From:	[redacted]
Sent:	28/11/2022 12:14:39 PM
To:	Council Northernbeaches Mailbox
Cc:	Catherine Wiltshire
Subject:	TRIMMED: RE: DA 2022 1915 29 WANDEEN ROAD CLAREVILLE WRITTEN SUBMISSION: LETTER OF OBJECTION SUBMISSION: WILTSHIRE
Attachments:	WILTSHIRE 2022 WS.docx;

Kind regards,

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

SUBMISSION: WILTSHIRE

a written submission by way of objection

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28 November 2022

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RE: DA 2022 1915
29 WANDEEN ROAD CLAREVILLE
WRITTEN SUBMISSION: LETTER OF OBJECTION
SUBMISSION: WILTSHIRE

Dear Sir,

This document is a written submission by way of objection lodged under Section 4.15 of the EPAA 1979 [the EPA Act].

We are being assisted by a very senior experienced consultant in the preparation of this Written Submission.

Unless the Applicant submits Amended Plans to resolve all of the adverse amenity impacts raised within this Submission, we ask Council to REFUSE this DA.

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A. EXECUTIVE SUMMARY

The design of the dwelling does not ensure that the existing high levels of amenity to our property is retained.

The proposal is considered to be inappropriate within the streetscape.

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

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

- View loss
- Visual Privacy
- Solar Loss
- Visual Bulk

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

- Building Height: Proposed 9.42m v Control 8.50m [10.8% non-compliance]
- Landscape Area: Proposed 399sqm v Control 501sqm [25% non-compliance]
- Number of Storey: Proposed Three: Control Two [50% non-compliance]
- Front Setback: Fails to align with neighbours
- Rear Setback: Proposed 4.5m v 6.5m Control [45% non-compliance]
- Side Boundary Envelope: Significant Non-Compliance
- Pool Height and Rear Setback Non-Compliance
- Tree Preservation: Removing four out of five of the protected trees

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

The proposed development does not satisfy the objectives of the zone or contribute to a scale that is consistent with the desired character of the locality and the scale of surrounding development.

A compliant building design would reduce the amenity impacts identified.

We agree with Roseth SC in NSWLEC Pafbum v North Sydney Council:

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

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

We want to emphasise the fact that we take no pleasure in objecting to our neighbour's DA.

We are objecting because the proposed DA has a poor impact on the amenity of our property, and the urban design outcomes within the streetscape, and this is caused by the DA being non-compliant to controls.

If the DA was fully compliant to all controls our amenity loss would be more reasonable.

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

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

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

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

Council will note that the proposed development is attempting to present a reasonably compliant built form to height controls and side/rear setback controls, whilst proposing a considerable non-compliant outcome in respect to the 60% Landscape Area control, front and rear setback and side boundary envelope controls.

The SEE states:

On 30 December 2020, Development Application DA2020/1726 was lodged with Council, seeking consent for alterations and additions to the existing dwelling and the construction of a swimming pool. The works were similar to those proposed in the current application.

On 23 March 2021, Council wrote to the applicant and advised of the following issues with the proposed development:

1. *Landscaping and Biodiversity*

I. *Removal of 5 trees*
II. *Inconsistent information relating to Tree 3*
III. *Inconsistency between the Landscape Plan and the Flora and Fauna Report*

2. *Bulk and Scale*

I. *Width of street wall*
II. *Non-recessive colours*
III. *Front setback and excavation*
IV. *Height of retaining wall in rear yard*
V. *Building envelope non-compliance*
VI. *Building height non-compliance*

On 7 April 2021, the application was voluntarily withdrawn by the applicant.

The proposed development in this DA presents considerable non-compliance including:

- Non-Compliant Building Height
- Non-Compliant Building Envelope: Setbacks & Side Boundary
- Non-Compliant Pool
- Removal of four mature Spotted Gums
- 'White on White' colour palate

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

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

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

B. FACTS

1. THE PROPOSAL

The development application seeks approval for alterations and additions to an existing dwelling including new swimming pool and landscaping.

2. THE SITE

The site is legally identified as Lot 89 within Deposited Plan 13760

3. THE LOCALITY

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

Our property shares a common boundary with the subject site.

4. STATUTORY CONTROLS

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

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

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

- SEPP (Housing) 2021 Affordable [Boarding, RFB] Diverse [Secondary Dwellings, Group, Co-Living, Build to Rent, Seniors]
- SEPP (Design & Place) 2021 – Apartment Design Guide, Urban Design Guide

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

C. CONTENTIONS THAT THE APPLICATION BE REFUSED

1. CONTRARY TO AIMS OF LEP

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

2. CONTRARY TO ZONE OBJECTIVES

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

3. INCORRECT CONSIDERATIONS OF 'GROUND LEVEL EXISTING'

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to present *ground level (existing)* in accordance with the LEP, and the recent decisions on *ground level (existing)* at the NSWLEC.

The LEP states the following within the LEP Dictionary:

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

The DA drawings have not adequately transferred the spot levels from the Registered Surveyors drawing onto the DA Architectural drawings to allow assessment of heights.

The topography of the site shows that the site has falls across the site.

We bring to Council's attention recent NSWLEC decisions relating to the consideration of *ground level (existing)* on sites that had not been totally built upon:

- In *Strebora Pty Ltd v Randwick City Council (No. 2)* [2017] NSWLEC 1575 ('*Strebora*'),: Commissioner: Dickson: *'the determination of 'ground level (existing)' must bear some relationship to the overall topography and context of the site'*

- In *Gejo Pty Ltd v Canterbury-Bankstown Council* [2017] NSWLEC 1712('*Gejo*'): Commissioner Gray: *'actual height of the proposed building must first be determined by application of the [relevant] LEP definitions and that the extrapolation approach used in Bettar and Stamford was justified in circumstances where the existing ground level is not known due to extensive development on the site'*.

- In *Nicola v Waverley Council* [2020] NSWLEC 1599 ('*Nicola*'): Commissioner Bindon: *'where the facts and circumstances of the case make the use of the extrapolation method appropriate, the levels to be used should*

be taken from the closest immediate proximity where existing ground can be found, whether that be inside or outside subject site.

- In Cadele Investments Pty Ltd v Randwick City Council [2021] NSWLEC 1484 at [90]-[91]: Commissioner Bindon stated: "the alternative method of measurement is not in accordance with the definition of building height in the RLEP, which relies on the defined term "ground level (existing)". In using the undefined "natural ground line" the Applicant relies on the concept of extrapolating the ground levels on the periphery of the site to avoid the inconvenient "variations to the landform created by the existing dwelling", and refers to Bettar v Council of the City of Sydney [2014] NSWLEC 1070 (Bettar) as providing an authority to do so.

