
Sent: 18/10/2023 3:39:28 PM
Subject: TRIMMED: DA 2023 1289 1112-1116 BARRENJOEY ROAD PALM BEACH
WRITTEN SUBMISSION: LETTER OF OBJECTION SUBMISSION: TULLOCH
Attachments: 1116 BR WS.pdf;

Kind regards,

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SUBMISSION

a written submission by way of objection

BILL TULLOCH BSC [ARCH] BARCH [HONS1] UNSW RIBA Assoc RAIA

prepared for

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18 OCTOBER 2023

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RE: DA 2023 1289
1112-1116 BARRENJOEY ROAD PALM BEACH
WRITTEN SUBMISSION: LETTER OF OBJECTION
SUBMISSION: TULLOCH

Dear Sir,

This document is a written submission by way of objection lodged under Section 4.15 of the EPAA 1979 [the EPA Act].

I have been instructed by my clients to prepare an objection to this DA.

I have been engaged by my clients to critically review the plans and documentation prepared in support of the above development application and to provide advice in relation to policy compliance and potential residential amenity impacts.

Having considered the subject property and its surrounds and the details of the development application currently before Council, I am of the opinion that the proposal, in its present form, does not warrant support. In addition, I am of the view that amendments would need to be made to the development proposal before Council was in a position to determine the development application by way of approval.

Unless the Applicant submits Amended Plans to resolve all of the adverse amenity impacts raised within this Submission, my clients ask Council to REFUSE this DA.

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A. EXECUTIVE SUMMARY

The design of the proposed development does not ensure that the existing high levels of amenity to my clients' property are retained.

Having reviewed the documentation prepared in support of the application and determined the juxtaposition of adjoining properties I feel compelled to object to the application in its current form.

The proposal is considered to be inappropriate within the streetscape.

The bulk, scale, density and height of the proposed development is excessive and inconsistent with the established and desired future streetscape character of the locality.

The subject site is zoned E1 Local Centre under the LEP, and there is no reason, unique or otherwise why a fully compliant solution to LEP and DCP controls cannot be designed on the site.

Council will note that all land surrounding the subject site is in C4 Environmental Living.

The proposed development fails the aims of the E1 Zone, namely:

To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment

The proposed development represents an overdevelopment of the site and an unbalanced range of amenity impacts that result in adverse impacts on my clients' property.

- Unacceptable Adverse View Loss Impacts
- Unacceptable Adverse Solar Loss Impacts
- Unacceptable Adverse Visual Privacy Impacts
- Unacceptable Adverse Acoustic Impacts from Roof Plant
- Unacceptable Adverse Visual Bulk and Scale Impacts
- Unacceptable Adverse Landscape Impacts
- Unacceptable Adverse Engineering Impacts

The proposed development fails to meet Council's planning controls, the objectives and the merit assessment provisions relating to:

- Excessive Building Height [HOB] of Roof @ 18.65: Proposed 10.65m v Control 8.5m [25% non-compliance] Roof @18.65 crosses the 8m contour
- Excessive Building Height [HOB] of Roof @ 15.55: Proposed 9.15m v Control 8.5m [8% non-compliance] crosses the 6.5m contour
- Excessive Building Height [HOB] of Roof @ 12.45: Proposed 10.0m v Control 8.5m [18% non-compliance] Above 2.45 survey mark
- Insufficient Northern Setback: Proposed 3m v Control 9.0m [x3 non-compliance] ADP 6m + 3m ADP Change in Zone

- Insufficient Southern Setback: Proposed 3m v Control 9.0m [x3 non-compliance] ADP 6m + 3m ADP Change in Zone
- Insufficient Rear Setback to retaining wall: Proposed 4.5m v Control 9.0m [100% non-compliance] ADP 6m + 3m ADP Change in Zone
- Three Storey configuration above EGL, rather than Two Storey configuration as the 8.5m HOB standard and DCP controls state.

The proposed development is incapable of consent, as there is a substantial list of incomplete information that has yet to be provided, including:

- Clause 4.6 on HOB
- View Loss Analysis from all of my client's property – height poles required for built form over 8.5m and 72 proposed trees over 8.5m
- Privacy Analysis – inadequate setbacks
- Registered Surveyors levels transferred to all DA drawings – none provided
- Dimensioning - none provided

The proposed development represents an unreasonably large building design, for which there are design alternatives to achieve a reasonable development outcome on the site without having such impacts.

The Height Blanket provided within the DA set of drawings describes that the proposed height to fall below the 10.0m concessional HOB height plane. This is false.

The roof at RL 18.65 crosses the 8.0m contour line presenting a height of building in excess of 10.65m.

I ask Council to request that the applicant superimpose the Registered Surveyors plan detail with all spot levels and contours onto the Roof Plan, with all proposed RLs shown, so that a full assessment can be made. Drawing A04 Level 4 Plan superimposes a suggested contour, however this 'contour' appears to be different to the Registered Surveyors plan showing the contour at RL 8.5 and RL 9.0. I contend that the maximum HOB must be 8.5m, as there are view loss and other amenity losses in play.

No Clause 4.6 written request has been submitted.

The SEE does not adequately demonstrate that the proposal achieves the relevant objectives of the development standards, or that there are insufficient environmental planning grounds to justify the extent of the proposed variations sought.

Any variations above the 8.5m standard would result in undue visual bulk that would be inconsistent with the desired future character of the locality.

The proposed development does not satisfy the objectives of the zone or contribute to a scale that is consistent with the desired character of the locality and the scale of surrounding development.

The proposed development presents a 'wall' of built form cascading down the slope with an apparent height above pavement of over 16m. No other built form

addresses Barrenjoey Road in this manner. The visual appearance of this massive built form immediately adjacent Barrenjoey House is unreasonable and unacceptable.

DA 2022/0469, at 1102 Barrenjoey Road, to the south of Barrenjoey House, was refused by NBLPP on 20 April 2023 for the following reasons:

1. The clause 4.6 written request does not adequately address the provisions of clause 4.6(3) to demonstrate that compliance with the Building Height development standard under clause 4.3 of Pittwater Local Environmental Plan 2014 is unreasonable or unnecessary in the circumstances of the case or that there are sufficient environmental planning grounds to deviate from the standard.
2. The proposal has not demonstrated that the development is compatible with desired future character of the zone and Palm Beach locality.
3. The proposed development exhibits unreasonable height, bulk and scale that would dominate the streetscape and in particular heritage listed Barrenjoey House.
4. Insufficient information submitted to satisfactorily demonstrate compliance with clause 7.7 of the LEP in relation to geotechnical impacts.

The reasons for refusal set out by NBLPP on the site to the south of Barrenjoey House, at 1102 Barrenjoey Road can equally be applied against this DA to the north of Barrenjoey House.

I contend that the design should better reflect Barrenjoey House, in terms of wall height and ridge height, with a design that better responds to the solid to void relationship of Barrenjoey House.

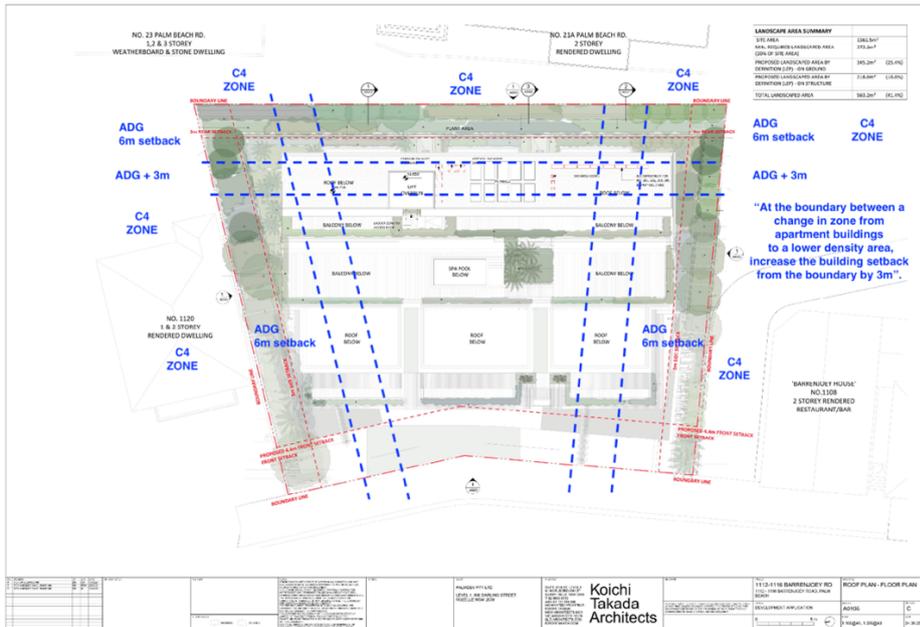
I contend that the rear and side setback do not comply with the ADG, nor the ADG requirement that states:

"At the boundary between a change in zone from apartment buildings to a lower density area, increase the building setback from the boundary by 3m".

The subject site is surrounded by C4 Zone land title.

This ADG control increases the required ADG setbacks from 6.0m to 9.0m.

I contend the proposed development is not only significantly over HOB, but significantly non-compliant to setback.



A compliant design to LEP & ADG controls

A LEP and ADG compliant building design would reduce the amenity impacts identified.

My clients agree with Roseth SC in NSWLEC Pafbum v North Sydney Council:

"People affected by a proposal have a legitimate expectation that the development on adjoining properties will comply with the planning regime."

The 'legitimate expectation' that my clients had as a neighbour was for a development that would not result in very poor amenity outcomes caused directly from the non-compliance to building envelope controls.

My clients wish to emphasise the fact that my clients take no pleasure in objecting to their neighbour's DA.

The proposed DA has a deleterious impact on the amenity of their property caused by the DA being non-compliant to controls.

Council and NSWLEC Commissioners regularly concede that development standards and building envelopes provide for maximums and that there is no entitlement to achieve those maximums.

It does seem unreasonable that the Applicants wish to remove my client's amenity to improve their own, and is proposing non-compliant outcomes that would seriously adversely affect my clients' amenity.

The LEP does not include floor space ratio standards to control building bulk and scale in this residential area. Managing building bulk and scale relies on the application of controls relating to landscaped area, building height and building setbacks and building envelopes.

Council's development controls relating to managing building bulk and scale are designed to ensure that buildings are consistent with the height and scale of the desired character of the locality, are compatible with the height and scale of surrounding and nearby development, respond sensitively to the natural topography and allow for reasonable sharing of views and visual amenity.

Council's DCP with respect to the locality, requires that development respond to the natural environment and minimise the bulk and scale of buildings. The proposed development in its current form does not achieve this and provides inadequate pervious landscaped area at ground level.

The proposal does not succeed when assessed against the Heads of Consideration pursuant to section 4.15 of the Environmental Planning and Assessment Act, 1979 as amended. It is considered that the application, does not succeed on merit and is not worthy of the granting of development consent.

The proposed development fails the fundamental principles of design excellence in terms of:

- Context and local character
- Built form, scale and public domain, urban design response
- Density
- Landscape integration
- Architectural expression, in terms of excessive built form in height and non-compliant setbacks
- Amenity impacts on neighbours

Council should note that spot survey levels and contour lines from the Registered Surveyors drawings have not been adequately transferred to the proposed DA drawings of plans, sections, and elevations to enable an assessment of height and the relationship and impact to adjoining neighbours. Neighbour's dwellings have not been accurately located on plans, sections and elevations, including windows and decks, to enable a full assessment of the DA. The plans and documentation are misleading as they do not clearly portray the true extent of works proposed. The plans include inaccuracies and inconsistencies and insufficient information has not been provided in order to enable a detailed assessment, including incomplete dimensional set-out and incomplete levels on drawings to define the proposed building envelope. There is incomplete analysis provided including view loss, solar loss and privacy loss.

My clients ask Council to seek modifications to this DA as the proposed development does not comply with the planning regime, by non-compliance to development standards, and this non-compliance leads directly to my clients' amenity loss.

If any Amended Plan Submission is made by the Applicant, and re-notification is waived by Council, my clients ask Council to inform them immediately by email of those amended plans, so that my clients can inspect those drawings on the Council website.

B. FACTS

1. THE PROPOSAL

The development application seeks approval for the demolition of the existing site structures and the construction of a shop top housing development incorporating 7 apartments above 2 retail tenancies and basement car parking for 23 vehicles accessed from the Barrenjoey Road frontage.

2. THE SITE

The subject property is legally described as Lot 21, DP 571298, No. 1112-1116 Barrenjoey Road, Palm Beach. The property is irregular in shape with irregular frontage to Barrenjoey Road of 35.965 metres, variable splayed depth of between 33.53 and 36.125 metres, a rear boundary dimension of 46.715 m an area of 1361.5sqm. The site falls approximately 14 metres across its surface in a westerly direction towards the Barrenjoey Road frontage.

3. THE LOCALITY

The existing character of the local area, including the immediate visual catchment (generally within 150 metres of the site) is of a well-established neighbourhood, made up of a heterogeneous mix of dwelling types within domestic landscaped settings.

My clients' property shares a common boundary with the subject site.

4. STATUTORY CONTROLS

The following Environmental Planning Instruments and Development Control Plans are relevant to the assessment of this application:

- Environmental Planning and Assessment Act 1979
- Environmental Planning and Assessment Regulation 2021
- All relevant and draft Environmental Planning Instruments;

- SEPP (Building Sustainability Index: BASIX) 2004;
- SEPP (Resilience and Hazards) 2021;
- SEPP No 65 Design Quality of Residential Apartment Development
- SEPP (Design & Place) 2021 – Apartment Design Guide, Urban Design Guide

- Pittwater Local Environmental Plan 2014 [referred to as LEP in this Submission]
- Pittwater 21 Development Control Plan [referred to as DCP in this Submission]

C. CONTENTIONS THAT THE APPLICATION BE REFUSED

1. LACK OF STATUTORY POWER

CLAUSE 4.6

The development application should be refused as the proposal exceeds the development standard prescribed by the LEP and it has not been supported by a request to vary pursuant to clause 4.6 of the LEP.

The application benefits from Clause 2D of Clause 4.3 *Height of Buildings*, which permits a 10.0m height on the site, in lieu of the standard 8.5m. As the Objectives of the clause are not met, the lesser building height of 8.5m is applicable. The proposal is not accompanied by a Clause 4.6 Variation Request in relation to building height and therefore cannot be consented.

2. CONTRARY TO AIMS OF LEP

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy the aims under the LEP.

- The development compromises amenity impacts on neighbours
- The development is not compatible with the desired future character of the locality in terms of building height and roof form.
- The development does not minimise the adverse effects of the bulk and scale of buildings

3. CONTRARY TO ZONE OBJECTIVES

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy the objectives of the zone of the LEP.

- The development compromises amenity impacts on neighbours
- The development compromises views
- The development compromises solar
- The development compromises privacy
- The development does not minimise visual impact

Council in a pre-submission meeting with the applicant stated:

An objective of the B1 zone is to:

To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood. The physical form of the proposed development is not considered to be "small-scale", in contrast with the existing development that adjoins the site. This is also demonstrated by the non-compliance with the Height of Buildings development standard. Hence, the proposal is not consistent with the Objectives of the zone.

I contend that:

- The Land Use Table for Zone E1 Local Centre specifies the following zone objective:

"To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment."

- The proposed development will not provide for an urban form that relates favourably in scale, architectural and landscape treatment to neighbouring land uses due to the height and scale of the building in the area of the height breach and the building generally.
- The height non-compliance and 16m elevational built form facing the street will be inconsistent with the desired character of the Palm Beach Locality which seeks the design, scale and treatment of future development within the commercial centres to reflect a 'seaside-village' character through building design and landscaping, and a built form that reflects the principles of good urban design.

4. INCONSISTENT WITH SEPP 65 DESIGN QUALITY PRINCIPLES

The proposed development should be refused because it does not satisfactorily respond to the applicable design quality principles identified within Schedule 1 of SEPP 65.

The design has not been fully resolved to ensure compliance with the relevant design principles, in particular the height and massing of the building should be revised to reduce the scale of the upper level (in the area of the breach), the building generally and the proposal should seek to improve the materiality to ensure it is compatible with the adjoining heritage building (Barrenjoey House).

The development application should be refused because the proposed design is unacceptable and the application does not comply with the Design quality principles in SEPP 65 or the Apartment Design Guide (ADG).

(a) Principle 1 (Context and neighbourhood character) of SEPP 65 requires buildings to respond to and enhance the qualities and identity of the area, including the adjacent sites, streetscape and neighbourhood. The height, scale and massing of the proposed development is not commensurate with surrounding low density residential development in the catchment area. As a consequence, the proposed

development will not enhance the qualities and identity of the area. The proposed development fails to satisfy Principle 1 of SEPP 65.

(b) Principle 2 (Built form and scale) of SEPP 65 requires development to achieve a scale, bulk and height appropriate to the existing or desired future character of the street and surrounding buildings. The part 2-3 storey residential flat building over 2 levels of basement car parking is not compatible with the height, bulk and scale of established development in the catchment area. Consequently, the proposed development fails to Satisfy Principle 2 of SEPP 65.

(c) Principle 3 (Landscape) of SEPP 65 requires development to contribute to the landscape character of the streetscape and neighbourhood and requires landscape design to optimise useability, privacy and opportunities for social interaction, equitable access, respect for neighbours' amenity and provides for practical establishment and long term management. The proposed development does not provide a satisfactory landscaping scheme to contribute to the landscape character of the streetscape or enable the practical establishment and long term management of landscaping.

Council in a pre-submission meeting with the applicant stated:

Part 1B

Part 1B of the ADG requires development to respond and contribute to the local character and context of the locale. This matter is discussed later under Part A of the Pittwater 21 Development Control Plan 2014 (PDCP) but in summary, is not found to be a proportionally or contextually appropriate response to the existing or desired future character.

Part 2F

Building separation requires separation distances between buildings of between 6 and 12m. These dimensions exceed and prevail over the side setback requirements stipulated in the PDCP. The northern boundary of the site adjoins land zoned E4 Environmental Living which predominantly lends itself to the continued use of that land as a dwelling house. The development has non-habitable rooms facing this site and should be setback 6m from the northern boundary

Part 3F-1

A 6m building separation / setback will be required to both the north and south boundaries of the site, to be consistent with Part 3F-1 of the ADG.

I contend that the ADG requires an additional 3m setback to the 6m building separation as adjoining sites are all within a C4 Environmental Living zone, and the ADG 3m additional setback 'change of zone' control applies.

5. CHARACTER & STREETScape

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide adequate streetscape outcome, presenting non-compliant envelope controls that are visible from the street. The proposed development will have unacceptable impacts upon the amenity of neighbours' property, specifically with regard to visual bulk impact.

The proposal does not meet the streetscape character and key elements of the precinct and desired future character.

The proposal is excessive in scale, has adverse impacts on the visual amenity of the environment, does not positively contribute to the streetscape in terms of an adequately landscaped setting. The proposal is visually dominant, and is incompatible with the desired future townscape area character.

The development has excessive bulk and scale and fails to comply with development standards set out LEP, resulting in a building which has unacceptable adverse impacts on neighbouring properties and the locality.

The non-compliant building envelope will lead to unacceptable visual bulk impact to neighbours.

The multiple non-compliances arising from the proposed upper floor level and the non-compliant setbacks indicates that the proposed development cannot achieve the underlying objectives of this control, resulting in an unacceptable building bulk when viewed from adjoining and nearby properties.

The development presents an inappropriate response to the site and an unsatisfactory response to the desired future character of the area.

Council in a pre-submission meeting with the applicant stated:

The Desired Future Character (DFC)

- *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. The bulk and scale of the proposal is too significant to reflect a "sea-side village" character, and is more reminiscent of densely populated urban commercial areas, rather than a village. There are insufficient areas of landscaped open space, particularly at ground level, due to the significant areas of excavation. The proposal is therefore not consistent with this Section of the P21 DCP.*
- *It is not agreed that the scale and continual horizontality of the built form lends itself to be reflective of a 'seaside village' and is it not found that an adequate provision of landscaping is afforded to contribute to this character. As described in the meeting it is the vastness of the built form which gives rise*

to the concern about meeting the DFC. Council is not anticipating a 'boatshed' like building with weather boarding, however it does anticipate that the widths and heights of any proposal would be congruent with their surroundings.

