

The General Manager  
Northern Beaches Council  
PO Box 82  
MANLY NSW 1655

10 December 2020

Our ref JXA 204661

Attention: Anne-Marie Young  
Email: Anne-Marie.Young@northernbeaches.nsw.gov.au

Dear Anne-Marie

**Manly Boatshed  
Development Application DA2020-0514  
Property: 1B Bolingbroke Parade, Fairlight NSW 2094**

We act on behalf of Manly Boatshed Pty Ltd, who have submitted development application number DA2020/0514 (the DA) with Council, seeking consent for alterations and additions to the premises known as Manly Boatshed, at 1B Bolingbroke Parade, Fairlight (the Site).

We have been asked to review and prepare a response to the legal submission prepared by Mr Turvey To dated 30 October 2020, attached to the letter objection of Ms Victoria Cowan, dated 30 October 2020.

Our response below addresses the two concerns raised by Mr To, being:

- a) Whether the proposed development is designated development; and
- b) To what extent the DA can rely on existing use rights.

**Designated Development**

1. Mr To is of the opinion that Council should conclude that the development proposed by the DA does not fall within the exception found at clause 35 of the *Environmental Planning and Assessment Regulation 2000* (the Regulations).
2. We disagree with Mr To and are of the view that the development proposed by the DA, seeking alterations and additions to the existing Manly Boatshed, is not designated development. Our reasoning for reaching this conclusion is set out below.
3. Clause 4 of the Regulations provides that development described in Schedule 3 of the Regulations is declared to be designated development for the purposes of the Act.

110366561 - 204661 (JXA)

4. Clause 23 of Part 1 of Schedule 3 provides:

**23 Marinas or other related land and water shoreline facilities**

*(1) Marinas or other related land or water shoreline facilities that moor, park or store vessels (excluding rowing boats, dinghies or other small craft) at fixed or floating berths, at freestanding moorings, alongside jetties or pontoons, within dry storage stacks or on cradles on hardstand areas—*

*(a) that have an intended capacity of 15 or more vessels having a length of 20 metres or more, or*

*(b) that have an intended capacity of 30 or more vessels of any length and—*

*(i) are located in non-tidal waters, or within 100 metres of a wetland or aquatic reserve, or*

*(ii) require the construction of a groyne or annual maintenance dredging, or*

*(iii) the ratio of car park spaces to vessels is less than 0.5:1, or*

*(c) that have an intended capacity of 80 or more vessels of any size.*

*(2) Facilities that repair or maintain vessels out of the water (including slipways, hoists or other facilities) that have an intended capacity of—*

*(a) one or more vessels having a length of 25 metres or more, or*

*(b) 5 or more vessels of any length at any one time.*

5. Whilst the proposed (and existing) use is of a kind that would satisfy the criteria of Clause 23, our client relies on the exception provided at Clause 35 of Part 2 of Schedule 3.

6. Clause 35 of Part 2 of Schedule 3 provides:

**35 Is there a significant increase in the environmental impacts of the total development?**

*Development involving alterations or additions to development (whether existing or approved) is not designated development if, in the opinion of the consent authority, the alterations or additions do not significantly increase the environmental impacts of the total development (that is the development together with the additions or alterations) compared with the existing or approved development.*

**Note—**

*Development referred to in this clause is not designated development for the purposes of section 4.10 of the Act. This means that section 8.8 of the Act (Appeal by an objector) will not extend to any such development even if it is State significant development.*

7. Mr To submits that the exception in Clause 35 is not engaged as the proposed development does not involve 'alterations and additions'. We again disagree with this assertion.
8. The DA, as lodged, seeks *alterations and additions* to the existing Manly Boatshed.

