

DEVELOPMENT APPLICATION ASSESSMENT REPORT

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| Application Number: | DA2020/1215 |
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| Responsible Officer: | Thomas Burns |
| Land to be developed (Address): | Lot 5 SP 5340, 5 / 20 Dowling Street QUEENSCLIFF NSW 2096 |
| Proposed Development: | Alterations and additions to an existing residential flat building |
| Zoning: | Warringah LEP2011 - Land zoned R2 Low Density Residential |
| Development Permissible: | No |
| Existing Use Rights: | Yes |
| Consent Authority: | Northern Beaches Council |
| Delegation Level: | NBLPP |
| Land and Environment Court Action: | No |
| Owner: | Elizabeth Renee Askew |
| Applicant: | Elizabeth Renee Askew |

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| Application Lodged: | 01/10/2020 |
| Integrated Development: | No |
| Designated Development: | No |
| State Reporting Category: | Residential - Alterations and additions |
| Notified: | 15/10/2020 to 29/10/2020 |
| Advertised: | Not Advertised |
| Submissions Received: | 1 |
| Clause 4.6 Variation: | 4.3 Height of buildings: 36.47% |
| Recommendation: | Approval |

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| Estimated Cost of Works: | \$ 120,000.00 |
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This report is submitted to the Northern Beaches Local Planning Panel (NBLPP) for the consideration of Development Application DA2020/1215 for alterations and additions to an existing residential flat building. The works are confined to Unit 5 of the residential flat building, which is located on the upper floor.

The maximum building height of the development is 11.6m, which represents a 36.47% variation to the Height of Buildings Development Standard, which prescribes an 8.5m building height limit. Despite this, the new works are sited 1.055m below the established ridge level and confined to an existing building footprint, with the maximum building height of the existing flat building remaining unaltered.

The development is defined as a residential flat building pursuant to the Warringah Local Environmental

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

The applicant has demonstrated that compliance with the height standard is both unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the 36.47% variation to Clause 4.3 of the WLEP 2011.

The development received one (1) submission, which related to plumbing and waterproofing matters, both of which are considered during construction works by the appointed Certifying Authority.

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

PROPOSED DEVELOPMENT IN DETAIL

The applicant seeks development consent for alterations and additions to an existing residential flat building. The works are confined to Unit 5 of the flat building and occur within the footprint of the existing outdoor terrace. Specifically, the proposed development is as follows:

- Demolish external wall and doors.
- Infill window adjoining bedroom 1.
- New addition within the footprint of the outdoor terrace to include a lounge room and bathroom.
- New roof over extension and new glazed doors and windows.

ASSESSMENT INTRODUCTION

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

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

SUMMARY OF ASSESSMENT ISSUES

Warringah Local Environmental Plan 2011 - 4.3 Height of buildings
 Warringah Local Environmental Plan 2011 - Zone R2 Low Density Residential
 Warringah Local Environmental Plan 2011 - 6.2 Earthworks
 Warringah Development Control Plan - C3 Parking Facilities
 Warringah Development Control Plan - C4 Stormwater
 Warringah Development Control Plan - D1 Landscaped Open Space and Bushland Setting
 Warringah Development Control Plan - D6 Access to Sunlight
 Warringah Development Control Plan - D7 Views
 Warringah Development Control Plan - D8 Privacy

SITE DESCRIPTION

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| Property Description: | Lot 5 SP 5340 , 5 / 20 Dowling Street QUEENSCLIFF NSW 2096 |
| Detailed Site Description: | <p>The subject site consists of one (1) allotment located on the western side of Dowling Street, Freshwater. The site also adjoins Oliver Street. Vehicular access is obtained from Dowling Street, whilst pedestrian access is obtained from both Dowling Street and Oliver Street.</p> <p>The site is irregular in shape with five boundaries (5) with a frontage of 18.595m along Dowling Street and a small frontage of 6.735m along Oliver Street. The site has respective depths of 45.995m and 47.91m along the northern and southern boundaries and has a surveyed area of 895sqm.</p> <p>The site is identified within R2 Low Density Residential zone pursuant to the Warringah Local Environmental Plan 2011 (WLEP 2011) and accommodates a three (3) storey residential flat building with a face brick facade and tiled roof. The flat building contains eight (8) units. A carport is located within the rear yard.</p> <p>The site is devoid of any significant canopy trees and contains small lawn areas, a small tree approximately 4m in height adjacent to the northern side boundary and small palm trees along the front boundary (Dowling Street). The site does not contain any threatened species.</p> <p>The site experiences a fall of approximately 3.4m that slopes away from Dowling Street towards the rear.</p> <p>The site is not burdened by any significant site constraints or restrictive covenants.</p> <p>Detailed Description of Adjoining and Surrounding Development</p> <p>Adjoining and surrounding development largely comprises low-density residential development, although there are</p> |

numerous examples of residential flat buildings within close proximity to the site, including the southern adjoining property (16 Dowling Street).

Map:



SITE HISTORY

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

Land Use Consent No. 70/55

Land Use Consent No. 70/55 for a residential flat building approved by Council on 24 March 1970.

Building Approval No. 0389/70

Building Approval No. 0389/70 for a residential flat building approved by Council on 5 May 2020.

Application History

The Assessment Officer undertook a site visit at the subject site on 28 October 2020. The site visit revealed that remediation works were being undertaken to the balconies of the flat building, specifically to repair the waterproofing of these areas.