We bring to Council's attention early NSWLEC decisions relating to the consideration of *ground level (existing)* on sites that had been wholly built upon:

- *Bettar v Council of the City of Sydney [2014] NSWLEC 1070*: Commissioner O'Neill. The *Bettar* extrapolation method

- Stamford Property Services Pty Ltd v City of Sydney [2015] NSWLEC 1189 ('Stamford'): Commissioner Pearson

Council will also note, that in October 2021, the Court decided not to apply Bettar in a particular case *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*. The Court did not apply the Bettar decision and instead said (at [73]) that:

- *the existing level of the site at a point beneath the existing building is the level of the land at that point; and*

- *the 'ground level (existing)' within the footprint of the existing building is the existing excavated ground level on the site.*

We contend that *ground level (existing)* on the subject site has not been assessed correctly.

We bring to Council's attention the following issues.

We contend that the 'ground level (existing)' is the level under the lower ground slab defined in the Registered Surveyors plan at RL 61.96. We contend the 'ground level (existing)'is RL 61.76 under the proposed ridge of the dwelling at RL 71.18.

The proposed height is 9.42m

The complete roof structure within 920mm of the ridge height exceeds the control.

4. EXCESSIVE BUILDING HEIGHT

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to comply with the building height development standard under the LEP.

The proposed development should be refused due to its excessive height and failure to comply with the *Height of Buildings* set out in the LEP which permits a maximum height of 8.5 metres.

The proposal is inconsistent with the objectives of the Height of Buildings development standard pursuant to LEP.

The adverse impacts of the proposed development, including on the amenity of neighbouring property and public property, are directly attributable to the exceedance of the height of buildings development standard.

The proposal is inconsistent with the LEP as there is a public benefit in maintaining the Height of Buildings development standard in this particular case.

The proposed portion of the building above the maximum height of 8.5m is not 'minor'. The building does not adequately step down the slope.

The DA seeks for a substantial non-compliance with the Council permissible height as provided for in the LEP. The proposal is supported by a clause 4.6 seeking to justify the breach of the height standard.

We submit that the proposal is excessive and an over development and that the clause 4.6 submissions do not satisfy the pre-requisites in clause 4.6 of the LEP.

In respect of the overall height control, we have considered the applicant's Clause 4.6 and we consider that, in this instance, they have not been able to establish an argument to support their assertion that it is unreasonable and unnecessary to comply with the control.

We submit that the submission fails on the basis of the assessment against the objectives of clause 4.3, as well as the environmental planning grounds set out. Additionally, we consider that the development does not comply with the objectives of the land use objectives.

In respect of the proposed development, we submit that the built form, which also incorporates other substantial non-compliant breaches will have negative impacts the amenity of neighbours as well as have significant impacts in respect of visual intrusion. Additionally, there is nothing provided for in this development that seeks to minimise the adverse effects of bulk and scale of the building.

We have reviewed the responses to these objectives in the applicant's Clause 4.6 and do not consider they satisfy the objectives. We strongly refute their arguments.

In respect of the compatibility test, unsurprisingly the applicant completely ignores multiple considerations dealing with the understanding of the site in respect of its

topography, how it is viewed from neighbouring properties as well as the lack of compatibility with its form and articulation.

We contend that the proposal fails to adequately demonstrate that compliance with each standard is unreasonable or unnecessary nor that there are sufficient environmental planning grounds to justify contravening each of the standards. Variation of the development standards is not in the public interest because the proposed development is not consistent with the objectives of each development standard nor the objectives of the zone. The proposed development has not sought adequate variations to development standards. The proposal is excessive in bulk and scale, and is inconsistent with the desired future character of the area resulting in adverse impacts on the streetscape. The proposal results in an unacceptable dominance of built form over landscape. The proposal fails to minimise the adverse effects of bulk and scale resulting in adverse amenity impacts.

The proposed development should be refused due to its excessive visual impact and impacts on the character of the locality, adjoining properties and the surrounding environment.

The form and massing of the proposal does not appropriately respond to the low-density character of the surrounding locality

The form and massing of development is also inconsistent with the provisions of the DCP which prescribe that new development should complement the predominant building form in the locality.

The proposal would not recognise or protect the natural or visual environment of the area, or maintain a dominance of landscape over built form. The proposal has not been designed to minimise the visual impact on the surrounding environment.

In Veloshin, [Veloshin v Randwick Council 2007], NSW LEC considered Height, Bulk & Scale. Veloshin suggest that Council should consider:

"Are the impacts consistent with impacts that may be reasonably expected under the controls? For non-complying proposals the question cannot be answered unless the difference between the impacts of a complying and a non-complying development is quantified."

The impacts are not consistent with the impacts that would be reasonably expected under the controls.

In Project Venture Developments v Pittwater Council (2005) NSW LEC 191, NSW LEC considered character:

"whether most observers would find the proposed development offensive, jarring or unsympathetic in a streetscape context, having regard to the built form characteristics of development within the site's visual catchment".

The non-compliant elements of the proposed development, particularly caused from non-compliant excessive heights would have most observers finding *'the proposed development offensive, jarring or unsympathetic'*.

5. EXCESSIVE WALL HEIGHT & NUMBER OF STOREY

The proposal is contrary to Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* as it fails to comply with the control.

The proposed development should be refused due to its excessive height and failure to comply with the Wall Height set out in the controls.

The proposed development is inconsistent with the objectives of the zone and the objectives that underpin the wall height.

The adverse impacts of the proposed development, including on the amenity of neighbouring property and public property, are directly attributable to the exceedance of the wall height control.

The failure of the SEE to demonstrate the outcomes required by the wall height control means that the variation cannot be supported and, therefore, by necessity, the development application should be refused.

The proposal is inconsistent with the LEP and DCP as there is a public benefit in maintaining the Wall Height control in this particular case.

The proposed portion of the building above the maximum wall height is not 'minor'.

We contend that the proposal fails to adequately demonstrate that compliance with each standard or control is unreasonable or unnecessary nor that there are sufficient environmental planning grounds to justify contravening each of the standards. Variation of the development standards or control is not in the public interest because the proposed development is not consistent with the objectives of each development standard or control nor the objectives of the zone. The proposed development has not sought adequate variations to development standards or controls. The proposal is excessive in bulk and scale, and is inconsistent with the desired future character of the area resulting in adverse impacts on the streetscape. The proposal results in an unacceptable dominance of built form over landscape. The proposal fails to minimise the adverse effects of bulk and scale resulting in adverse amenity impacts.