D12.14 Scenic Protection Category One Areas

- The site is located in a visually prominent area, on a heavily trafficked State road, adjoins highly used public open space, a transport terminal (the ferry wharf) and a popular Sydney metropolitan waterway to the west. All these factors mean that great importance must be placed on the ability of any new development to be consistent with the scenic values of the adjoining area. The proposed development fails to respond to these values.

Coastal and Catchments

- The objectives and requirements of both the CM Act and the CM SEPP must be addressed by the Statement of Environmental Effects (SEE) as they relate to development within the coastal zone. Clause 15 of the CM SEPP will also apply to the proposed development.

Council DSAP in a pre-submission meeting with the applicant stated:

- Redesign is required to achieve a seaside village character with adequate deep soil landscape areas to achieve a balance between maintaining the landforms, landscapes and other features of the natural environment, and the development of land.
- Consider articulating the built form with vertical landscape breaks of a significant scale to deliver a finer grain, built form characteristic of a seaside or coastal village
- Building heights should fully comply with the 10m height limit to ensure the building forms are better integrated with topography by stepping closely with natural slopes of the landform.
- Reduce the number of storeys by one
- Increase the building setbacks on the eastern and northern boundaries to 6m as recommended in the ADG. This will allow significant native planting between buildings and ensure the development contributes to the desired future character of the Palm Beach locality.
- Prior to DA lodgement remove all weed and waste from rear slope and undercover and survey any original sandstone cliff line and/ or endemic trees or ground storey vegetation.
- Incorporate these features into the design proposal and further revegetate this rear setback to provide a landscape feature at the rear of development. Design lower apartments so as to provide cross flow ventilation and entry of light and capitalising on the shaded rock mass as a cooling element.
- The street power lines should be undergrounded to enable the provision of additional street trees
- The building street setback should be provided with substantial landscape elements in deep soil.
- The building setback to Barrenjoey Road should be designed to allow at least two large endemic canopy trees to be provided.

- o *The rear setbacks should contain a minimum clear width of 3m for endemic tree planting. The private terrace areas should not encroach into the deep soil setback areas.*

I contend that the development application should be refused because the proposed development is not consistent with the provisions of Clause 4.3 Building Height of the PLEP as it is not considered to be compatible with the height and scale of surrounding development and does not minimise the adverse visual impact of development on the natural environment and heritage items.

The overall height, bulk and scale of the built form is too large and not consistent with the established building typologies and scale of the surrounding area or the desired character of the locality and is inconsistent with the objectives of Clause 4.3 'Height of buildings' of the PLEP which seeks to ensure that any building is consistent with the desired character of the locality, to ensure that buildings are compatible with the height and scale of surrounding and nearby development and to minimise the adverse visual impact of development on the natural environment and heritage items.

The proposed height, scale and form of the proposed shop top housing development does not address the special characteristics of the site and its important streetscape requirements, nor does it demonstrate an acceptable relationship that respects the significance Barrenjoey House (Item 2270076) which is listed as an item of local heritage significance on in Schedule 5 'Environmental Heritage' of the PLEP.

The building footprint (site coverage) is excessive, contributing to the unacceptably large bulk and scale of the proposal, with the non-compliant setbacks adding to this problem.

The built form is inconsistent with the design guidelines contained within Part D12 (Palm Beach locality) of the Pittwater 21 DCP.

The materials and finishes do not contribute to the character of the area which requires a lighter approach to architecture and roof form to be consistent with the desired character statement in A4.12 Palm Beach Locality of the Pittwater 21 DCP.

The proposed design is contrary to the desired future character outcomes in D12.1 'Character as viewed from a public place' outlined in the Pittwater 21 DCP due to the massing of the building, roof design and materials which do not respond to, reinforce or sensitively relate to the spatial characteristics of the existing built and natural environment.

The proposal does not achieve the desired future character described in Pittwater 21 DCP Palm Beach Locality. Section A4.12 states:

"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."

The design of the building presents to Barrenjoey Road a character with no solid to void wall elements to respond to Barrenjoey House.

There are no precedents in the vicinity for the proposed architectural design.

Several of the Outcomes in Section D12.1, "*Character as viewed from a public place*", are not achieved:

To achieve the desired future character of the Locality.

The proposal does not comply with the Apartment Design Guidelines ("ADG")

The proposal has an imposing scale which is beyond that of any other development in the vicinity and does not fit with the desired future character of the area.

The proposal dominates the streetscape and has an architectural character which is alien to the existing and desired future streetscape character.

6. INCORRECT CONSIDERATIONS OF 'GROUND LEVEL EXISTING'

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to present *ground level (existing)* in accordance with the LEP, and the recent decisions on *ground level (existing)* at the NSWLEC.

The LEP states the following within the LEP Dictionary:

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

Spot levels and contour lines from the Registered Surveyors drawings have not been transferred to the proposed DA drawings of plans, sections, and elevations to enable an assessed of height and the relationship and impact to adjoining neighbours. Neighbour's dwellings have not been accurately located on plans, sections and elevations, including windows and decks, to enable a full assessment of the DA.

The topography of the site shows that the site has falls across the site.

The manner in which building height is measured has been clarified in a recent judgement of the NSW Land and Environment Court. In accordance with the NSWLEC judgement for *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, building height is measured from the existing ground level.

Council will also note, that in October 2021, the Court decided not to apply *Bettar* in a particular case *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582. The Court did not apply the *Bettar* decision and instead said (at [73]) that:

- o *the existing level of the site at a point beneath the existing building is the level of the land at that point; and*

- *the 'ground level (existing)' within the footprint of the existing building is the existing excavated ground level on the site.*

My clients contend that *ground level (existing)* on the subject site has not been assessed correctly.

My clients bring to Council's attention the following issues.

- The Height Blanket describing the height to fall below the 10.0m concessional height plane is false. The roof at RL 18.65 crosses the 8.0m contour line presenting a height of building in excess of 10.65m.

The HOB non-compliance occurs over the natural hillside to the rear of the site.

I contend that the Applicant has avoided locating the Registered Surveyors spot levels and contour levels onto the plans, sections and elevations to suggest that the heights are lower than what is truly correct.

7. EXCESSIVE BUILDING HEIGHT

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to comply with the building height development standard under the LEP.

Council in a pre-submission meeting with the applicant stated:

"...based on the current design the proposal does not have sufficient merit to warrant the extent of the variation proposed.

The applicant is reminded that the 10m height limit is subject to satisfying the objective that: (d) the buildings are sited and designed to take into account the slope of the land and to minimise the need for cut and fill by designs that allow the building to step down the slope. As the proposal seeks to excavate the entirety of the site to below ground level it is unclear how it could be justified that the design achieves compliance with this objective. "

I contend that:

The development application should be refused because the proposal exceeds the maximum height of 8.5m permitted under Clause 4.3 Height of Buildings development standard under the Pittwater LEP 2014 with a height of 10.65m to the top of roof parapet (max height) a variation of up to 25% to the 8.5m standard which contributes to an unacceptable built form which is not compatible with the height and scale of surrounding development.

- The massing of the building should be revised to delete the upper level (in the area of the height breach) and the building generally to ensure that any

height non-compliance results in a built form that meets the character envisaged by the Palm Beach Locality statement.

- The massing of the building facing the streetscape should match the wall heights and roof heights of Barrenjoey House.
- The elevation consideration should consider a more appropriate solid to void relationship that better reflects the character of Barrenjoey House
- The roof form could include the bedroom accommodation of residential apartments to improve its relationship to the levels below, and to limit the roof openings
- The side and rear setbacks must accord with ADG controls, adding additional 3m setbacks due to the change of zone on all boundaries.

The development application should be refused because the applicant has not provided a written request under clause 4.6 of the Pittwater LEP 2014 seeking to justify a contravention of clause 4.3 Height of Buildings development standard. The SEE is not well founded and has not adequately addressed and demonstrated that:

- compliance with the standards is unreasonable or unnecessary in the circumstances of the case.
- there are sufficient environmental planning grounds to justify the contraventions, and
- the proposed development will be in the public interest because it is consistent with the objectives of the standards and the objectives for development within the zone in which the development is proposed to be carried out.

Any Clause 4.6 variation request cannot be supported as the proposal has not demonstrated that the design has fully resolved or addressed the requirements of Clause 4.3 Height of buildings development standard and the proposal does not meet the built form, height, scale and compatibility objectives for the development standard.

The proposed development should be refused due to its excessive height and failure to comply with the *Height of Buildings* set out in the LEP, and in particular:

- The proposed development, by virtue of its height and scale, will not be consistent with the desired character of the locality
- The development will not be compatible with the height and scale of surrounding and nearby development.

The development application should be refused because the proposed building height is excessive and does not comply with the objectives or controls in the LEP

There is no written request made pursuant to clause 4.6 of the LEP in relation to the contravention of the development standard.

The proposal is inconsistent with the objectives of the Height of Buildings development standard pursuant to LEP.

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss

- The development does not minimise visual impact
- The development is not compatible with the desired future character of the locality in terms of building height and roof form.
- The development does not minimise the adverse effects of the bulk and scale of buildings

The adverse impacts of the proposed development, including on the amenity of neighbouring property and public property, are directly attributable to the exceedance of the height of buildings development standard.

The proposal is inconsistent with the LEP as there is a public benefit in maintaining the Height of Buildings development standard in this particular case.

The proposed portion of the building above the maximum height is not 'minor'. The building does not adequately step down the slope.

The side and rear setbacks must accord with ADG controls, adding additional 3m setbacks due to the change of zone on all boundaries. There is substantial non-compliant built form in the ADG setback zones.

The DA seeks for a substantial non-compliance with the Council permissible height as provided for in the LEP.

The application seeks to vary the 8.5m height limit that is a development standard within the LEP.

It would appear that no Clause 4.6 request to vary the development standard has been submitted because the applicant also relies upon Clause 4.3(2D), which permits development above 8.5m but below 10m where specific criteria are met.

I contend the proposed height exceeds 10m, and a Clause 4.6 request is required.

Clause 4.3(2D) is reproduced below, in italics:

(2D) Despite subclause (2), development on land that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map may exceed a height of 8.5 metres, but not be more than 10.0 metres if—

(a) the consent authority is satisfied that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, and

(b) the objectives of this clause are achieved, and

(c) the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and

(d) the buildings are sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.

I maintain that it is not open to the applicant to utilise Clause 4.3(2D) which would allow consideration of the stated excessive maximum height because criteria (b), (c), and (d) above are not achieved. I demonstrate this non-compliance as follows:

Objectives of Clause 4.3 Height of Buildings - Criteria (b)

The proposed dwelling is not consistent with the following objectives of Clause 4.3:

(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,

The desired character of the locality is expressed within the DCP. The proposed development is clearly not consistent with this provision. The proposed development exceeds envelope controls that describe the expectation of the desired character.

At almost every point of measurement, the proposal will achieve more than two storeys. Whilst there are some three storey dwellings in the locality, they are generally stepped to ensure that predominantly structures are two storeys in any one place. It appears that the proposal has no intention of attempting to comply with this important aspect of the local character. This is clearly not consistent with the intentions of the DCP. The proposed development makes no attempt to minimise bulk and scale as viewed from street and importantly from the public water way. The proposed development cannot comply with the building envelope control due to its excessive height and lack of modulation.

The design offers little stepping of its form and proposes significant levels of excavation to create a basement level.

(b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

The scale of development is variable in the locality however, the lack of any stepping in the design, both horizontally and vertically to the extent proposed in this application is unprecedented in the nearby area. The height breach occurs across the full width of all levels, creating three storey configurations over the existing ground levels, rather than two storey configuration as anticipated by the LEP standard at 8.5m. This exacerbates the perception of scale as it is presented both at the edges of the dwelling and across the whole expanse of the elevation facing the water.

This type of development might suit a HOB zone that allows a 10.5m HOB standard, and a three-storey format. This is not the expectation within an 8.5m HOB zone, particularly positioned immediately adjacent to a heritage item that is in a two-storey wall height configuration.

Whilst other dwellings nearby are likely to have minor height breaches, they are in general experienced at isolated and centralised points, meaning that the height breach is generally further away from the observer and therefore less impacting. I contend that the full height breach of this proposed development will be observed at many locations in the immediate area and as such the incompatibility of this

proposed development in comparison to those around it will be confronting in the visual catchment.

(c) to minimise any overshadowing of neighbouring properties,

Elevations diagrams which include shadow from existing structures should be modelled to accurately quantify the sunlight to be lost in my client's dwelling.

(d) to allow for the reasonable sharing of views,

I contend that the height breach will remove views of the water and foreshore area as viewed from my client's property. The additional of 72 trees to mask the excessive height will take considerable view to a large catchment of neighbours.

(e) to encourage buildings that are designed to respond sensitively to the natural topography,

I contend that the extensive cut proposed on this site cannot be considered a sensitive response to the natural topography. This comes at the expense of the topography, and the amenity of the neighbourhood.

(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

I contend that the non-compliant built form will be dominant and be confronting in the landscape as viewed from the waterway, and this will impact upon the natural environment is contrary to the objectives of the development standard overall.

In summary, as the proposed development is unable to demonstrate consistency with the objectives of the Height of Buildings Development Standard, Clause 4.3(2D) cannot be relied upon.

The proposal is not supported by a clause 4.6 seeking to justify the breach of the height standard.

My clients submit that the proposal is excessive and an over development and that any clause 4.6 submissions would not satisfy the pre-requisites in clause 4.6 of the LEP.

My clients submit that the submission fails on the basis of the assessment against the objectives of clause 4.3, as well as the environmental planning grounds set out. Additionally, I consider that the development does not comply with the land use objectives.

In respect of the proposed development, I submit that the built form, which also incorporates other substantial non-compliant breaches to setbacks, will have negative impacts on the amenity of neighbours as well as have significant impacts in respect of visual intrusion. Additionally, there is nothing provided for in this development that seeks to minimise the adverse effects of bulk and scale of the building.

In respect of the compatibility test, unsurprisingly the applicant completely ignores multiple considerations dealing with the understanding of the site in respect of its topography, how it is viewed from neighbouring properties as well as the lack of compatibility with its form and articulation.

My clients contend that the proposal fails to adequately demonstrate that compliance with each standard is unreasonable or unnecessary nor that there are sufficient environmental planning grounds to justify contravening each of the standards.

Variation of the development standards is not in the public interest because the proposed development is not consistent with the objectives of each development standard nor the objectives of the zone. The proposed development has not sought adequate variations to development standards.

The proposal is excessive in bulk and scale, and is inconsistent with the desired future character of the area resulting in adverse impacts on the streetscape. The proposal results in an unacceptable dominance of built form over landscape. The proposal fails to minimise the adverse effects of bulk and scale resulting in adverse amenity impacts.

The proposed development should be refused due to its excessive visual impact and impacts on the character of the locality, adjoining properties and the surrounding environment.

The form and massing of the proposal does not appropriately respond to the low-density character of the surrounding locality

The form and massing of development is also inconsistent with the provisions of the DCP which prescribe that new development should complement the predominant building form in the locality.

The proposal would not recognise or protect the natural or visual environment of the area, or maintain a dominance of landscape over built form. The proposal has not been designed to minimise the visual impact on the surrounding environment.

In *Veloshin*, [*Veloshin v Randwick Council 2007*], NSW LEC considered Height, Bulk & Scale. *Veloshin* suggest that Council should consider:

“Are the impacts consistent with impacts that may be reasonably expected under the controls? For non-complying proposals the question cannot be answered unless the difference between the impacts of a complying and a non-complying development is quantified.”

The impacts are not consistent with the impacts that would be reasonably expected under the controls.

In *Project Venture Developments v Pittwater Council (2005)* NSW LEC 191, NSW LEC considered character:

"...whether most observers would find the proposed development offensive, jarring or unsympathetic in a streetscape context, having regard to the built form characteristics of development within the site's visual catchment".

The non-compliant elements of the proposed development, particularly caused from non-compliant excessive heights and setbacks would have most observers finding *'the proposed development offensive, jarring or unsympathetic'*.

The planning controls are not limited to preventing offence and the like; and are concerned with establishing a certain physical and landscape character. In this instance I am not convinced that there are strong environmental planning grounds to justify a contravention of the scale proposed.

8. UNACCEPTABLE BUILDING SEPARATION

The proposed development should be refused as it is significantly non-compliant with setback of the DCP.

- Side
- Rear

The proposed development does not provide appropriate setbacks. This leads to inconsistency with the character of the area and unreasonable amenity impacts.

The non-compliance fails:

- To reduce amenity impacts on neighbours
- To provide opportunities for deep soil landscape areas.
- To ensure that development does not become visually dominant.
- To ensure that the scale and bulk of buildings is minimised.
- To provide adequate separation between buildings to ensure a reasonable level of privacy, amenity and solar access is maintained.
- To provide reasonable sharing of views to and from public and private properties.

The proposed development results in an encroachment beyond the prescribed building envelope. This non-compliance is indicative of an unacceptable built form and contributes to the severe amenity loss.

The proposal will result in an unsatisfactory scale of built form that will be disproportionate and unsuitable to the dimensions of the site and neighbouring residential development.

The height and bulk of the development will result in unreasonable impacts upon the amenity of neighbouring properties with regard to visual dominance.

The excessive built form of the proposal results in a development where the building mass becomes visually dominant and imposing, particularly when viewed from the visual catchment of neighbouring properties

The cumulative effect of the non-compliances with setback and other development standard result in an over development of the site with the site being not suitable for the scale and bulk of the proposal.

Council in a pre-submission meeting with the applicant stated:

D12.6 Side and rear building line

Whilst the proposal is consistent with the part of the DCP, the setbacks specified by the ADG, would require a 6m setback from the north and south boundaries of the site.

I contend that the side and rear setbacks do not comply with the ADG.

The proposal fails to meet the side and rear setback provisions of Cl 2F of the ADG.

The ADG further states that:

“At the boundary between a change in zone from apartment buildings to a lower density area, increase the building setback from the boundary by 3m”.

This increases the required rear setback to 9.0m.

Adherence to the ADG setbacks would reduce the overall scale and impact of the building and provide greater separation from Barrenjoey House.

9. CLAUSE 4.6 VARIATION REQUEST

The development application should be refused as the proposal exceeds the development standard prescribed by the LEP and it has not been supported by a request to vary pursuant to clause 4.6 of the LEP.

Council in a pre-submission meeting with the applicant stated:

Failure to respond to the character of the surrounding areas means that there are no sufficient planning grounds to vary the Height of Buildings development standard and any request based on the current design will not be supported.

I contend that:

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss
- The development does not minimise visual impact
- the impacts are not consistent with the impacts that may be reasonably expected under the controls;
- the proposal's height and bulk do not relate to the height and bulk desired under the relevant controls;

- the area has a predominant existing character and are the planning controls likely to maintain it;
- the proposal does not fit into the existing character of the area;
- the proposal is inconsistent with the bulk and character intended by the planning controls;
- the proposal looks inappropriate in its context

The objectives of the standard have not been met.

The bulk and scale of the proposed development is inappropriate for the site and locality.

Strict compliance with the maximum building height is reasonable and necessary in the circumstances of this case.

In summary, the proposal does not satisfy the requirements of clause 4.6 of LEP 2014.

The variation of the standard would not be in the public interest because it would set a precedent for development in the neighbourhood, such that successive exceedances would erode the views enjoyed from other similar properties.

The proposed development is inconsistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

10. HERITAGE CONSERVATION CONCERNS

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide adequate heritage conservation outcomes, presenting non-compliant envelope controls that are visible from the heritage items.

The application results in a built form which is not subservient to the heritage item.

The proposed development would have a detrimental impact upon the characteristics features of the heritage item resulting in a massing that is likely to overwhelm the heritage item contrary to the following provisions within the LEP and DCP.

The overall bulk of the proposal is not sympathetic to the proportions and architectural character of the neighbouring heritage item.

The proposed development does not conserve the environmental heritage of the local area and does not conserve the heritage significance of the adjacent heritage items including settings and views.

Council in a pre-submission meeting with the applicant stated:

The proposal does not create an adequate spatial relationship with this significant building. Hence, the proposal fails the requirements of this clause.

In further development of the proposal, consideration should be given to the comparative scale and bulk of the proposal with Barrenjoey House. The form of the building might be usefully articulated as two forms either side of a central bay, which combined with a reduction in height, would effectively recall the scale back closer to that of Barrenjoey House.