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

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

| Section 4.15 Matters for Consideration' | Comments |
|--|--|
| Section 4.15 (1) (a)(i) – Provisions of any environmental planning | See discussion on "Environmental Planning Instruments" in this report. |

| Section 4.15 Matters for Consideration' | Comments |
|---|---|
| instrument | |
| Section 4.15 (1) (a)(ii) – Provisions of any draft environmental planning instrument | Draft State Environmental Planning Policy (Remediation of Land) seeks to replace the existing SEPP No. 55 (Remediation of Land). Public consultation on the draft policy was completed on 13 April 2018. The subject site has been used for residential purposes for an extended period of time. The proposed development retains the residential use of the site, and is not considered a contamination risk. |
| Section 4.15 (1) (a)(iii) – Provisions of any development control plan | Warringah Development Control Plan 2011 applies to this proposal. |
| Section 4.15 (1) (a)(iia) – Provisions of any planning agreement | None applicable. |
| Section 4.15 (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation 2000) | <p><u>Division 8A</u> of the EP&A Regulation 2000 requires the consent authority to consider "Prescribed conditions" of development consent. These matters have been addressed via a condition of consent.</p> <p><u>Clause 50(1A)</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer at lodgement of the development application. This clause is not relevant to this application.</p> <p><u>Clauses 54 and 109</u> of the EP&A Regulation 2000 allow Council to request additional information. No additional information was requested in this case.</p> <p><u>Clause 92</u> of the EP&A Regulation 2000 requires the consent authority to consider AS 2601 - 1991: The Demolition of Structures. This clause is not relevant to this application.</p> <p><u>Clauses 93 and/or 94</u> of the EP&A Regulation 2000 requires the consent authority to consider the upgrading of a building (including fire safety upgrade of development). This clause is not relevant to this application.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider insurance requirements under the Home Building Act 1989. This matter has been addressed via a condition of consent.</p> <p><u>Clause 98</u> of the EP&A Regulation 2000 requires the consent authority to consider the provisions of the Building Code of Australia (BCA). This matter has been addressed via a condition of consent.</p> <p><u>Clause 143A</u> of the EP&A Regulation 2000 requires the submission of a design verification certificate from the building designer prior to the issue of a Construction Certificate. This clause is not relevant to this application.</p> |

| Section 4.15 Matters for Consideration' | Comments |
|--|---|
| Section 4.15 (1) (b) – the likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality | <p>(i) Environmental Impact The environmental impacts of the proposed development on the natural and built environment are addressed under the Warringah Development Control Plan 2011 section in this report.</p> <p>(ii) Social Impact The proposed development will not have a detrimental social impact in the locality considering the character of the proposal.</p> <p>(iii) Economic Impact The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.</p> |
| Section 4.15 (1) (c) – the suitability of the site for the development | The site is considered suitable for the proposed development. |
| Section 4.15 (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs | See discussion on “Notification & Submissions Received” in this report. |
| Section 4.15 (1) (e) – the public interest | No matters have arisen in this assessment that would justify the refusal of the application in the public interest. |

EXISTING USE RIGHTS

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

Section 4.65 of the Act defines an existing use as:

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

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

- (i) for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and*
- (ii) that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse."*

This necessarily requires the following questions to be answered:

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

Comment:

Council's records indicate that the subject site was approved for a residential flat building under Land Use Consent No. 70/55 on 24 March 1970, prior to the coming into force of the Warringah Local Environmental Plan 2011 (WLEP 2011) on 9 December 2011.

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

Comment:

The evidence available to Council reveals that the use of the land commenced as a lawful purpose prior to the coming into force of the WLEP 2011, which prohibits residential flat buildings in the R2 Low Density Residential zone. Since the approval date on 24 March 1970, Council's records contain no other approvals on the site that pertain to a land use other than that of a residential flat building, as defined under the WLEP 2011.

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

Comment:

The evidence available to Council reveals that Building Approval No. 0389/70 was approved on 5 May 1970, which enabled construction works to commence. The aforementioned building approval directly relates to Land Use Consent No. 70/55, which approved the use of the site for a residential flat building. There is no evidence that would suggest that the approved works did not commence within 12 months of the consent issuance date.

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

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

Comment:

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

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

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

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

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

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

Comment:

Whilst the development cannot be assessed against numerical controls governing bulk and scale, such controls still need to be taken into account in order to gain an informed understanding of the future context of character and surrounding development.

This assessment will draw a comparison between the bulk and scale of the development and bulk and scale of surrounding development and what is likely to occur in the vicinity in the future, based on applicable planning controls.

Surrounding Development

The site directly to the south (16 Dowling Street) accommodates a three storey residential flat building, whilst the property directly to the north (24 Dowling Street) accommodates a two storey dwelling house. In conjunction to 16 Dowling Street, there are other examples of similar residential flat buildings within the direct vicinity of the subject site, which include 3 Dowling Street (3 storey RFB 43m to the south-east), 7 Dowling Street (3 storey RFB 30m to the south-east) and 21 Cavill Street (part-3 part-4 storey RFB 9m to the south-west). Other development is characterised by dwelling houses, typically of one (1) or two (2) storeys.

Building Height

The site is subject to an 8.5m statutory height limit, as is applicable in the R2 Low Density Residential zone. The maximum building height of the proposed development 11.6m (RL48.92), which is sited 1.055m below the established ridge height of of the flat building (RL48.92).

Front Setback

The minimum front setback control that applies in the R2 Low Density Residential zone (which includes the subject site) is 6.5m. The development does not alter the existing front building line (taken from Dowling Street), with the works being sited to the rear of the flat building and separated over 6.5m from the Dowling Street frontage.

Side Setback

The minimum side setback for the site (and R2 zone) is 900mm. Generally a 4.5m side building line is required for a residential flat building under the WDCP 2011. The proposed development is located within the footprint of an existing outdoor terrace on the upper floor and does not alter the established side building lines of 4.09m and 3.66m from the northern and southern side boundaries.

Rear Setback

The minimum rear setback for the site (and R2 zone) is 6m. The 6m rear building line is also applied to

residential flat buildings within the R3 Medium Density Residential zone. The development is located within the footprint of an existing outdoor terrace and the established rear building line of 11.73m is unaltered. The external wall of the new addition is setback 14.94m from the rear boundary.

Concluding Comments of Bulk and Scale

The proposed development pertains to a small addition to provide additional floor space for Unit 5 on the top level of the subject residential flat building. The works take place within a portion of the existing outdoor terrace footprint. The proposed development will not alter the overall building height and footprint of the subject flat building and will maintain the existing landscape elements within the site. In this regard, the proposed development is considered to maintain an appropriate relationship with the existing and future context of the locality.

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

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

Comment:

The resulting development will maintain a bulk and scale that is acceptable and consistent with the surrounding residential flat buildings within close proximity to the site.

3. What are the impacts on adjoining land?

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

Comment:

This assessment has considered the potential amenity impacts upon adjoining properties, with specific regard to the objectives of the Warringah Development Control Plan 2011 (WDCP 2011).

