
From: [REDACTED]
Sent: 27/07/2023 11:59:44 AM
To: Council Northernbeaches Mailbox
Cc: malcolm white
Subject: TRIMMED: DA 2023 0894 18 ROCK BATH ROAD PALM BEACH
WRITTEN SUBMISSION: LETTER OF OBJECTION SUBMISSION:
TULLOCH
Attachments: 18 ROCK BATH WS.pdf;

Kind regards,

Bill Tulloch BSc[Arch]BArch[Hons1]UNSW RIBA RAIA
[REDACTED]

SUBMISSION

a written submission by way of objection

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

prepared for

MALCOLM WHITE, 16 ROCK BATH ROAD PALM BEACH

27 JULY 2023

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RE: DA 2023 0894
18 ROCK BATH 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.

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.

The proposal is considered to be inappropriate within the view from Council land to the west, and from the beachfront.

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

The subject site is zoned C4 Environmental Living under the LEP, and there is no reason, unique or otherwise why a fully compliant solution to LEP and DCP controls cannot be designed on the site.

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

- Unacceptable Adverse DEVASTATING View Loss Impacts from built form and excessive tree canopy
- Unacceptable Adverse Visual Privacy Impacts
- Unacceptable Adverse Visual Bulk and Scale Impacts
- Unacceptable Adverse Visual Impact and Glare Concerns from Rooftop Solar Array
- Unacceptable Adverse Landscape Impacts

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

- Height of Building: it is uncertain whether the RL 32 parapet falls above the RL 23.5 contour – this survey contour requires to be added to the roof plan.
- Front Building Line [west]: the non-compliance leads directly to a moderate view loss and unreasonable visual bulk
- Building Envelope [west]: the non-compliance leads directly to a moderate view loss and unreasonable visual bulk
- Side Building Line [south]: there should be no excavation or fill within the 2.5m southern side building line

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

- View Loss Analysis from my client's property
- Incomplete dimensioning

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

The 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.

A compliant building design would reduce the amenity impacts identified.

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

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

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

My clients wish to emphasise the fact that my clients take no pleasure in objecting to their neighbour's DA, however is not objecting to the principle of a redevelopment of the subject site.

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

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

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

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

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

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

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

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

- Context and local character
- Built form, scale and public domain, urban design response
- Density
- Landscape integration
- Amenity impacts on neighbours

We understand that NBC had earlier concerns relating to this proposal, including:

ISSUE: B6.1 Access driveways and works on the public road reserve

It is strongly encouraged that the design of the driveway is amended to address the recommendations of Council's Engineers. Concern is also expressed about the visual impact of the elevated driveway

ISSUE: B6.1 Access driveways and works on the public road reserve

A construction management plan will be required to demonstrate that the work will not impact on access to and from neighbouring properties, in particular No. 16 Rock Bath Road.

ISSUE: D12.13 Construction, Retaining walls, terracing and undercroft areas

The use of sandstone walls on the elevated driveway is supported. However, Council have concerns about the visual impact of the driveway on the scenic quality of the area. Any future application shall be supported with details to assess the visual impact on the scenic quality and the landscape character.

ISSUE: 4.3 Height of Buildings

Any breach of the 8.5m height limit will only be supported if evidence can be provided to demonstrate that there is inconsistency with the objectives of the C4 zone and the HOB. In particular, no view loss will be supported if it is a result of a breach in the 8.5m height limit.

ISSUE: D12.5 Front Building Line

The front setback is to Rock Bath Road which is located to the west of the site. Given that the new dwelling generally sits on the footprint of the existing dwelling and the site is irregular in shape, an exception to the setback may be accepted on merit. It is however recommended that the upper floor be stepped in further from the western boundary to ensure that the objectives of the control are achieved.

ISSUE: D12.6 Side and rear building line

The side setback will apply to the southern boundary. The eastern and northern boundary will be treated as a rear boundary. As discussed above, the pool store and stair are required to be setback a minimum of 1m from the southern boundary. It is recommended that the proposed retaining wall be pulled back off the southern

boundary. In addition, clarification is required as to the work to the existing retaining wall which is shown on the survey to be outside the subject site. The architectural plans refer to the demolition of this wall which will require owners' consent from No. 16. Further, the DA will need to be submitted to include No. 16 Rock Bath Road as part of the subject site if works are proposed on No. 16.

ISSUE: D9.9 Building envelope

Given the unique shape of the site, the southern boundary is the only side boundary. However, in order to minimise impacts along the western (front) boundary, it is recommended that the development comply with an envelope control, at a minimum, along this side. This will assist in supporting the large variation to the front setback control.

The proposal results in a breach of 4.5m in height for a length of 4.5m to the western boundary. It is recommended that the upper floor be stepped in from the western boundary to minimise impacts to No. 16 and minimise the breach to the front setback control.

ISSUE: C1.3 View sharing

It is strongly suggested that the design solution ensures that there are no unreasonable impacts on views from No. 16 looking towards Palm Beach and the northern headland and lighthouse. In addition, planting on the green roof shall be low lying species to ensure there are no view loss impacts from the proposed planting. **A detailed view loss assessment will be required to address the Tenacity Principles.**

[NBC: NOTE THIS HAS NOT BEEN PROVIDED]

ISSUE: C1.1 Landscaping

Concern is raised in respect of potential impacts on existing trees and vegetation within adjoining properties and the road reserve. Existing trees and vegetation within adjoining property and within the road verge is not permitted to be impacted upon. Council does not support the removal of street trees unless the street tree is proven to present an arboricultural risk.

ISSUE: C1.25 Plant, Equipment Boxes and Lift Over-Run

It is recommended that the pool store be relocated to be 1m off the southern boundary to minimise acoustic impacts to No. 16 and concurrently address the side setback breach.

My clients are very concerned on view loss.

In this instance, it must be strongly recommended that the proposed built form is lowered, and reduced in scale from the east, and is redesigned to respond to, and address, principle four of Tenacity Consulting v Warringah Council, which would reduce the view impact to an acceptable level on adjoining properties.

- The height of the built form creates devastating view outcomes.
- The excessive built form to the east creates devastating view outcomes.

