

24 June 2019

Chief Executive Officer
Northern Beaches Council
725 Pittwater Road
DEE WHY NSW 2099

Dear Chief Executive Officer

STATEMENT OF ENVIRONMENTAL EFFECTS
PROPERTY: 11 CRANE LODGE PLACE PALM BEACH

We act for Jaime and Marcus Ryan ('our clients'), being the owners of the property known as No 11 Crane Lodge Place, Palm Beach ('the site').

1.0 Purpose and status of this document

This letter comprises a fresh statement of environmental effects ('SEE') prepared by our firm and relates to an earlier SEE dated July 2018. It is to be read in conjunction with that document. In the event of any conflict, disharmony or discrepancy between any part of the SEE and this document, this document prevails to the extent of the conflict, disharmony or discrepancy.

All other reports plans and other documents (the 'incorporated documents') submitted as part of the application are to be taken to be incorporated by reference in this document, and read and construed accordingly, as if the contents of the incorporated documents were fully contained within the 'four corners' of this document.

2.0 Background

The DA, which was lodged with Council on 30 July 2018, sought consent from Council, as consent authority, for the carrying out of various alterations and additions to the existing dwelling house on the site.

On 20 December 2018 Council, under delegated authority, made a decision to refuse development consent to the DA for the following reasons:

1. The height of the proposed works exceed [sic] 8.5m above existing ground level, resulting in inconsistency with the maximum building height development standard prescribed by clause 4.3 (Height of buildings) of PLEP 2014. The maximum building height development standard cannot be varied without the submission and consideration of a variation request under the provisions of clause 4.6 of PLEP 2014. The subject application has not addressed the proposed building height non-compliance and a submission requesting a variation to the building height development standard has not been provided.
2. The proposed development extends well beyond the building envelope prescribed by clause D12.8 (Building Envelope) of P21 DCP, and any variations associated with the slope of the site are not considered to be warranted, as consistency with the outcomes of the control is not achieved. In particular, the application has not demonstrated that the resultant development will be consistent with the desired future character of the Palm Beach locality or that the bulk and scale of the proposal has been minimised. Furthermore, it is unclear as to whether the noncompliant elements of the proposal will result in any unreasonable impacts upon the amenity of adjoining properties, particularly with regard to solar access and view sharing.

Following the determination of DA2018/1275, a Section 8.2(1A) Review of Determination application was lodged (REV2019/0022) on 03/05/2019. Council contacted the applicant and requested that the application be withdrawn on the grounds that the Council is unlikely to be able to determine the application before the relevant statutory timeframe for appeal in Class 1 expires (ie within 6 months of the original date of determination). The applicant was requested to relodge the application as a fresh Development Application.

4.0 The site

The site is legally described as Lot 16 in Deposited Plan 31294, and is commonly known as 11 Crane Lodge Place, Palm Beach.

The site is a battle-axe handle allotment, with a total area of 1427.8 sqm, and is accessed by a shared driveway which extends from the cul-de-sac of Crane Lodge Place, that is used by the occupiers of this dwelling house and those of adjoining sites. The site is burdened by a right of carriageway, which extends along the entire battle-axe handle and the southern boundary of the site.

An existing three (3) storey dwelling house with a swimming pool is situated immediately adjacent to the driveway and right of carriageway, and the northern portion of the site is generally free of development.

The site contains a considerable slope and features a number of significant canopy trees and various rock outcrops.

The site is not classified as bush fire prone land.

The site is located within Geotechnical Hazard H1 Area.

The site has been used for residential purposes for a significant period of time with no prior land uses. Accordingly, it can be comfortably said that the site poses no risk of contamination.

The site is located in the Palm Beach Locality under *Pittwater 21 Development Control Plan 2014* ('PDCP').

5.0 The amendments

The application includes some minor amendments when compared to the proposed development under DA2018/1275. Details of the amendments to the proposed development are as follows:

- i. A change in the setback such that the building width on the east is reduced by 0.5m.
- ii. A reduction to the deck width south, by 0.5m.
- iii. It is no longer proposed to create an additional hard stand parking space off the easement by excavating the sandstone rock.
- iv. The existing garage will be left in its current position and not relocated.

Amended plans have been prepared by Blue Sky Building Designs and accompany this application. Sections have been drawn so that all are in the one plan and do not show features 'behind'. The abovementioned change in setback, which results in a change as respects the building envelope, is reflected in the amended plans.

Planning justification for the amendments, to the extent to which it is not otherwise obvious or readily discernible or shown on the amended plans, is provided in the paragraphs that follow.