9. As Mr To correctly noted, the term alterations and additions is not defined by the Regulations or by the *Environmental Planning and Assessment Act 1979* (the Act). Accordingly, determining whether the proposed development is characterised as alterations and additions to the existing marina requires consideration of case law.
10. Whilst Mr To opines that on the face of the judgment of the planning principle published by the Land and Environment Court in *Coorey v Municipality of Hunters Hill* [2013] NSWLEC1187, it does not appear that much turned on whether the application was described as being for 'alterations and additions', we are of the view that it did.
11. The planning principle establishes at paragraphs 56 to 62 of the judgment, with the former Senior Commissioner Moore citing *Moto Projects (No 2) Pty Limited v North Sydney Council* [1999] NSWLEC 280, that to determine whether an application is appropriate to be regarded as being for additions and/or alterations or not, both a qualitative and quantitative analysis of what is proposed to what is currently in existence must be undertaken. The judgment at paragraphs 59 and 60 provides non-exhaustive lists of qualitative and quantitative issues that should be considered.
12. Mr To refers to the decision of Commissioner Pearson in *Cracknell & Lonergan Architects Pty Ltd v Leichhardt Municipal Council* [2015] NSWLEC 1089. In that decision, the Commissioner considered the purpose for which the question of whether the development is characterised as being for alterations and additions is being asked.
13. Applying the approach of Commissioner Pearson would result in a consideration of the factors provided for at Clause 36 of Part 2 of Schedule 3 of the Regulations, as opposed to the non-exhaustive lists provided for at paragraphs 59 and 60 of the *Coorey* decision.
14. Undertaking a qualitative and quantitative review of the development as adopted in the *Coorey* judgment, or having consideration to the factors at Clause 36 of Part 2 of Schedule 3 of the Regulations, both require an analysis of the impact of the development.
15. In our view, both approaches arrive at the same conclusion, being that the proposed development is *not* designated development by application of Clause 35 of the Part 3 of Schedule 3.
16. Commencing firstly by undertaking a qualitative and quantitative analysis, we note the following key changes:

#### Qualitative Changes

- Replacement of slipway area with passive craft area with safe water access – use of natural hardwood for decking, recycled old slipway timbers and non-reflective materials to complement surrounding vegetation and foreshore;
- Introduction of bicycle racks to promote active transport modes;
- Removal of paint room;
- Refurbishment of tender office winch shed;

#### Quantitative Changes

- No changes proposed to 39 commercial moorings;

- Addition of an indoor kiosk and outdoor seating for use by the kiosk, with a total area of 55m<sup>2</sup>;
  - Reduction of 4m<sup>2</sup> to water access area;
  - Increase in 23 passive craft storage spaces;
  - Increase to footprint of Boatshed building by 42m<sup>2</sup> ;
  - Addition of passive craft storage shed with a total area of 39.8m<sup>2</sup> ; and
  - Increase to floor area of amenities by 34m<sup>2</sup>
17. Turning to consideration of Clause 36 of Part 2 of schedule 3 of the Regulations, Mr To, at paragraph 16 of his submission states that the Statement of Environmental Effects prepared by Planning Ingenuity (SEE) *relatively briefly* addresses the matters it is required to consider.
18. At paragraph 31 of his submission, he refers to the proposed physical works that are described in sections 3.6.1 to 3.6.7 of the SEE, and at paragraph 32 of his submission, makes reference to his client's (Ms Cowan) previous submission dated 14 July 2020.
19. The response prepared by Planning Ingenuity dated 18 September 2020 to Council's letter of 3 September 2020 has not been referred to by Mr To in undertaking his review.
20. The Planning Ingenuity response provides a very detailed consideration of the environmental impacts of the proposed development (as amended), and **should** form the basis of Council's consideration of the environmental impacts to be generated by the proposed development.
21. In particular, Council should have regard to the table commencing on page 14 of the Planning Ingenuity response which provides a detailed comparison of the existing and proposed facilities and operation, with comments on the environmental impact of the development.
22. We provide the following summary of the environmental impact of the proposed development as detailed in the Planning Ingenuity response:
- a. Reduced environmental impact to the air and water quality and aquatic environment and reduced noise and visual impacts;
  - b. Reduced environmental impacts through reduced level of operations of the shipwright/boat repair and workshop, and removal of paint room;
  - c. Reduced environmental impact through promotion of transport modes i.e. provision of additional bicycle racks and green travel plan;
  - d. Visual enhancement of the Manly Boatshed building which has been designed with good articulation and high quality materials;
  - e. Benefits to the aquatic environment and net gain of aquatic habitat due to the decking of the water access area; and
  - f. Improved amenities which provide benefits to users accessing the waterway

23. In our view, through an analysis of both the qualitative and quantitative changes and the factors provided for at Clause 36 of Part 2 of Schedule 3 of the Regulations, the proposed development does not significantly increase the impacts of the total development. Accordingly, the exception provided at Clause 35 of Part 2 of Schedule 3 of the Regulations is satisfied, and the proposed development is *not* designated development.