I contend that the development application should be refused because the proposed development is not consistent with the provisions of Clause 5.10 Heritage Conservation of the Pittwater Local Environmental Plan 2014 as it results in adverse visual impacts on the adjoining heritage item.

The proposed shop top housing development is contrary to Clause 5.10 'Heritage conservation' of the Pittwater Local Environmental Plan 2014 as the proposed building is of an unacceptable height, massing and form that dominates and presents an unacceptable relationship to 'Barrenjoey House' (Item 2270076)), which is listed as an item of local heritage significance on Schedule 5 'Environmental heritage' of the Pittwater Local Environmental Plan 2014.

The proposed 16m high built form above the pavement, along with the 10.65m HOB, and non-compliant ADG setbacks to C4 zones, directly contributes to the visual bulk, height and scape of the building and visually dominates the adjoining heritage item.

The proposed height, scale and form of the proposed shop top housing development does not demonstrate an acceptable relationship and will detract from the visual prominence of the heritage item within the streetscape.

The proposed setbacks of the proposed shop top housing development do not provide an adequate transitional zone and separation to the heritage item and will obscure significant views to the heritage item when viewed from Barrenjoey Road in a southerly direction.

The proposed shop top housing development is contrary to the provisions of part B1.2 'Heritage Conservation – Development in the vicinity of heritage items' of the Pittwater 21 Development Control Plan in that the development does not minimise the impact on the heritage significance, does not provide an adequate buffer zone (transition zone) and does not maintain and respect significant views to the heritage item.

11. POOR GARAGE DESIGN

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as the design of the garage does not accord with the DCP provisions.

Off-street parking is proposed for a total of 23 cars in a new single-level basement parking area. The proposed development makes provision for a total of 23 car

parking spaces, comprising 14 residential parking spaces, 2 visitor parking spaces - both small car bays - and 7 retail spaces (including a shared service bay and a disabled space), thereby resulting in a 'shortfall' of 6 retail spaces when assessed under Council's DCP 2011 parking requirements.

The visitor parking spaces are both small bays and 6 retail spaces are double stacked. This is unacceptable. Sight plays contain high landscape.

Traffic in a single operation for a carpark that requires 30 cars is considered inappropriate.

I contend that the proposal is not acceptable as it does not satisfy the parking requirements of the Pittwater 21 DCP.

The proposal includes the provision of 23 car parking spaces, resulting in a net shortfall of six car parking spaces from Council's DCP requirements. Due to the high demand for parking in the area, additional parking spaces need to be provided on site. A review of the parking layout and/or reduced dwellings or bedrooms, should be considered in order to meet the parking requirements for the development.

My clients most strongly object to the repositioning of the Bus Stop. Any other locations would significantly impact access to and from their property, and would create unwanted and unacceptable amenity outcomes.

12. IMPACTS UPON ADJOINING PROPERTIES: ADVERSE VIEW LOSS IMPACTS

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to achieve an appropriate view sharing outcome to neighbours.

The development application should be refused as it results in unacceptable view loss from adjoining and nearby residential dwellings.

Particulars:

- (a) The proposal is inconsistent with objectives of the DCP regarding views;
- (b) The proposal is inconsistent with objective and controls of the DCP regarding views and view sharing;
- (c) The proposal is inconsistent with the height of building development standard under LEP and setback controls under the ADG;
- (d) The application documentation has failed to accurately and comprehensively consider and document view loss impacts on ALL affected neighbours at ALL levels of their property with view loss photomontage in full accordance with NSWLEC standards;

(e) Given that the applicant has failed to undertake an actual full view impact analysis associated with the individual impacted properties then the proposal is inconsistent with the Land and Environment Court Planning Principle contained in *Tenacity Consulting v Warringah Council* and in particular the “fourth step” regarding the reasonableness of the proposal in circumstances where impacts arise from a development that breaches planning controls; and secondly whether a more skilful design could reduce the impact on views of neighbours.

The development results in a loss of private views enjoyed by the neighbouring properties.

The development does not satisfy the objectives and planning controls of the DCP in respect to view loss.

The development exceeds the maximum quantum of development for the site by contravening development standards and planning controls.

The reduction of private views enjoyed by the neighbouring properties is attributed to the breaches of statutory development standards and planning controls that regulate the building envelope.

The proposed scale and design are not considered to take into account site or area planning to protect available water views. The proposed height, setback, design and roof form are not considered to promote or maximise the opportunity of achieving the ‘reasonable sharing of views’ and some view access to be maintained for neighbours. It is considered that design options do exist, in terms of ‘innovative design solutions’ to improve the urban environment, including maintaining view access in the area and tapering built form with the sloping topography. The application does not detail whether or which ‘skilful’ design options have been considered in accordance with the Planning Principle established by the Land and Environment Court in *Tenacity Consulting v Warringah Council* (2004) NSWLEC 140. The principle seeks to achieve a development whilst allowing reasonable view access. The available information does not provide current height poles or a view montage to clearly quantify the views blocked or protected by the current design. At a reduced height, with a lower roof form, the building could potentially allow some view across. It is considered reasonable to request a revised design in order to protect the public interest.

Height poles are to be erected and are to be certified by a registered surveyor.

View impact photographs are to be taken from my client's property and public places.

View impact photomontages prepared in accordance with the Land and Environment Court policy on the use of photomontages are to be prepared from the view impact photographs.

I consider that my clients' view loss is greater than moderate.

For proposed developments where there is the potential for view loss from nearby or adjoining properties, consideration must be given to the view sharing principles

detailed in the judgement handed down by the NSW Land and Environment Court under *Tenacity Consulting v Warringah Council*.

In relation to principle four of this judgement (being the 'assessment of the reasonableness of the proposal that is causing the impact'), it is considered that a development which complies with all planning controls would be deemed more reasonable than one that is non-compliant. The proposal, as it currently stands, presents numerous non-compliances to the planning controls listed under the LEP and DCP. This brings into question as to whether a more 'skilful' (or sensitive) design would achieve an improved and acceptable outcome, and as such allowing for an acceptable level of view sharing.

In this instance, it must be strongly recommended that the proposed proposal is redesigned to respond to, and address, principle four of *Tenacity Consulting v Warringah Council*.

In this instance, alternative design outcomes are encouraged to appropriately and satisfactorily address the four-part assessment of *Tenacity Consulting v Warringah Council*.

The proposed development when considered against the DCP and the NSW Land and Environment Court Planning Principle in *Tenacity Consulting Pty Ltd v Warringah Council (2004) NSWLEC* will result in an unacceptable view impact and will not achieve appropriate view sharing.

The proposed development will result in unacceptable additional view impacts. The view impact is greater than moderate when considered against the *Tenacity* planning principle. The view impact could reasonably be avoided by a more considered design that retains the amenity of the proposal, whilst limiting the impact upon the neighbouring property.

The built form proposed blocks scenic, iconic or highly valued items or whole views as defined in *Tenacity* terms.

The proposed development will unreasonably obstruct views enjoyed by my clients' property from highly used rooms and from entertainment balconies, resulting in inconsistency with the requirements and objectives of the DCP.

The proposed development has not considered the strategic placement of canopy trees to avoid further view loss impacts upon existing view corridors.

The Applicant has not provided an adequate View Impact Analysis which details the extent to which existing water views from my clients' property, and other impacted dwellings, are obstructed under the current proposal. The existing documentation accompanying the application is insufficient to undertake a detailed analysis of the proposal against the relevant DCP and NSWLEC guidelines.

I bring to Council's attention a number of recent dismissal of appeals on view loss grounds:

- FURLONG V NORTHERN BEACHES COUNCIL [2022] NSWLEC 1208

- DER SARKISSIAN V NORTHERN BEACHES COUNCIL [2021] NSWLEC
- WENLI WANG V NORTH SYDNEY COUNCIL [2018] NSWLEC 122
- REBEL MH NEUTRAL BAY V NORTH SYDNEY COUNCIL [2018] NSWLEC 191
- AHEARNE V MOSMAN MUNICIPAL COUNCIL [2023] NSWLEC 1013_

I contend that the composite consideration from these NSWLEC dismissals, gives clear consideration that where view loss occurs across a side boundary caused by non-compliant development, and the view loss is moderate or higher, then the DA is unreasonable.

Other decisions suggest that even when a compliant development causes view loss, and the view is across a side boundary, and when there is an alternative option open to avoid that view loss, and that alternative has not been taken, then the DA is unreasonable.

FURLONG V NORTHERN BEACHES COUNCIL [2022] NSWLEC 1208

I refer to a dismissal of a Class 1 Appeal by NSWLEC Commissioner Dr Peter Walsh on a nearby site in Dee Why on view loss grounds. I refer to Furlong v Northern Beaches Council [2022] NSWLEC 1208. [NBC DA 2021/0571, 55 Wheeler Parade Dee Why]

I represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council and the Court on this Appeal.

I raise the dismissal by NSWLEC of the Applicant's appeal. The case in question had many similarities to this DA.

NBC DDP refused this DA on 24 November 2021, with Panel members Rod Piggott, Rebecca Englund, Tony Collier and Liza Cordoba, following a Refusal Recommendation of NBC Development Assessment Manager, by the NBC Responsible Officer Jordan Davies, a very senior NBC Planning Officer, that Council as the consent authority refuses Development Consent to DA2021/0517 for Alterations and additions to a dwelling house on land at Lot B DP 338618, 55 Wheeler Parade Dee Why subject to the conditions that were outlined in the Assessment Report.

The assessment of DA 2020/0517 involved a consideration of a view loss arising from a proposed development that presented a generally compliant envelope to LEP and DCP controls.

The DDP agreed with the recommendation and refused this DA.

The Assessment Report found that:

“ A view assessment is undertaken later in this assessment report and the proposal is found to result in an unsatisfactory view sharing outcome and the application is recommended for refusal for this reason”

The Assessment Report found that in respect to a compliant envelope:

“ the question to be answered is whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact upon views of neighbours.”

The Assessment Report within the Tenacity Assessment concluded:

“the view impact looking south-east is considered both severe and devastating from the respective rooms given the significant proportion of the views which are impacted. The aspect looking south and south- east are considered whole, prominent coastal views which are certainly worthy of consideration and at least partial protection. The proposal to remove the vast majority of these views is considered overall to be a severe view impact.”

The DA was recommended for refusal, and DDP refused the DA in full support of the NBC Responsible Officer's Assessment Report.

The severity of the view loss that was considered unacceptable by the DDP was clearly stated by the DDP. This level of view loss was considered as 'severe' by the assessing officers and the DDP.

The Applicant appealed this decision.

On 22 April 2022, the appeal on Furlong v Northern Beaches Council [2022] NSWLEC 1208, was dismissed by the NSWLEC Commissioner Dr Peter Walsh. The decision summarised the issues:

60 Council took me to the findings of Robson J in Wenli Wang v North Sydney Council [2018] NSWLEC 122 ('Wenli Wang').

I reproduce pars [70]-[71] below:

“70 Applying the fourth step of Tenacity, I repeat that the proposed development complies with the development standards in the LEP and is therefore more reasonable than a development which would have breached them. However, I do also note that there is evidence in the form of the Colville plan that a similar amount of floor space could be provided by a design which reduces the effect on the view from the surrounding properties.

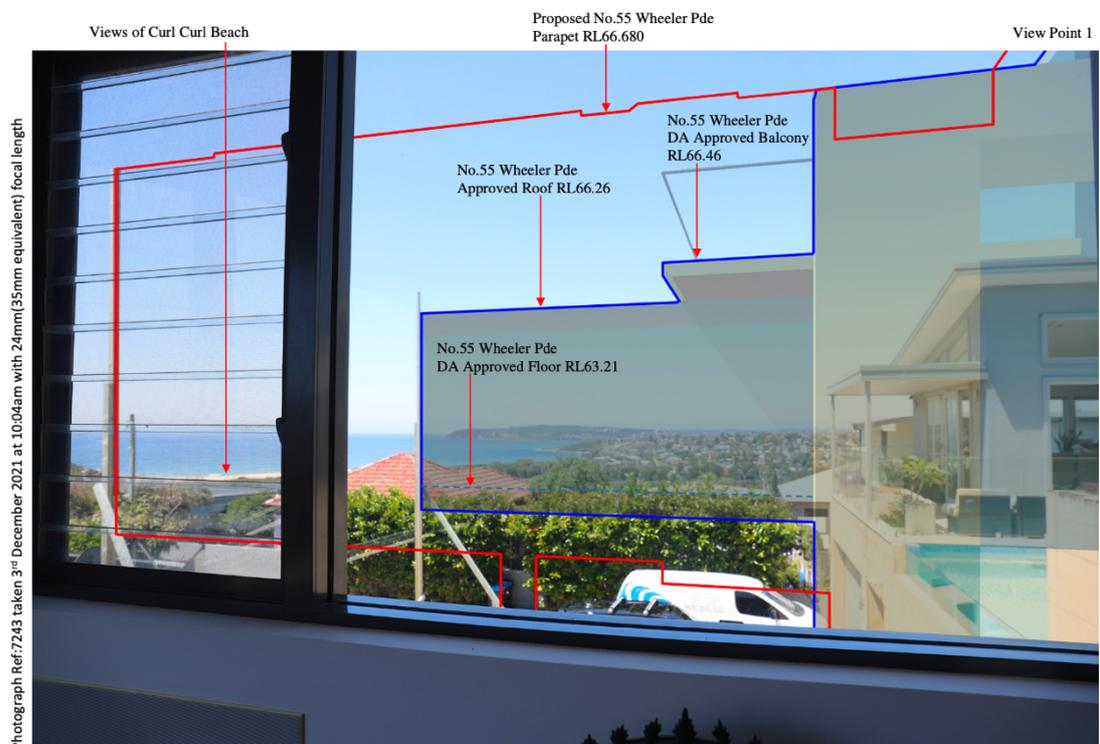
71 I consider there is force in the submission of Council that the applicant has taken a circular approach to the fourth step of Tenacity which presupposes a right to the level of amenity achieved by the proposed development. Whilst it is true that a redevelopment similar to that provided in the Colville plan would not provide the same amenity as the proposed development, it would provide a very high level of amenity and enjoy impressive views.”

61 In the matter before me, I am more inclined to the kind of conclusion expressed at [71] in Wenli Wang. While the proposed development, accommodating the alternative designs suggested by Council (either shifting the master bedroom westwards some 3.5m or sliding the master bedroom to the south to bring about the same view availability effect – see [43]), may not provide the same amenity outcomes as would be the case without such changes, the proposal would still enjoy a very high level of amenity, including in regard to the panoramic views available to

the south, especially from living areas. The master bedroom would still enjoy superior views.

62 The proposal would bring about a severe view loss impact on 51A Wheeler Parade when there are reasonable design alternatives which would moderate this impact significantly. The proposal does not pay sufficient regard to cl D7 of WDCP which requires view sharing. The proposal before the Court does warrant the grant of consent in the circumstances.

The key issues in this case considered that the proposal would bring about a greater than moderate view loss impact, across a side boundary, on a Study/Bedroom when there was a reasonable design alternative which would moderate this impact significantly. The proposal did not pay sufficient regard to cl D7 of WDCP which requires view sharing.



Photomontage by Pam Walls
Based on Survey Plus Survey#17703F:13/5/2021
Studio JLA DA Drawings#0328G:26/3/2021

3D computer model of DA Approved No.55 as 50% transparency
View from No.51A Wheeler Pde Study
Objection to No.55 Wheeler Pde, Dee Why. NSW

The NSWLEC Furlong View Loss

In light of the guidance given in Tenacity, side boundary views have been considered difficult to protect for homeowners who will suffer from view loss from a proposed development.

However, the decision by Commissioner Walsh in *NSWLEC Furlong* has clarified that although the decision in *Tenacity* makes it so that views across side boundaries are more difficult to protect than front and rear boundary views, that:

“does not mean the protection of views across side boundaries is not appropriate in some circumstances”.

Furlong has therefore extended the reach of the second step set out in *Tenacity* in circumstances where a proposed development would bring about moderate, severe or devastating view loss to side boundary views.

In *Furlong*, 'severe view loss' was taken to occur when a proposed development would block views that are of a 'high value' and not replicated in other areas of the property, even if those view were perceived from the side boundaries of a property.

The key-takeaway from this decision is that views that are not perceived from the front and rear boundaries of a property can still be protected if they are of 'high value' and not replicated in other areas of the property. In such circumstances, the loss of 'high value' views could be considered to cause severe view loss and may be able to be protected.

I contend that the decision in *Furlong* refines the steps in *Tenacity* and gives stronger protection to neighbouring properties who might suffer from view loss.

Further, a design alternative which reduces the view loss is more likely to be accepted. This goes to the reasonableness of a proposal under the fourth step in *Tenacity*.

Since *Tenacity*, side boundary views were considered difficult to protect for home owners who will suffer from view loss from a proposed development.

However, *Furlong* suggests that for side boundary views which are of a high value and not replicated in other areas of the property, it is appropriate to protect those views and refuse the proposed development. In this way, *Furlong* refines the planning principle in relation to view loss by placing greater emphasis on the perceived value of the view.

DER SARKISSIAN V NORTHERN BEACHES COUNCIL [2021] NSWLEC 1041

I refer to a dismissal of a Class 1 Appeal by NSWLEC Commissioner Dr Peter Walsh on a nearby site in Curl Curl on view loss grounds. My clients refer to *Der Sarkissian v Northern Beaches Council [2021] NSWLEC 1041*. [NBC DA 2019/0380, 72 Carrington Parade, Curl Curl]

I raise the dismissal by NSWLEC of the Applicant's appeal. The case in question had many similarities to this DA.

- The main view loss concern was to a neighbour immediately behind 72 Carrington Parade, Curl Curl. My clients are in a similar position immediately behind the subject site.
- The view loss involved side setback controls.
- The view loss at Curl Curl was severe – my clients' loss would be also be greater than moderate: my clients would have significant loss of land/water interface from my clients' living spaces

The key matters within the Commissioner's Conclusion:

- the determinative issue in this case is view loss
- the proposal would significantly change the amenity enjoyed for the worse.
- both policy controls and view sharing principles suggest the proposal goes too far.
- proposal attempts to achieves too much on a constrained site.
- a reasonable development at the upper level in regard to view sharing and setback policy,
- with good design, there is scope for this to occur while also providing for reasonable floor space on this level.

It is clear that the view loss, on this DA, occurs through a poor consideration on wall height, building height and side boundary envelope controls.

My commentary on this DA is very similar to Commissioner Walsh in *Der Sarkissian v Northern Beaches Council* [2021] NSWLEC 1041

- the determining issue in this case is view loss – in my clients' case a water and water/land interface view loss
- the proposal would significantly change the amenity enjoyed for the worse.
- policy controls of building height, wall height, side boundary envelope non-compliances and view sharing principles suggest the proposal goes too far.
- proposal attempts to achieves too much on a constrained site.
- a reasonable development at the upper level in regard to view sharing building height, wall height, side boundary envelope policy, would share the view
- with good design, there is scope for view sharing to occur while also providing for reasonable floor space on all levels

My clients contend that there is no reasonable sharing of views amongst dwellings.

The new development is not designed to achieve a reasonable sharing of views available from surrounding and nearby properties.

The proposal has not demonstrated that view sharing is achieved through the application of the Land and Environment Court's planning principles for view sharing.

WENLI WANG V NORTH SYDNEY COUNCIL [2018] NSWLEC 122

I refer to a dismissal of a Class 1 Appeal by NSWLEC Commissioner Robson on 22 August 2018, *Wenli Wang V North Sydney Council* [2018] NSWLEC 122

This decision, and referenced in *FURLONG*, gives consideration to the assessment of a complaint development.

The view loss was a devastating loss from highly used rooms, across a rear boundary, and where considered an iconic view. In general terms, the Commissioner considered that there was that a more skilful design available to the applicant that

although 'would not provide the same amenity as the proposed development, it would provide a very high level of amenity and enjoy impressive views.'

The key stated was that it was necessary to provide the same amenity, but a very high level of amenity and enjoy impressive views.