6.0 The proposed development

The development proposal related to the proposed carrying out of various alterations and additions to the existing dwelling house situated on the site. More specifically, the proposal involves alterations and additions to an existing four (3) storey split level dwelling house, including as follows:

Landscaping:

- Removal of three (3) palm trees;
- New entry stairs and landscaped stairs on the eastern boundary;
- Existing grass area to be lowered down to deck level;
- Replacement of existing retaining walls at the rear and eastern boundary.

Entry Level:

- Internal reconfiguration including the creation of a rumpus room and guest bedroom which includes a walk-in robe and ensuite. The guest bedroom has been extended over the existing deck;
- New decking off the rumpus room in the eastern boundary setback and next to guest room.

First Level:

- Internal reconfiguration;
- Demolish the existing deck. Rebuild a deck with an extension to the east and to the south;
- New roof structure with skylights over the new decking.

Second Level:

- Internal reconfiguration of the existing master bedroom, laundry and bathroom;
- Existing rear deck to be extended and surrounded by new retaining wall;
- Lower the grass area at the rear to the deck level;
- Remove existing entry door at the eastern wall and replace it with a window.
- Infill in roof.

7.0 Clause 4.6 variation request

The development proposal involves, among other things, an infill in the roof on the second level. The height exceedance (over and above 8.5m above existing ground level) is some 1.13m, but with the height otherwise being below 10m above existing ground level.

We agree with Council that a clause 4.6 variation request is required as a matter of law in relation to the height exceedance as respects the infill in the roof on the second level.

The planning justification for the height exceedance is set out in the clause 4.6 variation request which forms part of this application. Essentially, the justification is as follows:

- i. The dwelling house is existing.
- ii. The height exceedance as respects the roof on the second level is a present reality.
- iii. Insofar as the height exceedance is concerned, the development proposal involves an infill of the existing roof on the second level so as to join the two dormer-like structures into one composite structure.
- iv. The height exceedance of the existing roof is a present reality and the infill of the roof will not create any additional height exceedance beyond that which already exists, except in relation to the infill which is minor in nature only and does not make much difference as regards the appearance of bulk.
- v. Most importantly, the ridge of the roof on the second level is not visible from the street and further will not create any view loss for neighbours.

8.0 Building envelope, desired future character, bulk and scale, and impacts upon amenity

Building envelope

At the outset, it must be stressed, as respects the building envelope issue, 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 purported 'requirements' in PDCP and, in particular, clause D12.8 (Building Envelope) of PDCP relating to building envelope, are only **guidelines**. They are not statutory requirements. This means, among other things, that any purported controls or 'requirements' in PDCP, as well as in any policy of Council (eg a dividing fences policy or code), must not be applied automatically and inflexibly but rather, flexibly: see *Emmott v Ku-ring-gai Municipal Council* (1954) 3 LGRA 177. Regrettably, many councils rigidly and inflexibly apply the provisions of their development control plans, administrative policies and codes, without regard to the specific circumstances of the matter before them.

The amended plans forming part of this application make a change to the building envelope by, relevantly, a change in the setback such that the building width on the east is reduced by 0.5m.

We submit that the change made as respects the side setback results in an extension beyond the building envelope control that is acceptable in all the circumstances.

Consistency with desired future character of the Palm Beach locality, bulk and scale, and impacts upon amenity

The 'desired character' of the Palm Beach Locality, in which the site is located, is expressed in section A4.12 of PDCP as follows:

Desired Character

The Palm Beach locality will remain primarily a low-density residential area with dwelling houses in [sic] maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape. Secondary dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations. Any dual occupancy dwellings will be located on the lowlands and lower slopes that have less tree canopy coverage, species and habitat diversity and fewer other constraints to development. Any medium density housing will be located within and around commercial centres, public transport and community facilities. Retail, community and recreational facilities will serve the community.

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

Future development will maintain a building height limit below the tree canopy and minimise bulk and scale whilst ensuring that future development respects the horizontal massing of the existing built form. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandah's and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.

The design, scale and treatment of future development within the commercial centres will reflect a 'seaside-village' character through building design, signage and landscaping, and will reflect principles of good urban design. Landscaping will be incorporated into building design. Outdoor cafe seating will be encouraged.

A balance will be achieved between maintaining the landforms, landscapes and

other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, to provide feed trees and undergrowth for koalas and other animals, and to enhance wildlife corridors.

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

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

Palm Beach will remain an important link to the offshore communities.

The responsible officer, in her assessment report conserving the DA2018/1275, stated (on p 10 of the report) that, '[o]verall, it cannot be said that the proposal achieves consistency with the desired future character of the locality.' Her reasons for coming to that conclusion appear to have been as follows (again, refer to p 10 of the report):

- The proposal will increase the height, bulk and scale of the dwelling to a point where, in the opinion of the responsible officer, it is inconsistent with the building height development standard prescribed by *Pittwater Local Environmental Plan 2014* ('PLEP') and building envelope prescribed by PDCP, such that, in the opinion of the officer, 'it cannot be said that the bulk and scale of the development has been appropriately minimised'.
- The non-conforming elements (presumably, those referred to above) are said to add to the visual appearance of the three storey structure, 'without any enhancement of landscaping to ensure that the visual impact of the development is secondary to landscaping'.