In this submission, I ask for the proposed development to be:

- Reduced in height
- Reduced in scale to the east, and generally not to extend past the current eastern projection of the existing dwelling on the subject site, perhaps to adjacent tree to facilitate view sharing

My clients are concerned about the excavation proposed, the stability of their land, and the potential damage to their dwelling. We ask for consideration by Council to reduce the height of the built form, by benching the proposed dwelling lower into the hillside, and providing greater east and west setbacks to achieve a better view sharing outcome. If the excavation was lowered, I would ask that the Geotechnical Engineer consider a higher level of attenuation methods to be deployed, such as rock sawing of the complete southern edge, with attenuation cuts completed prior to the reduction of levels. I would also ask that all hydraulic extraction be deleted, and the removal of rock is carried out in geotechnical techniques that avoids the substantial risks. I am sure that Croziers could identify such an approach.

My clients support the principle of a private driveway extending down to the subject site.

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

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

B. FACTS

1. THE PROPOSAL

The application seeks consent for the construction of a new dwelling house at 18 Rock Bath Road, Palm Beach. Specifically, the works include demolition of the existing dwelling and construction of a new dwelling.

The applicant states: "To facilitate vehicular access, the application also details a proposed new driveway within the Rock Bath Road public road reserve, which seeks to replace and extend the existing driveway servicing 16 Rock Bath Road, as follows demolition of the existing driveway servicing 16 Rock Bath Road, tree removal, construction of a new shared driveway servicing 16 and 18 Rock Bath Road, including a hard stand parking area associated with 16 Rock Bath Road, stormwater infrastructure, and Landscaping. Whilst it is appreciated that separate consent is required for the proposed driveway under the provisions of the Roads Act 1993, sufficient detail is provided to confirm that the driveway will provide suitable vehicular access to the site (and 16 Rock Bath Road) and that the likely impacts associated with the construction and use of the driveway are reasonable and acceptable."

2. THE SITE

The site is legally identified as Lot 292 in Deposited Plan 16362, and is commonly referred to as 18 Rock Bath Road, Palm Beach. The site is irregular in shape, with a 42.67m wide frontage to Rock Bath Road (unmade) to the south-west, a 39.435m wide boundary shared with the adjacent property at 16 Rock Bath Road to the south-east, and a total area of 1147.5sqm. Access to the site is limited to pedestrian access only, with a public pathway extending the length of Rock Bath Road.

3. THE LOCALITY

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

Dwelling houses adjoin the site to the south-east, stepping up the slope in response to the fall of the land. Dwelling houses are also located to the south-west of the site, on the opposite side of the unmade road. Surrounding and nearby dwelling houses are typically three storeys in height, are of varying age and character, and are oriented towards available views to Palm Beach, Barrenjoey Headland and the ocean. A rock shelf that is zoned for environmental conservation bounds the site to the north, separating the site from the ocean beyond. The site is in close proximity to the Palm Beach Rock Pool and the southern end of Palm Beach, otherwise known as Kiddies Corner. The Rock Bath Road public road reserve comprises existing driveways servicing the properties at 12- 14 and 16 Rock Bath Road and a public

pathway connecting Florida Road to the beach reserve, with links to individual dwellings. The road reserve contains a number of existing canopy trees

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

4. STATUTORY CONTROLS

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

- Environmental Planning and Assessment Act 1979
- Environmental Planning and Assessment Regulation 2000

- SEPP (Building Sustainability Index: BASIX) 2004;
- SEPP (Resilience and Hazards) 2021;
- SEPP (Biodiversity and Conservation) 2021.

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

C. CONTENTIONS THAT THE APPLICATION BE REFUSED

1. CONTRARY TO AIMS OF LEP

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

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

2. CONTRARY TO ZONE OBJECTIVES

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

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

3. CHARACTER, BUILT FORM, BULK AND SCALE

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 bulk impact.

The visual bulk impact of the proposed eastern extension would have adverse impact on the locality, particularly from vantage points across the broader catchment of Palm Beach.

In this submission, I ask for the proposed development to be:

- Reduced in height
- Reduced in scale to the east, and generally not to extend past the current eastern projection of the existing dwelling on the subject site, perhaps to adjacent tree to facilitate view sharing

The development has excessive bulk and scale and has unacceptable adverse impacts on neighbouring properties and the locality.

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

As detailed above, a redesign of the proposed development is strongly recommended to improve the amenity of adjoining properties, and to the broader catchment of Palm Beach.

4. DRIVEWAY DESIGN

My clients are concerned to the design and ramifications to the proposed new driveway within the Rock Bath Road public road reserve, which seeks to replace the access to my client's property and extend the existing driveway servicing 16 Rock Bath Road.

The current driveway extends to my client's property only. Due to the nature and condition of the driveway, it generally precludes illegal parking within the driveway.

My clients support the principle of a private driveway extending down to the subject site.

My client's concerns are as follows:

- The proposed driveway does not provide an adequate zone to park two B85 Vehicles on a level 5.4m x 5.4m platform with an appropriate turning bay. Kerbs, barriers and wheel stops must be provided; Swept Path Diagrams to be provided.
- The pedestrian access to 16 Rock Bath Road Palm Beach, requires to be clear of the parking zone, so as to allow a clear and safe pedestrian entry to 16 Rock Bath Road Palm Beach;
- The parking zone is required to be at the same level as the level of 16 Rock Bath Road Palm Beach, to allow direct entry without the need for steps. Additional survey is required;
- The demolition of the existing driveway will preclude my clients from vehicle access to their property at 16 Rock Bath Road Palm Beach. How is this to be resolved?

5. 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.

As referred to earlier, my clients are concerned about the excavation proposed, the stability of their land, and the potential damage to their dwelling. We ask for consideration by Council to reduce the height of the built form, by benching the proposed dwelling lower into the hillside, and providing greater east and west setbacks to achieve a better view sharing outcome. If the excavation was lowered, I would ask that the Geotechnical Engineer consider a higher level of attenuation methods to be deployed, such as rock sawing of the complete southern edge, with

attenuation cuts completed prior to the reduction of levels. I would also ask that all hydraulic extraction be deleted, and the removal of rock is carried out in geotechnical techniques that avoids the substantial risks. I am sure that Croziers could identify such an approach.