The judgement read:

68. I repeat that the proposed development complies with the development standards in the LEP and is therefore more reasonable than a development which would have breached them. However, I do also note that there is evidence in the form of the Colville plan that a similar amount of floor space could be provided by a design which reduces the effect on the view from the surrounding properties.
69. I consider there is force in the submission of Council that the applicant has taken a circular approach to the fourth step of Tenacity which presupposes a right to the level of amenity achieved by the proposed development. Whilst it is true that a redevelopment similar to that provided in the Colville plan would not provide the same amenity as the proposed development, it would provide a very high level of amenity and enjoy impressive views.
70. Given the importance placed upon view "sharing" by the DCP, I have given some weight to the fact that the site as currently developed enjoys iconic and panoramic views. The reasonableness of the proposed development should be seen in that light and I find that it is a factor which makes the DA less reasonable in the terms envisaged by the fourth step of Tenacity. Whilst it is true that a redevelopment similar to that provided in the Colville plan would not provide the same amenity as the proposed development, it would provide a very high level of amenity and enjoy impressive views.

REBEL MH NEUTRAL BAY PTY LTD V NORTH SYDNEY COUNCIL [2018] NSWLEC 191

As noted by his Honour, Justice Moore of the Court in Rebel MH Neutral Bay Pty Ltd v North Sydney Council [2018] NSWLEC 191 (Rebel),

"the concept of sharing of views does not mean, for the reasons earlier explained, the creation of expansive and attractive views for a new development at the expense of removal of portion of a pleasant outlook from an existing development. This cannot be regarded as "sharing" for the purposes of justifying the permitting of a non-compliant development when the impact of a compliant development would significantly moderate the impact on a potentially affected view".

This is a key consideration, and one that parallels the forementioned NSWLEC decisions.

AHEARNE V MOSMAN MUNICIPAL COUNCIL [2023] NSWLEC 1013

As noted by Commissioner Espinosa of the Court in *Ahearne v Mosman Municipal Council* [2023] NSWLEC 1013 that the view sharing objectives and controls were minimised through the appropriate distribution of floor space and landscaping.

The importance of this decision reinforces the issues of landscaping in view loss assessment, and the consideration that the composite outcome of appropriate distribution of floor space and landscaping is relevant to view sharing principles.

MAIN VIEW LOSS REFUSALS

I attach commentary to the main view loss that have been refused by Councils over the past few years. This is added to this Submission to show the custom and practice of LLP decisions relating to this matter.

NORTHERN BEACHES COUNCIL RECENT REFUSALS ON VIEW LOSS

I raise refusals by NBC DDP and NBLPP in 2022 and 2023, on view loss grounds, with side boundary view loss refusals identified with an *:

- NBLPP REFUSAL: DA 2021/1408 16 ADDISON ROAD MANLY*
- NBC DDP REFUSAL: DA 2021/1734; 21 HEADLAND ROAD NORTH CURL CURL.
- NBLPP REFUSAL: DA 2022/0625 27 KARLOO PARADE NEWPORT*
- NBLPP REFUSAL: DA 2022/1158 13 ILUKA ROAD, PALM BEACH*
- NBLPP REFUSAL: DA 2022/1650 8 BAROONA ROAD CHURCH POINT*
- NBC DDP REFUSAL: Mod 2022/0518 26 RALSTON ROAD PALM BEACH

NBLPP REFUSAL: DA2021/1408 16 ADDISON ROAD MANLY

On 16 March 2022, NBLPP refused DA2021/1408 at 16 Addison Road Manly, accepting the Assessment Report of NBC Officer Maxwell Duncan. NBLPP Members were Crofts, Sainsbury, Krason and Cotton. The DA was refused as the proposed development was inconsistent with the provisions of Clause 3.4.3 Maintenance of Views of the Manly Development Control Plan.

The view loss was across side boundaries.

Comment to Principle 4:

The proposed development complies with the Building Height and Floor Space Ratio development standards under the Manly LEP. The subject development does not comply with the controls of the MDCP 2013 and, in the circumstance, it is found that the view loss for the neighbouring property is unacceptable and warrants the refusal of the application. The demonstrated non-compliances, being side setbacks and wall height give rise to unreasonable view impacts. It is acknowledged that the context and siting of the existing dwelling on the subject site, makes views for adjoining properties extremely vulnerable to any form of new development. However, it is concluded that the extent of the breaches of the planning controls is excessive and a more skilful and compliant design would vastly improve the outcome. The question of a more skilful design has been considered in that a close analysis of the plans identifies the opportunity to retain areas of view lines from all

affected properties. The views assessment determined that there is the opportunity to significantly lessen the impact on views. While it acknowledged that full compliance would be unreasonable given the constraints of the site, a greater level of compliance with both the wall height and side setback control would allow for view corridors to be maintained. In this regard, the development potential would not be significantly compromised. Therefore, the proposed dwelling house in particular the first-floor setback and wall height non-compliance is considered unreasonable in the circumstances of this application in that the application does not demonstrate a reasonable sharing of views.

In general terms, NBLPP assessed that the proposed development was unreasonable, in that the minor non-compliance to the side setbacks and wall height contributed to the view loss, and therefore was unreasonable. Although the proposed development complied with HOB and FSR, NBLPP considered that a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact.

NBC DDP REFUSAL: DA 2021/1734; 21 HEADLAND ROAD NORTH CURL CURL.

On 14 September 2022, NBC DDP refused DA 2021 1734 at 21 Headland Road North Curl Curl. Officer Richter [Independent Planning Consultant] recommended refusal on view loss grounds. The Panel Members were Adam Richardson, Anne-Maree Newbery and Neil Cocks.

The proposed development was compliant to HOB at 8.16m, with a modest non-compliance to Side Boundary Envelope.

The view loss was a modest triangular ocean south towards Manly, across a front and rear boundary.

The view loss however was devastating – a complete loss.

The DDP Refusal noted the following:

'The proposed scale and design are not considered to take into account site or area planning to protect available water views. The proposed height, design and roof form are not considered to promote or maximise the opportunity of achieving the 'reasonable sharing of views' and some view access to be maintained for the first floor areas of No. 20 Headland Road. It is considered that design options may exist, in terms of 'innovative design solutions' to improve the urban environment (including maintaining view access in the area and tapering built form with the sloping topography). The application does not detail whether or which 'skilful' design options have been considered in accordance with the Planning Principle established by the Land and Environment Court in Tenacity Consulting v Warringah Council (2004) NSWLEC 140. The principle seeks to achieve a development whilst allowing reasonable view access. The available information does not provide current height poles or a view montage to clearly quantify the views blocked or protected by the current design. At a reduced height, with a flatter roof form, the

building could potentially allow some view across. It is considered reasonable to request a revised design in order to protect the public interest.'

In general terms, NBC DDP assessed that the proposed development was unreasonable, in that the minor non-compliance to side boundary envelope and minor non-compliance to wall height contributed to the view loss, and therefore was unreasonable. Although the proposed development complied with HOB, NBC DDP considered that a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact.

NBLPP REFUSAL: DA2022/0625 27 KARLOO PARADE NEWPORT

On 7 December 2022, NBLPP refused DA 2022/1158 on view loss grounds, across a side boundary. A recommendation for refusal on view loss grounds was presented by NBC Officer, Steven Findlay. NBLPP Members were Biscoe, Esposito, Brown and Simmons.

The view loss was severe.

The view in question was a partial view, across a side boundary to the headland view in Newport.

The loss was predominantly caused by a non-compliant HOB, Landscape Area, Side Boundary Envelope, and Setback controls.

The assessment read:

The view impacts are almost entirely caused by non-compliances which, independently when measured against the respective Outcomes in the P21DCP and PLEP. In response to Principle 4 - the design of the building is unreasonable and it is a non-compliance that is causing the view impacts. The site has ample opportunity to accommodate an alternate, more skilful design, which retains more views. The development is therefore inconsistent with the View Sharing Planning Principle of Tenacity Consulting Pty Ltd Vs Warringah Council (2004) NSWLEC 140.

In general terms, NBLPP assessed that the proposed development was unreasonable, in that the loss was predominantly caused by a non-compliant HOB, Landscape Area, Side Boundary Envelope, and Setback controls.

NBLPP REFUSAL: DA 2022/1158 13 ILUKA ROAD, PALM BEACH

On 14 December 2022, NBLPP refused DA 2022/1158 on view loss grounds, across a side boundary. A recommendation for refusal on view loss grounds was presented

by NBC Officer Peter Robinson. NBLPP Members were Biscoe, Krason, Hussey and Bush.

The view in question was a partial view, across a side and secondary street boundary, across a reserve to the water view in Pittwater. The Assessment Report considered that 50% of the water view would be lost, and considered it a moderate loss. The loss was predominantly caused by a non-compliant secondary front building line. Although the proposed development was compliant to HOB, and most other envelope controls, it was the non-compliant secondary front building line that caused the moderate view loss that was considered unreasonable.

In general terms, NBLPP assessed that the proposed development was unreasonable, in that the minor non-compliance to the secondary front building line contributed to the view loss, and therefore was unreasonable. Although the proposed development complied with HOB, NBLPP considered that a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact.

NBLPP REFUSAL: DA 2022/1650 8 BAROONA ROAD CHURCH POINT

On 5 April 2023, NBLPP refused DA 2022/1650 on view loss grounds, across a side boundary. A recommendation for refusal on view loss grounds was presented by NBC Officer Stephanie Gelder. NBLPP Members were Tuor, Kirk, Hussey and Graham.

The Assessment Report stated:

The reasonableness of the proposal that is causing the impact is considered to be inappropriate in this instance. The proposal presents variations to the Built Form Controls, including the Landscaped Area that demonstrates the proposed development is an over-development of the subject site, as it reduces the total landscaped area as a result of additional built form. The view impact for the rear addition to the existing dwelling house is considered to be unreasonable, and it is considered a more skilful design could be explored to reduce the impact to No.10 Baroona Road, although it is noted that the site has almost reached its highest and best use. In summary, the proposed development presents a significant view loss impact, that is unacceptable, and therefore unsupportable. The proposed development does not satisfy this outcome.

The view in question was a whole view, across a side boundary, to the water view in Pittwater. The Assessment Report considered that the loss would be severe. The proposed built form in this location was generally compliant to envelope controls.

In general terms, NBLPP considered that a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact.

NBC DDP REFUSAL: Mod 2022/0518 26 RALSTON ROAD PALM BEACH

On 28 June 2023, NBLPP refused Mod DA 2022/0518 on view loss grounds, across a rear and front boundary.

The DDP Panel members were Daniel Milliken, Rod Piggott and Kelly Lynch.

The applicant in this case was requesting an increase in building heights, over the previously approved height that allowed for a reasonable sharing of views.

The assessment had concluded the views from openings to the north facing living room on the second storey to the southern neighbour would be adversely affected by the proposed building height increase. This includes obstruction of the Broken Bay water view, and degrading the land/water interface view which is currently enjoyed from the living area. This outcome fails to comply with Part C1.3 of the P21 DCP and formed the main reason for refusal of the application.

In general terms, although the proposed additional height fell under HOB standards, the severe loss of view was unreasonable considering there was other '*more skilful design*' solutions to increasing storey heights, such as benching the built form into the hillside.

WOOLLAHRA COUNCIL RECENT REFUSALS ON VIEW LOSS

WLPP REFUSAL DA 87/2022 127 VICTORIA ROAD BELLEVUE HILL

On 1 June, 2023, WLPP refused DA 87/2022 on view loss grounds, across front and rear boundaries.

Council had assessed that there were at least six properties with moderate or severe view loss caused by an extension of a roofline at a non-compliant height. There was also a substantial non-compliance to floorplate density controls that contributed to the view loss.

Council stated that: "... *the impacts on the limited water views available could have been minimised by a compliant development. A more skilful design based on a proper view sharing assessment would reduce the impact on views.*"



WLPP REFUSAL: DA 324/2022: 74 BELLEVUE ROAD BELLEVUE HILL

On 20 April, 2023, WLPP refused DA 324/2022 on view loss grounds.

Council stated:

Various submissions state that the proposed development will adversely impact private views enjoyed by existing residents of the Sydney Harbour Bridge, Sydney Opera House, Sydney Harbour, the City and the North Sydney skyline and question the accuracy of the applicant's visual impact assessment. Some submissions also contend that the proposal does not sufficiently assess the impacts of the proposal, and that a more skilful design would reduce the visual impact of the development. The visual impact assessment is not satisfactory and further information is required to determine the full extent of the view-sharing impacts as well as the reasonableness of any impacts caused by the proposed development. The VIA fails to sufficiently explain whether visual impacts arising from the development has been reduced (without affecting the development potential and the amenity of the proposed development) through a more skilful design.

WLPP REFUSAL: DA 335/2022: 84 BIRRIGA ROAD BELLEVUE HILL

On 1 June, 2023, WLPP refused DA 335/2022 on view loss grounds.

Council stated:

A number of properties located within the adjacent buildings (82 and 90 Birriga Street) benefit from private views towards Rose Bay. Objectively, these views are considered to be of low to moderate significance. The impact of the proposed development on private views within these properties is likely to vary from moderate to severe. A visual impact assessment has not been submitted as part of the application. In the absence of this, the impact of the proposed development on views is considered unacceptable.

WAVERLEY COUNCIL RECENT REFUSALS ON VIEW LOSS

DEEMED REFUSAL DA9/2023 14-18 CAMPBELL PARADE BONDI BEACH

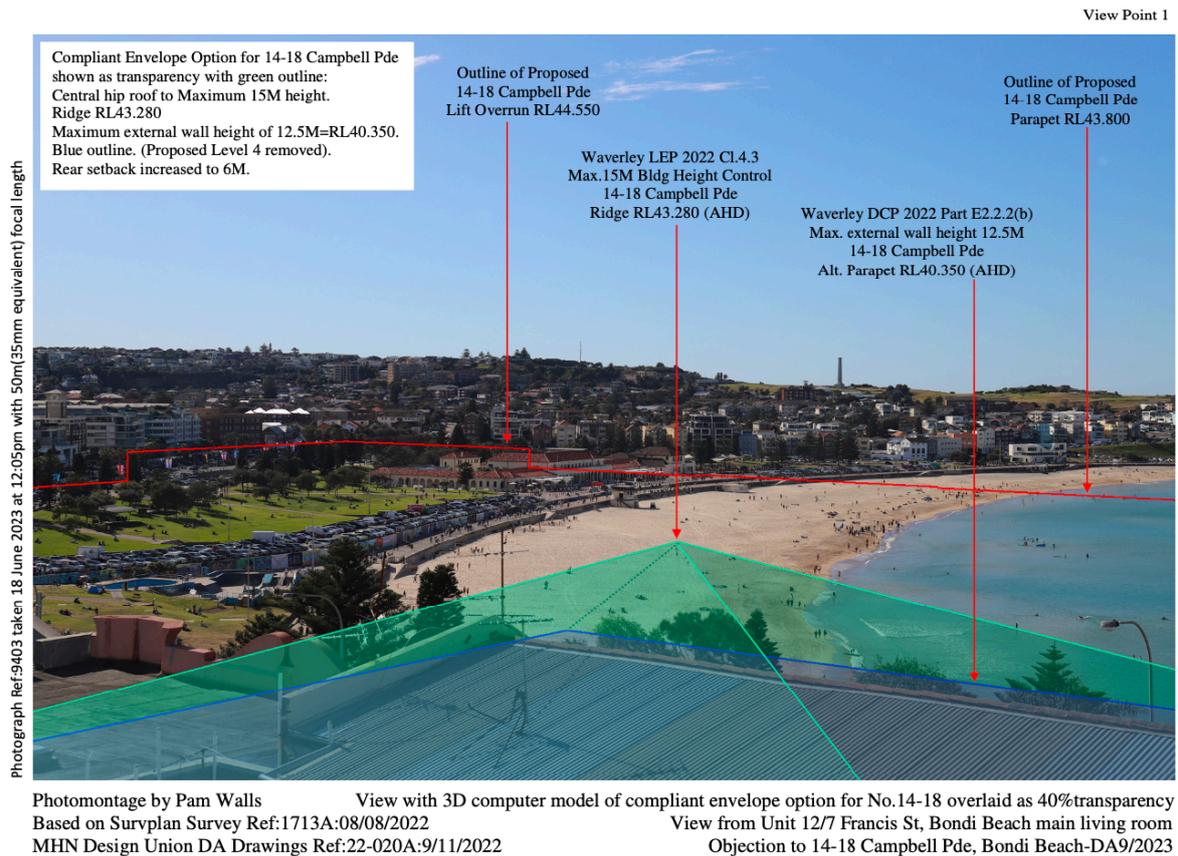
On 18 April 2023, the applicant commenced proceedings based upon a deemed refusal of the DA.

Council contentions were that the appeal be dismissed on view sharing grounds. The proposed development was non-compliant to height, wall height, and setback controls. The applicant had failed to undertake an actual view impact analysis associated with the individual impacted properties. Council concluded that the proposal is inconsistent with the Land and Environment Court Planning Principle contained in *Tenacity Consulting v Warringah Council* and in particular the "fourth

step" regarding the reasonableness of the proposal in circumstances where impacts arise from a development that breaches planning controls; and secondly whether a more skilful design could reduce the impact on views of neighbours.

I acted for 24 neighbours in this matter.

Six montages were submitted to show the severe loss to devastating view loss. I attach one of those montages.



NORTH SYDNEY COUNCIL

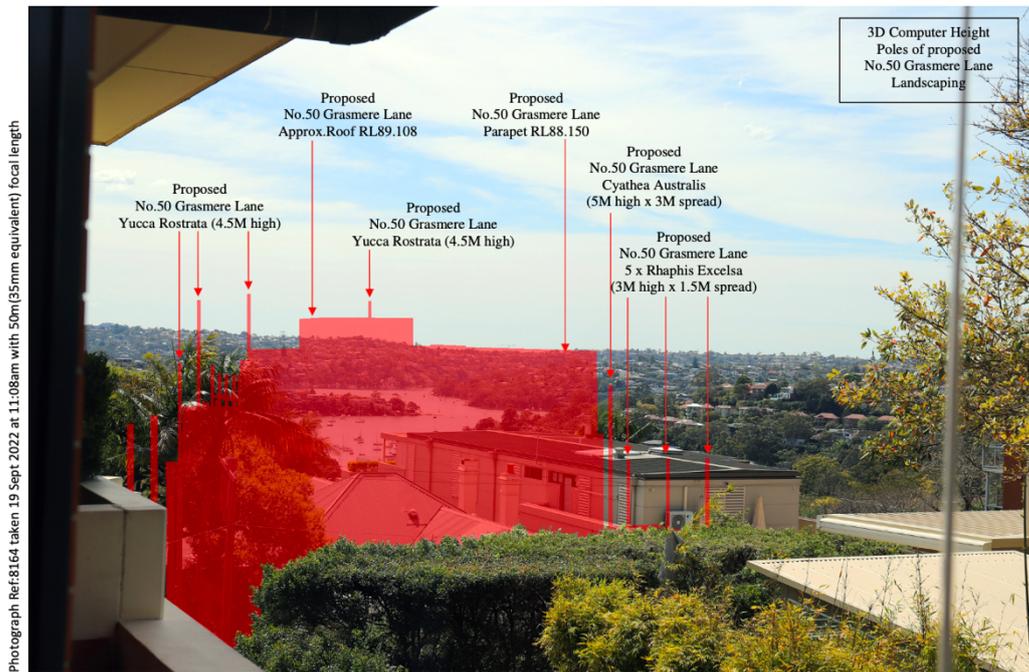
DA 218 2022; 50 Grasmere Lane CREMORNE NSW 2090

Council was unsupported on this DA, and the applicant withdrew the application.

I represented nine neighbours in this matter.

The proposed development exceeded height and setback controls, and caused severe to devastating view loss from my client's apartment.

I attach a photomontage prepared by Pam Walls depicting the devastating outcome.



Photomontage by Pam Walls

Based on ARP Surveyors P/L Survey Ref:509B-22/07/2022

Floris Smith Architecture DA Drawings Ref:1-2101-18/07/2022

View with 3D computer model of proposed No.50 overlaid as 50% red transparency

View from Unit 13/38 Sutherland St kitchen

Objection to 50 Grasmere Lane, Cremorne-DA218/22

TENACITY CONSULTING V WARRINGAH COUNCIL 2004

In *Tenacity*, [*Tenacity Consulting v Warringah Council 2004*], NSW LEC considered Views. Tenacity suggest that Council should consider:

“A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable.”

The development breaches multiple planning controls and is unreasonable.

My clients contend that the impact on views arises as a result of non-compliance with one or more planning controls, and the view loss from the highly used rooms and decks is considered unreasonable.

APPLICATION OF TENACITY PLANNING PRINCIPLE

I have been unable to consider the impact of the proposal on the outward private domain views from my clients' property.

