

Greg Coppin

From: mstaunton [staunton@mpchambers.net.au]
Sent: Friday, 10 July 2009 12:52 PM
To: Noel Carroll; Tony Sattler; greg boston; Greg Coppin
Subject: This was just posted on the Court's website



Land and Environment Court of New South Wales

CITATION : **Carroll v Manly Council [2009] NSWLEC 1205**

PARTIES : APPLICANT
Noel Carroll

RESPONDENT
Manly Council

FILE NUMBER(S) : 11247 of 2008

CORAM: Tuor C

KEY ISSUES: DEVELOPMENT APPLICATION :- alterations and additions to a residential dwelling house to create two dwellings density and floor space ratio

LEGISLATION CITED: Environmental Planning and Assessment Act 1979
Manly Local Environmental Plan 1988
Manly Development Control Plan 2007

CASES CITED: Goldin & Anor v Minister for Transport Administering the Ports Corporatisation and Waterways Management Act 1995 [2002] NSWLEC 75

DATES OF HEARING: 28 May 2008
EX TEMPORE JUDGMENT DATE : 29 May 2009

LEGAL REPRESENTATIVES: APPLICANT
Mr M Staunton (barrister)
SOLICITOR
Sattler & Associates

RESPONDENT

L/N1

ALL COMMUNICATIONS TO BE
ADDRESSED TO
THE TOWN CLERK
BOX 92, P.O. MANLY 2095
TELEPHONE: 977-3411



TOWN HALL
MANLY, N.S.W. 2095

PLEASE QUOTE IN YOUR REPLY

76/1594 RJK.VC

21st September, 1976.

Mr. W.J. Humel,
88 Bower Street,
MANLY, 2095

Dear Sir,

Re: Building Application 309/76.
Erection of New Dwelling House.
No. 88 Bower Street, Manly.

Your application dated 27th August, 1976 for building approval under Part XI of the Local Government Act, 1919, and the Ordinances made thereunder has been approved, subject to the conditions listed hereunder.

In conveying this advice to you I also direct your attention to the provisions of Sections 288C, 317L, 341, 342N or 342V of the Act, one or more of which concern your right to lodge an appeal against the Council's decision.

Conditions of Approval:

1. Standard Conditions of Approval Nos. 301, 302, 303, 304, 305, 309, 311, 312, 313, 314, 316, 317, 318, 324, 328, 331, 348, 351, 352, 356, as appended.
2. The applicant's attention being drawn to Standard Conditions of Approval Nos. 304, 316, 317, 324, 331, 351 above, and the plans being amended/notated to the satisfaction of the Municipal Health & Building Surveyor prior to their release.
3. No portion of the external walling along the Eastern elevation of the proposed structure being located at less distance than 1500mm from the side boundary, with the eaves not being less than 1125mm from such boundary, and the plans being amended accordingly prior to their release.
4. Bedroom 3 having a floor area of not less than 7.5m², and the plans being suitably amended prior to their release.
5. The lessee obtaining prior approval from the owner of the property for the proposed works.

6. Pursuant to Clause 31.4 of Ordinance No. 70, the applicant -
- (i) shall at his own expense preserve and protect buildings or structures on the adjoining allotment of land from damage;
 - (ii) if necessary, support and underpin such buildings in an approved manner;
 - (iii) notify the owner of the building on the adjoining allotment of intention to excavate below the footings of the building, at least seven days prior to commencing excavations.
7. A detailed certificate, signed by a qualified practising Structural Engineer being submitted to Council, such certificate being to the effect that the proposed excavations will not cause movement or damage to the building or other structures situated on property known as No. 86 Bower Street, Manly.
8. The proposed excavations being carried out by the use of mechanical Jackpicks only, such equipment being fitted with a suitable muffling device and being operated by a suitable decibel rated compressor, details of which to be submitted for prior approval by the Municipal Health & Building Surveyor.
9. The hours of operation of excavation equipment being limited to 7 a.m. to 6 p.m. on Mondays to Fridays, and between 7 a.m. to 1 p.m. Saturdays, with total exclusion on Sundays and Public Holidays.
10. Two (2) copies of additional information relating to the proposed garage and incorporating the following details, being submitted to Council for approval prior to release of the plans :-
- (a) The overall size and height of the proposed structure.
 - (b) The extent of excavation.
 - (c) Detailed sections relating to the proposed driveway showing all gradings.
11. The proposed driveway to be graded at 1 in 8 for the first 2.5 metres inside the property, and the plans being suitably amended.
12. The site plans being suitably shaded so as to clearly show the extent of the site at the Northern end.
13. The owner being advised that the premises are situated in an area zoned Residential 2(a) under the Manly Planning Scheme in which flats are prohibited and that the proposed alterations and additions must be used only in conjunction with the remainder of the dwelling and not for separate occupation, and further, that an inspection will be made of the premises at some future date to ensure that separate occupation has not occurred.

14. The new dwelling house not being occupied until written permission to do so is given by Council.

15. The existing dwelling house being completely demolished and all building materials being removed from the allotment within three (3) months from the date of occupancy of the new building. Failure to observe this requirement will lead to Council revoking permission to occupy the new dwelling.

IT IS MOST IMPORTANT THAT THE STANDARD CONDITIONS OF APPROVAL ARE READ CAREFULLY. The Standard Conditions of Approval referred to above may be read directly from the enclosed specification listing such conditions.

Would you please arrange to call at the Building Department of this Council, between 9.00 a.m. - 10.30 a.m. and amend/notate the plans as required so that they may be issued to you with the least possible delay.

Yours faithfully,

(C.R. MENZIES)
Town Clerk

Encl.

J.H.

JUDGMENT/ORDER

COURT DETAILS

Court **LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES**
#Division **Class 1**
Registry **Level 4, 225 Macquarie Street, Sydney**
Case number **11247 of 2008**

TITLE OF PROCEEDINGS

Applicant **Noel Carroll**

Respondent **Manly Council**

DATE OF JUDGMENT/ORDER

Date made or given **29 May 2009**

Date entered **1 June 2009**

TERMS OF JUDGMENT/ORDER

1. The appeal is upheld.
2. The development application (216/07) for alterations and additions to a residential dwelling house to create two (2) dwellings at 88 Bower Street, Manly, is approved subject to the conditions in Annexure A.
3. The exhibits, except Exhibits 1, B and D may be returned.

SEAL AND SIGNATURE

Court seal

Signature

Capacity

Date

Annexure 'A'
Conditions of Consent

Carroll v Manly Council
88 Bower Street, Manly

- 1 This approval relates to Drawings/Plan Nos. DA 01b, DA 02b, DA 03b, 04b, 05b, 06b, 07b, 08b, 09b and CO01 prepared by Wolski Lycenko Brecknock Architects, all dated 25 March 2009 and received by Council on 15 April 2009.
- 2 The depth of the proposed pond is not to exceed 300mm unless made child safe to the satisfaction of Council/Accredited Certifier.
- 3 All works areas are to be fenced to prevent Bandicoots from entering construction zones. Details of fencing are to be provided to Council/Accredited Certifier prior to the issue of Construction Certificate.
- 4 All machinery and construction material stockpiles are to be inspected daily prior to operation commencing to ensure that no bandicoot are sheltering.
- 5 The construction of a vehicular footpath crossing is required. The design and construction shall be in accordance with Council's Policy. All works shall be carried out **prior to the issue of Occupation Certificate.**
- 6 The construction of a kerb layback is required. The design and construction shall be in accordance with Council's Policy. All works shall be carried out **prior to the issue of Occupation Certificate.**
- 7 The existing surplus vehicular crossing and/or kerb layback shall be removed and the kerb and nature strip reinstated **prior to issue of the Occupation Certificate.**
- 8 The driveway/access ramp grades, access and car parking facilities shall comply with the Australian Standard for Off-Street Parking AS2890.1-2004 or later editions.
- 9 A long section of the driveway shall be submitted with the Construction Certificate Application. The long section is to be drawn at a scale of 1:20 and shall include Relative Levels (RL) of the road centreline, kerb, road reserve, pavement within property and garage floor. The RLs shall include the existing levels and the designed levels.
- 10 No portion of the proposed building or works, including gates and doors during opening and closing operations are, to encroach upon any road reserve or other public land.

- 11 Pursuant to Section 97 of the Local Government Act, 1993, Council requires, **prior to issue of the Construction Certificate, or commencement of any excavation and demolition works**, payment of a Trust Fund Deposit of \$15,000.00. The Deposit is required as security of compliance with Conditions of Consent, and as security against damage to Council property during works on the site.

Note: Should Council property adjoining the site be defective eg, cracked footpath, broken kerb etc., this shall be reported in writing to Council, **at least 7 days prior to the commencement of any work on site.**

- 12 Pedestrian access, including disabled and pram access, is to be maintained throughout the course of the construction as per Australian Standard AS 1742.3, "Part 3 - Traffic control devices for works on roads".
- 13 Separate application shall be made to Council's Infrastructure Division for approval to complete, to Council's standards and specifications, works on Council property. This shall include vehicular crossings, footpaths, drainage works, kerb and guttering, brick paving, restorations and any miscellaneous works. Applications shall be made a minimum of twenty-eight (28) days prior to commencement of proposed works on Council's property. Applicant to notify Council at least 48 hrs before commencement of works to allow Council to supervise/inspect works.
- 14 Any adjustment to the public utility service is to be carried out in compliance with their standards and the cost is to be borne by the applicant.
- 15 Details of the builder's name and licence number contracted to undertake the works shall be provided to Council/Accredited Certifier **prior to issue of the Construction Certificate.**
- 16 Insurance must be undertaken with the contracted builder in accordance with the Home Building Act, 1997. Evidence of Insurance together with the contracted builders name and licence number must be submitted to Council /Accredited Certifier **prior to issue of the Construction Certificate.**
- 17 Toilet facilities are to be provided at or in the vicinity of the work site on which work involved in the erection or demolition of a building is being carried out, at the rate of one toilet for every 20 person or part of 20 persons employed at the site, by effecting either a permanent or temporary connection to the Sydney Water's sewerage system or by approved closets.

- 18 Retaining walls being constructed in conjunction with excavations with such work being in accordance with structural engineer's details. Certification of compliance with the structural detail during construction shall be submitted to the Principal Certifying Authority.
- 19 No person shall use or occupy the building or alteration which is the subject of this approval without the **prior issue of an Occupation Certificate**.
- 20 A sign must be erected on the subject site in a prominent position stating that unauthorised entry is prohibited and giving details of the name of the builder or the person responsible for the site and 24 hour contact details. The sign is to have dimensions of approximately 500mm x 400mm.

Note: The sign is not required if the building on the site is to remain occupied during the course of the building works.
- 21 All construction works shall be strictly in accordance with the Reduced Levels (RLs) as shown on the approved plans with certification being submitted to the Principal Certifying Authority during construction from a registered surveyor certifying ground and finished ridge levels.
- 22 No portion of the proposed building is to encroach onto a Public Road or Reserve, except as may be permitted by the Local Government Act 1993.
- 23 Consent given to build in close proximity to the allotment boundary is in no way to be construed as permission to build on or encroach over the allotment boundary. Your attention is directed to the provisions of the Dividing Fences Act which gives certain rights to adjoining owners, including use of the common boundary. In the absence of the structure standing well clear of the common boundary, it is recommended that you make yourself aware of your legal position which may involve a survey to identify the allotment boundary.
- 24 Four (4) certified copies of the Structural Engineer's details in respect of all reinforced concrete, structural steel support construction and any proposed retaining walls shall be submitted to the Council/Accredited Certifier **prior to the issue of the Construction Certificate**.
- 25 Where any excavation extends below the level of the base of the footing of a building on an adjoining allotment of land, the person causing the excavation shall support the neighbouring building in accordance with the requirements of the Building Code of Australia.
- 26 The floor surfaces of bathrooms, shower rooms, laundries and WC compartments are to be of an approved impervious material properly graded and drained and waterproofed in accordance with AS3740.

- Certification is to be provided to the Principal Certifying Authority from a licenced applicator prior to the fixing of any wall or floor tiles.
- 27 A suitable sub-surface drainage system being provided adjacent to all excavated areas and such drains being connected to an approved disposal system.
 - 28 The implementation of adequate care during demolition/ excavation/ building/ construction to ensure that no damage is caused to any adjoining properties.
 - 29 Prior to excavation applicants should contact the various utility providers to determine the position of any underground services.
 - 30 An adequate security fence, is to be erected around the perimeter of the site prior to commencement of any excavation or construction works, and this fence is to be maintained in a state of good repair and condition until completion of the building project.
 - 31 Building work shall not progress beyond first floor level until such time as Registered Surveyor's details of levels are submitted to the Principal Certifying Authority. These levels shall confirm that the works are in accordance with the levels shown and approved in the development approval.
 - 32 On completion of the building structure a Registered Surveyor's report is to be submitted to the Principal Certifying Authority confirming that the building has been completed in accordance with the levels as shown on the approved plan.
 - 33 All external cladding and trim of the approved building shall be of a non reflective nature (with reflectivity index of maximum 20%). Details of such finishes shall be submitted to the Council/Accredited Certifier **prior to the issue of the Construction Certificate**. This condition does not apply to windows unless those windows are tinted or have anti-glare film on them.
 - 34 Roofwater and surface stormwater from paved areas from the development shall be collected and piped to the harbour foreshore in a manner approved by the Principal Certifying Authority. If the piped system runs across park reserves, approval by Council's relevant officer shall be obtained. The stormwater disposal system must have a stilling sump and flow dissipater provided at the property line.
 - 35 A detailed stormwater management plan shall be prepared to fully comply with Council's "Specification for on-site Stormwater Management 2003" and shall be submitted with the Construction Certificate application. The stormwater management plan shall be prepared by an experienced Chartered Civil Engineer. Council/Accredited Certifier shall ensure that the design complies with

the above said specification prior to the issue of a Construction Certificate.

- 36 A dilapidation report in regard to adjoining properties and Council land is to be submitted to Council with the Trust Fund **Deposit prior to the issue of the Construction Certificate.**
- 37 All demolition is to be carried out in accordance with AS2601-2001.
- 38 Asbestos cement sheeting must be removed in accordance with the requirements of the WorkCover Authority.
- 39 A Fire Safety Schedule specifying the fire safety measures (both current and proposed) that should be implemented in the building premises shall be submitted with the Construction Certificate application, in accordance with Part 9 Clause 168 of the Environmental Planning and Assessment Regulation 2000.

Note: A Construction Certificate cannot be issued until a Fire Safety Schedule is received.

- 40 The building being erected in Type C construction for a Class 2 building in accordance with the Fire Resistance Provisions of the Building Code of Australia.
- 41 All building work must be carried out in accordance with the provisions of the Building Code of Australia.
- 42 An automatic fire detection and alarm system shall be installed in the proposed dwelling in accordance with the requirements of Part 3.7.2 of the Building Code of Australia 1996 - Housing Provisions.
- 43 No building materials, waste containers or skips may be stored on the road reserve or footpath without prior separate approval from Council, including payment of relevant fees.
- 44 All disturbed surfaces on the land resulting from the building works authorised by this approval shall be revegetated and stabilised so as to prevent any erosion either on or adjacent to the land.
- 45 The felling, lopping, topping, ringbarking, wilful destruction or removal of any tree or trees unless in conformity with this approval or subsequent approval is prohibited.
- 46 All lights used to illuminate the exterior of the buildings or site shall be positioned and/or fitted with cut off luminaries (baffles) so as to prevent the emission of direct light onto adjoining roadways and land.
- 47 Precautions shall be taken when working near trees to be retained including the following:

- do not store harmful or bulk materials or spoil under or near trees
 - prevent damage to bark and root system
 - do not use mechanical methods to excavate within root zones
 - do not add or remove topsoil from under the drip line
 - do not compact ground under the drip line.
- 48 Details are to be provided of at least three (3) existing or proposed endemic trees for the site that are typically expected to reach a height at maturity of 10 metres. A list of appropriate endemic trees for the Manly area may be obtained at Council's Customer Service desk. Details of new planting are to include appropriate siting and pot size (minimum of 25 litres) in accordance with section 3.2 of the Residential Development Control Plan 2001. Details are to be submitted **with the Construction Certificate** to the satisfaction of the Council/Accredited Certifier.
- 49 A sediment/erosion control plan for the site shall be submitted for approval to the Council/Accredited Certifier **prior to the issue of the Construction Certificate**. Implementation of the scheme shall be completed prior to commencement of any works on the site and maintained until completion of the development.
- 50 Any future structures to be erected on the site shall be the subject of a Development Application and Construction Certificate Application.
- 51 Should you appoint Council as the Principal Certifying Authority (PCA) to undertake inspections during the course of construction then the following inspection/certification are required:
- Silt control fences
 - Footing inspection - trench and steel
 - Reinforced concrete slab x 4
 - Retaining Wall steel
 - Framework inspection x 2
 - Wet area moisture barrier
 - Drainage inspection
 - Driveway crossing/kerb layback
 - Landscaping inspection
 - Final inspection
- 52 The cost of these inspections by Council is \$3,360.00 (being \$240.00 per inspection inclusive of GST). **Payment of the above amount is required prior to the first inspection. Inspection appointments can be made by contacting the Environmental Services Division on 9976 1573 or 9976 1587.**
- 53 At least 24 hours notice should be given for a request for an inspection and submission of the relevant inspection card. Any additional

inspection required as a result of incomplete works will incur a fee of \$100.00.