The proposed development provides excessive excavation. The excavation should be removed within the 2.5m southern setback zones. The excavation should be reduced elsewhere to reduce the risks.

I have numerous concerns:

- A mass failure of the slope that falls across the property and from 16 Rock Bath Road Palm Beach and continues above at moderate angles failing and impacting on the proposed works.
- The vibrations produced during the proposed excavation impacting on 16 Rock Bath Road Palm Beach
- The excavation collapsing onto the work site from 16 Rock Bath Road Palm Beach before retaining structures are in place.
- The proposed basement excavation affecting the footings of 16 Rock Bath Road Palm Beach causing failure.
- Excessive vibration recommendations considering the age and fragility of 16 Rock Bath Road Palm Beach
- Stability of the natural hillside slope; upslope of the proposed residence, beneath the proposed residence, downslope of the proposed residence and to all neighbour's land.
- Stability of the cliff adjacent to the site.

I have other concerns:

- The geotechnical report references "4.0m depth" however bulk excavations of up to approx. 6.5m depth are proposed across the site extending to within proximity of both side property boundaries and neighbouring residential dwellings of 16 Rock Bath Road Palm Beach. The existing levels along the boundary are at c. 31.4, whilst the proposed structure at the lowest level extends to c. 24.9 or lower
- There have been no boreholes, of any type, carried out within the zone of the deepest excavation, to the southern corner of the subject site, at the base of the existing retaining walls at @ survey mark 28.86, immediately below the top of existing retaining walls @ 31.36, immediately adjacent my client's property

My clients have geotechnical concerns.

- Stability of existing retaining walls that will remain;
- Stability of proposed retaining walls to support the excavations for the proposed residence, and external landscaping walls.
- Incomplete consideration of landslip hazards
- Incomplete consideration of Natural Hillside Slope
- Incomplete consideration of the Cliff above the Site
- Incomplete consideration to create a Large-Scale Translational Slide

- Incomplete consideration of Existing Retaining Walls
- Incomplete consideration of Proposed Retaining Walls
- Incomplete consideration of partial excavation of large boulders
- Incomplete consideration and inadequate identification of 'floaters' across neighbour's boundary
- Incomplete consideration of Surface Erosion
- Incomplete consideration of potential Rock Fall
- Incomplete consideration of landslip of soils from excavation

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

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

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

Typical conditions are as follows:

Conditions Recommended to Establish the Design Parameters

- all existing landscaping retaining walls within the site will be replaced as part of the development.
- a geotechnical investigation of the site should be carried out to confirm the subsurface conditions prior to the start of excavation. The investigation should be carried out following demolition to so access to the entire site for a drilling rig is possible.
- at least four boreholes be drilled, involving coring of the rock to assess its quality
- Cone Penetration Testing across the site to determine the soil profile and consistency;
- Boreholes for soil identification and collection of laboratory samples;
- Installation of groundwater monitoring wells with data loggers to measure groundwater levels before and during construction;
- Permeability testing in wells;
- Groundwater modelling to assess inflows and drawdown;
- Shoring wall analyses.
- Assess the groundwater level and fluctuations across the site and provide a detailed groundwater assessment to predict soil permeability, inflow rates, drawdown and its effect in the short and long term for the site and surrounding properties;
- Excavations are expected to encounter sandstone bedrock and where such excavation is carried out using a hydraulic rock hammer continuous vibration

monitoring must be carried out during rock hammer use. Vibration monitors should be set up on the adjoining houses. The ground vibration measured as peak particle velocity must not exceed 5mm/sec at the site boundaries, or 3mm/sec on older fragile properties. Lower PPV may be necessary due to the structural design of neighbouring properties

- Subject to inspection by a geotechnical engineer temporary batters for the proposed excavation should be no steeper than 1 Vertical (V) in 1 Horizontal (H) within the soil profile and extremely weathered rock and vertical in competent rock. All surcharge and footing loads must be kept well clear of the excavation perimeter.
- Where the required batters cannot be accommodated within the site geometry, or where not preferred, a retention system would be required and should be installed prior to excavation commencing.
- proposed new retaining walls should be designed using parameters set out by the geotechnical engineer, such as: For cantilever walls, adopt a triangular lateral earth pressure distribution and an 'active' earth pressure coefficient, K_a , of 0.3, for the retained height, assuming a horizontal backfill surface. A bulk unit weight of 20kN/cubm should be adopted for the soil profile. Any surcharge affecting the walls (e.g. traffic loading, live loading, compaction stresses, etc) should be allowed in the design. Propped or anchored retaining walls may be designed based on a trapezoidal lateral pressure distribution of $6H$ kPa, where H is the retained height in metres, assuming no structures are located within $2H$ of the wall. The retaining walls should be provided with complete and permanent drainage of the ground behind the walls. The subsoil drains should incorporate a non-woven geotextile fabric (e.g. Bidim A34), to act as a filter against subsoil erosion. For soldier pile walls strip drains should be placed behind the shotcrete panels. Toe resistance of the wall may be achieved by keying the footing into bedrock. An allowable lateral stress of 200kPa may be adopted for design.
- No rock anchors beyond the subject site boundary
- All proposed footings must be founded in sandstone bedrock. The footings should be designed for an allowable bearing pressure of 600kPa, subject to inspection by a geotechnical engineer prior to pouring.
- The surface water discharging from the new roof and paved areas must be diverted to outlets for controlled discharge to the existing stormwater system which appears to drain to the north. Any stormwater discharge must be spread across the slope and not discharged in a concentrated manner.
- The guidelines for Hillside Construction should also be adopted.

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

- All structural design drawings must be reviewed by the geotechnical engineer who should endorse that the recommendations contained in this report have been adopted in principle. As the construction certificate will need to be obtained prior to demolition, the structural drawings prepared for the construction certificate application will require review following completion of the geotechnical investigation and must be marked as such. The need for the geotechnical investigation following demolition must be clearly stated on the construction certificate structural drawings.

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

construction, excavations should cease, and the project Geotechnical Engineer should be contacted immediately for appropriate review.