Height poles and montage view loss analysis has yet to be provided by the Applicant.

An assessment in relation to the planning principle of Roseth SC of the Land and

Environment Court of New South Wales in *Tenacity Consulting v Warringah* [2004] NSWLEC 140 - Principles of view sharing: the impact on neighbours (*Tenacity*) is made, on a provisional basis ahead of height poles being erected by the Applicant.

The steps in *Tenacity* are sequential and conditional in some cases, meaning that proceeding to further steps may not be required if the conditions for satisfying the preceding threshold is not met.

STEP 1 VIEWS TO BE AFFECTED

The first step quoted from the judgement in *Tenacity* is as follows:

The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

An arc of view is available when standing at a central location in the highly used zones including entertainment decks, highly used rooms, and private open spaces on my clients' property.

The proposed development will impact upon expansive water views, and water views in which the interface between land and water is visible. The views include whole views.

The composition of the arc is constrained over the subject site boundaries, by built forms and landscape. The central part of the composition includes the subject site. Views include scenic and valued features as defined in *Tenacity*. The proposed development will take away views for its own benefit. The view is from my clients' highly used rooms towards the view. The extent of view loss exceeds moderate and the features lost are considered to be valued as identified in Step 1 of *Tenacity*.

STEP 2: FROM WHERE ARE VIEWS AVAILABLE

This step considers from where the affected views are available in relation to the orientation of the building to its land and to the view in question. The second step, quoted, is as follows:

The second step is to consider from what part of the property the views are obtained. For example, the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.

The views in all cases are available across the boundary of the subject site, from standing and seated positions. An arc of view is available when standing at highly

used zones on my clients' property.

In this respect, I make two points: My clients have no readily obtainable mechanism to reinstate the impacted views from my clients' high used zones if the development as proposed proceeds; and all of the properties in the locality rely on views over adjacent buildings for their outlook, aspect and views.

STEP 3: EXTENT OF IMPACT

The next step in the principle is to assess the extent of impact and the locations from which the view loss occurs.

Step 3 as quoted is:

The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

As I rate the extent of view loss is above moderate in my opinion the threshold to proceed to Step 4 of Tenacity is met.

STEP 4: REASONABLENESS

The planning principle states that consideration should be given to the causes of the visual impact and whether they are reasonable in the circumstances.

Step 4 is quoted below:

The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

NSWLEC Commissioner Walsh in *Balestriere v Council of the City of Ryde* [2021] NSWLEC 1600 in relation to the Fourth Step:

There are three different points to the fourth Tenacity step, concerned with assessing the reasonableness of the impact, which I summarise as follows:

Point 1 - Compliance, or otherwise, with planning controls.

Point 2 - If there is a non-compliance, then even a moderate impact may be considered unreasonable.

Point 3 - For complying proposals: (a) "whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact", and (b) "if the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable".

As the proposed development does not comply with outcomes and controls, that are the most relevant to visual impacts, greater weight would be attributed to the effects caused.

In my opinion the extent of view loss considered to be the greater than moderate, in relation to the views from my clients' highly used zones of my clients' dwelling. The view is from a location from which it would be reasonable to expect that the existing view, particularly of the view that could be retained especially in the context of a development that does not comply with outcomes and controls. The private domain visual catchment is an arc from which views will be affected as a result of the construction of the proposed development. The proposed development will create view loss in relation to my clients' property. The views most affected are from my clients' highly used zones and include very high scenic and highly valued features as defined in Tenacity. Having applied the tests in the Tenacity planning principle I conclude that my clients would be exposed to a loss greater than moderate from the highly used rooms. The non-compliance with planning outcomes and controls of the proposed development will contribute to this loss. Having considered the visual effects of the proposed development envelope, the extent of view loss caused would be unreasonable and unacceptable.

The proposed development cannot be supported on visual impacts grounds. The proposal incorporates a significant departure from controls, which helps contain building envelope. Additionally, the siting of the proposed development and its distribution of bulk does not assist in achieving view sharing objectives. Where the diminishing of private views can be attributed to a non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. My assessment finds that view sharing objectives have not been satisfied.

The above non-compliance will give rise to unreasonable amenity impacts upon the adjoining properties. In this instance, the proposal is not considered to achieve compliance with this control.

There are architectural solutions that maintains my clients' view. I identify the precise amendments necessary to overcome this loss.

As noted by his Honour, Justice Moore of the Court in *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191 (Rebel),

“the concept of sharing of views does not mean, for the reasons earlier explained, the creation of expansive and attractive views for a new development at the expense of removal of portion of a pleasant outlook from an existing development. This cannot be regarded as “sharing” for the purposes of justifying the permitting of a non-compliant development when the impact of a compliant development would significantly moderate the impact on a potentially affected view”.

The same unreasonable scenario in Rebel applies to the current DA. The proposed breaching dwelling will take away views from my clients' property (and possibly other adjoining properties) to the considerable benefit of the future occupants of the proposed dwelling. This scenario is not consistent with the principle of View Sharing enunciated by his Honour, Justice Moore in Rebel. The adverse View Loss from my clients' property is one of the negative environmental consequences of the proposed development. The proposed development cannot be supported on visual impacts grounds.

These issues warrant refusal of the DA.

My clients ask Council to request that the Applicant position 'Height Poles/Templates' to define the non-compliant building envelope, and to have these poles properly measured by the Applicant's Registered Surveyor. The Height Poles will need to define: All Roof Forms, and all items on the roof, Extent of all Decks, Extent of Privacy Screens. Height Poles required for all trees. The Applicant will have to identify what heights and dimensions are proposed as many are missing from the submitted DA drawings.

In conclusion, as the dwelling proposed will impact views from my clients' property, the erection of height poles is required to allow an accurate assessment of view impact. The height poles should provide a delineation to identify any elements of the proposed built form that breaches the envelope controls of height and setbacks.

My clients contend that the proposed development when considered against the DCP and the NSW Land and Environment Court Planning Principle in *Tenacity Consulting Pty Ltd v Warringah Council (2004) NSWLEC* will result in an unacceptable view impact and will not achieve appropriate view sharing.

My clients contend that the proposal is contrary to Section 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979* in that it does not satisfy the view sharing controls of the DCP.

13. IMPACTS UPON ADJOINING PROPERTIES: VIEW LOSS CAUSED BY POOR STRATEGIC POSITIONING OF TREE CANOPY

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to strategically locate new tree canopy to avoid amenity loss.

My clients are concerned that new trees are positioned within the Tenacity Viewing Corridors to my clients' view.

There are 72 proposed trees that are over 10m in height proposed to be planted within the water viewing corridor. 15 of these trees are over 15m in height:

- 5 *Livistona australis* 20m
- 10 *Waterhousia floribunda* 15m
- 1 *Pandanus* 12m
- 27 *Syzygium 'Resilience'* 10m
- 15 *Elaeocarpus eumundi* 10m
- 7 *Cupaniopsis anacardioides* 10m
- 7 *Banksia integrifolia* 10m

I contend that the heights of the proposed canopy should not exceed the HOB of 8.5m, considering the view loss implication.

The applicant has not considered any of these matters within their assessment to date.

I contend that in respect to the 72 trees proposed the proposal is unreasonable:

- (a) The proposal is inconsistent with objectives of the DCP regarding views;
- (b) The proposal is inconsistent with objective and controls of the DCP regarding views and view sharing;
- (d) The application documentation has failed to accurately and comprehensively consider and document view loss impacts on ALL affected neighbours at ALL levels of their property with view loss photomontage in full accordance with NSWLEC standards;
- (e) Given that the applicant has failed to undertake an actual full view impact analysis associated with the individual impacted properties then the proposal is inconsistent with the Land and Environment Court Planning Principle contained in *Tenacity Consulting v Warringah Council* and in particular the "fourth step" regarding the reasonableness of the proposal in circumstances where impacts arise from a development that breaches planning controls; and secondly whether a more skilful design could reduce the impact on views of neighbours.

The development results in a loss of private views enjoyed by the neighbouring properties.

The development does not satisfy the objectives and planning controls of the DCP in respect to view loss.

At the recent NSWLEC case, *Hong v Mosman Municipal Council [2023] NSWLEC 1149* decision dated 31 March 2023, view loss caused by excessive landscape was a key issue. Commissioner Walsh summarised the matter in cl 30 of his decision:

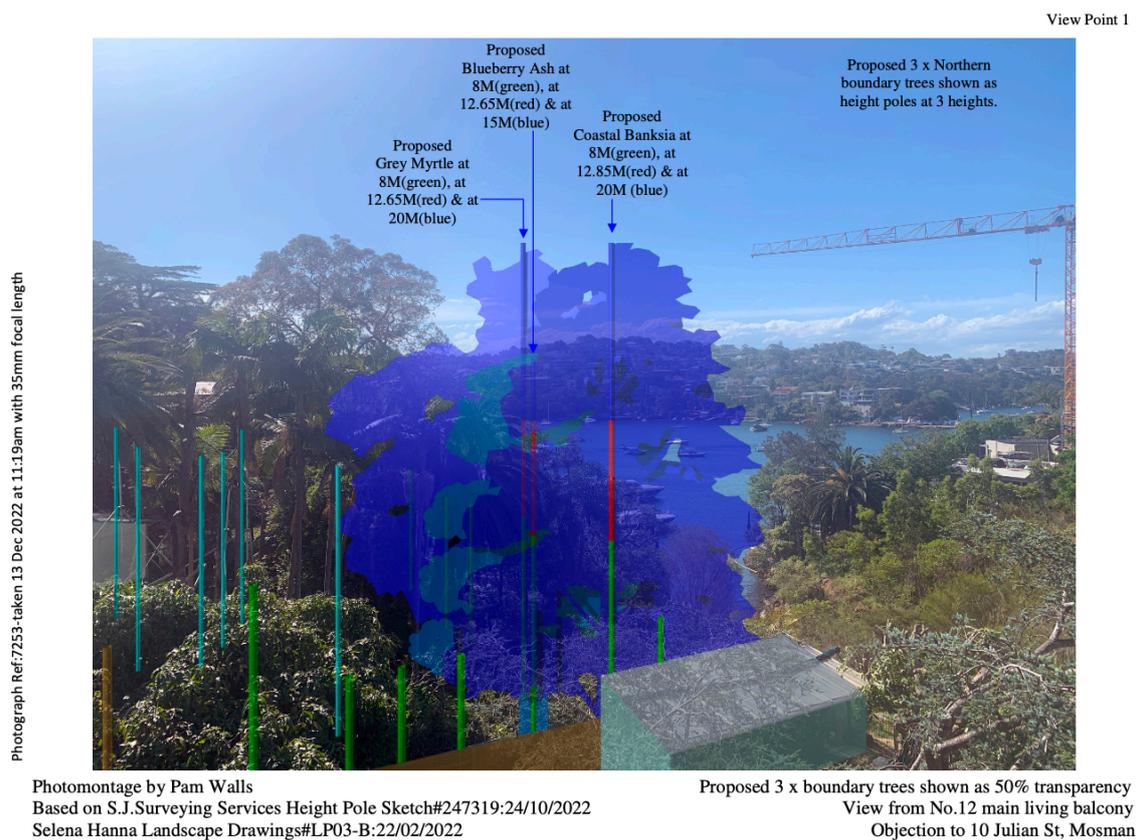
In regard to landscaping and tree protection, I note again that in Court and to some degree of detail, I worked through with the experts the various points of concern raised. This resulted in a number of further agreed alterations to the landscape plan. The Revision C drawings, based on the evidence of the experts but also in my own reading, now provide that appropriate balance between retaining and sometimes enhancing Middle Harbour views, while also providing for a valuable local landscape contribution.

The Revision C drawings required 9 high canopy trees to be deleted and replaced by 3m high species. The condition of consent required a further four transplanted palms to be deleted from the Landscape Plans.

I represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council and the Court on this Appeal.

I add the montage prepared to support the neighbour's submission in these respects.

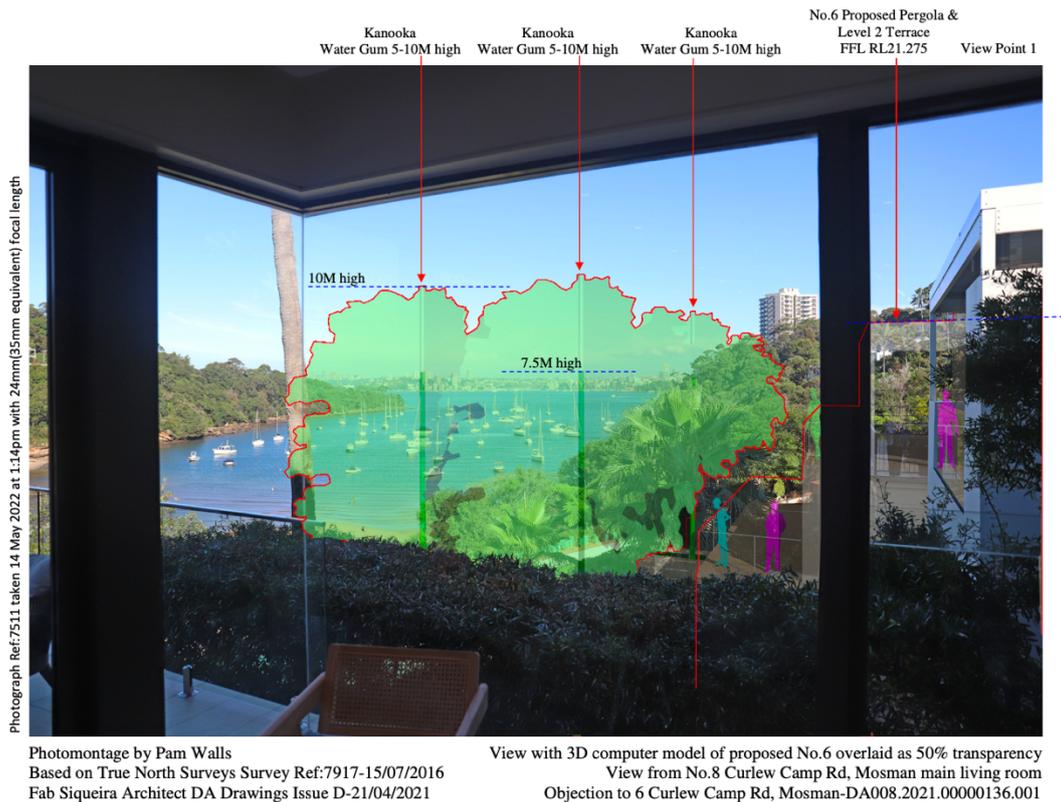


Hong v Mosman Municipal Council [2023] NSWLEC 1149
View Loss caused by excessive landscape in the harbour viewing corridor zone

At the recent NSWLEC case, *Zubani v Mosman Municipal Council [2022] NSWLEC 1381*, decision dated 19 July 2022, clearly identifies that under *Tenacity*, Council must be mindful to restrict landscape heights to ensure views are adequately protected. Commissioner Morris referred to the matter in 47 and 49.

I represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council and the Court on this Appeal.



Zubani v Mosman Municipal Council [2022] NSWLEC 1381
View Loss caused by excessive landscape in the street setback zone

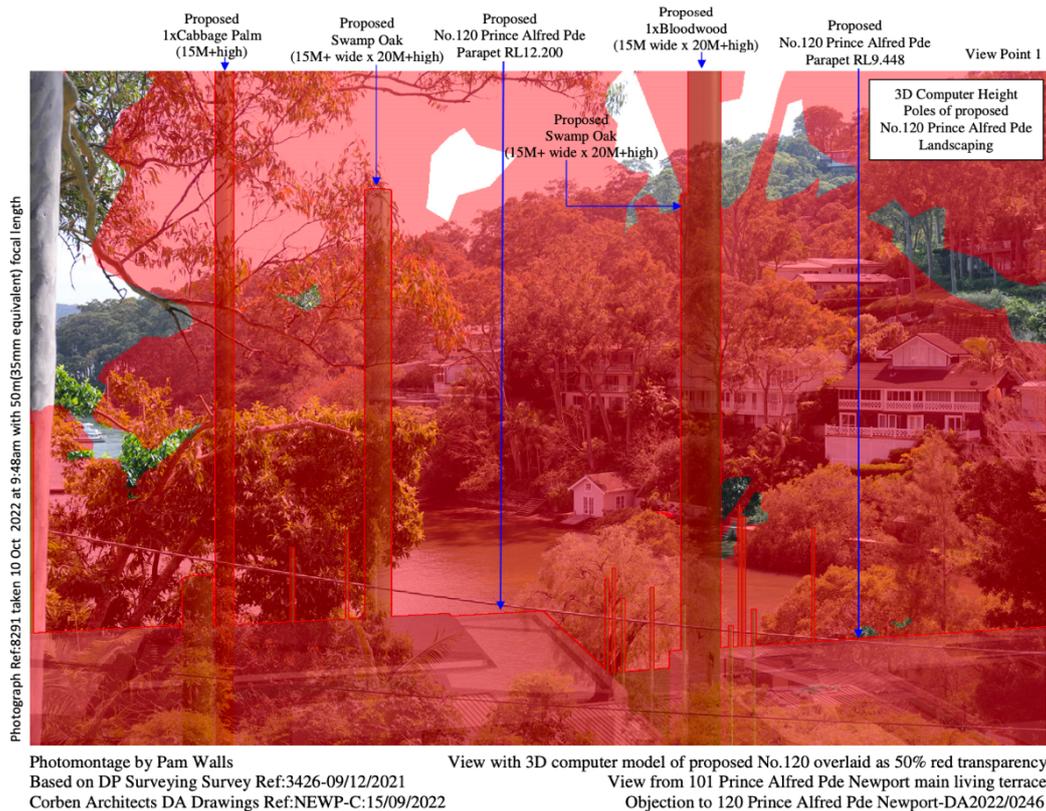
At the recent NSWLEC case, *Petesic v Northern Beaches Council [2022] NSWLEC*, decision dated 30 May 2022, view loss caused by excessive landscape was a key issue. Northern Beaches Council's SOFAC filed 16 September 2021, prepared by Louise Kerr, Director Planning and Place at NBC, in B2 Item 7, called for '*strategic positioning of canopy trees*' to avoid view loss. Proposed Trees were lowered and repositioned as a result. Commissioner Chilcott referred to the matter in 49[5].

At the recent NBLPP decision, DA 2022 0246 at 120 Prince Alfred Parade, Newport on 8 December 2022, the Panel agreed to delete trees higher than 8.5m in the viewing corridor as recommended by Council's assessment Report, and imposed the

additional condition that the trees “shall be maintained so that they do not exceed 8.5 metres in height measured from the ground at the base of the tree”

I represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council and the Court on this Appeal.



NBLPP: DA 2022 0246 120 Prince Alfred Parade, Newport on 8 December 2022
View Loss caused by excessive landscape

At the recent NBC DDP decision, DA 2022 2280 at 47 Beatty Street Balgowlah in July 2023, the Panel agreed to delete trees higher than 6.0m in the viewing corridor as recommended by Council's Assessment Report. The NBC DDP Panel Members were Daniel Milliken, Maxwell Duncan and Neil Cocks.

The condition imposed stated that the trees:

“...shall be replaced with a species with a maximum mature height of 6m.”

The Panel also deleted a roof terrace that obstructed harbour views.



Photograph Ref:9178 taken 8 March 2023 at 9:29am with 50m(35mm equivalent) focal length

Photomontage by Pam Walls
Based on True North Survey Ref:1091-17/02/2022
ESS Lifestyle DA Drawings Ref:0158-25/05/2022

View with 3D solid block computer model of proposed No.47 and indicative landscaping
View from 18 Tutus St, Balgowlah main external living balcony
Objection to 47 Beatty St, Balgowlah-DA2022/2280

The roof terrace, retractable awning, stairs, balustrading, stairwell wall and raised parapet wall shall be deleted from the roof level. The roof level shall consist of roof planting, with species consistent with the submitted landscape plan, and have no structures exceeding RL 36.2 placed on the roof (apart from landscaping).

I represented the neighbour in this matter.

I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council.

14. IMPACTS UPON ADJOINING PROPERTIES: OVERSHADOWING

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it will have unacceptable impacts upon the amenity of neighbours' property, specifically with regard to overshadowing.

