
From: [REDACTED]
Sent: 3/07/2024 4:10:52 PM
To: Council Northernbeaches Mailbox
Cc: [REDACTED]
Subject: TRIMMED: DA 2024/0774 6 MITCHELL ROAD, PALM BEACH
Attachments: 6 MITCHELL WS 2024.pdf;

Kind regards,

Bill Tulloch BSc[Arch]BArch[Hons1]UNSW RIBA Assoc RAIA
DA Objection Pty Ltd
Director
[REDACTED]

DA OBJECTION

a written submission by way of objection

BILL TULLOCH BSC [ARCH] BARCH [HONS1] UNSW RIBA Assoc RAIA
Director
DA Objection Pty Ltd

prepared for

DAVID ANDREW THOMAS & ELIZABETH HELEN THOMAS, 5 MITCHELL ROAD, PALM BEACH

3 JULY 2024

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RE: DA 2024/0774
6 MITCHELL 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 is 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 and the setting of the Bible Gardens, with built form over HOB standards.

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, particularly with the proposed 9.4m high Turning Bay set immediately adjacent my client's property.

There is no reason, unique or otherwise why a fully compliant solution to LEP and DCP controls cannot be designed on the site.

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.

1. The proposal fails to achieve an acceptable view sharing outcome, including views from the Bible Gardens, and potentially neighbours, caused by non-complaint HOB. The non-compliant Lift Tower and Turning Bay have not been shown within Figure 6 View Analysis of the SEE. Height Poles are required to assess the full impact.
2. The proposal fails to achieve an acceptable engineering outcome, with multiple concerns relating to the proposed Turning Bay, and the engineering issues relating to the proposed works to the accessway, and the cut and fill proposed along the western boundary. Road safety issues with sight lines being blocked by a four-storey structure are unacceptable. The current elevated driveway does not meet Australian standards. The amendments to the driveway and the turning bay raise significant road safety issues.
3. The proposal fails to protect three major native trees. The Arborist Report calls for the retention of Trees T5 15m high Red Bloodwood, T6 15m high Smooth Bark Apple, and T7 10m high Port Jackson Fig, however the engineering drawings and some architectural drawings show these trees removed to make way for the non-complaint Turning Bay. These three trees are all rated by the Arborist as High Landscape Significance and High Retention value. All are rated as 'Good' condition. This is unacceptable.
4. The proposal fails to provide adequate documentation regarding a Construction Management Plan and how the existing dwelling will be demolished, and material removed, together with how the proposed dwelling will then be constructed having due regard to the need to provide 24 hour a day access for both vehicles and pedestrians to and from my client's property and other properties. The proposed Civil works to the right-of-way to the road upgrades and the turning bay will ensure the right-of-way is out of use for many months, putting adjoining neighbours unable to access their property. Insufficient information has been submitted in terms of the

construction of the dwelling to satisfy Council that there will be no unreasonable impacts on pedestrian and vehicular access. There is insufficient information in terms of the detailed Construction Management Plan which will assure Council that there will be no unreasonable impacts on access to private properties along the shared driveway during construction. This is unacceptable. The proposal fails to ensure access to the other properties serviced by the right of carriageway, and that the right of carriageway is not obstructed. The application has not provided sufficient detail to confirm that the right of carriageway will not be blocked during construction. Without this information the development does not meet the relevant consideration of section 4.15 of the Act and has unreasonable social impacts, is not suitable for the site and is not in the public interest. The proposal is inconsistent with Clause B6.7 (Transport and Traffic Management) and B8.6 (Construction and Demolition - Traffic Management Plan) of the Pittwater DCP as insufficient information has been submitted to ensure the development will have minimal disturbance to the residential community in terms of available safe access from the shared right of carriageway to dwellings, especially during construction. The proposal fails to provide adequate safety and security with no adequate resolution to the vehicle and pedestrian safe entry and exit to the subject site, on Mitchell Road, and safe access to the visitors to the Bible Gardens. This is unacceptable.

5. Insufficient information has been submitted to demonstrate that the proposed development will not adversely impact the structural integrity of the Bible Gardens, the cut and fill along the boundaries, and the structural support below the proposed Turning Bay positioned directly over the unstable and high-risk Overhanging Rock Faces as seen within the Crozier Report. There are other significant other geotechnical issues for all adjoining neighbours raised within the Crozier Report.
6. The proposal fails to achieve an acceptable heritage outcome as there will be a loss of view from the non-complaint HOB elements. This has not been adequately assessed by the applicant. The new retaining wall along the Bible Gardens boundary will need to demolish parts of the existing boundary wall zones of the Bible Gardens, and the major retaining wall structure will cause the viewing platform within the Bible Gardens to be removed from usage for many years, due to construction hoardings. The setting of the Bible gardens will be affected by the removal of the multiple large native trees on the subject site. This is unacceptable.
7. The proposal fails to achieve an acceptable solar access outcome, with the solar diagrams not including the 9.3m high Turning Bay into the diagrams. No survey detail is provided to show my clients main decks, windows and other highly used zones to show the impact of this non-compliant element. This is unacceptable.
8. The proposal fails to achieve an acceptable privacy outcome, with visual and acoustic concerns from the proposed Turning Bay 9.3m high, set only 1m from my client's property. This is unacceptable.
9. The proposal fails to achieve an acceptable visual bulk and scale outcome, in terms of the non-compliant height of the Turning Bay and the non-complaint height of the Lift & Stair Tower. This is unacceptable.
10. The proposal fails to achieve an acceptable landscape outcome, with unspecified landscape along the western boundary that may block ocean views, or may fail to screen the non-compliant 9.3m high Turning Bay. Area calculations are incorrect, as the layout of the proposed turning bay and road access to Mitchell Road as shown on the Civil drawings has not been

excluded from the area calculations. There is considerable non-compliance. This is unacceptable.

- Trees planted within viewing corridors. There are multiple canopies that may remove important views.
 - The landscape plan is not completed to NBC Standards: there are no list of numbers of plants and trees to be provided, the location of those species, the heights and spread of the trees. The retained trees are not clearly marked on the landscape plan. The design has not been completed by a Landscape Architect, which is considered totally inappropriate for such an important site, adjacent the Bible Gardens.
 - The Arborist Report calls for the retention of Trees T5 15m high Red Bloodwood, T6 15m high Smooth Bark Apple, and T7 10m high Port Jackson Fig, however the engineering drawings and architectural drawings, shows these trees removed to make way for the non-complaint Turning Bay. These three trees are all rated by the Arborist as High Landscape Significance and High Retention value. All are rated as 'Good condition'.
 - Major incursion into the SRZ & TPZ of Neighbours Trees. The proposed structure is likely to result in a significant loss of root volume of the trees, potentially making these trees unviable for retention. This should be reviewed by the Arborist.
 - Major incursion into the SRZ & TPZ of Trees to be retained. The proposed structure is likely to result in a significant loss of root volume of this tree, potentially making these trees unviable for retention. This should be reviewed by the Arborist.
 - Limited deep soil space provided for large replacement tree species. The tiered/terraced deep soil areas located around the perimeter of the development provide an insufficient area and volume of soil for root growth for the large replacement tree species that are specified on the submitted Landscape plan. This decreases the probability that the species will grow to their full dimensions and therefore decreases their potential to provide maximum amenity. A smaller and restricted root spread also increases the potential chances of whole tree failure at maturity. Soil depths according to Crozier Geotec Report are minimal at best.
 - Lack of small to medium sized trees included in the planting scheme. The existing planting plan consists of low groundcovers, shrubs and large tree species. Small to medium sized trees included in the proposal is likely to greatly increase green amenity and screening to residents within the property and on neighbouring properties.
 - The Landscape Area drawings do not fully accord with the Architectural drawings or the Engineering drawings. Areas shown that are deep soil are in fact: Zones for the new road and turning bay construction; Heavily excavated zones; Rock Outcrops; Zones less than 1m wide; Paved zones according to the architectural plans; Overhanging structures in the setback zone; retaining walls; substantial rock face with plants proposed on them.
11. The proposal fails to provide adequate finishes detail to the Turning Bay, and fails to provide sufficient landscape detail, elevations and sections along the western boundary to assess the matter. This is unacceptable.
12. Architectural Plans, Sections and Elevations are not adequately completed and co-ordinated with engineering and landscape drawings, and arborist reports.

- There is great uncertainty to many areas, particularly the Turning Bay, where engineering details appear to be depicted differently on different DA drawings. There are no architectural sectional or elevational drawings showing this non-complaint element. The architectural plan detail is nearly non-existent. Engineering drawings refer to architectural details and finishes that are not provided by the architectural drawings.
- Drawing DA 1 & DA 2 shows the Turning Bay area as a 'Wild Garden' with the three trees retained, but DA 2 also shows the alignment of the Turning Bay! Drawing DA 22 & DA 23, the Landscape Drawings, shows the 'Wild Garden' with the trees retained, and includes the Turning Bay as 'Landscape Area' in the area calculations in an effort trying to 'pump' the non-compliant landscape area up to reach near compliance!
- Driveway details on the architectural drawings to Mitchell Road are different to the engineering drawings – again in an effort to 'pump' the landscape area calculations.
- Survey levels have not been adequately transferred onto the DA drawings to define HOB. The 8.5m & 10.0m HOB lines are inaccurately depicted, ensuring false and misleading assessment by others. No Clause 4.6 has been submitted.
- DA 16 does not locate the non-compliant HOB elements into the viewing corridor – leading to further misinformation as to the view loss impact. Clearly the non-compliant elements would have a direct impact to the viewing corridors as defined by DA 16. There is no view impact assessment from any neighbouring zone.
- There is no cut and fill drawing – so this assessment struggles to assess the impacts. DA drawings are unclear as to finished levels in many areas, and whether cut & fill is required, or whether retaining walls are required on boundaries.
- The DA drawings simply appear incomplete and not co-ordinated in many areas. Council should simply refuse the DA as not meeting Council's submission standards.
- 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.
- This is unacceptable.