The non-compliant elements of the proposed development, particularly caused from non-compliant excessive heights would have most observers finding *'the proposed development offensive, jarring or unsympathetic'*.

6. INADEQUATE CLAUSE 4.6 VARIATION REQUEST

Council cannot be satisfied that under clause 4.6 of the LEP seeking to justify a contravention of the development standard that the development will be in the public interest because the proposed development is inconsistent 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 Applicant seeks to vary the height of buildings development standard.

The amount of variation is incorrectly stated.

The request relies upon the 1st way identified by Preston CJ in Wehbe. The first way in Wehbe is to establish that the objectives of the standard are achieved.

We contend that the variation has not responded to the objective of the maximum building height standard and given adequate reasoning why compliance is unreasonable or unnecessary:

(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality

This Objective of Clause 4.3 (1)(a) seeks to ensure buildings are compatible with the height and scale of surrounding and nearby development.

The surrounding area is predominantly characterised by two storey development. The proposed development is seeking consent for a three storey development.

The portion of the site that the dwelling is positioned on is flat, and not sloping as the variation suggests.

The non-compliance extends over the entire roof form of all zones under the ridge.

The non-compliance is a considerable zone of the footprint of the proposed dwelling.

The street façade is of a three storey development, in a location where the expectation is a two storey outcome.

The proposed development is considered to be not compatible with the bulk and scale of surrounding development.

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

The proposed height of the dwelling does not maintain consistency with the siting of surrounding development

The proposed development is not considered to be compatible with the bulk and scale of surrounding development.

(c) to minimise any overshadowing of neighbouring properties,

The proposal is accompanied by incomplete Shadow Diagrams which demonstrate that the proposal will see unreasonable diminution of existing solar access currently received by neighbouring properties.

(d) to allow for the reasonable sharing of views,

The proposal is considered to result in unreasonable view impacts on our property.

Development proposed to the front and to the rear of the existing dwelling is three storey in height, which will deprive that our neighbouring property will not maintain our views of Pittwater.

(e) to encourage buildings that are designed to respond sensitively to the natural topography,

The proposal presents as a three storey development to Wandeen Road.

The footprint of the upper floor is to be substantially increased.

The proposal has not been designed to follow the sloping topography of the site, as the site is flat where the house is positioned.

The proposed development does not respond sensitively to the natural topography, as the site is heavily excavated, and removes four of the five substantial trees on the site.

(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

The proposal will present as a three storey development to Wandeen Road.

The proposal will be inconsistent with and complement the existing detached style single dwelling housing within the streetscape and the wider Avalon Beach area.

This objective is not achieved in that the proposal will require substantial site disturbance and excavation with the removal of four of the five trees.

The natural ground levels will be altered.

The landscape area is 25% below compliance.

The proposal will not achieve an appropriate balance between landscaping and built form.

The proposal is inconsistent with the objectives of the development standard.

<u>Are there sufficient environmental planning grounds to justify contravening the development standard?</u>

There are insufficient environmental planning grounds to justify contravening the development standard.

The proposed development does not achieve the objects in Section 1.3 of the EPA Act, specifically:

The proposed development does not maintain the general bulk and scale of surrounding contemporary dwellings and maintains architectural consistency with the prevailing development pattern which promotes the orderly & economic use of the land (cl 1.3(c)).

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

- Building Height: Proposed 9.42m v Control 8.50m [10.8% non-compliance]
- Landscape Area: Proposed 399sqm v Control 501sqm [25% non-compliance]
- Number of Storey: Proposed Three: Control Two [50% non-compliance]
- Front Setback: Fails to align with neighbours
- Rear Setback: Proposed 4.5m v 6.5m Control [45% non-compliance]
- Side Boundary Envelope: Significant Non-Compliance
- Pool Height and Rear Setback Non-Compliance
- Tree Preservation: Removing four out of five of the protected trees

The proposed development will not provide for improved amenity within a built form which is compatible with the streetscape of Wandeen Road, presenting as a three storey development, which does not promote the orderly and economic use of the land (cl 1.3(c)).

The proposed new development is considered not to promote good design and enhance the residential amenity of the immediate area, which is inconsistent with the Objective 1.3 (g).

The proposed development does not respect surrounding properties by locating the development where it will not unreasonably obstruct views across the site and will maintain the views from the site (1.3(g)).

No evidence has been provided that the findings of Commissioner O'Neill in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, are relevant as to any prior excavation within the building footprint that distorts the height of buildings development standard plan, or that can be properly described as an environmental planning ground within the meaning of clause 4.6(3)(b) of the LEP.

No evidence has been provided that the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSWLEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [2021] NSW LEC 1242, are relevant. The departure is not small from the actual numerical standard and the amenity impacts of the departure constitute environmental planning grounds fir refusal. The proposed development is not good design and amenity of the development in accordance with the objects of the EP&A Act.

Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the C4 Environmental Living Zone?

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

The C4 Environmental Living contemplates low density residential uses on the land.

The proposal is for a three storey development that is highly visible from the street.

The proposal not only exceeds height controls, but also all setback and envelope controls.

Has Council obtained the concurrence of the Secretary?

The Council cannot assume the concurrence of the Director-General with regards to this clause 4.6 variation, as the variation involves departure of a numerical standard to an extent that is less than 10%.

- Building Height: Proposed 9.42m v Control 8.50m [10.8% non-compliance]

Summary

This development proposes a departure from the maximum building height control, with the proposed development reaching a height of up to 9.42m above existing ground level, representative of a 920mm or 10.8% variation to the maximum height development standard.

This variation does not occur as a result of the sloping topography of the site and siting of existing development. The proposal simply wishes to build a three storey dwelling, in a zone that anticipates a two storey dwelling.

The objectives of the standard have not been met.

The bulk and scale of the proposed development is inappropriate for the site and locality.

Strict compliance with the maximum building height is reasonable and necessary in the circumstances of this case.

In summary, the proposal does not satisfy the requirements of clause 4.6 of PLEP 2014.

The variation of the standard would not be in the public interest because it would set a precedent for development in the neighbourhood, such that successive exceedances would erode the views enjoyed from other similar properties.

The proposed development is inconsistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

7. UNACCEPTABLE BUILDING SEPARATION

The proposed development should be refused as it is significantly non-compliant with setback of the DCP.

- Front
- Rear
- Side Boundary Envelope

The proposed development does not provide appropriate setbacks. This leads to inconsistency with the character of the area and unreasonable amenity impacts.