Solar Access

In relation to solar access, it is noted that the additional overshadowing resulting from the development is minor and only equates to lower portions of existing windows located on the second floor at 16 Dowling Street (southern adjoining property). These windows are located on the northern elevation of the adjoining property, with the overshadowing of these windows only occurring after 3pm on June 21 (winter solstice). Therefore, the overshadowing is considered to be insignificant and acceptable. This is further discussed in the section of this report relating to Clause D6 of the WDCP 2011.

Views

In relation to views, it is noted that balconies and terraces on adjoining properties have been orientated towards the west to obtain distant views of the escarpment to the west of Manly Dam. The development is sited below the existing ridge level and is not likely to give rise to unacceptable levels of view loss, given the orientation of adjoining private open space and location of significant views that are to the

west. No substantial views are obtained from southern adjoining properties to the north. This is further discussed in the section of this report relating to Clause D7 of the WDCP 2011.

Privacy

In relation to privacy, it is noted that windows orientated towards side boundaries contain high sill heights where appropriate and afford appropriate separation to negate opportunities for direct overlooking into adjoining private open space or visually sensitive rooms on adjoining properties. This is further discussed in the section of this report relating to Clause D8 of the WDCP 2011.

Concluding Comments of Amenity

Based on the above assessment, it is concluded that the development will not result in unacceptable amenity impacts.

4. What is the internal amenity?

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

Comment:

The proposal has been suitably designed to ensure that it achieves an adequate standard of internal amenity.

Conclusion

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

BUSHFIRE PRONE LAND

The site is not classified as bush fire prone land.

NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited from 15/10/2020 to 29/10/2020 in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the relevant Development Control Plan.

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

| Name: | Address: |
|--------------------------|--|
| Mr Mathew Richard Pigott | 7 / 20 Dowling Street QUEENSCLIFF NSW 2096 |

The following issues were raised in the submission and each have been addressed below:

Plumbing

Concern was raised with regard to the plumbing, specifically whether the existing system could withstand an additional bathroom.

Comment:

This is not a matter of consideration at Development Application stage and can be considered during construction stage by the appointed Certifying Authority.

Waterproofing

Concern was raised with regard to the waterproofing and whether the waterproofing of the top floor (currently being undertaken as part of building remediation works) would be compromised by the proposed development.

Comment:

This is not a matter of consideration at Development Application stage and can be considered during construction stage by the appointed Certifying Authority.

Concluding Remarks

All of the concerns raised within the submission have been appropriately addressed above. The matters raised in the submission do not warrant a reason for refusal.

REFERRALS

| Internal Referral Body | Comments |
|--|---|
| Building Assessment - Fire and Disability upgrades | <p>The application has been investigated with respects to aspects relevant to the Building Certification and Fire Safety Department. There are no objections to approval of the development subject to inclusion of the attached conditions of approval and consideration of the notes below.</p> <p>Note: The proposed development may not comply with some requirements of the BCA and the Premises Standards. Issues such as this however may be determined at Construction Certificate Stage.</p> |

ENVIRONMENTAL PLANNING INSTRUMENTS (EPIs)*

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

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

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

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

(SREPs)

SEPP 55 - Remediation of Land

Clause 7 (1) (a) of SEPP 55 requires the Consent Authority to consider whether land is contaminated. Council records indicate that the subject site has been used for residential purposes for a significant period of time with no prior land uses. In this regard it is considered that the site poses no risk of contamination and therefore, no further consideration is required under Clause 7 (1) (b) and (c) of SEPP 55 and the land is considered to be suitable for the residential land use.

SEPP 65 - Design Quality of Residential Apartment Development

Clause 4 of State Environmental Planning Policy No. 65 – Design Quality for Residential Apartment Development (SEPP 65) stipulates that:

(1) This Policy applies to development for the purpose of a residential flat building, shop top housing or mixed use development with a residential accommodation component if:

(a) the development consists of any of the following:

- (i) the erection of a new building,
- (ii) the substantial redevelopment or the substantial refurbishment of an existing building,
- (iii) the conversion of an existing building, and

(b) the building concerned is at least 3 or more storeys (not including levels below ground level (existing) or levels that are less than 1.2 metres above ground level (existing) that provide for car parking), and

(c) the building concerned contains at least 4 or more dwellings.

The proposal constitutes relatively minor alterations and additions to an existing residential flat building, specifically to provide additional floor space for Unit 5 on the third storey. The overall height and footprint of the subject flat building will remain unaltered. In this regard, the proposal is not considered a substantial redevelopment or substantial refurbishment of an existing flat building.

Accordingly, no further consideration of this Policy is required for the purpose of this assessment.

SEPP (Building Sustainability Index: BASIX) 2004

A BASIX Certificate has been submitted with the application (see Certificate No. A383692 dated 14 August 2020). A condition has been included in the recommendation of this report requiring compliance with the commitments indicated in the BASIX Certificate.

SEPP (Coastal Management) 2018

The site is identified within the 'Coastal Environment Area' under the provisions of the SEPP (Coastal Management) 2018. Accordingly, the proposal is considered against Clauses 13 and 15 of the Policy as follows:

13 Development on land within the coastal environment area

(1) Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following—

- (a) the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,*
- (b) coastal environmental values and natural coastal processes,*
- (c) the water quality of the marine estate (within the meaning of the [Marine Estate Management Act 2014](#)), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,*
- (d) marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,*
- (e) existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,*
- (f) Aboriginal cultural heritage, practices and places,*
- (g) the use of the surf zone.*

(2) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that—

- (a) the development is designed, sited and will be managed to avoid an adverse impact referred to in subclause (1), or*
- (b) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or*
- (c) if that impact cannot be minimised—the development will be managed to mitigate that impact.*

(3) This clause does not apply to land within the Foreshores and Waterways Area within the meaning of [Sydney Regional Environmental Plan \(Sydney Harbour Catchment\) 2005](#).

Comment:

The site is visually and physically separated from the coastal zone or environmentally sensitive lands, being approximately 360m to the north from Manly Lagoon and over 500m to the west of Freshwater Beach. Given the above and the scale of works proposed, Council can be satisfied that the development is designed, sited and will be managed to avoid an adverse impact upon the matters referred to in Clause 13.

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

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

Comment:

The proposal pertains to relatively minor alterations and additions to an existing residential flat building and is unlikely to cause increased risk of coastal hazards within the locality.