54 An Occupation Certificate is to be issued by the Principal Certifying Authority **prior to occupation of the development.**

55 A contribution is to be paid for the provision, extension or augmentation of community facilities, recreation facilities, open space and administration that will, or are likely to be, required as a consequence of development in the area. Total contribution for this development of **\$48,145.65** the amount of the payment shall be in accordance with the Section 94 charges as at the date of the payment. The charges may vary at the time of payment in accordance with Council's Section 94 Contributions plan to effect changes in land values, construction costs and the Consumer Price Index. This contribution shall be paid to Council prior to the release of the Construction Certificate and the amount payable shall be in accordance with Council's adopted Section 94 Contributions plan for residential development effective from **July 2008** calculated for additional persons as follows:

Traffic & Parking	\$568.08
Streetscape & Landscaping	\$2,540.68
Environmental Programs	\$3,794.00
Community Facilities	\$1,004.01
Open Space Embellishment	\$4,377.85
Open Space Acquisition	\$1,471.27
<hr/>	
Total:	\$13,755.90 per person

The calculations for DA 216/07 are as follows: 2 x 3.1 persons per allotment

Current rate of contribution (2008-2009) is \$13,755.90 per person

Therefore the total amount is 2 x 3.1 x \$13,755.90 = \$85,286.58

Note: The Section 94 Contribution fees are adjusted on the 1st July each year and are based on the March CPI figures.

56 However, credit can be given for the existing dwelling on site (2.7 x 1 x \$13,755.90 = \$37,140.93). Therefore the required amount would be \$85,286.58 - \$37,140.93 = **\$48,145.65.**

57 All excavated material should be removed from the site in an approved manner and be disposed of lawfully to a tip or other authorised disposal area.

58 Roof and framing including provision for tie downs, bracing and fixings are to be designed by a practising Structural Engineer. The Engineer is to specify appropriate wind category relating to the site terrain, house design and height of the structure, with details being submitted to the

Principal Certifying Authority prior to the commencement of framework.

- 59 Building or construction work must be confined to the hours between 7.00am to 6.00pm, Monday to Friday and 7.00am to 1.00pm, Saturday, with a total exclusion of such work on Public Holidays and Sundays. Non-offensive works where power operated plant is not used and including setting out, surveying, plumbing, electrical installation, tiling, internal timber or fibrous plaster fixing, glazing, cleaning down brickwork, painting, building or site cleaning by hand shovel and site landscaping, is permitted between the hours of 1.00pm to 4.00pm Saturdays.

Note: That the Protection of the Environment Operations Act 1997 may preclude the operation of some equipment on site during these permitted working hours.

- 60 The capacity and effectiveness of erosion and sediment control devices must be maintained to Council's satisfaction at all times.
- 61 A copy of the Soil and Water Management Plan must be kept on-site at all times and made available to Council officers on request.
- 62 Stockpiles are not permitted to be stored on Council property (including nature strip) unless prior approval has been granted.
- 63 Stockpiles of topsoil, sand, aggregate, spoil or other material shall be stored clear of any drainage line or easement, natural watercourse, kerb or road surface.
- 64 Drains, gutters, roadways and access ways shall be maintained free of sediment and to the satisfaction of Council. Where required, gutters and roadways shall be swept regularly to maintain them free from sediment.
- 65 Building operations such as brickcutting, washing tools or paint brushes, and mixing mortar not be performed on the roadway or public footway or any other locations which could lead to the discharge of materials into the stormwater drainage system.
- 66 Stormwater from roof areas shall be linked via a temporary downpipe to a Council approved stormwater disposal system immediately after completion of the roof area. Inspection of the building frame will not be made until this is completed to Council's satisfaction.
- 67 The applicant and/or builder must prior to the commencement of work, install at the periphery of the site, measures to control sedimentation and the possible erosion of the land.

The measures must include:

- (i) siltation fencing;
 - (ii) protection of the public stormwater system; and
 - (iii) site entry construction to prevent vehicles that enter and leave the site from tracking loose material onto the adjoining public place.
- 68 Details of the method of termite protection which will provide whole of building protection, inclusive of structural and non-structural elements, shall be submitted to the Council/Accredited Certifier **prior to issue of the Construction Certificate**. Attention is drawn to the provisions of Australian Standard 3660.1 "Protection of Buildings from Subterranean Termites - New Buildings" and to Council's Code for the "Protection of Buildings Against Termite Attack".
- 69 **Prior to issue of the Occupation Certificate**, a durable termite protection notice shall be permanently fixed to the building in a prominent location detailing the form of termite protection which has been used in accordance with Council's Code for the "Protection of Buildings Against Termite Attack".
- 70 This approval shall expire if the development hereby permitted is not commenced within 5 years of the date hereof or any extension of such period which Council may allow in writing on an application made before such an expiry.
- 71 The landscaping plan shall be amended to be consistent with the architectural plans prior to the issue of a construction certificate and in particular tall (3m or higher) tree planting shall be contained within Lot 3 DP 8075 and shall maintain a view corridor along the common boundary with 92 Bower Street.
- 72 A lightweight timber battened privacy screen 1.5m high shall be provided along the full west (short) sides of car spaces 1 and 2 and shall extend along 50% of the north (long) side of car space 2. Details of the privacy screen are to be provided to Council/Accredited Certifier **prior to the issue of Construction Certificate**.

Annelise Tuor
Commissioner of the Court
ljr

Ms C Schofield (solicitor)
SOLICITOR
Pikes Lawyers

JUDGMENT:

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

Tuor C

29 May 2009

11247 of 2008 Noel Carroll v Manly Council

**This decision was given extemporaneously.
It has been revised and edited prior to publication.**

JUDGMENT

1 **Commissioner:** This is an appeal against the refusal by Manly Council (the council) of a development application (216/07) for alterations and additions to a residential dwelling house to create two dwellings at 88 Bower Street, Manly (the site).

2 Council contends that the proposal is an overdevelopment of the site due to the excessive density and floor space and that the proposal is not in the public interest because of the departures from the planning controls.

The site and its locality

3 The site is located on the northern side of Bower Street. It is irregular in shape with an area of 679.4sqm, a 26.715m frontage to Bower Street and a 14.275 frontage to the Marine Parade pedestrian walkway along the ocean. There is also an area of about 56sqm between the site's northern boundary and the pedestrian walkway which is held under licence from the Department of Lands.

4 The site is developed with a part two/part three storey brick dwelling . An elevated driveway provides access to two onsite parking spaces. There is a large Moreton Bay Fig and a number of palm trees on the site near Bower Street. The site falls from Bower Street towards Marine Parade.

5 The locality is a residential area with a mix of detached houses to the east and residential flat buildings to the west. The topography of the area rises to the east with the adjoining two storey dwelling (86 Bower Street) being elevated above the site.

Planning controls

6 The site is within Zone 2 Residential under *Manly Local Environmental Plan 1988* (LEP1988). The proposal is permissible with consent. Clause 10(3) of LEP 1988 requires the consent authority to be satisfied that the proposal is consistent with the objectives of the zone. Council contends that the proposal does not meet the following objectives of the Residential zone:

.....
(b) to delineate, by means of development control in the supporting material, the nature and intended future of the residential areas within the Municipality,

(c) to allow a variety of housing types while maintaining the existing character of residential areas throughout the Municipality,

(d) to ensure that building form, including alterations and additions, does not degrade the amenity of surrounding residents or the existing quality of the environment,

.....
(h) to encourage the revitalisation of residential areas by rehabilitation and suitable redevelopment, and

.....

7 The site is within a Foreshore Scenic Protection Area. Clause 17 of LEP 1988 requires that the development not have a detrimental effect on the amenity of the Foreshore Scenic Protection Area. Council did not raise this as an issue.

8 *Manly Development Control Plan for the Residential Zone 2007* (the DCP) is relevant. The site is located within density sub-zone 5. Clause 3.2.2 of the DCP permits a maximum density of one dwelling/500 sqm of site area in sub-zone 5. Clause 3.4.2(a) of the DCP permits a maximum floor space ratio (FSR) of 0.5:1. The proposal exceeds both these numerical controls.

9 The existing dwelling and the proposed development do not comply with other numerical controls in the DCP but council did not press these as an issue.

The evidence

10 The Court visited the site. Statements of Evidence and a Joint Report of Mr S Layman, for the council and Mr G Boston and Mr G Coppin, for the applicant were tendered, but the experts were not required for cross-examination.

11 No objectors gave evidence on site but their written submissions were tendered. The Owners Corporation and individual owners of the adjoining property (92 Bower Street) raised concerns particularly about privacy impacts from the proposal. The experts did not support these concerns but suggested privacy screens around the parking area. The proposal also includes privacy screens on some windows and the balcony.

Excessive density

12 Mr Layman stated that different residential zones generally distinguish different density of residential development. In Manly there is only one residential zone but the density sub-zones in the DCP provide a mechanism to delineate the different character of residential areas. He considered the variation to the density control in cl 3.2.2 of the DCP would in effect be changing the zone. In his opinion, this would set a precedent and undermine the planning regime for residential density in Manly.

13 Mr Layman considered the proposal did not satisfy the objectives of the Residential zone in LEP 1988 or the density control in the DCP. In his opinion, the existing high density development in the locality did not reflect the desired future character of the area sought by the planning controls.

14 Mr Boston noted that multi-unit development is permissible throughout the Residential zone regardless of the density sub-zone. While the proposal does not comply with the numerical control in cl 3.2.2 for density sub-zone 5, in Mr Boston's opinion, it met the objectives of the control. He stated that the site is located near the boundary of density sub-zone 3 which permits one dwelling/250sqm of site area. Adjoining development between the site and the sub-zone boundary (92 and 94 Bower Street and 5 Marine Parade) are multi-unit dwellings which exceed the density control for sub-zone 5. The proposal retains a single dwelling presentation, does not result in adverse residential amenity impacts and maintains the character of the locality.

15 Part 3 of the DCP requires that variation from numerical controls will not only need to meet the objectives of the control, but demonstrate that a more desirable outcome is achieved. Mr Boston considered that a more desirable outcome is achieved:

given that the variation to the dwelling density standard will provide for adaptive reuse of the existing dwelling and increase the availability and variety of dwellings in this locality without unacceptable impact on the natural environment, views, privacy, solar access or visual amenity.

The proposed development exhibits exceptional design quality providing a built form outcome which presents as a single dwelling house when viewed from the adjacent private and public domains. To that extent, the existing character of development on this site and how it relates to its context, will not be materially altered as a consequence of the increased dwelling density proposed.

Having regard to the objectives contained in LEP 1998, the DCP and those pertaining to clause 3.2 of the DCP and the particular site and built form circumstances identified I have formed the opinion that the development will not undermine the integrity and intent of the density Sub-zone 5, will not diminish the quality of the residential environment and will not provide for the inappropriate or unsuitable development of the site...

Findings

16 The parties agreed that the DCP must be the focal point for the assessment of the application and that real, proper and genuine consideration must be given to the DCP controls, but that the controls are discretionary.

17 Mr Staunton, for the applicant, submits "that in the exercise of discretion, the consent authority will have regard to whether the objectives of the control are achieved, notwithstanding the non-compliance with the numerical controls".

18 The proposal provides two dwellings on the site with an area of 679 sqm, which exceeds the numerical control in cl 3.2.2 of the DCP by some 32%. Ms Schofield, for the council, submits that this variation is beyond the flexibility that should be applied to the application of the DCP.

19 The objectives of the residential density control in cl 3.2 of the DCP are relevantly:

- (a) to regulate the number of dwellings in specific areas,*
- (b) to promote a variety of dwelling types and residential environments in the LGA, and*
- (c) to assist in maintaining the character of the locality.*

.....

20 I accept Mr Boston's evidence that the proposal satisfies the objectives of the density control in cl 3.2. While the proposal provides two dwellings on the site where there is currently one, there is no appreciable difference to the scale and form of the development or the area of open space. The perception of density of the development will be no different to its current appearance.

21 The proposal is located at the boundary of two density sub-zones and forms a transition between the high density sub-zone of residential flat buildings to the west and the lower density sub-zone of single dwellings to the east. The proposal will add to the variety of dwelling types without changing the residential character of the locality. It will retain a similar form and scale to the other existing single dwellings while providing two dwellings on the site. It therefore meets objectives (a), (b) and (c) of cl 3.2 of the DCP.

22 I also accept Mr Boston's evidence that a more desirable outcome is achieved and that the proposal meets the requirements of Part 3 of the DCP. I do not accept Mr Layman's evidence that the proposal will affect a rezoning of the land. Multi-unit development is permissible in all density sub-zones and the proposal meets the objectives of the Residential zone under LEP 1988. It satisfies the objectives of the DCP density control and therefore is consistent with the intended future of the residential area and meets objective (b) of the Residential zone in LEP 1988. As previously stated, it provides a different housing type while maintaining the character of the area and therefore meets objective (c) of the Residential zone in LEP 1988.

23 The proposal does not degrade the amenity of surrounding residents or the existing quality of the environment and therefore meets objective (d) of the Residential zone in LEP 1988.

24 The proposal will provide alterations and additions to an existing dwelling and is consistent with objective (h) of the Residential zone in LEP 1988.

Floor Space Ratio

25 The proposal exceeds the FSR control in cl 3.4 of the DCP. The control will permit 305sqm of gross floor area. The existing dwelling has 350sqm and the proposal 379sqm. The floor space of the proposal therefore provides an additional 29sqm above the gross floor area of the existing dwelling.

26 Mr Layman accepted that strict compliance with the FSR control is not necessary given the floor space of the existing dwelling. He further accepts that the proposal is not inconsistent with the existing context, but, in his opinion, it is inconsistent with the desired future character of the sub-zone.

27 Mr Boston considered that the bulk of the existing and proposed development was appropriate within the context of the site and did not result in adverse amenity impacts. He stated that the proposal met the objectives of the standard.

28 Mr Coppin's evidence is that the additional 29sqm of floor space would not add to the perception of the bulk of the building beyond that which currently exists.

Findings

29 The objectives of the FSR control in cl 3.4 of the DCP include:

(a) to assist in controlling the bulk of the buildings, and

.....

(c) to ensure the scale of development is consistent with the existing and desired character of the residential area.

30 I accept Mr Boston's evidence that the proposal meets these objectives. The bulk of the existing building is acceptable and the proposal will not add to this bulk in an appreciable manner. It therefore meets objective (a) of cl 3.4 of the DCP.

31 The scale of the proposal is less than the adjoining single dwelling house to the east and is similar to that of the recent residential flat building to the west. The proposal is compatible with the existing character of the area. I do not accept Mr Layman's evidence that the desired character of the area within the planning controls would be materially different to the character that currently exists within the context of the existing site such that the scale of the development would be inconsistent. The proposal therefore meets objective (c) of cl 3.4 of the DCP.

Overdevelopment

32 Council contends that due to the unsatisfactory density and FSR, the proposal is an overdevelopment of the site. I have not accepted that the density and FSR are unacceptable and it therefore it follows that the proposal is not an overdevelopment of the site.

Public interest

33 Council contends that approval of the proposal would undermine the planning regime in LEP 1988 and the DCP and would therefore not be in the public interest. The proposal has been assessed against the relevant planning controls and I am satisfied that while the proposal does not comply with the numerical density and FSR controls, it meets the objectives of these controls, the objectives of the DCP and the Residential zone objectives in LEP 1988. It therefore does not offend the public interest.

Precedent

34 Council is concerned that the proposal will set a precedent for approval of other similar applications. Mr Staunton referred to *Goldin & Anor v Minister for Transport Administering the Ports Corporatisation and Waterways Management Act 1995* [2002] NSWLEC 75. He submits that:

precedent can be a relevant consideration in planning appeals however two matters need to be present. The first is that the development must be likely to lead to others of a similar character and the second is that

the totality would prove to be objectionable.

35 I do not accept that the proposal will set a precedent for other developments. The site is within a specific planning framework at the edge of a density sub-zone within a context of residential flat buildings and houses that are of a similar or larger scale to the proposal. The site is also in a particular topographical location with a clear character.

36 The proposal, although for two dwellings where there is currently one, will appear of a similar scale and bulk to the existing dwelling. The proposal provides open space for each dwelling and the additional parking is provided in a manner where it does not impact on the streetscape. In addition, the experts agree that the proposal does not result in adverse amenity impacts on adjoining properties.

37 The merits of the proposal are therefore acceptable within the context of the planning controls. The merits of any other similar proposal would also need to be addressed within the context of the planning controls. For these reasons the proposal will not set a precedent.

Conditions

38 The conditions are agreed between the parties except for condition 70 which proposes a two year consent. This is a standard condition imposed by the council on the basis that the planning regime may change. The applicant seeks a five year consent. I accept Mr Staunton's submission that a five year consent is appropriate given the potential time that may be involved to activate the consent. The proposal is acceptable within the context of the current controls. There is no evidence that the planning controls would change within the foreseeable future to such an extent as to render the proposal unacceptable.

Orders

39 The orders of the Court are therefore:

1. The appeal is upheld.
2. The development application (216/07) for alterations and additions to a residential dwelling house to create two (2) dwellings at 88 Bower Street, Manly, is approved subject to the conditions in Annexure A.
3. The exhibits, except Exhibits 1, B and D may be returned.

Annelise Tuor
Commissioner of the Court

Annexure 'A'
Conditions of Consent
Carroll v Manly Council
88 Bower Street, Manly

1 This approval relates to Drawings/Plan Nos. DA 01b, DA 02b, DA 03b, 04b, 05b, 06b, 07b, 08b, 09b and CO01 prepared by Wolski Lycenko Brecknock Architects, all dated 25 March 2009 and received by Council on 15 April 2009.

2 The depth of the proposed pond is not to exceed 300mm unless made child safe to the

satisfaction of Council/Accredited Certifier.

3 All works areas are to be fenced to prevent Bandicoots from entering construction zones. Details of fencing are to be provided to Council/Accredited Certifier prior to the issue of Construction Certificate.

4 All machinery and construction material stockpiles are to be inspected daily prior to operation commencing to ensure that no bandicoot are sheltering.

5 The construction of a vehicular footpath crossing is required. The design and construction shall be in accordance with Council's Policy. All works shall be carried out **prior to the issue of Occupation Certificate.**

6 The construction of a kerb layback is required. The design and construction shall be in accordance with Council's Policy. All works shall be carried out **prior to the issue of Occupation Certificate.**

7 The existing surplus vehicular crossing and/or kerb layback shall be removed and the kerb and nature strip reinstated **prior to issue of the Occupation Certificate.**

8 The driveway/access ramp grades, access and car parking facilities shall comply with the Australian Standard for Off-Street Parking AS2890.1-2004 or later editions.

