

DEVELOPMENT APPLICATION ASSESSMENT REPORT

Application Number:	DA2021/2588
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Responsible Officer:	Thomas Burns
Land to be developed (Address):	Lot CP SP 5290, 69 Evans Street FRESHWATER NSW 2096
Proposed Development:	Alterations and additions to a residential flat building
Zoning:	Warringah LEP2011 - Land zoned R2 Low Density Residential
Development Permissible:	No
Existing Use Rights:	Yes
Consent Authority:	Northern Beaches Council
Delegation Level:	NBLPP
Land and Environment Court Action:	No
Owner:	The Owners Of Strata Plan 5290
Applicant:	Bruce Alexander Cuttance

Application Lodged:	25/01/2022
Integrated Development:	No
Designated Development:	No
State Reporting Category:	Residential - Alterations and additions
Notified:	02/02/2022 to 16/02/2022
Advertised:	Not Advertised
Submissions Received:	1
Clause 4.6 Variation:	4.3 Height of buildings: 336.24%
Recommendation:	Approval

Estimated Cost of Works:	\$ 275,500.00
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EXECUTIVE SUMMARY

This report is submitted to the Northern Beaches Local Planning Panel (NBLPP) for consideration of Development Application DA2021/2588 for alterations and additions to an existing 11 storey residential flat building. The works are largely cosmetic to visually enhance the existing flat building and do not increase the overall height or footprint of the existing residential flat building.

The existing residential flat building is subject to a 1968 land use consent has a maximum height of 33.7m, which is significantly above the 8.5m height limit that is currently applied to the subject site. The proposed development includes a number of privacy screens on the north-western and south-eastern side elevations of the subject flat building. The top of the privacy screening on the 11th storey is 28.58m above the existing ground level, which is a technical breach of 336.24% from the 8.5m height

development standard. Despite this, the privacy screening is situated 5.12m below the existing maximum height of the residential flat building and confined to the existing building footprint. As such, the works will have negligible impacts upon the amenity of surrounding properties, specifically with regard to views, solar access, privacy and visual bulk. Additionally, it is considered that the proposed works will provide for greater articulation to the existing residential flat building, which will ensure the development maintains an appropriate relationship with the surrounding built environment.

The development is defined as a residential flat building, which is a prohibited land use within the R2 Low Density Residential zone under the provisions of Warringah Local Environmental Plan (Warringah LEP) 2011. Section 4.67(3) of the Environmental Planning and Assessment Act 1979 (EP&A Act 1979) stipulates that the provisions contained within an Environmental Planning Instrument do not strictly apply to a development that relies on existing use rights, which in this case applies to the subject application. Despite this, the applicant has submitted a written request under Clause 4.6 to vary the height standard, in line with the recent judgement in the NSW Land and Environment Court Case of *Made Property Group Pty Limited v North Sydney Council [2020] NSWLEC 1332*.

The applicant has demonstrated that compliance with the height standard is both unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the 336.24% variation to Clause 4.3 - Height of Buildings of Warringah LEP 2011.

One submission was received following the public exhibition period. The submission raised concerns of environmental pollution, solar access, visual impact, stormwater drainage, road visibility, cost of works and lack of consultation with neighbours. A detailed assessment of these issues has been conducted and the application has been found to be satisfactory.

It is recommended that the NBLPP approve the application, subject to the conditions attached to this report.

PROPOSED DEVELOPMENT IN DETAIL

The applicant seeks development consent for alterations and additions to an existing residential flat building. The works consist of:

- New cladding to the existing garages including replacing garage doors.
- Extend the cladding of the bin room up to the same height of the garages.
- New covered roof over the bin storage area.
- New western wall beside entry doors, including letter boxes.
- Reclad the columns.
- New garage door and parapet above of unit 9's carport.
- New cladding on the wall of level 2 entry from the driveway.
- New visual privacy screens on balconies.

Note: Remediation works are currently being undertaken to the subject residential flat building pursuant to Subdivision 27 'Minor building alterations (external)' of SEPP (Exempt and Complying Development Codes) 2008. The works include re-painting, cement rendering, replacement of windows, repair works to non-structural walls and replacement of balustrading. These works are classified as exempt development pursuant to Subdivision 27 of the SEPP and do not require Council's consent. The applicant has submitted a statutory declaration to confirm the scope of remediation works currently being carried out as exempt development. A condition has been included with this consent to ensure these works are excluded from this development consent.

ASSESSMENT INTRODUCTION

The application has been assessed in accordance with the requirements of the Environmental Planning and Assessment Act 1979 and the associated Regulations. In this regard:

- An assessment report and recommendation has been prepared (the subject of this report) taking into account all relevant provisions of the Environmental Planning and Assessment Act 1979, and the associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon the subject site and adjoining, surrounding and nearby properties;
- Notification to adjoining and surrounding properties, advertisement (where required) and referral to relevant internal and external bodies in accordance with the Act, Regulations and relevant Development Control Plan;
- A review and consideration of all submissions made by the public and community interest groups in relation to the application;
- A review and consideration of all documentation provided with the application (up to the time of determination);
- A review and consideration of all referral comments provided by the relevant Council Officers, State Government Authorities/Agencies and Federal Government Authorities/Agencies on the proposal.

SUMMARY OF ASSESSMENT ISSUES

Warringah Local Environmental Plan 2011 - 4.3 Height of buildings
Warringah Local Environmental Plan 2011 - Zone R2 Low Density Residential
Warringah Development Control Plan - C8 Demolition and Construction
Warringah Development Control Plan - C9 Waste Management

SITE DESCRIPTION

Property Description:	Lot CP SP 5290 , 69 Evans Street FRESHWATER NSW 2096
Detailed Site Description:	<p>The subject site consists of one allotment located on the south-western side of Evans Street, Freshwater.</p> <p>The site is regular in shape with a frontage of 16.19m and respective depths of 52.535m and 49.81m along the north-western and south-eastern side boundaries. The site has a surveyed area of 828.5sqm.</p> <p>The site is located within the R2 Low Density Residential zone pursuant to Warringah LEP 2011 and accommodates a 11 storey residential flat building with a rooftop terrace and integrated parking.</p> <p>The site experiences a fall of approximately 11.4m that slopes away from the north-east towards the south-west. The site is situated on top of an escarpment.</p> <p>The site is devoid of any significant vegetation. Exposed sandstone rock outcrops are located on the low side of the property adjacent to the south-eastern boundary.</p>

Description of Surrounding Development

Located immediately adjacent to the south-east and north-west of the site are multi storey residential flat buildings of a similar age to the subject residential flat building. Development further towards the north-west is generally characterised by detached low density residential development (i.e. dwelling houses), ranging from 1-3 storeys in height and representing both older and modern housing stock. Located to the north-east on the opposite side of Evans Street is the Harbord Diggers site, which accommodates seniors housing, a registered club, a childcare centre and a health services facility. Located to the rear (south-west) of the site is Freshwater Beach.

Map:



SITE HISTORY

The land has been used for residential purposes for an extended period of time. A search of Council's records has revealed the following relevant history:

- Land Use Consent No. 68/120 for a 'B' or 'C' Class Residential Flat Building Containing 20 Flats approved by Council on 21 May 1968.
- Development Consent No. 98/235 for Alterations to Unit 9 within the residential flat building approved by Council on 3 August 1998.

APPLICATION HISTORY

The Development Assessment Planner examined the subject site and the surrounds on 24 February 2022.

Following the preliminary assessment of the application, which included the aforementioned site inspection, Council wrote to the applicant requesting the following information to proceed with the assessment:

- Revised Clause 4.6 written request to address all of the requirements within Clause 4.6 of Warringah LEP 2011.
- Statutory declaration to confirm the scope of the current remediation works that are being carried out as exempt development pursuant to SEPP (Exempt and Complying Development Codes) 2008.

