

4th April 2025

The CEO
Northern Beaches Council
PO Box 82
Manly NSW 1655

Dear Sir,

Statement of Environmental Effects
Modification of Development Consent DA2023/1289
Land and Environment Court proceedings 2023/00465007
Demolition and construction of shop top housing
1112 – 1116 Barrenjoey Road, Palm Beach

1.0 Introduction

On 6th March 2025 the Land and Environment Court of NSW (the Court) granted development consent DA2023/1289 involving the demolition of existing site structures and the construction of shop top housing comprising five residential apartments over two ground floor retail tenancies including one level of basement on the subject site.

We have been engaged to prepare an application to modify the consent pursuant to Section 4.56 of the Environmental Planning and Assessment Act 1979 (the Act). This application seeks to refine the detail of the application to address a number of issues identified during detailed structural design development and to enhance the internal layout and amenity of the apartments.

The modifications are contained wholly within the approved building envelope such that the 3-dimensional form, design quality, streetscape appearance and landscape outcomes as approved are not compromised as consequence of the modifications sought. Importantly, the spatial relationship of the proposal to adjoining development is maintained together with a complimentary and compatible streetscape presentation and appropriate residential amenity outcomes.

To that extent Council can be satisfied that the modified development represents substantially the same development as originally approved. Accordingly, the modifications are appropriately dealt with by way of Section 4.56 of the Act.

2.0 Detail of Modifications Sought

Architectural modifications

The proposed modifications are shown clouded and described on the accompanying Revision D plans prepared by Koichi Takada Architects as follows:

- **ITEM 1:** Basement and ground shoring wall and footprint updated to align with boundary landscaping
- **ITEM 2:** Basement parking bay arrangement and structural columns adjusted to reflect structural design
- **ITEM 3:** Boundary landscaping amended to suit construction methodology
- **ITEM 4:** Ground level skylight shape updated
- **ITEM 5:** Interior layout updated for units 101, 102, 201, 202, 301
 - Unit 101, 201:
 - Amended layout to bathroom, ensuite and laundry locations
 - Added powder room
 - Updated arrangement to robe and storage
 - Amended Kitchen and multi-purpose room layouts
 - Amended living and dining location
 - BBQ added to balcony
 - Unit 102, 202:
 - Amended layout to bathroom, ensuite and laundry locations
 - Added powder room
 - Updated arrangement to robe and storage
 - Amended Kitchen and multi-purpose room layouts
 - BBQ added to balcony
 - Unit 301:
 - Amended layout to bathroom, ensuite, powder room and laundry locations
 - Updated arrangement to robe and storage
 - Updated arrangement to lounge room
 - Amended Kitchen layouts
 - BBQ added to balcony
- **ITEM 6:** Door amendments on eastern rear façade to accommodate lounge room changes for unit 301
- **ITEM 7:** SPA Pool location updated for unit 301 and adjacent glass balustrade height to extend 1m above edge of pool
- **ITEM 8:** Mechanical vent locations added to North, East and South façade
- **ITEM 9:** Rear Eastern retaining wall removed

Modification of conditions

Condition 1 - The application seeks the modification of this condition to reference the amended architectural plans.

Condition 9 - This condition can be deleted as the accompanying landscape plans incorporate the required amendments.

Condition 15 - This condition can be deleted as the accompanying landscape plans incorporate the required amendments.

Condition 26 - This condition is to be updated to reference the amended access report.

3.0 Section 4.56 of the Environmental Planning and Assessment Act 1979

Section 4.56 of the Act provides that:

- (1) *A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court and subject to and in accordance with the regulations, modify the development consent if:*
 - (a) *it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and*
 - (b) *it has notified the application in accordance with:*
 - (i) *the regulations, if the regulations so require, and*
 - (ii) *a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*
 - (c) *it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person, and*

(d) *it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.*

(1A) *In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application.*

In answering the above threshold question as to whether the proposal represents “substantially the same” development the proposal must be compared to the development for which consent was originally granted, and the applicable planning controls.

In order for Council to be satisfied that the proposal is “substantially the same” there must be a finding that the modified development is “essentially” or “materially” the same as the (currently) approved development - *Moto Projects (no. 2) Pty Ltd v North Sydney Council* [1999] 106 LGERA 298 per Bignold J.

The above reference by Bignold J to “essentially” and “materially” the same is taken from Stein J in *Vacik Pty Ltd v Penrith City Council* (unreported), Land and Environment Court NSW, 24 February 1992, where his honour said in reference to Section 102 of the Environmental Planning and Assessment Act (the predecessor to Section 96):

“Substantially when used in the Section means essentially or materially or having the same essence.”