9 A long section of the driveway shall be submitted with the Construction Certificate Application. The long section is to be drawn at a scale of 1:20 and shall include Relative Levels (RL) of the road centreline, kerb, road reserve, pavement within property and garage floor. The RLs shall include the existing levels and the designed levels.

10 No portion of the proposed building or works, including gates and doors during opening and closing operations are, to encroach upon any road reserve or other public land.

11 Pursuant to Section 97 of the Local Government Act, 1993, Council requires, **prior to issue of the Construction Certificate, or commencement of any excavation and demolition works**, payment of a Trust Fund Deposit of \$15,000.00. The Deposit is required as security of compliance with Conditions of Consent, and as security against damage to Council property during works on the site.

Note: Should Council property adjoining the site be defective eg, cracked footpath, broken kerb etc., this shall be reported in writing to Council, **at least 7 days prior to the commencement of any work on site.**

12 Pedestrian access, including disabled and pram access, is to be maintained throughout the course of the construction as per Australian Standard AS 1742.3, "Part 3 - Traffic control devices for works on roads".

13 Separate application shall be made to Council's Infrastructure Division for approval to complete, to Council's standards and specifications, works on Council property. This shall include vehicular crossings, footpaths, drainage works, kerb and guttering, brick paving, restorations and any miscellaneous works. Applications shall be made a minimum of twenty-eight (28) days prior to commencement of proposed works on Council's property. Applicant to notify Council at least 48 hrs before commencement of works to allow Council to supervise/inspect works.

14 Any adjustment to the public utility service is to be carried out in compliance with their standards and the cost is to be borne by the applicant.

15 Details of the builder's name and licence number contracted to undertake the works shall be provided to Council/Accredited Certifier **prior to issue of the Construction Certificate.**

16 Insurance must be undertaken with the contracted builder in accordance with the Home Building Act, 1997. Evidence of Insurance together with the contracted builders name and licence number must be submitted to Council /Accredited Certifier **prior to issue of the Construction Certificate.**

17 Toilet facilities are to be provided at or in the vicinity of the work site on which work involved in the erection or demolition of a building is being carried out, at the rate of one toilet for every 20 person or part of 20 persons employed at the site, by effecting either a permanent or temporary connection to the Sydney Water's sewerage system or by approved closets.

18 Retaining walls being constructed in conjunction with excavations with such work being in accordance with structural engineer's details. Certification of compliance with the structural detail during construction shall be submitted to the Principal Certifying Authority.

19 No person shall use or occupy the building or alteration which is the subject of this approval without the **prior issue of an Occupation Certificate.**

20 A sign must be erected on the subject site in a prominent position stating that unauthorised entry is prohibited and giving details of the name of the builder or the person responsible for the site and 24 hour contact details. The sign is to have dimensions of approximately 500mm x 400mm.

Note: The sign is not required if the building on the site is to remain occupied during the course of the building works.

21 All construction works shall be strictly in accordance with the Reduced Levels (RLs) as shown on the approved plans with certification being submitted to the Principal Certifying Authority during construction from a registered surveyor certifying ground and finished ridge levels.

22 No portion of the proposed building is to encroach onto a Public Road or Reserve, except as may be permitted by the Local Government Act 1993.

23 Consent given to build in close proximity to the allotment boundary is in no way to be construed as permission to build on or encroach over the allotment boundary. Your attention is directed to the provisions of the Dividing Fences Act which gives certain rights to adjoining owners, including use of the common boundary. In the absence of the structure standing well clear of the common boundary, it is recommended that you make yourself aware of your legal position which may involve a survey to identify the allotment boundary.

24 Four (4) certified copies of the Structural Engineer's details in respect of all reinforced concrete, structural steel support construction and any proposed retaining walls shall be submitted to the Council/Accredited Certifier **prior to the issue of the Construction Certificate.**

25 Where any excavation extends below the level of the base of the footing of a building on an adjoining allotment of land, the person causing the excavation shall support the neighbouring

building in accordance with the requirements of the Building Code of Australia.

26 The floor surfaces of bathrooms, shower rooms, laundries and WC compartments are to be of an approved impervious material properly graded and drained and waterproofed in accordance with AS3740. Certification is to be provided to the Principal Certifying Authority from a licenced applicator prior to the fixing of any wall or floor tiles.

27 A suitable sub-surface drainage system being provided adjacent to all excavated areas and such drains being connected to an approved disposal system.

28 The implementation of adequate care during demolition/ excavation/ building/ construction to ensure that no damage is caused to any adjoining properties.

29 Prior to excavation applicants should contact the various utility providers to determine the position of any underground services.

30 An adequate security fence, is to be erected around the perimeter of the site prior to commencement of any excavation or construction works, and this fence is to be maintained in a state of good repair and condition until completion of the building project.

31 Building work shall not progress beyond first floor level until such time as Registered Surveyor's details of levels are submitted to the Principal Certifying Authority. These levels shall confirm that the works are in accordance with the levels shown and approved in the development approval.

32 On completion of the building structure a Registered Surveyor's report is to be submitted to the Principal Certifying Authority confirming that the building has been completed in accordance with the levels as shown on the approved plan.

33 All external cladding and trim of the approved building shall be of a non reflective nature (with reflectivity index of maximum 20%). Details of such finishes shall be submitted to the Council/Accredited Certifier **prior to the issue of the Construction Certificate**. This condition does not apply to windows unless those windows are tinted or have anti-glare film on them.

34 Roofwater and surface stormwater from paved areas from the development shall be collected and piped to the harbour foreshore in a manner approved by the Principal Certifying Authority. If the piped system runs across park reserves, approval by Council's relevant officer shall be obtained. The stormwater disposal system must have a stilling sump and flow dissipater provided at the property line.

35 A detailed stormwater management plan shall be prepared to fully comply with Council's "Specification for on-site Stormwater Management 2003" and shall be submitted with the Construction Certificate application. The stormwater management plan shall be prepared by an experienced Chartered Civil Engineer. Council/Accredited Certifier shall ensure that the design complies with the above said specification prior to the issue of a Construction Certificate.

36 A dilapidation report in regard to adjoining properties and Council land is to be submitted to Council with the Trust Fund **Deposit prior to the issue of the Construction Certificate**.

37 All demolition is to be carried out in accordance with AS2601-2001.

38 Asbestos cement sheeting must be removed in accordance with the requirements of the WorkCover Authority.

39 A Fire Safety Schedule specifying the fire safety measures (both current and proposed) that should be implemented in the building premises shall be submitted with the Construction Certificate application, in accordance with Part 9 Clause 168 of the Environmental Planning and Assessment Regulation 2000.

Note: A Construction Certificate cannot be issued until a Fire Safety Schedule is received.

40 The building being erected in Type C construction for a Class 2 building in accordance with the Fire Resistance Provisions of the Building Code of Australia.

41 All building work must be carried out in accordance with the provisions of the Building Code of Australia.

42 An automatic fire detection and alarm system shall be installed in the proposed dwelling in accordance with the requirements of Part 3.7.2 of the Building Code of Australia 1996 - Housing Provisions.

43 No building materials, waste containers or skips may be stored on the road reserve or footpath without prior separate approval from Council, including payment of relevant fees.

44 All disturbed surfaces on the land resulting from the building works authorised by this approval shall be revegetated and stabilised so as to prevent any erosion either on or adjacent to the land.

45 The felling, lopping, topping, ringbarking, wilful destruction or removal of any tree or trees unless in conformity with this approval or subsequent approval is prohibited.

46 All lights used to illuminate the exterior of the buildings or site shall be positioned and/or fitted with cut off luminaries (baffles) so as to prevent the emission of direct light onto adjoining roadways and land.

47 Precautions shall be taken when working near trees to be retained including the following:

- do not store harmful or bulk materials or spoil under or near trees
- prevent damage to bark and root system
- do not use mechanical methods to excavate within root zones
- do not add or remove topsoil from under the drip line
- do not compact ground under the drip line.

48 Details are to be provided of at least three (3) existing or proposed endemic trees for the site that are typically expected to reach a height at maturity of 10 metres. A list of appropriate endemic trees for the Manly area may be obtained at Council's Customer Service desk. Details of new planting are to include appropriate siting and pot size (minimum of 25 litres) in accordance with section 3.2 of the Residential Development Control Plan 2001. Details are to be submitted **with the Construction Certificate** to the satisfaction of the Council/Accredited Certifier.

49 A sediment/erosion control plan for the site shall be submitted for approval to the Council/Accredited Certifier **prior to the issue of the Construction Certificate**. Implementation of the scheme shall be completed prior to commencement of any works on the site and maintained until completion of the development.

50 Any future structures to be erected on the site shall be the subject of a Development Application and Construction Certificate Application.

51 Should you appoint Council as the Principal Certifying Authority (PCA) to undertake inspections during the course of construction then the following inspection/certification are required:

- Silt control fences
- Footing inspection - trench and steel
- Reinforced concrete slab x 4
- Retaining Wall steel
- Framework inspection x 2
- Wet area moisture barrier
- Drainage inspection
- Driveway crossing/kerb layback
- Landscaping inspection
- Final inspection

52 The cost of these inspections by Council is \$3,360.00 (being \$240.00 per inspection inclusive of GST). **Payment of the above amount is required prior to the first inspection. Inspection appointments can be made by contacting the Environmental Services Division on 9976 1573 or 9976 1587.**

53 At least 24 hours notice should be given for a request for an inspection and submission of the relevant inspection card. Any additional inspection required as a result of incomplete works will incur a fee of \$100.00.

54 An Occupation Certificate is to be issued by the Principal Certifying Authority **prior to occupation of the development.**

55 A contribution is to be paid for the provision, extension or augmentation of community facilities, recreation facilities, open space and administration that will, or are likely to be, required as a consequence of development in the area. Total contribution for this development of **\$48,145.65** the amount of the payment shall be in accordance with the Section 94 charges as at the date of the payment. The charges may vary at the time of payment in accordance with Council's Section 94 Contributions plan to effect changes in land values, construction costs and the Consumer Price Index. This contribution shall be paid to Council prior to the release of the Construction Certificate and the amount payable shall be in accordance with Council's adopted Section 94 Contributions plan for residential development effective from **July 2008** calculated for additional persons as follows:

Traffic & Parking \$568.08
 Streetscape & Landscaping \$2,540.68
 Environmental Programs \$3,794.00
 Community Facilities \$1,004.01
 Open Space Embellishment \$4,377.85
 Open Space Acquisition \$1,471.27

Total: \$13,755.90 per person

The calculations for DA 216/07 are as follows: 2 x 3.1 persons per allotment
 Current rate of contribution (**2008-2009**) is \$13,755.90 per person
 Therefore the total amount is 2 x 3.1 x \$13,755.90 = \$85,286.58

Note: The Section 94 Contribution fees are adjusted on the 1st July each year and are based on the March CPI figures.

56 However, credit can be given for the existing dwelling on site ($2.7 \times 1 \times \$13,755.90 = \$37,140.93$). Therefore the required amount would be $\$85,286.58 - \$37,140.93 = \mathbf{\$48,145.65}$.

57 All excavated material should be removed from the site in an approved manner and be disposed of lawfully to a tip or other authorised disposal area.

58 Roof and framing including provision for tie downs, bracing and fixings are to be designed by a practising Structural Engineer. The Engineer is to specify appropriate wind category relating to the site terrain, house design and height of the structure, with details being submitted to the Principal Certifying Authority **prior to the commencement of framework**.

59 Building or construction work must be confined to the hours between 7.00am to 6.00pm, Monday to Friday and 7.00am to 1.00pm, Saturday, with a total exclusion of such work on Public Holidays and Sundays. Non-offensive works where power operated plant is not used and including setting out, surveying, plumbing, electrical installation, tiling, internal timber or fibrous plaster fixing, glazing, cleaning down brickwork, painting, building or site cleaning by hand shovel and site landscaping, is permitted between the hours of 1.00pm to 4.00pm Saturdays.

Note: That the Protection of the Environment Operations Act 1997 may preclude the operation of some equipment on site during these permitted working hours.

60 The capacity and effectiveness of erosion and sediment control devices must be maintained to Council's satisfaction at all times.

61 A copy of the Soil and Water Management Plan must be kept on-site at all times and made available to Council officers on request.

62 Stockpiles are not permitted to be stored on Council property (including nature strip) unless prior approval has been granted.

63 Stockpiles of topsoil, sand, aggregate, spoil or other material shall be stored clear of any drainage line or easement, natural watercourse, kerb or road surface.

64 Drains, gutters, roadways and access ways shall be maintained free of sediment and to the satisfaction of Council. Where required, gutters and roadways shall be swept regularly to maintain them free from sediment.

65 Building operations such as brickcutting, washing tools or paint brushes, and mixing mortar not be performed on the roadway or public footway or any other locations which could lead to the discharge of materials into the stormwater drainage system.

66 Stormwater from roof areas shall be linked via a temporary downpipe to a Council approved stormwater disposal system immediately after completion of the roof area. Inspection of the building frame will not be made until this is completed to Council's satisfaction.

67 The applicant and/or builder must prior to the commencement of work, install at the periphery of the site, measures to control sedimentation and the possible erosion of the land.

The measures must include:

- (i) siltation fencing;
- (ii) protection of the public stormwater system; and
- (iii) site entry construction to prevent vehicles that enter and leave the site from tracking loose material onto the adjoining public place.

68 Details of the method of termite protection which will provide whole of building protection, inclusive of structural and non-structural elements, shall be submitted to the Council/Accredited Certifier **prior to issue of the Construction Certificate**. Attention is drawn to the provisions of Australian Standard 3660.1 "Protection of Buildings from Subterranean Termites - New Buildings" and to Council's Code for the "Protection of Buildings Against Termite Attack".

69 **Prior to issue of the Occupation Certificate**, a durable termite protection notice shall be permanently fixed to the building in a prominent location detailing the form of termite protection which has been used in accordance with Council's Code for the "Protection of Buildings Against Termite Attack".

70 This approval shall expire if the development hereby permitted is not commenced within 5 years of the date hereof or any extension of such period which Council may allow in writing on an application made before such an expiry.

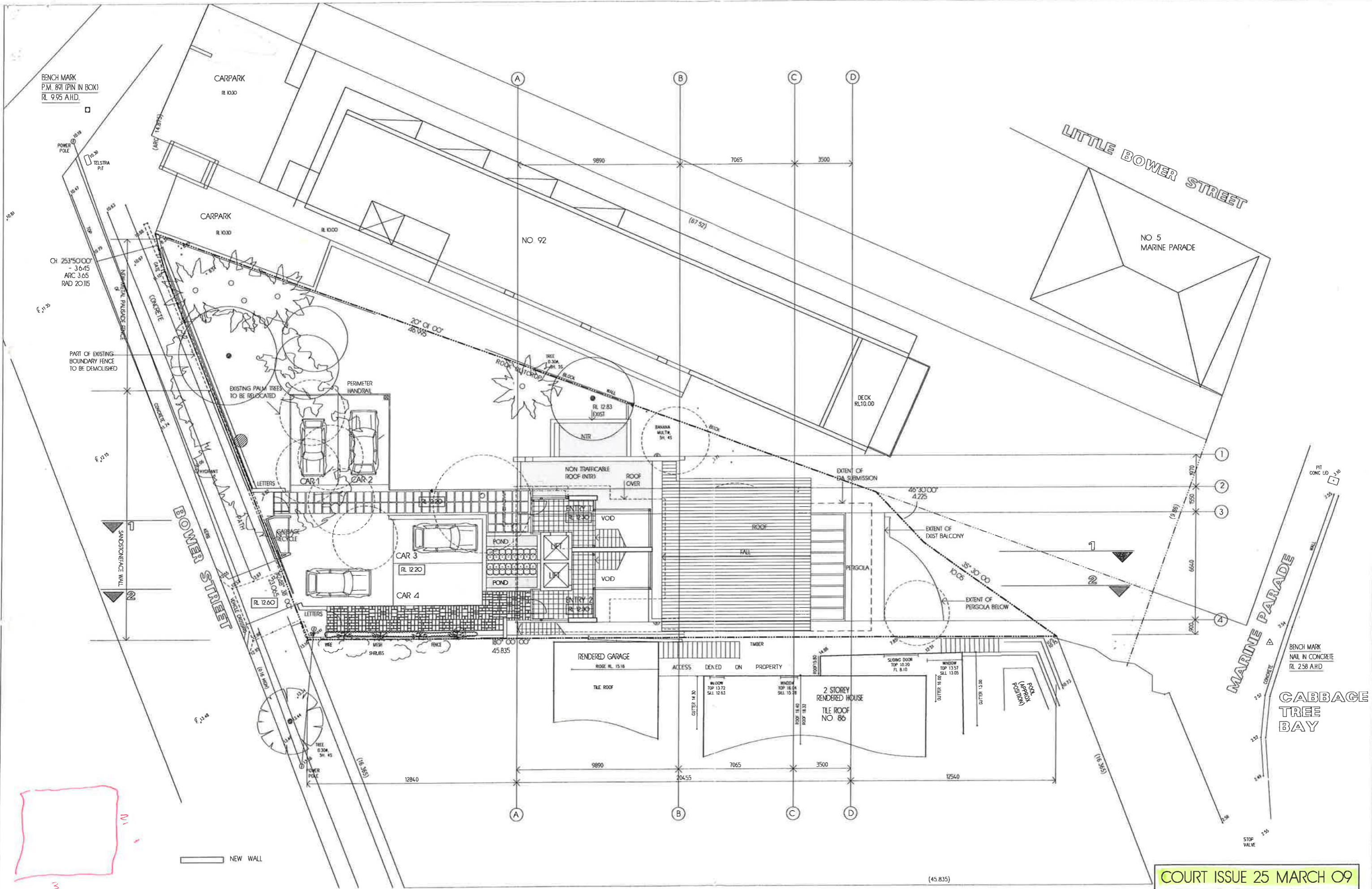
71 The landscaping plan shall be amended to be consistent with the architectural plans prior to the issue of a construction certificate and in particular tall (3m or higher) tree planting shall be contained within Lot 3 DP 8075 and shall maintain a view corridor along the common boundary with 92 Bower Street.