Concluding Remarks

Having regard to the above assessment, it is concluded that the proposed development demonstrates consistency with the relevant matters prescribed within the SEPP (Coastal Management) 2018.

Warringah Local Environmental Plan 2011

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

Principal Development Standards

| Standard | Requirement | Proposed | % Variation | Complies |
|----------------------|-------------|------------------|-------------|-----------|
| Height of Buildings: | 8.5m | 11.6m (RL47.865) | 36.47% | No |

Compliance Assessment

| Clause | Compliance with Requirements |
|---|---|
| 4.3 Height of buildings | No (see detail under Clause 4.6 below) |
| 4.6 Exceptions to development standards | Yes |
| 6.2 Earthworks | N/A |
| 6.4 Development on sloping land | Yes |

Detailed Assessment

Zone R2 Low Density Residential

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

4.6 Exceptions to development standards

Description of non-compliance:

| | |
|--------------------------------------|---------------------|
| Development standard: | Height of Buildings |
| Requirement: | 8.5m |
| Proposed: | 11.6m |
| Percentage variation to requirement: | 36.47% |

The site is subject to an 8.5m maximum building height under the requirements of Clause 4.3 of the WLEP 2011. The proposed development contains a maximum building height of 11.6m, which represents a 36.47% variation from the Development Standard.

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

Accordingly, Council requested that the applicant submit a written request pursuant to Clause 4.6 of the WLEP 2011 to contravene the Height of Buildings Development Standard.

Assessment of request to vary a development standard:

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

Clause 4.6 Exceptions to development standards:

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

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

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

Comment:

Clause 4.3 - Height of Buildings Development Standard is not expressly excluded from the operation of this clause.

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

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

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

(a) the consent authority is satisfied that:

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

- (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
- (b) the concurrence of the Secretary has been obtained.

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

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

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

Comment:

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

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

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

Comment:

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

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

s 1.3 of the EP&A Act 1979 reads as follows:

1.3 Objects of Act(cf previous s 5)

The objects of this Act are as follows:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
- (c) to promote the orderly and economic use and development of land,
- (d) to promote the delivery and maintenance of affordable housing,
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
- (g) to promote good design and amenity of the built environment,
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,
- (j) to provide increased opportunity for community participation in environmental planning and assessment.

The applicants written request argues, in part:

"Clause 4.6 requires the departure from the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard. As demonstrated below, there are no negative impacts resulting from the proposed works: Overshadowing, Privacy and View Loss have all been assessed and found to be no issue.

Bulk and Scale:

The height control primarily is used to protect against undesirable impacts resulting from an inappropriate bulk and scale. The height of the additional roof in this instance is well below the existing roof ridge and as such does not represent an obtrusive extension of the existing bulk and scale.

Overshadowing:

The impact of additional height was considered one of the factors to address due the possibility of overshadowing the neighbour. In consideration of this the height of the southern edge of the extension was kept in alignment with the existing gutter line – which is quite low. The extension utilises a skillion roof arrangement and a sloping ceiling so that for the new Lounge area and WC the southern ceiling height is 2.3m and it angles up to 3m.

A survey of the site and neighbour was completed. The proposed scheme was modelled to determine the extent of shadow impact. This found that while the works do overshadow the neighbouring residential flat building at No.16, the existing building already casts shadow onto these units and the additions do not reduce further any sunlight into living room windows.

Most of the windows of the Unit building at No.16 facing the subject site are bathroom or bedroom windows and the main living windows face East and West out the Western end of the property or over Dowling Street. As demonstrated clearly in the elevational shadow diagrams, the additional mid-winter shadow falls on wall area of the adjacent building to the south and does not cause a reduction in sunlight to any windows. This was determined at Pre-DA to be a critical factor in determining the impact of the proposed additions and with this analysis complete it is submitted that the shadow impact is not a reason to refuse approval.

View Loss:

The building sits at the crown of the road overlooking Oliver Street. The only views that may be affected by the development would be from the first floor of No. 16, however they have a constructed a solid privacy screen along the subject site side of their unit. There is no view loss resulting from the proposal.

Privacy Impacts:

The proposed works occupy a very large open roof terrace outside of Unit 5. In constructing the proposed works, this fills in a large portion of this space and there is only one small highlight window in the extension and one highlight window in the Bedroom to replace the West facing window. As such the works do not increase any privacy impacts – in fact it reduces the possibility of overlooking".

Comment:

It is agreed that despite the height variation, the overall bulk and scale of the resulting development will be acceptable. This argument is validated, given the ridge level of the new addition is sited 1.055m below the established building height and the additional floor space will be located within an existing building footprint (without footprint of outdoor terrace). The development is not increasing the building density or overall building height and therefore, the bulk and scale is deemed to be acceptable.

It is also accepted that the development will not result in unacceptable overshadowing impacts. This matter is discussed in detail within the section of this report relating to Clause D6 of the WDCP 2011, where it is concluded that a small portion of additional overshadowing will occur to windows on the second floor at 16 Dowling Street (southern adjoining property). The minor overshadowing is occurring after 3pm on the winter solstice and as such, is acceptable.

It is also agreed that the height variation will not result in unacceptable levels of view loss. This matter is discussed in detail within the section of this report relating to Clause D7 of the WDCP 2011, where it is concluded that unaltered overall building height, coupled with the western orientation of outdoor private open space on adjoining sides and local topography that slopes from east to west, will ensure that the development does not compromise significant views.

It is also accepted that the height variation will not prompt unacceptable privacy impacts. This matter is discussed in detail within the section of this report relating to Clause D8 of the WDCP 2011, where it is concluded that adequate separation and the appropriate siting of windows will ensure that the privacy impacts associated with the development are reasonable.

In this regard, the applicant's written request has demonstrated that the proposed development is an orderly and economic use and development of the land, and that the structure is of a good design that will reasonably protect and improve the amenity of the surrounding built environment, therefore satisfying Clauses 1.3 (c) and (g) of the EP&A Act 1979.

Therefore, the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by Clause 4.6 (3)(b) of the WLEP 2011.