Consideration must also be given to the recent findings of the court in the matters of *Realize Architecture Pty Ltd v Canterbury-Bankstown Council* [2023] NSWLEC 1437 and *Canterbury-Bankstown Council v Realize Architecture Pty Ltd* [2024] NSWLEC 31. What can be discerned from the findings in the above matters is that the Court approached its interpretation of the ‘substantially the same’ test in the following ways (consistent with the guidance of earlier Court decisions quoted throughout the Judgments).

- Comparing the quantitative differences between the proposed modified development against the original approved development.
- Comparing the qualitative differences between the proposed modified development against the original approved development.
- Comparing the critical elements of the proposed modified development against the original approved development.

- Most importantly, by then balancing the evidence in respect of all of those factual comparisons before forming a subjective opinion as to whether the proposed modified development was ‘substantially the same’ as the original approved development.

Having regard to the above considerations we provide the following analysis.

Quantitative differences

- No physical changes to the previously approved development other than those required to enhance buildability and residential amenity.
- No change to the approved carparking.
- No changes to the previously approved landscape quality or stormwater management regime.

Qualitative differences

- The modifications do not compromise the overall design quality of the development having regard to SEPP Housing design quality principles and the ADG.
- The modifications do not compromise the heritage conservation, streetscape or residential amenity outcomes afforded through approval of the original application in terms of views, privacy or solar access.
- The development will continue to be appropriately serviced in relation to car parking and waste management.

Critical elements

- The proposal remains an application proposing a shop top housing with no change to the approved commercial floorspace or residential density or the extent to which the street frontage is activated.

Balancing

We are satisfied that the critical elements of the proposal are maintained and that the quantitative and qualitative differences are not such as to render the developments not substantially the same.

On the basis of the above analysis, we regard the development as modified “essentially or materially” the same as the approved development such that the application is appropriately dealt with by way of categorised as being “substantially the same” and is appropriately dealt with by way of section 4.56 of the Act.

4.0 Pittwater Local Environmental Plan 2014

The Pittwater Local Environmental Plan 2014 (PLEP 2014) is the principal local environmental planning instrument applicable to the land. The relevant provisions of PLEP 2014 and the manner in which they relate to the site and the proposed development are assessed below.

Height of buildings

Pursuant to clause 4.3 of PLEP 2014 the maximum building height for development on the land is 8.5 metres. The stated objectives of this clause are as follows:

- (a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*
- (b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (c) to minimise any overshadowing of neighbouring properties,*
- (d) to allow for the reasonable sharing of views,*
- (e) to encourage buildings that are designed to respond sensitively to the natural topography,*
- (f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

We confirm that the overall height of the development as previously approved is not altered as a consequence of the modifications sought.

Heritage conservation

The modifications do not compromise the heritage conservation outcomes afforded through approval of the original application having regards to the sites immediate proximity to Barrenjoey House and other heritage listed properties.

Flooding

The modifications do not compromise the flooding outcomes achieved through approval of the original application.

Acid Sulfate Soils

Pursuant to clause 7.1 PLEP 2014 the site is mapped as Class 5 on the Acid Sulfate soils map. The modifications do not compromise the developments performance when assessed against these provisions from a geotechnical perspective.

Earthworks and geotechnical hazards

In relation to the clause 7.2 and 7.7 PLEP 2014 provisions we confirm that the extent of excavation remains consistent with that originally proposed.

5.0 Pittwater 21 Development Control Plan

Having assessed the modified development against the applicable provision of P21DCP we note the following:

- Although the basement layout is adjusted to accommodate the shoring detail the proposal maintains the same off-street car parking quantum and waste management arrangements as approved pursuant to the original application.
- The siting, scale, form and massing of the development is not altered with the modified proposal maintaining the previously approved building setbacks and spatial relationship with adjoining development including Barrenjoey House,
- The modified proposal does not compromise the residential amenity outcomes afforded to adjoining development in relation to visual and aural privacy and solar access,
- the previously approved landscape outcomes are maintained with the accompanying updated landscape plans reflecting the shoring detailing proposed and the amendments sought through the imposition of conditions 9 and 15,
- The previously approved stormwater management regime is not altered, and
- The previously approved materials and finishes are maintained.

6.0 State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development

This application is accompanied by an Architect designed verification as required pursuant to clause 102 of the Environmental Planning and Assessment Regulation 2021. Such certification confirms that the modifications do not diminish or detract from the design quality of the original development or compromise the design and intent of the original development. Accordingly, there is no statutory impediment to the granting of consent to the modifications sought.