With the utmost respect, it is extremely difficult to understand how the responsible officer could have so concluded.

The height of the building is hardly changing at all except as respects the infill in the roof on the second level between the two dormer-like structures. That departure from the relevant control is the subject of the clause 4.6 variation request submitted along with this application. The height exceedance is a present reality as respects the dormer-like structures and the infill simply encloses the space between those structures so as to join the two dormer-like structures into one composite structure. As such, the infill of the roof creates no additional height exceedance beyond that which already exists, except in

relation to the infill itself which can only be seen to be minor in nature only. Most importantly, the ridge of the roof on the second level is not visible from the street.

In terms of bulk and scale, again there is little change and this application proposes a setback change which results in a positive alteration as respects the departure from the building envelope control. That departure can only be seen to be minor in nature.

The officer's assertion that the built form of the development, in terms of its impact, must be 'secondary to landscaping' is, with the utmost respect, almost risible. In an urban environment, it is virtually impossible for any built form to be 'secondary to landscaping' unless all development is in the form of discretely built 'miniature homes' that are entirely camouflaged by the surrounding native bushland. The officer makes this quite remarkable comment in the context of the 'desired future character' of the locality, yet the description of the 'desired character' for the Palm Beach Locality [see above] **makes absolutely no reference at all to the supposed need for the built form to be 'secondary to landscaping'**.

If Council wishes to impose such a requirement—namely, that the built form should be secondary to landscaping—then we suggest that Council amend the 'desired character' statement for this Locality, and perhaps others as well, after public exhibition and submissions. In that regard, we very much doubt whether the majority of residents in the Palm Beach Locality or in any other locality would actually want to live in what would be tantamount to a national park.

The legal reality is this—not only does the 'desired character' for the Palm Beach Locality make absolutely no reference at all to the supposed need for the built form to be 'secondary to landscaping', what it does state on the point is quite different, namely:

A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. (Refer section A4.12, PDCP)

Without wishing to put too fine a point on it, the responsible officer has fundamentally misconstrued the clear terms of Council's development control plan, making what is an error of law. In that regard, the making of findings or the drawing of conclusions or inferences in the absence of evidence or not supported by any reasonable view of the findings of primary fact having regard to the evidence, or in circumstances where the tribunal has otherwise misdirected itself, is an error of law: see *Azzopardi v Tasman UEB Industries*

Ltd [1985] 4 NSWLR 139); *Sinclair v Mining Warden at Maryborough* (1975) (1975) 132 CLR 473; *Bracegirdle v Oxley* [1947] KB 349.

Now, in terms of the actual content of the 'desired character' statement for the Palm Beach Locality we respectfully submit to Council that:

- The proposal will not result in the Locality no longer being *primarily* a low-density residential area with dwelling houses being a maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape. True, the existing dwelling house presents as a three storey structure (the south elevation actually makes the dwelling house appear as a four storey structure), but so are many other dwelling houses in the Locality. That factor alone does not prevent the Locality from no longer being *primarily* a low-density residential area with dwelling houses being a maximum of two storeys.
- The development is located such that it is supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.
- The development maintains a building height limit below the tree canopy and minimises bulk and scale whilst respecting the horizontal massing of the existing built form. The proposed development is consistent with the bulk and scale of newer built elements in the locality. The minor departure from the building envelope (which is further reduced from the original proposal) is acceptable, given that this is a minor built element not adding to bulk and scale and that the building footprint is situated on a slope.
- The development proposal involves minimal alterations to the built footprint and dwelling bulk.
- The development incorporates shade elements in the form of pergolas, verandah's and the like.
- Building colours and materials harmonise with the natural environment.
- The existing development, in conjunction with the proposed additions and alterations, is stepped down the slope to integrate, as far as practicable, with the landform and landscape.
- The development proposal minimises site disturbance and is designed to be safe from hazards.
- Landscaping is incorporated into the development proposal. The natural

environmental has been preserved where possible through the construction of new retaining walls and landscaping throughout the garden. There is no proposed removal of any existing native trees. It is therefore the case that, a 'balance' (NOTE: that is the word used in the 'desired character' statement) is achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land.

- The proposed alterations and additions are setback from the side building line of adjoining properties, thus ensuring that visual privacy is maintained.
- The shadow diagrams demonstrate that there will be minimal impact in terms of solar access.
- The design of the building is such that all existing views from adjoining properties will be maintained.