72 A lightweight timber battened privacy screen 1.5m high shall be provided along the full west (short) sides of car spaces 1 and 2 and shall extend along 50% of the north (long) side of car space 2. Details of the privacy screen are to be provided to Council/Accredited Certifier **prior to the issue of Construction Certificate**.

Annelise Tuor
Commissioner of the Court
ljr

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

BENCH MARK
P.M. 871 (PIN IN BOX)
RL 9.95 A.H.D.



COURT ISSUE 25 MARCH 09

RESIDENTIAL DEVELOPMENT
 88 BOWER STREET, MANLY
 FOR NOEL & PAULINE GARROLL

ENTRY LEVEL
 RL 12.30

da01b
 MARCH 2009
 2631

WOLSKI LYCENKO BRECKNOCK ARCHITECTS
 115 MILITARY ROAD, NEUTRAL BAY, 2089
 Tel: 9553 8477 Fax: 955 1857

0 1 2 3 4 5m
 PLOT DATE 30MARCH09



CH 253° 50' 00"
-3.645
ARC 3.65
RAD 20.15

BOWER STREET

LITTLE BOWER STREET

NO. 5 MARINE PARADE

MARINE PARADE





NO. 92

ADJOINING SITE
TOTAL AREA
811.4 m²

HOUSE 1

2 STOREY RENDERED HOUSE
TILE ROOF
NO. 86

COURT ISSUE 25 MARCH 09

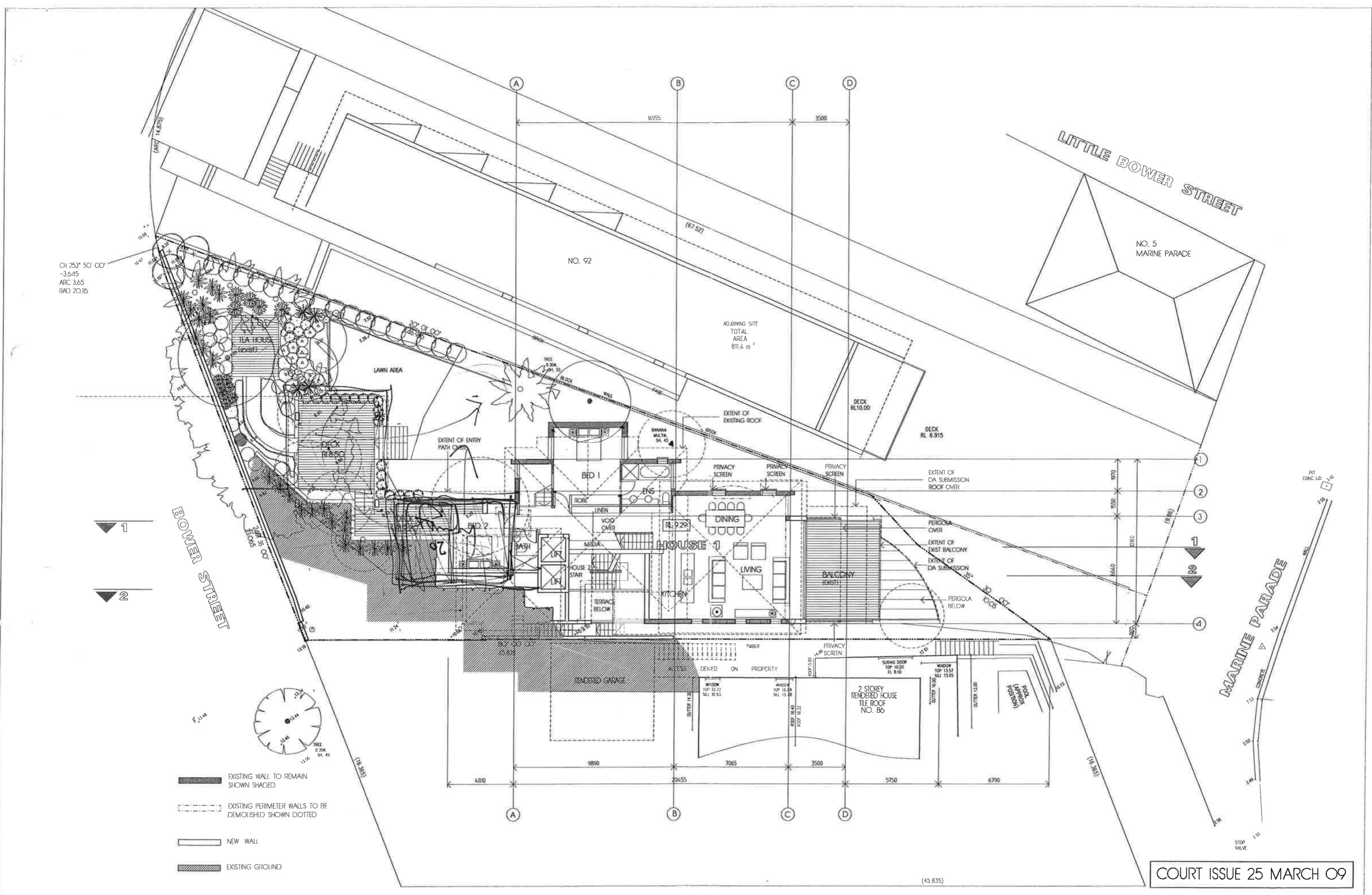
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-  EXISTING PERIMETER WALLS TO BE DEMOLISHED SHOWN DOTTED
-  NEW WALL
-  EXISTING GROUND

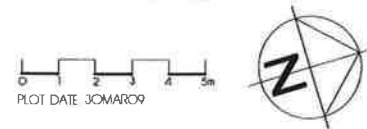
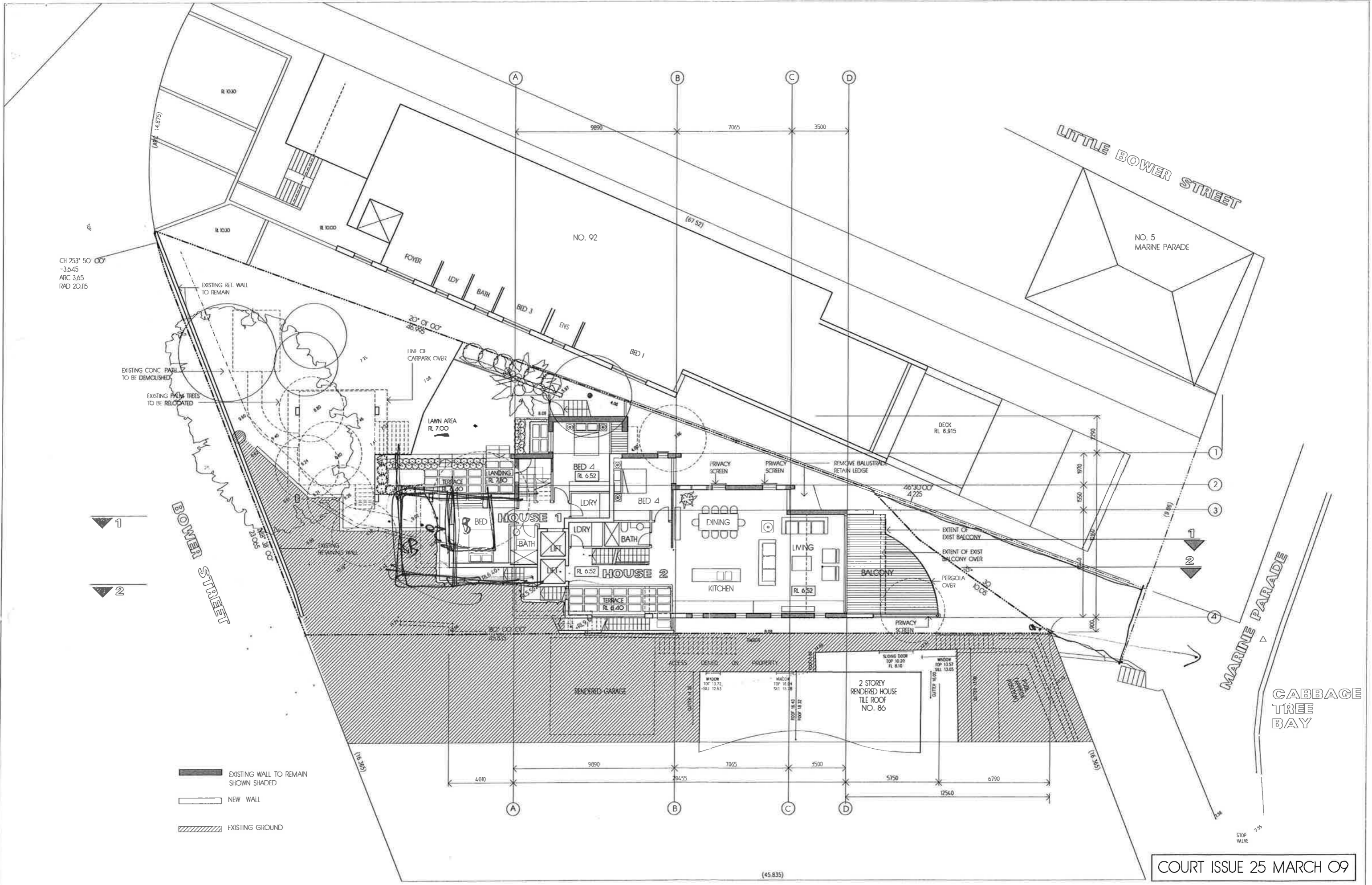
RESIDENTIAL DEVELOPMENT
88 BOWER STREET, MANLY
FOR NOEL & PAULINE CARROLL

UPPER GROUND LEVEL
RL 9.29

da02b
MARCH 2009
26.31

WOLSKI LYCENKO BRECKNOCK ARCHITECTS
75 MILITARY ROAD, NEUTRAL BAY, 2089
Tel: 9959 8477 Fax: 9951 0557





RESIDENTIAL DEVELOPMENT
88 BOWER STREET, MANLY
FOR NOEL & PAULINE CARROLL

WOLSKI LYCENKO BRECKNOCK ARCHITECTS
115 MILITARY ROAD NEUTRA, BAY 2080
Tel 9952 8477 Fax 99278857





GROUND LEVEL
RL 6.52

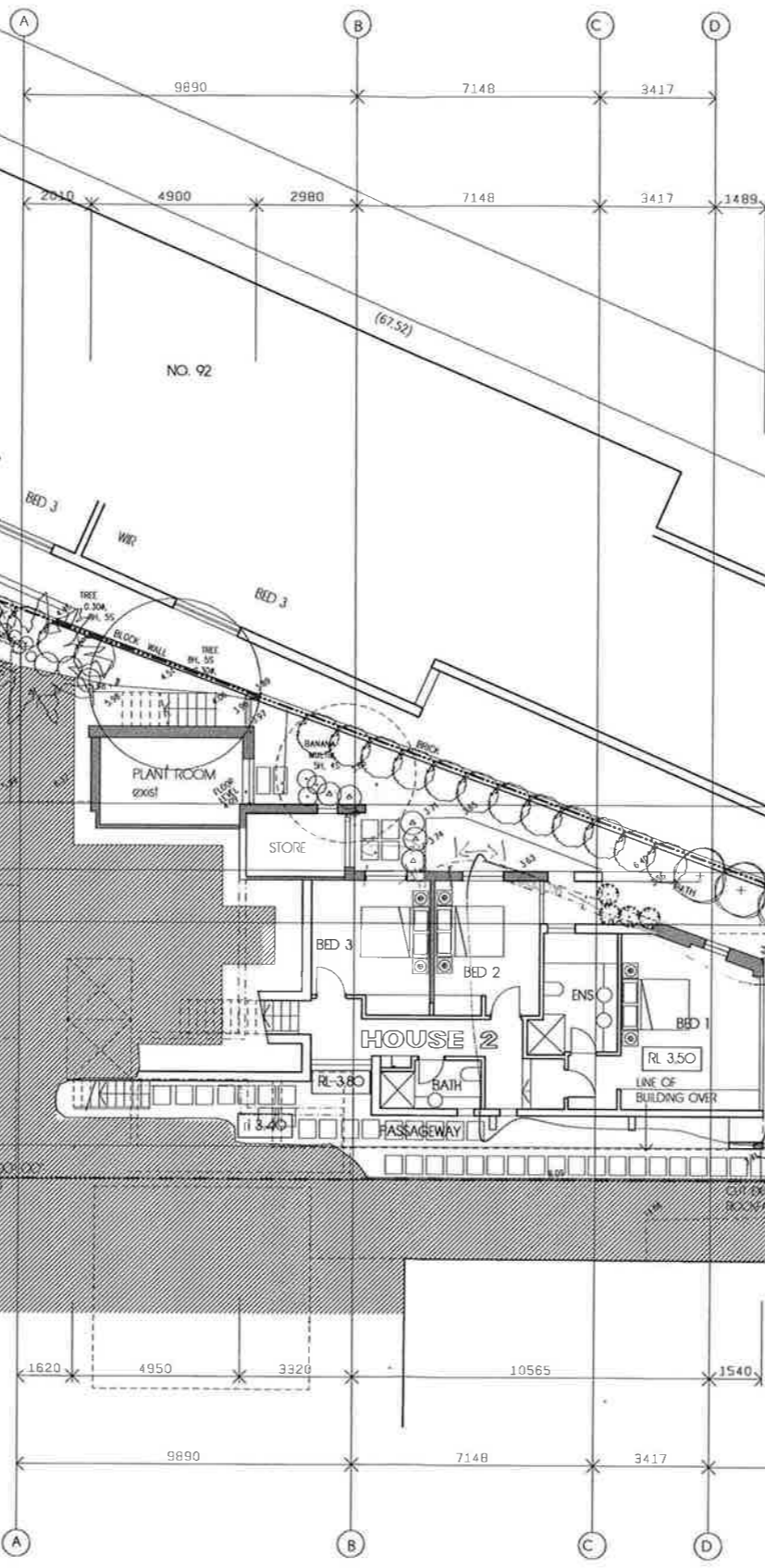
da03b
MARCH 2009
2631

CH 253° 50'
-3.645
ARC 3.65
RAD 20.15

① 2290
② 1970
③ 1550
④ 5640

BOWER STREET
MARINE PARADE

-  EXISTING WALL TO REMAIN SHOWN SHADED
-  EXISTING PERIMETER WALL TO BE DEMOLISHED SHOWN DOTTED
-  NEW WALL
-  EXISTING GROUND



NOTE 'A'
LAND HELD UNDER LICENCE 301336
FROM DEPARTMENT OF LANDS
(NOT INCLUDED IN SITE AREA
CALCULATIONS)

COURT ISSUE 25 MARCH 09

0 1 2 3 4 5m
PLOT DATE 30 JUL 12

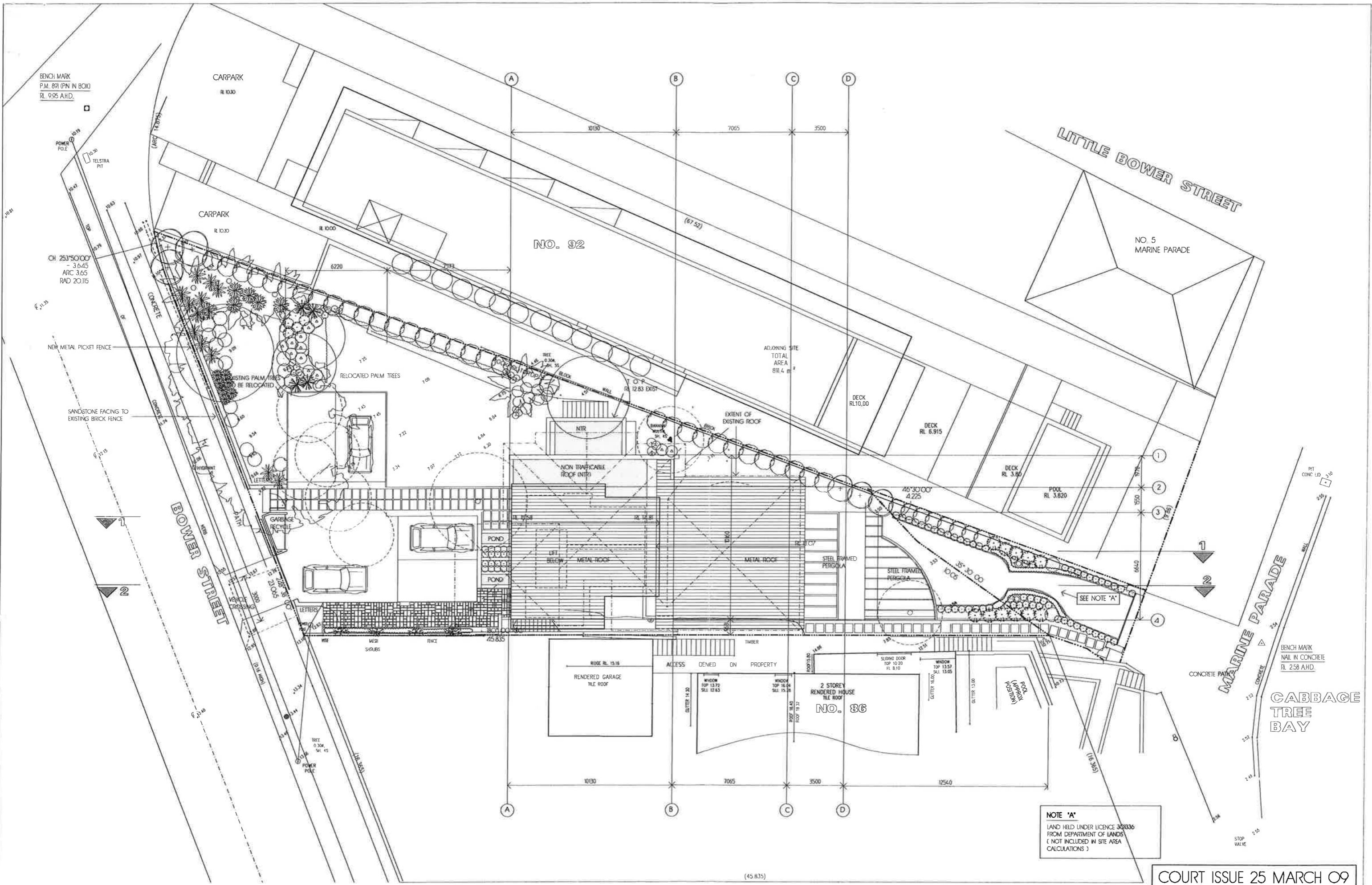


RESIDENTIAL DEVELOPMENT
88 BOWER STREET, MANLY
FOR NOEL & PAULINE GARROLL

WOLSKI LYCENKO BRECKNOCK ARCHITECTS
115 MILITARY ROAD NEUTRAL BAY 2089
Tel 9953 9477 Fax 9953 557

LOWER GROUND LEVEL
RL 3.80 \ RL 3.50

da 04b
FEBRUARY 2009
2631



BENCH MARK
P.M. 871 (PIN IN BOX)
RL 9.95 AHD.