7.0 Matters for Consideration Pursuant to Section 4.15(1) of the Environmental Planning and Assessment Act 1979 as amended

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15(1) of the Environmental Planning and Assessment Act 1979(as amended):

The provision of any planning instrument, draft environmental planning instrument, development control plan or regulations.

The modified development responds positively to the relevant outcomes and built form controls of the Pittwater 21 Development Control Plan. The proposal is permissible pursuant to the provisions of Pittwater LEP 1993.

The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

Context and Setting

i) *What is the relationship to the region and local context on terms of:*

- *the scenic qualities and features of the landscape?*
- *the character and amenity of the locality and streetscape?*
- *the scale, bulk, height, mass, form, character, density and design of development in the locality?*
- *the previous and existing land uses and activities in the locality?*

The modifications are contained wholly within the approved building envelope and not readily discernible as viewed from outside the site, with the 3 dimensional form, streetscape appearance and landscape outcomes as approved not compromised as consequence of the modifications sought.

ii) *What are the potential impacts on adjacent properties in terms of:*

- *relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)?*
- *visual and acoustic privacy?*
- *views and vistas?*
- *edge conditions such as boundary treatments and fencing?*

The approved development will remain, in its modified state, a development which will continue to relate to its surrounds and adjoining development in the same fashion as originally approved in terms of view sharing, height, boundary setbacks, privacy and landscape outcomes.

Access, transport and traffic

Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:

- *travel demand?*
- *dependency on motor vehicles?*
- *traffic generation and the capacity of the local and arterial road network?*
- *public transport availability and use (including freight rail where relevant)?*

- *conflicts within and between transport modes?*
- *traffic management schemes?*
- *vehicular parking spaces?*

Previously approved car parking numbers are maintained.

Public domain

There are no public domain changes.

Economic impact in the locality

The proposed development will provide short term employment opportunities during construction.

Site design and internal design

i) *Is the development design sensitive to environmental conditions and site attributes including:*

- *size, shape and design of allotments?*
- *the proportion of site covered by buildings?*
- *the position of buildings?*
- *the size (bulk, height, mass), form, appearance and design of buildings?*
- *the amount, location, design, use and management of private and communal open space?*
- *landscaping?*

The modifications sought are contained within the approved building envelope and not discernible as viewed from outside the site, with the 3 dimensional form, streetscape appearance and landscape outcomes as approved not compromised as consequence of the modifications sought.

ii) *How would the development affect the health and safety of the occupants in terms of:*

- *lighting, ventilation and insulation?*
- *building fire risk – prevention and suppression/*
- *building materials and finishes?*
- *a common wall structure and design?*
- *access and facilities for the disabled?*
- *likely compliance with the Building Code of Australia?*

The modifications will ensure that the development complies with the provisions of the Building Code of Australia. There will be no detrimental effects on the occupants through the building design which will achieve the relevant standards pertaining to health, safety and accessibility.

Construction

i) *What would be the impacts of construction activities in terms of:*

- *the environmental planning issues listed above?*
- *site safety?*

Normal site safety measures and procedures will ensure that no site safety or environmental impacts will arise during construction.

The suitability of the site for the development.

Does the proposal fit in the locality?

- *are the constraints posed by adjacent developments prohibitive?*
- *would development lead to unmanageable transport demands and are there adequate transport facilities in the area?*
- *are utilities and services available to the site adequate for the development?*

The adjacent development does not impose any insurmountable development constraints. The site is well located with regards to utility services and public transport. There will be no excessive levels of transport demand created.

Are the site attributes conducive to development?

The site has no special physical or engineering constraints is suitable for the proposed development.

Any submissions received in accordance with this Act or the regulations.

It is envisaged that any submissions made in relation to the proposed development will be appropriately assessed by Council.

The public interest.

It is considered that the development will result in a significant addition of good design to the locality. The development is consistent with the adopted planning regime.

9.0 Conclusion

This application seeks to refine the detail of the application to address a number of issues identified during detailed structural design development and to enhance the internal layout and amenity of the apartments.

The modifications are contained wholly within the approved building envelope such that the 3-dimensional form, design quality, streetscape appearance and landscape outcomes as approved are not compromised as consequence of the modifications sought. Importantly, the spatial relationship of the proposal to adjoining development is maintained together with a complimentary and compatible streetscape presentation and appropriate residential amenity outcomes.

To that extent Council can be satisfied that the modified development represents substantially the same development as originally approved. Accordingly, the modifications are appropriately dealt with by way of Section 4.56 of the Act.

Having given due consideration to the relevant considerations pursuant to s4.15(1) of the Act it is considered that the modifications, the subject of this document, succeeds on merit and is appropriate for the granting of consent.

Yours sincerely

BOSTON BLYTH FLEMING PTY LTD



Greg Boston

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Director