The proposal will result in an unsatisfactory scale of built form that will be disproportionate and unsuitable to the dimensions of the site and neighbouring residential development.

The height and bulk of the development will result in unreasonable impacts upon the amenity of neighbouring properties with regard to visual dominance.

The excessive built form of the proposal results in a development where the building mass becomes visually dominant and imposing, particularly when viewed from the visual catchment of neighbouring properties

The cumulative effect of the non-compliances with setback and other development standard result in an over development of the site with the site being not suitable for the scale and bulk of the proposal.

8. INSUFFICIENT LANDSCAPE AREAS

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide adequate landscape area.

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

We ask that all new native tree species are selected to achieve a maximum of 68 metres in height at maturity, and no higher than the building. Trees to be located 3m from buildings, and 1.5m from common boundaries.

9. EXCESSIVE REMOVAL OF NATIVE TREES

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to retain existing native trees.

The proposal removes the following trees:

	Identification	Height (m)	Crown (m)	DBH (m)	TPZ (m)	SRZ (m)	Age	Health/ Vigour	Structure	Significance/ Retention Values	Comments
1	*Corymbia maculata* Spotted Gum	<15.00	<10.00	0.42	5.20	2.40	Mature	Good & Good	Typical	High/ High	Remove & Replace: Tree s are within the proposed excavation area for vehicle turning area.
2	*Corymbia maculata* Spotted Gum	<13.00	<10.00	0.36	4.40	2.20	Mature	Good & Good	Typical	High/ High	Remove & Replace: Tree s are within the proposed excavation area for vehicle turning area.
3	*Corymbia maculata* Spotted Gum	<19.00	<9.00	0.40	4.80	2.30	Mature	Good & Good	Typical	High/ High	Retain, Manage & Protect: Tree TPZ radial distance is breached by swimming pool, manual excavation within TPZ is specified. Standard TPZ temporary metal mesh fencing panels with above ground supports are also specified.
4	*Corymbia maculata* Spotted Gum	<20.50	<11.00	0.46	5.60	2.50	Mature	Good & Good	Typical	High/ High	Remove & Replace: Tree TPZ/SRZ radial distances significantly adversely impacted upon by the as proposed swimming pool & rear of dwelling stairs.
5	*Corymbia maculata* Spotted Gum	<18.00	<9.50	0.33	4.10	2.20	Mature	Good & Good	Typical	High/ High	Remove & Replace: Tree TPZ/SRZ radial distances significantly adversely impacted upon by the as proposed swimming pool.

We ask for the four trees proposed to be removed, to be retained.

We contend that there is insufficient arboricultural reason or design reasons to remove these trees.

A more skilful design would protect these trees.

We ask for the development to be reduced to ensure that no more than 10% of the TPZ is affected.

10. POOR GARAGE DESIGN

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as the design of the garage does not accord with the DCP provisions.

We are concerned that the proposed visitors' car parking:

- Removes two mature canopy trees: Spotted Gums
- Requires substantial excavation
- Is built without an adequate turning area to allow front in and front out access

11. EXCESSIVE SWIMMING POOL ENVELOPE

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as the height, setback, and envelope of the swimming pool is unacceptable.

We are concerned that the proposed swimming pool:

- Has excessive height above GLE
- Has inadequate separation to the rear boundary
- Has inadequate privacy devices deployed
- Has no Pool Plant located on plans

12. EXCESSIVE EXCAVATION & GEOTECHNICAL CONCERNS

The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to provide minimal excavation, with excavation proposed too close the neighbours' property.

We have geotechnical concerns.

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

The following geotechnical requirements are added as conditions to the DA:

- Geotechnical assessment meeting the requirements of Sydney Water, *Technical guidelines, Building over and adjacent to pipe assets,* August 2021. This assessment will relate to the proximity of the excavation to the existing sewer main.
- A minimum of four cored boreholes extending to at least 3 m below the proposed bulk excavation level. A monitoring well is to be installed in at least one borehole the presence or otherwise of a groundwater level within the proposed depth of excavation established prior to design.
- Rock grinders are to be used for excavation. Hydraulic rock hammering is not to be used for excavation as it has the potential to provoke rock instability of the existing cliff face.
- Vibration monitoring limits are to be set at maximum Peak Particle Velocity of 5 mm/sec on neighbouring properties, or 3mm/sec to heritage or older fragile dwellings.

A Geotechnical Monitoring Plan is to be prepared which:

- Will detect any settlement associated with temporary and permanent works and structures;
- Will detect vibration in accordance with AS 2187 .2-1993 Appendix J including acceptable velocity of vibration (peak particle velocity);
- Will detect groundwater changes calibrated against natural groundwater variations;
- Details the location and type of monitoring systems to be utilised;
- Details the pre-set acceptable limits for peak particle velocity and ground water fluctuations;
- Details recommended hold points to allow for the inspection and certification of geotechnical and hydro-geological measures by the professional engineer; and;
- Details a contingency plan.

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

13. IMPACTS UPON ADJOINING PROPERTIES: VIEW LOSS

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

We consider that our view loss is greater than moderate. Our loss is best defined as severe.

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

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

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

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

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

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

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

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

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

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

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

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

FURLONG V NORTHERN BEACHES COUNCIL [2022] NSWLEC 1208

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

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

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

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

The DDP agreed with the recommendation and refused this DA.

The Assessment Report found that:

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

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

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

The Assessment Report within the Tenacity Assessment concluded:

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

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

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

The Applicant appealed this decision.

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

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

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

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

71 I consider there is force in the submission of Council that the applicant has taken a circular approach to the fourth step of Tenacity which presupposes a right to the level of amenity achieved by the proposed development. Whilst it is true that a redevelopment similar to that provided in the Colville plan would not provide the same amenity as the proposed development, it would provide a very high level of amenity and enjoy impressive views."

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

the south, especially from living areas. The master bedroom would still enjoy superior views.

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

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

DER SARKISSIAN V NORTHERN BEACHES COUNCIL [2021] NSWLEC 1041

We refer to a dismissal of a Class 1 Appeal by NSWLEC Commissioner Dr Peter Walsh on a nearby site in Curl Curl on view loss grounds. We refer to Der Sarkissian v Northern Beaches Council [2021] NSWLEC 1041. [NBC DA 2019/0380, 72 Carrington Parade, Curl Curl]

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

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

The key matters within the Commissioner's Conclusion:

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

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

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

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

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

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

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

WENLI WANG V NORTH SYDNEY COUNCIL [2018] NSWLEC 122

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

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

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

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

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

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

TENACITY CONSULTING V WARRINGAH COUNCIL 2004

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

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

The development breaches multiple planning controls and is unreasonable.