### Existing Use

24. Mr To in paragraphs 40 to 60 of his submission raises concern with our client's reliance on existing use rights for Level 1 of the Manly Boatshed building.
25. The DA seeks to retain and refurbish Level 1 of the Manly Boatshed building, being an existing residential dwelling. On the basis that residential development is prohibited under both the *Manly Local Environmental Plan 2013* and the *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005*, the proposed development relies upon existing use rights.
26. Under section 4.65 of the Act, existing use rights is defined as:
- (a) *the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for this Division, have the effect of prohibiting that use, and*
  - (b) *the use of a building, work or land:*
    - (i) *for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and*
    - (ii) *that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse.*

27. Clause 4.68(1) of the Act provides for the continuation of existing uses and states that:

*"Nothing in an environmental planning instrument operates so as to require consent to be obtained under this Act for the continuance of a use of a building, work or land for a lawful purpose for which it was being used immediately before the coming into force of the instrument or so as to prevent the continuance of that use except with consent under this Act being obtained"*

28. Clause 41 of the Regulation provides:

*(1) An existing use may, subject to this Division:*

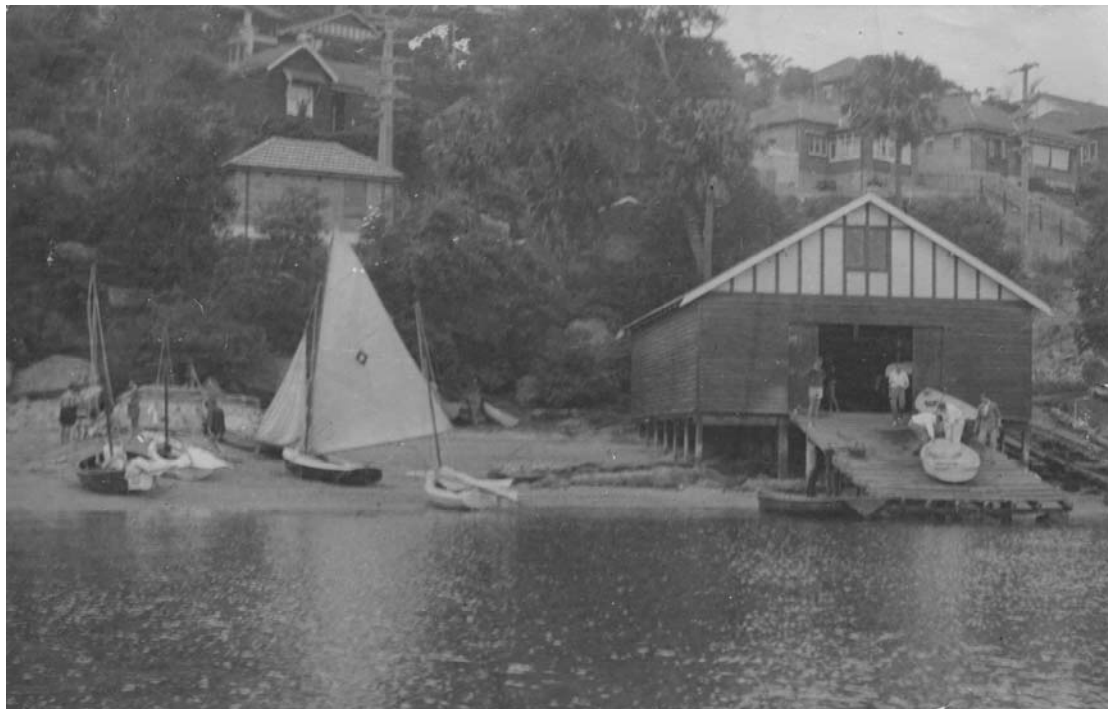
*(a) be enlarged, expanded or intensified, or*

*(b) be altered or extended, or*

*(c) be rebuilt. Or*

*(d) be changed to another use, but only if that other use is a use that may be carried out with or without development consent under the Act...*