The information was subsequently submitted to Council's satisfaction. The additional information did not alter the scope of works and therefore, the application was not required to be re-notified, in accordance with the Northern Beaches CPP.

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

The relevant matters for consideration under the Environmental Planning and Assessment Act, 1979, are:

Section 4.15 Matters for Consideration	Comments
Section 4.15 (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on “Environmental Planning Instruments” in this report.
Section 4.15 (1) (a)(ii) – Provisions of any draft environmental planning instrument	Draft State Environmental Planning Policy (Remediation of Land) seeks to replace the existing SEPP No. 55 (Remediation of Land). Public consultation on the draft policy was completed on 13 April 2018. The subject site has been used for residential purposes for an extended period of time. The proposed development retains the residential use of the site, and is not considered a contamination risk.
Section 4.15 (1) (a)(iii) – Provisions of any development control plan	Warringah Development Control Plan 2011 applies to this proposal.
Section 4.15 (1) (a)(iiia) – Provisions of any planning agreement	None applicable.
Section 4.15 (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation 2000)	<p><u>Division 8A</u> of the EP&A Regulation 2000 requires the consent authority to consider "Prescribed conditions" of development consent. These matters have been addressed via a condition of consent.</p> <p><u>Clauses 54 and 109</u> of the EP&A Regulation 2000 allow Council to request additional information. Additional information was requested in relation to existing works being undertaken on the subject site and an amended Clause 4.6 request for the variation to Clause 4.3 - Height of Buildings within Warringah LEP 2011. The applicant submitted the additional information on 30 March 2022 and the information has been assessed accordingly.</p> <p><u>Clause 92</u> of the EP&A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures.</p>

Section 4.15 Matters for Consideration	Comments
	<p>This matter has been addressed via a condition of consent.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This matter has been addressed via a condition of consent.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider the provisions of the Building Code of Australia (BCA). This matter has been addressed via a condition of consent.</p>
Section 4.15 (1) (b) – the likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality	<p>(i) Environmental Impact The environmental impacts of the proposed development on the natural and built environment are addressed under the Warringah Development Control Plan 2011 section in this report.</p> <p>(ii) Social Impact The proposed development will not have a detrimental social impact in the locality considering the character of the proposal.</p> <p>(iii) Economic Impact The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.</p>
Section 4.15 (1) (c) – the suitability of the site for the development	The site is considered suitable for the proposed development.
Section 4.15 (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs	One submission was received following the notification period. The submission is addressed within the section of this report relating to 'Notification & Submissions Received'.
Section 4.15 (1) (e) – the public interest	No matters have arisen in this assessment that would justify the refusal of the application in the public interest.

EXISTING USE RIGHTS

- Does the existing use satisfy the definition of "existing use" under the *Environmental Planning and Assessment Act 1979* (the 'Act')?

Section 4.65 of the Act defines an existing use as:

"(a) the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part, have the effect of prohibiting that use, and

(b) the use of a building, work or land:

- (i) for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and*
- (ii) that has been carried out, within one year after the date on which that provision*

commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse."

This necessarily requires the following questions to be answered:

1. Was the use of the building, work or land a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part 4 of the Act, have the effect of prohibiting that use?

Comment:

Council's records indicate that the subject site was approved for a residential flat building under Land Use Consent No. 68/120 on 21 May 1968, prior to the coming into force of Warringah LEP 2011 on 9 December 2011.

2. Was the use of the land granted development consent before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use?

Comment:

The evidence available to Council reveals that the use of the land commenced as a lawful purpose prior to the coming into force of Warringah LEP 2011, which prohibits residential flat buildings within the R2 Low Density Residential zone.

3. Has the use of the land been carried out within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse?

Comment:

The works approved under Land Use Consent No. 68/120 have been lawfully carried out prior to the coming into force of Warringah LEP 2011, which prohibits residential flat buildings on the site.

- **What is "the land on which the existing use was carried out" for the purposes of cl 42(2) (b) of the Environmental Planning and Assessment Regulation 2000 ("the Regulation")?**

Meagher JA in *Steedman v Baulkham Hills Shire Council* [No. 1] (1991) 87 LGERA 26 stated (at 27) the rule to be applied as follows: *"if the land is rightly regarded as a unit and it is found that part of its area was physically used for the purpose in question it follows that the land was used for that purpose"*.

Comment:

Having regard to the above case law, it is noted that the whole of the area of the land was physically used for the purpose in question and therefore, it is considered that the land was used for that purpose and that existing use rights apply to the whole of the subject site.

- **What are the planning principles that should be adopted in dealing with an application to alter enlarge or rebuild and existing use?**

The judgement in *Fodor Investments v Hornsby Shire Council (2005) NSWLEC 71*, sets out the planning principles that should be applied in dealing with development applications seeking to carry out development on the basis of existing use rights.

The following four principles adopted by the NSW Land and Environment Court in this case will have general application in dealing with development applications that rely on existing use rights:

1. How do the bulk and scale (as expressed by height, floor space ratio and setbacks) of the proposal relate to what is permissible on surrounding sites?

While planning controls, such as height, floor space ratio and setbacks do not apply to sites with existing use rights; they have relevance to the assessment of applications on such sites. This is because the controls apply to surrounding sites and indicate the kind of development that can be expected if and when surrounding sites are redeveloped. The relationship of new development to its existing and likely future context is a matter to be considered in all planning assessments.

Comment:

Building Height

The site is subject to a 8.5m maximum building height development standard, as applicable in the R2 zone. The existing building has an approximate height of 33.7m. The top of the privacy screen on the uppermost floor is located 28.58m above the existing ground level, which is 5.12m below the maximum height of the existing residential flat building.

Wall Height

The Warringah DCP 2011 stipulates that the maximum permitted wall height, when measured from the underside of the ceiling on the uppermost floor to the ground level, is 7.2m. The existing building has a maximum wall height of 28.67m. The proposal does not increase the wall height of the existing residential flat building.

Building Envelope

The site is subject to a side building envelope control that requires buildings to remain within an envelope that is determined by projecting planes at 45 degrees from 5m above the existing ground level along the side boundaries. The existing residential flat building protrudes significantly outside of the prescribed envelope for the site. However, the proposed privacy screens are affixed to the existing flat building and do not change the building envelope of the existing residential flat building.

Front Setback

The minimum setback required in the R2 zone is 6.5m. The proposed development includes a new roof over the existing bin storage area. Whilst the covered bin enclosure area is setback 3m from the front boundary, which does not meet the 6.5m numeric requirement, the new roof over the bin enclosure area does not exacerbate the existing numeric non-compliance, noting that the existing uncovered bin storage area is setback 3m from the front boundary. The covered bin enclosure is not visually excessive and will not have an unreasonable impact upon the streetscape.

Side Setback

The minimum side setback required in the R2 zone is 900mm. The new works are located outside of

the 900mm side setback areas.

Rear Setback

The minimum rear setback required in the R2 zone is 6m. The existing residential flat building is constructed to the rear boundary. The proposed development does not change the existing rear building line.

Concluding Comments of Bulk and Scale

The works proposed under this application are largely cosmetic and do not modify the height or footprint of the existing 11 storey residential flat building. In this regard, the proposed development is considered to maintain an appropriate relationship with the existing and future context of the locality

2. What is the relevance of the building in which the existing use takes place?

Where the change of use is proposed within an existing building, the bulk and scale of that building are likely to be deemed acceptable, even if the building is out of scale with its surroundings, because it already exists. However, where the existing building is proposed for demolition, while its bulk is clearly an important consideration, there is no automatic entitlement to another building of the same floor space ratio, height or parking provision.