The Applicant has not provided adequate Solar Access Diagrams, at one hourly intervals, in plan and elevation of my clients' property, to assess the loss of solar access at mid-winter, of my client's windows, private open space, and PV Solar Panels to accord with DCP controls and NSWLEC planning principles

My clients believe that further assessment of the shadow impacts through the production of elevational shadow diagrams or a "View from the Sun" assessment

are critical in order to understand the potential future impacts and necessary for Council's reasonable assessment.

Shadow diagrams have not included the additional shadow cast by the non-complaint envelope, in plan and elevation. The elevational shadow diagrams must show the position of windows on adjoining properties.

The proposed development should be refused as it will have unacceptable impacts upon the amenity of adjoining properties, specifically with regard to overshadowing.

The proposed development will result in unreasonable overshadowing of the windows of my clients' property and the private open space of my clients' property, resulting in non-compliance with the provisions of DCP.

A variation to the DCP is not supported as the objectives of the clause are not achieved.

In *The Benevolent Society v Waverley Council* [2010] NSWLEC 1082 the LEC consolidated and revised planning principle on solar access is now in the following terms:

"Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines. The poor quality of a proposal's design may be demonstrated by a more sensitive design that achieves the same amenity without substantial additional cost, while reducing the impact on neighbours."

My clients contend that the overshadowing arises out of poor design. The design does not respect envelope controls, and must be considered 'poor design'.

The Applicant has not submitted hourly solar diagrams to fully assess the solar loss. My clients ask Council to obtain these diagrams.

The loss of sunlight is directly attributable to the non-compliant envelope.

The planning principle *The Benevolent Society v Waverley Council* [2010] NSWLEC 1082 is used to assess overshadowing for development application. An assessment against the planning principle is provided as follows:

- *The ease with which sunlight access can be protected is inversely proportional to the density of development. At low densities, there is a reasonable expectation that a dwelling and some of its open space will retain its existing sunlight. (However, even at low densities there are sites and buildings that are highly vulnerable to being overshadowed.) At higher densities sunlight is harder to protect and the claim to retain it is not as strong.*

The density of the area is highly controlled. Building envelope controls have been exceeded.

- *The amount of sunlight lost should be taken into account, as well as the amount of sunlight retained.*

The solar diagrams are not complete, but what has been provided shows that the proposed development will overshadow the adjoining dwellings. The amount of sunlight that will be lost will only be able to be fully considered once solar elevational drawings are submitted. What has been submitted gives the very clear indication that the outcome is not in accordance with controls

- *Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines. The poor quality of a proposal's design may be demonstrated by a more sensitive design that achieves the same amenity without substantial additional cost, while reducing the impact on neighbours.*

The proposed development has been designed without considering the amenity of the neighbouring properties. It is considered that a more skilful design, with a compliant envelope control, could have been adopted that would have reduced the impact on the neighbouring properties. What has been submitted gives the very clear indication that the outcome is not in accordance with controls

- *To be assessed as being in sunlight, the sun should strike a vertical surface at a horizontal angle of 22.5o or more. (This is because sunlight at extremely oblique angles has little effect.) For a window, door or glass wall to be assessed as being in sunlight, half of its area should be in sunlight. For private open space to be assessed as being in sunlight, either half its area or a useable strip adjoining the living area should be in sunlight, depending on the size of the space. The amount of sunlight on private open space should be measured at ground level.*

This can only be fully assessed once elevational solar drawings at hourly intervals are submitted. What has been submitted gives the very clear indication that the outcome is not in accordance with controls

- *Overshadowing by fences, roof overhangs and changes in level should be taken into consideration. Overshadowing by vegetation should be ignored, except that vegetation may be taken into account in a qualitative way, in particular dense hedges that appear like a solid fence.*

There is no major overshadowing as a result of vegetation

- *In areas undergoing change, the impact on what is likely to be built on adjoining sites should be considered as well as the existing development.*

The area is not currently undergoing change, the LEP and DCP controls have not altered for many years.

The assessment of the development against the planning principal results in the development not complying with the solar access controls and therefore amended plans should be requested to reduce the overshadowing impact on the adjoining neighbour. It is suggested that a more skilful design of the development, with a compliant envelope control, would result in less impact in regard to solar access. It is requested that Council seek amended plans for the development to reduce the impact of the development, and these matters are addressed elsewhere in this Written Submission.

My clients object to solar loss to my clients' private open space, and to my clients' windows that fails to allow mid-winter solar access into highly used room by non-compliant development controls.

15. IMPACTS UPON ADJOINING PROPERTIES: PRIVACY

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it will have unacceptable impacts upon the amenity of neighbours' property, specifically with regard to visual privacy.

The proposed development should be refused as it will have unacceptable impacts upon the amenity of my clients' property, specifically with regard to visual privacy.

The proposed development will result in unacceptable overlooking of the adjoining dwelling and associated private open space, resulting in inconsistency with the provisions of the ADG, DCP and the objectives of the DCP.

The location and design of the proposed balcony and terraces at the upper floor levels and the excessive glazed windows facing the side boundary will result in unacceptable visual and acoustic privacy impacts to adjoining properties.

The Applicant has not provided an adequate Privacy Impact Analysis which details the extent to which privacy at my clients' property will be adversely impacted by the proposal.

An assessment of the privacy impact against the planning principle *Meriton v Sydney City Council* [2004] NSWLEC 313 follows:

Principle 1: The ease with which privacy can be protected is inversely proportional to the density of development. At low-densities there is a reasonable expectation that a dwelling and some of its private open space will remain private. At high-densities it is more difficult to protect privacy.

Response: The development is located in a low-density area.

Principle 2: Privacy can be achieved by separation. The required distance depends upon density and whether windows are at the same level and directly facing each other. Privacy is hardest to achieve in developments that face each other at the same level. Even in high-density development it is unacceptable to have windows at the same level close to each other. Conversely, in a low-density area, the objective should be to achieve separation between windows that exceed the numerical standards above. (Objectives are, of course, not always achievable.)

Response: The proposed development results in a privacy impact with the proposed windows facing neighbours without sufficient screening devices being provided, considering the proposed windows are directly opposite my clients' windows and balconies. ADG separation has not be adhered to – a greater side and rear setback is required.

Principle 3: The use of a space determines the importance of its privacy. Within a dwelling, the privacy of living areas, including kitchens, is more important than that of bedrooms. Conversely, overlooking from a living area is more objectionable than overlooking from a bedroom where people tend to spend less waking time.

Response: The windows in question are windows of the main circulation zones and living areas, it is considered that the living areas will result in an unacceptable privacy breach. The proposed windows and decks face the rear private open spaces for the neighbouring dwelling and will result in an unacceptable level of privacy impact. It is considered that the private open space of the neighbouring dwellings could be better protected by a more compliant ADG setback.

Principle 4: 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.

Response: The proposed development is a new development and the proposed windows have been designed without any consideration to the privacy of the neighbouring property. It is considered that the private open space of the neighbouring dwellings could be better protected by a more compliant ADG setback.

Principle 5: Where the whole or most of a private open space cannot be protected from overlooking, the part adjoining the living area of a dwelling should be given the highest level of protection.

Response: It is considered that the private open space of the neighbouring dwellings could be better protected by a more compliant ADG setback.

Principle 6: Apart from adequate separation, the most effective way to protect privacy is by the skewed arrangement of windows and the use of devices such as fixed louvres, high and/or deep sills and planter boxes. The use of obscure glass and privacy screens, while sometimes being the only solution, is less desirable.

Response: It is considered that the private open space of the neighbouring dwellings could be better protected by a more compliant ADG setback.

Principle 7: 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.

Response: It is considered that the private open space of the neighbouring dwellings could be better protected by a more compliant ADG setback.

Principle 8: In areas undergoing change, the impact on what is likely to be built on adjoining sites, as well as the existing development, should be considered.

Response: The area is not undergoing change that would warrant privacy impact such as the one presented.

Comment: As the development is considered to result in an unacceptable privacy impact due to the design, it is requested that the proposed development be redesigned to reduce amenity impact on the neighbouring properties.

In the context of the above principles, the application can be considered to violate the reasonable expectation that the habitable rooms and private open space at my clients' property will remain private. It is therefore reasonably anticipated that the application does not comply with the DCP.

The above non-compliance will give rise to unreasonable amenity impacts upon the adjoining properties. In this instance, the proposal is not considered to achieve compliance with this control.

16. IMPACTS UPON ADJOINING PROPERTIES: ENGINEERING

EXCESSIVE EXCAVATION & GEOTECHNICAL CONCERNS

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it is inconsistent with the provisions of Clause 7.7 'Geotechnical Hazards' of the PLEP,

The Geotechnical Report does not ensure that the geotechnical risk is mitigated appropriately and that there is no significant adverse impact on the development and the land surrounding the development. The provisions of Appendix 5 Pittwater DCP 21 have not been complied with by the provision of a 'professional certification' Form 1 and Form 1a has not been provided with the Report. The Report does not provide a suitable level of detail as required under Cl 6.5 of Appendix 5 of the Pittwater 21 DCP.

Insufficient information has been submitted to demonstrate that the proposed development will not adversely impact the structural integrity of the surrounding properties.

The site is classified within the H1 [highest category] within the LEP.

The site subsurface condition is highly variable, according to the geotechnical report, and additional cored boreholes is required.

The Applicant has not provided adequate protection to my clients' property from excessive excavation and potential land slip and damage to my clients' property.

The geotechnical report:

1. Is written well before final issue of the Architect's drawings; The geotechnical report refers to outdated August 2021 Architects drawings
2. Assesses a significant shallower excavation that is proposed in the architectural design, potentially making the recommendations and design parameters of the report invalid and/or unsuitable.
3. The stated lowest level in the report is MINUS 1.24m, however the DA drawings show levels to MINUS 2.4m.

4. Suggests BEL at 3.8m [east] and [14.7m] west, where the DA drawings and survey show 5.1m [east] and 16.8m [west] at the 14 contour to the south-east.
5. Identifies a BEGL at 3.0m [p.9], rather than 5.1m to 16.8m as identified above;
6. Shows consistent groundwater with minimal fluctuations between RL 1.38 and RL 1.08, with excavation proposed 3.5m below these levels, and not 2.2m as the report infers;
7. Anticipates that the groundwater will be maintained at a depth of about 1m below the bulk excavation level, however 3.5m is the likely outcome considering the above;
8. Considers risks of ground settlement to neighbouring properties, including heritage items
9. Advises that '*unsupported vertical cuts are not recommended*', whilst architectural drawings suggest '*natural cut wall*' for multiple levels
10. Considers a cantilevered contiguous pile wall with mass concrete between the piles be installed to below BEL. Allowing for a 3m installation below ground the cantilever is approximately 20m. There is no consideration how piling machinery can complete this task on a very steep slope. Of significant concern, the DA drawing does not show this outcome, and stops the pile wall at Level 1
11. Confirms that a slope stability and risk assessment was not carried out, and relies upon a 2009 risk assessment carried out on another DA scheme with completely different excavation cuts.
12. Refers to an outdated 2020 report relating to excavations adjacent RMS infrastructure, with no updated report referencing the 5.1m BEL.
13. Over 3m deep soil to eastern boundary, without adequate recommendations to support the soil and the adjacent property.
14. The land is subject to Class 5 land for acid sulfate soils. The geotechnical report has demonstrated if the water table beneath the site will be affected by the proposed works, which requires further investigation on acid sulfate soils.

I have significant concerns to the Geotechnical Report:

- does not provide suitable assessment to meet the Council Geotechnical Risk Management Policy requirements.
- inadequate geotechnical investigations,
- incomplete geotechnical recommendations,
- conservative parameters for design of retention systems.
- incomplete geotechnical monitor plan,
- excessive vibration limits, maximums of 3mm/sec should be considered due to the age and fragility of neighbouring properties
- lack of full-time monitoring and control of the vibration,
- incomplete dilapidation survey report recommendations,
- incomplete attenuation methods of excavation,
- exclusion of excavation in the setback zone,
- exclusion of anchors under my clients' property, and

I have numerous concerns:

- A mass failure of the slope that falls across the property and continues above at moderate angles failing and impacting on the proposed works.
- The vibrations produced during the proposed excavation impacting on the surrounding structures.
- The excavation collapsing onto the work site before retaining structures are in place.
- The proposed basement excavation undercutting the footings of the neighbouring property causing failure.
- Excessive vibration recommendations considering the age and fragility of neighbours' properties
- The geotechnical report does not reference the relevant Council policy or zoning providing no certainty that the site zoning or policy was considered in its preparation
- The geotechnical report is not accompanied by forms of the policy, as is required for submission and acceptance of the report by Council, and which confirm that engineer has assessed the conditions as per the policy and holds Professional Indemnity Insurance
- The geotechnical report does not identify how saw cut sandstone edge details are achieved on DA drawing 300 & 301, contrary to geotechnical engineer's advice;
- no recommendations regarding suitable equipment or ground vibration control
- The geotechnical report limited boreholes that extend to bedrock.
- The geotechnical report provides no landslide hazards and treatment options, and refers to an earlier DA scheme none of which appear site or development specific.
- The geotechnical report provides no description of adjacent properties or conditions/hazards with these properties that could be impacted by or impact upon the development (ie. boulders, stabilised outcrops)
- The geotechnical report ort provides no recommendations for excavation support systems at the eastern boundary

The Sydney 1:100 000 geological series sheet 9130 shows the site is underlain by a geological unit, Rnn Narrabeen Group Rocks, with the Hawkesbury Sandstone located upslope to the east.

The Narrabeen Group rocks are known to weather far more deeply than the Hawkesbury Sandstone along with a higher tendency for defects and as such the bedrock is likely to contain various weathered units of siltstone/shale/claystone that will have lower stability when compared to the sandstone.

A high potential exists for variation to the interpreted geological sequence and as such the suitability of the recommendations and design parameters supplied in the report.

The maximum excavation depth appears to be up to 3.0m greater than that indicated in the geotechnical report. This would be expected to alter the risk levels assessed in the report and the recommendations for support systems.

Safe batter slopes are not possible in many locations with respect to boundary stability, and therefore pre-excavation support is needed.

As such, a more detailed investigation into sub-surface conditions is required to confirm geological sequences and determine and provide recommendations for support systems.

The report also appears to be assessing a significant shallower excavation than is proposed in the architectural design, potentially making the recommendations and design parameters of the report invalid/unsuitable.

Based on the apparent potential for excavation of deep excavation within proximity of property boundaries, it is considered that the geotechnical report does not provide suitable assessment to meet the Council Geotechnical Risk Management Policy requirements.

The geotechnical report supplied does not meet the Council's policy requirements or objectives and as such should not be accepted by Council with the Development Application.

The geotechnical report provides limited assessment which does not appear site or development specific, provides no adequate design or construction recommendations to maintain stability within the "Acceptable Risk Management" criteria and involved very limited and shallow investigation for what are deep excavations into the hill slope that have high potential for detrimental impact on adjacent properties and structures.

As such, should approval of the proposed development occur based on the supplied geotechnical report, then serious concerns should be held for the stability and protection of my client's property and house.

My clients have geotechnical concerns.

- Stability of the natural hillside slope; upslope of the proposed residence, beneath the proposed residence, downslope of the proposed residence and to all neighbour's land.
- Stability of existing retaining walls that will remain;
- Stability of proposed retaining walls to support the excavations for the proposed residence, and external landscaping walls.
- Incomplete consideration of landslip hazards
- Incomplete consideration of Natural Hillside Slope
- Incomplete consideration to create a Large-Scale Translational Slide
- Incomplete consideration of Existing Retaining Walls
- Incomplete consideration of Proposed Retaining Walls
- Incomplete consideration of partial excavation of large boulders
- Incomplete consideration and inadequate identification of 'floaters' across neighbour's boundary
- Incomplete consideration of Surface Erosion
- Incomplete consideration of potential Rock Fall
- Incomplete consideration of landslip of soils from excavation

My clients have concerns regarding the lack of extensive recommendations in respect to the following:

- Incomplete Conditions Recommended to Establish the Design Parameters
- Incomplete Conditions Recommended to the Detailed Design to be Undertaken for the Construction Certificate
- Incomplete Conditions Recommended During the Construction Period
- Incomplete Conditions Recommended for Ongoing Management of the Site/Structure(s)
- Incomplete Geotechnical Risk Management Forms

The Geotechnical report does not contain the full extent of conditions normally associated with this type of deep excavation on a steep slope. Some of these matters are partially addressed but not all.

Typical conditions are as follows:

Conditions Recommended to Establish the Design Parameters

- all existing landscaping retaining walls within the site will be replaced as part of the development.
- a geotechnical investigation of the site should be carried out to confirm the subsurface conditions prior to the start of excavation. The investigation should be carried out following demolition so access to the entire site for a drilling rig is possible.
- at least four boreholes be drilled, involving coring of the rock to assess its quality
- Cone Penetration Testing across the site to determine the soil profile and consistency;
- Boreholes for soil identification and collection of laboratory samples;
- Installation of groundwater monitoring wells with data loggers to measure groundwater levels before and during construction;
- Permeability testing in wells;
- Groundwater modelling to assess inflows and drawdown;
- Shoring wall analyses.
- Assess the groundwater level and fluctuations across the site and provide a detailed groundwater assessment to predict soil permeability, inflow rates, drawdown and its effect in the short and long term for the site and surrounding properties;
- Excavations are expected to encounter sandstone bedrock and where such excavation is carried out using a hydraulic rock hammer continuous vibration monitoring must be carried out during rock hammer use. Vibration monitors should be set up on the adjoining houses. The ground vibration measured as peak particle velocity must not exceed 5mm/sec at the site boundaries, or 3mm/sec on older fragile properties. Lower PPV may be necessary due to the structural design of neighbouring properties
- Subject to inspection by a geotechnical engineer temporary batters for the proposed excavation should be no steeper than 1 Vertical (V) in 1 Horizontal (H) within the soil profile and extremely weathered rock and vertical in

competent rock. All surcharge and footing loads must be kept well clear of the excavation perimeter.

- Where the required batters cannot be accommodated within the site geometry, or where not preferred, a retention system would be required and should be installed prior to excavation commencing.
- proposed new retaining walls should be designed using parameters set out by the geotechnical engineer, such as: For cantilever walls, adopt a triangular lateral earth pressure distribution and an 'active' earth pressure coefficient, K_a , of 0.3, for the retained height, assuming a horizontal backfill surface. A bulk unit weight of 20kN/cubm should be adopted for the soil profile. Any surcharge affecting the walls (e.g. traffic loading, live loading, compaction stresses, etc) should be allowed in the design. Propped or anchored retaining walls may be designed based on a trapezoidal lateral pressure distribution of $6H$ kPa, where H is the retained height in metres, assuming no structures are located within $2H$ of the wall. The retaining walls should be provided with complete and permanent drainage of the ground behind the walls. The subsoil drains should incorporate a non-woven geotextile fabric (eg. Bidim A34), to act as a filter against subsoil erosion. For soldier pile walls strip drains should be placed behind the shotcrete panels. Toe resistance of the wall may be achieved by keying the footing into bedrock. An allowable lateral stress of 200kPa may be adopted for design.
- No rock anchors beyond the subject site boundary
- All proposed footings must be founded in sandstone bedrock. The footings should be designed for an allowable bearing pressure of 600kPa, subject to inspection by a geotechnical engineer prior to pouring.
- The surface water discharging from the new roof and paved areas must be diverted to outlets for controlled discharge to the existing stormwater system which appears to drain to the north. Any stormwater discharge must be spread across the slope and not discharged in a concentrated manner.
- The guidelines for Hillside Construction should also be adopted.

Conditions Recommended to the Detailed Design to be Undertaken for the Construction Certificate

- All structural design drawings must be reviewed by the geotechnical engineer who should endorse that the recommendations contained in this report have been adopted in principle. As the construction certificate will need to be obtained prior to demolition, the structural drawings prepared for the construction certificate application will require review following completion of the geotechnical investigation and must be marked as such. The need for the geotechnical investigation following demolition must be clearly stated on the construction certificate structural drawings.
- All hydraulic design drawings must be reviewed by the geotechnical engineer who should endorse that the recommendations contained in this report have been adopted in principle.
- All landscape design drawings must be reviewed by the geotechnical engineer who should endorse that the recommendations contained in this report have been adopted in principle.
- Dilapidation surveys must be carried out on the neighbouring buildings and structures. A copy of the dilapidation report must be provided to the neighbours and Council or the Principle Certifying Authority.