Conditions Recommended During the Construction Period

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

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

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

- All existing and proposed surface (including roof) and subsurface drains must be subject to ongoing and regular maintenance by the property owners. In addition, such maintenance must also be carried out by a plumber at no more than ten yearly intervals; including provision of a written report confirming scope of work completed (with reference to the 'as-built' drawing) and identifying any required remedial measures.
- The existing retaining walls on the western and eastern boundaries that are to remain must be inspected by a structural engineer at no more than ten yearly intervals; including the provision of a written report confirming scope of work completed and identifying any required remedial measures
- No cut or fill in excess of 0.5m (e.g. for landscaping, buried pipes, retaining walls, etc), is to be carried out on site without prior consent from Council.
- Where the structural engineer has indicated a design life of less than 100 years then the structure and/or structural elements must be inspected by a structural engineer at the end of their design life; including a written report confirming scope of work completed and identifying the required remedial measures to extend the design life over the remaining 100 year period.

Other Conditions:

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

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

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

- Additional action to remove risk where reasonable and practical have been identified and included in the report.

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

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

6. IMPACTS UPON ADJOINING PROPERTIES: ADVERSE VIEW LOSS IMPACTS

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

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

- The height of the built form creates devastating view outcomes.
- The excessive built form to the east creates devastating view outcomes.

Particulars:

(a) The proposal is inconsistent objectives of the DCP regarding views;

(b) The proposal is inconsistent with objective and controls of the DCP regarding views and view sharing;

(c) The proposal is inconsistent with the height of building development standard under LEP and the maximum wall height and setback controls under the DCP;

(d) The application documentation has failed to accurately and comprehensively consider and document view loss impacts on affected neighbours;

(e) Given that the applicant has failed to undertake an actual view impact analysis associated with the individual impacted properties then the proposal is inconsistent with the Land and Environment Court Planning Principle contained in *Tenacity Consulting v Warringah Council* and in particular the "fourth step" regarding the reasonableness of the proposal in circumstances where impacts arise from a

development that breaches planning controls; and secondly whether a more skilful design could reduce the impact on views of neighbours.

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

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

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

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

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

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

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

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

I consider that my clients' view loss is greater than moderate. My clients' loss is best defined as severe or devastating.

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 built form is lowered, and 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. An alternative design outcome could be achieved involving a reduction to the internal floor space of the proposed upper level.

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

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

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

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

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

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

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

The proposal may also cause potential view loss of the water views from the public road, and may cause potential view loss from other neighbours who have not been notified of this DA.

The SEE has not considered the loss of street view loss from the public domain. The impact on public domain views has not been assessed by the applicant. I refer to *Rose Bay Marina Pty Limited v Woollahra Municipal Council* 2013 NSWLEC 1046. My clients contend that the public domain street view will be completely lost.

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

- *FURLONG V NORTHERN BEACHES COUNCIL* [2022] NSWLEC 1208 [NSWLEC Dismissal of Appeal]
- *DER SARKISSIAN V NORTHERN BEACHES COUNCIL* [2021] NSWLEC 1041 [NSWLEC Dismissal of Appeal]
- *WENLI WANG V NORTH SYDNEY COUNCIL* [2018] NSWLEC 122
- *REBEL MH NEUTRAL BAY PTY LTD V NORTH SYDNEY COUNCIL* [2018] NSWLEC 191
- *AHEARNE V MOSMAN MUNICIPAL COUNCIL* [2023] NSWLEC 1013

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

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

FURLONG V NORTHERN BEACHES COUNCIL [2022] NSWLEC 1208

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

I represented the neighbour in this matter.

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

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

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

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

The DDP agreed with the recommendation and refused this DA.

The Assessment Report found that:

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

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

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

The Assessment Report within the Tenacity Assessment concluded:

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

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

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

The Applicant appealed this decision.

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

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

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

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

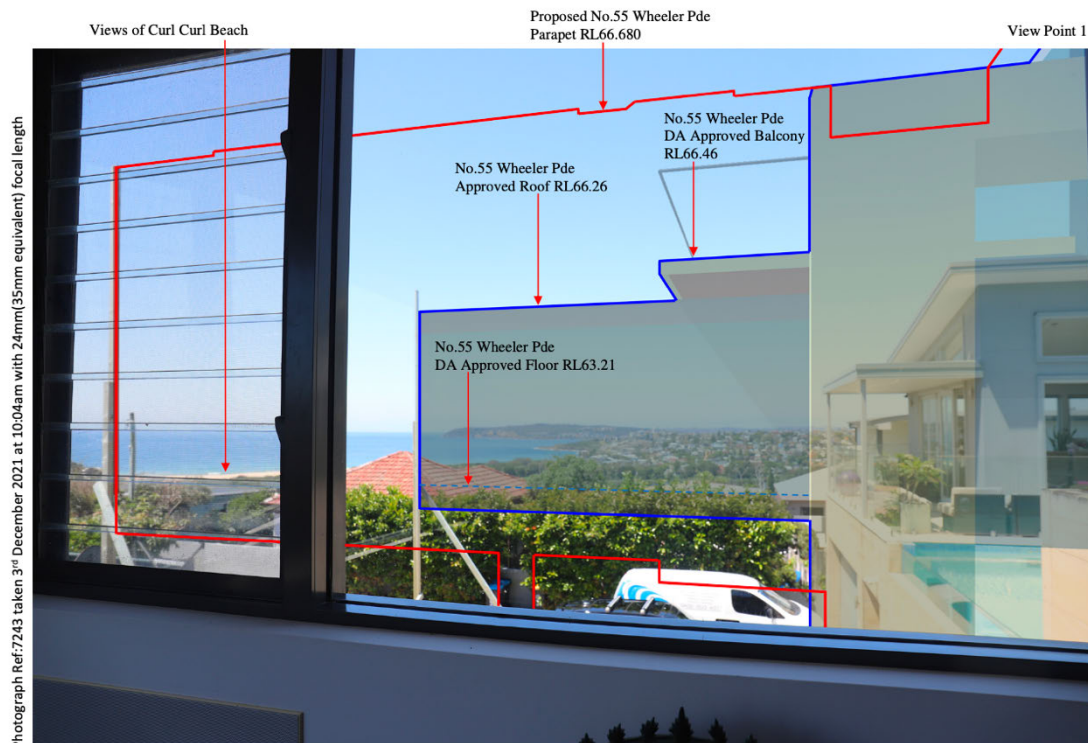
71 I consider there is force in the submission of Council that the applicant has taken a circular approach to the fourth step of Tenacity which presupposes a right to the level of amenity achieved by the proposed development. Whilst it is true that a

redevelopment similar to that provided in the Colville plan would not provide the same amenity as the proposed development, it would provide a very high level of amenity and enjoy impressive views."