CH 253°50'00"
- 3.645
ARC 3.65
RAD 20.115

NEW METAL PICKET FENCE

SANDSTONE FACING TO
EXISTING BRICK FENCE

BOWER STREET

LITTLE BOWER STREET

NO. 5
MARINE PARADE

NO. 92

ADJOINING SITE
TOTAL AREA
811.4 m²

NON TRAFFICABLE
ROOF (NTR)

EXTENT OF
EXISTING ROOF

DECK
RL 10.00

DECK
RL 6.915

DECK
RL 3.80

POOL
RL 3.620

POND

POND

LIFE BELOW
METAL ROOF

METAL ROOF

STEEL FRAMED
PERGOLA

STEEL FRAMED
PERGOLA

SEE NOTE 'A'

RENDERED GARAGE
TILE ROOF

ACCESS DENIED ON
PROPERTY

2 STOREY
RENDERED HOUSE
TILE ROOF
NO. 86

SLIDING DOOR
TOP 10.20
RL 9.10

WINDOW
TOP 13.75
SILL 12.63

WINDOW
TOP 14.04
SILL 12.83

WINDOW
TOP 14.40
SILL 13.28

OUTTER 14.30

OUTTER 13.00

OUTTER 13.00

OUTTER 13.00

OUTTER 13.00

OUTTER 13.00

OUTTER 13.00

BENCH MARK
NAIL IN CONCRETE
RL 2.58 AHD.

CABBAGE
TREE
BAY

CONCRETE PATH

NOTE 'A'
LAND HELD UNDER LICENCE 301836
FROM DEPARTMENT OF LANDS
(NOT INCLUDED IN SITE AREA
CALCULATIONS)

COURT ISSUE 25 MARCH 09

0 1 2 3 4 5 1000
PLOT DATE 30MARCH09

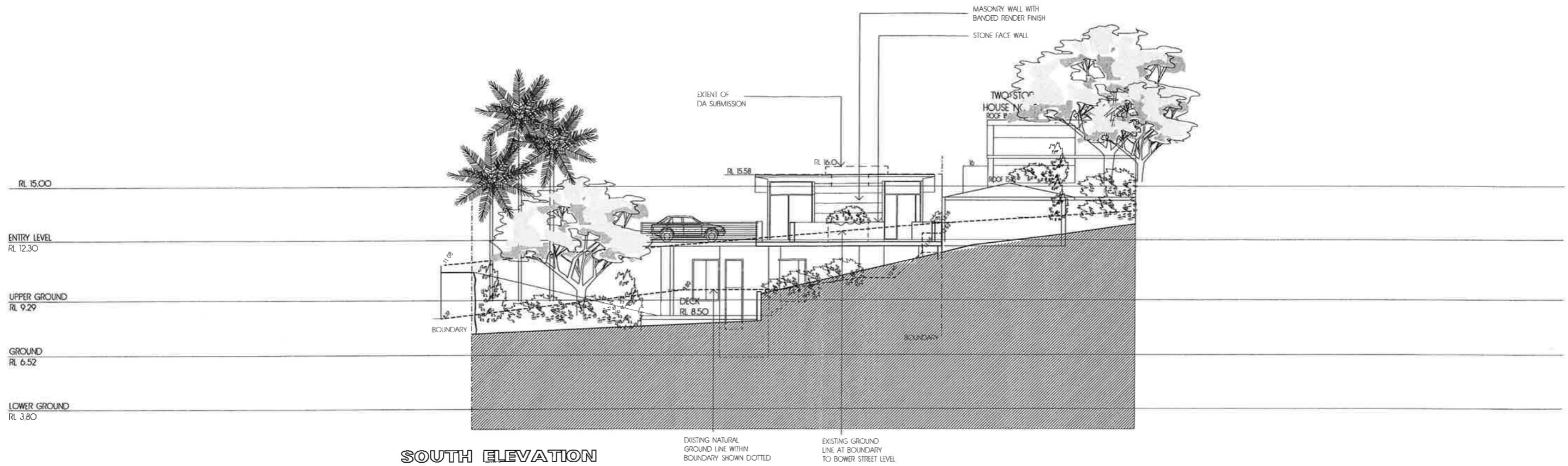


RESIDENTIAL DEVELOPMENT
88 BOWER STREET, MANLY
FOR NOEL & PAULINE CARROLL

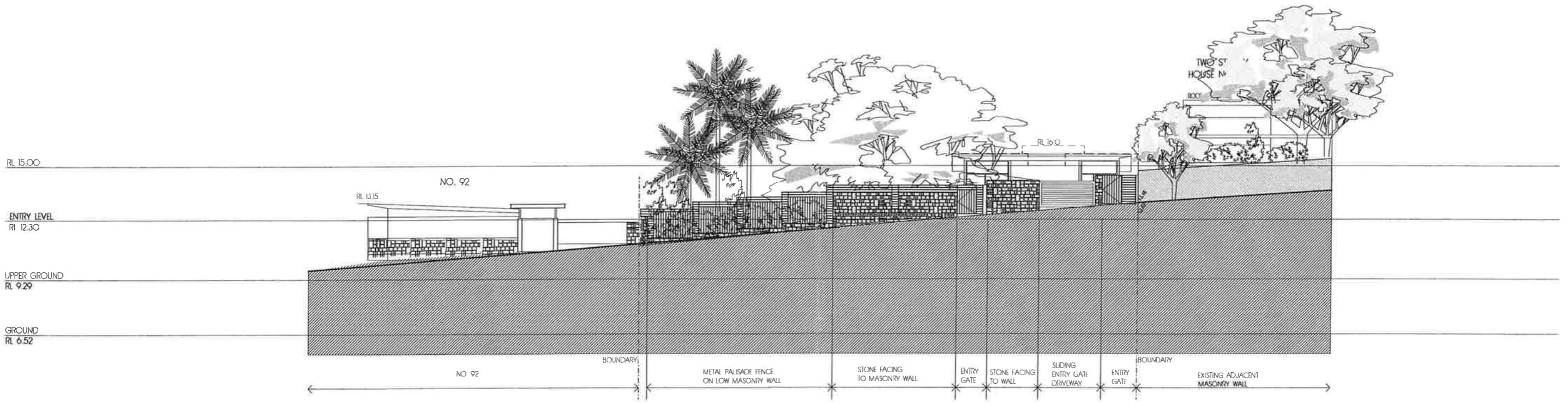
WOLSKI LYCENKO BRECKNOCK ARCHITECTS
115 MILITARY ROAD NEUTRAL BAY 2089
Tel: 9553 8477 Fax: 9553 8557

ROOF LEVEL
SITE PLAN

da05b
DECEMBER 2006
26.31



SOUTH ELEVATION



STREET ELEVATION

EXISTING GROUND

COURT ISSUE 25 MARCH 09

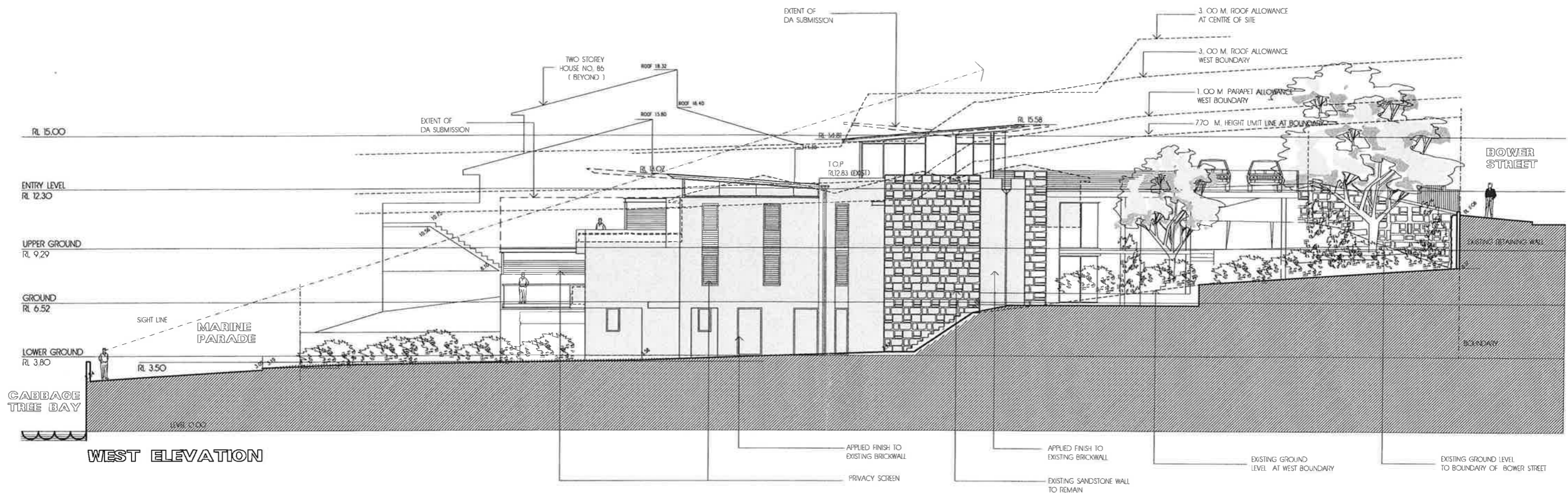
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RESIDENTIAL DEVELOPMENT
 88 BOWER STREET, MANLY
 FOR NOEL & PAULINE CARROLL

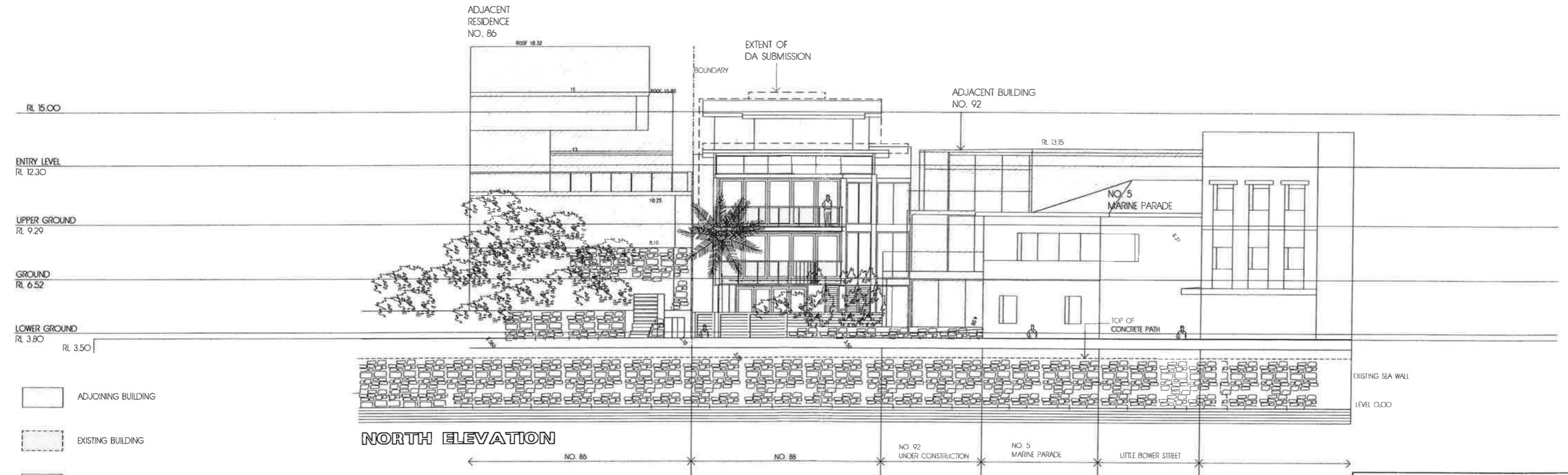
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 118 MILITARY ROAD, NEUTRAL BAY 2089
 Tel: 9553 8477 Fax: 9553 8557

ELEVATIONS

da06b
 FEBRUARY 2009
 2631



WEST ELEVATION



NORTH ELEVATION

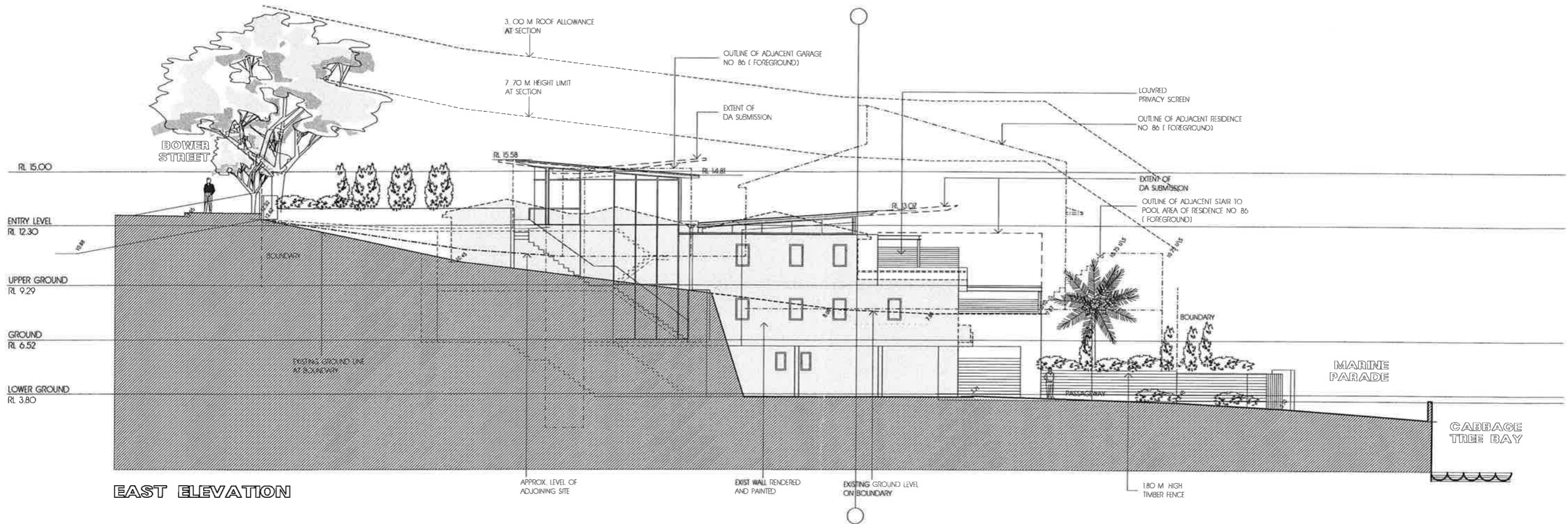
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 FOR NOEL & PAULINE CARROLL

