply with the planning regime. *[Emphasis in the original]*

In the case of the present development proposal:

- the magnitude of impact upon the amenity, use and enjoyment by our clients of the rear of their property is considerable;

- the lack of privacy screening is unnecessary and unreasonable, showing almost contempt for, and a blatant disregard of, the legitimate expectations and entitlements of our clients;
- our client's property, especially the rear of the property which will receive the greatest impact, is extremely vulnerable;
- the lack of attention in the design of the development proposal to the impacts of the proposed development on our client's property in terms of visual privacy and overlooking is relevant to the assessments of those impacts, for even a small impact should be avoided if a more skilful design can reduce or eliminate it; and
- the fact that proposal fails to comply with a number of important planning controls is much harder to justify than would otherwise be the case with a complying proposal.

In short, our clients have, as Roseth SC pointed out in *Pafburn*, a legitimate expectation that the development to take place on the subject property 'will comply with the planning regime'.

There is, as we have already submitted, an even greater problem as respects the present development proposal. The Development Application purports to describe the development proposal as 'alterations and additions'. With respect, such a description of the proposed development is quite misleading and inappropriate in light of the planning principle promulgated in *Coorey v Municipality of Hunters Hill* [2013] NSWLEC 1187. When regard is had to the resultant loss of privacy that would inevitably ensure for our clients in the event that the development proposal in its current form were to be approved, as well as the combined quantitative and qualitative changes to the built form of the existing dwelling on the subject property, we submit that it is wrong to construe and environmentally assess the proposed development as being merely 'alterations and additions'.

In our respectful submission, the proposal 'should be characterised as being for a new building' (*Coorey* at [61]) on the basis that the true nature of the proposed development is, in fact, 'a proposal for an entirely new structure' (*Coorey* at [70]) which needs to be appropriately assessed as such having regard to those controls in the MLEP and MDCP that are relevantly applicable to the erection of new buildings. In that regard, please refer to the non-compliances with the relevantly applicable height of buildings and floor space ratio development controls discussed in this submission. When the extent of the non-compliances is looked at in its totality along with impacts on privacy, the natural environment and the character of the locality, the development proposal is unacceptable, especially in light of the location of the subject property.

In addition, the close proximity of the proposed development to our clients' property and the overall height of the proposed development will create an unacceptable privacy impact for our clients as respects their use and enjoyment of their land. At present, no screening from the deck to the pool located on our clients' property is proposed. In our opinion, the Development Application and accompanying plans, in their current form, need to be amended to make provision for the installation of appropriate screening devices so as to ensure that there will be no loss of amenity by reason of loss of privacy. In that regard, privacy louvres need to be fixed to all glazing the full length of the existing glass balustrade alongside the boundary of the subject property and our clients' property.

In our opinion, the proposal the subject of the Development Application requires considerable modification so as to render it acceptable and consistent with the current planning controls.

In the event that Council is not minded to refuse the Development Application, but on the contrary approve the application in its present form, being a course of action which, in our respectful submission, would be inappropriate both as a matter of planning principle and law, then we respectfully submit that it is essential that appropriately worded conditions are imposed on any consent that issues to reduce the adverse impacts that would otherwise arise for our clients from the carrying out of the development.

However, we must give a word of warning here that Council must exercise restraint. There is a considerable body of case law attesting to the proposition that circumstances can arise, and otherwise be such, under which conditions attached to a consent are 'so radical as to destroy the substance of the application': see eg *Parkes Developments Pty Ltd v Cambridge Credit Corporation Ltd* (1974) 33 LGRA 196; *Flower & Samios Pty Ltd v Mosman Municipal Council* (L & E Ct, Stein J, No 10097/93, 24 June 1993, unreported). The imposition of such conditions is tantamount to a refusal of the application, and the latter is, in any such circumstances, the only legally appropriate decision. *Refusal*—not a grant of conditional development consent. We respectfully submit that, having regard to the nature, character, bulk and scale of the development proposal, and the likely impacts of the development upon the natural and human-built environments (and, in particular, on our clients' property), the only legally appropriate course of action is to *refuse* consent to the Development Application in its current form.

Our clients reserve all of their rights and entitlements.

Yours faithfully,
TURNBULL PLANNING INTERNATIONAL PTY LIMITED

Pierre A Le Bas
Director & Legal Counsel
BA(Geog)(UNE) LLB(Hons1) GradCertLegP(UTS) MTCP(Syd)
pierre@turnbullplanning.com.au

Sophie Litherland
Senior Associate (Town Planner)
BUrbRegPlan (UNE) GradDipSustainability (UNSW)
sophie@turnbullplanning.com.au
lav.bow86m2_submission.docx

ANNEXURE 1

Photograph 1: showing direct overlooking of 84 Bower Street from pool terrace at No. 86 Bower Street

Photograph 2: showing privacy impacts from upper level of No. 86 Bower Street Manly.

Partner Patrick Holland
Direct line 02 8241 5610
Email pholland@mccullough.com.au
Our reference PSH:174443-1

Lawyers McCullough Robertson

10 January 2020

Louise Kerr
Director, Place and Planning
Northern Beaches Council
1 Belgrave Street
MANLY NSW 1655

Email louise.kerr@northernbeaches.nsw.gov.au
azmeena.kelly@northernbeaches.nsw.gov.au
natalie.watson@northernbeaches.nsw.gov.au

Dear Ms Kerr

Re: 82-84 Bower Street, Manly (Property) | Development Consent no. 168/2017

1. We refer to the above Property and development consent for which a meeting was held on Wednesday 8 January 2020 at 86 Bower Street, Manly (**meeting**).