Comment:

The existing residential flat building will not be demolished. The resulting development will maintain a bulk and scale that is acceptable.

3. What are the impacts on adjoining land?

The impact on adjoining land should be assessed as it is assessed for all development. It is true that where, for example, a development control plan requires three hours of sunlight to be maintained in adjoining rear yards, the numerical control does not apply. However, the overshadowing impact on adjoining rear yards should be reasonable.

Comment:

As the works do not increase the existing building height and are confined to the existing footprint, the proposed development will not result in unacceptable amenity impacts, specifically with regards to views, solar access, privacy and visual bulk.

4. What is the internal amenity?

Internal amenity must be assessed as it is assessed for all development. Again, numerical requirements for sunlight access or private open space do not apply, but these and other aspects must be judged acceptable as a matter of good planning and design. None of the legal principles discussed above suggests that development on sites with existing use rights may have lower amenity than development generally.

Comment:

The proposal has been suitably designed to ensure that it achieves an adequate standard of internal amenity. The louvre privacy screens will ensure outlooks are maintained from the existing units, whilst providing for an increased level of visual privacy.

Conclusion

The use has been approved under a previous environmental planning instrument and as such, is a lawful use. Subsequently, the use can be retained under the current environmental planning instrument (Warringah LEP 2011).

BUSHFIRE PRONE LAND

The site is not classified as bush fire prone land.

NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited from 02/02/2022 to 16/02/2022 in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the Community Participation Plan.

As a result of the public exhibition process council is in receipt of 1 submission/s from:

Name:	Address:

One submission was received following the public exhibition period. The following issues were raised in the submission:

- **Environmental Pollution from Remediation Works that are currently being undertaken to the Residential Flat Building**

The submission raises concern of environmental pollutants (i.e. concrete dust) occurring as a result of the remediation works that are currently being undertaken to the existing residential flat building.

Comment:

This concern is not related to the subject development application and therefore, is not a matter for consideration under Section 4.15 of the EP&A Act 1979. Furthermore, this matter will be referred to Council's Environmental Health/Compliance Department to undertake an investigation separate to this application.

- **Solar Access**

The submission raised concerns that the proposed development will create unreasonable overshadowing of adjoining properties.

Comment:

The works do not increase the height of the existing residential flat building and do not change the building footprint. As such, the proposal will have negligible impacts upon existing solar access to the adjacent residential flat buildings to the north-west and south-east.

- **Visual Impacts**

The submission raised concern of visual impacts from the privacy screening.

Comment:

The privacy screening provides greater articulation to the existing residential flat building and will not result in unreasonable visual impacts.

- **Length of Construction Timeframe**

The submission raised concerns of the construction timeframe.

Comment:

This is not a matter for consideration under Section 4.15 of the EP&A Act 1979.

- **Stormwater Drainage**

The submissions raised concern of how stormwater will be managed from the development.

Comment:

It is noted that the proposal includes a roof over the bin storage area. A condition has been included with this consent to ensure the stormwater drainage works comply with relevant Australian Standards.

- **Visibility when exiting adjoining properties in Vehicles**

The submission raised concern that that proposal would compromise road visibility when exiting adjoining properties in vehicles.

Comment:

The works are confined to the existing building footprint and do not increase the overall height of the subject residential flat building. In this regard, the works are unlikely to reduce road visibility.

- **Cost of Works**

The submission raised concern that the cost of works may not be an accurate depiction of the works proposed.

Comment:

The application has been accompanied by a cost of works summary from the architect, which stipulates that the cost of works are \$275,500. The cost of works summary form has been prepared in accordance with Council's lodgement requirements for development with an estimated value below \$1,000,000.

Conclusion

The concerns raised within the submission have been addressed above and resolved through conditions where necessary. The concern do not warrant refusal of the application, subject to the inclusion of appropriate conditions.

REFERRALS

Internal Referral Body	Comments
Building Assessment - Fire and Disability upgrades	<p><i>Supported, no conditions recommended.</i></p> <p>The application has been investigated with respect to aspects relevant to the Building Certification and Fire Safety Department. There are no objections to approval of the development.</p> <p>Note: The proposed development may not comply with some requirements of the BCA. Issues such as these however may be determined at Construction Certificate stage.</p>
NECC (Coast and Catchments)	<p><i>Supported, no conditions recommended</i></p> <p>This application was assessed in consideration of:</p> <ul style="list-style-type: none"> • Supplied plans and reports; • Coastal Management Act 2016; • State Environmental Planning Policy (Coastal Management) 2018 (clauses 14 & 15); and • Relevant LEP and DCP clauses. <p>The application meets the requirements of the relevant Environmental Planning Instruments and policies.</p> <p>The application is supported without conditions.</p>
Parks, reserves, beaches, foreshore	<p><i>Supported, subject to conditions</i></p> <p>The development application is for alterations and additions to a residential flat building.</p> <p>The property adjoins Freshwater Beach Reserve downslope.</p> <p>All development works must ensure that surface sediment runoff and/or erosion is controlled, managed and contained within the site boundaries and prevented from travelling across the boundary and into the Freshwater Beach Reserve. No physical encroachments over the site boundaries are permitted.</p> <p>Parks, Reserves and Foreshores raise no concerns with the development proposal subject to imposed conditions.</p>

ENVIRONMENTAL PLANNING INSTRUMENTS (EPIS)*

All, Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the merit assessment of this application.

In this regard, whilst all provisions of each Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the assessment, many provisions contained within the document are not relevant or are enacting, definitions and operational provisions which the proposal is considered to be acceptable against.

As such, an assessment is provided against the controls relevant to the merit consideration of the application hereunder.

State Environmental Planning Policies (SEPPs) and State Regional Environmental Plans (SREPs)

SEPP 19 - Bushland in Urban Areas

The site adjoins land zone RE1 Public Recreation to the rear. For land adjoining land zoned or reserved for public open space, Council shall not grant development consent unless it has taken into account:

- (c) the need to retain any bushland on the land,*
- (d) the effect of the proposed development on bushland zoned or reserved for public open space purposes and, in particular, on the erosion of soils, the siltation of streams and waterways and the spread of weeds and exotic plants within the bushland, and*
- (e) any other matters which, in the opinion of the approving or consent authority, are relevant to the protection and preservation of bushland zoned or reserved for public open space purposes.*

Comment:

The proposed development does not result in the removal of vegetation on the adjacent public open space. A condition has been included with this consent that prevents access through the adjoining reserve during construction works to minimise potential impacts. Furthermore, sediment and erosion control measures will be in place to prevent sediment migration to adjoining land.

Conclusion

Based on the above assessment, it is concluded that the proposal demonstrates consistency with SEPP 19.

SEPP 65 - Design Quality of Residential Apartment Development

SEPP 65 – Design Quality of Residential Apartment Development states the following:

- (1) This Policy applies to development for the purpose of a residential flat building, shop top housing or mixed use development with a residential accommodation component if:*
 - (a) the development consists of any of the following:*
 - (i) the erection of a new building,*
 - (ii) the substantial redevelopment or the substantial refurbishment of an existing building,*
 - (iii) the conversion of an existing building, and*
 - (b) the building concerned is at least 3 or more storeys (not including levels below ground level (existing) or levels that are less than 1.2 metres above ground level (existing) that provide for car parking) ,and*
 - (c) the building concerned contains at least 4 or more dwellings.*

Comment:

Whilst the existing residential flat building is 11 storeys in height and contains 20 dwellings, the proposed works are largely cosmetic and do not increase the height of the existing residential flat

building or alter the footprint of the building. In addition, the works do not result in a net reduction or increase of dwellings within the residential flat building. As such, it is considered that the proposed works do not constitute a substantial redevelopment or substantial refurbishment of the existing residential flat building.