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

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

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

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

Comment:

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

Objectives of Development Standard

The underlying objectives of the standard, pursuant to Clause 4.3 – ‘Height of Buildings’ of the WLEP 2011 are:

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

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

Comment:

As discussed previously in this report, the site is located within the immediate vicinity of similar residential flat buildings (i.e. 16 Dowling Street, 3 Dowling Street, 7 Dowling Street and 21 Cavill Street). The overall height and scale of the development will remain substantially unaltered, noting that the ridge level of the new addition (RL47.865) is sited 1.055m below the established ridge level of the flat building (RL48.92) and that the additional floor space is located within the footprint of the existing outdoor terrace. Furthermore, the development will maintain the existing landscape elements within the site. In this regard, the proposed development is considered to be compatible with the height and scale of surrounding and nearby residential flat buildings.

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

Comment:

The overall height and density of the development will remain consistent with the existing flat building and as such, the development will not have an unacceptable visual impact on the streetscape. As noted earlier within the report, the development will not result in unacceptable amenity impacts, specifically having regard to views, privacy and solar access.

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

Comment:

The site is visually and physically separated from coastal and bushland environments and therefore, the development will not detract from the scenic qualities of these areas.

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

Comment:

The the overall height and density of the flat building will remain unaltered, the development will not have an unacceptable visual impact upon the streetscape.

Zone Objectives

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

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

Comment:

The development will not increase the density of the subject flat building and the overall bulk and scale will remain consistent with established residential flat buildings within the vicinity of the site.

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

Comment:

The site will retain the residential land use.

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

Comment:

The site will not alter the existing landscape treatments on the site.

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the R2 Low Density Residential zone, despite the development being associated with a prohibited land use.

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

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

Planning Circular PS 18-003 dated 21 February 2018, as issued by the NSW Department of Planning & Infrastructure, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument. In this regard, given the consistency of the variation to the objectives of the zone, the concurrence of the Secretary for the variation to the Height of Buildings Development Standard is assumed by the Local Planning Panel.

6.2 Earthworks

No earthworks are proposed.

Warringah Development Control Plan

Built Form Controls

| Built Form Control | Requirement | Proposed | % Variation* | Complies |
|--------------------|-------------|--------------|--------------|----------|
| B1 Wall height | 7.2m | 9.4m (south) | 30.56% | No |
| | | | | |

| | | | | |
|---|---|--------------------------|---------------|-----------|
| B3 Side Boundary Envelope | 5m then projected at 45 degrees (north) | Within envelope | - | Yes |
| | 5m then projected at 45 degrees (south) | Outside envelope | 4.39% - 8.66% | No |
| B5 Side Boundary Setbacks | 0.9m (north) | 6.81m - 10.75m | - | Yes |
| | 0.9m (south) | 3.66m | - | Yes |
| B7 Front Boundary Setbacks | 6.5m | >6.5m and at rear of RFB | - | Yes |
| B9 Rear Boundary Setbacks | 6m | 14.94m | - | Yes |
| D1 Landscaped Open Space (LOS) and Bushland Setting | 40% | no change to landscaping | N/A | N/A |

***Notes:**

1. The percentage variation is calculated on the *overall* numerical variation (ie: for LOS - Divide the proposed area by the numerical requirement then multiply the proposed area by 100 to equal X, then 100 minus X will equal the percentage variation. Example: $38/40 \times 100 = 95$ then $100 - 95 = 5\%$ variation).

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

Part B Built Form Controls

The Land and Environment Court Planning Principle established in the judgement by Senior Commissioner Roseth in *Fodor Investments v Hornsby Shire Council [2005] NSWLEC 71* confirms that the provisions of Environmental Planning Instruments and Development Control Plans that derogate or detract from the benefit endowed on a site by existing use rights do not apply to the assessment of applications on sites where existing use rights apply. Therefore, zone objectives and planning controls that govern the size of a development (i.e building height, floor space ratio, building envelope and setbacks) are not strictly applied where existing use rights apply.

This includes qualitative provisions as well as quantitative provisions. Having regard to the above case law, the built form controls contained within the WDCP 2011 compliance table are not strictly applied to this particular application and is, therefore, only included as a record to identify how the proposed development relates to applicable planning controls that would otherwise apply to the subject site if existing use rights did not apply. In this regard, no further assessment is provided in this report relating to the numerical non-compliances identified within the Built Form Controls table above. Instead, this report includes a merit based assessment having regard to the matters for consideration prescribed within Section 4.15 of the Environmental Planning and Assessment Act 1979.

Compliance Assessment

| Clause | Compliance with Requirements | Consistency Aims/Objectives |
|--------------------------------|------------------------------|-----------------------------|
| A.5 Objectives | Yes | Yes |
| C3 Parking Facilities | N/A | N/A |
| C4 Stormwater | Yes | Yes |
| C8 Demolition and Construction | Yes | Yes |
| | | |

| Clause | Compliance with Requirements | Consistency Aims/Objectives |
|---|------------------------------|-----------------------------|
| C9 Waste Management | Yes | Yes |
| D1 Landscaped Open Space and Bushland Setting | N/A | N/A |
| D2 Private Open Space | Yes | Yes |
| D3 Noise | Yes | Yes |
| D6 Access to Sunlight | Yes | Yes |
| D7 Views | Yes | Yes |
| D8 Privacy | Yes | Yes |
| D9 Building Bulk | Yes | Yes |
| D10 Building Colours and Materials | Yes | Yes |
| D11 Roofs | Yes | Yes |
| D12 Glare and Reflection | Yes | Yes |
| D14 Site Facilities | Yes | Yes |
| D20 Safety and Security | Yes | Yes |
| D21 Provision and Location of Utility Services | Yes | Yes |
| E1 Preservation of Trees or Bushland Vegetation | Yes | Yes |
| E6 Retaining unique environmental features | Yes | Yes |
| E10 Landslip Risk | Yes | Yes |

Detailed Assessment

C3 Parking Facilities

The proposed development does not alter the existing parking arrangement on the site. The WDCP 2011 calculates the required parking rates based off the number of bedrooms within a residential flat building. The proposed development does not increase the number of bedrooms on the site and as such, will not impact upon the parking requirements for the site. Therefore, no further consideration of this control is required for the purpose of this assessment.

C4 Stormwater

Conditions have been included with this consent to ensure that stormwater is disposed of appropriately.