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

- Excessive Building Height [HOB]: Proposed 10.62m v Control 8.5m [25% non-compliance] LIFT TOWER 62.98 Survey [adjacent ex, timber deck landing, under lift] Proposed Roof 73.6 HOB 10.62. No Clause 4.6.
- Excessive Building Height [HOB]: Proposed 9.35m v Control 8.5m [10% non-compliance] TURNING BAY NW Corner 64.34 Survey Proposed Surface 72.565 Top of solid Barriers & Balustrade 73.665 HOB 9.35m. No Clause 4.6.
- Excessive Wall Height [WH]: Proposed 10.62m LIFT TOWER
- Excessive Wall Height [WH]: Proposed 9.35m TURNING BAY
- Insufficient Western Side Setback: TURNING BAY Proposed 1m with 9.35m wall heights

- Insufficient Northern Rear Setback: Proposed 1.2m
- Insufficient Southern Setback: Zero
- Exceedance of Boundary Envelope with zones in the upper levels exceeding the controls.
- Insufficient Landscape Area, with zones included within the area calculations that should be deleted relating to the Engineering Drawings not co-ordinated with the Landscape Drawings.
- Excessive Number of Storey
- Unacceptable Pool that cantilevers over the cliff edge [refer Crozier Report]

The site is not suitable for the proposed development pursuant to Section 4.15(1)(c) of the Environmental Planning and Assessment Act 1979. The site is not considered suitable for the proposed development in terms of its size, scale and design, despite it being residential development in the zone.

Having regard to the reasons noted above, pursuant to the provisions of Section 4.15(1)(d) and Section 4.15(1)(e) of the Environmental Planning and Assessment Act 1979, approval of the development application is not in the public interest. The extent of issues identified with the proposed development are such that the public's interest is not served by way of approval of the development application.

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.

Clause 4.6 Written Request

The Applicant has not provided a Clause 4.6 written request to adequately demonstrate that the proposal achieves the relevant objectives of the development standards. I contend there are insufficient environmental planning grounds to justify the extent of the proposed variations sought. The variations would result in undue visual bulk that would be inconsistent with the desired future character of the locality.

I contend that the building footprint is not situated on a slope that is greater than 30 deg, and therefore the concession to a 10m HOB does not apply. The slope appears to be c.26 degrees.

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.

View Sharing

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 Viewing Sharing of the DCP. The proposed development is not considered to result in the reasonable sharing of views.

Significant concern is raised in relation to view loss to my client's property as a result of the proposed development, the non-compliant turning circle and building height encroachment of this proposal.

The controls require that new development is to be designed to achieve a reasonable sharing of views available from surrounding and nearby properties and must demonstrate that view sharing is achieved through the application of the Planning Principles established in the NSW Land and Environment Court case *Tenacity Consulting v Warringah Council*.

In relation to Principal four of the Court case (*'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 LEP and DCP controls, which questions whether a more 'skilful' (or sensitive) design would achieve an improved and acceptable outcome.

Further exploration of an alternative design outcome which would include the amendments mentioned within this submission is therefore encouraged to satisfactorily address the Planning Principles established in the NSW Land and Environment Court case.

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".

I contend that 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.

I contend that the view impact may be considered above a moderate impact from the respective zones within the property given the significant proportion of the views which are impacted. The aspect is considered whole, prominent coastal views, perhaps iconic views, which are certainly worthy of consideration and substantial protection. The proposal to remove the vast majority of these views is considered overall to be above a moderate view impact.

As Council will recall, in respect to Point 3, NSWLEC Commissioner Walsh in *Furlong v Northern Beaches Council [2022] NSWLEC 1208* referenced *Wenli Wang v North Sydney Council [2018] NSWLEC 122*, in considering that if a more skilful design could be achieved arriving at an outcome that achieved '*a very high level of amenity and enjoy impressive views*', then a proposed development has gone too far, and must be refused.

I contend that the proposed development has '*gone too far*' and the '*more skilful design*' solution identified in this Submission, achieves '*a very high level of amenity and enjoy impressive views*' for the applicant.

The controls in any DCP are not merely building envelope controls, but extend to specific controls concerning the increase of setbacks and heights to minimise view loss, as well as controls requiring the incorporation of design measures to facilitate view sharing.

I refer to *Bondi Residence Pty Ltd v Waverley Council* [2024] NSWLEC 1297, WC DA 9/2023, a dismissal of a Class 1 Appeal by NSWLEC Commissioner Gray on view loss grounds in June 2024. Commissioner Gray stated clearly that is indeed the case.

The failure to use any other design measures, such as benching the proposed development into the slope, further setbacks or decreasing excessive storey heights, deleting inappropriate turning bays, and reducing excessive lift and stair tower heights, to facilitate view sharing and minimise view loss, is of particular concern.

The '*more skilful design*' solution identified in this Submission, gives the applicant a very high level of amenity, and would enjoy spectacular and impressive views.

Comply with the Planning Regime

A compliant building design would better 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 will note that the proposed development is non-compliant on height, setbacks, boundary envelopes and landscape area that combined add to the unacceptability of the proposal.

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.

Fundamental Principles of Design Excellence

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

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

Incomplete Information

The proposed development is incapable of consent, as there is a substantial list of incomplete information that has yet to be provided. I refer Council to Section C of this submission - *Contentions that relate to Insufficient Information*

Re-Notification

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.

Modifications Sought

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.

Section D of this submission titled '*Request for amended plans to be submitted to better address impacts upon adjoining properties*', addresses the amendments that my clients seek to better resolve their amenity issues.

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, in accordance with Section E '*Reasons for Refusal*' of this submission.

B. 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.

10M BUILDING HEIGHT CONCESSION

The applicant has put forward that the 10m building height concession pursuant to Clause 4.3(2D) of the LEP should apply to the development and as such, the proposal would not need to address the requirements of Clause 4.6 of the LEP. Upon examination of Clause 4.3(2D), the assessment reveals that the proposal does not meet the remaining pre-conditions to qualify for an exception of the 8.5m building height and as such, a Clause 4.6 variation request is required.

The slope does not exceed 30 degrees. The existing level to the Bible Gardens boundary is RL 71.3, with the top of the existing retaining wall to the northern boundary on the site at RL 61.29. The vertical drop is 10m. The horizontal distance is greater than 17.32m to achieve the 30-degree target, however the horizontal distance appears to be closer to 20m. There is no measured scale bar on the drawings to check this matter. The angle appears to be c.26 degrees through the non-compliant HOB zone.

Even if Clause 4.3(2D) was considered operable by NBC, the preconditions of Clause 4.3(2D) require that the consent authority is satisfied that the objectives of the standard are achieved and the portion of the encroachment is minor. Therefore, it is concluded that the proposal has not satisfied these matters and the overall building bulk on the upper levels has not been minimised in a way to reduce impacts and the extent of non-compliance.

No Clause 4.6 variation request was submitted with the application, as the applicant relies upon Clause 4.3(2D) and an incorrect height measurement, and as such, there is no power to approve the application.

2. INCONSISTENT WITH THE PROVISIONS OF CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

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.

My clients contend that the variation has not responded to the objective of the maximum building height standard and given adequate reasoning why compliance is unreasonable or unnecessary.

Furthermore, and in simple terms, I contend that:

- The development compromises amenity impacts on neighbours
- 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 non-compliant heights of the Lift Tower give rise to unsafe sightlines within the right-of-way
- the non-compliant heights of the turning bay, positioned over high-risk geotechnical zones, adds considerable additional solar loss, privacy loss, potential view loss, and visual bulk to my client's property

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.

3. 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 proposal fails to protect residential amenity, has excessive building bulk and fails to manage environmental constraints.
- 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

4. 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 proposal is of a bulk and scale which is inconsistent with development in this location and therefore fails to achieve the desired future character of the neighbourhood.
- The development has not been designed to be in harmony with the natural environment and does not have a high visual quality presentation to the streetscape
- The development compromises amenity impacts on neighbours
- To provide for the housing needs of the community within a low-density residential environment.
- To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment
- The proposed development will not be of an acceptably low density and scale that is integrated with the landform and landscape and will have an unacceptable visual impact on the aesthetic values of the area.

5. BUILDING BULK & SCALE

The proposed development should be refused due to its excessive bulk and scale and its failure to comply with the numerical standards and controls.

The application will result in an unacceptable loss of visual amenity from adjoining private properties. and from the public domain including the foreshore.

The loss of visual amenity is due to the excessive bulk and scale of the proposed development.

The breaches of the building envelope will result in both an adverse visual impact when viewed from private and public domains.

The numerical non-compliances result in a cumulative impact, that increases the built form, resulting in an overdevelopment of the site.

The proposal will present excessive bulk and scale that is not representative of the type of development anticipated by the zone or the applicable controls.

The proposal will result in unreasonable bulk and scale for the type of development anticipated in the zone.

The proposal does not step down with the topography of the site.

The proposal does not allow for enough landscaping to suitably reduce the bulk and scale of the development.

The proposal does not provide adequate articulation of the built form to reduce its massing.

The proposal fails to minimise the visual impact of development when viewed from adjoining properties and streets.

6. 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 proposed development should be refused due to its excessive bulk, scale and resulting impacts upon the amenity of adjoining properties and the character of the surrounding locality.

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.

The proposed development should be refused because it is incompatible with the desirable elements of the current character of the locality and is inconsistent with the standards and controls:

- The design of the proposal does not recognise or complement the desirable elements of the subject site's current character.
- The proposal does not employ a building form that relates to the landform as it does not step down with the slope of the site.

- The proposal offers little visual relief of the resultant building bulk. Such building bulk is not compatible in scale with adjacent and surrounding development.
- The proposal will present as a large building with insufficient building articulation and landscaping to break up and visually reduce the building bulk.
- The proposal will not appear as low density and, therefore, does not achieve consistency or compatibility with the general built form within the locality or the zone. The development does not present as detached in style with distinct building separation and areas of landscaping.

7. 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.

In accordance with recent caselaw via the NSW Land and Environment Court (*Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*), building height is to be taken from the existing ground level, whether disturbed or undisturbed.

Insufficient information has been provided to establish the exact height of building proposed. The ground level of the existing dwelling houses is not provided on sections.

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

- In accordance with recent caselaw via the NSW Land and Environment Court (*Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*), building height is to be taken from the existing ground level, whether disturbed or undisturbed.
- Insufficient information has been provided to establish the exact height of building proposed. The ground level of the existing dwelling houses is not provided

Non-compliant height is not supported with reference to building bulk, view loss, solar, and character.

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

- Excessive Building Height [HOB]: Proposed 10.62m v Control 8.5m [25% non-compliance] LIFT TOWER 62.98 Survey [adjacent ex, timber deck landing, under lift] Proposed Roof 73.6 HOB 10.62
- Excessive Building Height [HOB]: Proposed 9.35m v Control 8.5m [10% non-compliance] TURNING BAY NW Corner 64.34 Survey Proposed Surface 72.565 Top of solid Barriers & Balustrade 73.665 Height 9.35m

8. 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.