In all the circumstances, we respectfully submit that, when real and proper consideration is given to the details of the development proposal, in its amended form, the only conclusion that is available on the facts and merits of the proposal is that the resultant development *is* 'consistent with the desired future character of the Palm Beach locality'. The word 'consistent' means not antipathetic, that is, it is capable of existing in harmony: see, for example, *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 185; *Hughes v Newcastle City Council* (1987) 32 APA 200. It strains credulity to assert, as the responsible officer has done, that the development proposal is inconsistent with the 'desired character' statement for the Palm Beach Locality.

As mentioned above, the bulk and scale of the proposal have been minimised.

As respects the officer's assertion that 'it is unclear as to whether the noncompliant elements of the proposal will result in any unreasonable impacts upon the amenity of adjoining properties, particularly with regard to solar access and view sharing', a proper review of the amended plans, read in conjunction with the other documents provided to Council, both as part of the original application and as part of this application, can only lead to the conclusion that there will be only minor incremental overshadowing impacts to neighbouring properties (refer, especially, the shadow diagrams prepared by Blue Sky Building Designs), and that views and vistas will be preserved from neighbouring properties. The shadow diagrams demonstrate that there will be minimal extra impact in terms of solar access. The availability of sufficient solar access during the winter solstice will be maintained to the site

and the adjoining properties. As respects the issue of views, the design of the building is such that all existing views from adjoining properties will be maintained (refer section C1.3 of PDCP).

9.0 Other relevant matters for consideration

The responsible officer, in her assessment report concerning DA2018/1275, made mention of some other matters for consideration under section 4.15 of the EPAA. In that regard, the officer asserts that both the 'character [of the proposal] as viewed from a public place' (cf section D12.1 of PDCP) and in terms of the issue of Scenic Protection Category One Areas (cf section D12.14 of PDCP) are unsatisfactory. On page 11 of her assessment report, the officer states:

Concern is raised with regard to the scale of the proposal and the lack of landscaping proposed forward of the non-compliant built form. The dwelling is located in an elevated position that is visible from a wide catchment, and as no vegetation is provided to the west of the dwelling, the site becomes entirely reliant upon landscaping down slope to screen and soften the built form. However, given the increased height, width and prominence of the site, down slope landscaping is not considered to ensure that the development will be secondary to landscaping, resulting in inconsistency with the requirements and outcomes of this clause.

We have elsewhere in this letter dealt with the issues of bulk and scale and built form generally as well as with the spurious interpolated 'requirement' that the development be 'secondary to landscaping'. We respectfully submit that no reasonable planning officer, properly apprised of the nature, extent and character of the proposed development, and otherwise properly acting within the four corners of their powers and the reasonable exercise of their administrative discretion, could have so concluded.

10.0 Justification for the proposal

To a large extent, we have already addressed this issue in this statement of environmental effects.

The proposal will provide tangible improvements in landscape quality and result in the construction of a high-quality dwelling house which will be integrated into the environment and will enjoy a unique character. In addition, the proposal will provide occupant amenity without adverse environmental impacts to neighbours.

In our opinion, there are no matters which, in terms of the reasonable and responsible exercise of Council's administrative discretion, would prevent

Council from granting consent to the proposal in this instance, subject to the imposition of appropriate conditions of consent.

In our opinion, the clause 4.6 variation request which accompanies the application justifies the contravention of the height of buildings development standard in PLEP by demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard. Further, the request shows that the proposed development will be in the public interest because it is consistent with such of the objectives of the standard as are of relevance to the subject-matter of the development application and the objectives for development within the E4 Environmental Living zone in which the proposed development is to be carried out.

To the extent to which there is a minor non-compliance with the height of buildings development control and with the building envelope guideline control in PDCP, we respectfully submit, for the reasons and on the grounds set out in this document, the non-compliances are, when weighed in the balance, both justifiable and acceptable.

Finally, we trust that, in Council's consideration and determination of this application, Council not again fall into error by purporting to require that the development be secondary to the landscaping.

In our opinion, the proposal merits support from the consent authority and a grant of conditional development consent.

11.0 Conclusion and submission to Council

We are of the opinion that the amendments to the development the subject of this application will not cause any appreciable adverse environmental impact and can only serve to work in favour of the proposal.

We conclude and respectfully submit to Council that there is sufficient probative material for Council to be more than comfortably satisfied that the development is satisfactory from an environmental planning viewpoint and warrants a grant of conditional consent.

We would welcome the opportunity to sit down with Council officers and discuss this matter and amplify any matters discussed in this letter and address any further queries or questions Council officers may have, should this be necessary.

Yours faithfully,

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