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

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

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



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

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

The NSWLEC Furlong View Loss

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

However, the decision by Commissioner Walsh in *NSWLEC Furlong* has clarified the following:

1. 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*”; and
2. the proper application of the decision in *Tenacity* requires that “*the extent of view loss impact should be assessed from the property as a whole*”.

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 homeowners who will suffer from view loss from a proposed development.

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

DER SARKISSIAN V NORTHERN BEACHES COUNCIL [2021] NSWLEC 1041

My clients refer to a dismissal of a Class 1 Appeal by NSWLEC Commissioner Dr Peter Walsh on a nearby site in Curl Curl on view loss grounds. My clients refer to Der

Sarkissian v Northern Beaches Council [2021] NSWLEC 1041. [NBC DA 2019/0380, 72 Carrington Parade, Curl Curl]

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

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

The key matters within the Commissioner's Conclusion:

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

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

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

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

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

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

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

WENLI WANG V NORTH SYDNEY COUNCIL [2018] NSWLEC 122

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

In this particular case, Council is assessing a substantially non-compliant development, however view loss over a side boundary again is a key matter,

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

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

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

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

AHEARNE V MOSMAN MUNICIPAL COUNCIL [2023] NSWLEC 1013

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

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

NBC RECENT REFUSALS ON VIEW LOSS

I raise refusals by NBC DDP and NBLPP in 2022 and 2023, on view loss grounds:

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

NBLPP REFUSAL: DA2021/1408 16 ADDISON ROAD MANLY

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

The view loss was across side boundaries.

Comment to Principle 4:

The proposed development complies with the Building Height and Floor Space Ratio development standards under the Manly LEP. The subject development does not comply with the controls of the MDCP 2013 and, in the circumstance, it is found that the view loss for the neighbouring property is unacceptable and warrants the refusal of the application. The demonstrated non-compliances, being side setbacks and wall height give rise to unreasonable view impacts. It is acknowledged that the context and siting of the existing dwelling on the subject site, makes views for adjoining properties extremely vulnerable to any form of new development. However, it is concluded that the extent of the breaches of the planning controls is excessive and a more skilful and compliant design would vastly improve the outcome. The question of a more skilful design has been considered in that a close analysis of the plans identifies the opportunity to retain areas of view lines from all affected properties. The views assessment determined that there is the opportunity to significantly lessen the impact on views. While it acknowledged that that full compliance would be unreasonable given the constraints of the site, a greater level of compliance with both the wall height and side setback control would allow for view corridors to be maintained. In this regard, the development potential would not be significantly compromised. Therefore, the proposed dwelling house in particular the first-floor setback and wall height non-compliance is considered unreasonable in the circumstances of this application in that the application does not demonstrate a reasonable sharing of views.

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

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

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

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

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

The view loss however was devastating – a complete loss.

The DDP Refusal noted the following:

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

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

NBLPP REFUSAL: DA2022/0625 27 KARLOO PARADE NEWPORT

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

The view loss was severe.

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

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

The assessment read:

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

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

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

On 14 December 2022, NBLPP refused DA 2022/1158 on view loss grounds, across a side boundary. A recommendation for refusal on view loss grounds was presented by NBC Officer Peter Robinson. NBLPP Members were Biscoe, Krason, Hussey and Bush.

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

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

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

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

The Assessment Report stated:

The reasonableness of the proposal that is causing the impact is considered to be inappropriate in this instance. The proposal presents variations to the Built Form Controls, including the Landscaped Area that demonstrates the proposed development is an over-development of the subject site, as it reduces the total

landscaped area as a result of additional built form. The view impact for the rear addition to the existing dwelling house is considered to be unreasonable, and it is considered a more skilful design could be explored to reduce the impact to No.10 Baroona Road, although it is noted that the site has almost reached its highest and best use. In summary, the proposed development presents a significant view loss impact, that is unacceptable, and therefore unsupportable. The proposed development does not satisfy this outcome.

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

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

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

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

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

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

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

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

TENACITY CONSULTING V WARRINGAH COUNCIL 2004

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

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

The development breaches multiple planning controls and is unreasonable.

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

APPLICATION OF TENACITY PLANNING PRINCIPLE

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

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

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

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

STEP 1 VIEWS TO BE AFFECTED

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

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

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

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

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

STEP 2: FROM WHERE ARE VIEWS AVAILABLE

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

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

The views in all cases are available across the boundary of the subject site, from standing and seated positions. An arc of view is available when standing at highly used zones on my clients' property.

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

STEP 3: EXTENT OF IMPACT

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

Step 3 as quoted is:

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

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

The height of the built form creates devastating view outcomes.

The excessive built form to the east creates devastating view outcomes.

The view loss occurs of both levels of my client's property, I will address both levels.

UPPER LEVEL 16 ROCK BATH ROAD PALM BEACH

PHOTOS FROM ENTERTAINMENT DECK

Photo taken at the centre of circular building, 1m back from balustrade, standing position

[LIVING/DINING/KITCHEN ZONE]



SEVERE LOSS

The proposed new roof projects 8m forward of the existing ridge.

The view loss will be an expansive zone of the near water view

UPPER LEVEL 16 ROCK BATH ROAD PALM BEACH

PHOTOS FROM ENTERTAINMENT DECK

Rotated viewpoint to the north from previous photo

Photo taken at the centre of circular building, 1m back from balustrade, standing position

[LIVING/DINING/KITCHEN ZONE]



SEVERE LOSS

The proposed new roof projects 8m forward of the existing ridge.