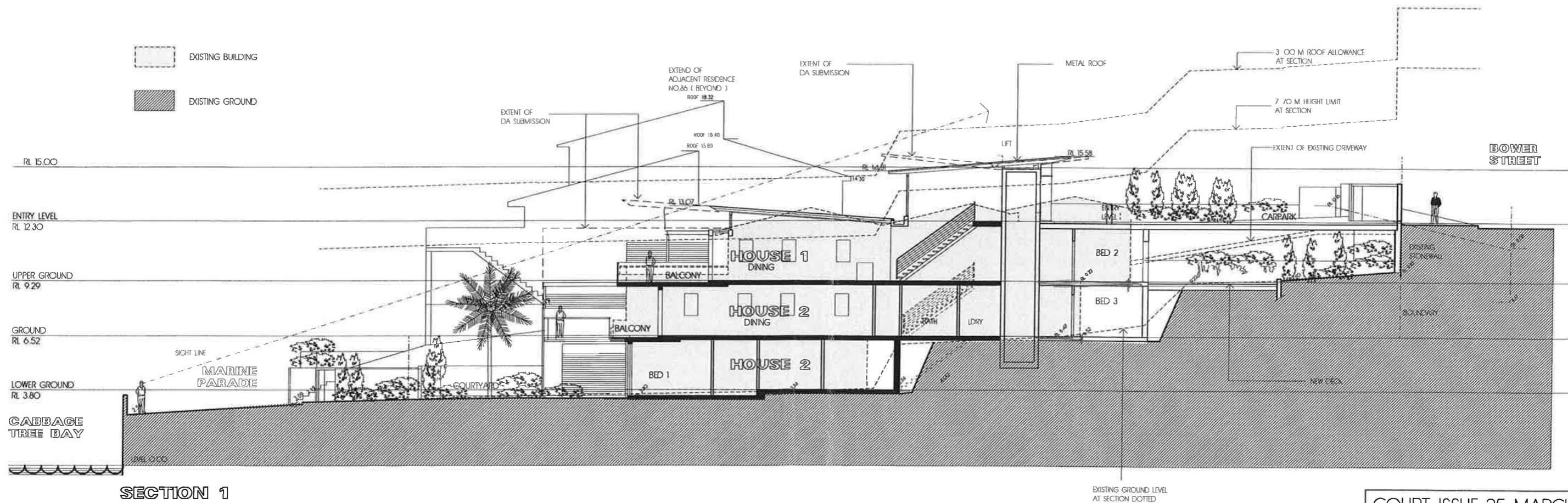
ELEVATIONS

WOLSKI LYCENKO BRECKNOCK ARCHITECTS
 115 MILITARY ROAD NEUTRAL BAY 2089
 Tel 9953 0477 Fax 99538597

da07b
 FEBRUARY 2009
 2631

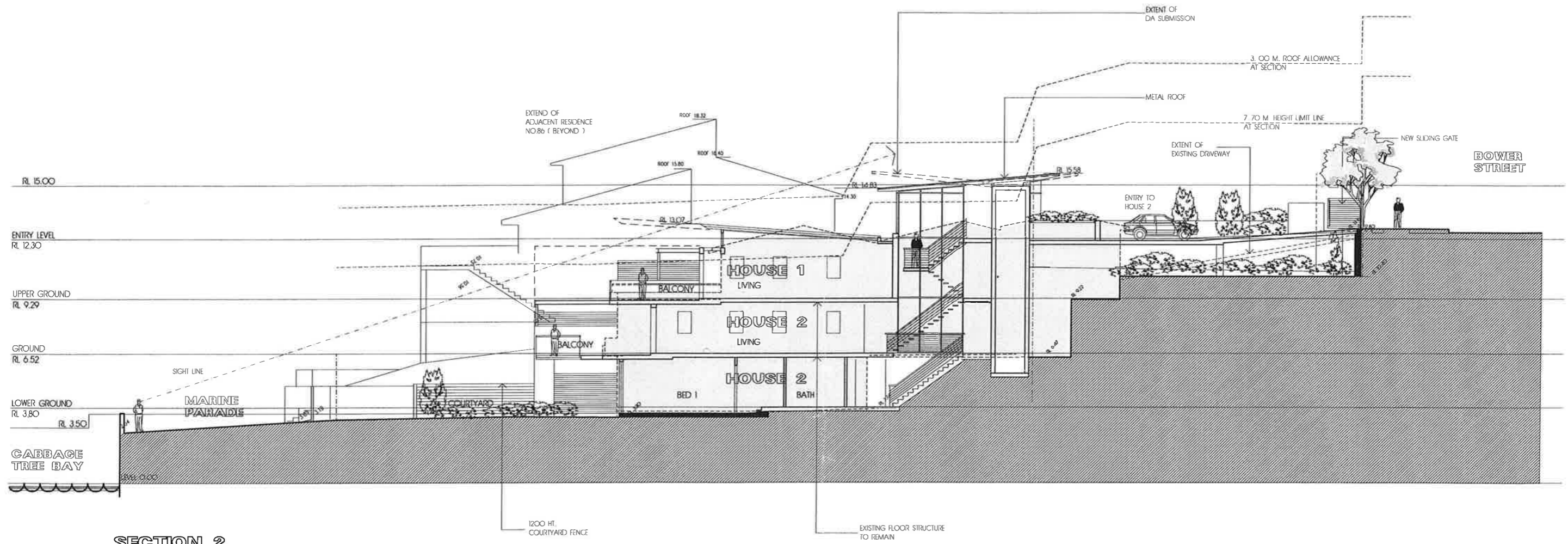


EAST ELEVATION





SECTION 1

COURT ISSUE 25 MARCH 09



SECTION 2

-  EXISTING BUILDING
-  EXISTING GROUND

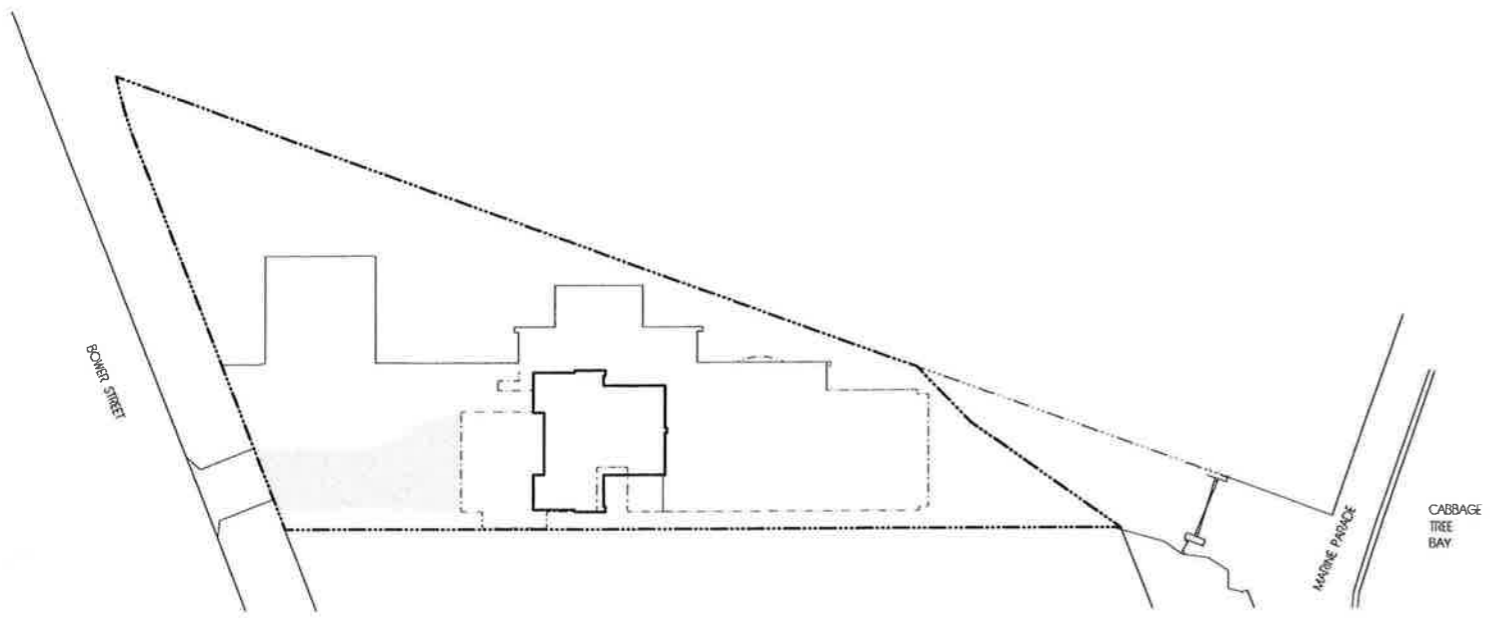
COURT ISSUE 25 MARCH 09

RESIDENTIAL DEVELOPMENT
 88 BOWER STREET, MANLY
 FOR NOEL & PAULINE CARROLL

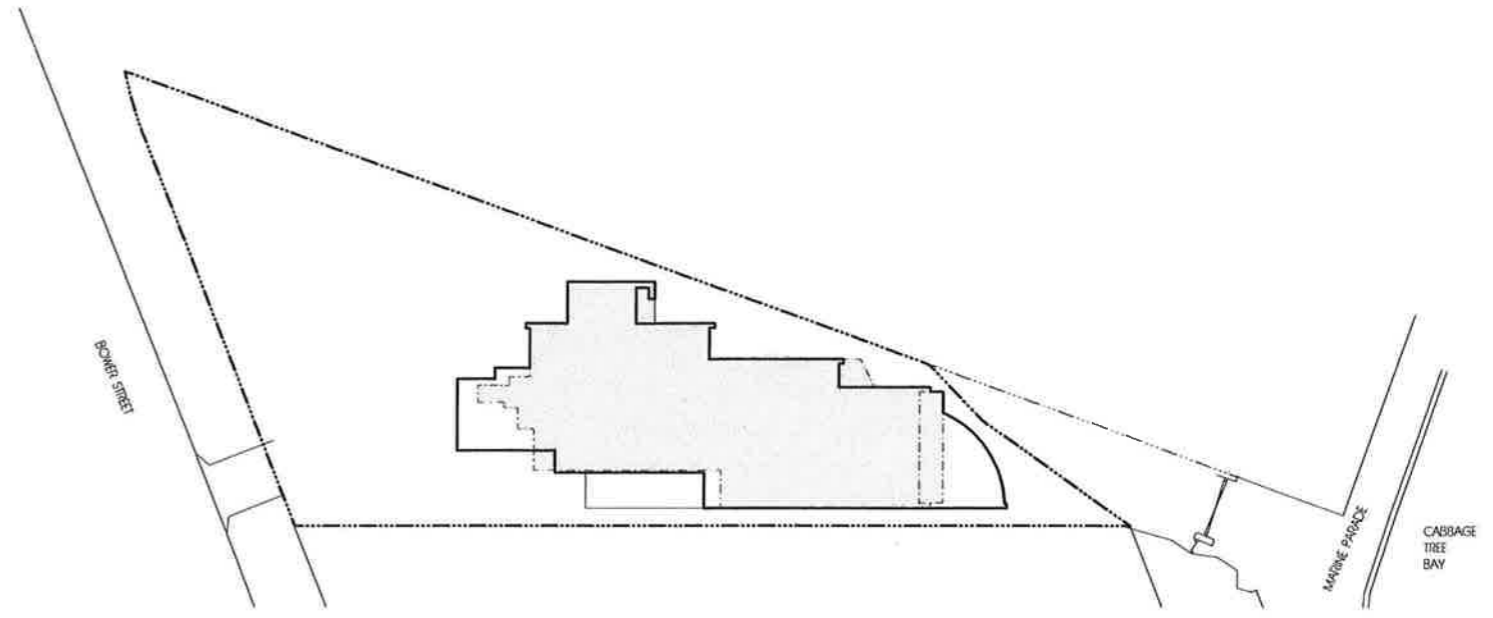
WOLSKI LYCENKO BRECKENRICK ARCHITECTS
 118 MILITARY ROAD NEUTRAL BAY 2089
 Tel 9953 8477 Fax 9953 9553

SECTION 2

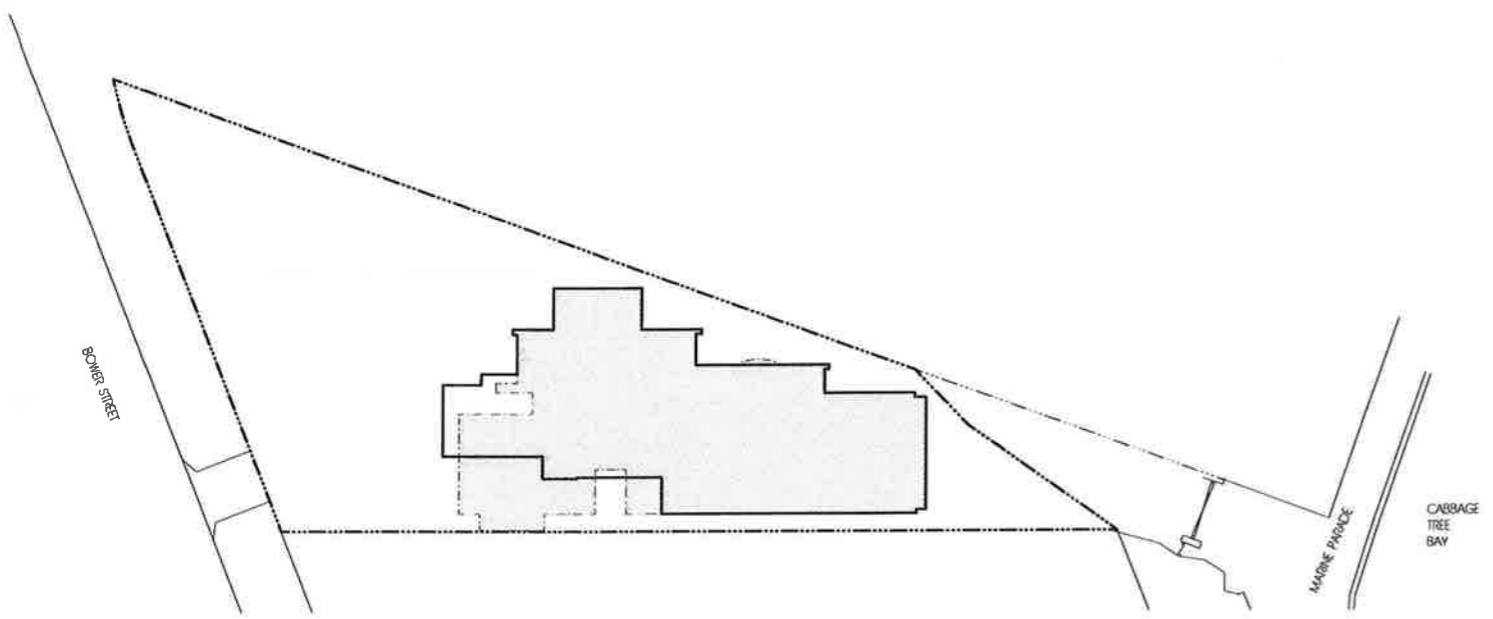
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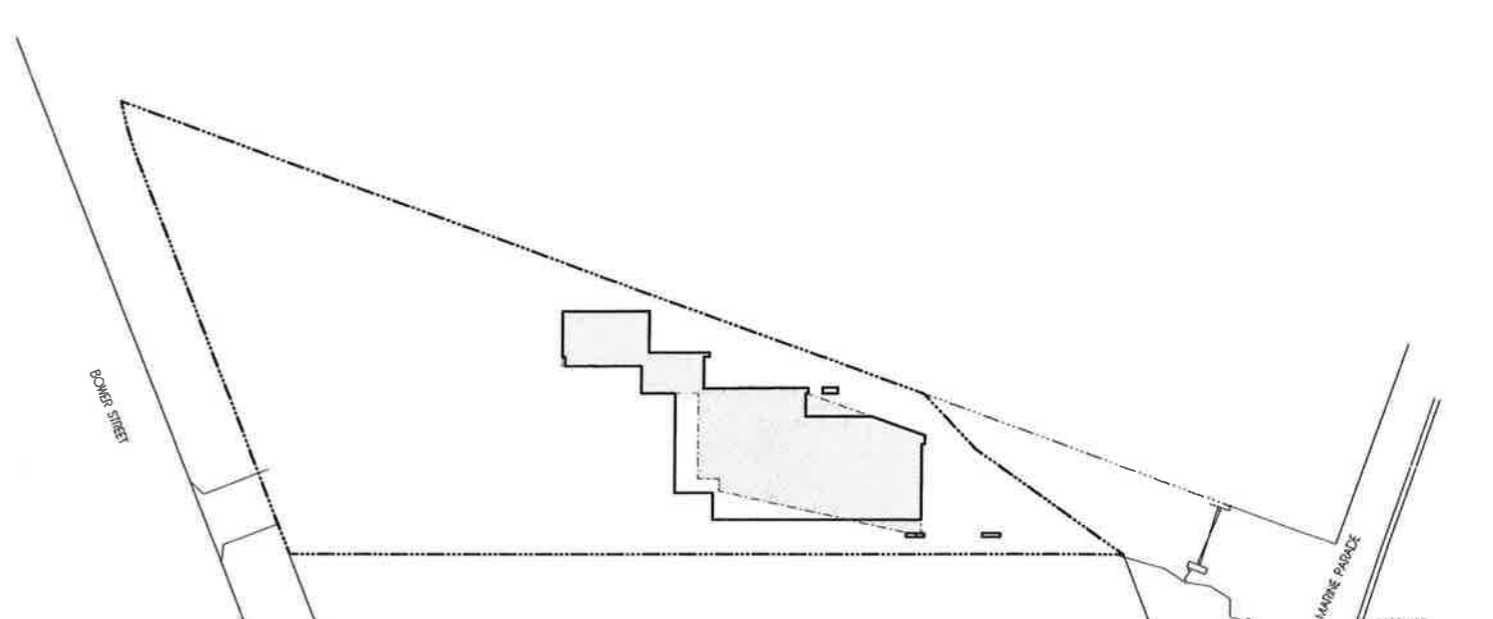
ENTRY PLAN



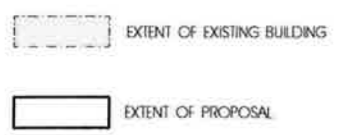
GROUND PLAN



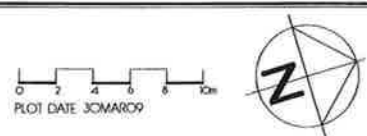
UPPER GROUND PLAN



LOWER GROUND PLAN



COURT ISSUE 25 MARCH 09



RESIDENTIAL DEVELOPMENT
 88 BOWER STREET, MANLY
 FOR NOEL & PAULINE CARROLL

WOLSKI LYCENKO BRECKNOCK ARCHITECTS
 115 MILITARY ROAD NEUTRAL BAY 2095
 Tel 9959 6477 Fax 9959 6537

EXIST / NEW
 COMPARISON

GO01
 FEBRUARY 2009
 2631



Development Assessment Unit Report Residential Zone

DA #	216/07
Site Address	88 Bower Street, MANLY
Proposal	Section 96 application to modify development consent for alterations and additions to the existing single dwelling house into two (2) dwellings.
Officer	

Application Lodged: 19/01/2011 (Section 96 lodged)
Applicant: Noel Carroll
Owner: The Trustees of the Roman Catholic Church
Estimated Cost: \$1, 800 000
Zoning: Manly Local Environmental Plan, 1988 - Residential
Surrounding Development: Immediately surrounding developments mainly comprise a mix of two and three storey developments (of both dwellings and multi-dwelling developments)
Heritage: in the vicinity of items of environmental heritage

SUMMARY:

1. Development Application DA 510/06 for alterations and additions to a (2) two storey residential flat building was lodged on 21/06/07.
2. Council refused the development application on 14/03/08.
3. Following an appeal against the refusal, the Land and Environment Court upheld the appeal on 29/05/2009.
4. This Section 96 modification was lodged on 19/01/2011
5. This application was advertised and all adjoining and nearby property owners were notified. And no objections were received.
6. The application was referred to the Fairy Bower Precinct Community Forum for comments.
7. Site inspection is recommended.
8. The application is recommended for refusal

LOCALITY PLAN

Shaded area is subject site. (for MIAP reports only – provided by Administration)

RECOMMENDATION

That the Section 96 application to modify the consent to Development Application No. 216/07 for alterations & additions alterations and additions to the existing single dwelling into two (2) dwellings at No.88 Bower Street, Manly, be refused for the following reason:

- Pursuant to Section 96 AA of the Environmental Planning and Assessment Act 1979, Council is not satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted.