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

APPLICATION OF TENACITY PLANNING PRINCIPLE

We have been unable to consider the impact of the proposal on the outward private domain views from our property.

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

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

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

STEP 1 VIEWS TO BE AFFECTED

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

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

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

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

features lost are considered to be valued as identified in Step 1 of Tenacity.

We contend that the proposed development must be reduced in massing so as to maintain our view of Pittwater.

STEP 2: FROM WHERE ARE VIEWS AVAILABLE

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

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

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

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

STEP 3: EXTENT OF IMPACT

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

Step 3 as quoted is:

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

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

STEP 4: REASONABLENESS

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

Step 4 is quoted below:

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

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

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

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

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

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

In respect to Point 3, NSWLEC Commissioner Walsh in Furlong v Northern Beaches Council [2022] NSWLEC 1208 referenced *Wenli Wang v North Sydney Council* [2018] NSWLEC 122, in considering that if a more skilful design could be achieved arriving at an outcome that achieved '*a very high level of amenity and enjoy impressive views', then a proposed development has gone too far, and must be refused.*

As the proposed development does not comply with outcomes and controls, that are the most relevant to visual impacts, greater weight would be attributed to the effects caused.

In our opinion the extent of view loss considered to be the greater than moderate, in relation to the views from our highly used zones of our dwelling. The view is from a location from which it would be reasonable to expect that the existing view, particularly of the view that could be retained especially in the context of a development that does not comply with outcomes and controls. The private domain visual catchment is an arc from which views will be affected as a result of

the construction of the proposed development. The proposed development will create view loss in relation to our property. The views most affected are from our highly used zones and include very high scenic and highly valued features as defined in Tenacity. Having applied the tests in the Tenacity planning principle we conclude that we would be exposed to a loss greater than moderate from the highly used rooms. The non-compliance with planning outcomes and controls of the proposed development will contribute to this loss. Having considered the visual effects of the proposed development envelope, the extent of view loss caused would be unreasonable and unacceptable.

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

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

There are architectural solutions that maintains our view, by proposing development that maintains our view, and we identify the precise amendments necessary to overcome this loss.

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

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

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

These issues warrant refusal of the DA.

We ask Council to request that the Applicant position 'Height Poles/Templates' to define the non-compliant building envelope, and to have these poles properly measured by the Applicant's Registered Surveyor. The Height Poles will need to

define: All Roof Forms, and all items on the roof, Extent of all Decks, Extent of Privacy Screens. Height Poles required for all trees. The Applicant will have to identify what heights and dimensions are proposed as many are missing from the submitted DA drawings.

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

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

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

14. IMPACTS UPON ADJOINING PROPERTIES: PRIVACY

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

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

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

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

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

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

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

Principle 2: Privacy can be achieved by separation. The required distance depends upon density and whether windows are at the same level and directly facing each other. Privacy is hardest to achieve in developments that face each other at the

same level. Even in high-density development it is unacceptable to have windows at the same level close to each other. Conversely, in a low-density area, the objective should be to achieve separation between windows that exceed the numerical standards above. (Objectives are, of course, not always achievable.)

Response: The proposed development result in a privacy impact with the proposed First Floor Deck facing neighbours without sufficient screening devices being provided, considering the proposed First Floor Deck are directly opposite our windows.

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

Response: The First Floor Deck is off highly used living areas, it is considered that the First Floor Deck will result in an unacceptable privacy breach. The proposed First Floor Deck facing the private open spaces for the neighbouring dwelling and will result in an unacceptable level of privacy impact.

Principle 4: Overlooking of neighbours that arises out of poor design is not acceptable. A poor design is demonstrated where an alternative design, that provides the same amenity to the applicant at no additional cost, has a reduced impact on privacy.

Response: The proposed development is a new development and the proposed windows have been designed without any consideration to the privacy of the neighbouring property.

Principle 5: Where the whole or most of a private open space cannot be protected from overlooking, the part adjoining the living area of a dwelling should be given the highest level of protection.

Response: It is considered that the private open space of the neighbouring dwellings could be better protected.

Principle 6: Apart from adequate separation, the most effective way to protect privacy is by the skewed arrangement of windows and the use of devices such as fixed louvres, high and/or deep sills and planter boxes. The use of obscure glass and privacy screens, while sometimes being the only solution, is less desirable.

Response: The use of privacy devices would reduce the impact of the dwelling.

Principle 7: Landscaping should not be relied on as the sole protection against overlooking. While existing dense vegetation within a development is valuable, planting proposed in a landscaping plan should be given little weight.

Response: Additional landscaping may assist in additional to privacy devices.

Principle 8: In areas undergoing change, the impact on what is likely to be built on adjoining sites, as well as the existing development, should be considered.

Response: The area is not undergoing change that would warrant privacy impact such as the one presented.

Comment: As the development is considered to result in an unacceptable privacy impact due to the design, it is requested that the proposed development be redesigned to reduce amenity impact on the neighbouring properties.

In the context of the above principles, the application can be considered to violate the reasonable expectation that the habitable rooms and private open space at our property will remain private. It is therefore reasonably anticipated that the application does not comply with the DCP.

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

15. IMPACTS UPON ADJOINING PROPERTIES: OVERSHADOWING

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

The Applicant has not provided adequate Solar Access Diagrams, at one hourly intervals, in plan and elevation of our property, to assess the loss of solar access at mid-winter, to accord with DCP controls and NSWLEC planning principles

We believe that further assessment of the shadow impacts through the production of elevational shadow diagrams or a "View from the Sun" assessment are critical in order to understand the potential future impacts and necessary for Council's reasonable assessment.

The proposed development should be refused as it will have unacceptable impacts upon the amenity of adjoining properties, specifically with regard to overshadowing.

The proposed development will result in unreasonable overshadowing of the windows of our property and the private open space of our property, resulting in non-compliance with the provisions of DCP.

A variation to the DCP is not supported as the objectives of the clause are not achieved.

In The Benevolent Society v Waverley Council [2010] NSWLEC 1082 the LEC consolidated and revised planning principle on solar access is now in the following terms:

"Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines. The poor quality of a proposal's design may be demonstrated by a more sensitive design that achieves the same amenity without substantial additional cost, while reducing the impact on neighbours."

We contend that the overshadowing arises out of poor design. The design does not respect envelope controls, and must be considered 'poor design'.