For these reasons, the provisions of SEPP 65 do not apply to the proposed development. No further consideration of this Policy is required for the purpose of this assessment.

SEPP (Building Sustainability Index: BASIX) 2004

The Environmental Planning and Assessment Regulation 2021 stipulates types of development that is excluded from BASIX requirements.

BASIX excluded development means the following development—

- (a) development for the purposes of a garage, storeroom, carport, gazebo, verandah or awning,*
- (b) development that involves the alteration of a building listed on the State Heritage Register under the [Heritage Act 1977](#),*
- (c) development that involves the alteration of a building resulting in a space that cannot be fully enclosed, other than a space that can be fully enclosed but for a vent needed for the safe operation of a gas appliance,*

Example—

A verandah that is open or enclosed by a screen, mesh or other material that permits the free and uncontrolled flow of air.

Comment:

The proposed works are not connected to internal habitable areas within the existing residential flat building. The privacy screens and associated external works proposed will not preclude free and uncontrolled flow of air into the building. In this regard, the works are considered 'BASIX excluded development'.

SEPP (Coastal Management) 2018

State Environmental Planning Policy (Resilience and Hazards) 2021

Chapter 2 Coastal Management

The site is located within the Coastal Use Area pursuant to this SEPP. Accordingly, an assessment has been carried out against Clauses 14 and 15 of the SEPP as follows:

2.11 Development on land within the coastal use area

(1) Development consent must not be granted to development on land that is within the coastal use area unless the consent authority—

- (a) has considered whether the proposed development is likely to cause an adverse impact on the following—*

(i) existing, safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,

(ii) overshadowing, wind funnelling and the loss of views from public places to foreshores,

(iii) the visual amenity and scenic qualities of the coast, including coastal headlands,

(iv) Aboriginal cultural heritage, practices and places,

(v) cultural and built environment heritage, and

(b) is satisfied that—

(i) the development is designed, sited and will be managed to avoid an adverse impact referred to in paragraph (a), or

(ii) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or

(iii) if that impact cannot be minimised—the development will be managed to mitigate that impact, and

(c) has taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.

(2) This section does not apply to land within the Foreshores and Waterways Area within the meaning of Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005.

Comment:

The works are confined to the existing building footprint and do not increase the maximum height of the existing residential flat building. In this regard, the proposed development will not result in overshadowing, wind funnelling and the loss of views from public places to the foreshore area. In addition, the works will not preclude access to or along the foreshore. It is considered that the provision of louvre privacy screening will provide for greater articulation to the building and thus, the works will not detract from the visual amenity of the area.

The site is also sufficiently separated from sites with built or environmental heritage significance and therefore, the development will not have an adverse impact upon cultural and built environmental heritage. Moreover, the site is not mapped within an area known for containing Aboriginal heritage significance and therefore, the proposal will not have an adverse impact upon Aboriginal cultural heritage, practice or places.

The Development Assessment Planner has taken into account the surrounding coastal and built environment and the bulk, size and scale of the proposed development and concluded that the proposal is suitable within this setting given the historical nature of the existing flat building.

For the reasons outlined above, it is considered that the proposed development has been suitably designed, sited and will be managed to avoid an adverse impact upon the matters referred to in Clause 2.11 of this SEPP.

2.12 Development in coastal zone generally—development not to increase risk of coastal

hazards

Development consent must not be granted to development on land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land.

Comment:

Given the minor nature of the proposal and mitigation measures employed during construction works (i.e. sediment and erosion control measures), it is considered that the proposal is unlikely to cause increased risk of coastal hazards within the locality.

Chapter 4 Remediation of land

4.1 Object of this Chapter

(1) The object of this Chapter is to provide for a Statewide planning approach to the remediation of contaminated land.

(2) In particular, this Chapter aims to promote the remediation of contaminated land for the purpose of reducing the risk of harm to human health or any other aspect of the environment—

(a) by specifying when consent is required, and when it is not required, for a remediation work, and

(b) by specifying certain considerations that are relevant in rezoning land and in determining development applications in general and development applications for consent to carry out a remediation work in particular, and

(c) by requiring that a remediation work meet certain standards and notification requirements.

Comment:

Council records indicate that the subject site has been used for residential purposes for a significant period of time with no prior land uses. In this regard it is considered that the site poses no risk of contamination and therefore, no further consideration is required under as the land is considered to be suitable for the residential land use.

Conclusion

Having regard to the above assessment, it is concluded that the proposal is consistent with the relevant requirements within SEPP (Resilience and Hazards) 2021.

Warringah Local Environmental Plan 2011

Is the development permissible?	No
After consideration of the merits of the proposal, is the development consistent with:	
aims of the LEP?	Yes
zone objectives of the LEP?	No

Principal Development Standards

Standard	Requirement	Proposed	% Variation	Complies
Height of Buildings:	8.5m	28.58m	336.24%	No

Compliance Assessment

Clause	Compliance with Requirements
4.3 Height of buildings	No (see detail under Clause 4.6 below)
4.6 Exceptions to development standards	Yes
6.4 Development on sloping land	Yes

Detailed Assessment

Zone R2 Low Density Residential

The proposed development relies on existing use rights. As such, compliance with the zone objectives is not relevant to this application.

4.6 Exceptions to development standards

Description of non-compliance:

Development standard:	Height of buildings
Requirement:	8.5m
Existing:	33.1m (top of building parapet)
Proposed:	28.58m (top of privacy screen on 11th storey)
Percentage variation to requirement:	336.24%

The site is subject to a 8.5m maximum building height under the requirements of Clause 4.3 of the Warringah LEP 2011. The top of the proposed privacy screening on the 11th storey is situated 28.58m above the existing ground level, which represents a 336.24% technical variation to the development standard. However, it is noted that the privacy screening is located 5.12m below the existing maximum height of the subject residential flat building.

Whilst Section 4.67(3) of the Environmental Planning and Assessment Act 1979 (EP&A Act 1979) stipulates that the provisions contained within an Environmental Planning Instrument do not strictly apply to a development that relies on existing use rights, the recent judgement in the Land and Environment Court Case of *Made Property Group Pty Limited v North Sydney Council [2020] NSWLEC 1332* required a written request pursuant to Clause 4.6 to be submitted to vary a development standard, despite the subject development benefiting from existing use rights.

Accordingly, an assessment against the matters within Clause 4.6 of Warringah LEP 2011 is provided below.

Assessment of request to vary a development standard:

The following assessment of the variation to Clause 4.3 – Height of Buildings development standard, has taken into consideration the judgements contained within *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

Clause 4.6 Exceptions to development standards:

(1) The objectives of this clause are as follows:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

Comment:

Clause 4.3 – Height of Buildings development standard is not expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

Clause 4.6 (4)(a)(i) (Justification) assessment:

Clause 4.6 (4)(a)(i) requires the consent authority to be satisfied that the applicant's written request, seeking to justify the contravention of the development standard, has adequately addressed the matters required to be demonstrated by cl 4.6(3). There are two separate matters for consideration contained within cl 4.6(3) and these are addressed as follows:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

Comment:

The Applicant's written request (attached to this report as an Appendix) has demonstrated that the objectives of the development standard are achieved, notwithstanding the non-compliance with the development standard.

In doing so, the Applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by cl 4.6(3)(a).

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

Comment:

In the matter of Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Preston CJ provides the following guidance (para 23) to inform the consent authority's finding that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard:

'As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.'

s 1.3 of the EPA Act reads as follows:

1.3 Objects of Act(cf previous s 5)

The objects of this Act are as follows:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The applicant's written request argues, in part:

"It is considered that there are sufficient environmental planning grounds to justify contravening the development standard.