Introduction

Approved development

Development consent has been granted for alterations and additions the existing single dwelling house into two (2) dwellings. Details of the approval include:

Lower Ground Level– Bedrooms 1, 2 and 3 (with an en-suite provided off Bedroom 1), a bathroom and a laundry for use for Dwelling 2 and a plant room.

Ground Level – Bedroom 4, a bathroom and a combined kitchen, dining and living room leading to a north facing terrace for use for Dwelling 2 and Bedrooms 3 and 4, a bathroom and a laundry for use for Dwelling 1.

Upper Ground Level – Bedrooms 1 and 2 (Bedroom 1 with an en-suite and WIR), a bathroom and a combined kitchen, dining and living room leading to a north facing terrace for use for Dwelling 1 and stair access to and from the entry level to the lower levels for use for Dwelling 2.

Entry Level – Entry foyers to Dwellings 1 and 2 providing access to two (2) private lifts and stair access to the lower levels. Lift access is not provided to the lower ground level.

Upper (Street Level) - Four (4) on site car parking spaces within the sites front setback

Section 96 Modification

This application seeks the following changes to the approved plans:

Entry Level - No change

Upper Ground Level

- Replace Bedroom 2 with an enlarged sitting room under the alignment of the driveway above; and
- Provision of sliding privacy screens to west facing sitting room windows.

Ground Level – RL 6.25

- Lower floor level by 270mm;
- Additional excavation below driveway to accommodate the relocation of Bedroom 2; and
- Minor repositioning of west facing dining room window and associated privacy screen.

Lower Ground Floor Level – RL 3.80/ RL 3.50

- Lower floor level by 300mm;
- Additional excavation below floor above and internal layout changes to accommodate a sitting room; and
- Deletion of east facing windows.

This application also seeks to modify Conditions 55 and 56 of the consent to reduce the Section 94 contributions payable such that they do not exceed the maximum \$20,000 threshold for local government contributions applying to residential dwellings in accordance with the Section 94E Ministerial Direction of 13 January 2009

Applicant's Supporting Statement

The application plans by Wolski Coppin Architects and Statement of Environmental Effects by Boston Blyth Flemming, Town planners and a legal advice by Michael Staunton, the barrister acting on behalf of the applicant, are in the file.

Precinct Community Forum Comments

No submission or objection received at the writing of this report.

Engineers Comments

No new engineering conditions.

Building Comments

No new building conditions.

Landscaping Comments

No comments received at the writing of this report.

Environmental Planner Comments

No comments received at the writing of this report.

Planning Comments

The subject site is located on the northern side of Bower Street. The site is irregular in shape and has frontage of 26.715m to Bower Street. The depth of the site is 46.995m and 45.835m along its western and eastern boundaries respectively. The site has a rear (north western) frontage of 14.275m (effectively to Marine Parade). There exists a small parcel of land (approximately 56m² in area) between the sites northern boundary and the pedestrian walkway itself which is land held under license from the NSW Department of Lands. The area of the site is 679.4m².

The site has a part two / part three storey brick dwelling with a hipped and gabled slated roof, with an elevated concrete driveway that provides vehicular access to two on-site car parking spaces. A timber cabana is located on the southwestern corner of the site.

Vegetation on the site is dominated by an existing Moreton Bay fig, a number of palm trees and various other species within the front setback area. The land falls from the street to the rear of the site (to Marine Parade with an overall fall of approximately of 1 in 5 (along the sites eastern boundary) and 1:6 (along the sites western boundary). There is a cross fall from the sites eastern boundary to its western boundary. There is a solid 1.8m high masonry fence along the front boundary (interrupted only by a front pedestrian gate and vehicle crossing and gate) and the vegetation cover within the front setback area.

Occupying the adjoining site to the west (No 92 Bower Street) is a recently completed three (3) storey multi-dwelling development containing three (3) residential units. Further to the west again, on No 94 Bower Street (located on the corner of Bower Street and Bower Lane), is a two (2) storey residential flat building containing four (4) units.

The adjoining site to the east is occupied by a two storey dwelling of a rendered masonry construction. Occupying sites further to the east are generally single dwelling houses of two and three storey construction.

Environmental Planning & Assessment Act 1979 – Section 79(C)(1)

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) the provisions of:**
 - (i) any environmental planning instrument, and**

Environmental Planning and Assessment Act 1979

Section 96 AA of the Environmental Planning and Assessment Act 1979, states that "a consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

- (a) it is satisfied that the proposed modification is of minimal environmental impact, and*
- (b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all) under this section, and*

- (c) *it has notified the application in accordance with:*
- (i) *the regulations, if the regulations so require, or*
 - (ii) *a development control plan, if the consent authority is a council that has made a development control plan under section 72 that requires the notification or advertising of applications for modification of a development consent, and*
- (d) *it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be."*

In support of this Section 96 application, the applicant has said the following:

When one undertakes the above analysis in respect of the subject application it is clear that the approved development for alterations and additions to a residential dwelling house to create 2 dwellings remains, in its modified state, essentially and materially the same development. The building continues to relate to its surrounds in the same fashion, namely the increase in floor space is accommodated without any discernible change to the three dimensional form or external appearance of the development, as approved, when viewed from adjoining residential properties or the adjacent public domain.

The building will continue to relate to adjoining development and its context in the same way as originally approved with the previously approved external finish, car parking, drainage and landscape regimes not altered as a consequence of the modifications proposed.

The Court in the authority of Stavrides v Canada Bay City Council [2007] NSWLEC 248 established general principles which should be considered in determining whether a modified proposal was "substantially the same" as that originally. A number of those general principles are relevant to the subject application, namely:

- *The approved use and dwelling density does not change;*
- *The external building appearance, footprint and envelope are commensurate with those original approval;*
- *The increase in floor space is accommodated without any discernible change to the three dimensional form or external appearance of the development, as approved, when viewed from adjoining residential properties or the adjacent public domain*
- *The additional floor space does not impose any additional amenity impacts on adjoining properties in terms of views, privacy, visual bulk or overshadowing.*

On the basis of the above analysis we regard the proposed application as being "essentially and materially" the same as the approved development such that the application is appropriately categorised as being "substantially the same" and appropriately dealt with by way of Section 96AA of the Act.

This Section 96 application is also accompanied by a Memorandum of Advice from Mr. Michael Staunton, the barrister acting on behalf of the applicant, stating that this application is substantially the same as the approved development on the site.

In both the submissions by both the applicant's town planner and their barrister, no reference was made to the judgement in *Claron Projects Pty Ltd v Leichhardt Municipal Council* [2004] NSWLEC 296 DATES OF HEARING: 24/05/2004 DATE OF JUDGMENT: 06/16/2004 Here, the test requires more than just a comparison of the differences between the building and use that would result from the original consent and the building and use that would result from the amended consent.

Extracts from this case is tabled below:

<p>19. <i>Development</i> is defined in the Act as: (a) <i>The use of land, and</i></p>

(b)) *The subdivision of land, and*
(c) *The erection of a building, and*
(d) *The carrying out of a work, and*
(e) *The demolition of a building or work, and*
(f) *Any other act, matter or thing referred to in section 26 that is controlled by an environmental instrument, but does not include any development of a class or description prescribed by the regulations for the purposes of this definition.*

20. By referring to the term *development* the s 96 (1A)(b) test therefore also requires an examination of the process of demolition and erection of buildings and works.

21. In the context of the definition of development, the effect of the subject application is that the consent as modified will have a number of relevant characteristics, which must be compared to the original consent. First it comprises *the use of land* and this will remain unchanged. Second, the strata subdivision approval will also remain unchanged.

22. Third the subject application includes *the demolition of a building or work* comprising most of the external walls of the (then) existing building whereas the original external walls were to be retained almost entirely intact. This is in my opinion a material and significant difference

23. Fourth it comprises the *erection of a building* comprising the erection of new walls to a height of two storeys around three sides of the building on top of proposed new footings plus a new wall on top of the existing north wall whereas the original proposal was to be erected on top of the existing external walls. Even though these reconstructed walls will provide the same support for the new upper structure the reconstruction of the walls is also a material and significant difference.

24. Taking into account the extent of additional demolition of the building (i.e. excluding the demolition of the roof) and the additional building construction it is clear that the consent as modified can no longer be described as *additions and alterations to existing two-storey dwelling and conversion into a residential flat building*. It would not be incorrect to describe the original consent as modified by the subject application as: the demolition of an existing two-storey building and the erection of a new three-storey plus attic residential flat building.

25. The fact that these external walls needed to be demolished so that appropriate footings could be constructed sufficient to support the entirety of the proposal makes no difference to my conclusions. Nor does the fact that the bricks recovered from the demolition of the walls are to be reused.

26. In these circumstances I have decided that even though the resulting built form and land use will be almost identical, the consent as modified by the subject application would not be for substantially the same development as the development for which consent was originally granted. Therefore the subject application cannot be approved.

For reasons that will be discussed in the consideration below, it is considered that the proposed modifications are not substantially the same as the original development that has been consented to.

This application proposes to lower the existing floor levels of the two lower floors to create more floor to ceiling height. It is also proposed to excavate into the site to create to accommodate the additional floor space.

Taking into account the extent of additional excavation proposed and the demolition of the existing floors, it is considered that the consent as modified can no longer be considered as being substantially the same as the original development. Further, it is doubtful if the proposal can be considered as additions and alterations to the existing two-storey dwelling.

It is considered that the amended proposal results in the development being not substantially the same as the original development. Further the proposal is considered to be the construction of a new residential flat building. In this regard, a new development application is considered necessary for the proposed works.

Section 94 Contribution - This application also seeks to modify Conditions 55 and 56 of the consent to reduce the Section 94 contributions payable such that they do not exceed the maximum \$20,000 threshold for local government contributions applying to residential dwellings in accordance with the Section 94E Ministerial Direction of 13th January 2009

It is considered that as the applicant prior to the determination of the appeal agreed the condition by the Land and environment Court, this condition remain unchanged.

Manly Local Environmental Plan 1988:

The site is in Zone No 2 – Residential Zone. Residential flat buildings are permissible with the consent of Council.

The site is located in a Foreshore Scenic Protection Area. Clause 17 of the LEP says that the council shall not grant consent to the carrying out of development unless it is satisfied that the development will have a detrimental effect on the amenity of the Foreshore Scenic Protection Area. For reasons addressed in the consideration of the DCP below, it is considered that the modifications sought will have a detrimental effect on the amenity of the Foreshore Scenic Protection Area.

Clause 19 of the Manly Local Environmental Plan, 1988 relates to development in the vicinity of an item of environmental heritage. For reasons discussed below, it is considered that the proposed modifications will have a detrimental impact on the heritage listed foreshore scenic protection setting.

Manly Local Environmental Plan 1988 Clause 10 Objectives

The following comments are made in regard to the objectives for the Residential Zone as stated in Clause 10 of the Manly Local Environmental Plan 1988;

(a) *to set aside land to be used for purposes of housing and associated facilities;*
N/A

(b) *to delineate, by means of development control in the supporting material, the nature and intended future of the residential areas within the Municipality;*
N/A

(c) *to allow a variety of housing types while maintaining the existing character of residential areas throughout the Manly Council area;*

The proposed changes sought will have a detrimental impact on the existing character of the area and will add an unacceptable bulk to the bulk and scale of the approved development.

(d) *to ensure that building form, including alterations and additions, does not degrade the amenity of surrounding residents or the existing quality of the environment;*
The proposal will degrade the amenity of surrounding residents and the existing quality of the environment.

(e) *to improve the quality of the residential areas by encouraging landscaping and permitting greater flexibility of design in both new development and renovations;*

The quality of the residential area will be detrimentally affected by this proposal.

- (f) *to allow development for purposes other than housing within the zone only if it is compatible with the character and amenity of the locality;*
N/A
- (g) *to ensure full and efficient use of existing social and physical infrastructure and the future provisions of service and facilities to meet any increased demand;*
N/A
- (h) *to encourage the revitalisation of residential areas by rehabilitation and suitable redevelopment.*
N/A
- (i) *to encourage the provision and retention of tourist accommodation that enhances the role of Manly as an international tourist destination, and particularly in relation to the land to which Manly Local Environmental Plan 1988 (Amendment No 57) applies.*
N/A

79C(1)(a)(ii) - any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority (unless the Director-General has notified the consent authority that the making of the draft instrument has been deferred indefinitely or has not been approved), and

There is no draft planning instrument of relevance to the subject application.

79C(1)(a)(iii) - any development control plan, and Manly DCP for the Residential Zone 2007

The original proposal contravened the following controls of the DCP:

1. The maximum permitted dwelling density.
2. The maximum permitted floor space ratio control.
3. The maximum permitted wall height along the western elevation.
4. The maximum permitted number of storeys.
5. The maximum permitted height of a wall proposed with a zero side setback.
6. The minimum required side setbacks to the eastern and western boundaries.

As the approved development was considered to be alterations and additions to the existing building, the proposal had the benefit of the existing setbacks, floor space, and wall height. Notwithstanding these, the Council refused the application. The Land and Environment Court approved the development application based on the context of the site and its impact on the locality and the overall design. It is doubtful if the application would have been approved by the Court in its present modified form.

It is acknowledged that the applicant's statement that the proposed development is generally within the approved building footprint and envelope. It is agreed that the modifications sought do not alter the previously approved height of the development and the setbacks remain unchanged. There is no change to the approved landscaped open space and private open space. The levels of solar access are to be maintained to adjoining development. The level of privacy afforded between adjoining development under the current approval is not compromised as a consequence of the modifications sought. There will be no additional impact on any public or private views.

This current application proposes an additional 73m² of gross floor area, resulting in an increase in the previously approved FSR from 0.56:1 to 0.66:1. The application proposes additional excavation at both the lower ground and ground levels. It is also proposed to further excavate into the southern end of the site to accommodate the additional floor area. It is considered that there is a discernible change to the external appearance of the approved development.

Submissions made in accordance with this Act or the regulations

Nearby and adjoining property owners were notified in accordance with Council’s Notification Policy and no submissions were received.

79C(1) (e) the public interest.

The proposal is considered to be contrary to the public interest.

CONCLUSION:

The application has been assessed having regard to Section 79C and 96 of the Environmental Planning and Assessment Act 1979, the Manly Local Environmental Plan 1988 and the Development Control Plan for the Residential Zone 2007 Amendment 1 and is considered to be unsatisfactory.

The applicant now proposes to modify the approved development by lowering the existing floor levels of the two lower floors. It is also proposed to excavate into the site to accommodate the additional floor space. Taking into account the extent of additional excavation proposed and the demolition of the existing floors, it is considered that the consent as modified can no longer be considered as being substantially the same as the original development. Further, it is doubtful if the proposal can be considered as additions and alterations to the existing two-storey dwelling.

It is considered that as Conditions 55 and 56 was agreed by the applicant prior to the determination of the appeal by the Land and Environment Court, this condition remain unchanged.

In this regard, a new development application is considered necessary for the proposed works. It is recommended that this application be refused.

ATTACHMENTS

Please list any attachments for this report.

-
-

Assessment Planner: _____ Date: _____



Development Assessment Unit Report Residential Zone

DA #	216/07
Site Address	88 Bower Street, Manly
Proposal	Section 96AA application to modify approved Alterations and additions to an existing single dwelling house into two (2) dwellings- involving a front first floor and second floor addition to House 1, a front ground floor addition to House 2 and internal alterations, window relocations to each dwelling – Part 4.
Officer	Sonny Ooi

<u>Application Lodged:</u>	03 August 2012 (Section 96 lodged)
<u>Applicant:</u>	Noel Carroll
<u>Owner:</u>	The Trustees of the Roman Catholic Church
<u>Estimated Cost:</u>	\$1, 800 000
<u>Zoning:</u>	Manly Local Environmental Plan, 1988 - Residential
<u>Surrounding Development:</u>	Immediately surrounding developments mainly comprise a mix of two and three storey developments (of both dwellings and multi-dwelling developments)
<u>Heritage:</u>	In the vicinity of items of environmental heritage

SUMMARY:

1. DEVELOPMENT APPLICATION DA 216/07 FOR ALTERATIONS AND ADDITIONS TO A DWELLING HOUSE TO CREATE TWO DWELLINGS WAS LODGED ON 21/06/07.
2. COUNCIL REFUSED THE DEVELOPMENT APPLICATION ON 14/03/08.
3. FOLLOWING AN APPEAL AGAINST THE REFUSAL, THE LAND AND ENVIRONMENT COURT UPHELD THE APPEAL ON 29/05/2009.
4. A SECTION 96 MODIFICATION WAS LODGED ON 19/01/2011.
5. THE SECTION 96 APPLICATION WAS REFUSED ON 29/03/11.
6. THIS APPLICATION WAS ADVERTISED AND ALL ADJOINING AND NEARBY PROPERTY OWNERS WERE NOTIFIED. ONE (1) OBJECTION WAS RECEIVED.
7. THE APPLICATION WAS REFERRED TO THE FAIRY BOWER PRECINCT COMMUNITY FORUM FOR COMMENTS.
8. SITE INSPECTION IS RECOMMENDED.
9. THE APPLICATION IS RECOMMENDED FOR **REFUSAL**.

