
From: Anna Williams
Sent: 11/03/2024 8:58:02 AM
To: Council Northernbeaches Mailbox; Anne-Marie Young
Cc: Karl Robertson; Diana Robertson
Subject: TRIMMED: Submission objecting to Mod 2024/0048 for 11 May Road, 613-615 Pittwater Rd Dee Why
Attachments: Submission for 11 May Road Dee Why.pdf;

Attention: Anne-Marie Young

Good Morning,

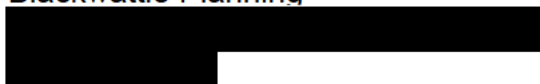
Please find attached a submission objecting to Mod2024/0048 on behalf of the landowners at No. 3 May Road Dee Why.

Can you please confirm receipt of this submission and take into consideration the issues raised in the assessment and in the forthcoming court proceedings.

Regards,

Anna Williams,

Director
Blackwattle Planning



The CEO
Northern Beaches Council
council@northernbeaches.nsw.gov.au

11 March 2024

Attention: Anne-Marie Young
anne-marie.young@northernbeaches.nsw.gov.au

Dear Sir/Madam,

**RE: MOD2024/0048 Section 4.55(8) - Modification of Development Consent
DA2018/1166 granted for Demolition Works and Construction of a Boarding House
development**

We are advising the landowners owners of No 3 May Road Dee Why and we thank you for the opportunity to respond to this application. In principle, the owners of No. 3 May Road have no objection to the approved development and the ongoing use of the site as a boarding house. The latest modification application however intensifies the development and raises significant concerns and impacts upon the amenity of No. 3 May Road. These are outlined for Council's consideration below.

Our objections to the proposal

We have reviewed the modification plans online. On behalf of our client we raise the following concerns with the proposed amendments, with particular reference to the impacts of bulk and scale and overlooking as viewed from No. 3 May Road.

Additionally, we are concerned regarding the intensification of the site that arises from the proposed additional floor space and additional traffic generation in an area that is already heavily impacted in this regard.

We have also found the application to be substantially deficient in the information provided and believe that a proper assessment of the application is unable to be carried out in these circumstances.

1. S 4.55 EP & A Act 19779 test of *Substantially the same development*

The modification application lodged is made under Clause 4.55 of the Environmental Planning & Assessment Act 1979. We note that the applicant has not specified whether the application is made under subclause (1A) or (2). Regardless, a threshold test applies which requires that the consent authority to be:

- (a) *...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),*
...

We are concerned that the application is not correctly made because it fails to meet this test of being substantially the same as the originally approved development. In particular the additional levels and additional floor space proposed are not considered to be materially or essentially the same as the development approved as required by the caselaw established in *Moto Projects (no. 2) Pty Ltd v North Sydney Council 1999*. The comparative analysis must address both qualitative elements as well as the context in which the development was approved, which in turn requires an analysis of relationships to neighbouring properties.

The previous modification application (Mod2021/0226) successfully met the threshold test of substantially the same development as approved by addressing the principles outlined in *Stavrides v Canada Bay City Council*. The Statement of Environmental Effects for that application (Boston Blythe Fleming at pages 4 and 5) argued that the development as proposed to be modified at that time was essentially and materially the same because:

- *The proposed use did not change; and,*
- *The **external building appearance, envelop and volume** as perceived from adjoining properties and the public domain are not altered; and,*
- *The modifications maintain the previously approved **residential amenity outcomes** in terms of views, privacy, visual bulk and overshadowing; and*
- *The modifications maintain the **previously approved streetscape and landscape outcomes***

When applied to the current modification application, almost all these tests are not met. The use does not change, however the application fails the remaining comparative tests as follows:

- The **external building appearance, envelope and volume**, both factually and as perceived from adjoining properties and the public domain is dramatically increased with an increase in the number of storeys, increase in overall apparent height, and increase in floor space. Floor space as proposed is in excess of 130sqm for Buildings 'A' and 'B' alone. This additional bulk and scale will be perceived adversely as overbearing and out of character from No. 3 May Road and from the May Road streetscape.

The increase in floor space of the overall development has not been identified in the application however it is clear that it would be far higher again.