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 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 proposed building height is excessive and does not comply with the objectives or controls in the LEP.

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 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.

In respect of the overall height control, I have considered the applicant's Clause 4.6 and I consider that, in this instance, they have not been able to establish an argument to support their assertion that it is unreasonable and unnecessary to comply with the control.

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 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.

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 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.

The proposed development should be refused due to its excessive bulk and scale and its failure to comply with the LEP development standard

The main LEP standards that control bulk have been exceeded;

- The SEE does not satisfactorily demonstrate: *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case* because it does not achieve consistency with the objectives of the zone or the objectives of the equivalent development standard contained within clause 4.4 of the LEP; and *that there are sufficient environmental planning grounds to justify contravening the development standard* because the provided justification is insufficient and disagreed with.
- The proposal will present excessive bulk and scale that is not representative of the type of development anticipated by the zone or the applicable controls.
- The proposal does not comply with requirement set out within the DCP, as it does not step down with the topography of the site
- The proposal does not comply with requirement set out within the DCP as it does not allow for enough landscaping to suitably reduce the bulk and scale of the development.
- The proposal does not comply with requirement set out within the DCP as it does not provide adequate articulation of the built form to reduce its massing.
- The proposal is inconsistent with the following objectives of the DCP: *To encourage good design and innovative architecture to improve the urban environment; and To minimise the visual impact of development when viewed from adjoining properties, streets, waterways and land zoned for public recreation purposes.*

9. EXCESSIVE WALL HEIGHT & NUMBER OF STOREY

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 control.

The proposed development should be refused due to its excessive height and failure to comply with the Wall Height set out in the controls.

The proposed development is inconsistent with the objectives of the zone and the objectives that underpin the wall height.

This non-compliance, as well as the other non-compliances, arising from the proposed upper level indicates that the proposal cannot satisfactorily achieve the underlying objectives of this control, ultimately resulting in an unacceptable building bulk that creates a severe amenity impact.

- The development compromises amenity impacts on neighbours
- 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 impacts are very similar to the HOB impacts raised in the section above.

10. INSUFFICIENT SETBACKS

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

- Side
- Front
- Rear
- Boundary Envelope

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

The proposal is inconsistent with the objectives of the DCP.

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.

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 design fails to comply with the building envelope measured at the side boundary. The DCP requires that development be provided within this envelope to ensure reasonable amenity is maintained for neighbours. A significant proportion of the upper level of the proposed Turning Bay falls outside this building envelope. Together with the breach of the height limit, the Building Envelope breach will result in view loss, excessive bulk and scale, and significant visual impact. I note that the control considered that some flexibility in applying this control should be provided on land where the building footprint has a steeper slope. This site cannot meet the criteria for this variation. In addition, I note that any constraint of topography is ultimately overcome by the proposal given the significant cut of the land form proposed. Under these circumstances, it would be contrary to the policy and inherently unreasonable to allow such a departure from the control.

I note that flexibility in relation to DCP controls may be acceptable where the outcomes of the control are demonstrated to be achieved. In this case, the control is unable to do so because:

- The design cannot achieve the desired future character as demonstrated earlier in this submission; and,
- The width and height of the design within the Turning Bay & Lift Tower & Stair is significantly overbearing in relation to the spatial characteristics of the natural environment, and the confronting presentation to the waterway is not sensitive to this important visual catchment.
- By virtue of the unmitigated height breach and extensive building envelope breach, it is not possible to say that the bulk and scale of the built form has been minimised.

- View loss results from the non-compliant design and a reasonable and equitable sharing of views is not achieved.

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 standards result in an over development of the site with the site being not suitable for the scale and bulk of the proposal.

11. EXCESSIVE REMOVAL OF NATIVE TREES

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to retain existing native trees.

The Arborist Report calls for the retention of Trees T5 15m high Red Bloodwood, T6 15m high Smooth Bark Apple, and T7 10m high Port Jackson Fig, however the engineering drawings and architectural drawings shows these trees removed to make way for the non-complaint Turning Bay. These three trees are all rated by the Arborist as High Landscape Significance and High Retention value. All are rated as 'Good' condition.

Drawing DA 1 & DA 2 shows the area as a 'Wild Garden' with the trees retained, but DA 2 also shows the alignment of the Turning Bay!!

Drawing DA 22 & DA 23, the Landscape Drawing shows the 'Wild Garden' with the trees retained, and includes the Turning Bay as Landscape Area!!

The proposal is inconsistent with the objectives of the DCP.

The proposal removes numerous trees as defined by the Arborist Report, and further trees not defined within the Arborist Report.

My clients ask for the majority of the significant trees to be retained.

My clients contend that there is insufficient arboricultural reason to remove these trees.

The proposal also builds into the SRZ and TPZ of the multiple trees, including potentially my client's trees.

My clients ask for the development to be reduced to ensure that no more than 10% of the TPZ is affected on the subject site.

My clients ask for the development to be reduced to ensure that no TPZ of their trees is affected.

12. INADEQUATE LANDSCAPE AMENITY

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 landscape amenity.

The proposal does not provide for adequate landscape area according to the controls.

Variations to the controls cannot be allowed as the proposal does not meet the objectives of the clause.

The proposal fails:

- To enable planting to maintain and enhance the streetscape.
- To conserve and enhance indigenous vegetation, topographical features and habitat for wildlife.
- To provide for landscaped open space with dimensions that are sufficient to enable the establishment of low-lying shrubs, medium high shrubs and canopy trees of a size and density to mitigate the height, bulk and scale of the building.
- To enhance privacy between buildings.
- To accommodate appropriate outdoor recreational opportunities that meet the needs of the occupants.
- To provide space for service functions, including clothes drying.
- To facilitate water management, including on-site detention and infiltration of stormwater.

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.

I have significant concerns:

- Trees planted within viewing corridors. There are multiple canopies that will remove important views. I address this later in the submission.
- The landscape plan is not completed to NBC Standards: there are no list of numbers of plants and trees to be provided, the location of those species, the heights and spread of the trees. The retained trees are not clearly marked on the landscape plan. The design has not been completed by a Landscape Architect, which is considered totally inappropriate for such an important site, adjacent the Bible Gardens.
- The Arborist Report calls for the retention of Trees T5 15m high Red Bloodwood, T6 15m high Smooth Bark Apple, and T7 10m high Port Jackson Fig, however the engineering drawings and architectural drawings, shows these trees removed to make way for the non-complaint Turning Bay. These three trees are all rated by the Arborist as High Landscape Significance and High Retention value. All are rated as 'Good condition'. Confusion rains!

- Major incursion into the SRZ & TPZ of Neighbours Trees. The proposed structure is likely to result in a significant loss of root volume of the trees, potentially making these trees unviable for retention. This should be reviewed by the Arborist.
- Major incursion into the SRZ & TPZ of Trees to be retained. The proposed structure is likely to result in a significant loss of root volume of this tree, potentially making these trees unviable for retention. This should be reviewed by the Arborist.
- Limited deep soil space provided for large replacement tree species. The tiered/terraced deep soil areas located around the perimeter of the development provide an insufficient area and volume of soil for root growth for the large replacement tree species that are specified on the submitted Landscape plan. This decreases the probability that the species will grow to their full dimensions and therefore decreases their potential to provide maximum amenity. A smaller and restricted root spread also increases the potential chances of whole tree failure at maturity. Soil depths according to Crozier Geotec Report are minimal at best.
- Lack of small to medium sized trees included in the planting scheme. The existing planting plan consists of low groundcovers, shrubs and large tree species. Small to medium sized trees included in the proposal is likely to greatly increase green amenity and screening to residents within the property and on neighbouring properties.
- The Landscape Area drawings do not fully accord with the Architectural drawings or the Engineering drawings. Areas shown that are deep soil are in fact: Heavily excavated zones; Zones less than 1m wide; Paved zones according to the architectural plans; Overhanging structures in the setback zone; zones for new road and turning bay construction; rock face with plants proposed on them, etc, etc.

13. 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 item.

The proposal is inconsistent with the objectives of the LEP and DCP.

- The development application should be refused because approval of the proposal will have an adverse and unacceptable impact on the heritage significance of the Bible Gardens, pursuant to the LEP.
- The application results in adverse impacts on the heritage significance of the Bible Gardens due to its failure to satisfy the heritage requirements of the LEP as well as the heritage requirements of the DCP.
- The proposed excavation on the Bible Gardens boundary, including existing zones within the Bible Gardens, is considered excessive resulting in a detrimental impact on the subject heritage item and the surrounding areas, pursuant to the LEP as well as the requirements of the DCP.
- The application results in a built form which is not subservient to the Bible Gardens. The proposed development has multiple non-compliances to numerical standards and controls.
- The proposed development would have a detrimental impact upon the characteristics features of the Bible Gardens resulting in a massing that is likely to overwhelm the Bible Gardens contrary to the 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.

- o The current application will have impacts upon the heritage values of the Bible Gardens, including views.

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

14. TRAFFIC, ACCESS & PARKING

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as traffic, access and parking issues do not accord with the DCP provisions.

Mitchell Road in design and configuration is extremely narrow and when there is one vehicle parked on the eastern side of the roadway, there is a bare minimum for other vehicles to pass safely.

To consider the use of Mitchell Road for the purpose of accommodating excavation equipment, excavation removal trucks, trade vehicles, material deliveries, concrete trucks and a vast number of vehicle movements is considered totally unfeasible.

This would present a serious safety issue to the numerous residents who use Mitchell Road to access their property by both vehicular and pedestrian means, particularly my clients.

The Development Application comprises no statements relating to how demolition material from the existing dwelling and excavation of the rock and associated material associated to site would be collected and transported from the subject site.

The Development Application lacks substance and fails to demonstrate how traffic control could be administered for vehicles associated with the demolition of the existing residence, excavation and removal of the material adjacent to the heritage-listed Bible Garden, and deliveries of materials associated with the construction of the proposed dwelling.

It would be impossible task to create a dedicated work zone in Mitchell Road as an integral component of the demolition of the existing dwelling and the construction of the proposed dwelling.

It is also of paramount importance that Council appreciates that this road acts as a pedestrian corridor for local residents and, in particular, children and seniors who reside in this unique residential precinct. There are multiple visitors to the Bible Garden that have no prior knowledge of the existing road constraints and that has not been considered by the applicant.

There is no crane shown, or how safe access can be provided under the potential swing of the crane. My clients refuse to give any agreement to crange over their property. Their driveway must never be blocked by construction traffic.