The Applicant has not submitted hourly solar diagrams to fully assess the solar loss. We ask Council to obtain these diagrams.

The loss of sunlight is directly attributable to the non-compliant envelope.

The planning principle The Benevolent Society v Waverley Council [2010] NSWLEC 1082 is used to assess overshadowing for development application. An assessment against the planning principle is provided as follows:

• The ease with which sunlight access can be protected is inversely proportional to the density of development. At low densities, there is a reasonable expectation that a dwelling and some of its open space will retain its existing sunlight. (However, even at low densities there are sites and buildings that are highly vulnerable to being overshadowed.) At higher densities sunlight is harder to protect and the claim to retain it is not as strong.

The density of the area is highly controlled. Building envelope controls have been exceeded.

• The amount of sunlight lost should be taken into account, as Well as the amount of sunlight retained.

The solar diagrams are not complete, but what has been provided shows that the proposed development will overshadow the adjoining dwellings. The amount of sunlight that will be lost will only be able to be fully considered once solar elevational drawings are submitted. What has been submitted gives the very clear indication that the outcome is not in accordance with controls

• Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines. The poor quality of a proposal's design may be demonstrated by a more sensitive design that achieves the same amenity without substantial additional cost, while reducing the impact on neighbours.

The proposed development has been designed without considering the amenity of the neighbouring properties. It is considered that a more skilful design, with a compliant envelope control, could have been adopted that would have reduced the impact on the neighbouring properties. What has been submitted gives the very clear indication that the outcome is not in accordance with controls

• To be assessed as being in sunlight, the sun should strike a vertical surface at a horizontal angle of 22.5o or more. (This is because sunlight at extremely oblique angles has little effect.) For a window, door or glass wall to be assessed as being in sunlight, half of its area should be in sunlight. For private open space to be assessed as being in sunlight, either half its area or a useable strip adjoining the living area should be in sunlight, depending on the size of the space. The amount of sunlight on private open space should be measured at ground level.

This can only be fully assessed once elevational solar drawings at hourly intervals are submitted. What has been submitted gives the very clear indication that the outcome is not in accordance with controls

• Overshadowing by fences, roof overhangs and changes in level should be taken into consideration. Overshadowing by vegetation should be ignored, except that vegetation may be taken into account in a qualitative way, in particular dense hedges that appear like a solid fence.

There is no major overshadowing as a result of vegetation

• In areas undergoing change, the impact on what is likely to be built on adjoining sites should be considered as Well as the existing development.

The area is not currently undergoing change, the LEP and DCP controls have not altered for many years.

The assessment of the development against the planning principal results in the development not complying with the solar access controls and therefore amended plans should be requested to reduce the overshadowing impact on the adjoining neighbour. It is suggested that a more skilful design of the development, with a compliant envelope control, would result in less impact in regard to solar access. It is requested that Council seek amended plans for the development to reduce the impact of the development, and these matters are addressed elsewhere in this Written Submission.

We object to solar loss to our private open space, and to our windows that allow mid-winter solar access into highly used room by non-compliant development controls.

16. IMPACTS UPON ADJOINING PROPERTIES: VISUAL BULK IMPACT

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

The non-complaint building envelope will lead to unacceptable visual bulk impact to neighbours.

17. PUBLIC INTEREST

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

and approval of such a development would be prejudicial to local present and future amenity as well as desired future character and therefore is not in the public interest.

D. CONTENTIONS THAT RELATE TO INSUFFICIENT INFORMATION

View Impact Analysis

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

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

Privacy Impact Analysis

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

Solar Access Diagrams

The Applicant has not provided adequate Solar Access Diagrams, at one hourly intervals, in plan and elevation of our property, to assess the loss of solar access at mid-winter, to accord with DCP controls and NSWLEC planning principles

We believe that further assessment of the shadow impacts through the production of elevational shadow diagrams or a "View from the Sun" assessment are critical in order to understand the potential future impacts and necessary for Council's reasonable assessment.

Visual Bulk Analysis

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

Geotechnical

The Applicant has not provided adequate protection to our property from excessive excavation and potential land slip and damage to our property, including excessive vibration limits, lack of full-time monitoring of the vibration, incomplete dilapidation report recommendations, incomplete attenuation methods of excavation, exclusion

of excavation in the setback zone, exclusion of anchors under our property, and incomplete consideration of battering in the setback zone.

The following geotechnical requirements are added as conditions to the DA:

- A geotechnical investigation meeting the requirements of TfNSW Technical Direction Geotechnology GTD 2020/001 | Version No. 01 – 2 July 2020 *Excavation adjacent to Transport for NSW Infrastructure*. This investigation will relate to the proximity of the excavation to the road
- Geotechnical assessment meeting the requirements of Sydney Water, *Technical guidelines, Building over and adjacent to pipe assets,* August 2021. This assessment will relate to the proximity of the excavation to the existing sewer main.
- A minimum of four cored boreholes extending to at least 3 m below the proposed bulk excavation level. A monitoring well is to be installed in at least one borehole the presence or otherwise of a groundwater level within the proposed depth of excavation established prior to design.
- Rock grinders are to be used for excavation. Hydraulic rock hammering is not to be used for excavation as it has the potential to provoke rock instability of the existing cliff face.
- Vibration monitoring limits are to be set at maximum Peak Particle Velocity of 5 mm/sec on neighbouring properties, or 3mm/sec to heritage or older fragile dwellings.

A Geotechnical Monitoring Plan is to be prepared which:

- Will detect any settlement associated with temporary and permanent works and structures;
- Will detect vibration in accordance with AS 2187 .2-1993 Appendix J including acceptable velocity of vibration (peak particle velocity);
- Will detect groundwater changes calibrated against natural groundwater variations;
- Details the location and type of monitoring systems to be utilised;
- Details the pre-set acceptable limits for peak particle velocity and ground water fluctuations;
- Details recommended hold points to allow for the inspection and certification of geotechnical and hydro-geological measures by the professional engineer; and;
- Details a contingency plan.

We ask for the Geotechnical Report to be updated to include these matters, and the recommendations of the risk assessment required to manage the hazards as identified in the Geotechnical Report are to be incorporated into the construction plans. Details demonstrating compliance are to be submitted to the Principal Certifying Authority prior to the issue of the Construction Certificate.