- The proposed new work under this application creates increased and adverse **residential amenity outcomes** particularly with respect to privacy and visual bulk upon No. 3 May Road. The additional level proposed at Building 'A' creates three levels of built form presenting to the rear yard of No.3 May Road, as does the extension of a fourth level at Building 'B'.

Both buildings as a result of these amendments offer increased overlooking opportunities with the perimeter balcony proposed at the top level of Building 'A' being approximately 4m above the rear yard of No. 3 May Rd. The proposed setback of 6m for Building 'A' is now ineffectual as no ability to screen or landscape the intervening sightlines is possible from the new balcony at 4m above.

The reference to deep soil planting in the north eastern corner of Building 'A' fails to demonstrate how overlooking from the balcony above is mitigated with only one canopy tree proposed, and being of a species with minimal canopy density and spread. A new balcony to Building 'B' at the fourth storey is also proposed oriented towards the rear yard of No. 3 May Road with no overlooking mitigation proposed.

- The amendments no longer maintain the **previously approved streetscape** outcomes as the approved built form presented a two storey scale to May Road, and the new work now comprises three and four storey presentations. This is best understood by a comparison of the approved versus proposed north elevation of the development in Figure 1 and 2 below:

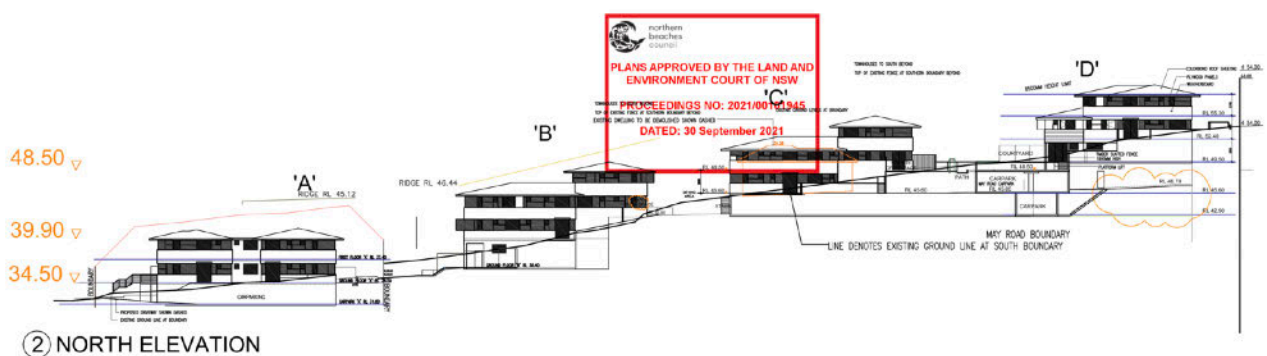


Figure 1: North Elevation approved under Mod 2021/0226 and consistent with the original approval demonstrating two storey presentation to No. 3 May Road

Source: Leech Harmon Architects

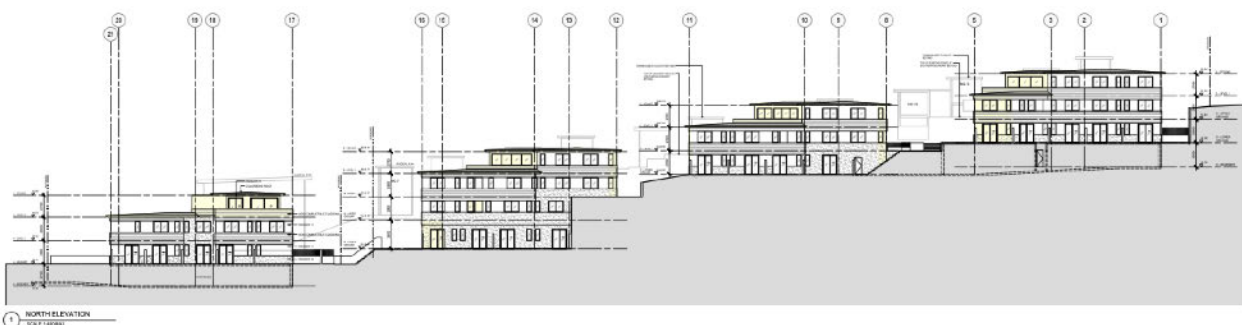


Figure 2: North Elevation proposed under current modification application demonstrating at least three and up to four storey presentations across all buildings

Source: Marcellino Sain Architects

The increased vertical massing of the development as proposed to be modified, together with the substantially reduced roof pitch and overall increase in number of levels (both factually and as perceived) significantly changes this development from the original approval.