Although the existing residential flat building already exceeds the prescribed height, and although the proposed privacy screens are within the existing building envelope, they exceed the height limit of 8.5 metres.

As indicated previously the overall height of the existing residential flat building does not change as a result of the proposed privacy screens, and its contextual relationship with adjoining development, as well as the streetscape, will be maintained.

The proposed addition of the privacy screens do not cause any adverse environmental impacts in terms of amenity to adjoining property owners such as overshadowing, privacy or loss of views.

In that regard, whilst there is no requirement that the development comply with the objectives set out in clause 4.6(1), it is relevant to note that objective (b) provides: "to achieve better outcomes for and from (my emphasis) development by allowing flexibility in particular circumstances." (sic)

It should be noted at the outset that in Initial Action, the Court held that it is incorrect to hold that the lack of adverse impact on adjoining properties is not a sufficient ground justifying the development contravening the development standard when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse impacts.

It is considered that the variation to the development standard in this instance, does not reduce the amenity of other development in the vicinity of the site or the public domain, but results in significantly enhanced amenity for the occupants of the existing residential flat building in terms of screening of existing services, as well as providing increased privacy on their balconies.

The various proportions of the existing residential flat building have been maintained that contribute to the visual appearance of the building, enabling a visual identification of a built form that remains appropriate for the site.

More importantly it is considered that a flexibility in relation to the height standard, results in a better planning outcome being achieved, and increased amenity for the occupants of the existing residential flat building.

Further to the above it is noted that existing view corridors are not adversely affected by the provision of the privacy screens.

In addition, the variation to the development standard does not result in additional overshadowing, as there are no changes proposed to the existing height of the building envelope and or footprint of the existing building, and there are no shadow adverse impacts.

Additionally, the variation to the development standard does not result in any increase of impacts on the streetscape.

That is this proposal does not change the height, form, design and finished materials of the facades facing Evans Street.

The form of the development, its appearance and its size, as seen from the public domain, will not be changed as a result of this application, and is entirely consistent with the existing character of the area.

It is considered that the absence of external impacts, the increased internal amenity for the occupants of the residential flat building, constitute sufficient environmental planning grounds to justify a departure

from the development standard, which could not be otherwise achieved if the prescribed height limit was maintained.

The proposed development also achieves the relevant objects in Section 1.3 of the EPA Act, in that the proposed modification specifically:

- Promotes the orderly and economic use and development of land through the efficient use of infrastructure (roads, water, sewer, electricity, community services, and facilities), to meet the housing needs of the community.*
- Does not adversely impact on the conservation of threatened and other species of native animals and plants, ecological communities and their habitats (1.3(e)).*
- Provides increased articulation of the existing residential flat building, without any increase in height or footprint of that building, providing increased amenity for the residents of the residential flat building (1.3(g)).*
- Provides for the proper construction and ultimate use of the balcony areas, in addition to the screening of services, ensuring the continued maintenance of the approved residential flat building, and the protection of the health and safety of its future occupants (1.3(h)).*

These are not simply benefits of the development as a whole, but are benefits emanating from the breach of the height control standard.

It is noted that in Initial Action, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

- 86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*
- 87. The second matter was in cl 4.6(3) (b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6 (3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard".

Planner Comment:

Council's Development Assessment Planner generally agrees with the applicant's justification to contravene the development standard. In particular, it is agreed that whilst the privacy screening

exceeds the 8.5m height plane the works are confined the existing building footprint and do not increase the maximum height of the existing residential flat building. In this regard, the works will have negligible impacts on the amenity of surrounding properties, with specific regard to solar access, privacy, visual bulk and views. It is considered that the privacy screening will provide for greater articulation to the existing residential flat building, which will enhance the streetscape. Overall, the non-compliance with the height standard will increase the internal amenity of the occupants of the residential flat building, through obscuring existing services and providing for greater privacy to each unit, without resulting in adverse streetscape or amenity impacts.

In this regard, the applicant's written request has demonstrated that the proposed development is an orderly and economic use and development of the land, and that the structure is of a good design that will reasonably protect and improve the amenity of the surrounding built environment, therefore satisfying cls 1.3 (c) and (g) of the EPA Act.

Therefore, the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by cl 4.6 (3)(b).

Therefore, Council is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

Clause 4.6 (4)(a)(ii) (Public Interest) assessment:

cl 4.6 (4)(a)(ii) requires the consent authority to be satisfied that:

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out

Comment:

In considering whether or not the proposed development will be in the public interest, consideration must be given to the underlying objectives of the Height of Buildings development standard and the objectives of the R2 Low Density Residential zone. An assessment against these objectives is provided below.

Objectives of development standard

The underlying objectives of the standard, pursuant to Clause 4.3 – 'Height of buildings' of the Warringah LEP 2011 are:

(1) The objectives of this clause are as follows:

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

Comment:

The privacy screening is situated 5.12m below the maximum height of the existing residential flat building and will maintain the existing building envelope. Therefore, the height and scale of the building will continue to maintain an appropriate visual relationship with surrounding and nearby development.

b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

Comment:

The privacy screens do not increase the maximum height of the existing building and are located within an existing footprint. In this regard, the proposal will not result in any unreasonable amenity impacts, specifically with regard to visual bulk, views, privacy and solar access.

c) to minimise adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

Comment:

The proposal does not result in a reduction of landscaping on the site.

d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities,

Comment:

It is considered that the privacy screening will provide for greater articulation to the existing residential flat building, which will ensure that the development does not have an unreasonable visual impact when viewed from Freshwater Beach and surrounding public places.

Zone objectives

The underlying objectives of the R2 Low Density Residential zone are:

- *To provide for the housing needs of the community within a low density residential environment.*

Comment:

The subject site and adjacent properties immediately to the north-west and south-east do not contain low density residential development and accommodate multi storey residential flat buildings. However, the proposed development does not increase the density or height of the subject flat building, thereby ensuring the overall bulk and scale of the development continues to maintain an appropriate visual relationship with the surrounding environment.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comment:

The site will retain the residential land use.

- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

Comment:

The proposal does not result in a reduction of landscaping on the site.

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the R2 Low Density Residential zone and Clause 4.3 - Height of Buildings.

Clause 4.6 (4)(b) (Concurrence of the Secretary) assessment:

cl. 4.6(4)(b) requires the concurrence of the Secretary to be obtained in order for development consent to be granted.

Planning Circular PS20-002 dated 5 May 2020, as issued by the NSW Department of Planning & Infrastructure, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument. In this regard, given the consistency of the variation to the objectives of the zone, the concurrence of the Secretary for the variation to the Height of buildings Development Standard is assumed by the Local Planning Panel.

Warringah Development Control Plan

Built Form Controls

Built Form Control	Requirement	Proposed	% Variation*	Complies
B1 Wall height	7.2m	28.67m (no change to existing)	N/A	N/A
B3 Side Boundary Envelope	5m then projected at 45 degrees (NW)	privacy screens outside of envelope	up to 271.17%	No
	5m then projected at 45 degrees (SE)	privacy screens outside of envelope	up to 256.03%	No
B5 Side Boundary Setbacks	0.9m (NW)	no change	N/A	N/A
	0.9m (SE)	no change	N/A	N/A
B7 Front Boundary Setbacks	6.5m	3m (roof over bin storage) - front setback consistent with only change being the roof covering	53.85%	No
B9 Rear Boundary Setbacks	6m	no change	N/A	N/A
D1 Landscaped Open Space (LOS) and Bushland Setting	40%	no change	N/A	N/A

Note: The development is considered against relevant built form controls applicable for the site. It should be noted that the above controls are generally applied to development permissible with consent in the R2 Low Density Residential zone.