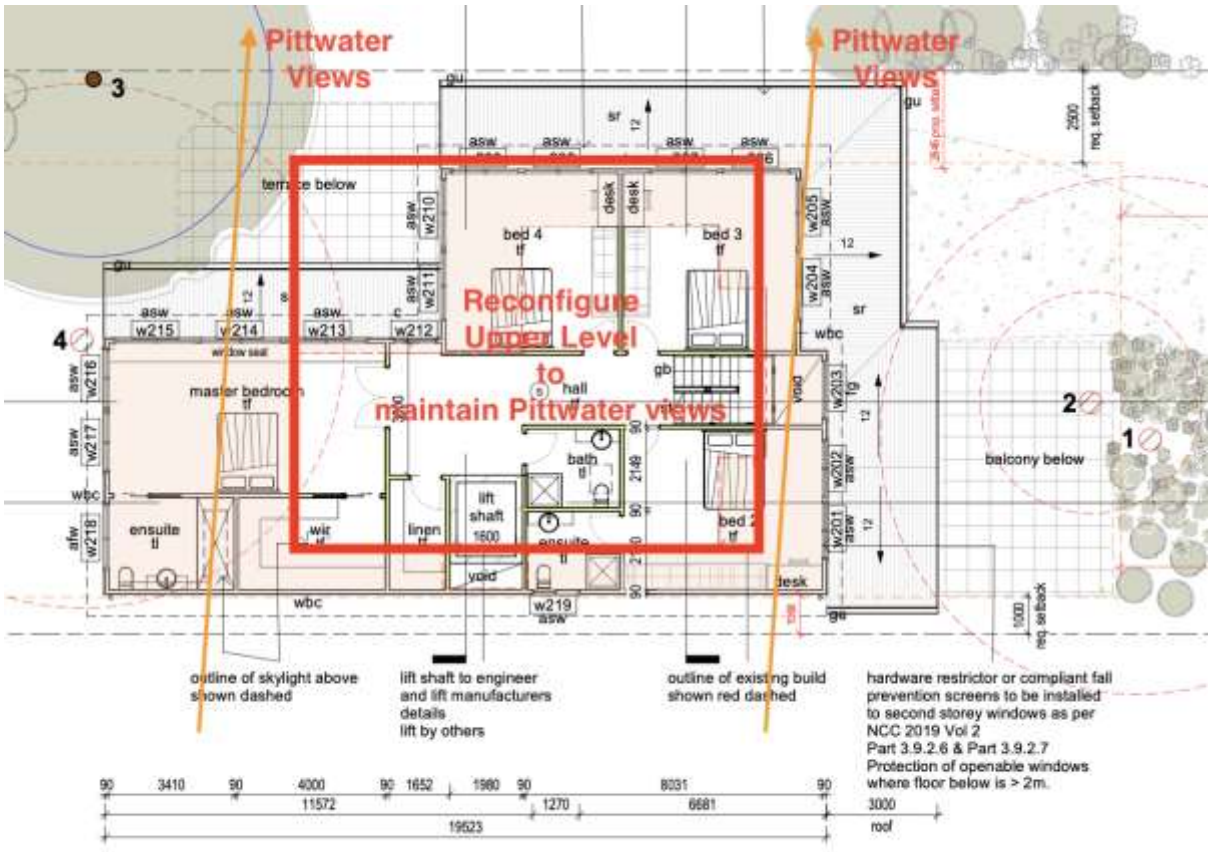
E. REQUEST FOR AMENDED PLANS TO BE SUBMITTED TO BETTER ADDRESS IMPACTS UPON ADJOINING PROPERTIES

A compliant building design would reduce the amenity impacts identified.

Reduce the proposed development as follow:

1. REDUCTION OF BUILT FORM

- Reduce the Building Height to 8.5m
- Reduce built form at the Second Floor that removes water views
- Delete northern extension at the Second Floor, and consider an extension that better protects views
- Delete southern extension to the Second Floor, and consider an extension that better protects views
- Delete all built from within the eastern and western Side Boundary Envelope
- Increase Rear Setback to DCP controls
- Increase Landscape Area to DCP controls
- Delete visitors carparking zone, and retain trees
- Delete extended 7.6m Balcony to the north, reduce Balcony to 3.0m, to avoid amenity loss
- Retain all five Spotted Gums
- Decrease excavation, with no excavation or fill in side setback zone



2. PRIVACY DEVICES

- Privacy Windows: New Windows to have 1.65 high sills, measured from the internal FFL, or the window is to be fixed and non-opening and fitted with obscured glazing to 1.65m height above internal FFL, with
- Privacy Windows: Privacy Screens to be shall be of fixed panels or battens or louver style construction (with a maximum spacing of 20mm), in materials that complement the design of the approved development
- Privacy Decks: 1.65m privacy screens to all decks facing our property, measured from the internal FFL of the deck, shall be of fixed panels or battens or louver style construction (with a maximum spacing of 20mm), in materials that complement the design of the approved development.

3. LANDSCAPING

- Landscaping. To maintain view sharing, the proposed trees and plants over 8m in height shall be deleted in the landscape plan. An amended Landscape Plan prepared by a qualified landscape designer to a scale of 1:100 and conditions of this Consent shall be submitted to Council's satisfaction with the Construction Certificate. The plan shall show: a north point; existing and proposed finished ground levels; the location of all existing and proposed landscape features; proposed streetscape works adjacent to the property boundary; existing trees to be retained, removed or transplanted (including species and dimensions); and tree protection zones for trees (on or near the property) that are to be retained and are liable to impacts from the proposed development. Predominantly locally indigenous plant species shall be specified in the Plant Schedule. All plantings shall be of local species not to exceed 8m in height. Details must be submitted with the Construction Certificate application, and shall be to the satisfaction of the Principal Certifying Authority (PCA), to maintain view sharing. Tree planting shall be located to minimise impacts on view loss.
- Landscaping: additional tree canopy planting throughout the property located at least 3 metres from buildings and 1.5m from common boundaries to offset loss of tree canopy, and reduce the built form and establish an appropriate setting where landscape is prominent
- Landscaping: additional 5m high planting for screening along the boundaries, to reduce the built form and establish an appropriate setting where landscape is prominent
- Landscaping: position a 1m high and 1m wide deep soil on-slab planter to the eastern edge of the re-configured Northern Balcony at First Floor, with planting to 1.8m height above the FFL of the deck.

4. OTHER MATTERS/CONDITIONS OF ANY CONSENT

- Dilapidation reports, including photographic surveys, of the adjoining properties must be provided to the Principal Certifying Authority prior to any works commencing on the site (including demolition or excavation). The

reports must detail the physical condition of those properties listed below, both internally and externally, including walls, ceilings, roof, structural members and other similar items. The dilapidation report is to be prepared by a suitably qualified person. A copy of the report must be provided to Council, the Principal Certifying Authority and the owners of the affected properties prior to any works commencing. Post-Construction Dilapidation Reports, including photos of any damage evident at the time of inspection, must be submitted after the completion of works. The report must: compare the post-construction report with the pre-construction report, clearly identify any recent damage and whether or not it is likely to be the result of the development works, should any damage have occurred, suggested remediation methods.