Overall, the extent of additional floor space proposed is significant and the scale and appearance of buildings proposed quite different from the development originally approved. Under the above tests, the application does not fairly comprise *essentially or materially the same development* as the original approval and the application should be refused on this basis.

2. Height of Buildings - Clause 4.3 (WLEP 2011)

The original Development Application and all subsequent modification applications up until the current application have relied upon Height of buildings being measured from natural ground level. The most recently approved modification was determined in September 2021. The north elevation of the approved plans is reproduced at Figure 1 above, and shows ground lines representing interpolated natural ground from which building heights were then measured.

Since that time, a decision of Commissioner O'Neill in the NSW Land and Environment Court (*Merman Investments v Woollahra Council*) changed the manner in which Height of Buildings is measured to utilise *ground level (existing)*, which is defined in Warringah LEP 2011 as:

ground level (existing) means the existing level of a site at any point.

We note that the height limit measurements on plans the subject of the current modification application do not appear to have been calculated using the *Merman Investments* approach, as is the adopted practice of the Court and the Council. Further, the Statement of Environmental Effects does not detail the manner in which the height of the development has been calculated or what the height actually is.

It is our view that ***ground level (existing)*** at the time of the lodgement of the current application must be measured at the recently excavated level of the site, which could be as low as RL31.80 for Building 'A' and RL 36.40 for Building 'B'.

As no survey information is provided within the application documentation, this cannot be confirmed and we ask that Council require the applicant to provide a detailed survey evidencing the currently excavated levels of the site so that the height of buildings can be measured accurately. In the absence of such information we are concerned that the proposed new floor space breaches the 8.5m height limit.

If currently excavated levels on the site are consistent with proposed basement levels for Buildings 'A' and 'B', the proposed Height of Buildings of the development as proposed to be modified could be as much as 11m and 12m respectively. This would be a variation to the Height of Buildings Development Standard of up to 41%.

We ask that Council examine the plans closely, require current survey information be provided, and ensure that the height of the building proposed is accurately measured and complies with the accepted approach.

Should the height of buildings be found to be breaching the statutory height limit of 8.5m, we ask that the applicant be required to amend the plans to achieve compliance. We do not see that there are sufficient environmental planning grounds to warrant a departure from the 8.5m limit, particularly noting the ongoing R2 Low Density zoning of the site.

2. Visual Bulk and Scale

Notwithstanding the outcome of the Height of Buildings assessment as outlined above, the proposed additional level at Building 'A' and additional floor space at Level 2 of Building 'B' presents unacceptable visual bulk and scale when viewed from the private open space areas of No. 3 May Road.

An additional 130sqm of floor space is proposed in the direct vicinity of the rear yard of No. 3 May Road, and the additional bulk is both uncharacteristic of the R2 Low Density zone and overbearing upon the predominant 2 story scale of dwellings fronting May Road. In particular we raise substantial concern regarding the actual and apparent extension of building 'B' to increase the presentation to four storeys to the private open space of our client, but also the impact of such scale upon the immediate locality from which it will be substantially dominating.

The original decision of the Court to restrict of the development to a maximum of 80 rooms is again validated by the inability of additional floor space to appropriately respond to its context. We request that Council maintain this position in the assessment and the current Court proceedings.

3. Privacy

As discussed previously in this submission, the inclusion of an additional level and additional floor space with associated balconies results in commanding sightlines of our clients private open space. Mitigation of overlooking impacts is entirely inadequate, and the application provides no information on how the development as proposed to be modified meets its obligations in this regard.