The right-of-way is used by the occupants of No 15 Florida for both pedestrian and vehicle access. Blockage of the right-of-way may cause further traffic congestion at

the Mitchell Road intersection, creating unsafe conditions. The rebuilding of the right-of-way will sever access to residents for many months.

This alone creates a dangerous precedent and should not, under any circumstances, be endorsed by Council.

My clients are concerned that the proposed garage and turning bay:

- Is built with a turning area that is highly elevated, built over highly unstable ground, and is non-complaint to HOB
- Is built without garaging with inadequate side setback to the Bible Gardens;
- Is built within the front setback zone, taking away the opportunity for deep soil planting

The proposed traffic and parking arrangement, driveway and sight splay are unsatisfactory.

- A new Turntable positioned in front of the proposed garages should be designed to have a minimum of 6.2m rotation zone, including 5.2 metres in diameter and an additional 1.0 metre on the radius to replace the elevated non-complaint Turning Bay
- Sightlines to cars entering the access driveway from the subject site must be achieved through substantial lowering of the built form to the south of the right-of-way access driveway, perhaps as an open car zone space, with roof levels below the height of the accessway
- Swept path analysis should be revised accordingly to demonstrate satisfactory movements of B99 vehicles.
- The width of access driveway must be confirmed. This should be clearly depicted on the architectural drawings.
- In accordance with AS 2890.1- 2004 (Parking Facilities, Part 1: Off-Street car parking), the proposed driveway shall be a minimum of 5.5 metres in width for a minimum distance of 6 metres from the property boundary.
- Vehicles are to enter and exit the site in a forward direction.
- All demolition and construction vehicles are to be contained wholly within the site, and not in the street in any area, in parking bays in the street, or on the access driveway. Only one vehicle must enter at any time into the proposed garage zone. The vehicle must enter the subject site before stopping. All Construction Vehicles must be controlled in a zone away from Mitchell Road, and called in to site, one at a time. All workers must also park away from Mitchell Road, and bused into the site. Signs displaying 'no parking in Mitchell Road for construction personnel' must be displayed at the nearby intersection, and enforced by the Builders' staff in Mitchell/Pacific Road intersection during construction periods. A permanent traffic control must be deployed at the Mitchell/Pacific Road intersection to control unauthorized construction traffic. Traffic Control must be in place at all construction times along Mitchell Road, and along the right of way. Other measures must be employed, as directed by NBC Traffic Engineers, to provide a safe environment for neighbours and visitors to the Bible Garden during demolition & construction.

Vehicle Access & Parking

All internal driveways and vehicle parking space must be designed and constructed to comply with the relevant section of AS 2890 (Off-street Parking standards).

With respect to this, the following revision(s) must be undertaken;

Dimensioned plans for the parking area including the driveway width and parking spaces width are to be submitted to Council's traffic engineer for review to confirm that parking bays and the driveway widths are appropriately sized.

Vehicular Swept Paths

Vehicular manoeuvring swept path plots should be provided for review by Council's traffic engineer.

The plots to be prepared using traffic engineering software such as Autotrack/Autoturn, for a B85 car entering and egressing the most constraint spaces in a forward direction and for a B99 passing a B85 vehicle inside the carpark. The drawings must be compliant with Australian/New Zealand Standard AS/NZS 2890.1:2004 - Parking facilities - Off-street car parking.

Demolition Traffic Management Plan

As a result of the site constraints, limited vehicle access and parking, a Demolition Traffic Management Plan (DTMP) shall be prepared by a suitably accredited person and submitted to and approved by the Council Traffic Team prior to commencing any demolition work.

Truck movements must be restricted to operate from 10am to 4pm. No truck movements on weekends, public holidays, or school holidays when the Bible Gardens receives multiple visitors. Trucks must not stop or park in Mitchell Road, and must proceed directly to the subject site. Only one truck movement allowed at any time.

The DTMP must:-

- Make provision for all construction materials to be stored on site, at all times.
- The DTMP is to be adhered to at all times during the project.
- Specify construction truck routes and truck rates. Nominated truck routes are to be distributed over the surrounding road network where possible.
- Provide for the movement of trucks to and from the site, and deliveries to the site. Temporary truck standing/ queuing locations in a public roadway/ domain in the vicinity of the site requires prior approval Council's Traffic Engineers.
- Include a Traffic Control Plan prepared by an TfNSW accredited traffic controller for any activities involving the management of vehicle and pedestrian traffic.
- Specify that a minimum fourteen (14) days notification must be provided to adjoining property owners prior to the implementation of any temporary traffic control measures.
- Include a site plan showing the location of any site sheds, location of requested Work Zones, anticipated use of cranes, structures proposed on the footpath areas (hoardings, scaffolding or temporary shoring) and extent of tree protection zones around Council street trees.

- Take into consideration the combined construction activities of other development in the surrounding area. To this end, the consultant preparing the DTMP must engage and consult with developers undertaking major development works within a 250m radius of the subject site to ensure that appropriate measures are in place to prevent the combined impact of construction activities. These communications must be documented and submitted to Council prior to work commencing on site.
- Specify spoil management process and facilities to be used on site.
- Specify that the roadway (including footpath) must be kept in a serviceable condition for the duration of demolition. At the direction of Council, the applicant is to undertake remedial treatments such as patching at no cost to Council.

The DTMP shall be prepared in accordance with relevant sections of Australian Standard 1742 – “Manual of Uniform Traffic Control Devices”, RMS’ Manual – “Traffic Control at Work Sites”.

Implementation of Demolition Traffic Management Plan

All works and demolition activities are to be undertaken in accordance with the approved Demolition Traffic Management Plan (DTMP). All controls in the DTMP must be maintained at all times and all traffic management control must be undertaken by personnel having appropriate TfNSW accreditation. Should the implementation or effectiveness of the DTMP be impacted by surrounding major development not encompassed in the approved DTMP, the DTMP measures and controls are to be revised accordingly and submitted to Council for approval. A copy of the approved DTMP is to be kept onsite at all times and made available to the accredited certifier or Council on request.

Construction Traffic Management Plan

As a result of the site constraints, limited vehicle access and parking, a Construction Traffic Management Plan (CTMP) and report shall be prepared by a TfNSW accredited person and submitted to and approved by the Council Traffic Team prior to issue of any Construction Certificate.

Due to heavy traffic congestion, truck movements will be restricted during the major commuter peak times being 8.00-9.30am and 4.30-6.00pm. Truck movements must be agreed with Council’s Traffic and Development Engineer prior to submission of the CTMP.

The CTMP must address following:

- The proposed phases of construction works on the site, and the expected duration of each construction phase.
- The proposed order in which works on the site will be undertaken, and the method statements on how various stages of construction will be undertaken
- Make provision for all construction materials to be stored on site, at all times
The proposed areas within the site to be used for the storage of excavated materials, construction materials and waste containers during the construction period
- The proposed method of access to and egress from the site for construction vehicles, including access routes and truck rates through the Council area and

the location and type of temporary vehicular crossing for the purpose of minimising traffic congestion and noise in the area, with no access across public parks or reserves being allowed

- The proposed method of loading and unloading excavation and construction machinery, excavation and building materials, formwork and the erection of any part of the structure within the site. Wherever possible mobile cranes should be located wholly within the site
- Make provision for parking onsite. All Staff and Contractors are to use the basement parking once available
- Temporary truck standing/ queuing locations in a public roadway/ domain in the vicinity of the site are not permitted unless approved by Council prior
- Include a Traffic Control Plan prepared by a person with suitable RMS accreditation for any activities involving the management of vehicle and pedestrian safety
- The proposed manner in which adjoining property owners will be kept advised of the timeframes for completion of each phase of development/construction process. It must also specify that a minimum Fourteen (14) days notification must be provided to adjoining property owners prior to the implementation of any temporary traffic control measure
- Include a site plan showing the location of any site sheds, location of requested Work Zones, anticipated use of cranes and concrete pumps, structures proposed on the footpath areas (hoardings, scaffolding or shoring) and any tree protection zones around Council street trees
- Take into consideration the combined construction activities of other development in the surrounding area. To this end, the consultant preparing the CTMP must engage and consult with developers undertaking major development works within a 250m radius of the subject site to ensure that appropriate measures are in place to prevent the combined impact of construction activities, such as (but not limited to) concrete pours, crane lifts and dump truck routes. These communications must be documented and submitted to Council prior to work commencing on site
- The proposed method/device to remove loose material from all vehicles and/or machinery before entering the road reserve, any run-off from the washing down of vehicles shall be directed to the sediment control system within the site
- Specify that the roadway (including footpath) must be kept in a serviceable condition for the duration of construction. At the direction of Council, undertake remedial treatments such as patching at no cost to Council
- The proposed method of support to any excavation adjacent to adjoining properties, or the road reserve. The proposed method of support is to be designed and certified by an appropriately qualified and practising Structural Engineer, or equivalent
- Proposed protection for Council and adjoining properties
- The location and operation of any on site crane

The CTMP shall be prepared in accordance with relevant sections of Australian Standard 1742 – “Manual of Uniform Traffic Control Devices”, RMS’ Manual – “Traffic Control at Work Sites”.

Implementation of Construction Traffic Management Plan

All works and construction activities are to be undertaken in accordance with the approved Construction Traffic Management Plan (CTMP). All controls in the CTMP must be maintained at all times and all traffic management control must be undertaken by

personnel having appropriate TfNSW accreditation. Should the implementation or effectiveness of the CTMP be impacted by surrounding major development not encompassed in the approved CTMP, the CTMP measures and controls are to be revised accordingly and submitted to Council for approval. A copy of the approved CTMP is to be kept onsite at all times and made available to Council on request.

15. EXCESSIVE SWIMMING POOL ENVELOPE

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as the height, setback, and envelope of the swimming pool is unacceptable.

The proposal is inconsistent with the objectives of the DCP.

My clients are concerned that the proposed swimming pool:

- The Pool has excessive height above GLE, cantilevering over the cliff edge as seen within Crozier Report.
- The Pool has inadequate separation to the side boundary considering the height above EGL
- The Pool has inadequate privacy devices deployed
- The Pool Plant is positioned too close to my clients' boundary – it must be positioned towards the centre of the subject site
- The Pool Plant has not been identified to being in an acoustic enclosure, that is essential to maintain maximum noise level associated with the pool filter plant and other pool plant not to exceed 5dB[A] above ambient background level when measured from any adjoining premises including my client's property
- External mechanical plant systems (for pools, air conditioning and the like) must be acoustically enclosed and located centrally and away from neighbours living areas of neighbouring properties and side and rear boundaries.