2. As you are aware, we act for Mr and Mrs Lavender (**our client**) who are the owners of 86 Bower Street, Manly, in relation to their concerns regarding breaches of Development Consent no.168/2017 (**the Consent**) carried out at 82-84 Bower Street, Manly (**the Property**).

3. On behalf of our client we wish to again thank you, Ms Kelly and Ms Watson for attending the meeting on behalf of Northern Beaches Council (**Council**).

4. The purpose of this letter is to confirm in writing the key items that were discussed at the meeting, our client's position with respect to these items and our understanding of the steps Council has taken to date and will or is likely to take moving forward with respect to any future development application that the owner of the Property (**developer**) may submit to Council.

Status of Stop Works Order and enforcement action

5. We understand that a revised Stop Works Order (**Revised SWO**) dated 19 December 2019 was issued by Council which amends the Stop Works Order dated 21 November 2019 by permitting the developer to continue works authorised under Development Consent no. 2019/0125.

6. At the meeting Council agreed to inform our client should any appeal be commenced by the developer with respect to the Revised SWO, or in the event that the status of the SWO changes in any way.

7. It was noted and our client is pleased to hear that Ms Watson intends to undertake inspections of the Property while the Revised SWO is in place to ensure compliance with the Orders given by Council.

8. We confirm it is our opinion and our client's position as relayed in our previous letter to you of 4 December 2019, that until such time as a new development application is submitted to Council by the developer and alternative works on the Property are approved, the SWO should remain in place.

9. Given the extent and significant nature of the non-compliances with the Consent observed, Council may wish to consider whether a complaint to the Building Professionals Board should be made particularly in relation to issuing of a construction certificate for the development. In the circumstances it is difficult to fathom that a construction certificate could have been validly issued by the developer's private certifier given the extent of deviations from the approved plans evidenced to date.

New Development Application

10. At the meeting we confirm that you advised that the developer has made representations to Council's Development Assessment Manager, indicating that it is the developer's intention to submit a fresh development application to Council in relation to the Property.

11. We understand that there has been no indication that you are aware of that the developer intends to submit a modification application to Council seeking approval for alterations and additions to the Consent.

12. As detailed in our letter of 4 December 2019, we remain of the view that a new development application must be submitted by the developer and approved before any further works (excluding those authorised under development consent no.2019/0125) can lawfully proceed on the Property. It is therefore encouraging for our client to learn that the developer may be seeking to pursue this course of action.

13. Should any development application or application of any kind relating to the Property be submitted to Council, our client appreciates that Council will ensure our client is kept informed of this.

14. Our client is further comforted by your assurance that a new town planner, being someone other than Claire Downie, will be appointed by Council to assess any fresh development application that may be submitted by the developer with respect to the Property.

15. In the event that a new development application is submitted to Council which proposes to retain certain existing works already undertaken in accordance with the Consent, it was indicated by you that Council is able to reasonably request that the developer provide certification from a surveyor which demonstrates that the existing works are compliant with the approved plans. Given the developer's established disregard of the conditions of the Consent evidenced to date, there is uncertainty as to whether the existing works carried out are consistent with the Consent. For this reason we are instructed to urge Council to ensure certification is obtained and considered prior to approval of any new development application.

Key concerns

16. To reiterate that which was expressed to you at the meeting, we confirm that should any new development application be submitted to Council by the developer, a main concern that our client has relates to the impacts the development may have on our client's privacy.

17. The additional storey authorised by the Consent would have resulted in significant overlooking into our client's property if the development was to have been completed. The height of the additional storey, combined with the location and proximity of the rear deck and the placement of windows along the western façade allow future residents of the Property to have a direct line of sight into our client's bathroom, bedroom, kitchen, living room and rear private open space area.

18. In the event that the developer proceeds to submit a new development application, our client trusts that Council will have regard to these abovementioned concerns which our client feels were not adequately considered and addressed by Council with respect to its decision to issue the Consent.

Conclusion

19. As noted in this letter, should there be any applications submitted to Council in relation to the Property, the Consent or the Revised SWO, our client looks forward to hearing from Council directly about this as soon as possible.

20. If you have any queries in relation to this letter, please do not hesitate to contact me on (02) 8241 5610 or my colleague Elizabeth Ryan on (02) 8241 5638.

Yours sincerely

Patrick Holland
Partner

northern beaches council

23 January 2020

McCullough Robertson Lawyers
Attn: Mr Patrick Holland
Email: pholland@mccullough.com.au

Our Ref: 2020/018615

Dear Mr Holland

Re: Stop Works Order concerning Development Consent 168/2017
Property: 82-84 Bower Street, Manly (Your ref PSH:174443-1)

Thank you for your letter dated 10 January 2020.

Council understands the views expressed on behalf of your client in this matter.

In regards to the Stop Works Order, the owner's representative and the builder have advised Council of their intention to comply with the revised Stop Works Order dated 19 December 2019. This has been subsequently confirmed by Council inspection and we will continue to monitor the situation.

Should Council be advised of any appeal against the terms of the Order or be requested to revise the terms of the Order, your client will be notified accordingly.

In accordance with Council's Community Consultation Plan your client as an adjoining property owner would be notified and invited to make a submission should any future applications be submitted.

Should you require any further information or assistance in this matter, please contact Darren Greenow on 9970 1275 or by email council@northernbeaches.nsw.gov.au.

Yours faithfully

Peter Robinson
Acting Director Planning & Place Division