The north elevation as proposed demonstrates intensification of an already intrusive design into the private open space of adjoining single dwellings. The sheer number of occupants of the development, now increased in both rooms and associated balconies, with direct sightlines from an elevated position is an unacceptable outcome, especially given the R2 Low Density Zone.

We request that Council and the Court reject the design on the basis of these overlooking impacts for which there appears no acceptable remedy.

4. Traffic generation

The intensification of the proposal will extend to additional traffic generation and parking impacts within the immediate neighbourhood that is already utilised beyond its capacity. We request that Council examine the impact of the proposed additional units upon the availability of parking in the immediate area noting the proposed substantial reduction in parking internal to the subject site.

This significant reduction comes with an increase in occupancy of 24 occupants and it is reasonable to expect that in these circumstances a substantial increase in the intensity of parking and traffic impacts in May Road and surrounding streets.

The submitted Statement of Environmental Effects suggests that an updated traffic and parking report is provided to support the proposed reduction in parking and to analyse traffic impacts. At time of writing, no such traffic report appears in the list of documents accompanying the modification application.

5. Plan of Management

The increased density by way of 12 additional rooms and 24 additional occupants is proposed together with an additional 4 common rooms and with an overall reduction in parking. With specific reference to No. 3 May Road, additional occupancy, balconies and common areas will all result in a likelihood of greater visual and acoustic privacy impacts which are unacceptable. In general, the amended plans represent a substantial increase in the intensity of the use of the site.

We note that the Statement of Environmental Effects refers to an updated Plan of Management, no such Plan appears in the application documents. If Council gives consideration to supporting the proposed additional floor space and common areas we ask that the Plan of Management proposed for managing such impacts be placed on public notification to protect both the interests of No. 3 May Road, and the wider public interest. Failure to publicly notify such information could in our opinion be considered a breach of the Act.

6. Failure to properly address and comply with SEPP (Housing) 2021

Upon review of the Statement of Environmental Effects, we note that there appears to be no proper assessment of the proposed changes against the requirements of SEPP (Housing) 2021, Division 2 Boarding Houses.

Whilst the absence of such an assessment by the application is for the entire provisions of SEPP (Housing) 2021 relevant to Boarding Houses, we are particularly concerned about the failure to address Subclause (2) of Clause 25, Division 2 which states that :

(2) Development consent must not be granted under this Division unless the consent authority considers whether—

(a) the design of the boarding house will be compatible with—

(i) the desirable elements of the character of the local area

...

We contend that the desirable elements of the character of the local area have not been identified by the application. However we believe if they were to do so this would include a maximum height of 2 storeys for residential development in the R2 Zone, a maximum height generally of 8.5m, a predominance of construction of such dwellings with pitched roof design which minimises the bulk of buildings at their edges, and setbacks with a depth of planting to ensure bulk and visual privacy impacts are appropriately mitigated.

We cannot agree that the development as proposed to be modified is at all consistent with these desirable elements, and unless the contrary is demonstrated Council could not be justified in granting development consent.

Conclusions

The proposed modification application should not be approved because:

- The application does not meet the threshold tests required for modification applications under the Environmental Planning & Assessment Act 1979; and,
- The design as proposed to be modified is unlikely to comply with the Height of Buildings development standard; and,
- The additional floor space and storeys proposed results in unacceptable visual and acoustic privacy impacts upon the private open space of No. 3 May Road, and upon the streetscape of May road generally; and,
- The increased intensity and reduced parking facilities proposed will exacerbate already unacceptable traffic and parking impacts in the immediate locality; and,
- The application is not accompanied by information required for the proper assessment of the application, namely survey information, traffic and parking assessment, and Plan of management; and,
- The proposed amendments are not demonstrated to be in accordance with the standards required for the granting of consent under SEPP (Housing) 2021.

We request that Council reject the application and defend the proceedings brought by the applicant in the NSW Land and Environment Court to uphold the applicable statutory requirements and to ensure that unacceptable amenity impacts are not imposed upon No. 3 May Road and the locality generally.

Please feel free to contact us on 0418 622 598 or at anna@blackwattleplanning.com.au should you wish to discuss further.

Regards,

Anna Williams,
Director

BLACKWATTLEPLANNING