16. IMPACTS UPON ADJOINING PROPERTIES: ADVERSE VIEW SHARING 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 proposal is inconsistent with the objectives of the DCP.

Height Poles are requested to assess the non-compliant HOB.

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

- The proposal is inconsistent with objectives of the DCP regarding views;
- The proposal is inconsistent with objective and controls of the DCP regarding views and view sharing;
- The proposal is inconsistent with the DCP, as the proposal fails under the fourth Tenacity Step, *Point 2 - If there is a non-compliance, then even a moderate impact may be considered unreasonable, or* The proposal is inconsistent with

the DCP, as the proposal fails under the fourth Tenacity Step, Point 3 [a]: *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"*.

- The application documentation has failed to accurately and comprehensively consider and document view loss impacts on affected neighbours;
- 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 whether a more skilful design could reduce the impact on views of neighbours.
- The proposal is inconsistent with the decision made by NSWLEC Commissioner Walsh in *Furlong v Northern Beaches Council [2022] NSWLEC 1208* in considering that if a more skilful design could be achieved arriving at an outcome that achieved '*a very high level of amenity and enjoy impressive views*', and the proposal had not taken that option, then a proposal had '*gone too far*', and must be refused.

I contend that 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.

I contend that the view impact is considered above a moderate impact from the respective zones within the property, and Bible Gardens, and given the significant proportion of the views which are impacted. The aspect is considered whole, prominent views, which are certainly worthy of consideration and at least partial protection. The proposal to remove some of these views is considered overall to be potentially above a moderate view impact.

As Council will recall, in respect to Point 3, NSWLEC Commissioner Walsh in *Furlong v Northern Beaches Council [2022] NSWLEC 1208* referenced *Wenli Wang v North Sydney Council [2018] NSWLEC 122*, in considering that if a more skilful design could be achieved arriving at an outcome that achieved '*a very high level of amenity and enjoy impressive views*', then a proposed development has gone too far, and must be refused.

I contend that the proposed development has '*gone too far*' and the '*more skilful design*' solution identified in this Submission, achieves '*a very high level of amenity and enjoy impressive views*' for the applicant.

The '*more skilful design*' solution identified in this Submission, gives the applicant a potentially larger GFA than what is being sort, a very high level of amenity, and would enjoy spectacular and impressive views.

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 and views from the Bible Gardens 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, 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.

Certified Height Poles have not been erected.

View Impact Assessment has not been undertaken from my client's property or from the Bible Gardens.

View impact photomontages prepared in accordance with the Land and Environment Court policy on the use of photomontages have not prepared.

I consider that my clients' view loss and the loss from the Bible Gardens might be 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 upper floor and other parts of the non-compliant envelope is redesigned to respond to, and address, principle four of *Tenacity Consulting v Warringah Council*, which would provide the Applicant with a similar amenity while also reducing the view impact to an acceptable level on adjoining properties.

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 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 Assessment 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.

The proposal may also cause potential view loss of the water views from the Bible Gardens and may cause potential view loss from other neighbours.

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

1. BONDI RESIDENCE PTY LTD V WAVERLEY COUNCIL [2024] NSWLEC 1297
2. FURLONG V NORTHERN BEACHES COUNCIL [2022] NSWLEC 1208
3. DER SARKISSIAN V NORTHERN BEACHES COUNCIL [2021] NSWLEC
4. WENLI WANG V NORTH SYDNEY COUNCIL [2018] NSWLEC 122
5. REBEL MH NEUTRAL BAY V NORTH SYDNEY COUNCIL [2018] NSWLEC 191
6. AHEARNE V MOSMAN MUNICIPAL COUNCIL [2023] NSWLEC 1013

1. Bondi Residence Pty Ltd v Waverley Council [2024] NSWLEC 1297

I refer to a dismissal of a Class 1 Appeal by NSWLEC Commissioner Gray on view loss grounds.

I refer to Bondi Residence Pty Ltd v Waverley Council [2024] NSWLEC 1297. WC DA 9/2023. 14-18 Campbell Parade, Bondi Beach.

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.

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

The Commissioner in this case did not accept that the assessment of reasonableness of a view impact is confined to a comparison of a so-called "compliant envelope" with what is proposed. The controls in the WDCP are not merely building envelope controls, but extend to specific controls concerning the increase of setbacks to minimise view loss, as well as controls requiring the incorporation of design measures to facilitate view sharing.

The Commissioner in this case stated that much of the impact arises from the non-compliance with the control in the WDCP concerning the maximum number of storeys. The control is for a maximum of four storeys (Part E2, Section 2.2.2, control (b)(i)), with which the proposed development does not comply. Having regard to the photomontages that have informed the view impact analysis, it is clear from the wireframes that much of the built form that obstructs the views arises from the additional fifth-storey that is contrary to this four-storey control.

The Commissioner in this case stated that it is therefore clearly contemplated that numerical compliance is not sufficient, and additional setbacks ought to be utilised to minimise view loss.... increasing the side boundary setbacks from that proposed would improve view sharing corridors. The proposed development has not done so.

The Commissioner in this case stated that the severe impacts on views from the most affected properties are unacceptable as they are caused by the breach of the storey control, the failure to provide adequate side setbacks at the upper level, and the failure to use any other design measures to facilitate view sharing and minimise view loss. This is contrary to the objective to "minimise view loss from existing developments by proposed development". In accordance with Tenacity at [29], 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 proposed developed within this DA may causes moderate impacts on views from highly used zones within my client's property and potentially from the Bible Gardens, are unacceptable as they are caused by the breach of envelope controls, **and** the failure to use any other design measures to facilitate view sharing and minimise view loss. This is contrary to the objective to "minimise view loss from existing developments by proposed development". In accordance with *Tenacity* at [29], 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".

2. 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.

I contend that the composite consideration from this NSWLEC dismissal, 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. This decision suggests 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.

Mr Furlong (Applicant) applied for development consent to renovate his three-storey home at Dee Why. The application was refused by the Northern Beaches Council (Council) because of the potential view loss impacts for a neighbouring property. The Applicant appealed the decision to the Land and Environment Court. Court's Decision

Commissioner Walsh upheld the Council's decision on the basis that the proposal would bring about "severe view loss impacts" when there was a reasonable design alternative available which would significantly moderate the impact.

The Commissioner assessed the view loss impacts in line with the principles from *Tenacity*:

What are the views to be affected?

The primary view to be affected had "panoramic" and "iconic" views of North Head, Curl Curl Beach, the ocean and horizon, as well as foreground suburbs. The whole view would be lost, leading the Commissioner to find the neighbour would suffer from a "devastating view loss".

What part of the property are the views obtained from?

The view is obtained across a side boundary. The general rule drawn from *Tenacity* is that views across side boundaries are more difficult to protect than views from the front and rear boundaries of a home.

The Commissioner did not agree with that proposition entirely and found that protection of side boundary views may be appropriate in some circumstances and is not always unrealistic. This suggests that the location of the vantage point may be offset by some other factor, such as the value of the view.

What is the extent of the impact on the whole property?

There were other views that would be affected, however they were of lesser value than the primary view. Despite this, the Commissioner assessed the impact on the property as a whole as “severe”.

What is the reasonableness of the proposal that is bringing about the impact?

The assessment of reasonableness considers compliance with the local planning controls and whether there are any reasonable design alternatives which would reduce the impact on view loss.

The Commissioner found that compliance with development controls does not, of itself, overcome policy settings aimed at reasonable view sharing. The Commissioner held that the proposal “does not pay sufficient regard” to the local development control plan which required view sharing.

Further, the Commissioner found that a design alternative which shifted the position of the proposed extension by 3.5m was reasonable and would not impede the view to the same extent.

Comment:

As opposition to development applications by neighbours due to view loss is quite common, it is important to be aware of the ramifications of *Furlong*. In particular, 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*. The reasonableness of the proposal is also influenced by planning policies and controls, which often prescribe a range of competing objectives. Interpreting and applying these objectives can be confusing and difficult. As this a key factor in having your proposed renovations approved, you should seek legal advice to assist you in complying with the relevant planning policies and controls.

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.

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.

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.

3. 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.

4. 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.*

5. 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.

6. 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.

VIEW SHARING & NSWLEC TENACITY CONSULTING V WARRINGAH COUNCIL 2004

The DCP Controls on View Sharing refers to outcomes that all new development is to be designed to achieve a reasonable sharing of views available from surrounding and nearby properties.

The DCP Outcomes on View Sharing refers to a reasonable sharing of views amongst dwellings. Views and vistas from roads and public places to water, headland, beach and/or bush views are to be protected, maintained and where possible, enhanced.

The DCP states that the proposal must demonstrate that view sharing is achieved through the application of the Land and Environment Court's planning principles for view sharing, and references the NSWLEC Planning Principle defined *within 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, and from the Bible Gardens.

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.

The controls require that new development is to be designed to achieve a reasonable sharing of views available from surrounding and nearby properties and must demonstrate that view sharing is achieved through the application of the Planning Principles established in the NSW Land and Environment Court case *Tenacity Consulting v Warringah Council*.

In *Tenacity* Step 4 is described as 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.

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

There are three different aspects 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.

In relation to Principal four set down in the *Tenacity* decision ('*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 LEP and DCP controls, with a massive non-compliance to FSR, which questions whether a more 'skilful' (or sensitive) design would achieve an improved and acceptable outcome. Further exploration of an alternative design outcome which would include the amendments mentioned within this submission is therefore necessary to satisfactorily address the Planning Principles established in the NSW Land and Environment Court case.

I contend that the view impact results in a greater than moderate impact from the respective zones within the property given the significant proportion of the views which are impacted. The views are certainly worthy of consideration and substantial protection.

The proposal to remove the vast majority of these views is considered overall to be a greater than moderate view impact and I contend that the proposal therefore fails on NSWLEC *Tenacity* Step 4 Reasonableness.

In respect to Point 3, NSWLEC Commissioner Walsh in Furlong v Northern Beaches Council [2022] NSWLEC 1208 referenced Wenli Wang v North Sydney Council [2018] NSWLEC 122, in considering that if a more skilful design could be achieved arriving at an outcome that achieved 'a very high level of amenity and enjoy impressive views', then a proposed development has gone too far, and must be refused.

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 is considered to be greater than moderate, in relation to the views from my clients' highly used zones of my clients' dwelling and/or from the Bible Gardens. 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 maintain 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.