The view loss will be an expansive zone of the near water view

LOWER LEVEL 16 ROCK BATH ROAD PALM BEACH

PHOTOS FROM WINDOWS TO HIGHLY USED LIVING ZONE

Photo taken at the window of living zone, standing position



TOTAL DEVASTATING LOSS

The proposed new roof projects 8m forward of the existing ridge, and higher than the existing lower ridge level

The view loss will be an expansive zone of the near water view, and the land/water interface, and part of Barrenjoey Headland

LOWER LEVEL 16 ROCK BATH ROAD PALM BEACH
PHOTOS FROM WINDOWS TO HIGHLY USED LIVING ZONE

Windows slightly to the east of the previous photo

Photo taken at the window of living zone, standing position



TOTAL DEVASTATING LOSS

The proposed new roof projects 8m forward of the existing ridge, and higher than the existing lower ridge level

The view loss will be an expansive zone of the near water view, and the land/water interface, and part of Barrenjoey Headland

LOWER LEVEL 16 ROCK BATH ROAD PALM BEACH
PHOTOS FROM WINDOWS TO HIGHLY USED LIVING ZONE

Windows slightly to the east of the previous photo

Photo taken at the window of living zone, standing position



TOTAL DEVASTATING LOSS

The proposed new roof projects 8m forward of the existing ridge, and higher than the existing lower ridge level

The view loss will be a total loss of near water view, the land/water interface, and part of the hillside

LOWER LEVEL 16 ROCK BATH ROAD PALM BEACH

PHOTOS FROM EXTERNAL ZONES SURROUNDING LIVING ZONES

ALL VIEWS WILL BE LOST

TOTAL DEVASTATING LOSS

Water, Water/Beach Interface, near Water/Rock Platform Interface, Beach,
Barrenjoey Headland, Barrenjoey Lighthouse

Photo taken at standing position at various locations throughout the garden zones



TOTAL DEVASTATING LOSS



TOTAL DEVASTATING LOSS



TOTAL DEVASTATING LOSS



SEVERE LOSS CAUSED BY NON-COMPLIANT FRONT SETBACK

STEP 4: REASONABLENESS

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

Step 4 is quoted below:

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

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

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

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

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

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

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

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

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

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

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

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

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

These issues warrant refusal of the DA.

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

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

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

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

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

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

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

There are 10 Coastal Tee Trees proposed on the subject site. These trees can grow to 6m high, or higher considering the protected north facing aspect.

My clients ask that none of these trees are planted within their viewing corridors. Height poles need to be erected to test the outcomes.

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:

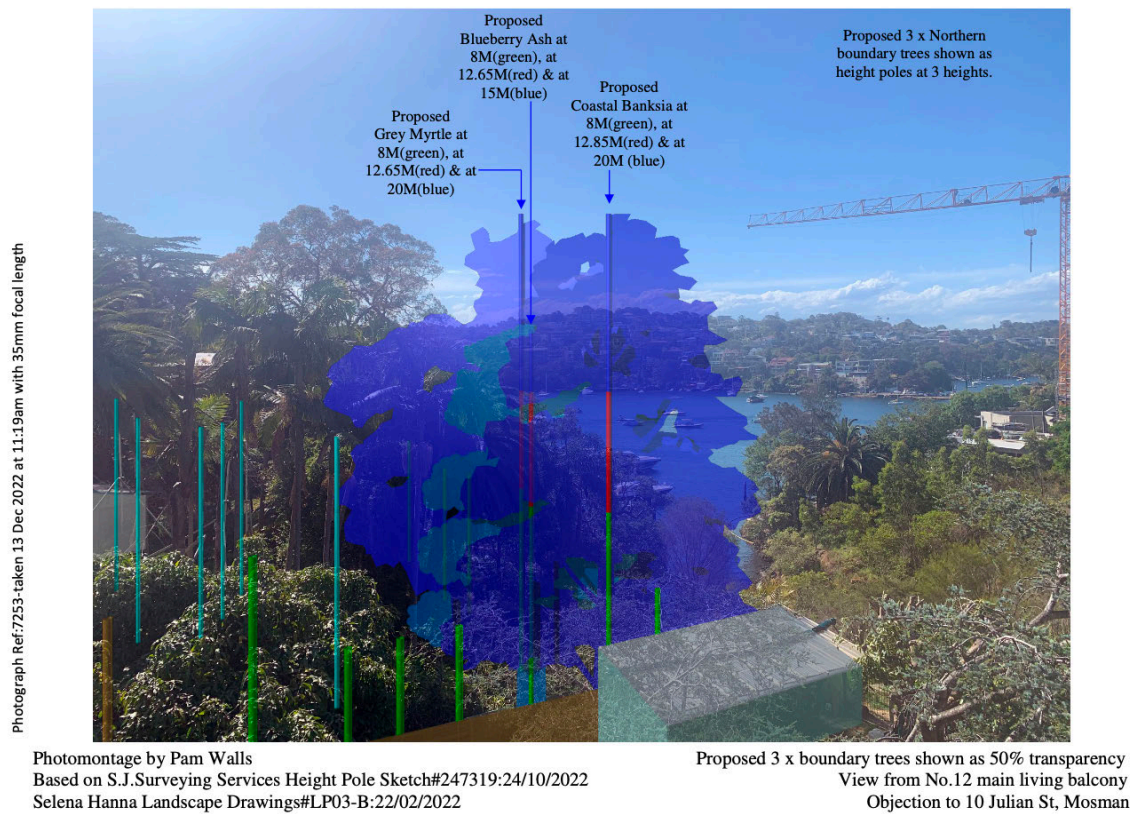
In regard to landscaping and tree protection, I note again that in Court and to some degree of detail, I worked through with the experts the various points of concern raised. This resulted in a number of further agreed alterations to the landscape plan. The Revision C drawings, based on the evidence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