- An excavation/retention methodology must be prepared prior to bulk excavation commencing. The methodology must include but not be limited to proposed excavation techniques, the proposed excavation equipment, excavation sequencing, geotechnical inspection intervals or hold points, vibration monitoring procedures, monitor locations, monitor types, contingency plans in case of exceedances.
- The excavation/retention methodology must be reviewed and approved by the geotechnical engineer.
- A Geotechnical Monitoring Plan is to be prepared which will detect any settlement associated with temporary and permanent works and structures; Will detect vibration in accordance with AS 2187 .2-1993 Appendix J including acceptable velocity of vibration (peak particle velocity); Will detect groundwater changes calibrated against natural groundwater variations; Details the location and type of monitoring systems to be utilised; Details the pre-set acceptable limits for peak particle velocity and ground water fluctuations; Details recommended hold points to allow for the inspection and certification of geotechnical and hydro-geological measures by the professional engineer; and Details a contingency plan.
- A geotechnical investigation meeting the requirements of TfNSW Technical Direction Geotechnology GTD 2020/001 | Version No. 01 – 2 July 2020 *Excavation adjacent to Transport for NSW Infrastructure*. This investigation will relate to the proximity of the excavation to the road
- Geotechnical assessment meeting the requirements of Sydney Water, *Technical guidelines, Building over and adjacent to pipe assets*, August 2021. This assessment will relate to the proximity of the excavation to the existing sewer main.
- A minimum of four cored boreholes extending to at least 3 m below the proposed bulk excavation level. A monitoring well is to be installed in at least one borehole the presence or otherwise of a groundwater level within the proposed depth of excavation established prior to design.
- Rock grinders are to be used for excavation. Hydraulic rock hammering is not to be used for excavation as it has the potential to provoke rock instability of the existing cliff face.
- Vibration monitoring limits are to be set at maximum Peak Particle Velocity of 5 mm/sec on neighbouring properties, or 2mm/sec to heritage, historical, structures in sensitive and fragile conditions or older fragile dwellings.
- Monitoring is to be carried out during demolition and excavation using a vibration monitoring instrument [Vibra] and alarm Levels [being the appropriate PPV] selected in accordance with the type of structures present within the zone of influence of the proposed excavation. If vibrations in adjacent structures exceed the above values or appear excessive during construction, excavations should cease, and the project Geotechnical Engineer should be contacted immediately for appropriate review.

Conditions Recommended During the Construction Period

- The recommendations provided below must be reviewed and amplified following completion of the geotechnical investigation. The recommendations given below assume that good quality rock will be encountered at relatively shallow depths.

- The structural drawings must be updated following completion of the geotechnical investigation and subsequently reviewed by the geotechnical engineer to confirm that the geotechnical recommendations have been adopted.
- The approved excavation/retention methodology must be followed.
- Bulk excavations must be progressively inspected by the geotechnical engineer as excavation proceeds. We recommend inspections at 1.5m vertical depth intervals and on completion.
- The geotechnical engineer must inspect all footing excavations prior to placing reinforcement or pouring the concrete.
- Proposed material to be used for backfilling behind retaining walls must be approved by the geotechnical engineer prior to placement.
- Compaction density of the backfill material must be checked by a NATA registered laboratory to at least Level 2 in accordance with, and to the frequency outlined in, AS3798, and the results submitted to the geotechnical engineer.
- If they are to be retained, the existing stormwater system, sewer and water mains must be checked for leaks by using static head and pressure tests under the direction of the hydraulic engineer or architect, and repaired if found to be leaking.
- The geotechnical engineer must inspect all subsurface drains prior to backfilling.
- An 'as-built' drawing of all buried services at the site must be prepared (including all pipe diameters, pipe depths, pipe types, inlet pits, inspection pits, etc).
- All rock anchors must be proof-tested to 1.3 times the working load. In addition, the anchors must be subjected to lift-off testing no sooner than 24 hours after locking off at the working load. The proof-testing and lift-off tests must be witnessed by the geotechnical engineer. The anchor contractor must provide the geotechnical engineer with all field records including anchor installation and testing records.
- No rock anchors under neighbour's property.
- The geotechnical engineer must confirm that the proposed alterations and additions have been completed in accordance with the geotechnical reports.

Conditions Recommended for Ongoing Management of the Site/Structure(s)

The following recommendations have been included so that the current and future owners of the subject property are aware of their responsibilities:

- All existing and proposed surface (including roof) and subsurface drains must be subject to ongoing and regular maintenance by the property owners. In addition, such maintenance must also be carried out by a plumber at no more than ten yearly intervals; including provision of a written report confirming scope of work completed (with reference to the 'as-built' drawing) and identifying any required remedial measures.
- The existing retaining walls on the western and eastern boundaries that are to remain must be inspected by a structural engineer at no more than ten yearly intervals; including the provision of a written report confirming scope of work completed and identifying any required remedial measures

- No cut or fill in excess of 0.5m (e.g. for landscaping, buried pipes, retaining walls, etc), is to be carried out on site without prior consent from Council.
- Where the structural engineer has indicated a design life of less than 100 years then the structure and/or structural elements must be inspected by a structural engineer at the end of their design life; including a written report confirming scope of work completed and identifying the required remedial measures to extend the design life over the remaining 100 year period.

Other Conditions:

- It is possible that the subsurface soil, rock or groundwater conditions encountered during construction may be found to be different (or may be interpreted to be different) from those inferred from the surface observations
- Surface run-off patterns during heavy rainfall may present poor outcomes

Concern is raised that the Geotechnical report has not fully addressed these matters

- Comprehensive site mapping conducted - inadequate
- Mapping details presented on contoured site plan with geomorphic mapping
- Subsurface investigation required
- Geotechnical model developed and reported as an inferred subsurface type-section
- Geotechnical hazards identified
- Geotechnical hazards described and reported
- Risk assessment conducted in accordance with the Geotechnical Risk Management Policy; Consequence analysis & Frequency analysis
- Risk calculation
- Risk assessment for property conducted in accordance with the Geotechnical Risk Management Policy
- Risk assessment for loss of life conducted in accordance with the Geotechnical Risk Management Policy
- Assessed risks have been compared to "Acceptable Risk Management" criteria as defined in the Geotechnical Risk Management Policy
- Opinion has been provided that the design can achieve the "Acceptable Risk Management" criteria provided that the specified conditions and recommendations presented in the Report are achieved recommendations presented in the Report are adopted.
- Design Life Adopted:100 years
- Geotechnical Conditions to be applied to all four phases as described in the Geotechnical Risk Management Policy
- Additional action to remove risk where reasonable and practical have been identified and included in the report.

The Applicant has not provided adequate protection to my clients' property from excessive excavation and potential land slip and damage to my clients' property, including intrusive geotechnical investigations, incomplete geotechnical recommendations, incomplete geotechnical monitor plan, excessive vibration limits, lack of full-time monitoring of the vibration, incomplete dilapidation report recommendations, incomplete attenuation methods of excavation, exclusion of

excavation in the setback zone, exclusion of anchors under my clients' property, and incomplete consideration of battering in the setback zone.

My clients ask for the Geotechnical Report to be updated to include all these matters, and the recommendations of the risk assessment required to manage the hazards as identified in the Geotechnical Report.

The groundwater table is at slightly above the zero datum and is likely to exhibit a subdued fluctuation reflecting the coastal/tidal conditions present at the beach. Groundwater levels will fluctuate with climatic conditions and to lesser extent due to tidal influences, and are likely to increase following periods of extended wet weather. Groundwater is likely at a relatively shallow depth and dewatering is required for the construction of the basement levels. A 'tanked fully water-tight basement will be required and should be designed for hydraulic uplift pressures. Control of temporary groundwater inflow during construction requiring dewatering and the construction of a shoring wall extending to sufficient depth beneath the excavation. Dewatering in sands leading to possible localised temporary draw down of the groundwater table which may cause settlement of adjacent buildings being supported on high level footings and similar effect of services, if not properly controlled. In constructing the basement, it is assumed that a shoring wall will be installed to below the bulk excavation level, the site will then be dewatered, progressively excavated and finally a tanked basement will be constructed. Generally, the groundwater level should be lowered to at least 1 m below the bulk excavation level to allow machinery to operate and traverse the site. On this basis, the normal groundwater level may need to be temporarily lowered significantly, and locally deeper for lift pits, causing added risk of settlement of adjacent buildings.

SUPPORT AND RETENTION

A Site-specific Risk Assessment Matrix with appropriate definitions for qualitative measures of likelihood and consequences for assessing the risk of damage to existing developments by the proposed development.

Implementation Plan, comprising the following:

- a. Monitoring program including various pre-set acceptable limits, location and type of monitoring systems and recommended hold points.
- b. Contingency Plan including details of measures to be adopted to restore groundwater level or to provide any necessary additional support.

Construction Methodology to address all aspects of the construction process relating to the geotechnical and hydrogeological requirements. This includes:

- o A design statement and supporting drawings that shows the design measures proposed to minimise risks and to ensure that no adverse impacts will occur;

- Structural report of the proposed support and retention measures that confirms the structural adequacy of any adjacent structure including any necessary additional support for the structure;
- All the above reports shall be prepared by a suitably qualified and experienced structural engineer based on the findings of the geotechnical investigation report. In summary, the reports shall include the following details:
- Location of nearby foundations/footings (site and neighbouring properties) including any existing boundary walls and structures - the engineer must provide design solutions showing that the footings of all existing structures will not be disturbed or undermined by the proposed excavation;
- Recommendations on methods of excavation and appropriate construction techniques, to ameliorate any potential adverse impacts to adjoining properties;
- Recommendations as to appropriate temporary and permanent site support and retention measures – all support and retention measures shall be wholly located within the subject site;
- Prediction of ground settlements in areas adjacent to the development site resulting from temporary and permanent site support and retention measures – the engineer shall demonstrate that the proposed settlement will have no adverse impact on the surrounding properties and infrastructure;
- Prediction of potential vibration caused by methods of excavation and recommendations on appropriate plant, equipment and construction methods to limit vibration.
- Permanent earth or rock anchors will not be consented by my client on or below their property
- Method and rate of dewatering where required;
- Certification to confirm that the structural adequacy of all adjoining structures will not be adversely affected and compromised.
- Should underpinning works be determined to be carried out to the footing of any neighbouring structures including any boundary walls, details and procedures of such underpinning works shall be included in the reports. In addition, written owner consent from the adjoining property owners is also required to be submitted in order for these works to be carried out.
- Alternatively, the structural engineer shall provide an engineering solution to preclude the necessity to underpinning works caused by the proposal and certify that underpinning works to neighbouring structures are not required.

STORMWATER CONCERNS

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide adequate stormwater control outcomes.

My clients ask Council to consider the stormwater design and the OSD.

My clients ask Council to ensure that there are stormwater pits to collect surface and sub surface stormwater along the perimeter of the subject site.

My clients are extremely concerned that the proposed stormwater drawings do not show adequate collection of stormwater along the side and rear boundaries of the subject site, to retain the stormwater washing across the subject site onto my client's property.

The external floor wastes shown and the 100mm pipework, is considered insufficient to deal with the rainfall events including the 1 in 100 year design storm.

Council will be aware that the average design rainfall criteria within the ARR2019 guidelines.

Council will recall that in March 2022, that a persistent low-pressure trough produced an East Coast Low resulted in significant rainfall over much of Greater Sydney for the first nine days of the month. Rainfall was well above average, with many parts of Greater Sydney received at least 3 to 5 times their monthly average, as well as their highest monthly total on record. The heavy rainfall on the 3rd, 8th and 9th resulted in significant flash flooding across Sydney.

Nearby, Collaroy recorded over 525mm in the first 9 days of March 2022. Terry Hills recorded 500mm in the same 9-day period. Other locations in Sydney reached 600mm.

<http://www.bom.gov.au/climate/current/month/nsw/archive/202203.sydney.shtml#recordsRainDailyHigh>

Rainfall records in Sydney going back 60 years to 120 years were broken.

With climate change this is the 'new norm', and it will get worse.

My clients request that the onsite stormwater system is increased with large pits and large pipework to collect all stormwater on the subject site around all side and rear setbacks to accord with the 1% AEP.

FLOOD CONCERNS

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide adequate flood protection.

The proposed development does not accord with flood control. I note Council's unsupported referral dated 23 September 2023.

Council is not satisfied that the proposal is compliant with Section B3.11 of the Pittwater 21 DCP 2021 and Clause 5.21(2)(a-e) of the Pittwater LEP 2014, with consideration of Clause 5.21(3)(a-d) of the Pittwater LEP 2014 for the following key reason:

- The internal retail floor areas below the FPL extend over the allowable 5m from the front of the building. This is not accepted. Refer control C7 - B3.11 of the Pittwater DCP.
- Access to the property is expected to be cut off by the H3 flood hazard area. Therefore, control E1 - B3.11 of the Pittwater DCP must be considered in the Flood Risk Management Report.

My clients are concerned that there is no adequate Overland Flood Study to include: Hydrological data Hydraulics data; Catchment plan showing sub-catchments (where applicable); Computer model such as HEC-RAS showing the 1% AEP stormwater flow over the subject site; Cross sections detailing the 20% and 1% AEP water surface levels traversing the site; Extent of water surface levels to extend upstream and downstream of the subject property; Any overland flow mitigation measures to protect the proposed development from stormwater inundation must not exacerbate flooding for adjoining properties by diverting more flows to adjoining properties.

My clients ask Council to address the following:

- Council is to ensure that the works proposed on the site are capable of accommodating all storm events including the 1 in 100 year design storm with no adverse impacts to my clients' property.
- Council is to ensure that the overland flow path provided is capable of accommodating all reasonable development and redevelopment in the catchment draining to the proposed overland flow path.
- Council is to ensure that the development will not result in a net loss in flood storage or floodway in 1% AEP flood. These calculations must be provided and mapping of the floodway in relation to the proposed building must also be provided.
- Council is to ensure that my clients' property will have no increase in PMF levels and PMF peak velocity on neighbouring properties.

ACOUSTIC NOISE FROM PLANT

I am concerned to the AC Condensers proposed for the roof, and the potential acoustic noise, the discharge openings and the carpark exhaust discharge.

I note Council's Environmental Health unsupported Referral dated 27 September 2023 that states:

The plans for the proposed development identify the air conditioning condensers located on the roof top. The A/C condensers is for four apartments and two shop units. Noise from the condenser units may be an issue, especially to residential receivers 23 Palm Beach Road and 21A Palm Beach Road, and needs to be

considered as part of this proposal. The applicant is required to have an acoustic report completed to assess potential noise to nearby residential receivers from the A/C condenser on the roof, the vertical discharge openings and the carpark exhaust discharge. In addition, the acoustic report is to assess potential noise impacts on the residential apartments within the proposal from sources such as: The plant room in the basement; Any exhaust/air outlets on the Eastern and Northern side of the building that may impact on the apartments during sensitive noise times. Environmental Health recommends refusal at this time The proposal is therefore unsupported

WASTE MANAGEMENT

I am concerned that inadequate consideration has been given to the waste management issues. I note Council's Waste unsupported Referral of 27 September 2023 that states:

The proposal does not accommodate the correct number of waste and recycling bins (8 x 240 litre). Specifically: 1) The bin holding/service bay at the front of the property will need to be enlarged to accommodate 8 x 240 litre bins. This will require the internal dimensions of the bin holding bay to be 4.8 metres long and 800millimetres deep. This bin holding area must be free from any services infrastructure such as gas and water meters. 2) The residential bin room may need to be enlarged to accommodate 8 x 240 litre bins. The bins must not be double stacked in the room. Each bin is 600mm wide and 750mm deep. The proposal is therefore unsupported.

17. PRECEDENT

The Development Application should be refused because approval of the proposal will create an undesirable precedent for similar inappropriate development in the area.

18. PUBLIC INTEREST

The proposal is contrary to the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*. The proposed development is not in the public interest as the development is inconsistent with the scale and intensity of development that the community can reasonably expect to be provided on this site by nature of the applicable controls. The development does not represent orderly development of appropriate bulk, scale or amenity impact in the locality and approval of such a development would be prejudicial to local present and future amenity as well as desired future character and therefore is not in the public interest.

D. CONTENTIONS THAT RELATE TO INSUFFICIENT & INADEQUATE INFORMATION

The applicant has not submitted sufficient and/or adequate information as requested by Council under Part 6, Division 1 Clause 54 of the EPA Regulation 2000 to enable a reasonable assessment under the applicable legislation.

The application lacks sufficient detail to make an informed assessment particularly with respect to determining the extent of the following matters and the relationship and impact to adjoining neighbours.

View Impact Analysis

The Applicant has not provided an adequate View Impact Analysis which details the extent to which existing water views from my clients' property are obstructed under the current proposal, from the proposed built form and the proposed trees, to accord with DCP controls and NSWLEC planning principles

My clients ask Council that after amended plans are submitted to reduce the building envelope below building height, wall height, and all envelope controls, to request that the Applicant position 'Height Poles/Templates' to define the non-compliant building envelope, and to have these poles properly measured by the Applicant's Registered Surveyor. The Height Poles will need to define: All Roof Forms, and all items on the roof, Extent of all Decks, Extent of Privacy Screens. Height Poles required for all trees. The Applicant will have to identify what heights and dimensions are proposed as many are missing from the submitted DA drawings.

Solar Access Diagrams

The Applicant has not provided adequate Solar Access Diagrams, at one hourly intervals, in plan and elevation of my clients' property, to assess the loss of solar access at mid-winter, to accord with DCP controls and NSWLEC planning principles

My clients believe that further assessment of the shadow impacts through the production of elevational shadow diagrams or a "View from the Sun" assessment are critical in order to understand the potential future impacts and necessary for Council's reasonable assessment.

Privacy Impact Analysis

The Applicant has not provided an adequate Privacy Impact Analysis, to accord with DCP controls and NSWLEC planning principles.

Visual Bulk Analysis

The Applicant has not provided adequate montages from my clients' property to assess the visual bulk assessment from the proposed non-compliant envelope.

Existing and Finished Ground Levels

Spot levels and contour lines from the Registered Surveyors drawings have not been transferred to the proposed DA drawings of plans, sections, and elevations to enable an assessment of height and the relationship and impact to adjoining neighbours. Neighbour's dwellings have not been accurately located on plans, sections and elevations, including windows and decks, to enable a full assessment of the DA.

Geotechnical

The Applicant has not provided adequate protection to my clients' property from excessive excavation and potential land slip and damage to my clients' property, including excessive vibration limits, lack of full-time monitoring of the vibration, incomplete dilapidation report recommendations, incomplete attenuation methods of excavation, exclusion of excavation in the setback zone, exclusion of anchors under my clients' property, and incomplete consideration of battering in the setback zone. The geotechnical requirements referred to earlier must be added to the Geotechnical Report. My clients ask for the Geotechnical Report to be updated to include these matters, and the recommendations of the risk assessment required to manage the hazards as identified in the Geotechnical Report are to be incorporated into the construction plans.

In Medium Strength Rock the use of better techniques to minimise vibration transmission will be required. These include: Rock sawing the excavation perimeter to at least 1.0m deep prior to any rock breaking with hammers, keeping the saw cuts below the rock to be broken throughout the excavation process; Limiting rock hammer size to 300kg, with a 5t excavator as a maximum; Rock hammering in short bursts so vibrations do not amplify. Rock breaking with the hammer angled away from the nearby sensitive structures; Creating additional saw breaks in the rock where vibration limits are exceeded; Use of rock grinders (milling head). Should excavation induced vibrations exceed vibration limits after the recommendations above have been implemented, excavation works are to cease immediately.