17. IMPACTS UPON ADJOINING PROPERTIES: VIEW SHARING 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 ensure view sharing and avoid amenity loss.

The proposal is inconsistent with the objectives of the DCP.

My clients are concerned that new trees are positioned within the Tenacity Viewing Corridors to my clients' view, and those new trees are unreasonable as they will severely affect my client's view.

My clients ask that:

- To maintain view sharing, the proposed trees and plants over 3m in height shall be deleted in the landscape plan along the western boundary. Tree planting shall be located to minimise impacts on view loss, with no trees or landscape species removing water views

Hong v Mosman Municipal Council [2023] NSWLEC 1149

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:

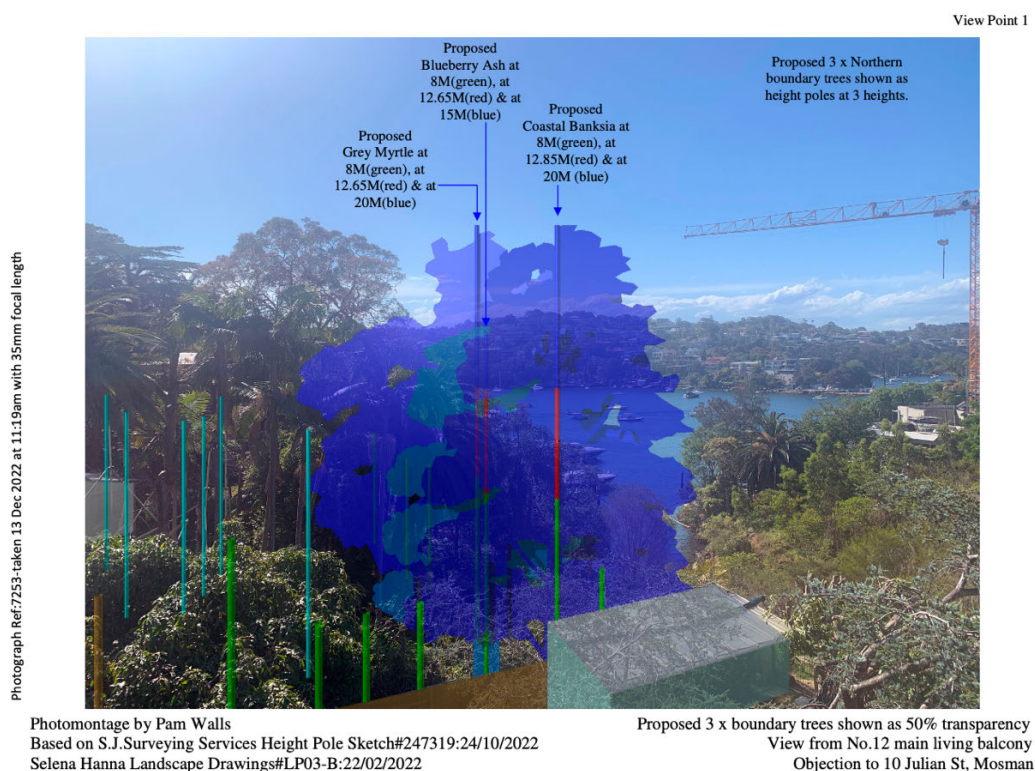
In regard to landscaping and tree protection, I note again that in Court and to some degree of detail, I worked through with the experts the various points of concern raised. This resulted in a number of further agreed alterations to the landscape plan. The Revision C drawings, based on the evidence 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

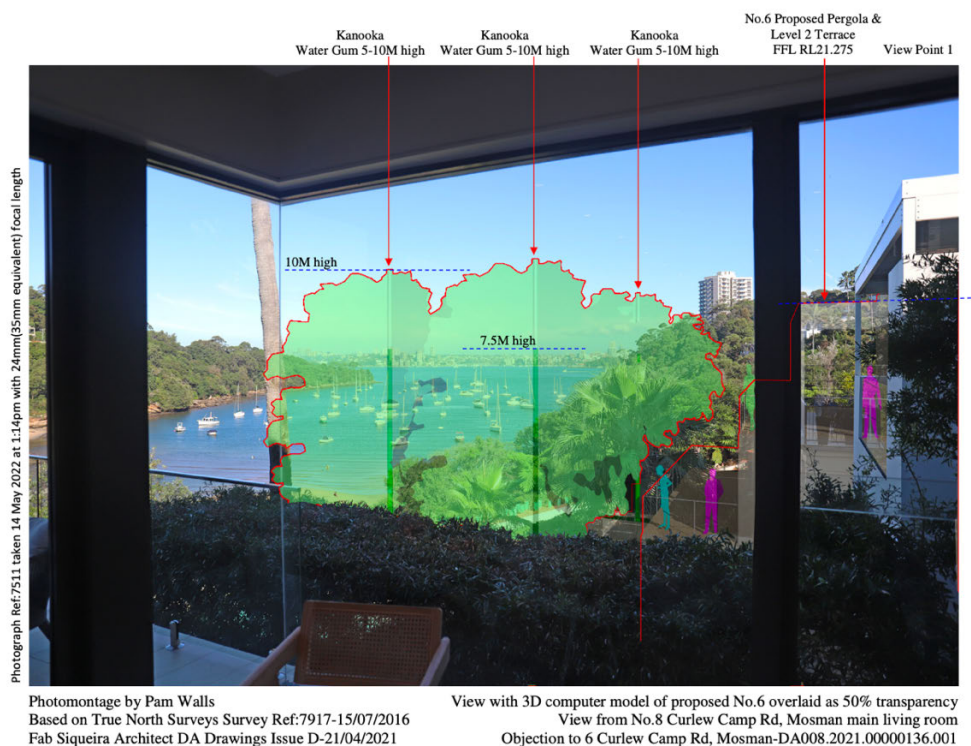
View Loss caused by excessive landscape in the harbour viewing corridor zone

Zubani v Mosman Municipal Council [2022] NSWLEC 1381

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.



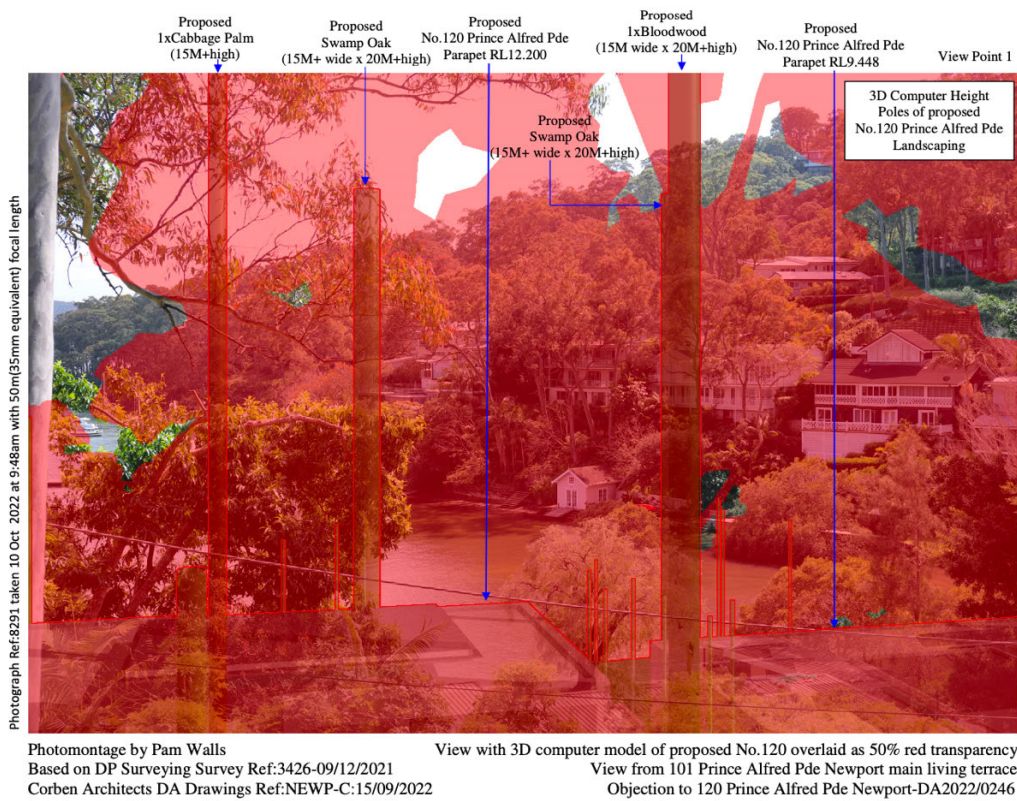
Zubani v Mosman Municipal Council [2022] NSWLEC 1381
View Loss caused by excessive landscape in the street setback zone

DA 2022 0246 at 120 Prince Alfred Parade

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

DA 2022 2280 at 47 Beatty Street Balgowlah

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.



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.

Petesic v Northern Beaches Council [2022] NSWLEC

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].

My clients are very concerned that new trees are positioned within the Tenacity Viewing Corridors to my clients' view. The loss of view caused by the canopy will create view loss that is severe in outcome.

18. IMPACTS UPON ADJOINING PROPERTIES: SOLAR ACCESS

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 solar access and excessive overshadowing by the non-compliant built form.

The proposal is inconsistent with the objectives of the DCP.

The proposed development presents unacceptable amenity impacts to adjoining properties by way of solar access impacts that arise because of the excessive bulk and scale of the proposal and numerical non-compliance.

The highly elevated Turning Bay has not been depicted on the Shadow 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, 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 22.50 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.

19. 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 proposal is inconsistent with the objectives of the DCP.

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 from the highly elevated Turning Bay, resulting in inconsistency with the provisions of the DCP and the objectives of the DCP.

My client has acoustic concerns of cars reversing directly adjacent habitable rooms and bedrooms, with car light nuisance and noise.

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.

The proposed development should be refused because it will result in unacceptable visual privacy impact contrary to the DCP:

- The proposal is inconsistent with the DCP as it does not use appropriate site planning with respect to the location and design of windows and balconies, such that it results in unreasonable visual privacy impacts to the dwellings of neighbouring properties;
- The proposal does not comply with requirement set out in the DCP as it is not designed to optimise privacy for the occupants of the neighbouring dwellings
- The floor level of the Turning Bay, would result in looking over and beyond. The difference in levels will result in direct viewing into the private open spaces of neighbour's dwellings.
- The proposal relies on landscaping to the rear to assist with privacy, which should not be used in place of good design, as per the planning principle set by *Super Studio v Waverley Council [2004] NSWLEC 91*.
- The proposal is not consistent with the objective of the DCP, to ensure the siting and design of buildings provides a high level of visual and acoustic privacy for occupants and neighbours.