Part B Built Form Controls

The Land and Environment Court Planning Principle established in the judgement by Senior Commissioner Roseth in *Fodor Investments v Hornsby Shire Council* [2005] NSWLEC 71 confirms that the provisions of Environmental Planning Instruments and Development Control Plans that derogate or

detract from the benefit endowed on a site by existing use rights do not apply to the assessment of applications on sites where existing use rights apply. Therefore, zone objectives and planning controls that govern the size of a development (i.e building height, floor space ratio, building envelope and setbacks) are not strictly applied where existing use rights apply. This includes qualitative provisions as well as quantitative provisions. Having regard to the above case law, the built form controls contained within the WDCP 2011 compliance table are not strictly applied to this particular application and is, therefore, only included as a record to identify how the proposed development relates to applicable planning controls that would otherwise apply to the subject site if existing use rights did not apply. In this regard, no further assessment is provided in this report relating to the numerical non-compliances identified within the Built Form Controls table above. Instead, this report includes a merit based assessment having regard to the matters for consideration prescribed within Section 4.15 of the Environmental Planning and Assessment Act 1979.

Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
A.5 Objectives	Yes	Yes
C4 Stormwater	Yes	Yes
C8 Demolition and Construction	No	Yes
C9 Waste Management	No	Yes
D3 Noise	Yes	Yes
D6 Access to Sunlight	Yes	Yes
D7 Views	Yes	Yes
D8 Privacy	Yes	Yes
D9 Building Bulk	Yes	Yes
D10 Building Colours and Materials	Yes	Yes
D12 Glare and Reflection	Yes	Yes
D14 Site Facilities	Yes	Yes
D20 Safety and Security	Yes	Yes
D21 Provision and Location of Utility Services	Yes	Yes
D22 Conservation of Energy and Water	Yes	Yes
E1 Preservation of Trees or Bushland Vegetation	Yes	Yes
E2 Prescribed Vegetation	Yes	Yes
E4 Wildlife Corridors	Yes	Yes
E6 Retaining unique environmental features	Yes	Yes
E7 Development on land adjoining public open space	Yes	Yes
E10 Landslip Risk	Yes	Yes

Detailed Assessment

C8 Demolition and Construction

The application was not accompanied by a Waste Management Plan. To ensure the proper disposal of builder's waste, a suitable condition has been included with this consent requiring the applicant to prepare a Waste Management Plan in accordance with Council's Waste Management Guidelines. The plan is to be submitted to the Certifying Authority prior to the issue of the Construction Certificate.

C9 Waste Management

The application was not accompanied by a Waste Management Plan. To ensure the proper disposal of builder's waste, a suitable condition has been included with this consent requiring the applicant to prepare a Waste Management Plan in accordance with Council's Waste Management Guidelines. The plan is to be submitted to the Certifying Authority prior to the issue of the Construction Certificate.

THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES

The proposal will not significantly affect threatened species, populations or ecological communities, or their habitats.

CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN

The proposal is consistent with the principles of Crime Prevention Through Environmental Design.

POLICY CONTROLS

Northern Beaches Section 7.12 Contributions Plan 2021

The proposal is subject to the application of Northern Beaches Section 7.12 Contributions Plan 2021.

A monetary contribution of \$2,755 is required for the provision of new and augmented public infrastructure. The contribution is calculated as 1% of the total development cost of \$275,500.

CONCLUSION

The site has been inspected and the application assessed having regard to all documentation submitted by the applicant and the provisions of:

- Environmental Planning and Assessment Act 1979;
- Environmental Planning and Assessment Regulation 2000;
- All relevant and draft Environmental Planning Instruments;
- Warringah Local Environment Plan;
- Warringah Development Control Plan; and
- Codes and Policies of Council.

This assessment has taken into consideration the submitted plans, Statement of Environmental Effects, all other documentation supporting the application and public submissions, and does not result in any unreasonable impacts on surrounding, adjoining, adjacent and nearby properties subject to the conditions contained within the recommendation.

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

- Consistent with the objectives of the DCP
- Consistent with the zone objectives of the LEP
- Consistent with the aims of the LEP
- Consistent with the objectives of the relevant EPIs
- Consistent with the objects of the Environmental Planning and Assessment Act 1979

Council is satisfied that:

1) The Applicant's written request under Clause 4.6 of the Warringah Local Environmental Plan 2011 seeking to justify a contravention of Clause 4.3 Height of Buildings has adequately addressed and demonstrated that:

a) Compliance with the standard is unreasonable or unnecessary in the circumstances of the case; and

b) There are sufficient environmental planning grounds to justify the contravention.

2) The proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

The proposed development involves alterations and additions to an existing residential flat building.

The maximum height of the proposed development is 28.58m, which exceeds the 8.5m height limit. Despite this, the privacy screening is situated 5.12m below the maximum height of the residential flat building and confined to the existing building footprint.

When considered against the Warringah LEP 2011 and Warringah DCP 2011 objectives, the proposed development is considered to align with the relevant aims and requirements of these Policies, noting that the development will not result in any unacceptable amenity or environmental impacts.

The concerns raised within the submission have been addressed and do not warrant refusal of the application.

Therefore, the application is recommended for approval.

It is considered that the proposed development satisfies the appropriate controls and that all processes and assessments have been satisfactorily addressed.

RECOMMENDATION

That Northern Beaches Council as the consent authority vary Clause 4.3 Height of buildings development standard pursuant to clause 4.6 of the WLEP 2011 as the applicant's written request has adequately addressed the merits required to be demonstrated by subclause (3) and the proposed development will be in the public interest and is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

Accordingly the Northern Beaches Local Planning Panel, on behalf of Northern Beaches Council as the consent authority grant Development Consent to DA2021/2588 for Alterations and additions to a residential flat building on land at Lot CP SP 5290, 69 Evans Street, FRESHWATER, subject to the conditions printed below:

DEVELOPMENT CONSENT OPERATIONAL CONDITIONS

1. **Approved Plans and Supporting Documentation**

The development must be carried out in compliance (except as amended by any other condition of consent) with the following:

a) Approved Plans

Architectural Plans - Endorsed with Council's stamp		
Drawing No.	Dated	Prepared By
CD 02	September 2021	Woodhouse & Danks Architects
CD 03	September 2021	Woodhouse & Danks Architects
CD 04	September 2021	Woodhouse & Danks Architects
CD 05	September 2021	Woodhouse & Danks Architects
CD 06	September 2021	Woodhouse & Danks Architects
CD 07	September 2021	Woodhouse & Danks Architects
CD 08	September 2021	Woodhouse & Danks Architects
CD 09	September 2021	Woodhouse & Danks Architects
CD 10	September 2021	Woodhouse & Danks Architects
CD 11	September 2021	Woodhouse & Danks Architects
CD 12	September 2021	Woodhouse & Danks Architects
CD 13	September 2021	Woodhouse & Danks

		Architects
CD 14	September 2021	Woodhouse & Danks Architects
CD 20	September 2021	Woodhouse & Danks Architects
CD 21a	December 2021	Woodhouse & Danks Architects
CD 22a	December 2021	Woodhouse & Danks Architects
CD 40	August 2021	Woodhouse & Danks Architects
CD 41	August 2021	Woodhouse & Danks Architects
CD 42	August 2021	Woodhouse & Danks Architects
CD 43	August 2021	Woodhouse & Danks Architects
CD 44a	December 2021	Woodhouse & Danks Architects
CD 45	August 2021	Woodhouse & Danks Architects
CD 45	August 2021	Woodhouse & Danks Architects

Reports / Documentation – All recommendations and requirements contained within:

Report No. / Page No. / Section No.	Dated	Prepared By
BCA Report	December 2021	Woodhouse & Danks Architects
Preliminary Geotechnical Assessment Ref. J3764	29 September 2021	White Geotechnical Group

b) Any plans and / or documentation submitted to satisfy the Conditions of this consent.