- The Applicant must provide a certificate to ensure the recommendations of the risk assessment required to manage the hazards as identified in the Geotechnical Report are to be incorporated into the construction plans. The certificate shall be prepared by a qualified geotechnical engineer.
- The external finish to the roof and walls shall have a medium to dark range (BCA classification M and D) in order to minimise solar reflections to neighbouring properties. Any roof with a metallic steel finish is not permitted.
- The Applicant is to provide a certification of drainage plans detailing the provision of on-site stormwater detention in accordance with Council's Water Management for Development Policy. Detailed drainage plans are to be prepared by a suitably qualified Civil Engineer, who has membership to the Institution of Engineers Australia, National Professional Engineers Register (NPER) and registered in the General Area of Practice for civil engineering.
- Excavation work is to ensure the stability of the soil material of adjoining properties, the protection of adjoining buildings, services, structures and / or public infrastructure from damage using underpinning, shoring, retaining walls and support where required. All retaining walls are to be structurally adequate for the intended purpose, designed and certified by a Structural Engineer.
- The development is required to be carried out in accordance with all relevant Australian Standards.
- A survey certificate prepared by a Registered Surveyor at the following stages of construction: (a) Commencement of perimeter walls columns and or other structural elements to ensure the wall or structure, to boundary setbacks are in accordance with the approved details. (b) At ground level to ensure the finished floor levels are in accordance with the approved levels, prior to concrete slab being poured/flooring being laid. (c) At completion of the roof frame confirming the finished roof/ridge height is in accordance with levels indicated on the approved plans.
- All plant and equipment is to be located within the lower ground/basement of the building and is not to be located on balconies or the roof. Plans and specifications complying with this condition must be submitted to the Certifying Authority for Approval prior to the issue of any Construction Certificate. The Certifying Authority must ensure that the building plans and specifications submitted, referenced on and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition. Reason: Minimise impact on surrounding properties, improved visual appearance and amenity for locality

F. REASONS FOR REFUSAL

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

1. Council is not satisfied that under clause 4.6 of the LEP seeking to justify a contravention of the development standard that the development will be in the public interest because it is inconsistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

2. The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy objectives and planning controls of LEP:

- Aims of Plan
- Zone Objectives
- Height of Buildings
- Exceptions to Development Standards
- Biodiversity Protection

3. The proposal is contrary to Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* as it fails to satisfy objectives and planning controls of DCP:

- Excessive Wall Height & Number of Storey
- Unacceptable Building Separation
- Insufficient Landscape Areas
- Excessive Removal of Native Trees
- Poor Garage Design
- Excessive Swimming Pool Envelope
- Excessive Excavation & Geotechnical Concerns
- Impacts Upon Adjoining Properties: View Loss
- Impacts Upon Adjoining Properties: Privacy
- Impacts Upon Adjoining Properties: Overshadowing
- Impacts Upon Adjoining Properties: Visual Bulk
- A4.1 Avalon Beach Locality
- B3.1 Land Slip Hazard
- B4.7 Pittwater Spotted Gum Forest – Endangered Ecological Community
- B4.22 Preservation of Trees and Bushland Vegetation
- B6.1 Access Driveways
- B6.2 Internal Driveways
- B6.3 Off-Street Vehicle Parking Requirements

- B8.1 Construction and Demolition - Excavation and Landfill
- C1.1 Landscaping
- C1.3 View Sharing
- C1.4 Solar Access
- C1.5 Visual Privacy
- C1.6 Acoustic Privacy
- C1.25 Plant, Equipment Boxes and lift Over-Run
- D Locality Specific Development Controls
- D1 Avalon Beach Locality
- D1.1 Character as viewed from a public place
- D1.8 Front Building Line
- D1.9 Side and Rear Building line
- D 1.11Building Envelope
- D1.14 Landscaped Area - Environmentally Sensitive Land
- D1.20 Scenic Protection Category One Areas

4. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that the plans and documentation are misleading as they do not clearly portray the true extent of works proposed. The plans include inaccuracies and inconsistencies and insufficient information has been provided in order to enable a detailed assessment. There is insufficient information has been submitted to enable the assessment of the application.
5. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that the proposal would not satisfy the matters for consideration under Biodiversity & Conservation SEPP 2021 and Resilience & Hazards SEPP 2021
6. The proposal is contrary to Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* in that it will have an adverse impact through its bulk, scale and siting on the built environment, through its potential use, adverse social impact in the locality and through lack of landscape provision, and adverse impact on the natural environment.
7. The site is not suitable for the proposal pursuant to Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979* in that this area of the site is unsuitable for a development of such excessive bulk and scale.
8. The proposals are unsuitably located on the site pursuant to Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979*.
9. The proposal does not satisfy Section 4.15(1)(d) of the Environmental Planning and Assessment Act 1979 in that the proposal does not adequately address the amenity of neighbours
10. The proposal is contrary to the public interest pursuant to Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*. The proposed development is not in the public interest as the development is inconsistent with the scale and intensity of development that the community can reasonably expect to be provided on this site by nature of the applicable controls. The development does not represent orderly development of appropriate bulk, scale or amenity impact in the locality and approval of

such a development would be prejudicial to local present and future amenity as well as desired future character and therefore is not in the public interest.

G. CONCLUSION

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

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

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

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

"The following questions are relevant to the assessment of impacts on neighbouring properties:
How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?
How reasonable is the proposal causing the impact?
How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?
Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?
Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?"

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

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

- The application has not adequately considered and does not satisfy the various relevant planning controls applicable to the site and the proposed development.
- The proposed dwelling is incompatible with the existing streetscape and development in the local area generally.

- The proposed dwelling will have an unsatisfactory impact on the environmental quality of the land and the amenity of surrounding properties.
- The site is assessed as unsuitable for the proposal, having regard to the relevant land use and planning requirements.

It is considered that the public interest is not served.

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

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

The proposed development represents an overdevelopment of the site and an unbalanced range of amenity impacts all of which would result in adverse impacts on our property.

Unless the Applicant submits Amended Plans to resolve all of the adverse amenity impacts raised within this Submission, we ask Council to REFUSE this DA.

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

Yours faithfully,

Dr Catherine Wiltshire
31 Wandeen Road
Clareville
NSW 2107