29. Section 4.65(b) of the Act is not relevant as we do not have a copy of what would be the first planning approval when the Boatshed was first constructed in 1930. It is likely that there was no requirement for planning approval in 1930. The Court in *Meriton Apartments Pty Limited v Fairfield City Council* [2004] NSWLEC 423 considered the former section 106(a) (which is now section 4.65(a) of the Act) and did not consider the former section 106(b) (which is now section 4.65(b)) despite the conjunctive “and” between the sections. Therefore, for the purposes of this advice, we will only consider section 4.65(a) of the Act to establish existing use rights.
30. Section 4.6 of the SEE notes that Level 1 of the Manly Boatshed building has been in continuous use as a residential dwelling since at least 1946 when the Treharne family first purchased the Subject Property.
31. We are instructed the Site was first occupied by Mr David Treharne and his wife Ms Edna Treharne with their three kids David, Ian and Hugh in 1946. We are further instructed that the Treharne family has occupied the residential component of the Site continuously since 1946.



**Figure 1:** Historical photograph of the Boatshed occupied by the Treharne family in about 1946.

32. We refer to Table 3 of the SEE comprising a summary of historic records to demonstrate our client’s continued occupation of the Site as a residence.
33. Mr To’s issue with the historic material provided in Table 3 is that it does not necessarily demonstrate a residential use from 1946. He accepts however (see paragraph 45 of his opinion), that it could be accepted that there was a residence on Level 1 by at least 1965.

34. In our opinion, there is sufficient evidence in the SEE to support the proposition that there has been continued residential use of the Site since 1946. We note that Council has not raised issue with our client relying upon existing use rights.
35. We do not have a copy of what would be the first planning approval at the time the Manly Boatshed building was constructed in 1930. However, the following building applications are relevant:
  - a. On 30 August 1966, Building Application 267/66 for extension of lounge and bedroom onto the existing deck was approved. A copy of that approval is attached and marked **Annexure A**.
  - b. On 21 November 1967, Building Application No. 461/67 for the erection of a walkway from the residence at the first floor of the structure and extending to Bolingbroke Parade was approved. A copy of that approval is attached and marked **Annexure B**.
36. The 1966 and 1967 Building Approvals seeking additions and alterations to the residential component of the Boatshed signifies that there was an existing residential use of Level 1 of the Manly Boatshed building prior to the first Building Approval in 1966 and since at least 1946.
37. We are aware of the following planning controls in place prior to 1966:
  - a. Manly Planning Scheme Ordinance 20 December 1968
  - b. Ordinance No.71 (under the Local Government Act 1919)
  - c. County of Cumberland Planning Scheme 1951 – which introduced land use zoning.
38. We submit that the residential use commenced in about 1946. Mr To accepts that there was a residence by at least 1965. Regardless of whether the use commenced in 1946 or 1965, the planning controls in place prior to 1966 did not prohibit the use of part of the land for residential purposes.
39. The dwelling was a lawful use that became prohibited with the introduction of the *Sydney Regional Environmental Plan (Sydney Harbor Catchment)* in 2005.
40. The DA seeks consent for (amongst other things) additions and alterations to the residence at Level 1 which includes an increase to the existing floor area to accommodate additional facilities including a rumpus room, ensuite and walk in robe to the master bedroom, separate kitchen pantry and an allocated cupboard near the entry walkway.
41. Therefore, the use of the land for residential purposes is likely to be 'enlarged, expanded or intensified' or 'altered or extended' which is permitted under clause 41 of the Regulations.
42. At paragraph 60 of Mr To's advice, he contends it is unclear whether the DA seeks 'independent residential use'. We are instructed that there will be no change of use of the Site. The residential use will continue to be ancillary to the principal use of the Site for boat storage.

43. Therefore, the proposed DA relies on existing use rights under section 4.65(1) of the Act. The purpose of the existing use right is not just limited to the boatshed operations but also encompasses the lawful residential use of Level 1 since about 1946.

## Conclusion

The proposed development is characterised as alterations and additions to the existing marina, and accordingly, on application of Clause 35 of Part 2 of Schedule 3 of the Regulations, the DA is not designated development.

The SEE has clearly established that existing use rights apply to the Manly Boatshed and particularly the residential use of Level 1 of the Manly Boatshed building which is now a prohibited use under the current applicable planning instruments.

Yours faithfully

**Bartier Perry**



**Dennis Loether | Partner**

**D** 8281 7925 **F** 8281 7838 **M** 0402 891 641  
dloether@bartier.com.au



**Julide Ayas | Lawyer**

**D** 8281 7983 **F** 8281 7838  
jayas@bartier.com.au