D1 Landscaped Open Space and Bushland Setting

The proposed works are confined to an existing building footprint and will not alter the existing landscaping on the site.

D6 Access to Sunlight

The shadow analysis submitted with the application indicates that the additional overshadowing resulting from the development is minor and only equates to lower portions of existing windows located on the second floor at 16 Dowling Street (southern adjoining property). These windows are located on the northern elevation of the adjoining property, with the overshadowing of these windows only occurring after 3pm on June 21 (winter solstice). Therefore, the overshadowing is considered to be

insignificant and acceptable.

D7 Views

The development is not likely to result in unacceptable levels of view loss. Balconies and terraces on adjoining properties have been orientated towards the west to obtain distant views of the escarpment to the west of Manly Dam. Figure 1 depicts this view corridor from the outdoor terrace on the upper floor within the subject flat building.

Figure 1: *views to south from the subject site*



Given the orientation of outdoor private open space and local topography that slopes from east to west, less substantial views are afforded to the north (depicted in Figure 2 below).

Figure 2: *views to north from the subject site*



In determining the reasonableness of the development's impact upon views, it is noted that the overall building height is sited 1.055m below the established ridge line and that the additional floor space is occupied within an existing building footprint.

Given the above, it is concluded that the development has been appropriately designed to minimise view loss and as such, Council is satisfied that the proposed development achieves consistency with the outcomes of this control and the planning principles outlined within the Land and Environment Court Case of *Tenacity Consulting Pty Ltd Vs Warringah Council (2004) NSWLEC 140*.

D8 Privacy

No submissions were received raising concern of potential privacy impacts. Nevertheless, this assessment has carried out a detailed assessment against the privacy controls within the WDCP 2011.

Clause D8 of the WDCP 2011 stipulates that building layout should be designed to optimise privacy for occupants of the development and occupants of adjoining properties. Ascertaining privacy impacts associated with a development is often difficult to quantify and can be slightly objective. Therefore, a more objective assessment can be provided by considering the development against the planning principle established in the NSW Land and Environment Court case of *Meriton v Sydney City Council [2004] NSWLEC 313*.

"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".

Comment:

The subject site is located within a low density residential zone, however the southern adjoining property (16 Dowling Street) accommodates a three (3) storey residential flat building with eight (8) units. The northern adjoining site (24 Dowling Street) contains a two (2) storey dwelling house. For the northern site there is a reasonable expectation that some of their private open space and visual sensitive rooms will remain private. For the southern side, it is expected that visual privacy would be more difficult to conserve, given the higher density living arrangement.

"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".

Comment:

24 Dowling Street

24 Dowling Street contains one window within close visual proximity of the proposed development. This window is located on the southern elevation of 20 Dowling Street and on the first floor, with a sill height of RL38.05

The proposed development contains a new louvre style window on the northern elevation of the minor addition (W01). The sill correlates with the finished floor level, which is sited at RL44.53. It is noted that W01 is located 8.9m to the south-west of the adjoining window at 24 Dowling Street.

Given the 8.9m separation, south-western orientation and 6.48m height difference in sill heights, there would be extremely limited opportunities (if any) for the occupants of Unit 5 to directly overlook into the first floor window at 24 Dowling Street from window W01.

16 Dowling Street

16 Dowling Street contains four (4) windows within close visual proximity of the proposed development. These windows are located on the northern elevation of the adjoining property (also on upper floor) and depicted in Figure 3 below.

Figure 3: windows on upper floor at 16 Dowling Street



The sill height of these windows are as follows (referred to from east to west, or front to rear):

- RL45.35.
- RL45.35.
- RL Not known, although lower sill height compared to adjacent windows.
- RL45.35.

The proposed development contains two (2) new windows on the southern elevation (W03 and W04). The sill height of window W03 is RL46.2 (1.67m high sill), with W04 being sited at RL45.99 (1.46m high sill).

Window W03 is setback between 7.19m - 10.84m from the opposing windows at 16 Dowling Street, whilst window W04 is setback between 6.87m - 8.5m from the aforementioned windows. The levels of the proposed windows are also similar to the adjoining windows.

Window W03 does not directly face into an adjoining window, whilst window W04 directly faces into two (2) windows on the adjoining flat building.

"The use of the 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".

24 Dowling Street

As previously established, there are very limited (if any) opportunities for overlooking into the windows at 24 Dowling Street from window W01, given the height differences, setbacks and orientation of window W01 relative to the adjoining windows.

16 Dowling Street

Council's records do not contain documentation that reveals the floor plan of the adjoining residential flat building at 16 Dowling Street and as such, Council is unable to determine the use of those rooms. Nevertheless, an assessment can be undertaken to determine the reasonableness of the privacy impacts based off the location of windows W03 and W04.

Window W03 adjoins a living area, which is considered to be an area where the occupants of the development will spend greater periods of waking time, compared to window W04 which adjoins a bedroom.

Notwithstanding, window W04 contains a 1.67m high window sill, which coupled with a minimum setback of 7.19m from the adjoining windows at 16 Dowling Street, is considered sufficient to ensure a reasonable level of visual privacy is maintained, noting that 16 Dowling Street accommodates medium density development where there is an expectation that complete visual privacy will not be maintained. Moreover, window W04 provides appropriate separation for low-use room (being a bedroom) to ensure an acceptable level of visual privacy is maintained.

"Where the whole or the most of the 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".

Comment:

The outdoor terrace at 16 Dowling Street will still be subject to overlooking from the existing outdoor terrace on the subject site. Nevertheless, the proposed works will not exacerbate these privacy impacts.

"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".

Comment:

No additional measures are considered necessary to protect the privacy of adjoining and nearby properties.

"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".

Comment:

Landscaping is not relied upon as a privacy measure.

Concluding Remarks

Having regard to the above assessment, it is concluded that the privacy impacts associated with the development will be acceptable.

THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES

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

CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN

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

POLICY CONTROLS

Northern Beaches Section 7.12 Contributions Plan 2019

The proposal is subject to the application of Northern Beaches Section 7.12 Contributions Plan 2019.

A monetary contribution of \$ 600 is required for the provision of new and augmented public infrastructure. The contribution is calculated as 0.5% of the total development cost of \$ 120,000.