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 Turning Bay facing neighbours without sufficient screening devices being provided, considering the Turning Bay are directly opposite my clients' windows and balconies.

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 Turning Bay will result in an unacceptable privacy breach. The proposed Turning Bay face the rear private open spaces for the neighbouring dwelling and will result in an unacceptable level of privacy impact.

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 Turning Bay have been designed without any consideration to the privacy of the neighbouring property.

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. My clients ask Council to consider the deletion of the Turning Bay and replaced with a turntable in front of the garaging

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: As mentioned above, the deletion of the Turning Bay and replaced with a turntable in front of the garaging would reduce the impact.

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: Additional landscaping may assist in addition to privacy devices.

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.

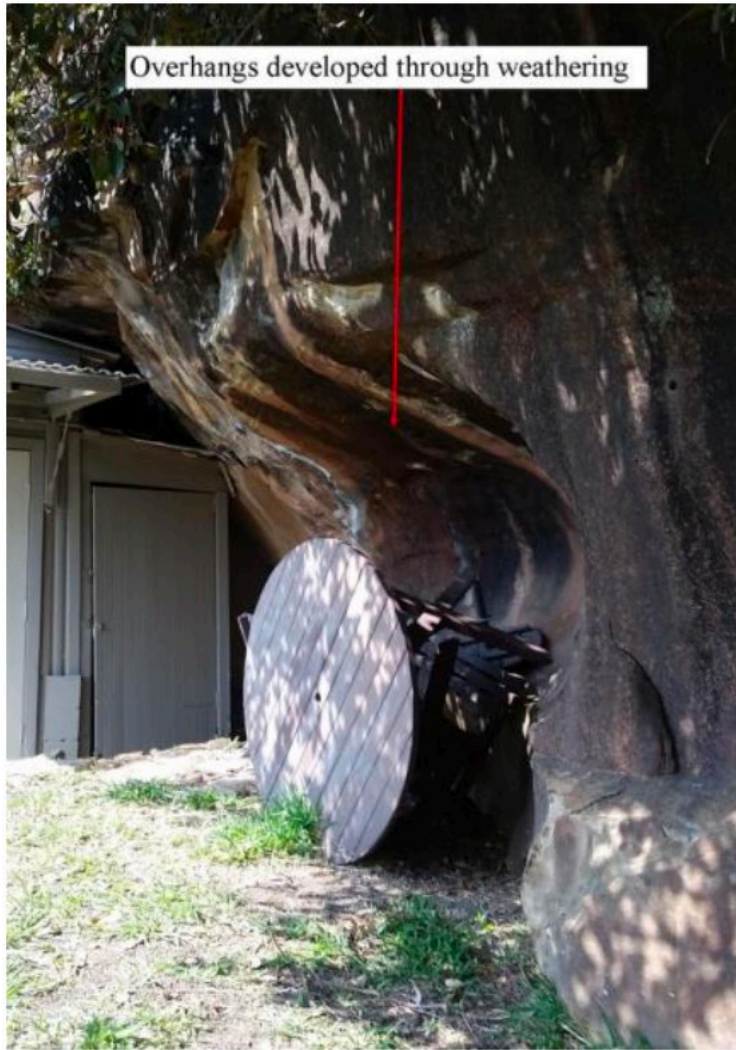
20. IMPACTS UPON ADJOINING PROPERTIES: ENGINEERING

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 fails to provide minimal excavation, with excavation proposed too close to the neighbours' property.

The Crozier Report is very well constructed, however I am concerned on the risks of building a 9.4m high Turning Bay over zones that are considered 'high risk' by Crozier. The proposed Turning Bay is positioned directly over the unstable 'Cliff Overhang' as seen on Crozier Figure 1 [page 34 of 60] – how the 'high risk' overhanging cliff is protected during construction of a 9.4m high Turning Bay above, with substantial loads to be transferred back into the bedrock, is uncertain. This may require a massive cantilevered structure of the highly loaded Turning Bay to avoid the unstable ground, but again no detail is provided by the architectural drawings or engineering drawings. This is required, as the design outcome may be significantly different to that drawn. I provide extracts from the Crozier Report including extracts of some photographs, as clearly the architectural and engineering drawings have avoided the issue:

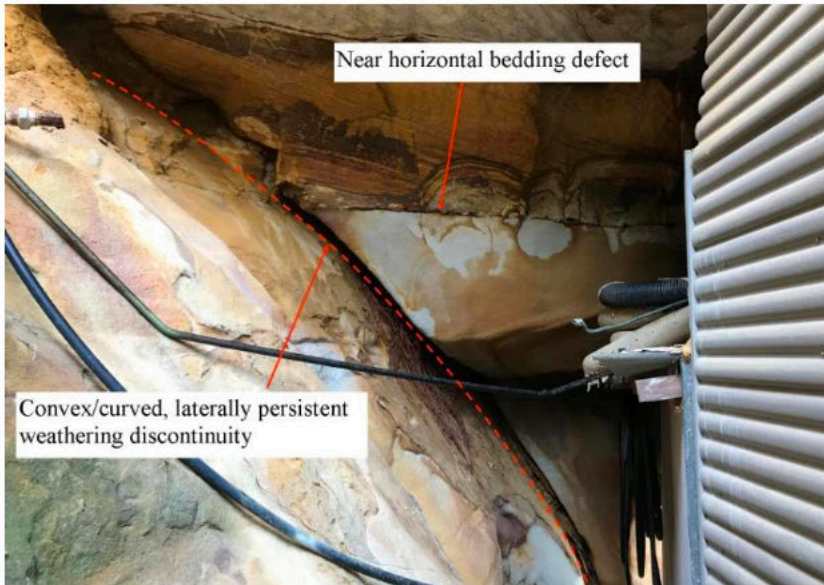
- *The site is located within the H1 (highest category) landslip hazard zone as identified within the Geotechnical Hazard Mapping (Geotechnical Risk Management Policy for Pittwater – 2009).*
- *Potential signs of previous surface slope movement were observed above the cliff crest including rotating trees and failing fence structures (see Crozier Report Photograph 5) however it was difficult to identify a mechanism for this distress and it may be related to surface creep rather than a deep-seated stability issue.*
- *Within the area to the west of the existing site structure, concave undercutting was observed as indicated in Crozier Report Photograph 8. It appears that preferential weathering of the rock mass is occurring and resulting in the concave features indicated in Crozier Report Photograph 8. This has resulted in an overhang in the upper sandstone unit that extends over the existing site house (Crozier Report Photograph 9).*
- *Areas of exposed bedrock which appeared susceptible to erosion were also observed to the south of the site structure and accumulation of eroded sandstone was observed at the toe of the exposure (Crozier Report Photograph 10).*
- *Several significant overhangs and potential destabilising defects were identified in the mapping*



Photograph 8: Overhang/undercutting within the site.



Photograph 9: Defects within bedrock and overhang/undercutting at south-west corner of existing house.



Photograph 11: convex defects to the rear of the existing site structure.



Photograph 12: Weak zones within bedrock

Insufficient information has been submitted to demonstrate that the proposed development will not adversely impact the structural integrity of the Bible Gardens, the cut and fill along the western boundary, and the structural support below the proposed Turning Bay directly under the Overhanging Rock Faces as seen above.

There are other significant other geotechnical issues for all adjoining neighbours raised within the Crozier Report.

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.

The proposal is inconsistent with the objectives of the LEP and DCP.

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 concerned that the drawings do not show adequate collection of stormwater along the boundaries of the subject site, to retain the stormwater washing across the subject site onto my client's property.

I request that the onsite stormwater system is increased with large pits and large pipework to collect all stormwater on the subject site to accord with the 1% AEP.

The proposed development is not supported by sufficient information to demonstrate compliance with Council's stormwater management requirements regarding the provision of onsite stormwater detention (OSD).

A DRAINS model is required for development. The pre-existing flow condition is to be modelled as state of nature up to the 1/100 AEP storm event.

- The stormwater drainage plans are to detail all the minimum information as required by the DCP;
- The drainage catchment plan should also include the footpath catchment area that will drain into the development site and is to be included into the site OSD Drains model calculations.
- Calculations in the form of a Hydraulic Grade Line analysis are required to demonstrate that the OSD tank pipe outlet is not affected by tail water levels from the any proposed extension works. The OSD pipe outlet is free draining to demonstrate the proposed OSD storage tank volumes are not compromised.

21. PRECEDENT

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

22. PUBLIC INTEREST

Pursuant to Section 4.15(1)(e) of the Environmental Planning and Assessment Act 1979, the proposed development is not within the public's interest.

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 is contrary to the provisions of relevant environmental planning instruments, development control plans and design guidelines. The proposed development represents numerous non-compliances and inconsistencies with State and Council policy. No circumstances exist that would justify the non-compliances and inconsistencies with these policies.

C. CONTENTIONS THAT RELATE TO INSUFFICIENT & INADEQUATE INFORMATION

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.

Clause 4.6 Variation Request

Not submitted.

Construction and Demolition - Traffic Management Plan

Not submitted.

Height

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 on HOB. The survey is incomplete as it has not recorded the existing ground levels within the lowest floor, nor shown the extent of the lowest floor, nor existing levels under the existing building. A corrected height plane blanket is to be provided for LEP & DCP non-compliances

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 or the Bible Gardens 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 any 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 30-minute 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.

The 9m+ high Turning Bay has not been added to the overshadowing diagrams.

The proposed development provides insufficient information to adequately assess whether the development complies or otherwise with the controls. The solar and shadow diagrams appear to be incorrect and do not adequately demonstrate the

shadow cast over the site and neighbouring property. The length of the winter shadows appears to be underestimated and the solar diagrams do not appear to take into consideration the topography of the site. In order to properly calculate the solar access to the proposed development and any overshadowing impacts to neighbouring sites 3-D modelling of views from the sun at 30-minute intervals must be submitted illustrating the overshadowing impacts of the neighbouring residential units.

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.

The architectural drawings do not provide side setback dimensions to the Turning Bay nor identify the nature of the rooms on the adjoining properties to enable a proper assessment of the impacts of the proposed development and consequently the application has failed demonstrate that the development is suitable for the site and that it will have acceptable environmental impacts on the built environment. Additional dimensions are required to be provided with adequate level of information clearly indicated depicting the separation of buildings and internal layouts of rooms on adjoining properties in order to confirm compliance with objectives and controls.