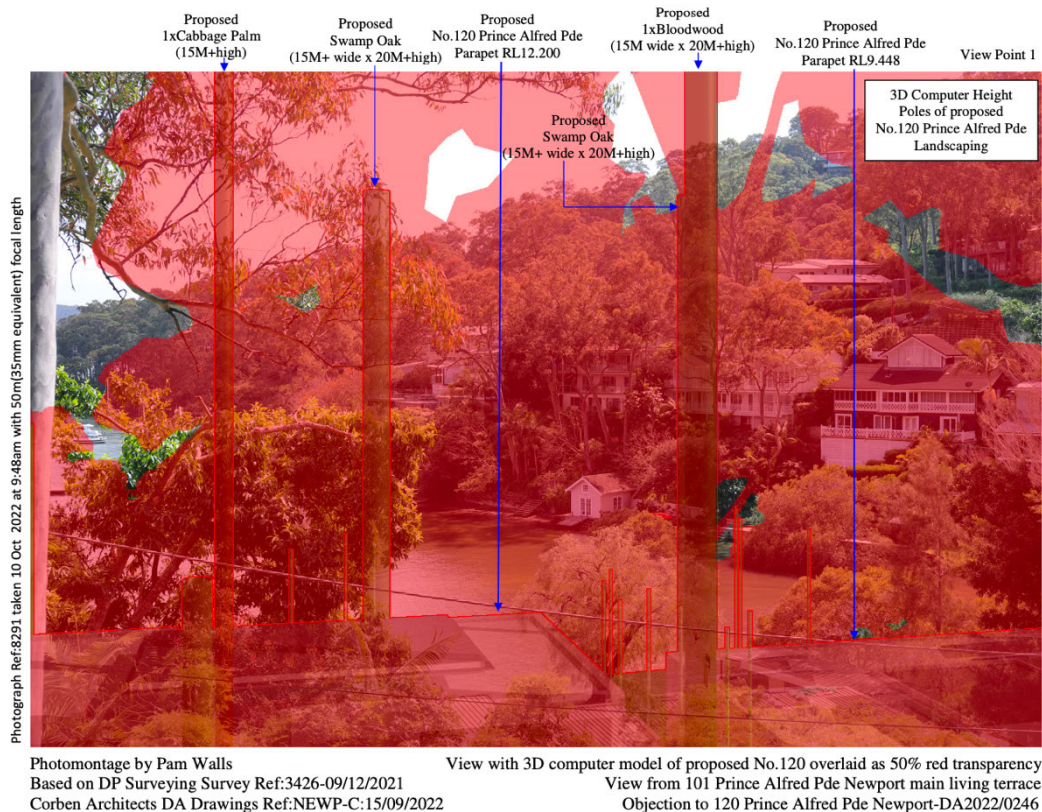


Hong v Mosman Municipal Council [2023] NSWLEC 1149
View Loss caused by excessive landscape in the harbour viewing corridor zone

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

I represented the neighbour in this matter.

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



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

At the recent NBC DDP decision, DA 2022 2280 at 47 Beatty Street Balgowlah in July 2023, the Panel agreed to delete trees higher than 6.0m in the viewing corridor as recommended by Council's Assessment Report, and imposed the additional condition 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.



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

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

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

I represented the neighbour in this matter.

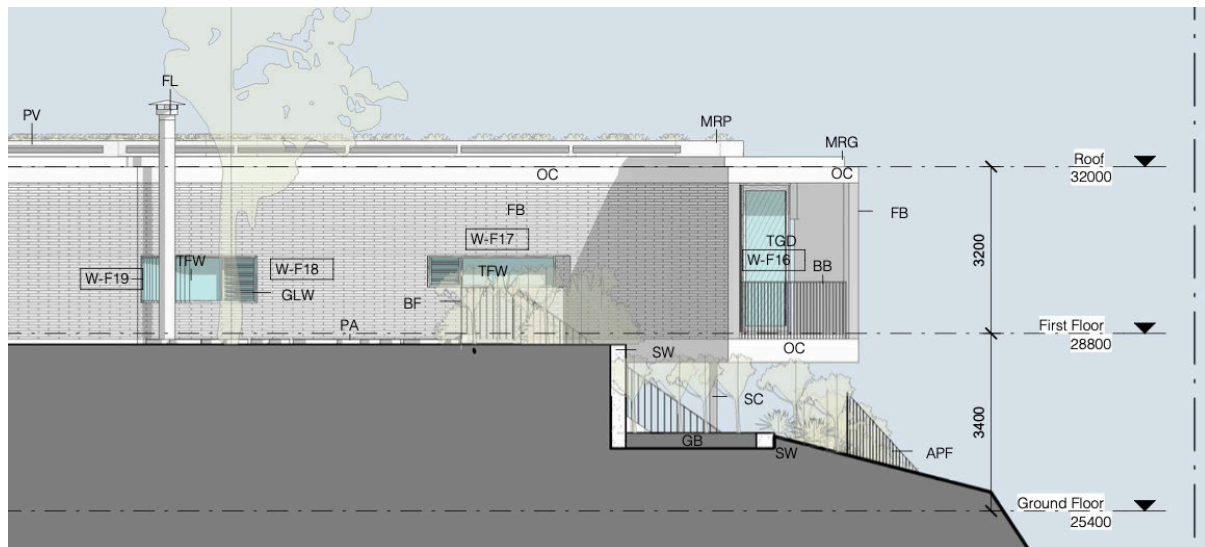
I include within this submission the view loss montages prepared by Pam Walls as a part of my submission to Council.

8. IMPACTS UPON ADJOINING PROPERTIES: PRIVACY

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

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

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



The southern elevation shows unprotected windows and terraces facing south to my client's private open space and windows. I ask for privacy devices to be deployed in these areas.

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

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

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

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

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

Response: The proposed development results in a privacy impact with the proposed windows facing neighbours without sufficient screening devices being provided, considering the proposed windows are directly opposite my clients' windows and balconies.

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

Response: The windows in question are windows of the main circulation zones and living areas, it is considered that the living areas will result in an unacceptable privacy breach. The proposed windows and decks facing 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 windows 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 most appropriate privacy screening measures to be imposed on windows and decks facing my clients' property, including landscaping

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 use of privacy devices would reduce the impact of the dwelling.

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.

9. PRECEDENT

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

10. PUBLIC INTEREST

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

D. CONTENTIONS THAT RELATE TO INSUFFICIENT & INADEQUATE INFORMATION

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

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

View Impact Analysis

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

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

Privacy Impact Analysis

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

Visual Bulk Analysis

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

Geotechnical

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

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

A compliant building design would reduce the amenity impacts identified.