CONCLUSION

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

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

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

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

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

Council is satisfied that:

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

demonstrated that:

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

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

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

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

The maximum height of the proposed development is 11.6m, which exceeds the 8.5m height limit. Notwithstanding, the roof line of the new addition is sited 1.055m below the existing ridge level and the works are confined to an existing building footprint within the outdoor roof terrace.

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

Therefore, the application is recommended for approval.

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

RECOMMENDATION

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

Accordingly the Northern Beaches Local Planning Panel, on behalf of Northern Beaches Council as the consent authority grant Development Consent to DA2020/1215 for Alterations and additions to an existing residential flat building on land at Lot 5 SP 5340, 5 / 20 Dowling Street, QUEENSCLIFF, subject to the conditions printed below:

DEVELOPMENT CONSENT OPERATIONAL CONDITIONS

1. Approved Plans and Supporting Documentation

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

a) Approved Plans

| Architectural Plans - Endorsed with Council's stamp | | |
|---|----------------|-----------------|
| Drawing No. | Dated | Prepared By |
| A100 (Revision C) - Site Analysis | 17 August 2020 | MHDP Architects |
| A101 (Revision C) - Unit 5 Floor Plan | 17 August 2020 | MHDP Architects |
| A102 (Revision B) - Unit 5 Roof Plan | 17 August 2020 | MHDP Architects |
| A201 (Revision C) - North Elevation | 17 August 2020 | MHDP Architects |
| A202 (Revision C) - South Elevation | 17 August 2020 | MHDP Architects |
| A203 (Revision C) - West Elevation | 17 August 2020 | MHDP Architects |
| A221 (Revision B) - Section A-A | 17 August 2020 | MHDP Architects |
| SK05 (Revision B) - External Finishes Schedule | 17 August 2020 | MHDP Architects |

| Reports / Documentation – All recommendations and requirements contained within: | | |
|--|----------------|-------------------------------------|
| Report No. / Page No. / Section No. | Dated | Prepared By |
| BASIX Certificate No. A383692 | 14 August 2020 | Mark Hurcum Design Practice Pty Ltd |

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

c) The development is to be undertaken generally in accordance with the following:

| Waste Management Plan | | |
|-----------------------|-------------------|-----------------|
| Drawing No/Title. | Dated | Prepared By |
| Waste Management Plan | 24 September 2020 | MHDP Architects |

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

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

2. **Prescribed Conditions**

- (a) All building works must be carried out in accordance with the requirements of the Building Code of Australia (BCA).
- (b) BASIX affected development must comply with the schedule of BASIX commitments specified within the submitted BASIX Certificate (demonstrated compliance upon plans/specifications is required prior to the issue of the Construction Certificate);
- (c) A sign must be erected in a prominent position on any site on which building work, subdivision work or demolition work is being carried out:
 - (i) showing the name, address and telephone number of the Principal Certifying Authority for the work, and
 - (ii) showing the name of the principal contractor (if any) for any building work and a telephone number on which that person may be contacted outside working hours, and
 - (iii) stating that unauthorised entry to the work site is prohibited.

Any such sign is to be maintained while the building work, subdivision work or demolition work is being carried out, but must be removed when the work has been completed.
- (d) Residential building work within the meaning of the Home Building Act 1989 must not be carried out unless the Principal Certifying Authority for the development to which the work relates (not being the Council) has given the Council written notice of the following information:
 - (i) in the case of work for which a principal contractor is required to be appointed:
 - A. the name and licence number of the principal contractor, and
 - B. the name of the insurer by which the work is insured under Part 6 of that Act,
 - (ii) in the case of work to be done by an owner-builder:
 - A. the name of the owner-builder, and
 - B. if the owner-builder is required to hold an owner-builder permit under that Act, the number of the owner-builder permit.

If arrangements for doing the residential building work are changed while the work is in progress so that the information notified under becomes out of date, further work must not be carried out unless the Principal Certifying Authority for the development to which the work relates (not being the Council) has given the Council written notice of the updated information.
- (e) Development that involves an excavation that extends below the level of the base of the footings of a building on adjoining land, the person having the benefit of the development consent must, at the person's own expense:
 - (i) protect and support the adjoining premises from possible damage from the excavation, and
 - (ii) where necessary, underpin the adjoining premises to prevent any such damage.
 - (iii) must, at least 7 days before excavating below the level of the base of the

footings of a building on an adjoining allotment of land, give notice of intention to do so to the owner of the adjoining allotment of land and furnish particulars of the excavation to the owner of the building being erected or demolished.

- (iv) the owner of the adjoining allotment of land is not liable for any part of the cost of work carried out for the purposes of this clause, whether carried out on the allotment of land being excavated or on the adjoining allotment of land.

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

Reason: Legislative requirement.

3. **General Requirements**

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

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

Demolition and excavation works are restricted to:

- 8.00 am to 5.00 pm Monday to Friday only.

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

- (b) Should any asbestos be uncovered on site, its demolition and removal must be carried out in accordance with WorkCover requirements and the relevant Australian Standards.
- (c) At all times after the submission the Notice of Commencement to Council, a copy of the Development Consent and Construction Certificate is to remain onsite at all times until the issue of a final Occupation Certificate. The consent shall be available for perusal of any Authorised Officer.
- (d) Where demolition works have been completed and new construction works have not commenced within 4 weeks of the completion of the demolition works that area affected by the demolition works shall be fully stabilised and the site must be maintained in a safe and clean state until such time as new construction works commence.
- (e) Onsite toilet facilities (being either connected to the sewer or an accredited sewer management facility) for workers are to be provided for construction sites at a rate of 1 per 20 persons.
- (f) Prior to the release of the Construction Certificate, payment of the Long Service Levy is required. This payment can be made at Council or to the Long Services Payments Corporation. Payment is not required where the value of the works is less than \$25,000. The Long Service Levy is calculated on 0.35% of the building and construction work. The levy rate and level in which it applies is subject to legislative change. The applicable fee at the time of payment of the Long Service Levy will apply.
- (g) The applicant shall bear the cost of all works associated with the development that occurs on Council's property.