In the event of any inconsistency between conditions of this consent and the drawings/documents referred to above, the conditions of this consent will prevail.

Reason: To ensure the work is carried out in accordance with the determination of Council and approved plans.

2. **Prescribed Conditions**

- (a) All building works must be carried out in accordance with the requirements of the Building Code of Australia (BCA).
- (b) BASIX affected development must comply with the schedule of BASIX commitments specified within the submitted BASIX Certificate (demonstrated compliance upon plans/specifications is required prior to the issue of the Construction Certificate);
- (c) A sign must be erected in a prominent position on any site on which building work, subdivision work or demolition work is being carried out:

- (i) showing the name, address and telephone number of the Principal Certifying Authority for the work, and
- (ii) showing the name of the principal contractor (if any) for any building work and a telephone number on which that person may be contacted outside working hours, and
- (iii) stating that unauthorised entry to the work site is prohibited.

Any such sign is to be maintained while the building work, subdivision work or demolition work is being carried out, but must be removed when the work has been completed.

- (d) Residential building work within the meaning of the Home Building Act 1989 must not be carried out unless the Principal Certifying Authority for the development to which the work relates (not being the Council) has given the Council written notice of the following information:

- (i) in the case of work for which a principal contractor is required to be appointed:
 - A. the name and licence number of the principal contractor, and
 - B. the name of the insurer by which the work is insured under Part 6 of that Act,
- (ii) in the case of work to be done by an owner-builder:
 - A. the name of the owner-builder, and
 - B. if the owner-builder is required to hold an owner-builder permit under that Act, the number of the owner-builder permit.

If arrangements for doing the residential building work are changed while the work is in progress so that the information notified under becomes out of date, further work must not be carried out unless the Principal Certifying Authority for the development to which the work relates (not being the Council) has given the Council written notice of the updated information.

- (e) Development that involves an excavation that extends below the level of the base of the footings of a building on adjoining land, the person having the benefit of the development consent must, at the person's own expense:
 - (i) protect and support the adjoining premises from possible damage from the excavation, and
 - (ii) where necessary, underpin the adjoining premises to prevent any such damage.
 - (iii) must, at least 7 days before excavating below the level of the base of the footings of a building on an adjoining allotment of land, give notice of intention to do so to the owner of the adjoining allotment of land and furnish particulars of the excavation to the owner of the building being erected or demolished.
 - (iv) the owner of the adjoining allotment of land is not liable for any part of the cost of work carried out for the purposes of this clause, whether carried out on the allotment of land being excavated or on the adjoining allotment of land.

In this clause, allotment of land includes a public road and any other public place.

Reason: Legislative requirement.

3. **General Requirements**

- (a) Unless authorised by Council:
Building construction and delivery of material hours are restricted to:

- 7.00 am to 5.00 pm inclusive Monday to Friday,
- 8.00 am to 1.00 pm inclusive on Saturday,
- No work on Sundays and Public Holidays.

Demolition and excavation works are restricted to:

- 8.00 am to 5.00 pm Monday to Friday only.

(Excavation work includes the use of any excavation machinery and the use of jackhammers, rock breakers, excavators, loaders and the like, regardless of whether the activities disturb or alter the natural state of the existing ground stratum or are breaking up/removing materials from the site).

- (b) Should any asbestos be uncovered on site, its demolition and removal must be carried out in accordance with WorkCover requirements and the relevant Australian Standards.
- (c) At all times after the submission the Notice of Commencement to Council, a copy of the Development Consent and Construction Certificate is to remain onsite at all times until the issue of a final Occupation Certificate. The consent shall be available for perusal of any Authorised Officer.
- (d) Where demolition works have been completed and new construction works have not commenced within 4 weeks of the completion of the demolition works that area affected by the demolition works shall be fully stabilised and the site must be maintained in a safe and clean state until such time as new construction works commence.
- (e) Onsite toilet facilities (being either connected to the sewer or an accredited sewer management facility) for workers are to be provided for construction sites at a rate of 1 per 20 persons.
- (f) Prior to the release of the Construction Certificate, payment of the Long Service Levy is required. This payment can be made at Council or to the Long Services Payments Corporation. Payment is not required where the value of the works is less than \$25,000. The Long Service Levy is calculated on 0.35% of the building and construction work. The levy rate and level in which it applies is subject to legislative change. The applicable fee at the time of payment of the Long Service Levy will apply.
- (g) The applicant shall bear the cost of all works associated with the development that occurs on Council's property.
- (h) No skip bins, building materials, demolition or excavation waste of any nature, and no hoist, plant or machinery (crane, concrete pump or lift) shall be placed on Council's footpaths, roadways, parks or grass verges without Council Approval.
- (i) Demolition materials and builders' wastes are to be removed to approved waste/recycling centres.
- (j) No trees or native shrubs or understorey vegetation on public property (footpaths, roads, reserves, etc.) or on the land to be developed shall be removed or damaged during construction unless specifically approved in this consent including for the erection of any fences, hoardings or other temporary works.
- (k) Prior to the commencement of any development onsite for:
 - i) Building/s that are to be erected
 - ii) Building/s that are situated in the immediate vicinity of a public place and is dangerous to persons or property on or in the public place
 - iii) Building/s that are to be demolished

- iv) For any work/s that is to be carried out
- v) For any work/s that is to be demolished

The person responsible for the development site is to erect or install on or around the development area such temporary structures or appliances (wholly within the development site) as are necessary to protect persons or property and to prevent unauthorised access to the site in order for the land or premises to be maintained in a safe or healthy condition. Upon completion of the development, such temporary structures or appliances are to be removed within 7 days.

- (l) A "Road Opening Permit" must be obtained from Council, and all appropriate charges paid, prior to commencement of any work on Council property. The owner/applicant shall be responsible for all public utilities and services in the area of the work, shall notify all relevant Authorities, and bear all costs associated with any repairs and/or adjustments as those Authorities may deem necessary.
- (m) The works must comply with the relevant Ausgrid Network Standards and SafeWork NSW Codes of Practice.
- (n) Requirements for new swimming pools/spas or existing swimming pools/spas affected by building works.
 - (1) Child resistant fencing is to be provided to any swimming pool or lockable cover to any spa containing water and is to be consistent with the following;

Relevant legislative requirements and relevant Australian Standards (including but not limited) to:

 - (i) Swimming Pools Act 1992
 - (ii) Swimming Pools Amendment Act 2009
 - (iii) Swimming Pools Regulation 2018
 - (iv) Australian Standard AS1926 Swimming Pool Safety
 - (v) Australian Standard AS1926.1 Part 1: Safety barriers for swimming pools
 - (vi) Australian Standard AS1926.2 Part 2: Location of safety barriers for swimming pools.
 - (2) A 'KEEP WATCH' pool safety and aquatic based emergency sign, issued by Royal Life Saving is to be displayed in a prominent position within the pool/spa area.
 - (3) Filter backwash waters shall be conveyed to the Sydney Water sewerage system in sewered areas or managed on-site in unsewered areas in a manner that does not cause pollution, erosion or run off, is separate from the irrigation area for any wastewater system and is separate from any onsite stormwater management system.
 - (4) Swimming pools and spas must be registered with the Division of Local Government.

Reason: To ensure that works do not interfere with reasonable amenity expectations of residents and the community.

4. **No Consent for Remediation Works currently being undertaken**

No consent is granted for the remediation works currently being undertaken to the residential flat building. This includes re-painting, cement rendering, replacement of windows, repair works to non-structural walls and replacement of balustrading.

Reason: The works constitute exempt development and are excluded from the scope of works

proposed under this Development Application.