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

Reduce the proposed development as follow:

1. REDUCTION OF BUILT FORM

- Erect 10 Height Poles to define leading edge of the proposed built form, and show proposed height, and position height marks on the height poles 1.0m lower, 2.0m lower and 3.0m lower than the proposed heights; lower the proposed built form to achieve a sharing of views;
- Erect 4 Height Poles to define proposed garage.
- Lower the built form to better share the views
- Reduce eastern extent of built form to better share views.
- D12.6 SIDE BUILDING LINE. Increase setback to 2.5m control. Clause D12.5 of P21 DCP prescribes a minimum setback of 2.5m or 1.0m. I contend that as my client's property is to the south of the subject site, to reduce amenity impacts, a 2.5m southern side setback should be the outcome. The proposed development is non-compliant in this regard, with structures located on the southern boundary, including deep excavation.
- Decrease excavation, with no excavation or fill in side setback zone
- Solar panels to lie flat of the roof, to be non-reflective, and not to exceed approved maximum roof height

2. PRIVACY DEVICES

- Privacy screening to a height of at least 1.7m measured from the FFL level is to be incorporated along the full extent of all windows to the side elevations, and to all balconies at the first floor which face the side boundary. Privacy screening to be fixed obscured glazing or fixed panels or battens or louver style construction (with a maximum spacing of 20mm), in materials that complement the design of the approved development.

3. LANDSCAPING

- Landscaping. Tree planting shall be located to remove impacts on view loss.

4. DRIVEWAY

- The proposed driveway does not provide an adequate zone to park two B85 Vehicles on a level 5.4m x 5.4m platform with an appropriate turning bay. Kerbs, barriers and wheel stops must be provided; Swept Path Diagrams to be provided.
- The pedestrian access to 16 Rock Bath Road Palm Beach, requires to be clear of the parking zone, so as to allow a clear and safe pedestrian entry to 16 Rock Bath Road Palm Beach;
- The parking zone is required to be at the same level as the level of 16 Rock Bath Road Palm Beach, to allow direct entry without the need for steps. Additional survey is required;
- The demolition of the existing driveway will preclude my clients from vehicle access to their property at 16 Rock Bath Road Palm Beach. How is this to be resolved?

5. CONDITIONS OF ANY CONSENT

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

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

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

- Tree Management Plan
- Ventilation - Internal Sanitary Rooms
- Utility Services Generally
- Waste Storage – Per Single Dwelling

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

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

Conditions which must be satisfied during any development work

- Asbestos Removal Signage
- Check Surveys - boundary location, building location, building height, stormwater drainage system and flood protection measures relative to Australian Height Datum
- Classification of Hazardous Waste
- Compliance with Australian Standard for Demolition
- Compliance with BCA and Insurance Requirements under the Home Building Act 1989
- Compliance with Council's Specification for Roadworks, Drainage and
- Compliance with Geotechnical / Hydrogeological Monitoring Program
- Miscellaneous Works, Road Works and, Work within the Road and Footway
- Critical Stage Inspections
- Disposal of Site Water During Construction
- Disposal of Asbestos and Hazardous Waste
- Dust Mitigation
- Erosion and Sediment Controls – Maintenance
- Footings in the vicinity of trees
- Hand excavation within tree root zones
- Hours of Work –Amenity of the Neighbourhood
- Installation of stormwater pipes and pits in the vicinity of trees
- Level changes in the vicinity of trees
- Notification of Asbestos Removal

- Maintenance of Environmental Controls
- Placement and Use of Skip Bins
- Prohibition of Burning
- Public Footpaths – Safety, Access and Maintenance
- Replacement/Supplementary trees which must be planted
- Requirement to Notify about New Evidence
- Site Cranes
- Site Waste Minimisation and Management – Construction
- Site Waste Minimisation and Management – Demolition
- Support of Adjoining Land and Buildings
- Tree Preservation
- Vibration Monitoring

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

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

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

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

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

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

Advising

- Asbestos Removal, Repair or Disturbance

- Builder's Licences and Owner-builders Permits
- Building Standards - Guide to Standards and Tolerances
- Commonwealth Disability Discrimination Act 1992
- Criminal Offences – Breach of Development Consent and Environmental Laws
- Dial Before You Dig
- Dilapidation Report
- Dividing Fences
- Lead Paint
- NSW Police Service and Road Closures
- Pruning or Removing a Tree Growing on Private Property
- Pruning or Removing a Tree Growing on Private Property
- Recycling of Demolition and Building Material
- Release of Security
- Roads Act 1993 Application
- SafeWork NSW Requirements
- Workcover requirements

F. REASONS FOR REFUSAL

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

1. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of the Environmental Planning and Assessment Act 1979
2. Adverse visual impacts to adjoining properties. The proposal raises the potential for adverse visual impacts and associated view impacts to the adjoining properties. In this regard, the proposal is contrary to the provisions of the aims of the LEP
3. Adverse visual and acoustic privacy impacts to adjoining properties. The proposal does not demonstrate effective mitigation of overlooking to adjoining properties from balconies and windows.
4. The extent of excavation is excessive. The proposal is contrary to objective of the DCP, in that it does not minimise excavation and has potential adverse impacts on existing and proposed vegetation.
5. The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy objectives and planning controls of LEP:
 - Aims of Plan
 - Zone Objectives
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 DCP:
 - Unacceptable Building Separation
 - Poor Strategic Positioning of Tree Canopy
 - Poor Garage Design
 - Excessive Excavation & Geotechnical Concerns
 - Impacts Upon Adjoining Properties: View Loss
 - Impacts Upon Adjoining Properties: Privacy
 - Impacts Upon Adjoining Properties: Visual Bulk
7. 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.

8. 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
9. 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.
10. 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.
11. The proposals are unsuitably located on the site pursuant to Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979*.
12. 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
13. The proposal is contrary to the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*. The proposed development is not in the public interest as the development is inconsistent with the scale and intensity of development that the community can reasonably expect to be provided on this site by nature of the applicable controls. The development does not represent orderly development of appropriate bulk, scale or amenity impact in the locality and approval of such a development would be prejudicial to local present and future amenity as well as desired future character and therefore is not in the public interest. The proposed development will have a detrimental impact on the amenity of adjoining residential properties, and for this reason is contrary to the public interest.

G. CONCLUSION

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

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

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

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

"The following questions are relevant to the assessment of impacts on neighbouring properties:

How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?

How reasonable is the proposal causing the impact?

How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?

Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?

Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?"

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

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

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

It is considered that the public interest is not served.

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

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

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

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

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

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

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

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.

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

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

Yours faithfully,

Bill Tulloch

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