- (h) No skip bins, building materials, demolition or excavation waste of any nature, and no hoist, plant or machinery (crane, concrete pump or lift) shall be placed on Council's footpaths, roadways, parks or grass verges without Council Approval.
- (i) Demolition materials and builders' wastes are to be removed to approved waste/recycling centres.
- (j) No trees or native shrubs or understorey vegetation on public property (footpaths, roads, reserves, etc.) or on the land to be developed shall be removed or damaged during construction unless specifically approved in this consent including for the erection of any fences, hoardings or other temporary works.
- (k) Prior to the commencement of any development onsite for:
 - i) Building/s that are to be erected
 - ii) Building/s that are situated in the immediate vicinity of a public place and is dangerous to persons or property on or in the public place
 - iii) Building/s that are to be demolished
 - iv) For any work/s that is to be carried out
 - v) For any work/s that is to be demolished

The person responsible for the development site is to erect or install on or around the development area such temporary structures or appliances (wholly within the development site) as are necessary to protect persons or property and to prevent unauthorised access to the site in order for the land or premises to be maintained in a safe or healthy condition. Upon completion of the development, such temporary structures or appliances are to be removed within 7 days.
- (l) A "Road Opening Permit" must be obtained from Council, and all appropriate charges paid, prior to commencement of any work on Council property. The owner/applicant shall be responsible for all public utilities and services in the area of the work, shall notify all relevant Authorities, and bear all costs associated with any repairs and/or adjustments as those Authorities may deem necessary.
- (m) The works must comply with the relevant Ausgrid Network Standards and SafeWork NSW Codes of Practice.
- (n) Requirements for new swimming pools/spas or existing swimming pools/spas affected by building works.
 - (1) Child resistant fencing is to be provided to any swimming pool or lockable cover to any spa containing water and is to be consistent with the following;

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

 - (i) Swimming Pools Act 1992
 - (ii) Swimming Pools Amendment Act 2009
 - (iii) Swimming Pools Regulation 2008
 - (iv) Australian Standard AS1926 Swimming Pool Safety
 - (v) Australian Standard AS1926.1 Part 1: Safety barriers for swimming pools
 - (vi) Australian Standard AS1926.2 Part 2: Location of safety barriers for swimming pools.
 - (2) A 'KEEP WATCH' pool safety and aquatic based emergency sign, issued by Royal Life Saving is to be displayed in a prominent position within the pool/spa area.
 - (3) Filter backwash waters shall be conveyed to the Sydney Water sewerage

system in sewerage areas or managed on-site in unsewered areas in a manner that does not cause pollution, erosion or run off, is separate from the irrigation area for any wastewater system and is separate from any onsite stormwater management system.

- (4) Swimming pools and spas must be registered with the Division of Local Government.

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

4. **No Consent for Works Being Undertaken To Balconies**

No consent is granted for the remediation works currently being undertaken on the balconies of the subject residential flat building.

Reason: The works constitute exempt development and are excluded from the scope of works proposed under this Development Application.

FEES / CHARGES / CONTRIBUTIONS

5. **Policy Controls**

Northern Beaches 7.12 Contributions Plan 2019

A monetary contribution of \$600.00 is payable to Northern Beaches Council for the provision of local infrastructure and services pursuant to section 7.12 of the Environmental Planning & Assessment Act 1979 and the Northern Beaches Section 7.12 Contributions Plan 2019. The monetary contribution is based on a development cost of \$120,000.00.

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

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

The Northern Beaches Section 7.12 Contributions Plan 2019 may be inspected at 725 Pittwater Rd, Dee Why and at Council's Customer Service Centres or alternatively, on Council's website at www.northernbeaches.nsw.gov.au

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

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

6. **Security Bond**

A bond (determined from cost of works) of \$1,500 and an inspection fee in accordance with

Council's Fees and Charges paid as security are required to ensure the rectification of any damage that may occur to the Council infrastructure contained within the road reserve adjoining the site as a result of construction or the transportation of materials and equipment to and from the development site.

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

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

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

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

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

7. BCA Report (Class 2-9)

A 'Building Code of Australia (BCA) Assessment Report' from an appropriately qualified Accredited Certifier* will need to be submitted with the Construction Certificate application addressing the following:

The report is to detail the extent to which the proposed building does or does not comply with the deemed-to satisfy provisions of Sections C, D, E and F of the Building Code of Australia. The report is to also provide recommendations with respect to the building works required to ensure that the specified measures and facilities for the proposed development are appropriate for its intended use to:

- i) restrict the spread of fire from the building to other buildings nearby, and
- ii) protect persons using the building, and to facilitate their egress from the building in the event of fire, and
- iii) where appropriate, provide access for persons with a disability, and
- iv) provide facilities and services appropriate for the development

*To be regarded as an "appropriately qualified accredited certifier" the certifier must hold the relevant level of accreditation that would enable the certifier to issue a construction certificate for the subject building.

The 'Building Code of Australia (BCA) Assessment Report' / 'Fire Audit Report' is to be submitted to the Certifying Authority with the Construction Certificate application.

Reason: To ensure adequate provision is made for Health, Amenity, access and Fire safety for building occupant health and safety

8. Compliance with Standards

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

Standards.

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

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

9. **External Finishes to Roof**

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

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

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

10. **Stormwater Disposal**

The applicant is to demonstrate how stormwater from the new development within this consent is disposed of to an existing approved system or in accordance with Northern Beaches Council's Water Management Policy. Details by an appropriately qualified and practicing Civil Engineer demonstrating that the existing approved stormwater system can accommodate the additional flows, or compliance with the Council's specification are to be submitted to the Certifying Authority for approval prior to the issue of the Construction Certificate.

Reason: To ensure appropriate provision for disposal and stormwater management arising from development.

CONDITIONS TO BE COMPLIED WITH DURING DEMOLITION AND BUILDING WORK

11. **Removing, Handling and Disposing of Asbestos**

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

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

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

12. **Survey Certificate**

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 completion of the roof frame confirming the finished roof/ridge height is in accordance with levels indicated on the approved plans.

Details demonstrating compliance are to be submitted to the Certifying Authority.

Reason: To determine the height of buildings under construction comply with levels shown on approved plans.

13. **Waste Management During Development**

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

Details demonstrating compliance must be submitted to the Certifying Authority.

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

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

14. **Stormwater Disposal**

The stormwater drainage works shall be certified as compliant with all relevant Australian Standards and Codes by a suitably qualified person. Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of any interim / final Occupation Certificate.

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