FEES / CHARGES / CONTRIBUTIONS

5. **Policy Controls**

Northern Beaches 7.12 Contributions Plan 2021

A monetary contribution of \$2,755.00 is payable to Northern Beaches Council for the provision of local infrastructure and services pursuant to section 7.12 of the Environmental Planning & Assessment Act 1979 and the Northern Beaches Section 7.12 Contributions Plan 2021. The monetary contribution is based on a development cost of \$275,500.00.

The monetary contribution is to be paid prior to the issue of the first Construction Certificate or Subdivision Certificate whichever occurs first, or prior to the issue of the Subdivision Certificate where no Construction Certificate is required. If the monetary contribution (total or in part) remains unpaid after the financial quarter that the development consent is issued, the amount unpaid (whether it be the full cash contribution or part thereof) will be adjusted on a quarterly basis in accordance with the applicable Consumer Price Index. If this situation applies, the cash contribution payable for this development will be the total unpaid monetary contribution as adjusted.

The proponent shall provide to the Certifying Authority written evidence (receipt/s) from Council that the total monetary contribution has been paid.

The Northern Beaches Section 7.12 Contributions Plan 2021 may be inspected at 725 Pittwater Rd, Dee Why and at Council's Customer Service Centres or alternatively, on Council's website at www.northernbeaches.nsw.gov.au

This fee must be paid prior to the issue of the Construction Certificate. Details demonstrating compliance are to be submitted to the Principal Certifying Authority.

Reason: To provide for contributions in accordance with the Contribution Plan to fund the provision of new or augmented local infrastructure and services.

6. **Security Bond**

A bond (determined from cost of works) of \$1,500 and an inspection fee in accordance with Council's Fees and Charges paid as security are required to ensure the rectification of any damage that may occur to the Council infrastructure contained within the road reserve adjoining the site as a result of construction or the transportation of materials and equipment to and from the development site.

An inspection fee in accordance with Council adopted fees and charges (at the time of payment) is payable for each kerb inspection as determined by Council (minimum (1) one inspection).

All bonds and fees shall be deposited with Council prior to Construction Certificate or demolition work commencing, and details demonstrating payment are to be submitted to the Certifying Authority prior to the issue of the Construction Certificate.

To process the inspection fee and bond payment a Bond Lodgement Form must be completed with the payments (a copy of the form is attached to this consent and alternatively a copy is located on Council's website at www.northernbeaches.nsw.gov.au).

Reason: To ensure adequate protection of Council's infrastructure.

CONDITIONS TO BE SATISFIED PRIOR TO THE ISSUE OF THE CONSTRUCTION CERTIFICATE

7. Compliance with Standards

The development is required to be carried out in accordance with all relevant Australian Standards.

Details demonstrating compliance with the relevant Australian Standard are to be submitted to the Certifying Authority prior to the issue of the Construction Certificate.

Reason: To ensure the development is constructed in accordance with appropriate standards.

8. External Finishes to Roof

The external finish to the roof over the bin storage area shall have a medium to dark range in order to minimise solar reflections to neighbouring properties. Any roof with a metallic steel finish is not permitted.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of the Construction Certificate.

Reason: To ensure that excessive glare or reflectivity nuisance does not occur as a result of the development.

9. Waste Management Plan

A Waste Management Plan must be prepared for this development. The Plan must be in accordance with Council's Waste Management Guidelines.

Details demonstrating compliance must be provided to the Certifying Authority prior to the issue of the Construction Certificate.

Reason: To ensure that any demolition and construction waste, including excavated material, is reused, recycled or disposed of in an environmentally friendly manner.

CONDITIONS THAT MUST BE ADDRESSED PRIOR TO ANY COMMENCEMENT

10. Installation and Maintenance of Sediment and Erosion Control

Prior to commencement of works on site, sediment and erosion controls must be installed along the immediate downslope of the works area in accordance with Landcom's 'Managing Urban Stormwater: Soils and Construction' (2004).

The erosion controls shall be maintained in an operational condition until the development activities have been completed and the site fully stabilised. Sediment shall be removed from the sediment controls following each heavy or prolonged rainfall period.

Techniques used for erosion and sediment control on site are to be adequately maintained and monitored at all times, particularly after periods of rain, and shall remain in proper operation until all development activities have been completed and the site is sufficiently stabilised with vegetation.

Reason: To protect the surrounding environment from the effects of sedimentation and erosion

from the site.

CONDITIONS TO BE COMPLIED WITH DURING DEMOLITION AND BUILDING WORK

11. No Access Through Land Owned or Managed by Council

Site access is not approved for delivery of materials nor construction of the development through adjacent land owned or managed by Council, without the written approval of Council.

Reason: Public safety, landscape amenity and tree protection.

12. Storage of Materials on Land Owned or Managed by Council Prohibited

The dumping or storage of building materials, spoil, vegetation, green waste or any other material in land owned or managed by Council is prohibited.

Reason: Public safety and environmental protection.

13. Protection of Council's Public Assets

Any damage to Council's public assets shall be made good by the applicant, and/or the contractor, to the satisfaction of Council.

Council's public assets include, but is not limited to, the following: road, kerb and gutters, crossovers, crossings, paths, grass verge, open space and associated elements such as furniture, recreational facilities and the like, within the meaning of the Local Government Act 1993.

Existing trees shall be protected in accordance with AS4970-2009 Protection of Trees on Development Sites, with particular reference to Section 4, with no ground intrusion into the tree protection zone and no trunk, branch nor canopy disturbance.

Should any problems arise with regard to the existing trees on public land during the construction period, the applicant is to immediately contact Council's Tree Services section and resolve the matter to Council's satisfaction.

Reason: To protect and/or restore any damaged public asset.

14. Removing, Handling and Disposing of Asbestos

Any asbestos material arising from the demolition process shall be removed and disposed of in accordance with the following requirements:

- Work Health and Safety Act;
- Work Health and Safety Regulation;
- Code of Practice for the Safe Removal of Asbestos [NOHSC:2002 (1998)];
- Guide to the Control of Asbestos Hazards in Buildings and Structures [NOHSC: 3002 (1998);
- Clause 42 of the Protection of the Environment Operations (Waste) Regulation 2005; and
- The demolition must be undertaken in accordance with Australian Standard AS2601 – The Demolition of Structures.

Reason: For the protection of the environment and human health.

15. Waste Management During Development

The reuse, recycling or disposal of waste during works must be done generally in accordance with the Waste Management Plan for this development.

Details demonstrating compliance must be submitted to the Principal Certifying Authority.

Reason: To ensure demolition and construction waste is recycled or reused and to limit landfill.

CONDITIONS WHICH MUST BE COMPLIED WITH PRIOR TO THE ISSUE OF THE OCCUPATION CERTIFICATE

16. Stormwater Disposal

The stormwater drainage works shall be certified as compliant with all relevant Australian Standards and Codes by a suitably qualified person.

Details demonstrating compliance are to be submitted to the Principal Certifying Authority prior to the issue of any interim / final Occupation Certificate.

Note: The following Standards and Codes applied at the time of determination:

(a) Australian/New Zealand Standard **AS/NZS 3500.3** - 2003 - Plumbing and drainage - Stormwater drainage

(b) Australian/New Zealand Standard **AS/NZS 3500.3** - 2003/Amdt 1 - 2006 - Plumbing and drainage - Stormwater drainage

(c) National Plumbing and Drainage Code.

Reason: To ensure appropriate provision for the disposal of stormwater arising from the development.

17. Removal of All Temporary Structures/Material and Construction Rubbish

Once construction has been completed all silt and sediment fences, silt, rubbish, building debris, straw bales and temporary fences are to be removed from the site.

Details demonstrating compliance are to be submitted to the Principal Certifying Authority prior to the issue of any interim / final Occupation Certificate.

Reason: To ensure bushland management.