E. REQUEST FOR AMENDED PLANS TO BE SUBMITTED TO BETTER ADDRESS IMPACTS UPON ADJOINING PROPERTIES

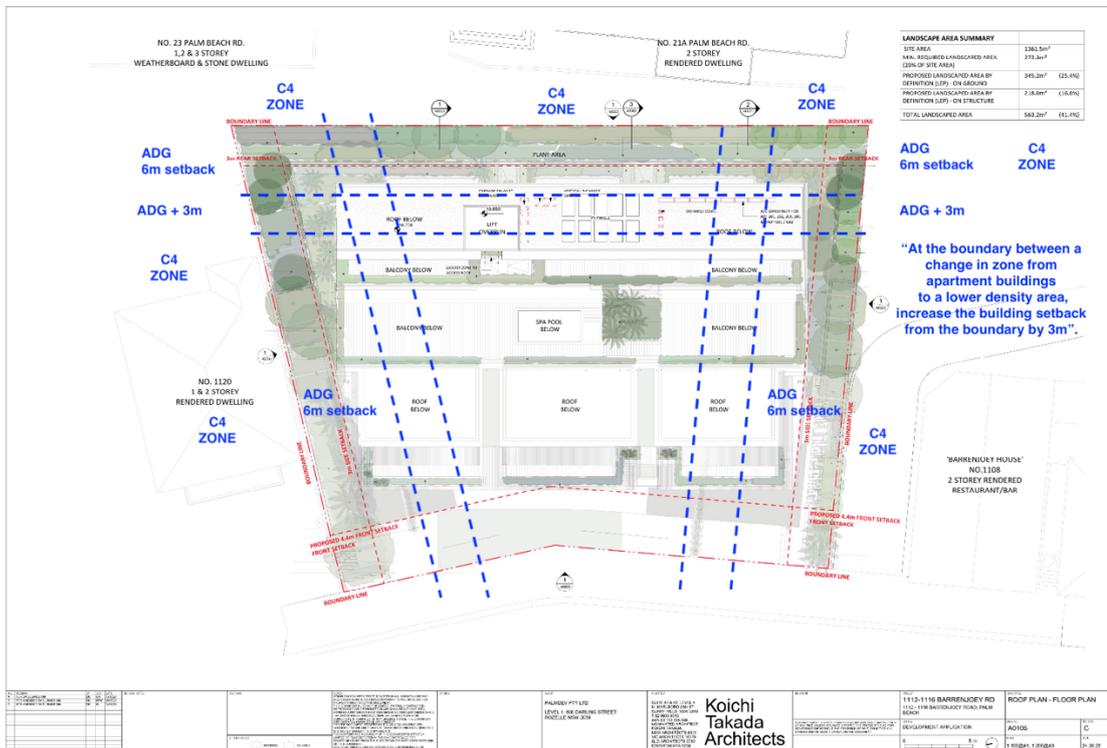
A compliant building design would reduce the amenity impacts identified.

Prepare and submit further supporting information and amendments to the assessing officer directly addressing the issues.

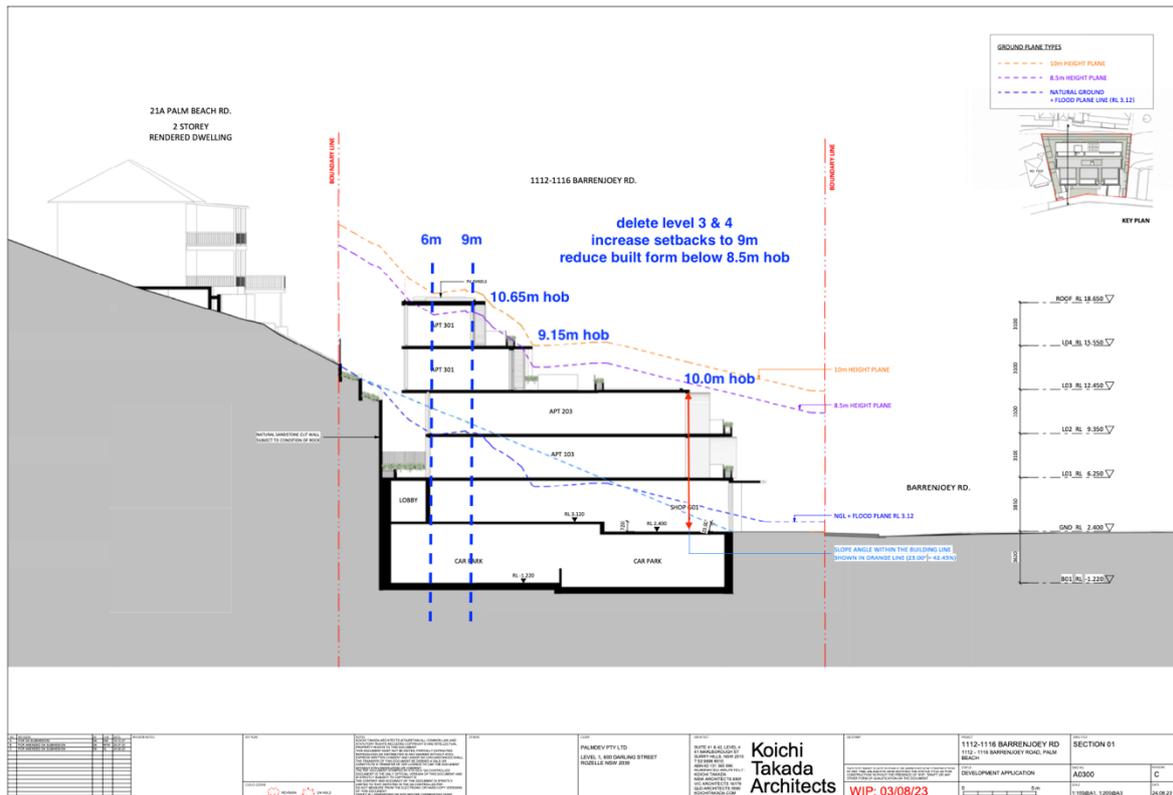
Reduce the proposed development as follow:

1. REDUCTION OF BUILT FORM

- Reduce the Building Height to 8.5m
- Increase Side & Rear Setback to ADG controls, of 6m + 3m = 9m, due to change of zone from E1 to C4
- Delete Levels 3 & 4.
- Consider to a two-storey pavilion facing the street to match wall and ridge heights of Barrenjoey House, with solid to void fenestration to match the heritage item, with bedrooms in the roof space.



A compliant design to LEP & ADG controls



2. PRIVACY DEVICES

- All windows facing my client's property to have windows sills increased to a minimum height of 1.6m measured from the FFL level, with obscured glazing or privacy screens.
- Privacy screening to a height of at least 1.7m measured from the FFL level is to be incorporated along the full extent of all balconies or which face the side boundary. Privacy screening to be fixed obscured glazing or fixed panels or battens or louver style construction (with a maximum spacing of 20mm), in materials that complement the design of the approved development.

3. LANDSCAPING

- Tree planting shall be located to minimise impacts on view loss, with no trees over 8m in the viewing corridor
- To maintain view sharing, the proposed trees and plants over 8m in height shall be deleted in the landscape plan.
- new trees and screening trees be increased to 400 L, so that a more mature landscape outcome is achieved.

- Tree canopy planting must be located at least 3m from buildings and 5m from common boundaries, to avoid excessive canopy protruding over neighbour's property.

4. CONDITIONS OF ANY CONSENT

My client asks for a complete set of Conditions to be included within any consent, including, but not limited to, the following:

Conditions which must be satisfied prior to the demolition of any building or construction

- Acoustic Certification of Mechanical Plant and Equipment
- Arborists Documentation and Compliance Checklist
- BASIX Commitments
- Checking Construction Certificate Plans – Protecting Assets Owned by Sydney Water
- Construction Certificate Required Prior to Any Demolition
- Demolition and Construction Management Plan
- Electric vehicle circuitry and electric vehicle charging point requirements
- Engineer Certification
- Establishment of Tree Protection Zone (TPZ) Fence
- Geotechnical and Hydrogeological Design, Certification and Monitoring
- Ground Anchors
- Identification of Hazardous Material
- Light and Ventilation
- No Underpinning works
- Noise Control - Acoustic Protection of adjoining residential units-Operation of Air Conditioning Plant
- Noise Control - Swimming pool/spa pool pumps and associated equipment
- Parking Facilities
- Payment of Long Service Levy, Security, Contributions and Fees
- Professional Engineering Details
- Public Road Assets Prior to Any Work/Demolition
- Road and Public Domain Works
- Soil and Water Management Plan – Submission and Approval
- Stormwater Management Plan
- Swimming and Spa Pools – Backwash
- Swimming and Spa Pools – Child Resistant Barriers
- Tree Management Plan
- Ventilation - Internal Sanitary Rooms
- Utility Services Generally
- Waste Storage – Per Single Dwelling

Conditions which must be satisfied prior to the commencement of any development work

- Adjoining Buildings Founded on Loose Foundation Materials
- Building - Construction Certificate, Appointment of Principal Certifier, Appointment of Principal Contractor and Notice of Commencement (Part 6, Division 6.3 of the Act)
- Compliance with Building Code of Australia and insurance requirements under the
- Dilapidation Reports for Existing Buildings
- Erosion and Sediment Controls – Installation
- Establishment of Boundary Location, Building Location and Datum
- Home Building Act 1989
- Notification of Home Building Act 1989 requirements
- Security Fencing, Hoarding (including 'Creative Hoardings') and Overhead Protection
- Site Signs
- Toilet Facilities
- Works (Construction) Zone – Approval and Implementation

Conditions which must be satisfied during any development work

- Asbestos Removal Signage
- Check Surveys - boundary location, building location, building height, stormwater drainage system and flood protection measures relative to Australian Height Datum
- Classification of Hazardous Waste
- Compliance with Australian Standard for Demolition
- Compliance with BCA and Insurance Requirements under the Home Building Act 1989
- Compliance with Council's Specification for Roadworks, Drainage and
- Compliance with Geotechnical / Hydrogeological Monitoring Program
- Miscellaneous Works, Road Works and, Work within the Road and Footway
- Critical Stage Inspections
- Disposal of Site Water During Construction
- Disposal of Asbestos and Hazardous Waste
- Dust Mitigation
- Erosion and Sediment Controls – Maintenance
- Footings in the vicinity of trees
- Hand excavation within tree root zones
- Hours of Work –Amenity of the Neighbourhood
- Installation of stormwater pipes and pits in the vicinity of trees
- Level changes in the vicinity of trees
- Notification of Asbestos Removal
- Maintenance of Environmental Controls
- Placement and Use of Skip Bins
- Prohibition of Burning
- Public Footpaths – Safety, Access and Maintenance
- Replacement/Supplementary trees which must be planted
- Requirement to Notify about New Evidence
- Site Cranes
- Site Waste Minimisation and Management – Construction
- Site Waste Minimisation and Management – Demolition
- Support of Adjoining Land and Buildings

- Tree Preservation
- Vibration Monitoring

Conditions which must be satisfied prior to any occupation or use of the building (Part 6 of the Act and Part 8 Division 3 of the Regulation)

- Amenity Landscaping
- Certification of Electric Vehicle Charging System
- Commissioning and Certification of Public Infrastructure Works
- Commissioning and Certification of Systems and Works
- Occupation Certificate (section 6.9 of the Act)
- Letter Box
- Swimming and Spa Pools – Permanent Child Resistant Barriers and other Matters
- Swimming Pool Fencing

Conditions which must be satisfied prior to the issue of the Occupation Certificate for the whole of the building

- Fulfillment of BASIX Commitments – clause 154B of the Regulation
- Landscaping
- Positive Covenant and Works-As-Executed Certification of Stormwater Systems
- Removal of Ancillary Works and Structures
- Road Works (including footpaths)

Conditions which must be satisfied during the ongoing use of the development

- Maintenance of BASIX Commitments
- Noise Control
- Noise from mechanical plant and equipment, including swimming pool plant
- Ongoing Maintenance of the Onsite Stormwater Detention (OSD) System, Rain Garden and Rainwater Tank
- Outdoor Lighting – Residential
- Outdoor Lighting – Roof Terraces
- Swimming and Spa Pools – Maintenance

Advising

- Asbestos Removal, Repair or Disturbance
- Builder's Licences and Owner-builders Permits
- Building Standards - Guide to Standards and Tolerances
- Commonwealth Disability Discrimination Act 1992
- Criminal Offences – Breach of Development Consent and Environmental Laws
- Dial Before You Dig
- Dilapidation Report
- Dividing Fences
- Lead Paint
- NSW Police Service and Road Closures

- Pruning or Removing a Tree Growing on Private Property
- Pruning or Removing a Tree Growing on Private Property
- Recycling of Demolition and Building Material
- Release of Security
- Roads Act 1993 Application
- SafeWork NSW Requirements
- Workcover requirements

F. REASONS FOR REFUSAL

My clients ask Council to refuse the DA as the proposal is contrary to the Environmental Planning and Assessment Act:

1. The applicant's written request under clause 4.6 of the Pittwater LEP 2014 [yet to be provided in October 2023] seeking to justify a contravention of clause 4.3 Height of Buildings development standard has not adequately addressed and demonstrated that: a) compliance with the standards is unreasonable or unnecessary in the circumstances of the case; b) there are sufficient environmental planning grounds to justify the contraventions, and c) the proposed development will be in the public interest because it is consistent with the objectives of the standards and the objectives for development within the zone in which the development is proposed to be carried out.
2. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development is inconsistent with the provisions of Clause 4.3 Building Height of the Pittwater Local Environmental Plan 2014 as it is not considered to be compatible with the height and scale of surrounding development and does not minimise the adverse visual impact of development on the natural environment and heritage items.
3. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development is inconsistent with the provisions of Clause 5.10 Heritage Conservation of the Pittwater Local Environmental Plan 2014.
4. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 7.7 Geotechnical Hazards of the Pittwater Local Environmental Plan 2014.
5. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposal is inconsistent with Part D12 (Palm Beach locality) of the Pittwater 21 DCP.
6. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposal is not considered to satisfactorily meet the relevant Design Quality Principles of SEPP 65, in particular Principle 1: Context and Neighbourhood Character and Principle 2: Built Form and Scale and Principle 9: Aesthetics
7. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of State Environmental Planning Policy (Resilience and Hazards) 2021. The proposed development is likely to cause an adverse impact on the visual amenity and scenic qualities, a matter for consideration under Section 2.11 Development on land within the coastal use area.
8. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of the Locality. The proposed development is considered to be inconsistent with the desired future character statement of the Locality.
9. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Scenic Protection. The proposed development is not considered

to minimise visual impact on the natural environment when viewed from any waterway and is inconsistent with this Clause, resulting from contravention of Limited Development on Foreshore Area.

10. Adverse visual impacts to adjoining properties. The proposal raises the potential for adverse visual impacts and associated view impacts to the adjoining properties. In this regard, the proposal is contrary to the provisions of the aims of the LEP
11. Adverse solar impacts to adjoining properties. The proposal raises the potential for adverse visual impacts and associated solar impacts to the adjoining properties. In this regard, the proposal is contrary to the provisions of the aims of the LEP.
12. Adverse visual and acoustic privacy impacts to adjoining properties. The proposal does not demonstrate effective mitigation of overlooking to adjoining properties from balconies and windows.
13. The extent of excavation is excessive. The proposal is contrary to the objective of the DCP, in that it does not minimise excavation and has potential adverse impacts on existing and proposed vegetation.
14. Council is not satisfied that under clause 4.6 of the LEP seeking to justify a contravention of the development standard that the development will be in the public interest because it is inconsistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.
15. The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy objectives and planning controls of LEP:
 - Aims of Plan
 - Zone Objectives
 - Height of Buildings
 - Exceptions to Development Standards
 - Heritage
 - Flood
 - Earthworks
 - Stormwater
 - Geotechnical Hazards
16. The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy objectives and planning controls of DCP:
 - Unacceptable Building Separation
 - Poor Strategic Positioning of Tree Canopy
 - Poor Garage Design
 - Excessive Excavation & Geotechnical Concerns

- Stormwater Concerns
- Flood Concerns
- Poor Streetscape Outcomes
- Heritage Conservation Concerns
- Impacts Upon Adjoining Properties: View Loss
- Impacts Upon Adjoining Properties: Overshadowing
- Impacts Upon Adjoining Properties: Privacy
- Impacts Upon Adjoining Properties: Visual Bulk

17. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that the plans and documentation are misleading as they do not clearly portray the true extent of works proposed. The plans include inaccuracies and inconsistencies and insufficient information has been provided in order to enable a detailed assessment. Dimensions to boundaries have not been shown in all locations of all proposed built elements. Levels on all proposed works have not been shown.
18. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that the proposal would not satisfy the matters for consideration under Biodiversity & Conservation SEPP 2021 and Resilience & Hazards SEPP 2021
19. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that it will have an adverse impact through its bulk, scale and siting on the built environment, and through lack of landscape provision, and adverse impact on the natural environment. The proposed development will have a detrimental impact on the visual amenity of the adjoining properties by virtue of the excessive building bulk, scale and mass of the upper floor and its associated non-compliant envelope.
20. The site is not suitable for the proposal pursuant to Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979* in that this area of the site is unsuitable for a development of such excessive bulk and scale.
21. The proposals are unsuitably located on the site pursuant to Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979*.
22. The proposal does not satisfy Section 4.15(1)(d) of the *Environmental Planning and Assessment Act 1979* in that the proposal does not adequately address the amenity of neighbours
23. The proposal is contrary to the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*. The proposed development is not in the public interest as the development is inconsistent with the scale and intensity of development that the community can reasonably expect to be provided on this site by nature of the applicable controls. The development does not represent orderly development of appropriate bulk, scale or amenity impact in the locality and approval of such a development would be prejudicial to local present and future amenity as well as desired future character and therefore is not in the public interest. The proposed development will have a detrimental impact on the amenity of adjoining residential properties, and for this reason is contrary to the public interest.

G. CONCLUSION

The proposed dwelling is not consistent with the intent of the LEP standards and DCP controls as they are reasonably applied to the proposal.

The variations to LEP standards and DCP controls are considered unreasonable in this instance. The cumulative effect on these non-compliances causes considerable amenity loss to my clients' property.

The development will not sit well within the streetscape with non-compliance to LEP standards and DCP controls causing considerable concern. In this regard, the proposal is considered excessive in bulk and scale and would be considered jarring when viewed from the public domain.

Commissioner Moore revised the NSWLEC planning principle for assessing impacts on neighbouring properties within *Davies v Penrith City Council* [2013] NSWLEC 1141

"The following questions are relevant to the assessment of impacts 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?"

My clients contend that the proposed development severely impacts my clients' property, and in terms of amenity, there is excessive sunlight, view or privacy loss. The loss is unreasonable. My clients' property is not vulnerable to the loss that is presented. The loss arises out of poor design, either through non-compliance to envelope controls or poorly located built form.

It is considered that the proposal is inappropriate on merit and unless amended plans are submitted, this DA must be refused for the following reasons:

- The application has not adequately considered and does not satisfy the various relevant planning controls applicable to the site and the proposed development.
- The proposed dwelling is incompatible with the existing streetscape and development in the local area generally.
- The proposed dwelling will have an unsatisfactory impact on the environmental quality of the land and the amenity of surrounding properties.
- The site is assessed as unsuitable for the proposal, having regard to the relevant land use and planning requirements.

It is considered that the public interest is not served.

The proposed development does not follow the outcomes and controls contained within the adopted legislative framework.

Having given due consideration to the matters pursuant to Section 4.15 of the Environmental Planning and Assessment Act, 1979 as amended, it is considered that there are multiple matters which would prevent Council from granting consent to this proposal in this instance.

The proposed development represents an overdevelopment of the site and an unbalanced range of amenity impacts all of which would result in adverse impacts on my clients' property. Primarily,

- The development compromises amenity impacts on neighbours
- The development compromises private views and solar loss
- The development does not minimise visual impact

In consideration of the proposal and the merit consideration of the development, the proposal is considered to be:

- Inconsistent with the zone objectives of the LEP
- Inconsistent with the aims of the LEP
- Inconsistent with the objectives of the DCP
- Inconsistent with the objectives of the relevant EPIs
- Inconsistent with the objects of the EPAA 1979

The proposed development does not satisfy the appropriate controls. Furthermore, the proposal would result in a development which will create an undesirable precedent such that it would undermine the desired future character of the area and be contrary to the expectations of the community, and is therefore not in the public interest. The proposal therefore must be refused.

It is considered that the proposed development does not satisfy the appropriate controls and that all processes and assessments have not been satisfactorily addressed.

We ask that if Council in their assessment of this application reveals unsupported issues, which prevent Council from supporting the proposal in its current form, and writes to the applicant describing these matters, we ask for that letter to be forwarded to us.

My clients trust that Council will support my clients' submission and direct the proponent to modify the DA plans, as outlined above. My clients ask Council Officers to inspect the development site from my clients' property so that Council can fully assess the DA.

Unless the Applicant submits Amended Plans to resolve all of the adverse amenity impacts raised within this Submission, my clients' ask Council to REFUSE this DA.

Yours faithfully,

Bill Tulloch

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