LOCALITY PLAN

Shaded area is subject site. (for MIAP reports only – provided by Administration)

RECOMMENDATION

That the Section 96AA application to modify the consent to Development Application No. 216/07 for alterations & additions to convert to a dwelling house into two (2) dwellings at No.88 Bower Street, Manly, be **refused** for the following reasons:

1. The proposal exceeds the maximum floor space ratio permitted in Section 3.4.2 under Council's Development Control Plan for Residential Zone 2007, Amendment No.1, having regard to Section 79C(1) (a) (iii) of the Environmental Planning and Assessment Act 1979.
2. The amount of excavation proposed exceeds that permitted in Section 2.5 of Council's Development Control Plan for Residential Zone 2007, Amendment No.1, having regard to Section 79C(1) (a) (iii) of the Environmental Planning and Assessment Act 1979.

3. The proposal is an overdevelopment of the site and will result in unacceptable visual bulk and scale as viewed from adjoining land and from the public domain, having regard to Section 79C(1) (b) of the Environmental Planning and Assessment Act 1979.
4. Due to the extent of demolition works now proposed, the development will not meet the definition of alterations and additions to an existing building, as defined in the Development Control Plan for Residential Zone 2007, Amendment No.1, and as such cannot be considered to be substantially the same development as that originally consented to by the Land and Environment Court, having regard to Section 96AA of the Environmental Planning and Assessment Act 1979.
5. The proposal is not in the public interest, having regard to Section 79C (1)(e) of the Environmental Planning and Assessment Act 1979.

Introduction.

The approved development was for alterations and additions to the existing dwelling house to create two (2) dwellings. Details of the approval include:

Lower Ground Level– Bedrooms 1, 2 and 3 (with an en-suite provided off Bedroom 1), a bathroom and a laundry for use for Dwelling 2 and a plant room.

Ground Level – Bedroom 4, a bathroom and a combined kitchen, dining and living room leading to a north facing terrace for use for Dwelling 2 and Bedrooms 3 and 4, a bathroom and a laundry for use for Dwelling 1.

Upper Ground Level – Bedrooms 1 and 2 (Bedroom 1 with an en-suite and WIR), a bathroom and a combined kitchen, dining and living room leading to a north facing terrace for use for Dwelling 1 and stair access to and from the entry level to the lower levels for use for Dwelling 2.

Entry Level – Entry foyers to Dwellings 1 and 2 providing access to two (2) private lifts and stair access to the lower levels. Lift access is not provided to the lower ground level.

Upper (Street Level) - Four (4) on site car parking spaces within the sites front setback

Section 96 Modification

This application is very similar to the earlier Section 96 application that Council refused in March 2011. This application seeks the following changes to the approved plans:

Entry Level

- No change

Upper Ground Level

- Replace Bedroom 2 with an enlarged sitting room under the alignment of the driveway above; and
- Provision of sliding privacy screens to west facing sitting room windows.

Ground Level – RL 6.25

- Lower floor level by 300mm;
- Additional excavation below driveway to accommodate the relocation of Bedroom 2; and
- Minor repositioning of west facing dining room window and associated privacy screen.

Lower Ground Floor Level – RL 3.80/ RL 3.50

- Lower floor level by 300mm;

- Additional excavation below floor above and internal layout changes to accommodate a sitting room; and
- Deletion of east facing windows.

This application also seeks to modify Conditions 55 and 56 of the consent to reduce the \$48,145.65 Section 94 contributions payable such that they do not exceed the maximum \$20,000 threshold for local government contributions applying to residential dwellings in accordance with the Section 94E Ministerial Direction of 13 January 2009.

Applicant's Supporting Statement

The application plans by Wolski Coppin Architects and Statement of Environmental Effects by Boston Blyth Flemming, Town planners and a legal advice by Sattler & Associates are in the file.

Precinct Community Forum Comments

No submission or objection received at the writing of this report.

Engineers Comments

No new engineering conditions.

Building Comments

No new building conditions.

Landscaping Comments

No objections but queried several aspects of the proposal.

Waste Comments

No objections subject to conditions.

Environmental Planner Comments

No objections subject to conditions.

Planning Comments

The subject site is located on the northern side of Bower Street. The site is irregular in shape and has frontage of 26.715m to Bower Street. The depth of the site is 46.995m and 45.835m along its western and eastern boundaries respectively. The site has a rear (north western) frontage of 14.275m (effectively to Marine Parade). There exists a small parcel of land (approximately 56m² in area) between the sites northern boundary and the pedestrian walkway itself which is land held under license from the NSW Department of Lands. The area of the site is 679.4m².

The site has a part two / part three storey brick dwelling with a hipped and gabled slated roof, with an elevated concrete driveway that provides vehicular access to two on-site car parking spaces. A timber cabana is located on the southwestern corner of the site.

Vegetation on the site is dominated by an existing Moreton Bay fig, a number of palm trees and various other species within the front setback area. The land falls from the street to the rear of the site (to Marine Parade with an overall fall of approximately of 1 in 5 (along the sites eastern boundary) and 1:6 (along the sites western boundary). There is a cross fall from the sites eastern boundary to its western boundary. There is a solid 1.8m high masonry fence along the front boundary (interrupted only by a front pedestrian gate and vehicle crossing and gate) and the vegetation cover within the front setback area.

Occupying the adjoining site to the west (No 92 Bower Street) is a recently completed three (3) storey multi-dwelling development containing three (3) residential units. Further to the west again, on No 94 Bower Street (located on the corner of Bower Street and Bower Lane), is a two (2) storey residential flat building containing four (4) units.

The adjoining site to the east is occupied by a two storey dwelling of a rendered masonry construction. Occupying sites further to the east are generally single dwelling houses of two and three storey construction.

Environmental Planning & Assessment Act 1979 – Section 79(C)(1)

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) **the provisions of:**
(i) **any environmental planning instrument, and**

Environmental Planning and Assessment Act 1979

Section 96 AA of the Environmental Planning and Assessment Act 1979, states that "a consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

- (a) *it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and*
(b) *it has notified the application in accordance with:*
(i) *the regulations, if the regulations so require, and*
(ii) *a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*
(c) *it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person, and*
(d) *it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.*

In support of this Section 96 application, the applicant has said the following:

When one undertakes the above analysis in respect of the subject application it is clear that the approved development for alterations and additions to a residential dwelling house to create 2 dwellings remains, in its modified state, essentially and materially the same development. The building continues to relate to its surrounds in the same fashion, namely the increase in floor space is accommodated without any discernible change to the three dimensional form or external appearance of the development, as approved, when viewed from adjoining residential properties or the adjacent public domain.

The building will continue to relate to adjoining development and its context in the same way as originally approved with the previously approved external finish, car parking, drainage and landscape regimes not altered as a consequence of the modifications proposed.

The Court in the authority of Stavrides v Canada Bay City Council [2007] NSWLEC 248 established general principles which should be considered in determining whether a modified proposal was "substantially the same" as that originally. A number of those general principles are relevant to the subject application, namely:

- *The approved use and dwelling density does not change;*
- *The external building appearance, footprint and envelope are commensurate with those original approval;*

- *The increase in floor space is accommodated without any discernible change to the three dimensional form or external appearance of the development, as approved, when viewed from adjoining residential properties or the adjacent public domain*
- *The additional floor space does not impose any additional amenity impacts on adjoining properties in terms of views, privacy, visual bulk or overshadowing.*

On the basis of the above analysis we regard the proposed application as being “essentially and materially” the same as the approved development such that the application is appropriately categorised as being “substantially the same” and appropriately dealt with by way of Section 96AA of the Act.

The applicant made no reference to the judgement in *Claron Projects Pty Ltd v Leichhardt Municipal Council* [2004] NSWLEC 296 DATES OF HEARING: 24/05/2004 DATE OF JUDGMENT: 06/16/2004. Here, the test requires more than just a comparison of the differences between the building and use that would result from the original consent and the building and use that would result from the amended consent.

Extracts from this case is tabled below:

19. *Development* is defined in the Act as:

(a) *The use of land, and*

(b) *The subdivision of land, and*

(c) *The erection of a building, and*

(d) *The carrying out of a work, and*

(e) *The demolition of a building or work, and*

(f) *Any other act, matter or thing referred to in section 26 that is controlled by an environmental instrument, but does not include any development of a class or description prescribed by the regulations for the purposes of this definition.*

20. By referring to the term *development* the s 96 (1A)(b) test therefore also requires an examination of the process of demolition and erection of buildings and works.

21. In the context of the definition of development, the effect of the subject application is that the consent as modified will have a number of relevant characteristics, which must be compared to the original consent. First it comprises *the use of land* and this will remain unchanged. Second, the strata subdivision approval will also remain unchanged.

22. Third the subject application includes *the demolition of a building or work* comprising most of the external walls of the (then) existing building whereas the original external walls were to be retained almost entirely intact. This is in my opinion a material and significant difference

23. Fourth it comprises the *erection of a building* comprising the erection of new walls to a height of two storeys around three sides of the building on top of proposed new footings plus a new wall on top of the existing north wall whereas the original proposal was to be erected on top of the existing external walls. Even though these reconstructed walls will provide the same support for the new upper structure the reconstruction of the walls is also a material and significant difference.

24. Taking into account the extent of additional demolition of the building (i.e. excluding the demolition of the roof) and the additional building construction it is clear that the consent as modified can no longer be described as *additions and alterations to existing two-storey dwelling and conversion into a residential flat building*. It would not be incorrect to describe the original consent as modified by the subject application as: the demolition of an existing two-storey building and the erection of a new three-storey plus attic residential flat building.

25. The fact that these external walls needed to be demolished so that appropriate footings could be constructed sufficient to support the entirety of the proposal makes no difference to my conclusions. Nor does the fact that the bricks recovered from the demolition of the walls are to be reused.

26. In these circumstances I have decided that even though the resulting built form and land use will be almost identical, the consent as modified by the subject application would not be for substantially the same development as the development for which consent was originally granted. Therefore the subject application cannot be approved

For reasons that will be discussed in the consideration below, it is considered that the proposed modifications are not substantially the same as the original development that has been consented to.

This application proposes to lower the existing floor levels of the two lower floors to create more floor to ceiling height. It is also proposed to excavate into the site to create to accommodate the additional floor space. Taking into account the extent of additional excavation proposed and the demolition of the existing floors, it is considered that the consent as modified can no longer be considered as being substantially the same as the original development. Further, it is doubtful if the proposal can be considered as additions and alterations to the existing two-storey dwelling.

It is considered that the amended proposal results in the development being not substantially the same as the original development. Further the proposal is considered to be the construction of a new residential flat building. In this regard, a new development application is considered necessary for the proposed works.

Section 94 Contribution - This application also seeks to modify Conditions 55 and 56 of the consent to reduce the Section 94 contributions payable such that they do not exceed the maximum \$20,000 threshold for local government contributions applying to residential dwellings in accordance with the Section 94E Ministerial Direction of 13th January 2009

As the applicant prior to the determination of the appeal agreed the condition by the Land and environment Court, it is recommended that this condition remain unchanged.

Manly Local Environmental Plan 1988:

The site is in Zone No 2 – Residential Zone. Residential flat buildings are permissible with the consent of Council.

The site is located in a Foreshore Scenic Protection Area. Clause 17 of the LEP says that the council shall not grant consent to the carrying out of development unless it is satisfied that the development will have a detrimental effect on the amenity of the Foreshore Scenic Protection Area. For reasons addressed in the consideration of the DCP below, it is considered that the modifications sought will have a detrimental effect on the amenity of the Foreshore Scenic Protection Area.

Clause 19 of the Manly Local Environmental Plan, 1988 relates to development in the vicinity of an item of environmental heritage. For reasons discussed below, it is considered that the proposed modifications will have a detrimental impact on the heritage listed foreshore scenic protection setting.

Manly Local Environmental Plan 1988 Clause 10 Objectives

The following comments are made in regard to the objectives for the Residential Zone as stated in Clause 10 of the Manly Local Environmental Plan 1988;

(a) *to set aside land to be used for purposes of housing and associated facilities;*

N/A- The existing and proposed development is for residential uses.

(b) *to delineate, by means of development control in the supporting material, the nature and intended future of the residential areas within the Municipality;*

N/A

(c) *to allow a variety of housing types while maintaining the existing character of residential areas throughout the Manly Council area;*

Do not comply - The proposed changes sought, particularly the additional excavation proposed to accommodate the additional floor space will have a detrimental impact on the existing character of the area.

(d) *to ensure that building form, including alterations and additions, does not degrade the amenity of surrounding residents or the existing quality of the environment;*

Do not comply - The proposal will degrade the amenity of surrounding residents and the existing quality of the environment.

(e) *to improve the quality of the residential areas by encouraging landscaping and permitting greater flexibility of design in both new development and renovations;*

Do not comply - No Change to landscape area but the quality of the residential area will be detrimentally affected by this proposal.

(f) *to allow development for purposes other than housing within the zone only if it is compatible with the character and amenity of the locality;*

N/A

(g) *to ensure full and efficient use of existing social and physical infrastructure and the future provisions of service and facilities to meet any increased demand;*

N/A

(h) *to encourage the revitalisation of residential areas by rehabilitation and suitable redevelopment.*

Do Not Comply – The proposed modifications are not suitable for the site.

(i) *to encourage the provision and retention of tourist accommodation that enhances the role of Manly as an international tourist destination, and particularly in relation to the land to which Manly Local Environmental Plan 1988 (Amendment No 57) applies.*

N/A

79C(1)(a)(ii) - any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority (unless the Director-General has notified the consent authority that the making of the draft instrument has been deferred indefinitely or has not been approved), and

The Draft Manly Local Environmental Plan 2011 (MLEP 2011) and the Draft Manly Development Control Plan (MDCP 2011) were on public exhibition between 30th April and 29th June 2012. The proposal does not satisfy the standards and objectives in the draft LEP.

79C(1)(a)(iii) - any development control plan, and Manly DCP for the Residential Zone 2007

The original proposal contravened the following controls of the DCP:

1. The maximum permitted dwelling density.
2. The maximum permitted floor space ratio control.
3. The maximum permitted wall height along the western elevation.
4. The maximum permitted number of storeys.
5. The maximum permitted height of a wall proposed with a zero side setback.
6. The minimum required side setbacks to the eastern and western boundaries.

As the approved development was considered to be alterations and additions to the existing building, the proposal had the benefit of the existing setbacks, floor space, and wall height. Notwithstanding these, the Council refused the application. The Land and Environment Court approved the development application based on the context of the site and its impact on the locality and the overall design. It should be noted that Paragraph 8 of the L& E Court's Judgment on the appeal incorrectly stated that the permissible FSR for the site is 0.5:1. Commissioner Tuor, in determining the appeal on the original application might have misdirected herself on the permitted FSR for the site. The permissible FSR for the site in the DCP is only 0.45:1. It is also noted that the Statement of Environmental Effects accompanying this Section 96 application incorrectly stated that the permissible FSR in the Draft LEP is 1.45:1. The proposed FSR in the Draft DCP remains at 0.45:1.

The existing improvements on the site have a FSR of 0.53:1 and the Court allowed a small increase to 0.56:1. This current application proposes an additional 73m² of gross floor area, resulting in an increase in the previously approved FSR from 0.56:1 to 0.66:1

It is acknowledged that the applicant's statement that the proposed development is generally within the approved building footprint and envelope. It is agreed that the modifications sought do not alter the previously approved height of the development and the setbacks remain unchanged. There is no change to the approved landscaped open space and private open space. The levels of solar access to adjoining development are considered to be satisfactory. The level of privacy afforded between adjoining developments under the current approval is not compromised as a consequence of the modifications sought. There will be no additional impact on any public or private views. However, the proposal will now require additional excavation at both the lower ground and ground levels to accommodate the proposed increase floor to ceiling height. It is also proposed to further excavate deep into the southern end of the site to accommodate the additional floor area. The proposed excavation is significantly more than that permitted in Section 2.5 of the DCP. It is considered that there is a discernible change to the external appearance of the approved development.

Submissions made in accordance with this Act or the regulations

Nearby and adjoining property owners were notified in accordance with Council's Notification Policy and one submissions was received from Turnbull Planning International Pty. Ltd. The objections are summarised below:

- Overdevelopment of site
- Commissioner Tuor, in determining the appeal on the original application might have misdirected herself on the permitted FSR for the site.
- Excessive excavation
- Overshadowing impact

The concerns raised have all been addressed above.

79C(1) (e) the public interest.

The proposal is considered to be contrary to the public interest.

CONCLUSION:

The application has been assessed having regard to Section 79C and 96 of the Environmental Planning and Assessment Act 1979, the Manly Local Environmental Plan 1988 and the Development Control Plan for the Residential Zone 2007 Amendment 1.

The applicant now proposes to modify the approved development by lowering the existing floor levels of the two lower floors. It is also proposed to excavate into the site to accommodate the additional floor space. Taking into account the extent of additional excavation proposed and the demolition of the existing floors, it is considered that the consent as modified can no longer be considered as being substantially the same as the original development. The additional floor area

is considered to be unsuitable for the site. The proposal is considered as an overdevelopment of the site and will result in unacceptable visual bulk and scale as viewed from adjoining land and from the public domain.

It is considered that as Conditions 55 and 56 were agreed by the applicant prior to the determination of the appeal by the Land and Environment Court, these conditions remain unchanged.

In this regard, a new development application is considered necessary for the proposed works. It is recommended that this application be refused.

ATTACHMENTS

Please list any attachments for this report.

Assessment Planner: _____

Date: _____