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 information on the works to the Bible Garden boundary, and detailed consideration of the support structures required for the Turning Bay over the unstable geotechnical zone, and other works along the western boundary.

Survey.

Details of neighbouring/surrounding properties, including window/door openings to determine if there will be any privacy, overshadowing or amenity impacts. Registered Surveyors levels transferred to all DA drawings. Incomplete dimensioning on DA plans, and incomplete levels on all elevations to all elements. 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. 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 on HOB.

External Plant

Details of all external plant and equipment including air conditioning units/condensers. Air conditioning units to the façade, roof or balconies of the building will not be acceptable.

D. 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

- Delete Turning Bay and provide a Turntable to front of the proposed garaging
- Reduce the Height of Building to LEP standards of 8.5m, and reduce built form to the south of the right-of-way carriageway so as not to block sightlines of neighbours
- Reduce the Wall Height to DCP controls
- Increase Side Setback to DCP controls and delete all built from within Boundary Envelope to DCP controls
- Increase Rear Setback to DCP controls
- Increase Front Setback to DCP controls
- Increase Landscape Area to DCP controls
- Decrease Excavation, with no excavation or fill in the western 3m side setback zone
- Delete Pool, and all structures beyond the top of the cliff edge

2. PRIVACY DEVICES

- All windows facing my client's property to have windows sills increased to a minimum height of 1.5m measured from the FFL level, or windows facing the side boundary are to be fitted with translucent/obscure/frosted glazing to a height of not less than 1.5m above the FFL. All opening windows facing my client's property to be positioned above 1.5m above the FFL.
- Louvred privacy screens added to the edge of all balconies facing my clients' property. Louvred privacy screens shall be fixed and angled at a 20-degree acute angle to the angle of the proposed development.
- All privacy screens are to have fixed louvre blades with a maximum spacing of 25mm, and shall be constructed of materials and colours that complement the finishes and character of the building.
- Screens installed on balconies are to extend the full height from finished floor level to the ceiling of the balcony.

3. LANDSCAPING

- New Landscape Plan to be completed by highly qualified Landscape Architect, to co-ordinate with Architectural, Civil, and Arborist once those matters are co-ordinated.
- Soft landscape to cliff edge to the north, with retaining wall structures as advised by Civil to retain the edge boundary. Delete pool and other structures that are currently positioned cantilevering over the cliff edge

- Carefully locate all rock outcrops on the Landscape Plan, and carefully identify zones where deep soil planting is possible, noting the Geotechnical advice regarding low soil depths
- To maintain view sharing, the proposed trees and plants over 3m in height shall be deleted in the landscape plan along the western boundary. Tree planting shall be located to minimise impacts on view loss, with no trees or landscape species removing water views
- 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.
- Additional 3m high planting for screening along the boundaries adjacent to the proposed built form, to reduce the built form and establish an appropriate setting where landscape is prominent
- New trees and screening trees be increased to 400 L bag size, so that a more mature landscape outcome is achieved.
- Increase deep soil garden width to full width of the side setback zone to the entire side boundary of the adjoining property, where possible, to adequately support columnar shrub screen planting,

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
- 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 [if consented]
- 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 [if consented]
- Swimming and Spa Pools – Child Resistant Barriers [if consented]
- 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
- Dilapidation Reports for Existing Buildings: A photographic survey and dilapidation report of my clients adjoining property detailing the physical condition of the property, both internally and externally, including, but not limited to, such items as walls, ceilings, roof, structural members and other similar items, MUST BE submitted to the Principal Certifier for approval prior to the issue of any Construction Certificate. The survey and report are to be prepared by an appropriately qualified person and a copy to be given to the owner of the adjoining property. A copy of the report is to be provided to Council, if Council is not the Principal Certifier, prior to the issue of any Construction Certificate.
- Geotechnical Report: Prior to issue of any Construction Certificate a Geotechnical/Civil Engineering report must be prepared which addresses at a minimum (but is not limited to) the following: a) the type and extent of substrata formations by the provision of a minimum of four (4) representative bore hole logs which are to provide a full description of all material from ground surface to 1.0m below the finished basement floor level and include the location and description of any anomalies encountered in the profile. The surface and depth of the bore hole logs must be related to Australian Height Datum; b) the appropriate means of excavation/shoring in light of point (a) above and proximity to adjacent property and structures. Potential vibration caused by method of excavation and potential settlements affecting nearby footings/foundations must be discussed and mechanisms to ameliorate any such impacts recommended; c) the proposed method to temporarily and permanently support the excavation for the basement adjacent to adjoining property, structures and road reserve if nearby (full support must be provided within the subject site); d) the existing groundwater levels in relation to the basement structure, where influenced; e) the drawdown effects on adjacent properties (including road reserve), if any, the basement excavation will have on groundwater together with the appropriate construction methods to be utilised in controlling groundwater. Where it is considered there is the potential for the development to create a "dam" for natural groundwater flows, a groundwater drainage system must be designed to transfer groundwater through or under the proposed development without a change in the range of the natural groundwater level fluctuations. Where an impediment to the natural flow path is constructed, artificial drains such as perimeter drains and through drainage may be utilised; and f) recommendations to allow the satisfactory implementation of the works. An implementation program is to be prepared along with a suitable monitoring program including control levels for vibration, shoring support, ground level and groundwater level movements during construction. The implementation program is to nominate suitable hold points at the various stages of the works for verification of the design intent before sign-off and before proceeding with subsequent stages. The geotechnical report must be prepared by an appropriately qualified consulting geotechnical/ hydrogeological engineer with previous experience in such investigations and reporting. It is the responsibility of the consulting geotechnical/ hydrological specialist to undertake the appropriate investigations, reporting and specialist recommendations to ensure a reasonable level of protection to adjacent property and structures both during and after construction. The report must contain site-specific geotechnical recommendations and shall specify the necessary hold/inspection points by relevant professionals as appropriate. The design principles for the geotechnical report are as follows: a) no ground settlement or movement is to be induced which is sufficient enough to cause an adverse impact to adjoining property and/or infrastructure; b) no changes to the ground water level are to occur as a result of the development that are sufficient enough to cause an adverse impact to the surrounding property and infrastructure; c) no changes to the ground water level are to occur during the construction of the development that are sufficient enough to cause an adverse impact to the surrounding property and infrastructure; d) vibration is to be minimised or eliminated to ensure no adverse impact on the surrounding property and infrastructure occurs, as a result of the construction of the development; e) appropriate support and retention systems are to be recommended and suitable designs prepared to allow the proposed development to comply with these Design Principles; and f) an adverse impact can be assumed to be crack damage as identified within the relevant Australian Standard for determining such damage. The report, satisfying the requirements of this condition, must be submitted to the Principal Certifier for approval prior to the issue of any Construction Certificate. The professional recommendations, implementation program, monitoring program, mitigation measures and the like contained in the report must be implemented in full during the relevant stages of excavation and construction.
- 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
- Engineer's Certification of Plans
- Structural adequacy & Excavation work
- 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 Construction Vibration. Vibrations associated with demolition, excavation and construction works are limited to a tolerance of 3mm/s PPV (peak particle velocity) at the property boundaries (or at sea cliff or cliff adjacent to the subject property). Vibration monitoring equipment is to be installed by a registered Geotechnical Engineer throughout the site and along the boundaries to verify that vibration is within the limits of the maximum tolerance. The vibration monitoring equipment must include a light/alarm, so the site foreman and equipment operator are alerted to the fact that vibration limits have been exceeded. Where the vibration tolerances have been exceeded, works shall cease until a change in construction / excavation methodology are implemented to ensure compliance. It also must log and record vibrations throughout the excavation and construction works so that compliance may be verified. Any monitoring devices are to be installed at the footing level of any adjacent structures. Reason: To restrict vibration impacts.

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 [if consented]
- Swimming Pool Fencing [if consented]

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 [if consented]

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

E. REASONS FOR REFUSAL

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

Contentions that the application be refused as listed within this submission.

1. 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.
2. The proposal is inconsistent with Section 4.15 (1) (b) of the EP&A Act as: (a) Insufficient information has been submitted to ensure that the development will not have unreasonable impacts on access to private dwellings. The proposal is inconsistent with Section 4.15 (1) (e) of the EP&A Act as it is not in the public interest.
3. The proposal is inconsistent with Clause B6.7 (Transport and Traffic Management) and B8.6 (Construction and Demolition - Traffic Management Plan) of the Pittwater DCP as insufficient information has been submitted to ensure the development will have minimal disturbance to the residential community in terms of available safe access from the shared right of carriageway to dwellings, especially during construction.
4. The proposal is inconsistent with Clause 6.2 of the Pittwater LEP, and Clause B8.1 (Construction and Demolition - Excavation) of the Pittwater DCP as insufficient information has been submitted to ensure that the earthworks will not have a detrimental impact on the amenity of adjoining properties.
5. The proposal is inconsistent with Clause 7.7 of the Pittwater LEP and Clause B3.1 (Landslip Hazards) of the Pittwater DCP as insufficient information has been submitted to ensure that the development has been designed, sited and managed to avoid any geotechnical risk or impact on surrounding development.
6. 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:
 - o Aims of Plan
 - o Zone Objectives
 - o Height of Buildings
 - o Exceptions to Development Standards
 - o Heritage
 - o Earthworks
 - o Stormwater
 - o Geotechnical Hazards
7. 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:

- Excessive Wall Height & Number of Storey
 - Unacceptable Setbacks
 - Insufficient Landscape Areas
 - Excessive Removal of Native Trees
 - Poor Strategic Positioning of Tree Canopy
 - Poor Garage Design and Turning Bay
 - Excessive Swimming Pool Envelope
 - Excessive Excavation & Geotechnical Concerns
 - Stormwater 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
8. 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.
 9. 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
 10. 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.
 11. 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.
 12. The proposals are unsuitably located on the site pursuant to Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979*.
 13. 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
 14. 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.

F. 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?"

I 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,

- o The development compromises amenity impacts on neighbours
- o 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:

- o Inconsistent with the zone objectives of the LEP
- o Inconsistent with the aims of the LEP
- o Inconsistent with the objectives of the DCP
- o Inconsistent with the objectives of the relevant EPIs
- o Inconsistent with the objects of the EPAA1979

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.

I 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, I ask for that letter to be forwarded to me.

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.

It is requested that Council inform both myself, and my clients directly, of any amended plans, updates or Panel meeting dates. My clients request that they present to the Panel, should the DA proceed to the LPP.

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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